

REPORT Nº 62/05¹
PETITION 862/03
ADMISSIBILITY
ALINA MARIA BARRAZA CODOCEO *ET AL.*
CHILE
October 12, 2005

I. SUMMARY

1. On October 24, 2003, the lawyer Nelson Caucoto ("the petitioner"), 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(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 Alina María Barraza Codoceo, Eduardo Patricio, Marcia Alejandra, Patricia Auristela, Nora Isabel, and Hernán Alejandro Cortés Barraza, wife and children, respectively of Mr. Hipólito Pedro Cortés Álvarez, who was assassinated state agents 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. In response, the Chilean State asked that the complaint be declared inadmissible, as totally out of order, because it deals with events that occurred before the deposit of the instrument of ratification and that had their origin 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.

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 petitioner also cited violations of Articles 4, 5, 7, 8.1, 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 17, below, the core of the petition relates to the rejection of judicial reparations and not to the summary execution of Mr. Cortés.

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 October 24, 2003 the Commission received a complaint presented by the lawyer Nelson Cauco and on September 22 of that year it acknowledged receipt of the complaint. On May 4, 2004 the Commission transmitted the complaint and its attachments to the government, requesting 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 seven months after the time limit, and the State did not request an extension nor offer any explanation for the delay in its response.³ [3] On February 22, 2005 the Commission transmitted the State's response to the petitioner. On April 26, 2005 the Commission received the petitioners' observations to the State's response, 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.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

5. The petition relates that on September 22, 1973, Mr. Hipólito Pedro Cortés Álvarez, a militant Communist and leader of the construction workers' union of the city of Ovalle, was arrested at his workplace by personnel of the national police, the Carabineros de Chile. From there he was taken to the public prison of La Serena where he was

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 an answer received late from the State but in this case, because of the importance of the matter, it will take it into consideration.

turned over to military officers. While he was detained there, his home was subjected to an illegal search by the Carabineros, looking for evidence to incriminate him. On October 16, 1973, Mr. Hipólito Pedro Cortés Álvarez was executed together with 14 other persons in the Arica Military Regiment. According to the petition, this execution was carried out at the orders of the so-called "*Caravan of Death*", the military leader of which reported to the press that "in accordance with orders from the wartime military tribunals the following persons were executed (...) Hipólito Pedro Cortés Álvarez and 14 other persons". The petition also claims that the body of Mr Cortés was unlawfully buried in a common grave of the La Serena cemetery.

6. According to the petitioner, these facts were recognized by the Chilean State through the Official Report of the National Truth and Reconciliation Commission (the "Rettig Commission"), which indicated that the 15 executions had been carried out by official personnel acting outside the law, and that the bodies had been secretly interred. The petitioner adds that it was only in 1998, after the advent of the democratic régime, that the bodies were exhumed from the common grave, whereupon it was established that Mr. Cortés had been tortured before he was killed.

7. The petitioner maintains that these facts were investigated by military tribunals, but that they reached no positive conclusion and the case was closed definitively on the basis of the amnesty law. Beginning in 1998, however, proceedings were brought against Augusto Pinochet in the Court of Appeals of Santiago, and "the investigation into the so-called *Caravana de la Muerte* thereupon continued and a significant number of military personnel were tried. That process is still underway."

8. In 1999, following acknowledgment by the Rettig Commission and the discovery of the corpse, the widow and children of Mr. Cortés submitted a claim for compensation before the Second Civil Court of La Serena (the "*Cortés con Fisco de Chile*" case, #1122-99). On March 9, 2001 the Second Civil Court granted the claim and ordered the State of Chile to pay the sum of 15 million pesos to each of the claimants. The State Prosecutor appealed the ruling before the Court of Appeals of La Serena, which in a judgment of April 9, 2002 revoked the first instance decision and accepted the argument the limitations had tolled (*prescripción*) presented by the State of Chile. The claimants then brought writ of cassation against the decision before the Supreme Court, which on March 25, 2003 dismissed the action, thereby confirming the denial of compensation to the claimants. In the wake of this judgment, the case was returned to the court of first instance, which confirmed its

original judgment with an order of ("Let it be done") in June 2003 and directed that the file be closed, terminating proceedings in the case.

9. Mrs. Barraza 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 such pensions and subsistence allowances must not be confused with real measures of reparation.

10. The petitioner complains that the rulings on both the appeal and the writ of cassation based rejection of the claims on the rules of civil law, which are intended to govern relationships between private individuals, applying them to a dispute under public law regulated by the Constitution and by international human rights treaties, and that such reasoning is "extraordinarily erroneous, prejudicial to the interest of the victims, their relatives, and a violation 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. The petitioner consequently requested the Commission to accept the complaint and to declare that the judgments of the Chilean courts, in applying the civil law statutes of limitations 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 ratified the American Convention, in particular the rights enshrined in Articles 1(1), 2, 8 and 25 of that treaty.

B. Position of the State

11. 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.

12. 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 general recognition of 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 party.

13. 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.

14. 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.

15. 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.

16. Consequently, Chile asked the Commission to declare this petition inadmissible, and also 13 other petitions to which it was responding at the same time, on the grounds that they relate to events that occurred before the deposit of the instrument of ratification and that had their origin prior to March 11, 1990.

IV. ANALYSIS OF ADMISSIBILITY

A. General considerations

17. 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 Hipólito Pedro Cortés Álvarez, nor to any possible violation of Article 4 of the American Convention. Nor does the complaint concern the criminal investigation of that summary execution. The petitioners question the refusal of the Chilean courts to grant compensation to Mrs. Morales, particularly after recognition, in the Rettig Report, of State responsibility for the case, and the compatibility of those decisions with the State's obligations under the American Convention. The Inter-American Court has already spoken of the normative value of the statement of recognition made by the Chilean State in a similar case.

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

18. The petitioner is entitled by Article 44 of the American Convention to present complaints before the Commission. The petition names as the alleged victims Alina María Barraza Codoceo, Eduardo Patricio, Marcia Alejandra, Patricia Auristela, Nora Isabel, and Hernán Alejandro Cortés Barraza, 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.

19. 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 petitioner also alleged 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 petitioner alleges the denial of justice in the fact that in 2003 the Chilean Supreme Court denied his application for compensation for mental suffering occasioned by the alleged arbitrary arrest, torture and execution of Mr. Hipólito Pedro Cortés Álvarez by State agents.

20. 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 force for Chile. As to the State's argument that the Commission should declare the petition inadmissible because the events had their origin prior to March 11, 1990, the Commission rejects this argument because the judicial proceedings constitute events independent of the summary executions. The Commission cites as authority for this conclusion the judgment of November 23, 2004 in the case of the *Sisters Serrano Cruz v. 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 1.1 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.

21. In the case at hand, as in the *Sisters Serrano Cruz* case, the petitioner has 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).

22. 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 April 9, 2002, and May 7, 2003, at which time the Chilean State was bound by the obligation to respect and guarantee the rights enshrined in the American Convention.

23. 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

24. 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 maintains that he has pursued and exhausted the domestic remedies available in Chilean law. He

argues that the Supreme Court, through the judgment handed down on May 7, 2003, dismissing the writ of cassation brought against the ruling of the Court of Appeals of La Serena, signaled the exhaustion of the remedies available under Chilean domestic law. For its part, the State has not denied or disputed the argument of the petitioner. Consequently, the Commission considers that the requirement of Article 46(1) of the American Convention is complied with .

2. Timely presentation of the petition

25. 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 petitioner argues that the denial of justice culminated in the judgment of the Supreme Court of May 7, 2003. The petitioner submitted his complaint to the Commission on October 24, 2003. The State has not invoked failure to comply with the six months rule, for which reason it is deemed to have tacitly waived this defense. The Commission concludes that the petition was presented within the time period established in Article 46(1)(b) of the Convention.

3. Duplication of proceedings and international *res judicata*

26. 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

27. The Commission notes that the petition raises important questions about the scope of civil reparations for the relatives of a victim of grave human rights violations. Consequently, the Commission concludes that in its description of the alleged facts the petitioners' complaint is neither manifestly groundless nor obviously out of order, and that the requirements of Article 47(b) are thereby complied with.

V. CONCLUSION

28. By virtue of the arguments of fact and of law set forth above, the Commission concludes that the case at hand complies with the

admissibility requirements 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 State and to the petitioner.
3. To continue its examination of the merits of the case.
4. To publish this decision and to include it in its 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 12th 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.