

REPORT Nº 7/94
CASE 10.911
EL SALVADOR
February 1, 1994

BACKGROUND:

1. On June 25, 1991, the Inter-American Commission on Human Rights received a petition based on the following:

At approximately 4:00 p.m. on March 30, 1990, Flor de María Hernández Rivas, age 14, was taken by force by National Guardsmen, who accused her of having participated in the November 1989 FMLN offensive.

That day, the young girl was near the San Miguelito Market in San Salvador when National Guardsmen patrolling the area apprehended her and forced her into a vehicle, threatening to kill her. Even though the young girl protested that she was innocent and even though they had no warrant to arrest and hold her in custody, the agents took her to the National Guard's Central Headquarters where they blindfolded her, put a hood over her head, mauled her breasts and hit her on the head to force her to cooperate with them. When she asked for water, they told her she would get no water until she told them the "truth". When she refused to acknowledge the charges made against her, electric shocks were applied to her breasts.

The next day, March 31, she was transferred to a small, cold cell, where she spent the entire day listening to the screams of others being tortured. She was given no food. The only time she was taken from the room was when she was fingerprinted.

On April 1, she was removed from that cell and taken elsewhere, where she was again physically and verbally abused. At one time, she was taken to yet another room, where three men raped her. The questioning lasted until April 2, at which point the guards returned her to her cell and gave her drugs to "ease the pain". She did not take the drugs, however, because she was afraid. That afternoon, they removed the blindfold, returned her clothes and released her, but not without threatening her. The guards told her they would kill her if they picked her up again.

On the day she was taken, her mother, María Amparo Hernández Alas, went to the National Guard to inquire about her daughter. Although the authorities' first reaction was to deny that the young girl had been taken into custody, they later told her that her daughter was "being investigated".

2. On July 2, 1991, the Inter-American Commission began processing the case

and requested that the Government of El Salvador to supply information on the material facts in the petition and any other information to apprise the Commission of the case history and to enable it to determine whether the remedies under domestic law had been exhausted. The Government was given 90 days in which to reply.

3. When those 90 days expired, the Commission, by note of January 28, 1992, again asked the Government of El Salvador for information, noting the possible application of Article 42 of its Regulations if, at the end of 30 days, no reply on the matter was sent to the Commission.

4. On August 18, 1992, the Commission again asked the Government of El Salvador for information on the investigations being conducted into this case, again noting the possible application of Article 42 of its Regulations.

5. On August 20, 1992, the Government of El Salvador sent a note of reply to the Commission, with regard to the following:

Apprehended on March 30 by the National Guard in this city [San Salvador] on suspicion of being a terrorist; released on April 2, 1990, and turned over to the Human Rights Commission.

Since none of the Hernández Rivas child's rights were violated and because she continues to enjoy full exercise of her rights, the Government of El Salvador respectfully requests that this case be closed.

6. On August 27, 1992, the Commission sent the Government of El Salvador a communication wherein it requested, given the content of its reply of August 20, that it provide information "concerning the circumstances of the arrest -as this was a minor-; the reasons for the arrest and the preexisting orders for same; the conduct of those in charge of interrogating the child, and any other information (...) that will shed light on the material facts in this case."

7. On September 21, 1992, the Government replied to the Commission's request as follows:

On August 20, 1992, I conveyed the Salvadoran Government's observations on this case and enclosed the release paper signed by witnesses who stated that the child was neither threatened nor subjected to physical and moral mistreatment. I would like to point out that the document in question was prepared after an investigation of the case conducted in accordance with the laws of the Republic, as the document in question states.

8. The Commission did not receive any further information from the Government

of El Salvador concerning this case.

9. On October 5, 1993, the Inter-American Commission on Human Rights, sitting at its 84th Regular Meeting considered this case and issued Report No. 19/93, pursuant to Article 50 of the American Convention on Human Rights.

10. The Inter-American Commission on Human Rights resolved to send the Report, on a confidential basis, to the Government of El Salvador, granting it three months to implement the recommendations contained therein.

11. The Government of El Salvador failed to answer the Commission's request of October 18, 1993.

ANALYSIS

1. On the question of admissibility

a. The petition satisfies the formal admissibility requirements stipulated in the American Convention on Human Rights and in the Commission's Regulations.

b. The petition is not pending settlement in another procedure under an international organization and is not substantially the same as a petition already examined by the Commission.

2. Of the Commission's competence in this case:

a. The Commission is competent in the instant case because it concerns violations of rights recognized in the American Convention on Human Rights, chiefly Article 5 guaranteeing the right to humane treatment; Article 7 on the right to personal liberty, Article 8 on the right to a fair trial, Article 19 on the rights of the child, and Article 25 on judicial protection, as provided in Article 44 of that Convention, of which El Salvador is a State party.

b. Article 1.1 of the American Convention, which is binding upon El Salvador, states that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

3. On the content of the petition:

a. Despite the fact that more than three years have passed since the events transpired and despite the seriousness of the charges, the Government of El Salvador has not provided a satisfactory response to the specific facts brought by the petitioner concerning the reasons for and lawfulness of the arrest of the minor Hernández Rivas, the charges of mistreatment during her confinement, or the investigations conducted into those complaints.

b. In the past, the Inter-American Commission on Human Rights has had occasion to address the violation of personal liberty and the minimum judicial guarantees that must be present when an individual is arrested. In Report 14/92 on case 10,447, approved on February 4, 1992, the Commission stated, *inter alia*, that "(...) in El Salvador the practice of detaining people without observing the proper legal and constitutional formalities has become widespread practice and it often happens that interrogations involve physical and psychological abuse, which lead to extrajudicial confessions exacted during the period the individual is held in administrative custody."

c. In the instant case, the victim is a minor and must be given all the necessary guarantees of due process and the special treatment that is her right as a minor. The United Nations Convention on the Rights of the Child, which El Salvador signed on January 26, 1990 and ratified on July 10 of that year, making it a State Party, prescribes the following in this regard:

Article 37: States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment (...)

Article 40:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's re-integration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

a) No child shall be alleged as, be accused as, or recognized as having infringed the penal law by reasons of acts or omissions which were not prohibited by national or international law at the time they were committed;

b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

- i) to be presumed innocent until proven guilty according to law;
- ii) to be informed promptly and directly of the charges against him or her, and if appropriate through his or her parents or legal guardian, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense;
- iii) to have the matter determined without delay by the competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
- iv) not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
- v) if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- vi) to have the free assistance of an interpreter if the child cannot understand or speak the language used;
- vii) to have his or her privacy fully respected at all stages of the proceedings.

d. A brief review of the petition and of the communications received from the Government of El Salvador makes it apparent that the above rules were not respected in the instant case. To make matters worse, Salvadoran authorities informed neither the International Committee of the Red Cross nor any other humanitarian agency to be present to examine the child's condition at the time of her arrest, while she was in custody and at the time of her release, for effective and reliable confirmation of the physical and psychological state of Flor de María de Hernández Rivas.

e. Moreover, the release paper sent by the Government of El Salvador and which it claimed was "signed by witnesses who stated that the child was neither threatened nor subjected to physical and moral mistreatment" is a form stating, *inter alia*, that the age

of the minor arrested is 14; the reason for the arrest is "suspicion of belonging to the D/T"; the names of the witnesses who signed that the child was properly treated are Eliseo García Juárez and Carlos Portales Canjura, members of the National Guard. (...) With acts of arbitrary authoritarianism and impunity rampant in El Salvador, this form is not the kind of objective, impartial and independent evidence that would refute the statements made by the victim herself.

4. On other aspects of the processing:

a. The facts prompting the petition are not such that they can be resolved through recourse to the friendly settlement procedure provided for in Article 48.1.f of the Convention and Article 45 of the Commission's Regulations and neither the Government nor the petitioners asked that the Commission use this procedure.

b. Because the friendly settlement procedure does not apply, the Commission must comply with the provisions of Article 50.1 of the Convention and issue its opinion and findings on the matter placed before it for consideration.

c. All legal and statutory procedures required under the Convention and the Commission's Regulations have been exhausted, and more than the prescribed time periods have been allowed.

5. On the exhaustion of the remedies under domestic law:

a. In the instant case it is obvious that the petitioner has been unable to secure effective protection from the bodies having jurisdiction. Hence, the requirements concerning exhaustion of the remedies under domestic law, contained in Article 46.2.b of the Convention, do not apply.

b. Moreover, the Government of El Salvador has not challenged the admissibility of the petition on the grounds of a failure to exhaust the remedies under domestic law; hence, in keeping with the jurisprudence of the Inter-American Court of Human Rights, the Commission must infer that the Government has tacitly waived that challenge.

c. Because no competent judicial or administrative authority undertook any inquiry into the facts in this case, the Commission is compelled to cite the findings of the Inter-American Court of Human Rights concerning the obligation of the State to investigate "every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when a State allows private persons or groups to act freely

and with impunity to the detriment of the rights recognized by the Convention."¹

d. With regard to the witnesses who have signed the release papers for the Hernández Rivas child, the State has failed to fulfill its obligation to investigate which, as the Inter-American Court of Human Rights stated, "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."²

6. With regard to the noncompliance with Report 19/93 of October 1993

The three-month deadline given to the Government of El Salvador has elapsed and it has not complied with the Commission's recommendations in Report No. 19/93, nor has it answered the communication of October 18, 1993, notifying it that the report was adopted and sending it a text thereof.

CONCLUSIONS:

1. The Inter-American Commission on Human Rights finds that the Government of El Salvador is responsible for the facts denounced in the communication of June 25, 1991, to the effect that on March 30, 1990, at approximately 4:00 p.m., Flor de María Hernández Rivas, age 14, was violently seized by National Guardsmen, who accused her of having participated in the November 1989 FMLN offensive. Denied the most elementary judicial guarantees and with no regard for her status as a minor, she was subjected to physical and psychological mistreatment while in custody at National Guard Headquarters. Before being released on April 2, she was threatened by her captors.

2. The Commission further finds that the Government of El Salvador has violated the American Convention on Human Rights, chiefly Article 5, which guarantees the right to humane treatment; Article 7, on the right to personal liberty; Article 8, on the right to a fair trial; Article 19 on the rights of children, and Article 25 on judicial protection,

¹ Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgement of July 29, 1988, paragraph 176.

² Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 177.

in relation to Article 1.1 of that Convention, of which El Salvador is a State Party.

3. The Commission makes the following recommendations to the Government of El Salvador:

a. That it conduct an exhaustive, rapid and impartial investigation into the facts denounced to identify those who arbitrarily arrested and tortured the child Flor María Hernández Rivas and those National Guardsmen who threatened her, and that they be brought to trial so that they may receive the punishment that such serious conduct demands.

b. That the consequences of the situation caused by the violation of the aforementioned rights be redressed and that the aggrieved party be paid a fair compensation.

c. That the necessary measures be taken to avoid a recurrence of similar events hereinafter, particularly the following measures:

- That the law clearly and unequivocally proscribe torture and other cruel, inhuman or degrading punishment or treatment, and establish punishment for the guilty parties and compensation for victims, making allowance for aggravating circumstances if the victim is a minor.

- That respect for the provisions of Article 19 on the rights of children of the American Convention on Human Rights and Article 40 of the Convention on the Rights of the Child be demanded; those provisions are intended to provide real and effective protection for the rights of minors, particularly minors involved in criminal proceedings.

4. It invites the Government of El Salvador to accept the jurisdiction of the Inter-American Court of Human Rights in this specific case which is the subject of this report.

5. To publish this report pursuant to Article 48 of the Commission's Regulations and Article 53.1 of the Convention, because the Government of El Salvador did not adopt measures to correct the situation denounced within the time period.