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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October-3 November 2005

DECISION

Communication No. 1078/2002

Submitted by:	Norma Yurich (not represented by counsel)
Alleged victim:	The author and her daughter, Jacqueline Drouilly Yurich
State party:	Chile
Date of communication:	10 July 2001 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 15 May 2002 (not issued in document form)
Date of decision:	2 November 2005
Subject matter:	Enforced disappearance of the author's daughter
Procedural issues:	Inadmissibility *ratione temporis*; non-exhaustion of domestic remedies

* Made public by decision of the Human Rights Committee.

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Substantive issues:	In respect of the author, violation of the right to physical safety and family life; in respect of her daughter, violation inter alia of the right to life and denial of justice
Articles of the Covenant:	Articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16; 17, paragraphs 1 and 2; 18, paragraph 1; and 26 of the Covenant
Articles of the Optional Protocol:	Articles 1 and 5, paragraph 2 (b)

[ANNEX]

Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-fifth session

concerning

Communication No. 1078/2002*

Submitted by:	Norma Yurich (not represented by counsel)
Alleged victim:	The author and her daughter, Jacqueline Drouilly Yurich
State party:	Chile
Date of communication:	10 July 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 November 2005,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Ms. Norma Yurich, a Chilean national, who submits it on her own behalf and that of her missing daughter, Jacqueline Drouilly Yurich, a student, born in 1949. She alleges violations by Chile of articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16; 17, paragraphs 1 and 2; 18, paragraph 1; and 26 of the Covenant. The author is not represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of an individual opinion of Committee members, Ms. Christine Chanet, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elizabeth Palm and Mr. Hipólito Solari-Yrigoyen is appended to the present document.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 23 March 1976, and the Optional Protocol on 28 August 1992.

The facts of the case

2.1 According to the author, on 30 October 1974 eight individuals, armed and dressed in plain clothes, who identified themselves verbally as agents of the National Intelligence Directorate (DINA), came to the house of the sister of Marcelo Salinas, the husband of Jacqueline Drouilly, in Santiago, and asked her where Salinas lived. The agents then went to Marcelo Salinas' home and, on discovering that he was not there, arrested Jacqueline Drouilly, who was pregnant at the time. She has been missing since then. Jacqueline Drouilly and her husband, who was himself arrested the following day, were members of the Movimiento de Izquierda Revolucionaria (MIR).

2.2 Two days later the same individuals went back to the house together with Marcelo Salinas, who was handcuffed, and took away various items belonging to the couple. A few days later, two men in plain clothes who identified themselves as military intelligence officers, came to the house and took away clothing, supposedly for the couple.

2.3 The author annexes copies of the testimony of two individuals who state that they were detained in late October and early November 1974 in a DINA detention centre in the calle José Domingo Cañas, in the municipality of Ñuñoa, Santiago. They also state that Jacqueline Drouilly and her husband were being held there and being subjected to torture, and that they were all transferred on or around 10 November 1974 to the Cuatro Alamos detention centre.

2.4 The author also provides a statement made on 16 August 1999 by a person who had been arrested in November 1974 by DINA agents, and who claims to have spent a period of detention in the Cuatro Alamos detention centre (Vicuña Mackenna and Departamental sector) in Santiago. During that period, between November and December 1974, this person shared a cell with Jacqueline Drouilly and testifies to having seen the author and her husband being taken out of their cells by DINA agents one night in late December 1974; the person never saw them again. Other witnesses stated that they saw Jacqueline Drouilly after 20 November 1974 in the detention centre known as the Villa Grimaldi, after which she was said to have returned to Cuatro Alamos.

2.5 On 11 November 1974 the author filed an application for *amparo* with the Santiago Appeal Court (case No. 1390). On 29 November 1974 the Court declared the case out of order and referred it to the 11th Criminal Court for investigation.

2.6 On 9 December 1974, proceedings for presumed misadventure were brought in the 11th Criminal Court, Santiago (case No. 796-2), but the investigations failed to establish Jacqueline Drouilly's whereabouts. On 31 January 1975 the case was dismissed. That decision was upheld on appeal by the Santiago Appeal Court.

2.7 On 26 February 1975 the author filed a further application for *amparo* with the Santiago Appeal Court (case No. 294). By memorandum of 17 March 1975 the Ministry of the Interior informed the Court that that person was not being held on Ministry orders. The same

information was provided once more in June 1975. On 13 June 1975 the Court rejected the application and referred the case to the relevant criminal court for investigation. On 19 June 1975 presumed misadventure proceedings were brought in the 11th Criminal Court, Santiago (case No. 2681). After some months the case was dismissed. On 16 July 1975, while the above proceedings were ongoing, the author brought a complaint for the abduction of Jacqueline Drouilly and Marcelo Salinas before the same court. This complaint was initially registered as No. 2994 but was later joined to the presumed misadventure case as No. 2681-4. The case was dismissed on 31 March 1976, since no offence could be shown to have been committed. On appeal, on 18 June 1976, the Appeal Court upheld the dismissal. On 3 October 1975 the author again filed an application for *amparo* with the Appeal Court (case No. 1263), citing the fact that Jacqueline Drouilly had been pregnant at the time of her arrest. The application was declared out of order on 20 October 1975 and this decision was upheld on appeal by the Supreme Court on 27 October 1975.

2.8 Jacqueline Drouilly was among those named in a complaint for mass abduction filed on 28 May 1975 with the Santiago Appeal Court in respect of 163 disappeared persons and containing a request for an inspecting magistrate to be appointed to take charge of the investigations. The request was rejected. It was resubmitted in July and August 1975, this time to the Supreme Court, but was again rejected.

2.9 The author also states that a criminal complaint was filed with the Santiago Appeal Court on 29 March 2001, for the disappearance of more than 500 members of MIR, including Jacqueline Drouilly. The author alleges unreasonably lengthy proceedings.

The complaint

3.1 The author alleges that her daughter was a victim of violations of articles 5; 6, paragraphs 1 and 3; 7; 9, paragraphs 1 to 4; 10, paragraphs 1 and 2; 12, paragraph 4; 13; 14, paragraphs 1 to 3 and 5; 16; 17, paragraphs 1 and 2; 18, paragraph 1; and 26 of the Covenant.

3.2 In her own case, she states that the search for her daughter, missing for so many years, has affected her physical and mental health, and that as a result she suffers from depressions and cardiac problems which have necessitated the insertion of a pacemaker. Her family situation has also been affected, her husband and her other two children having been obliged to leave the country out of fear. The author states that this amounts to constant torture (art. 7).

3.3 As to the investigation into her daughter's disappearance, the author alleges a denial of justice. Moreover, the continuing applicability of Decree-Law No. 2191 on Amnesty, of 1978, has prevented those responsible from being brought to trial.

State party's submissions on admissibility and on the merits; author's comments

4.1 In its comments of 25 May 2004, the State party maintains that, although the author has submitted the communication on her own and her daughter's behalf, the allegations upon which it is based relate to violations of Covenant rights only in respect of the daughter. Consequently, the State party takes the view that the communication has in fact been submitted on behalf of Jacqueline Drouilly. The information collected over a period of years by State bodies, human rights organizations and the courts shows that she was last seen alive in or around January or

March 1975, when being held incommunicado in the Cuatro Alamos compound, for which the now defunct DINA was responsible. Consequently, the communication submitted by the author should be declared inadmissible *ratione temporis*, since the events on which it is based occurred or commenced prior to the entry into force for Chile of the Optional Protocol.

4.2 Upon ratification of the Protocol, Chile made the following declaration: "In recognizing the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990." This declaration applies notwithstanding the argument that the denial of justice continues to be perpetrated by court rulings handed down after 11 March 1990, since the events giving rise to the communication commenced on 30 October 1974 and therefore took place prior to 23 March 1976, the date of the international entry into force of the Covenant.

4.3 As to the complaint brought by the author on her own behalf, this is of a general nature. The author fails to demonstrate how her rights under the Covenant have been violated by the State or to show that available domestic remedies have been exhausted.

4.4 The State party recalls the Committee's decisions on communications Nos. 717/1996 (Acuña Inostroza), 718/1996 (Vargas), 740/1997 (Barzana Yutronic) and 746/1997 (Menanteau and Vásquez), in respect of Chile, which it found inadmissible for those reasons.

4.5 As to the merits, the State party argues that there has been no violation of the Covenant. On 17 July 1996, the National Reparation and Reconciliation Board asked for the investigation to be reopened but this inquiry, too, was closed in December 1997. At the time of submission of the State party's comments, the trial of three former DINA agents was ongoing in the Santiago Appeal Court in respect of a criminal complaint filed by the father of Jacqueline Drouilly for aggravated abduction. Also ongoing in the same Court were proceedings in respect of a criminal complaint filed by the College of Social Work for the abduction of several of its members, including Jacqueline Drouilly.

4.6 The National Truth and Reconciliation Commission found that Jacqueline Drouilly and her husband Marcelo Salinas were victims of serious human rights violations by agents of the State. The State party explains the policies of Chile's democratic governments on human rights violations, including enforced disappearances, committed under the previous regime. It states, inter alia, that the Ministry of the Interior's Human Rights Programme is cooperating in investigations into some 300 cases of human rights violations, including the disappearance of Jacqueline Drouilly.

4.7 The Decree-Law on Amnesty, of 1978, extinguishes the criminal responsibility of perpetrators and of accessories to or after the fact, in respect of offences committed in Chile during the state of siege in force between 11 September 1973 and 10 March 1978. For many years the Supreme Court used to confirm lower court judgements dismissing cases under this Decree-Law, applying case law which held that the court was not in a position to investigate the facts and identify those responsible for the offence. A substantive shift could be seen in judicial

practice beginning in 1998, since when the Supreme Court, applying article 413 of the Code of Criminal Procedure, has repeatedly ruled that a case can be dismissed only on completion of the investigation to establish whether a crime has been committed and identify the perpetrator.

4.8 In the case of detainees who disappeared or were executed and whose remains were not recovered, the Supreme Court has accepted the opinion that such persons should be deemed to have been abducted within the meaning of article 141 of the Criminal Code. Since case law holds that abduction is an ongoing offence or an offence with ongoing effect, i.e., one that continues over time until the victim is found alive or dead, any application or decision on amnesty is deemed untimely unless one of those conditions is met. Until the date of the person's release or death is established, it cannot be established in law up to what precise date they were deprived of their liberty. If such deprivation of liberty continues beyond the period covered by the Decree-Law, i.e., 11 September 1973 to 10 March 1978, amnesty cannot be granted in the case in question.

4.9 On this basis, the Supreme Court has revoked the dismissal rulings applying the Decree-Law on Amnesty, resumed investigations into human rights violations and brought those involved to trial. Moreover, the Supreme Court has ruled that a final sentence dismissing a case of illegal detention cannot be exempted as *res judicata*.

4.10 In parallel, the Ministry of the Interior's Human Rights Programme has taken the position that, in applying the Decree-Law, it should be interpreted in such a way that it will cease to present an insurmountable obstacle to attempts to establish the truth and identify criminal responsibility for the offences under investigation. The Programme's position is that amnesty is not applicable to crimes which are not open to amnesty in international humanitarian law, such as crimes against humanity, war crimes and enforced disappearance.

5. In her comments of 22 September 2004, the author points out that she named her daughter's abductor in her statements to the National Truth and Reconciliation Commission but no proceedings were brought under President Aylwin's Government. Not until President Lagos took office were cases of human rights violations reopened. The offence committed against her daughter is an ongoing crime, not subject to amnesty or the statute of limitations. Under the rules as currently applied, the trial court needs the very people responsible to state the presumed exact date of the victim's death, whereupon the abduction becomes homicide, a crime prescriptible after 15 years. This amounts to giving the court itself the right to decide the presumed date of death, despite the absence of a body. The author is critical of this state of affairs, which in her view favours the perpetrators and does not ensure justice for the victims.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The author claims that her daughter's detention in October 1974 and her subsequent disappearance violate several provisions of the Covenant. The State party argues that the communication should be declared inadmissible *ratione temporis*, since the events upon which it is based occurred or commenced prior to the entry into force for Chile of the Optional Protocol.

The State party also recalls that upon ratifying the Optional Protocol it made a declaration to the effect that the Committee's competence applied only in respect of acts occurring after the entry into force for Chile of the Optional Protocol or, in any event, acts which began after 11 March 1990.

6.3 The Committee notes that the facts complained of by the author in connection with her daughter's disappearance occurred prior to the entry into force not only of the Optional Protocol but also of the Covenant. The Committee recalls the definition of enforced disappearance contained in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court: *"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.* In the present case, the original acts of arrest, detention or abduction, as well as the refusal to give information about the deprivation of freedom - both key elements of the offence or violation - occurred before the entry into force of the Covenant for the State party.

6.4 Furthermore, upon the submission of the communication, the State party, far from refusing to acknowledge the detention, admitted and assumed responsibility for it. In addition, the author makes no reference to any action of the State party after 28 August 1992 (the date on which the Optional Protocol entered into force for the State party) that would constitute a confirmation of the enforced disappearance. Accordingly, the Committee considers that even if the Chilean courts, like the Committee, regard enforced disappearance as a continuing offence, the State party's declaration *ratione temporis* is also relevant in the present case. In the light of the foregoing, the Committee finds that the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol. The Committee does not deem it necessary, therefore, to address the question of the exhaustion of domestic remedies.

6.5 The author argues that the search for her missing daughter has had an adverse effect on her physical and mental health and her family life, which amounts to a violation of her rights under the Covenant, notably article 7. The State party considers these claims to be of a general nature and that domestic remedies have not been exhausted in this regard. The Committee notes that the author has not demonstrated that she has availed herself of such remedies. The Committee therefore finds this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. Consequently, the Human Rights Committee decides:

(a) That the communication is inadmissible under articles 1 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author of the communication.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

INDIVIDUAL, DISSENTING, OPINION OF COMMITTEE MEMBERS MS. CHRISTINE CHANET, MR. RAJSOOMER LALLAH, MR. MICHAEL O'FLAHERTY, MS. ELISABETH PALM AND MR. HIPÓLITO SOLARI-YRIGOYEN

In order to shed new light on the question of enforced disappearances, the Human Rights Committee bases itself (para. 6.3) on the definition given in the Rome Statute of the International Criminal Court, a definition that differs from the one contained in the draft international convention for the protection of all persons from enforced disappearances.

According to the Committee, this definition includes two fundamental elements of the violation: the initial act of arrest, detention or abduction, and a refusal to acknowledge that deprivation of freedom.

By endorsing these criteria, which pertain to another international treaty, the Committee overlooks the fact that it must apply the Covenant, the whole Covenant and nothing but the Covenant.

Article 9, paragraph 1, of the Covenant provides that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Furthermore, article 16 of the Covenant stipulates that "everyone shall have the right to recognition everywhere as a person before the law".

In the present case, the acts of arrest, detention or abduction were committed without the State, which does not contest them, being in a position, consistent with article 16, to determine the actual situation of the disappeared person.

Disappearance, as the Committee itself indicates in paragraph 6.4 of its decision, constitutes a continuing violation. The continuing nature of this violation precludes the application of the exception *ratione temporis* and of the reservation of Chile, insofar as the latter cannot exclude the competence of the Committee with regard to ongoing violations.

The solution adopted by the Committee entails discharging the State of its responsibility for the sole reason that the State does not deny the criminal acts, as demonstrated by the fact that it has taken no action to "confirm" the enforced disappearance. This analysis could be applied to acts that fall within the scope of the Rome Statute, but it cannot prevail in the framework of articles 9 and 16 of the Covenant, since the issue involves continuing violations of those two provisions.

Indeed, to evade its responsibility, the State cannot limit itself to adopting an attitude of passive consent: it must provide evidence that it has used all available means to determine the whereabouts of the disappeared person. This was not done in the present case, and the undersigned cannot agree that there has been no violation of the Covenant.

(*Signed*): Christine Chanet

(*Signed*): Rajsoomer Lallah

(*Signed*): Michael O'Flaherty

(*Signed*): Elisabeth Palm

(*Signed*): Hipólito Solari-Yrigoyen

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
