

**REPORT N° 44 /02 <sup>1</sup>**  
ADMISSIBILITY  
PETITION 12.057  
LUIS ALFREDO ALMONACID ARELLANO  
CHILE  
October 9, 2002

**I. SUMMARY**

1. On September 15, 1998, the Inter-American Commission on Human Rights (hereinafter the "Commission" or the "IACHR") received a petition lodged by Mario Márquez Maldonado and Elvira Del Rosario Gómez (hereinafter "the petitioners"). It is alleged that the Republic of Chile (hereinafter "the State" or "the Chilean State") is responsible for the violation of the right to have access to justice by virtue of a court order of 25 March 1998 that closed the inquiry into the murder of Mr. Almonacid Arellano, based on the 1978 Amnesty Law, Decree 2,191.

2. The petitioners alleged that the State is responsible for the violation of the right to judicial protection and the right to judicial guarantees, and in so doing also violated its obligation to respect and ensure the rights recognized in Articles 1(1), 8(1) and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"). As to the petition's admissibility, the petitioners assert that access to justice at the domestic level has been denied and that the petition satisfies the admissibility requirements both in terms of form and substance. The State, on the other hand, argues that the constitutional governments that followed the military regime cannot be held accountable for the facts denounced. It asserts that the 1978 amnesty law, Decree 2,191, is the applicable law in the present case and cannot be repealed. It further asserts that the constitutional governments have not enacted amnesty laws and have done nothing to violate the international obligations undertaken by Chile. The State adds that the existing National Truth and Reconciliation Commission and the victims' reparations policy<sup>2</sup> are guarantees of the rights embodied in Articles 1(1), 8(1) and 25 of the Convention. It contends, therefore, that no right recognized in the American Convention has been violated.

3. After analyzing the parties' positions, the Commission concluded that it was competent to hear the petitioners' case and that said case was admissible under Articles 46 and 47 of the American Convention.

**II. PROCESSING BEFORE THE COMMISSION**

4. On September 15, 1998 the Commission received a petition lodged by Mario Márquez Maldonado and Elvira Del Rosario Gómez alleging violations of Articles 1(1), 8(1) and 25 of the Convention.

5. On October 7, 1998, the Commission transmitted the pertinent parts of the complaint to the Chilean State, setting a period of 90 days for the State to provide information concerning the facts alleged and the exhaustion of remedies under domestic law.

6. The State's response was received on January 7, 1999 and transmitted to the petitioners on January 22, 1999. The Commission set a period of 45 days for the petitioners to submit their observations. The petitioners' observations were received on March 20, 1999 and forwarded to

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1 In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commission member José Zalaquett, Second Vice-President and a Chilean national, did not participate in the discussion of this case or in the decision taken thereon.

2 According to the State, the National Truth and Reconciliation Commission proposed a number of measures to publicly redress and restore the victims' dignity. Some measures were symbolic gestures, while others were legal and administrative, in areas such as social security, health services for next of kin, education for children, housing, social welfare, and others.

the Chilean State on March 26, 1999. The Commission set a period of 30 days for the State to submit observations.

7. On April 22, 1999 the State requested a 30-day extension of the deadline for submitting its response, and the Commission has granted such extension. On January 22, 2002 the Commission repeated its request for information and set a period of 30 days for the State to submit its observations. The State did not reply.

### **III. THE PARTIES' POSITIONS**

#### **A. The petitioners' position**

8. The petitioners allege that on September 16, 1973 a group of some twelve *Carabineros* [gendarmes] under the command of Raúl Neveux Cortessi and Manuel Segundo Castro Osorio, came to the home of Mr. Luis Alfredo Almonacid Arellano, a professor and activist in the Chilean Communist Party, President of the *Central Única de Trabajadores* (CUT) in the city of Rancagua, and director of the *Sindicato Unido de Trabajadores de Educación* (SUTE). Mr. Almonacid Arellano was detained in the presence of his family, beaten, pushed and insulted. Outside the victim's home, Mr. Almonacid Arellano was pushed and lost his balance, whereupon Raúl Neveux Cortessi shot him fatally.

9. According to the petitioners, on September 19, 1973, the First Court of Rancagua instituted proceedings in an inquiry that it then dismissed on April 8, 1974. The Rancagua Appeals Court reversed the dismissal, but the case was dismissed again. The petitioners allege that time and time again over the course of 17 years, the case was dismissed and the dismissal overturned by the Rancagua Appeals Court. According to the petitioners, "from then on the case resulted in series of repeated dismissals of the accusations and eventual revocations of these dismissals by the Court, which had been known, during the 17 years of the military regime for its independence and constant efforts in the quest for the truth."

10. The petitioners allege that finally, on August 28, 1996 the Rancagua Appeals Court ruled that Raúl Neveux Cortessi was to be tried for the murder of Mr. Almonacid Arellano. The Military Prosecutor filed an appeal with the Supreme Court, which ruled that the military courts had jurisdiction in the case. On January 28, 1997 the military court issued a final ruling dismissing the investigation concerning Raúl Neveux Cortessi. The petitioners appealed the ruling, but on March 25, 1998 the court martial rejected the appeal and upheld the dismissal of the proceedings, specifying that the law 1978 amnesty law, decree 2,191 was applicable. The petitioners contend that the court martial's ruling definitively closed the judicial inquiries being conducted to establish the circumstances under which Mr. Almonacid was killed; as a result, the material and/or intellectual authors of the murder of Mr. Almonacid Arellano have gone unpunished.

11 In their response to the State's observations, the petitioners contend that the Chilean State is responsible for the violations of the Convention committed by agents of the State, not just those of the executive branch, but those of all branches of government, including the legislative and judicial.

12. The petitioners further allege that although the historical context in which Mr. Almonacid Arellano's death occurred was different from what it is under the current democratic government, the responsibility of the Chilean State transcends historical eras and, by the international law principle of the continuity of States, stretches beyond the era of democratic government and encompasses that of the military regime as well.

13. Therefore, they allege that this constitutes a violation of Articles 1(1), 8(1) and 25 of the Convention. Their argument is that the right to access to justice has not been guaranteed, that the obligation to investigate and punish was violated, as was the right of Mr. Almonacid Arellano's

next of kin to the judicial protection and guarantees recognized in the Convention. They assert that the 1978 amnesty law, decree 2,191, is incompatible with the provisions of the Convention because it denies the right of access to justice.

## **B. The State's position**

14. The State expressly asserts that "it does not deny the facts reported in the communication from the victim's representative." While it does not raise procedural objections, it makes a series of substantive arguments.

15. The State argues that the specific historical context of this case is a factor the Commission should consider. It explains that Chile moved from a military regime to a constitutional one, and that the 1978 amnesty law, decree 2,191, was part of that process. In this democratization process, the State contends, the constitutional governments implicitly accepted the juridical system and laws established by the military regime, and the constitutional governments could not, therefore, repeal the 1978 amnesty law, decree 2,191.

16. The State explains that, in any case, it would be impossible for the government to try to change this decree, because some of the members of the present senate -which plays an essential role in the process of legislative reform- were appointed by the military regime. Repeal of the 1978 amnesty law, decree 2,191, would also imply a violation of the criminal law principle of the non-retroactivity.

17. The State also argues that because the judicial branch of government is independent of the executive branch, the latter can have no influence on judicial decisions.

18. The State also notes that a distinction has to be made between an amnesty law decreed by a *de facto* government and one enacted by a constitutional government, as the National Truth and Reconciliation Commission and the Inter-American Commission on Human Rights both acknowledged. The State contends that an amnesty law decreed by a *de facto* regime is a way of ensuring that regime's impunity, whereas those enacted by constitutional governments are part of a process of national reconciliation. The State argues that because the amnesty law in question was decreed by the *de facto* government, the democratic government is not responsible for those decrees.

19. The State notes that the constitutional governments have not enacted any amnesty law that could be regarded as incompatible with the American Convention, nor have they, either by action or omission, done anything that would be contrary to the obligations Chile undertook as a party to the said Covenant.

20. Lastly, the State alleges that the National Truth and Reconciliation Commission already considered the case of Luis Alfredo Almonacid Arellano. This Commission acknowledged the facts, specifically that Almonacid Arellano was extra-judicially executed by agents of the State and that his human rights were violated. The State also explained that Mr. Almonacid Arellano's next of kin were already compensated based on the information provided by the *Instituto de Normalización Previsional* and the Office of the Deputy Secretary of the Interior since 1992.

## **IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY**

### **A. The Commission's competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae***

21. Under Article 44 of the American Convention, the petitioners are entitled to lodge complaints with the IACHR. The petition refers as alleged victims to persons whose Convention-recognized

rights Chile undertook to respect and ensure. As for the State, Chile has been a party to the American Convention since August 21, 1990 the date on which its instrument of ratification was deposited. The Commission thus has competence *ratione personae* to examine the petition.

22. The Commission has competence *ratione loci* to examine the petition because the violations of Convention-protected rights are alleged to have occurred within the territory of a State party to the Convention.

23. The Commission has competence *ratione temporis* because the obligation to respect and ensure the rights protected in the American Convention was already binding upon the State at the time the events alleged in the petition occurred.<sup>3</sup> The petitioners are not alleging violations of the American Convention for Mr. Almonacid Arellana's murder, which has occurred prior to Chile's ratification of the Convention.

24 Finally, the Commission has competence *ratione materiae*, because the petition denounces violations of human rights protected by the American Convention.

## **B. Admissibility requirements**

### **1. Exhaustion of the remedies under domestic law**

25. Under Article 46(1) of the American Convention, one of the requirements that must be met for a petition to be admissible is that the remedies under a State's domestic laws have been pursued and exhausted.

26. The State did not raise any preliminary objections alleging a failure to exhaust domestic remedies. The Commission therefore considers that the Chilean State did not claim during the initial proceedings on this petition the failure to exhaust the remedies under domestic law.

27. Time and time again the Inter-American Court has held that in order to be timely, the objection asserting failure to exhaust domestic remedies must be raised during the first stages of the proceedings; otherwise, it is presumed that the interested State has tacitly waived the use of that objection.<sup>4</sup>

28. Therefore, the Inter-American Commission considers that in this matter, Chile waived the objection asserting failure to exhaust domestic remedies, as it did not raise that objection, either within the established time periods or at the first opportunity it had during the proceedings, which was in its response to the petition that initiated the process.

### **2. Time period for lodging a petition**

29. With regard to the petition under study, the IACHR has established that Chile tacitly waived its right to raise the objection asserting failure to exhaust domestic remedies. Therefore, the requirement set forth in Article 46(1)(b) of the American Convention is not applicable. However, the Convention's requirement that domestic remedies be exhausted is independent of the requirement that the petition be lodged within six months following the judgment exhausting domestic jurisdiction. Therefore, the Inter-American Commission must determine whether the petition was lodged within a reasonable time. The Commission notes that the original petition of August 27, 1998 was received on September 15, 1998. Likewise, the most recent ruling by a

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3 Chile deposited its instrument of ratification of the Convention on August 21, 1990.

4 See, for example, Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community Case, Nicaragua, Judgment on Preliminary Objections, February 1, 2000 par. 53. In that judgment, the Inter-American Court held that "in order to validly oppose the admissibility of the petition.... The State should have expressly and *in a timely manner* invoked the rule that domestic remedies should be exhausted." (emphasis in the original). *Idem*, par. 54.

domestic court -which in the petitioners' opinion denied them of any possibility of access to justice- is dated March 25, 1998. Therefore, the Commission considers that the petition was presented within a reasonable period of time.

### **3. Duplication of proceedings and *res judicata***

30. There is nothing in the case file to suggest that the subject matter of the petition is pending in another international proceeding for settlement or that the petition itself is substantially the same as one already examined by the Commission or any other international body. Therefore, the Commission considers that the requirements set out in Articles 46(1)(c) and 47(d) of the Convention have been met.

### **4. Characterization of the facts alleged**

31. The Commission considers that the petitioners' allegations of violations of the right to judicial guarantees in the matter addressed in this report could tend to establish facts that would constitute violations of the rights of the victim and his next of kin, recognized in Articles 1(1), 8 and 25 of the American Convention, without prejudice to the possibility that, when considering the merits of the case, the Commission may find other violations.

## **V. CONCLUSIONS**

32. The Commission concludes that it has competence to examine the case lodged by the petitioners concerning the alleged violation of the right of access to justice, the right to judicial guarantees, and the State's obligation to respect and ensure the free and full exercise of the recognized rights to all persons subject to its jurisdiction.

33. Based on these arguments of fact and of law, and without prejudging the merits of the case,

## **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**

### **DECIDES:**

1. To declare this case admissible as regards the alleged violations of the rights contained in Articles 1(1), 8, and 25 of the American Convention.
2. To notify the State and the petitioners of this decision.
3. To proceed with the consideration of the merits of the case.
4. To publish this decision and include it in the Annual Report that the Commission will present to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 9<sup>th</sup> day of October in the year 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vice-President; Commission members Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, and Susana Villarán de la Puente.