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**REPORT No. 270/20**  
**PETITION 728-13**  
REPORT ON ADMISSIBILITY

ENRIQUE ROBERTO DUCHICELA HERNÁNDEZ  
AND HIS FAMILY MEMBERS  
ECUADOR

Approved electronically by the Commission on October 7, 2020.

**Cite as:** IACHR, Report No. 270/20, Petition 728-13. Admissibility. Enrique Roberto Duchicela Hernández and his family members. Ecuador. October 7, 2020.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Marta Escobar Andrade, Human Rights Center of the Pontificia Catholic University of Ecuador, Regional Foundation for Human Rights Advisory (INREDH)
<b>Alleged victim:</b>	Enrique Roberto Duchicela Hernández and his family members
<b>Respondent State:</b>	Ecuador
<b>Rights invoked:</b>	Articles 3 (recognition of legal personality), 4 (life), 5 (personal integrity), 7 (personal freedom), 8 (fair trial), 13 (freedom of expression) and 25 (judicial protection) in relation to article 1.1 of the American Convention on Human Rights <sup>1</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>2</sup>**

<b>Date of receipt</b>	April 30, 2013
<b>Notification of the petition:</b>	December 6, 2017
<b>Additional information received during the investigative stage:</b>	February 2, 2017
<b>State's first response:</b>	April 6, 2018
<b>Additional observations from the petitioners</b>	August 31, 2018
<b>Additional observations from the State</b>	December 3, 2018

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (deposit of instrument made on December 28, 1977)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 3 (recognition of legal personality), 4 (life), 5 (personal integrity), 7 (personal freedom), 8 (fair trial), 13 (freedom of expression) and 25 (judicial protection) in relation to article 1.1 of the American Convention

<sup>1</sup> Hereinafter "the American Convention" or "the Convention."

<sup>2</sup> The observations submitted by each party were duly transmitted to the opposing party.

<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, article 46.2 exception applies. c) of the Convention
<b>Timeliness of the petition:</b>	Yes, in the terms of section VI

## V. FACTS ALLEGED

1. The petitioning party denounces the failure to prevent and protect Mr. Enrique Roberto Duchicela Hernández (hereinafter “the alleged victim”), who was an agent of the Ecuadorian Foreign Service, and who they allege was detained, tortured and disappeared in the city of Lima, during the month of May 1988 while he was carrying out his official duties. Petitioners alleged that to date, the Ecuadorian State has not initiated a serious investigation nor has it provided all the information on the espionage functions carried out by Sergeant Duchicela and information related to his disappearance. Additionally, against the constitutional actions initiated by Ms. Escobar and her daughters, negative responses have been received, reflected in unduly motivated sentences.

2. It indicates that the alleged victim was a First Sergeant of Air Aviation of Ecuador and that on December 17, 1986, he was appointed Administrative Assistant in the Lima Air Attaché Office, a position that he carried out between January 11, 1987 and June 1988.

3. Petitioners affirm that, although officially, the alleged victim carried out activities for the assigned position, in essence he was fulfilling the mission entrusted by the Ecuadorian State, of accessing confidential and useful information. Petitioners describe that for this purpose, he bought and leaked information from the Peruvian Army Intelligence Service (hereinafter “SIE”) during 1986 and 1987. It states that, in 1987, the SIE authorities learned of said information leak, they discovered a spy network financed by Ecuador, and in the framework of their investigations they identified Second Lieutenant Marco Barrantes as the direct contact of the alleged victim. They point out that on March 18, 1988, Marco Barrantes was disappeared and in May of the same year, tried in absentia for crimes against the security of the Nation.

4. He reports that on Friday, May 27, 1988, the alleged victim communicated by telephone for the last time with his wife, Mrs. Marta Escobar Andrade, and that from that day he did not go to the Ecuadorian Embassy to work. They affirm that on May 30, 1988, his immediate boss informed the Ecuadorian Ambassador about the disappearance and that the latter brought the case to the attention of the Ecuadorian Foreign Ministry, indicating that there were indications of the arrest of the alleged victim and requesting that actions be coordinated with the Peruvian Chancellery. Notwithstanding, such information, the petitioners point out that the Ecuadorian State did not take any legal action, such as a writ of habeas corpus, which could have saved the life of the alleged victim.

5. Specifies that on June 3, 1988, Ms. Escobar went to the office of the Chief of Intelligence of the Ecuadorian Air Force, who promised to recover her husband, as long as she collaborated with his discretion on the issue of espionage. Likewise, petitioner relates that on June 4, 1988, she met with then-Ecuadorian President León Febres Cordero and some ministers. It alleges that the investigative proceedings in Peru were initiated in absolute secrecy and without the Ecuadorian authorities promoting the lifting of the reserve. They point out that on June 13 and 27, September 26, and December 26, 1988, the Embassy communicated with the Ministry of Foreign Affairs of Ecuador about the investigations and responses from Peru, without positive results.

6. It states that the Ecuadorian Ministry of Defense informed Mrs. Escobar that her husband had left a letter informing that he would not return to Ecuador because he had initiated an extra-marital sentimental relationship. It should be noted that the Ecuadorian Armed Forces supported this version for many years, despite the fact that the alleged letter from the alleged victim never appeared.

7. It indicates that on June 18, 1991, the Seventh Civil Court of Pichincha declared the presumed death of Mr. Duchicela due to the disappearance, and that the Ecuadorian State proclaimed his post-Mortem promotion to Second Warrant Officer.

8. It explains that for nine years no action was carried out, and that it was not until December 15, 1997, after a request by Mrs. Escobar before the International Committee of the Red Cross, that the Ministry of Foreign Relations requested information on the alleged disappearances of citizens during the Ecuador-Peru war.

9. It indicates that in 2000, the Peruvian journalist Ricardo Uceda contacted Mrs. Escobar to express that he had information about what had happened to the alleged victim and that he would make a publication in this regard. Thus, it indicates that in 2004 the book "Muerte en el pentagonito. The secret cemeteries of the Peruvian Army", in which chapter VIII entitled "The spy who did not return to Quito" recounts the disappearance of Mr. Duchicela. It describes that the journalistic investigation discovered that the alleged victim was kidnapped on May 27, 1988, after a follow-up and capture operation ordered by the high military commanders of the SIE. They state that said agent pointed out that Marco Barrantes and the alleged victim were detained, interrogated for espionage activities, tortured and executed on June 10, 1988 in the basements of the SIE, that their bodies were finally cremated and the ashes scattered in the gardens del Pentagonito on June 11, 1988.

10. It states that in January 2005, Ms. Escobar filed a complaint against the Ecuadorian State for the crimes of omission and concealment of forced disappearance, and that on October 16, 2008, the Prosecutor of the Crimes Against Life Unit, decided to refrain from hearing the case for lack of jurisdiction, alleging that the crime was committed in Peru and that the intellectual and material actors are Peruvian nationals.

11. Specifies that on March 8, 2010, Ms. Escobar asked the Ecuadorian Minister of Foreign Affairs that the government carry out judicial monitoring of the case in Peru, without receiving any type of state aid.

12. It indicates that on August 22, 2011, it filed a protection action against the Ministers of National Defense and Foreign Relations, and the State Attorney General, alleging the failure to initiate investigations into the disappearance of the alleged victim and transmitting the results to his relatives, as well as the failure of the Ecuadorian authorities to claim for his detention.

13. It states that on October 7, 2011, the Seventh Judge of Criminal Guarantees of Pichincha rejected the action, alleging that there was no violation of a constitutional right. It specifies that the appeal presented was dismissed on April 18, 2012, by the Provincial Court of Justice on the grounds that there were no violated constitutional rights.

14. Faced with this situation, on May 17, 2012, an extraordinary protection action was commenced before the Constitutional Court due to the lack of reasons for the said ruling. Petitioners point out that on September 19, 2012, said court rejected the action and ordered the case file on the grounds that "the petition made by the plaintiff is about the matter that was the reason for the protection action, denied in the first and second instance, when in reality the extraordinary protection action is a different action from the protection action". It indicates that said decision was notified to them by the website of the Constitutional Court on October 31, 2012.

15. On the other hand, it maintains that Mrs. Escobar on June 14, 2010, presented a request for access to public information to the Ministry of Foreign Affairs about the activities of the alleged victim during his stay in Peru, the information collected by that Ministry on his disappearance, and the names of the superior officers who made up the chain of command to which the alleged victim obeyed. It highlights that another request in the same terms was addressed to the Ministry of Defense.

16. It maintains that in the absence of a response from the authorities, on August 22 and 31, 2011, it filed an action for access to public information against the aforementioned ministries. They state that the action was granted in the first instance on September 16, 2011; and the second on November 8, 2011. They detail that on September 16, 2011, the Ministry of Foreign Affairs sent a list of documents, which did not include all the information requested. It states that for this reason, on June 18, 2012, the Fourth Civil Court of Pichincha issued a ruling on the action, providing that the information be delivered to the plaintiff in its entirety. It states that "in practice this decision was never carried out."

17. Likewise, it indicates that the Truth Commission heard the case of the alleged victim and in its report presented in 2010, it indicated that the Ministry of Foreign Affairs at that time did not take the measures that the case required nor did it comply with its duty to carry out immediate steps to locate his whereabouts. In addition, it specified that “the successive Ecuadorian governments, despite the insistence of his family, did not present any official or formal request for an investigation before the government of Peru or international organizations, nor did they order national organizations to carry out investigations to establish the facts.”.

18. In turn, the State maintains that on June 1, 1988, by order of the Ambassador of Ecuador in Peru, the Ecuadorian Air Attaché filed a complaint with the Investigative Police of Peru. It is worth highlighting that since the alleged disappearance of Mr. Duchicela was known, Ecuador made multiple efforts to clarify his situation, as well as actively promoting the corresponding investigations that took place in Peru, as it was the place where the events occurred.

19. It indicates that after the publication of the book “Muerte en el Pentagonito”, the Prosecutor's Office initiated an investigation and carried out some proceedings in Peru. However, it indicates that the prosecutor assigned to the case issued an order inhibiting the matter, since it lacked territorial jurisdiction.

20. It indicates that due to the publication of the Final Report of the Truth Commission, on November 14, 2010, the State Attorney General's Office initiated the pre-procedural investigation of the case, which has involved several investigative procedures in which there are requests for Criminal Assistance to Peru. It specifies that the investigation processes include technical activities that are currently open, "considering that the content of article 472.3 of the Comprehensive Criminal Code refers to circulating information reserved for the public, but accessible to the parties."

21. It indicates that on June 18, 1991, a sentence was passed declaring the presumed death, by virtue of the evidence of the investigations carried out by the State.

22. It alleges that the events described in the petition occurred in the territory of Peru, so much so that the investigations related to the case were conducted in that State, as the Peruvian jurisdiction to carry them out was not in doubt. Consequently, it considers that the actions or omissions alleged by the petitioners are not attributable to Ecuador and therefore, this does not generate its international responsibility, since the Commission lacks jurisdiction due to the location. Furthermore, it indicates that the Inter-American Commission does not have competence *ratione personae* to hear the case either, since the petition indicates as the alleged victim a person, who, according to what was alleged, was detained and was under the control and authority of Peruvian state agents.

23. It also specifies that within the framework of the protection action procedure, the basic rules of due process were observed by the judges and courts, and no violation of rights was evidenced. It also notes that the Constitutional Court denied the extraordinary protection action filed by the petitioners, stating that it was not an appeal and that said action has specific legal characteristics, but also that the constitutional rights allegedly violated were not upheld.

24. Finally, it points out that the petition was submitted untimely, since the notification of the definitive decision of the protection action of April 18, 2012, as indicated by the Rapporteur Secretary of the Provincial Court of Justice of Pichincha, implies that the petitioners took a year to present the petition.

## **VI. ANALYSIS REGARDING COMPETENCE**

25. In relation to competence based on the person, the Commission observes that the petition raises facts regarding the omission of prevention and the lack of immediate investigation into the disappearance of Mr. Duchicela, who was also protected by his capacity as attaché military in Peru. On the other hand, it takes note of the claim referring to the alleged lack of access to information and judicial protection, as well as the alleged suffering caused by the events to the detriment of his next of kin, who carried out the

corresponding legal actions. Both aspects are compatible with the competence *ratione personae* of the Commission.

26. In the same vein, the petitioners point out that they do not hold the Ecuadorian State responsible for the arrest and disappearance of Mr. Duchicela committed in Peru, but for the violation of the duty of prevention and due diligence in relation to the life of the alleged victim, the violation of the right to personal integrity of their family members, as well as the lack of protection and right to the truth of their family members.

27. The Commission recalls that at the time of adopting the American Convention, the Inter-American Specialized Conference on Human Rights opted to delete the reference to territory and establish the obligation of the States parties to the Convention to respect and guarantee the rights recognized therein to all persons subject to its jurisdiction. In this way, the margin of protection for the rights recognized in the American Convention was expanded, to the extent that the States could not only become internationally responsible for acts or omissions attributable to them within their territory, but also for those acts or omissions committed outside their territory, but within a sphere in which they exercise jurisdiction<sup>3</sup>.

28. In the present case, the Commission observes that the petitioners' main allegations make it possible to determine the jurisdiction of the Ecuadorian State, since the existence of a causal link can be established between the extraterritorial conduct or omission of a State and the alleged violation of the rights and freedoms of the alleged victim and his next of kin. In other words, there is a connection between the activities that the State carried out or should have carried out with respect to the rights of the alleged victim from the moment of his disappearance in Peru, and the alleged lack of judicial protection for his family members who were in Ecuador. Based on the foregoing, the Commission concludes that it is competent *ratione loci* to hear the present petition, since it alleges violations of rights protected in the American Convention that were committed by state agents of a State Party to said instrument in the territory of another State.

## **VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

29. The petitioner indicates that formal and informal procedures were taken before judicial, executive (military) and legislative authorities, in order to locate the whereabouts of the alleged victim and learn the truth of what happened, which to date, has not occurred. For its part, the State indicates that the petition was submitted in an untimely manner.

30. The Commission recalls that, in situations such as the one presented that include crimes against life, the remedies that must be taken into account for the purposes of admissibility of the petitions are those related to the criminal investigation and punishment of those responsible. In the specific case, the IACHR observes that, from the date of the alleged victim's disappearance in Lima, on May 27, 1988, his next of kin have turned to the Ecuadorian authorities seeking help in locating the alleged victim's whereabouts and investigating the facts. However, they did not have access to effective and adequate judicial remedies. It also takes into account that in 2005 they filed a complaint for omission and concealment in the disappearance against Ecuadorian authorities, which was filed on October 16, 2008 by the Prosecutor of the Crimes Against Life Unit, who resolved to refrain from knowing the cause alleging lack of jurisdiction.

31. Additionally, the Commission observes the State's argument that after the Truth Commission's Report was published, the State Attorney General's Office began the pre-procedural investigation of the case, with technical activities that are currently open. The foregoing would show that to date the truth of the facts and a criminal sanction against those responsible have not been determined. Given the foregoing, the IACHR concludes that the exception to the exhaustion of remedies provided for in Article 46.2.c of the American Convention applies to this petition.

<sup>3</sup> IACHR. Report No. 112/10, PI-02, Franklin Guillermo Aisalla Molina. Ecuador - Colombia. October 21, 2010, para. 90.

32. Finally, given that the petition was received on April 30, 2013, the alleged events that gave rise to the petition occurred on May 27, 1988 and the effects would extend to the present, as well as the nature of the complaint, the Commission considers that it was presented within a reasonable period of time and considers the requirement of Article 32.2 of the IACHR Rules of Procedure satisfied.

#### **VII. CHARACTERIZATION**

33. The Commission observes that the present petition includes allegations regarding the omission of the duty of prevention, the lack of diligence to take immediate action, and the absence of a prompt investigation into the alleged forced disappearance of Mr. Enrique Duchicela, as well as the lack of information provided to their next of kin and the establishment of an official version of the events that allegedly further affected their situation and their right to know the truth. In view of these considerations and after examining the elements of fact and law presented by the parties, the Commission considers that the allegations of the petitioning party are not manifestly unfounded and require a thorough study, since the alleged facts, if corroborated as true, could characterize violations of articles 3 (recognition of legal personality), 4 (life), 5 (personal integrity), 7 (personal freedom), 8 (fair trial), 13 (freedom of expression) and 25 (judicial protection) in relationship with Article 1.1 of the American Convention.

#### **VIII. DECISION**

1. Declare the present petition admissible in relation to Articles 3, 4, 5, 7, 8, 13, and 25 of the American Convention, in accordance with its Articles 1.1;

2. Notify the parties of this decision; continue with the analysis of the merits of the matter; and publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 7<sup>th</sup> day of the month of October, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice-President; Flávia Piovesan, Second Vice-President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.