

COMMITTEE AGAINST TORTURE

O.R., M.M., and M.S. v. Argentina

Communications No. 1/1988, 2/1988 and 3/1988

November 1989

CAT/C/WG/3/DR/1, 2 and 3/1988 *

DEAL JOINTLY AND ADMISSIBILITY

Submitted by: O.R., M.M., and M.S. [names deleted]

Alleged victims: Authors' deceased relatives

State party concerned: Argentina

Date of communication: 22 November 1988

Documentation references: Prior decisions - CAT/C/2/D/1/1988; CAT/C/2/D/2/1988; CAT/C/2/D/3/1988 [Fact Sheets - CAT/C/FS/1/1988 and Add 1-2]

The Committee against Torture established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on .. November 1989

Adopts the following:

A. Decision to deal jointly with three communications

The Committee against Torture,

Considering that communications Nos. 1/1988, 2/1988 and 3/1988 refer to closely related events said to have taken place in Argentina in 1976, and to the enactment of certain legislation in December 1986 and June 1987,

Considering further that the three communications can appropriately be dealt with together.

1. Decides, pursuant to rule 10/22, paragraph 4, of its rules of procedure, to deal jointly with these communications;

2. Further decides that this decision shall be communicated to the State party and the authors of the communications.

B. Decision on admissibility

1. The authors of the communications are O.R., M.M. and M.S., Argentinian citizens residing in Argentina, writing on behalf of their deceased relatives M.R., J.M. and C.S., who were Argentinian citizens and were allegedly tortured to death by Argentine military authorities in June, July and November 1976, respectively.

2.1 The authors claim that the enactment of Act No. 23,521 of 8 June 1987 (known as the “Due Obedience Act” or “Ley de Obediencia Debida”) and its application to the legal proceedings in the cases of their relatives constitute violations by Argentina of articles 2, 10, 13, 16, 19 and 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Similarly, it is also claimed that the enactment of Act No. 23,492 on 24 December 1986 (known as the “Finality Act” or “Ley de Punto Final”) constitutes violations of the Convention.

2.2 The Convention against Torture was signed by the Government of Argentina on 4 February 1985, ratified on 24 September 1986 and entered into force on 26 June 1987. Article 2 of the Convention provides in part:

“1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

(...)

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.”

2.3 It is claimed that Act No. 23,521 is incompatible with Argentina’s obligations under the Convention. The Act presumes, without admitting proof to the contrary, that those persons who held lower military ranks at the time the crimes were committed were acting under superior orders; the Act therefore exempts them from punishment. The immunity also covers superior military officers who did not act as commander-in-chief, chief of zone, or chief of security police or penitentiary forces, provided that they did not themselves decide or that they did not participate in the elaboration of criminal orders.

2.4 With regard to the time frame of application of the Convention, the authors acknowledge that their relatives were torture to death during the prior Argentine Government, before the entry into force of the Convention. They challenge, however, the compatibility of the Due Obedience Act with the Convention. Although Act No. 23,521 was enacted before the entry into force of the Convention against Torture, the authors refer to article 18 of the Vienna Convention on the Law of Treaties (in force 27 January 1980), which provides that

“A State is obliged to refrain from acts which would defeat the object or purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification...”.

Both signature and ratification of the Convention by Argentina took place prior to the enactment of Act No. 23,521.

2.5 At issue is also the compatibility with the Convention of Act No. 23,492, of 24 December 1986, known as Law of “Punto Final”, which established a deadline of 60 days for commencing new criminal investigations with regard to the events of the so-called “dirty war” (*guerra sucia*). This deadline expired on 22 February 1987.

3. By decisions under rule 13/22 of its rules of procedure, the Committee against Torture transmitted the three communications to the State party requesting information concerning the question of the admissibility of the communications.

4.1 On 14 July 1989 the State party objected to the admissibility of the communications on the grounds that all the events in question, including the enactment of the laws challenged by the authors took place prior to the entry into force of the Convention against Torture.

4.2 In particular, the State party refers to article 28 of the Vienna Convention on the Law of Treaties which stipulates:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act of fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

4.3 In this connection, the State party observes that this provision merely codifies the existing customary law with regard to the non-retroactivity of treaties. It refers to decisions of the Permanent Court of International Justice (Series A/B, No. 4, 24) and of the International Court of Justice (Reports, 1952, 40) holding that a treaty only applies retroactively if such an intention is expressed in the treaty or may be clearly inferred from its provisions.

4.4 In respect of this provision, the International Law Commission has observed:

“... in numerous cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission of Human Rights has held that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question” (Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1) p. 44).

4.5 The State party places Acts Nos. 23,492 and 23,521 in this context, since their scope of application extends from 24 March 1976 to 26 September 1983 and the Convention against Torture came into force on 26 June 1987.

5.1 The State party further contends that the authors have failed to exhaust domestic remedies, and indicates that all victims of crimes have a right to compensation for the physical and moral injury suffered and that Act No. 23,521 recognizes this right in article 6, which specifically provides that “the extinction of penal action pursuant to article 1 does not affect civil proceedings”.

5.2 Moreover, article 30 of the Criminal Code stipulates that the obligation to indemnify takes precedence over all other obligations incurred by the person responsible subsequent to the crime, including payment of the fine, while article 31 stipulates that the obligation to pay compensation is jointly shared by all those responsible for the crime. Thus, both the victims and their relatives as well as any third parties who might have suffered injury, even indirectly, are entitled to full compensation. Article 1112 of the Argentine Civil Code stipulates that public officials guilty of culpable omission in the course of their duties are liable to pay compensation. As far as the liability of the State is concerned, articles 43 and 1113 clearly stipulate that the State is responsible for its agents.

6.1 Counsel for the authors, in an undated submission received on 12 September 1989, contests the State party’s observations and reiterates that “what is being challenged is the application of the Due Obedience Act to the accused, as well as the very existence of that law, which breaches the Convention against Torture.”

6.2 With regard to the requirement of exhaustion of domestic remedies, counsel contends that there are no effective remedies, in particular with regard to compensation. Although the Government in principle accepts its liability to pay compensation, in practice, it allegedly prevents injured parties from obtaining compensation from the military courts, thus requiring them to pursue other channels, through the civil courts. Counsel further explains that “the distinction between civil and criminal action has not been accepted in our codes of procedure, which for the purposes of compensation for the consequences of a crime provide that proceedings must be continued in the same kind of court. Failure to do so has been regarded by our foremost procedural experts as a violation of the right to a defence. When the return to democracy began, the direct victims and/or their representatives plunged into criminal proceedings in order to ensure the investigation of the facts, the punishment of those responsible, the search for missing persons (which is still continuing) and the discovery of the truth about what actually happened. In addition there was a need for a statement by the criminal courts confirming the existence of the reported events and the form they took. Those who began proceedings to seek compensation came up against the requirement that the civil courts should be used, and the rejection of all the civil cases.”

7.1 Before considering any claims contained in a communication, the Committee against Torture shall, in accordance with rule 12/22 of its rules of procedure, decide whether or not it is admissible under article 22 of the Convention.

7.2 With regard to the temporal application of the Convention, the Committee recalls that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force on 26 June 1987. In this connection the Committee observes that the Convention only has effect from that date and cannot be applied retroactively. Therefore, the promulgation of the “Punto Final” Act on 24 December 1986 and the enactment, on 8 June 1987, of the “Due Obedience” Act could not, ratione temporis, have violated a Convention that had not yet entered into

force.

7.3 The only issue remaining before the Committee is whether there have been any violations of the Convention subsequent to its entry into force. A question arises concerning the immediate application of the provisions of the Convention, e.g. with regard to the right of victims of torture to a remedy. Article 13 provides in part: “Each State party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.” Although the authors have not invoked article 14 of the Convention, the Committee ex officio shall examine whether issues arise under this article, which stipulates in part: “Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”

7.4 The Committee observes that “torture” for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention. Thus the scope of articles 13 and 14 of the Convention did not cover torture that took place in 1976, ten years before the entry into force of the Convention, and the right to redress provided for in the Convention necessarily arises only with respect to events subsequent to 26 June 1987.

8. The Committee therefore decides:

(a) That the communications are inadmissible ratione temporis;

(b) That this decision shall be communicated to the State party and to the authors through their counsel.

9. The Committee observes, however, that even if the Convention against Torture does not apply to the facts of these communications, the State of Argentina is morally bound to provide a remedy to victims of torture and to their dependants, notwithstanding the fact that the acts of torture occurred before the entry into force of the Convention, under the responsibility of a de facto government which is not the present government of Argentina. The Committee notes with concern that it was the democratically elected post-military government that enacted the Punto Final and the Due Obedience Acts, which the Committee deems to be incompatible with the spirit and purpose of the Convention. The Committee also notes that by decree of 6 October 1989 the President of Argentina pardoned 39 senior military officers who were to have been tried by civilian courts. This policy is in stark contrast to the State response towards the victims of the “dirty war” of 1976 - 1983. The Committee urges the State party not to leave the victims of torture and their dependants wholly without a remedy. Since civil action for compensation is no longer possible because the period of limitations for lodging such an action has run, the Committee would welcome, in the spirit of article 14 of the Convention, the enactment of appropriate legislation to render applications for compensations viable.

10. The Committee would also welcome receiving from the State party detailed information concerning (a) the number of successful claims for compensation for victims of acts of torture during

the “dirty war”, or for their dependants, and (b) such pension schemes that may exist, apart from compensation, for the victims of torture or their dependants, including the criteria for eligibility for such pension.

* All persons handling this document are requested to respect and observe its confidential nature.