

**Brief on Admissibility Submitted by
the Centre on Housing Rights and Evictions (COHRE) on behalf of the Survivors of the
Río Negro community and similarly situated communities in Guatemala (Petitioners)**

Report No. _____
Case _____

*Sobrevivientes de la Comunidad de Río Negro y otras comunidades similares en
Guatemala, P-894-04, Guatemala*

Guatemala: The Chixoy Dam Case

I. GUATEMALA

A. EXHAUSTION OF DOMESTIC REMEDIES

1. With respect to the issue of exhaustion of domestic remedies, this case is admissible before the Inter-American Commission on Human Rights as domestic remedies do not afford due process, access to domestic remedies has been hindered, and there has been unwarranted delay with respect to domestic remedies.

2. Article 46 of the American Convention on Human Rights and Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights generally require that remedies of the domestic legal system be exhausted. “This requirement exists to ensure the state concerned the opportunity to resolve disputes within its own legal framework. When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted is excused.”¹

¹ *Plan de Sanchez v. Guatemala*, Report No. 31/99, Case 11.763 ¶ 24 (11 March 1999).

3. Indeed, Article 31 provides three exceptions to this general rule. The general rule of exhaustion of domestic remedies shall not apply when: (a) the domestic legislation of Guatemala does not afford due process of law for protection of the right or rights that have been violated; (b) the petitioner has been denied access to the remedies under domestic law or has been prevented from exhausting them; and (c) there has been unwarranted delay in rendering a final judgment under domestic remedies.

4. The *Plan de Sánchez Massacre*² case dealt with very similar admissibility issues and provides authoritative guidance with respect to the present Petition. Indeed, the massacres of the Plan de Sánchez and Río Negro communities occurred in the same geographical region, near the town of Rabinal in Department of Baja Verapaz, and during the same period of time, in 1982.

5. The Commission squarely addressed the application of Article 46 to Guatemala in *Plan de Sanchez v. Guatemala*. *Plan de Sanchez* involved a massacre by the Guatemalan military in July 1982 against an indigenous community located near Rio Negro. The Guatemalan government challenged the petition's admissibility, claiming the petitioners had failed to exhaust domestic remedies. After reviewing the efficacy and impartiality of Guatemala's justice system, the Commission held that Guatemala had prevented the petitioners "from invoking domestic remedies for a period of years due to the fear which affected them and the general community."³ The Commission further stated:

² See Inter-American Commission on Human Rights, *Plan de Sánchez Massacre case v. Guatemala*, ruling on admissibility, Report No. 31/99, Case 11.763 (11 March 1999); Inter-American Court of Human Rights, *Plan de Sánchez massacre case v. Guatemala*, Report No. 31/99, Case 11.763 (29 April 2004).

³ Id. at para. 27.

The rule of exhaustion does not require the invocation of remedies where this would place the physical integrity of the petitioner at risk, or where this offers no possibility of success. In addition to the information in the record, Commission reports from the period under study document the vulnerability of populations in rural areas to human rights abuses, and the resulting climate of insecurity, and further indicate that, at the time of the events denounced, the judiciary “had been stripped of its independence, autonomy and impartiality.”⁴

6. An examination of the U.S. State Department’s Human Rights Reports for Guatemala in 1999 and 2004 indicates that the human rights situation in Guatemala remains largely unchanged since *Plan de Sanchez*. In 1999, the Report begins its evaluation of the judiciary with the following:

The Constitution provides for an independent judiciary; however, the judicial system often fails to provide fair trials due to inefficiency, corruption, insufficient personnel or funds, and intimidation of judges, prosecutors, and witnesses.⁵

The U.S. State Department further found that “Death threats and intimidation of the judiciary were commonplace in most cases involving human rights violations, particularly where the defendants were current or former members of the military, military commissioners, or PACs.”⁶

7. In 2004, the Report begins its evaluation of the judiciary by reiterating the conclusions of the 1999 report, again stating:

⁴ *Id.* at para. 27.

⁵ 1999 *Country Reports on Human Rights Practices Released by the Bureau of Democracy, Human Rights, and Labor*, Guatemala. U.S. Department of State, February 25, 2000.

⁶ *Id.*

The Constitution provides for an independent judiciary; however, the judicial system often fails to provide fair trials due to inefficiency, corruption, insufficient personnel or funds, and intimidation of judges, prosecutors, and witnesses.⁷

The report goes on:

Judges and prosecutors continued to receive threats designed to influence pending decisions or to punish past decisions. Death threats and intimidation of the judiciary were common in cases involving human rights violations. Witnesses often were too intimidated to testify. Plaintiffs, witnesses, prosecutors, and jurists involved in high profile cases against members of the military or police reported threats, intimidation, and surveillance. Those involved in government corruption cases also were targeted.⁸

8. The Petitioners have been denied access to the remedies under domestic law and have been prevented from exhausting them. Indeed, when members of the Río Negro community have attempted to assert themselves and to advocate for justice, they have been met with death threats and other means by which the Government of Guatemala seeks to silence them. These means have created a climate of fear that has resulted in the Río Negro community being unable to seek domestic remedies.

9. As recently as 2003, members of the Río Negro community have had to temporarily flee Guatemala in fear for their lives. Additionally, after bringing a case against three low-level Civil Patrollers who participated in the massacres, a Río Negro survivor testified:

⁷ 2004 Country Reports on Human Rights Practices Released by the Bureau of Democracy, Human Rights, and Labor, Guatemala. U.S. Department of State, February 28, 2005.

⁸ *Id.*

It has been extremely difficult because we all live side by side, victims and perpetrators, and everyone knows who the witnesses are. We have received many threats throughout, some direct, some anonymous; some threatened to kill us once Ríos Montt was back in power. When we arrived at the courtroom for the trial, the patrollers who were not being tried threatened us.⁹

10. In the only completed case in which the domestic courts have examined some of the violence that occurred in the area in the early 1980s, the case have focused solely on low-level actors rather than the intellectual authors and financiers of those human rights violations.¹⁰ Furthermore, one other case involving slightly more senior perpetrators is still open with no resolution forthcoming.¹¹ Thus, these rare cases are not only ineffective at providing the Río Negro community with a just, fair and comprehensive remedy for the human rights violations it has suffered, but continue to be farcical on account of undue delay.

11. The Civil Self-Defense Patrols, who were responsible for atrocities in the 1980s, remain effectively immune from prosecution and politically influential in Guatemala. In its 2004 report, the IACHR “observed with concern the threats made by former Patrol leaders against human rights organizations that have publicly expressed their opposition to payment for services rendered that they have been negotiating with the National Government. The Commission [understood] that these threats have also been extended to the Human Rights

⁹ Interview with Mr. Carlos Chen, Río Negro survivor (28 September 2000).

¹⁰ On 30 November 1998, three low-level Civil Patrollers were sentenced to prison after being convicted of participating in the Río Negro massacres. This is the only case which has resulted in any perpetrators being brought to justice

¹¹ The Río Negro community has sought to hold Captain José Antonio González Solares, who at the time was commander of the Rabinal military base; Erick Ponce, who was commander of the Cobán military base; Lieutenant Colonel Julio Otzoy Colaj; and Benedicto Lucas García, who was the military chief of staff at the time; accountable, thought this case is not being undertaken in a timely or realistic manner by the Guatemalan authorities.

Ombudsman and the Constitutional Court.”¹² MINUGUA came to the same conclusion in its final report.¹³

12. The threats and intimidation against the Rio Negro community continue today. The U.S. State Department Report notes that “Witnesses to the 1982 Rio Negro massacre and lawyers on the case received numerous threats in the months leading up to the October 19 opening of the trial for six former PACs.”¹⁴ In October 2004, judicial proceedings ostensibly began against six low-level PAC members accused of participation in the Rio Negro massacre. The proceedings have languished since that time and there is no indication that they will begin in earnest any time soon, nor will they investigate the conduct of those who ordered and planned the murders.

13. In late 2004, Amnesty International launched an urgent action to protest Guatemala’s crackdown against Rio Negro activists.¹⁵ Amnesty reports that following a peaceful protest at the Chixoy Dam, which came to an end following an agreement between the parties to begin negotiations regarding compensation owed from the Chixoy Dam displacements, Guatemala brought criminal charges against nine leaders of the indigenous communities. Amnesty names a number of Rio Negro activists charged or under criminal investigation, including Daniel Pascual, a political leader and supporter of the Rio Negro community, who did not participate in the Dam protest.

¹² Annual Report of the Inter-American Commission on Human Rights 2004, OEA/Ser.L/V/II.122, Doc. 5 rev. 1, February 23, 2005, at ¶54.

¹³ MINUGUA’s (U.N. Verification Mission) 9th and Final Report on Fulfillment of the Peace Accords in Guatemala, August 30, 2004, at ¶35.

¹⁴ U.S. State Department Report 2004.

¹⁵ Amnesty International, Guatemala: Human rights defenders at risk. AMR 34/019/2004.

14. In February 2005, the Guatemalan Constitutional Court enjoined the domestic proceedings in the *Dos Erres* case, including the detention orders against the military perpetrators. In a piece run by the Toronto Star, “Lawyer Julio Cintron, who has defended military officials in other criminal cases, said the decision could serve as a precedent for at least five other cases involving victims of alleged massacres.”¹⁶ During this same period, violence against human rights workers spiked, prompting Amnesty International to send a formal memorandum to the Guatemalan government stating, “The beginning of 2005 witnessed a renewed attack from clandestine groups and organised crime aimed at intimidating and hindering the work of human rights defenders. Twenty-six human rights defenders were reportedly threatened or attacked between 1 January and 25 February 2005.”¹⁷

15. Other states have recently recognized the lack of adequate domestic remedies in Guatemala. As recently as October 2005, the Spanish Constitutional Court granted universal jurisdiction over genocide claims from Guatemala’s civil war.¹⁸ A Federal District Court in Massachusetts in the U.S. similarly granted universal jurisdiction over the claims of Guatemalans who had been tortured, kidnapped and endured the murder of family members by government forces. U.S. federal courts are equally bound by an exhaustion requirement and in taking jurisdiction; the Court held that it “is generally not required when foreign remedies are unobtainable, ineffective, inadequate or obviously futile.”¹⁹ The law under which this U.S. Court found jurisdiction, however, does not apply to jurisdiction over States

¹⁶ THE TORONTO STAR, A13 (February 3, 2005).

¹⁷ Amnesty Memo 4/20/2005.

¹⁸ Tribunal Constitucional de España, Sala Segunda, Sentencia 237/2005 de septiembre de 2005.

¹⁹ *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995).

and therefore is not a remedy that the Petitioners can use against either Guatemala or the U.S.

16. A review of the public record leaves no doubt that there is still no safe and impartial mechanism where victims of Guatemala's past human rights violations, and the inhabitants of Rio Negro in particular, can obtain remedy. Although MINUGUA's Final Report notes that progress has been made towards establishing democratic institutions in Guatemala, there has still only been "limited success in consolidating the rule of law and overcoming impunity."²⁰ The progress made by Guatemala politically does not mean that it has met its "affirmative duty" to *ensure* adequate remedies under Article 1(1) of the Convention.²¹

17. Finally, this brief incorporates by this reference the arguments set forth in the main Petition as well as the two *amicus curiae* briefs submitted by Rights Action in May 2006.

B. REASONABLE TIME PERIOD

18. Article 46 of the American Convention on Human Rights and Article 32 of the Rules of Procedure of the Inter-American Commission on Human Rights require, when an exception or exceptions to the general rule of exhaustion of domestic remedies applies, that the petition be submitted to the Inter-American Commission on Human Rights in a reasonable period of time, as determined by the Commission.

19. Since their brutal forced eviction, the survivors of the Río Negro community have been living in extreme poverty with little access to advocates or counsel willing or able to assist them with bringing claims before the Inter-American Commission on Human Rights.

²⁰ MINUGUA Report at ¶26

²¹ See, *Advisory Opinion on the Exceptions to the Exhaustion of Local Remedies*, OC 11/90 ¶ 34; See

Timeliness must be viewed in the context of the extreme poverty experienced by the dispersed survivors due to their forced eviction, the continuing climate of fear and intimidation that the above noted human rights reports have demonstrated remains a constant feature of Guatemala today, as well as the ongoing human rights violations against the Rio Negro community.

20. It wasn't until 2003 that the Centre on Housing Rights and Evictions, at the request of Rights Action, another non-governmental organization working in support of the Río Negro community, was able to begin its investigation into the facts of this Petition. With those facts now verified by COHRE and Rights Action, the community of Río Negro is finally able to safely petition the Inter-American Commission.

21. Based on the forgoing circumstances, and in particular the direct and intentional action of the Government of Guatemala to stifle the community's search for justice at the domestic level, the length of time that has elapsed since the forced eviction of the Río Negro community to the time of the submission of this Petition is reasonable.

II. UNITED STATES

22. The United States does not consider the Declaration of the Rights and Duties of Man to be a binding human rights instrument.²² Even if the Declaration was considered by the United States as a human rights instrument, United States courts have concluded that the Protocol of Buenos Aires, amending the OAS Charter, is non-self-executing.²³ As the

also *Velasquez Rodriguez*, IACHR No 4. (1988).

²² See, e.g., arguments of the United States presented in *Roach & Pinkerton v. United States*, Case 12.240, Report No. 100/03, Inter-Am. C.H.R., OEA/Ser./L/V/II.114 Doc. 70 rev. 1 at 790 (2003).

²³ See, e.g., *Doe v. Pylar*, 628 F.2d 448, 453 (5th Cir. 1980); *In re Alien Children Educ. Litig.*, 501 F.Supp. 544 (S.D. Tex. 1980).

protections in the Declaration have not been incorporated into U.S. domestic legislation, courts conclude that they lack jurisdiction to enforce treaty obligations.

23. Additionally, United States courts do not allow persons whose rights were violated abroad to use U.S. courts to hold States accountable. Indeed, courts often conclude that the doctrine of head of state immunity²⁴ or the doctrine of sovereign immunity²⁵ or both applies to cases brought to hold States, including the United States, liable for human rights violations. Furthermore, the Federal Tort Claims Act provides that the U.S. can not be sued for any claim arising in a foreign country.²⁶

24. Consequently, Petitioners are not able to avail themselves of domestic remedies in the United States.

III. IDENTITIES OF INDIVIDUAL PETITIONERS

23. This Petition is on behalf of the survivors of the Río Negro community of Baja Verapaz as well as those persons forcibly displaced from other communities due to the construction of the Chixoy Dam. These communities include Aldea Chirramos, Cubulco, Baja Verapaz; Aldea Chitomax, Culbulco, Baja Verapaz; Aldea Chicruz, Cubulco, Baja Verapaz; Caserio Guaynep, Aldea Chicruz, Culbulco, Baja Verapaz; Caserio Chisajcap, Aldea Chicruz, Cubulco, Baja Verapaz; Caserio Pueblo Viejo Cauinal, Aldea Chicruz, Cubulco, Baja Verapaz; Caserio S. Juan las Vegas, Aldea Chicruz, Cubulco, Baja Verapaz; Chuaxon,

²⁴ See, e.g., *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001).

²⁵ See, e.g., the Federal Tort Claims Act, which in 28 U.S.C. § 2680(k) provides that the U.S. can not be sued for any claim arising in a foreign country and which in 28 U.S.C. § 2680(h) provides that the government is not liable when any of its agents commits the torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Cubulco, Baja Verapaz; Los Encuentros (El Chebollah), Cubulco, Baja Verapaz; Caserio El Zapote, Aldea San Miguel Chicaj, Salama, Baja Verapaz; Aldea Camalmapa, San Miguel Chicaj, Salama, Baja Verapaz; Finca Santa Ana, San Cristobal, Alta Verapaz; Caserio Los Chicos, San Cristobal, Alta Verapaz; Caserio Pueblo Viejo, San Cristobal, Alta Verapaz; and Caserio Puente Viejo, San Cristobal, Alta Verapaz.

24. While it is impracticable to identify all individuals whose human rights were violations in the context of the Chixoy Dam project, the following have been identified.

25. Survivors of the Río Negro forced eviction include:

Carlos Chen

Jesús Tecú Osorio

Dominga Sic Ruiz (aka Denese Joy Becker)

MORE TO BE SENT SEPERATLY AT A LATER DATE

26. Surviving next-of-kin of massacre victims include:

Carlos Chen

Jesús Tecú Osorio

Dominga Sic Ruiz (aka Denese Joy Becker)

MORE TO BE SENT SEPERATLY AT A LATER DATE

27. Massacre Victims of Río Negro Massacre include:

Children Massacred in Río Negro on 13 March 1982

²⁶ Federal Tort Claims Act, 28 U.S.C. § 2680(k).

1. Enriqueta Chen Iboy
2. Antonio Chen Iboy
3. Alberta Iboy Sanchez
4. Juan Iboy Sanchez
5. Huwaldo Iboy Sanchez
6. Ishmail Iboy Sanchez
7. Cesario Osorio Iboy
8. Silberia Osorio Iboy
9. Irima Osorio Iboy
10. Santiago Iboy Osorio
11. Ermilio Sic Chen
12. Gilberto Sic Chen
13. Micaela Osorio Osorio
14. Ermilio Perez Osorio
15. Adelia Osorio Iboy
16. Tuana Iboy Sanchez
17. Paulina Chen Tecu
18. Santa Eduarda Chen Chen
19. Felisa Tum Osorio
20. Dorotea Sanchez OSorio
21. Juan Chen Tecu
22. Catarino Chen Tecu
23. Marcelo Tecu Osorio
24. Anastacio Tecu Osorio
25. Jaime Tecu Osorio
26. Maria Tum Osorio

27. Arribal Tum Osorio
28. Alfredo Sanchez Sic
29. Mario Sanchez Sic
30. Miguel Angel Perez Chen
31. Carmelina Cuxum Lajuj
32. Maria Salome Cuxum Sanchez
33. Maria Chen Sanchez
34. Martin Lajuj Sanchez
35. Matilde Osorio Chen
36. Armulfo Osorio Chen
37. Venedicto Osorio Chen
38. Pablo Osorio Sanchez
39. Bacilio Osorio Sanchez
40. Nicolas Osorio Sanchez
41. Santo Sanchez Lopez
42. Francisco Sanchez Lopez
43. Herlinda Lajuj Iboy
44. Ricardo Chen Osorio
45. Margarita Chen Tecu
46. Siriaca Chen Tecu
47. Saleima Tecu Osorio
48. Dominga Tecu Osorio
49. Tornaja Tecu Osorio
50. Anastacia Tecu Sanchez
51. Cristina Tecu Sanchez
52. Patrocinio Tecu Deleón

53. Estefana Tecu Deleón
54. Jesus Tecu Deleón
55. Juliana Uscap Chen
56. Jabier Chen Uscap
57. José Chen Uscap
58. Ortencia Uscap Teletor
59. Jesusa Sanchez Perez
60. Candelaria Perez Osorio
61. Demitrio Osorio Oboy
62. Maria Tereza Osorio Iboy
63. Petronila Osorio Iboy
64. Anastacia Osorio Iboy
65. Marcela Osorio Iboy
66. Viunta Tecu Sanchez
67. Gregorio Chen Sanchez
68. Eulalia Chen Osorio
69. Delfina Chen Osorio
70. Andelez Chen Osorio
71. Rosendo Sic Ruís
72. Tomasa Osorio Chen
73. Irina Cahuec Osorio
74. Juana Osorio Sanchez
75. Elena Osorio Chen
76. Luiz Osorio Chen
77. Magdalena Osorio Chen
78. Joaquina Osorio Mendosa

79. Lucia Osorio Mendosa
80. Arcadio Sanchez Gonsalez
81. Reginaldo Sanchez Gonsalez
82. Celestina Sanchez Gonsalez
83. Victoria Osorio Sic
84. Francisco Sic Sanchez
85. Pablo Sic Sanchez
86. Silberia Sic Sanchez
87. Nareisa Chen Osorio
88. Leocadio Tun Sanchez
89. Euseleio Chen Lopez
90. Frnacisco Sanchez Lopez
91. Adelia Osorio Iboy
92. Emiliana Osorio Alvarado
93. Juan Osorio Alvarado
94. Evaristo Alvarado
95. Gavina Chen Osorio
96. Pablo Chen Ismalej
97. Bonifacio Lopes Osorio
98. Francisco Iboy Sic
99. Silberia Iboy Sic
100. Micaela Osorio Osorio
101. Raymanda Sanchez Sanchez
102. Hector Lopes Osorio
103. Crispina Tecu Chen
104. Juana Tum Sanchez

105. Anastacia Cuxum Lajuj

106. Juana Cuxum Lajuj

107. Tomas Cuxum Lajuj

Women Massacred in Rio Negro on 13 March 1982

1. Paulina Iboy Osorio

2. Dominga Sanchez Chen

3. Dorotea Osorio Chen

4. Marcela Iboy Osorio

5. Juliana Osorio Osorio

6. Juana Iboy Osorio

7. Guillerma Osorio Chen

8. Nasaria Tum Sanchez

9. Luisa Osorio Sanchez

10. Vicenta Iboy Chen

11. Narcisa Chen Chen

12. Francisca Sanchez Chen

13. Catalina Iboy Sanchez

14. Demetria Osorio Lajuj

15. Pualina Chen Tecu

16. Francisca Sanchez Chen

17. Petronila Chen Sanchez

18. Gregoria Alvarado Gonsalez

19. Siriaca Osorio Osorio

20. Tranquilina Osorio Chen

21. Maria del Rosario Osorio Chen

22. Juana Tecu Osorio

23. Juana Tum Sanchez
24. Pedrina Osorio Perez
25. Tomasa Osorio Chen
26. Gavina Sic Siana
27. Vicenta Chen
28. Juana Osorio Chen
29. Vicenta Lajuj Chen
30. Clementina Osorio
31. Toribia Cuxum Osorio
32. Inesa Sanchez Iboy
33. Lucia Sanchez Iboy
34. Maria Chen Sanchez
35. Margarita Sanchez
36. Alejandra Osorio Chen
37. Rosa Sanchez Osorio
38. Tomasa Lopez Ixpata
39. Dominga Iboy Chen
40. Margarita Chen Tecu
41. Dominga Iboy Chen
42. Juana Osorio Chen
43. Angela Sanchez Chen
44. Iginia Chen Ixpata
45. Margarita Chen Uscap
46. Eugenia Iboy Osorio
47. Eligio Iboy Osorio
48. Carmela Osorio Osorio

49. Juana Perez
50. Paula Perez
51. Juana Nicha Sanchez Perez
52. Bernarda Chen Osorio
53. Euselia Cahuec
54. Juliana Iboy Sanchez
55. Narcisa Osorio Lopez
56. Eulalia Chen Osorio
57. Justa Osorio Sic
58. Baleriana Sic
59. Magdalena Ruiz
60. Marta Julia Chen Osorio
61. Felipa Osorio Chen
62. Isabela Osorio Chen
63. Juliana Chen Iboy
64. Pedrina Gonsalez Tecu
65. Julia Sanchez Chen
66. Manuela Chen Osorio
67. Maria Dolores Iboy Osorio
68. Isabela Sanchez Chen
69. Andrea Iboy Uscap
70. Matilde Osorio Chen

ADDITIONAL NAMES FROM OTHER MASSACRES TO BE SENT SEPERATLY AT

A LATER DATE

29. Survivors of the forced eviction of similarly situated communities include:

TO BE SENT SEPERATELY AT A LATER DATE

30. COHRE and ADIVIMA reserve the right to add additional victims to the above lists.

31. Finally, with respect to the World Bank and the Inter-American Development Bank, the Petition is not against the banks themselves, but against those States that had decision-making power within the banks *and* had human rights obligations under either the American Convention on Human Rights or the American Declaration on the Rights and Duties of Man. Therefore, these claims should be admissible under Article 44 of the American Convention and Articles 19 and 20 of the Statute of the Inter-American Commission on Human Rights. As mentioned in paragraph 63 of the Petition, the International Law Commission has concluded that States are liable for violations of international law undertaken by international organizations to which they are members.²⁷

Respectfully submitted,

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²⁷ International Law Commission, Report of the International Law Commission on the work of its fifty-fifth session, Chapter IV, page 33, *Text of Draft Articles on Responsibility of International Organizations Provisionally Adopted so far by the Commission*, Art. 1, 5 May - 6 June and 7 July - 8 August 2003, UN Doc. A/58/10 (2003).