HUMAN RIGHTS COMMITTEE

S. E. v. Argentina

Communication No. 275/1988 a/

26 March 1990

ADMISSIBILITY

Submitted by: S.E. (Name deleted)

Alleged victims: The author and her disappeared children

State party concerned: Argentina

Date of communication: 10 February 1988 (date of initial letter)

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

Meeting on 26 March 1990,

Adopts the following:

Decision on admissibility

1. The author of the communication is an Argentine citizen residing in Argentina. She writes on her own behalf and on behalf of her three disappeared children, born in 1951, 1953 and 1956, respectively, alleging violations of the Covenant by the Government of Argentina. She is represented by counsel.

The background

2.1 The author states that her eldest son, L. M. E., was abducted in Argentina on 10 August 1976 by persons belonging to or associated with the police, security forces or armed forces, apparently on account of his political opinions. Another son, C.E. and her daughter, L. E., were detained on 4 November 1976 in Uruguay and were allegedly seen in November/December 1976 at a detention camp in Argentina known as "The Bank" and at a police station, Brigada Guenes, in Buenos Aires. Their whereabouts have been unknown ever since, in spite of all the steps undertaken by the author to discover what happened to them.

2.2 On 24 December 1986 the Argentine legislature proclaimed Law No. 23,492, the so-called "Finality Act" (Ley de 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. On 8 June 1987, Law No. 23,521, the Due Obedience Act (Ley de Obediencia Debida), was promulgated, introducing an irrebuttable presumption that members of the security, police and prison services cannot be punished for such crimes if committed in due obedience to orders. The Act further extends protection to senior officers who did not have a decision-making role with regard to the violations. The Argentine Supreme Court has upheld the constitutionality of this Act.

2.3 On the basis of an application filed on 19 June 1984, the National Commission on the Disappearance of Persons (CONADEP) opened investigation files on the disappearances of L. M. E. (CONADEP file No. 5448), L. E. (No. 5449) and C. E. (No. 5450). The whereabouts of the disappeared persons, however, could not be established.

2.4 Article 6 of the Finality Act specifically provides that "The extinction of penal action pursuant to article 1 does not affect civil proceedings".

2.5 The author has not instituted civil proceedings to obtain compensation.

2.6 By operation of article 4037 of the Argentinian Civil Code, the period of limitations for instituting civil proceedings is two years. This period runs from the date of the alleged violation.

The complaint

3.1 The author claims that the enactment of the Finality Act and the Due Obedience Act constitute violations by Argentina of its obligations under article 2 of the Covenant, in particular "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (art. 2, para. 2), "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . .. " (art. 2, para. 3(a)) and "to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities . . . and to develop the possibilities of judicial remedy" (art. 2, para. 3(b)).

3.2 In particular, the author claims that the disappearance of her children was never fully investigated. She requests that the inquiries be reopened.

The State party's observations

4.1 The State party points out that the disappearances took place in 1976 during the period of military government, 10 years prior to the entry into force of the Covenant and of the Optional Protocol for Argentina.

4.2 With respect to the temporal application of the Covenant and of the Optional Protocol, the State party submits that the general rule for all juridical norms is non-retroactivity. In the specific area of treaty law, a firmly-established international practice leads to the same conclusion. Both the

Permanent Court of International Justice (Series A/B, No. 4, 24) and the International Court of Justice (I. C. J. Reports 1952, 40) have maintained that a treaty has to be considered as having a retroactive effect only when this intention is explicitly stated in the treaty or may be clearly inferred from its provisions. The validity of the principle of non-retroactivity of treaties was enshrined in the 1969 Vienna Convention on the Law of Treaties (in force on 27 January 1980), article 28 of which codifies this rule of customary international law:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or 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".

The communication should therefore be declared inadmissible ratione temporis.

4.3 As to the inquiries into the disappearance of the author's three children, the State party refers to the CONADEP investigations, which, unfortunately did not yield positive results. In this connection, the State party cites the CONADEP final report, which concerns over 8,900 disappearances.

4.4 The case of the author's children was also submitted to the United Nations Working Group on Enforced or Involuntary Disappearances on 13 August 1980. The State party's investigations in this respect failed to establish the whereabouts of the author's children, or when and where they were deprived of their lives.

4.5 With regard to the possibility of instituting civil proceedings for compensation, the State party points out that although the author could have presented a claim, she did not do so. The period of limitations for lodging civil actions for compensation has now elapsed.

Issues and Proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 With regard to the application ratione temporis of the International Covenant on Civil and Political Rights and of the Optional Protocol for Argentina, the Committee recalls that both instruments entered into force on 8 November 1986. It observes that the Covenant cannot be applied retroactively and that the Committee is precluded ratione temporis from examining alleged violations that occurred prior to the entry into force of the Covenant for the State party concerned.

5.3 It remains for the Committee to determine whether there have been any violations of the Covenant subsequent to its entry into force. The author has invoked article 2 of the Covenant and claimed a violation of the right to a remedy. In this context the Committee recalls its prior jurisprudence that article 2 of the Covenant constitutes a general undertaking by States and cannot be invoked, in isolation, by individuals under the Optional Protocol (M. G. B. and S. P. v. Trinidad

and Tobago, communication No. 268/1987, para. 6.2, declared inadmissible on 3 November 1989). Bearing in mind that article 2 can only be invoked by individuals in conjunction with other articles of the Covenant, the Committee observes that article 2, paragraph 3 (a), of the Covenant stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ..." (emphasis added). Thus, under article 2 the right to a remedy arises only after a violation of a Covenant right has been established. However, the events which could have constituted violations of several articles of the Covenant and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina. Therefore, the matter cannot be considered by the Committee, as this aspect of the communication is inadmissible ratione temporis.

5.4 The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependants.

5.5 To the extent that the author claims that the enactment of Law No. 23,521 frustrated a right to see certain government officials prosecuted, the Committee refers to its prior jurisprudence that the Covenant does not provide a right for an individual to require that the State party criminally prosecute another person (H. C. M. A. v. The Netherlands, communication No. 213/1986, para. 11.6, declared inadmissible on 30 March 1989). Accordingly, this part of the communication is inadmissible ratione materiae as incompatible with the provisions of the Covenant.

6. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the State party and to the author through her counsel.

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Notes:

a/ The text of an individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure is appended.

APPENDIX

Individual opinion: submitted by Mr. Bertil Wennergren pursuant to rule 92, paragraph 3, of the Committee's rules of procedure, concerning the Committee's decision to declare communication No. 275/1988, S.E. v. Argentina inadmissible

I concur in the views expressed in the Committee's decision. However, in my opinion, the

arguments in paragraph 5.4 of the decision need to be clarified and expanded. In this paragraph, the Committee reminds the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies, where applicable, for victims or their dependents.

According to article 28 of the 1969 Vienna Convention on the Law of Treaties (cited under paragraph 4.2 in the Committee's decision) a treaty's provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty in respect of that party; the Permanent Court of International Justice (PCIJ Series A/B, No. 74 (1938), p. 10-48 - Phosphates in Morocco case) has held in this context that both the terms concerning the limitation ratione temporis and the underlying intention are clear: This clause was inserted in order to deprive the acceptance of the compulsory jurisdiction of any retroactive events. In this case the Court had to decide whether or not issues arose from factors subsequent to the acceptance of its jurisdiction (which the Court refers to as the "crucial date"), first because certain acts, which, if considered separately, were in themselves unlawful international acts, were actually accomplished after the "crucial date"; secondly, because these acts, if taken in conjunction with earlier acts to which they were closely linked, constituted as a whole, a single, continuing and progressive illegal act which was not fully accomplished until after the "crucial date"; and lastly, because certain acts which were carried out prior to the "crucial date" nevertheless gave rise to a permanent situation which was inconsistent with international law and which existed after the said date. The question of whether a given situation or fact occurs prior to or subsequent to a particular date is, the Court explains, one to be decided in respect of each specific case, just as the question of the situations or facts with regard to which the issues arise must be decided in regard of each specific case. I note that the "crucial date" in this case is 8 November 1986.

The Committee has repeatedly indicated in prior decisions that it "can consider only an alleged violation of human rights occurring on or after (the date of entry into force of the Covenant and the Protocol for the State party) unless it is an alleged violation which, although occurring before the date, continues or has effects which themselves constitute a violation after that date". Disappearance cases that cannot be attributed to natural causes (accidents, voluntary escapes, suicides, etc) but that give rise to reasonable assumptions and suspicions of illegal acts, such as killing, deprivation of liberty and human treatment, may lead to claims not only under the respective material articles in the Covenant (articles 6, 7, 9 and 10) but in connection therewith also under article 2 of the Covenant, concerning a State party's obligation to adopt such measures as may be necessary to give effect to the rights recognized in the Covenant and to ensure that any person whose rights or freedoms are violated shall have an effective remedy. In an early decision involving a disappearance (30/1978 Bleier v. Uruguay) the Committee, after noting that according to unrefuted allegations "Eduardo Bleier's name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him and received his dirty clothing until the summer of 1976" (i.e. after the "crucial date"), urged the Uruguayan Government "to take effective steps...to establish what has happened to Eduardo Bleier since October 1975 (i.e. before the crucial date but with continuation after that date), to bring to justice any person found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he has suffered". In another case (107/1981 Quinteros v. Uruguay) the Committee was of the view that the information before it revealed breaches of articles 7, 9 and 10, paragraph 1, of the Covenant and concluded that the responsibility for the disappearance of Elena Quinteros fell on the

authorities of Uruguay and that the State party should take immediate and effective steps (i) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release, (ii) to bring to justice any persons found to be responsible for her disappearance and ill-treatment, (iii) to pay compensation for the wrongs suffered, and (iv) to ensure that similar violations do not occur in the future. In the latter case, the author of the communication was the mother of the disappeared victim who had alleged that she, too, was a victim of a violation of article 7, (psychological torture because she did not know about the whereabouts of her daughter) and who had given ample description of her sufferings. The Committee expressed its understanding with the anguish and stress caused to the mother both by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. She had the right to know what had happened to her daughter. The Committee therefore found that in these respects she was also a victim of a violation of the Covenant.

I draw the following conclusions. A disappearance per se does not raise any issue under the Covenant. For it to do so, a link to some of the material articles of the Covenant is required. And it is solely with such a link that article 2 of the Covenant may become applicable and an issue may arise under that article too. Should it become clear that the cause of the disappearance is attributable to a killing for which the State party must be held responsible, but that the killing took place before the "crucial date", then this killing cannot be deemed to constitute a violation of article 6 of the Covenant, notwithstanding that it was a crime against the right to life under domestic penal law. Consequently, a claim regarding the non-fulfillment of a State party's obligations under article 2 of the Covenant also cannot arise. But, on the other hand, if a killing before the "crucial date" is merely one hypothesis among several others, the case law of the Committee clearly indicates that under article 2 of the Covenant the State part is under a duty to carry out a meaningful investigation. Only when it is unimaginable that any act, fact or situation which would constitute a violation of the Covenant may have continued to exist or have occurred subsequent to the "crucial date", such an obligation does not arise. It should be added that a declaration under domestic civil law in respect of a disappeared person's death does not set aside a State party's obligation under the Covenant. Domestic civil law provisions cannot be given precedence over international legal obligations. Whatever the length and thoroughness be deemed necessary for an investigation to satisfy the requirements under the Covenant is to be considered case by case, but an investigation must under all circumstances be conducted fairly, objectively and impartially. Any negligence, suppression of evidence or other irregularity jeopardizing the outcome must be regarded as a violation of the obligations under article 2 of the Covenant, in conjunction with a relevant material article. And once an investigation has been closed due to lack of adequate results, it must be reopened if new and pertinent information comes to light.

Bertil WENNERGREN