HUMAN RIGHTS COMMITTEE

Vargas v. Chile

Communication Nº 718/1996**

26 July 1999

CCPR/C/66/D/718/1996/Rev.1

ADMISSIBILITY

Submitted by: Mrs. María Otilia Vargas Vargas(represented by Fundación de Ayuda Social de las Iglesias Cristianas)

Alleged victim: Mrs. María Otilia Vargas and her son Mr. Dagoberto Pérez Vargas

State party: Chile

Date of communication: 3 May 1996

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

Meeting on 26 July 1999

Adopts the following:

Decision on admissibility***

1. The author of the communication is Maria Otilia Vargas Vargas acting also on behalf of her son, Dagoberto Pérez Vargas, a Chilean citizen who disappeared in 1973, and was later confirmed to have been killed that year. It is alleged that Mr. Dagoberto Pérez Vargas was a victim of violations by Chile of articles 2; 5; 14, paragraph 1; 15, paragraphs 1 and 2; 16 and 26 of the International Covenant on Civil and Political Rights, and that the rights of Mrs. Vargas Vargas have been violated as a family member. The alleged victims are represented by Nelson G.C. Pereira of the Fundación de Ayuda Social de las Iglesias Cristianas.

The facts as submitted:

2.1 On 16 October 1973, an armed confrontation occurred between members of the now

defunct DINA (Dirección de Inteligencia Nacional)and members of the rebel group MIR (Movimiento de Izquierda Revolucionario)of which Dagoberto Pérez was a member. It was assumed that he was killed in the encounter, as his body was never recovered, but the only news about his fate that his family was able to gather was unofficial. None of the victim's relatives were ever notified of the whereabouts of the body, the circumstances of his death, where it had occurred or who had been responsible.

2.2 Proceedings to establish the circumstances of Mr. Pérez Vargas' death were initiated in the Metropolitan Regional Court of Santiago (Juzgado de Letras de Talagante, Región Metropolitana) on 28 April 1991. A criminal suit on charges of aggravated kidnapping resulting in murder and illegal association were filed against X. On 24 August 1993, the Magistrate on the Talagante Court declared that he had no competence to consider the case and transferred the case to a military jurisdiction, as two military officers appeared to have investigated the site of the incident. Counsel notes that the Court of Appeal of San Miguel subsequently remitted the appeal to a military jurisdiction.

2.3 On 24 August 1994, the 2nd Military Tribunal of Santiago (II Juzgado Militar de Santiago) decreed that the case be formally discontinued (Sobreseimiento definitivo) pursuant to Law 2.191 of 1978, without going into further investigations. On 9 May 1995, the Military Court (Corte Marcial) endorsed this decision. One of the civilian judges on the court dissented, arguing that the proceedings should be returned to the investigating phase.

2.4 A complaint (Recurso de Queja) was filed with the Supreme Court on grounds of abuse of power by the Military Tribunal and the Military Court, which had dismissed the case under the provisions of the 1978 Amnesty Decree. On 2 October 1995, the Supreme Court dismissed the complaint, without giving reasons. With this, counsel argues, available domestic remedies have been exhausted.

The complaint:

3.1 Before the Supreme Court, the case was based on violations by the Chilean authorities both of national law and international conventions. Reference was made in this context to the 1949 Geneva Conventions, in force for Chile since April 1951, under which certain illicit acts committed during an armed conflict without international dimensions, are not subject to an amnesty. In this respect, it was alleged that the events under investigation had taken place during a state of siege ("Estado de sitio en grado de 'Defensa Interna'") in Chile. Counsel alleges that by their acts, the present Chilean authorities are condoning, and have become accessories to, the acts perpetrated by the former military regime.

3.2 It is alleged that, regardless of how the events in question may be defined, i.e. whether under the Geneva Conventions or under article 15, paragraph 2, of the Covenant, they constitute acts or omissions which, when committed, were criminal acts according to general principles of law recognised by the community of nations, and which may not be statute-barred nor unilaterally pardoned by any State. Counsel states that with the application of the amnesty law, Decree no. 2191 of 1978, Chile has accepted the impunity of those responsible for these acts. It is alleged that the State is renouncing its obligation to investigate

international crimes, and to bring those responsible for them to justice and thus determine what happened to the victims. This means that fundamental rights of the author and his family have been violated. Counsel claims a violation of article 15, paragraph 2, of the Covenant, in that criminal acts have been unilaterally and unlawfully pardoned by the State.

3.3 Counsel alleges that the application of the amnesty law No.2.191 of 1978 deprived the victim and his family of the right to justice, including the right to a fair trial and to adequate compensation for the violations of the Covenant.[1] Counsel further alleges a violation of article 14 of the Covenant, in that the victim and his family were not afforded access on equal terms to the courts, nor afforded the right to a fair and impartial hearing. Since the case was remitted to the military courts, the principle of equality of arms was violated.

3.4 To counsel, the decision of the military tribunals not to investigate the victim's death amounts to a violation of article 16 of the Covenant, i.e. failure to recognize the victim as a person before the law.

3.5 As to the reservation entered by Chile upon ratification of the Optional Protocol in 1992, it is alleged that although the events complained of occurred prior to 11 March 1990, the decision challenged by the present communication is the judgment of the Supreme Court of October 1995.

State party's observations and counsel's comments:

4.1 In submissions dated 6 December 1996, 12 February 1997 and 9 February 1998, the State party provides a detailed account of the history of the cases and of the amnesty law of 1978, including information on the details of the death of Mr. Pérez Vargas. It specifically concedes that the facts did occur as described by the author's counsel. It was indeed in reaction to the serious human rights violations committed by the former military regime that former President Aylwin instituted the National Truth and Reconciliation Commission by Decree of 25 April 1990. For its report, the Commission had to set out a complete record of the human rights violations that had been brought to its attention; among these was the author's case. It is noted that his case is set out in Part II, Vol. I of the Commission's final report; the conclusion was that his death was attributable to 'political violence'.

4.2 The State party submits that the facts at the basis of the communication cannot be attributed to the constitutionally elected government(s) which succeeded the military regime. It provides a detailed account of the historical context in which large numbers of Chilean citizens disappeared and were summarily and extrajudicially executed during the period of the military regime.

4.3 The State party notes that it is not possible to abrogate the Amnesty Decree of 1978, and adduces reasons: first, legislative initiatives such as those relating to amnesties can only be initiated in the Senate (article 62 of the Constitution), where the Government is in a minority. Second, abrogation of the law would not necessarily have repercussions under criminal law for possible culprits, on account of the prohibition of retroactive application of criminal laws. This principle is enshrined in article 19 lit.3 of the Chilean Constitution and

article 15, paragraph 1, of the Covenant. Three, the composition of the Constitutional Court. Four, the designation of the Commanders in Chief of the Armed Forces; the President of the Republic may not remove the present officers, including General Pinochet. Lastly the composition and attributions of the National Security Council (Consejo de Seguridad Nacional) restrict the attributions of the democratic authorities in all matters pertaining to internal or external national security.

4.4 The State party further observes that the existence of the amnesty law does not inhibit the continuation of criminal investigations already under way in Chilean tribunals. In this sense, the amnesty decree of 1978 may extinguish the criminal responsibility of those accused of crimes under the military regime, but it cannot in any way suspend the continuation of investigations that seek to establish what happened to individuals who were detained and later disappeared. This has been the interpretation of the decree both by the Military Court and by the Supreme Court.

4.5 The Government emphasizes that the Chilean Constitution (article 73) protects the independence of the judiciary. As such, the Executive cannot interfere with the application and the interpretation of domestic laws by the courts, even if the courts' decisions go against the interests of the Government.

4.6 With respect to the terms of the amnesty law, the State party points to the necessity to reconcile the desire for national reconciliation and pacification of society with the need to ascertain the truth of past human rights violations and to seek justice. These criteria inspired ex-President Aylwin when he set up the Truth and Reconciliation Commission. To the State party, the composition of the Commission was a model in representativity, as it included members associated with the former military regime, former judges and members of civil society, including the founder and president of the Chilean Human Rights Commission.

4.7 The State party distinguishes between an amnesty granted de facto by an authoritarian regime, by virtue of its failure to denounce or investigate massive human rights abuses or by adopting measures designed to ensure the impunity of its members, and an amnesty adopted by a constitutionally elected democratic regime. It is submitted that the constitutionally elected governments of Chile have not adopted any amnesty measures or decrees which could be considered incompatible with the provisions of the Covenant; nor have they committed any acts which would be incompatible with Chile's obligations under the Covenant.

4.8 The State party recalls that after the end of the mandate of the Truth and Reconciliation Commission, another body - the so-called "*Corporación Nacional de la Verdad y Reconciliación"* - continued the work of the former, thereby underlining the Government's desire to investigate the massive violations of the former military regime. The "Corporación Nacional" presented a detailed report to the Government in August of 1996, in which it added the cases of 899 further victims of the previous regime. This body also oversees the implementation of a policy of compensation for victims which had been recommended by the Truth and Reconciliation Commission.

4.9 The legal basis for the compensation to victims of the former military regime is Law No.19.123 of 8 February 1992, which

* sets up the Corporación Nacional and mandates it to promote the compensation to the victims of human rights violations, as identified in the final report of the Truth and Reconciliation Commission;

* mandates the Corporación Nacional to continue investigations into situations and cases in respect of which the Truth and Reconciliation Commission could not determine whether they were the result of political violence;

* fixes maximum levels for the award of compensation pensions in every case, depending on the number of beneficiaries;

* establishes that the compensation pensions are readjustable, much like the general system of pensions;

* grants a "compensation bonus" equivalent to 12 monthly compensation pension payments;

* increases the pensions by the amount of monthly health insurance costs, so that all health-related expenditures will be borne by the State;

* decrees that the education of children of victims of the former regime will be borne by the State, including university education;

* lays down that the children of victims of the former regime may request to be exempted from military service.

In accordance with the above guidelines, the relatives of Mr. Pérez Vargas have received and are currently receiving monthly pension payments.

4.10 In the light of the above, the State party requests the Committee to find that it cannot be held responsible for the acts which are at the basis of the present communication. It solicits, moreover, a finding that the creation of the National Truth and Reconciliation Commission and the corrective measures provided for in Law No.19.123 constitute appropriate remedies within the meaning of article 2 of the Covenant.

4.11 The State party further recalls that with the transition to democracy, the victims of the former regime have been able to count on the full cooperation of the authorities, with a view to recovering, within the limits of the law and the circumstances, their dignity and their rights. Reference is made to the ongoing work of the Corporación Nacional de Reparación y Reconciliación.

5.1 In his comments, counsel takes issue with several of the State party's observations. He contends that the State party's defence ignores or at the very least misconstrues Chile's obligations under international law, which are said to mandate the Government to take

measures to mitigate or eliminate the effects of the Amnesty Decree of 1978. Article 2 of the American Convention on Human Rights and article 2, paragraph 2, of the Covenant impose a duty on the State party to take the necessary measures (by legislation, administrative or judicial action)to give effect to the rights enshrined in these instruments. To counsel, it is wrong to argue that there is no other way than to abrogate or declare null and void the 1978 amnesty decree: nothing prevents the State party from amnestying those who committed wrongs, except where the wrongs committed constitute international crimes or crimes against humanity. For counsel, the facts at the basis of the present communication fall into the latter category.

5.2 To counsel, it is equally wrong to argue that the principle of non-retroactivity of criminal laws operates against the possibility of prosecuting those deemed responsible for grave violations of human rights under the former military regime. This principle does not apply to crimes against humanity, which cannot be statute-barred. Moreover, if the application of the principle of non-retroactivity of criminal legislation operates in favour of the perpetrator but collides with other fundamental rights of the victims, such as the right to a remedy, the conflict must be solved in favour of the latter, as it derives from violations of fundamental rights, such as the right to life, to liberty or physical integrity. In other words, the perpetrator of serious crimes cannot be deemed to benefit from more rights than the victims of these crimes.

5.3 Counsel further claims that from a strictly legal point of view, the State party has, with the modification of Chile's Constitution in 1989 and with the incorporation into the domestic legal order of international and regional human rights instruments such as the American Convention on Human Rights and the Covenant, implicitly abrogated all (domestic) norms incompatible with these instruments; this would include the Amnesty Decree D.L.2.191 of 1978.

5.4 In respect of the State party's argument relating to the independence of the judiciary, counsel concedes that the application of the amnesty decree and consequently the denial of appropriate remedies to the victims of the former military regime derives from acts of Chilean tribunals, in particular the military jurisdictions and the Supreme Court. However, while these organs are independent, they remain agents of the State, and their acts must therefore engage State responsibility if they are incompatible with the State party's obligations under international law. Counsel therefore considers unacceptable the State party's argument that it cannot interfere with the acts of the judiciary: no political system can justify the violation of fundamental rights by one of the branches of Government, and it would be absurd to conclude that while the executive branch of government seeks to promote adherence to international human rights standards, the judiciary may act in ways contrary to, or simply ignore, these standards.

5.5 Counsel finally argues that the State party has misleadingly adduced the conclusions of several reports and resolutions of the Inter-American Commission on Human Rights in support of its arguments. To counsel, it is clear that the Commission would hold any form of amnesty which obstructs the determination of the truth and prevents justice from being done, in areas such as enforced and involuntary disappearances and summary executions,

as incompatible with and in violation of the American Convention on Human Rights.

5.6 In additional comments, counsel reiterates his allegations as summarized in paragraphs 3.2 and 3.3 above. What is at issue in the present case is not the granting of some form of compensation to victims of the former regime, but the denial of justice to them: the State party resigns itself to arguing that it cannot investigate and prosecute the crimes committed by the military regime, thereby foreclosing the possibility of any judicial remedy for the victims. To counsel, there is no better remedy than the determination of the truth, by way of judicial proceedings, and the prosecution of those held responsible for the crimes. In the instant case, this would imply ascertaining the burial sites of the victim, why he was murdered, who killed him or ordered him to be killed, and thereafter indicting and prosecuting those responsible.

5.7 Counsel adds that his interpretation of the invalidity of Amnesty Decree 2.191 of 1978, in the light of international law and the Covenant, has been endorsed by the Inter-American Commission on Human Rights in a Resolution adopted in March 1997. In this resolution, the Commission held the amnesty law to be contrary to the American Convention on Human Rights, and admonished the State party to amend its legislation accordingly. The Chilean Government was requested to continue investigations into disappearances that occurred under the former regime, and to indict, prosecute and try those held responsible. To counsel, the Commission's resolution perfectly sets out Chile's responsibility for facts and acts such as those at the basis of the present communications.

Admissibility considerations:

6.1 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.

6.2 The Committee notes that the State party does not explicitly challenge the admissibility of the communication, although it does point out that the events complained of by the author, including the Amnesty Decree of 1978, occurred prior to the entry into force of the Optional Protocol for Chile, which ratified that instrument on 28 August 1992 with the following declaration: "In ratifying 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".

6.3 The Committee notes that the author also challenges the judgment of the Supreme Court of Chile of 2 October 1995 denying the request for the revision of earlier adverse decisions rendered in respect to Mr. Pérez Vargas' application by military courts.

6.4 The Committee notes that the acts giving rise to the claims related to the death of Mr. Pérez Vargas occurred prior to the international entry into force of the Covenant, on 23 March 1976, hence, these claims are inadmissible *ratione temporis*. The Supreme Court

judgement of 1995 cannot be regarded as a new event that could affect the rights of a person who was killed in 1973. Consequently, the communication is inadmissible in respect of Mr. Pérez Vargas, under article 1 of the Optional Protocol, and the Committee does not need to examine whether the declaration made by Chile upon accession to the Optional Protocol has to be regarded as a reservation or a mere declaration.

6.5 The Committee notes that the communication has been submitted by Mrs. María Otilia Vargas Vargas, the mother of Mr. Pérez Vargas and that the State party has addressed her status as a victim of alleged violations of the Covenant. With the dismissal of the author's petition by the Supreme Court in October 1995, all domestic remedies available to the author have been exhausted. The State party itself has argued that Amnesty Decree 2.191 of 1978 cannot be abrogated or declared null and void, which must be understood as meaning that any judicial challenge of the Decree, constitutionally or otherwise, would inevitably fail. The Committee thus concludes that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met in the present case in relation to Mrs. Maria Otilia Vargas Vargas.

6.6 The Committee notes that the events complained of by Mrs. Vargas Vargas occurred prior to the entry into force of the Optional Protocol for Chile. However, the decision challenged by her is the judgment of the Supreme Court of Chile of October 1995, i.e. acts which occurred after the entry into force of the Optional Protocol for the State party. Thus, the Committee is not precluded *ratione temporis* from considering the communication of Mrs. Vargas Vargas.

6.7 The Committee notes that the claims made on behalf of Mrs. Vargas Vargas are general in character and have merely been derived from the claims made in respect of Mr. Pérez Vargas. She has not specified which of her rights under the Covenant have been violated through the Supreme Court judgement of 1995. Consequently, the Committee finds that the claims made in respect of Mrs. María Otilia Vargas Vargas have not been sufficiently substantiated for purposes of admissibility and the communication is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

1. (b) that the decision shall be communicated to the State party, and to the author and her counsel.

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, and Mr.

Abdallah Zakhia.

**Pursuant to rule 85 of the Committee's rules of procedure, Ms. Cecilia Medina Quiroga did not participate in the examination of the case.

***The text of an individual opinion signed by two Committee members is appended to the present document.

1/ In this respect, reference is made to the Inter-American Commission's decision in the Velasquez Rodriguez case.

[Adopted in English, French and Spanish, the English 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 opinion by Committee member Christine Chanet, concerning communications Nos. 717/1996 and 718/1996 and co-signed by Mr. Fausto Pocar concerning communication No. 718/1996

I challenge the decision taken by the Committee, which, in dealing with the two communications, dismissed the applicants on the grounds of the ratione temporis reservation lodged by CHILE at the time of its accession to the Optional Protocol.

In my view the question could not be addressed in this manner, in view of the fact that judicial decisions taken by the State party were adopted after the date it had specified in its reservation and that the problem raised in connection with article 16 of the Covenant relates to a situation which, as long as it is not permanently ended, has long-term consequences.

In the case in question, even if the actual circumstances referred to in the two communications diverge, the attitude of the State regarding the consequences to be drawn from the disappearances necessarily raised a question as regards article 16 of the Covenant.

Under article 16, everyone has the right to recognition as a person before the law.

While this right is extinguished on the death of the individual, it has effects which last beyond his or her death; this applies in particular to wills, or the thorny issue of organ donation;

This right survives a fortiori when the absence of the person is surrounded by uncertainty; he or she may reappear, and even if not present, does not cease to exist under the law; it is not possible to substitute civil death for confirmed natural death;

These observations do not imply that this right is of unlimited duration: either the identification of the body is incontestable and a declaration of death can be made, or uncertainty remains concerning the absence or the identification of the person and the State must lay down rules applicable to all these cases; it may, for example, specify a period after which the disappeared person is regarded as dead.

This is what the Committee should have sought to find out in this particular case by examining the matters in depth.

Ch. Chanet (signed)

Fausto Pocar (signed)

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