

REPORT Nº 60/05 ¹
PETITION 511/03
ADMISSIBILITY
MARIA ÓRDENES GUERRA
CHILE
October 12, 2005

I. SUMMARY

1. On July 14, 2003, the lawyer Nelson Caucoto, acting on behalf of Maria Laura Ordenes Guerra ("the petitioners"), submitted a complaint to the Inter-American Commission on Human Rights ("the Commission") against the Republic of Chile ("the State") for the alleged violation of the rights to a fair trial (Article 8) and to judicial protection (Article 25), together with violation of the obligations to respect rights and to adopt appropriate measures (Articles 1 and 2) established in the American Convention on Human Rights ("the American Convention"), for allegedly failing to provide reparation and compensation for the suffering caused to Mrs. Maria Ordenes Guerra after the murder of her husband, Mr. Augusto Andino Alcayaga Aldunate, who was kidnapped and assassinated by State agents on September 17, 1973 during the military dictatorship.²

2. With respect to admissibility of the complaint, the petitioner argued that the action of the Chilean courts had closed off the possibility of accessing justice and that the petition meets the requirements of form and substance for admissibility. The petitioners complain that judicial action was initiated to obtain compensation for the kidnaping and murder of Augusto Alcayaga Aldunate, but that the case was rejected by the Chilean judicial system on grounds of the statute of limitations (*prescripción*), denying the petitioners access to justice and to judicial reparations. In response, the Chilean State asked that the complaint be

1 Commissioner José Zalaquett, a Chilean national, did not participate in the discussion or decision of the case, in accordance with Article 17(2)(a) of the Commission's Rules of Procedure.

2 The petitioners also cited violations of Articles 4, 5, 7, 24 and 63(1), which were not supported by the complaint. During its 119th session, the Commission decided to open this case, among others, for the alleged violation of the right to a fair trial. As explained in paragraph 20, below, the core of the petition relates to the rejection of judicial reparations and not to the summary execution of Mr. Augusto Alcayaga Aldunate.

declared inadmissible, as totally out of order, because it deals with events that occurred before the deposit of the instrument of ratification and that began prior to March 11, 1990. Consequently, and in light of the reservation entered by the State, it argues that the facts of the complaint are expressly excluded from the jurisdiction of the Commission and of the Inter-American Court of Human Rights ("the Inter-American Court").

3. After examining the positions of the parties, the Commission has concluded that it is competent to decide the complaint presented by the petitioners and that the case is admissible, in light of Article 46 of the American Convention. Consequently, the Commission has decided to notify its decision to the parties and to publish this admissibility report and include it in its Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On July 14, 2003 the Commission received by fax a complaint alleging violations of the American Convention allegedly committed by the refusal of the Chilean courts to grant reparations to the widow of Mr. Augusto Alcayaga Aldunate, who was killed by State agents during the military dictatorship. On August 11, 2003 the Commission received the annexes to that petition, and it acknowledged receipt thereof on the same day. On May 4, 2004 the complaint and its attachments were transmitted to the government of Chile, with the request that it present its response within two months. On February 18, 2005 the Government of Chile responded to the petition. The State's response was presented eight months after the time limit, and the State did not request an extension nor offer any explanation for the delay in its response.³ On February 22, 2005 the Commission transmitted the State's response to the petitioners. On April 26, 2005 the Commission received the petitioners' response to the State's observations, which it transmitted to the State on August 11, 2005 without requesting any observations on that response because it merely reiterated the arguments contained in the petition. There has been no further correspondence with the parties since that date.

3 Article 30(3) of the Commission's Rules of Procedure provides: "The State shall submit its response within two months counted from the date the request is transmitted. The Executive Secretariat shall evaluate requests for extensions of this period that are duly founded. However, it shall not grant extensions that exceed three months from the date of the first request for information sent to the State." The Commission is not supposed to take account of an answer received late from the State but in this case, because of the importance of the matter, it will take it into consideration

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

5. The petition states that on September 17, 1973 Mr. Augusto Alcayaga Aldunate, president of the workers' union of The Company Elecmetal, left his home to go to work. Mrs. Maria Ordenes Guerra, his wife, also left the home and upon returning found that it had been ransacked by members of the national police, the Carabineros. Mrs. Ordenes went to her husband's workplace to determine his whereabouts. There she was informed that a group of Carabineros from the Fourth Precinct of Santiago, headquartered in Chiloé, had appeared during the morning and had detained her husband and other workers of the company. Mrs. Ordenes then went to the Fourth Precinct, where she was informed by personnel on guard that the detainees had been turned over to the military government and that therefore she should consult the Ministry of National Defense. At the Ministry of Defense she was told that they had no information, and she was referred to the Stadium of Chile and the National Stadium, which were being used as detention centers. There again, Mrs. Ordenes received no information on the whereabouts of her husband.

6. According to the petitioners, some days afterwards, upon visiting the Santiago Morgue that belongs to the Forensic Medical Institute, Mrs. Ordenes was informed that the body of her husband was there. Mr. Alcayaga had been executed on September 18, 1973 and his body had been dumped on a public road. The petition relates that, subsequent to these events, Mrs. Ordenes verified that the workers seized by members of the Fourth Precinct of Carabineros were taken to this police unit and from there to another precinct located in the Macul district, where they were executed and their bodies abandoned in the street, where they were subsequently retrieved and taken to the morgue.

7. The petitioners maintain that these facts were investigated by the 24th Criminal Court of Santiago as Case 108.215-VF, which was dismissed without having established the responsibility of any person.⁴ With respect to the criminal investigation, the petition also states that "at this date, after charges were laid against Augusto Pinochet and

⁴ The investigation was temporarily suspended pursuant to Article 409 (2) of the Code of Criminal Procedure for lack of "sufficient evidence to accuse any person as perpetrator or accomplice or for covering up the crime".

others in the year 2000, the investigation of this crime is in the hands of the Judges of the Court of Appeals of Santiago".

8. With respect to the trial for compensation for these events, the petitioners argued that in the proceedings "*Ordenes María con Fisco de Chile*", which began in 1997, Mrs. Maria Ordenes presented a claim before the Eighth Civil Court of Santiago for compensation for the moral suffering caused by State agents through the kidnapping and assassination of her husband, and for the denial of justice and the failure to provide information on those events. This claim was based on the report of the Rettig Commission, which recognized Mr. Augusto Alcayaga Aldunate as a victim of grave violations of human rights during the military dictatorship.

9. On January 28, 1999 the Eighth Civil Court of Santiago dismissed the claim, declaring that "the facts underlying the claim for compensation occurred in 1973, and the period of time that has elapsed prior to submission of the claim exceeded the statutory five years that the court deems applicable in this case".⁵ This was tantamount to saying, the petitioners argue, that Mrs. Maria Ordenes should have filed her claim against the State in 1977 in order to have it recognized. Since she did so in 1997, her action was too late and her right to reparations was extinguished by the statute of limitations. The claimant filed an appeal against that judgment, which was admitted on April 22, 1999.

10. On October 24, 2002 the Fourth Chamber of the Court of Appeals of Santiago denied the appeal, accepting in full the statutory limitations argument applied by the court of first instance. The plaintiff then brought an action for cassation against this decision, which was dismissed as *desierto*⁶ by the Supreme Court on January 7, 2003. The case was returned to the court of first instance, which confirmed its original judgment on March 17, 2003, and this was the last decision issued in the case.

11. The petitioners complain that this application of the rules of civil law, which are intended to govern relationships between private individuals, to a dispute under public law regulated by the Constitution and by international human rights treaties is "extraordinarily erroneous, prejudicial to the interest of the victims, their relatives, and a violation

⁵ Eighth Civil Court of Santiago, Case 494-97, Judgment of 28 January 1999, "whereas" clause 12.

⁶ "*Desierto*" is a juridical term used in Chile to mean "lapsed" or "expired", signifying that an appeal is untimely or out of order.

of the international law of human rights". By applying these provisions that deny the right to reparations, the courts are thereby placing the State of Chile in a flagrant violation of the American Convention, Article 2 of which requires states to adapt their internal legislation to the provisions of the Convention, something that has not occurred in this case.

12. Mrs. Ordenes received a survivor's (widow's) pension and education and health benefits for specified beneficiaries (her children) to a specified age limit under Law 19,123. The constitutional governments granted these benefits to the relatives of victims, claim the petitioners, but they must not be confused with real measures of reparation, "as the Inter-American Commission itself has indicated in considering cases of denial of justice from Chile, through application of the amnesty".

13. On the basis of these facts and considerations, the petitioners requested the Commission to accept their complaint and to declare that the judgments of the Chilean courts, in applying the statutory limitations of civil law to an issue involving violations of human rights and thereby preventing just reparations for the relatives of the victims, violated the commitments assumed by the Chilean State when it signed the American Convention, in particular the rights enshrined in Articles 1.(1), 2, 8 and 25 of that treaty.

B. Position of the State

14. In its response, the State noted that it was providing information on a complaint relating to events that occurred during the military régime that held power in Chile between September 1973 and March 1990.

15. The State observed that the reestablishment of democratic government marked the beginning of a lengthy and arduous process of updating and adapting its conduct and its internal rules to bring them into accord with international human rights treaties. The most important fact in this connection was approval of the reform to Article 5 of the Constitution, which provided for a general recognition of the international treaties approved in this area. There was unanimous political agreement in Chile that the exercise of sovereignty is limited by the duty to uphold the essential rights inherent in human nature. State organs are obliged to respect and promote these rights, guaranteed by the Constitution and also by the international treaties in force to which Chile is a state party.

16. Once the new government was installed in power, the new parliament approved, and subsequently ratified a series of treaties relating to human rights. In particular, it gave unanimous approval to the American Convention on Human Rights and Chile deposited its instrument of ratification on August 21, 1990.

17. In depositing its instrument of ratification with the OAS, the Government of Chile entered the following declaration or reservation:

a. The Government of Chile declares that it recognizes, for an indefinite period of time and on the condition of reciprocity, the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed a violation of the human rights established in the American Convention on Human Rights, as provided for in Article 45 of the Convention.

b. The Government of Chile declares that it recognizes as legally binding the obligatory jurisdiction of the Inter-American Court of Human Rights in cases dealing with the interpretation and application of this Convention pursuant to Article 62.

c. On formulating said declarations, the Government of Chile notes that the recognition of jurisdiction it has accepted refers to situations occurring subsequent to the date of deposit of this instrument of ratification, or, in any event, to circumstances which arose after March 11, 1990. Likewise the Government of Chile, on accepting the competence of the Inter-American Commission and the Inter-American Court of Human Rights declares that these organs, in applying Article 21(2) of the Convention, shall refrain from judgments concerning the concept of public use or social interest cited in cases involving the expropriation of an individual's property.

18. Chile notes that the Vienna Convention on the Law of Treaties expressly permits ratification of an international treaty with a reservation that is consistent with the object and purpose of the treaty. Chile maintains that its reservation stems from the conviction of democratic governments that human rights violations that occurred in the recent past must be resolved at the domestic level. In this context, the Chilean State has taken a series of initiatives, such as creating the Truth and Reconciliation Commission (the "*Comisión Rettig*"), Law 19,123 on reparation for victims of human rights violations, the Dialogue Roundtable and the recently created Commission on Political

Prisoners and Torture. The State stressed that it was not questioning the utility of participation by the international community in the handling of such situations, but that it was convinced that the Chilean people and their democratically elected bodies were the appropriate ones to attempt to heal the wounds left by the human rights violations that were committed during the military régime.

19. Consequently, Chile asked the Commission to declare this petition inadmissible, and to do the same with 13 other petitions to which it was responding at the same time, on the grounds that they relate to "Situations occurring subsequent to the date of deposit of the instrument of ratification" and "to circumstances which arose after March 11, 1990."

IV. ANALYSIS OF ADMISSIBILITY

A. General considerations

20. Before examining the admissibility of the complaint, the Commission deems it necessary to clarify that the petitioners' complaint in this case is not addressed to the summary execution of Augusto Alcayaga Aldunate, nor to any possible violation of Article 4 of the American Convention. Nor does the complaint concern the criminal investigation of that extrajudicial execution. The petitioners question the refusal of the Chilean courts to grant compensation to Mrs. Ordenes, particularly after recognition, in the Rettig Report, of State responsibility for the execution of Mr. Augusto Alcayaga Aldunate, and the compatibility of those decisions with the State's obligations under the American Convention.

B. Competence of the Commission *Ratione Materiae*, *Ratione Personae*, *Ratione Temporis*, and *Ratione Loci*

21. The petitioners are entitled by Article 44 of the American Convention to present complaints before the Commission. The petition names as the alleged victim Mrs. Maria Ordenes Guerra, with respect to whom Chile is committed to respect and guarantee the rights enshrined in the American Convention. The Commission notes that Chile has been a State Party to the American Convention since August 21, 1990, when it deposited its instrument of ratification. The Commission therefore has jurisdiction *ratione personae* to examine the petition.

22. The Commission has jurisdiction *ratione materiae* because the petition complains of possible violations of human rights protected

under the American Convention that, if proven, could constitute violations of Articles 1.(1), 2, 8 and 25 of the Convention. The petitioners also allege violations of Articles 4, 5, 7, 24 and 63 (1) of the American Convention, but offered no arguments or evidence to substantiate such violations. Specifically, the petitioners allege the denial of justice in the fact that in 2003 the Chilean Supreme Court, on grounds of statutory limitations, denied their application for compensation for mental suffering occasioned by the alleged arbitrary arrest and execution of Mr. Augusto Alcayaga Aldunate by State agents. They argue that the Chilean judicial system has systematically applied statutory limitations to deny judicial action seeking reparation for damages caused in the area of human rights.

23. The principal argument presented in the response by the State on February 18, 2005 is that Chile is not responsible, under the American Convention, for violations allegedly committed during the period between September 11, 1973 and March 11, 1990. The Commission considers that in the case at hand the allegations refer only to the judgments handed down by the Chilean courts between 1999 and 2003, when the Convention was already in effect for Chile. As to the State's argument that the Commission should declare the petition inadmissible because origin of the events took place prior to March 11, 1990, the Commission rejects this argument because the judicial proceedings constitute events independent of the summary executions. The Commission bases this conclusion on the judgment of November 23, 2004 in the case of the *Sisters Serrano Cruz vs. El Salvador*, in which the Inter-American Court held:

84. The Court considers that the events that occurred after recognition of the Court's jurisdiction by El Salvador, referring to the alleged violations of Articles 8 and 25 of the Convention in relation with Article 1 thereof, are not excluded by the limitation imposed by the State, because what is at issue are judicial decisions constituting independent events that began after El Salvador's recognition of the Court's jurisdiction, and that could constitute specific and independent instances of the denial of justice occurring after recognition of the Court's jurisdiction.

24. In the case at hand, as in the *Sisters Serrano Cruz* case, the petitioners have alleged a violation of due process, in particular, that the State applied the statute of limitations, under private international law, in order to deny justice, i.e. the possibility of reparations for an international crime committed by State agents. Despite the fact that the violations of due process could not have occurred without the predicate

summary execution, the Inter-American Court considers judicial rulings to be events independent and autonomous from the situation that gave rise to them. In its judgment of September 3, 2004 in the case of *Alfonso Martin del Campo Dodd v. United Mexican States*, the Inter-American Court emphasized this point:

79. On this point, the Court must indicate with all clarity that if the alleged crime was continuing or permanent, the Court would have competence to consider the acts or events occurring subsequent to recognition of the Court's jurisdiction. But in a case such as the present one, the supposed crime underlying the alleged violation (torture) was instantaneous, it occurred and was consummated before recognition of contentious jurisdiction. With respect to the investigation of that crime, this was pursued and was reopened on several occasions. This occurred subsequent to recognition of the Court's jurisdiction, *but neither the Commission nor the representatives of the presumed victim have provided any evidence to indicate specific violations of due process that the Court might have considered.* (Emphasis added).

25. In the present case, all the judicial proceedings that constitute the subject of the complaint took place subsequent to Chile's ratification of the American Convention. In addition, the Commission has jurisdiction *ratione temporis* because the judgments were issued on January 28, 1999, October 24, 2002, and January 7, 2003, at which time the Chilean State was bound by the obligation to respect and guarantee the rights enshrined in the American Convention.

26. The Commission has jurisdiction *ratione loci* inasmuch as the alleged violations took place within the territory of a State party to the American Convention.

B. Other requirements of admissibility

1. Exhaustion of domestic remedies

27. As a requirement for admissibility, Article 46(1) of the American Convention requires that the remedies under domestic law have been pursued and exhausted. The petitioner argues that he has pursued and exhausted the domestic remedies available under Chilean legislation. He claims that, through the judgment handed down on January 7, 2003, the Supreme Court closed off domestic judicial review. For its part, the State did not deny or contest the petitioner's assertion.

Consequently, the Commission considers that the requirement of Article 46(1) of the American Convention is complied with.⁷

2. Timeliness of the petition

28. Article 46(1)(b) of the Convention provides that a petition must be lodged within a period of six months from the date on which the petitioners are notified of the final judgment exhausting domestic remedies. The petitioners argue that the final decision under domestic law was issued on January 7, 2003. The petitioners submitted their complaint to the Commission on July 14, 2003. The State has not invoked failure to comply with the six months rule, for which reason it is deemed to have waived this defense tacitly. The Commission concludes that the petition was presented within the time limit established in Article (46)(1)(b) of the Convention.⁸

3. Duplication of proceedings and *res judicata*

29. The Commission understands that the substance of the petition is not pending in any other international proceeding for settlement, nor is it substantially the same as any petition previously studied by the Commission or other international body. Hence, the requirements set forth in Articles 46(1)(c) and Article 47 (d) of the Convention have also been met.

4. Characterization of the facts alleged

30. The Commission notes that the petition raises important questions about the scope of civil reparations for the relatives of victims of grave human rights violations. Consequently, the Commission concludes that in its description of the alleged facts the petitioners' complaint is not manifestly groundless or obviously out of order, and that the requirements of Article 47 (b) are thereby complied with.

V. CONCLUSION

⁷ The petitioners also argue that the decision of the Supreme Court of January 17, 2003, declaring *desierto* the appeal for cassation against the judgment of the Court of Appeals of Santiago, signified the exhaustion of the remedies available under Chilean law.

⁸ Moreover, the petitioners argue that the denial of justice culminated in the judgment of the Supreme Court of January 17, 2003. The petitioners submitted their complaint to the Commission on July 14, 2003, i.e. within the six months required by the American Convention.

31. By virtue of the arguments of fact and of law set forth above, the Commission concludes that the case at hand fulfills the requirements of admissibility established in Article 46 of the American Convention and, without prejudging the merits of the case,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
DECIDES:**

1. To declare the petition admissible with respect to Articles 1.(1), 2, 8 and 25 of the American Convention.
2. To transmit this report to the the petitioners and to the State.
3. To continue its examination of the merits of the case.
4. To publish this decision and to include it in The Commission's Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on the 12 day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners Evelio Fernández Arévalos, Freedy Gutiérrez, and Florentín Meléndez.