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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 28/92; Cases Nos. 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311
Session: Eighty-Second Session (21 September – 2 October 1992)
Title/Style of Cause: Alicia Consuelo Herrera v. Argentina
Rosaria Valenzi de Sanchez v. Argentina
Naval Mechanic School v. Argentina
Fundacion Servicio Paz y Justicia v. Argentina
Luis Adolfo Holmquits, Graciela Bustamante de Argacaraz, Gloria Constanza Curia, Fernando Ramiro Curia, Luisa Ana Ibacez, Adriana C. Mitrovich de Torres Correa, Ricardo Torres Correa, Francisco Rafael Diaz, Ramon Oscar Bianchi, Maria Isabel Jimenez de Soldatti, Rondoletto Family, Julio Cesar Campopiano, Ana Cristina Corral and Carlos Severino Soldatti v. Argentina
Rosa Ana Frigerio, Omar Tristan Roldan, Elena Delia Garaguso, Carlos Alberto Oliva, Laura Susana Martinelli, Liliana Carmen Pereyra, Eduardo Alberto Cagnola, Jorge Candeloro, Marta Haydee Garcia, Omar Alejandro Marocchi, Susana Valor, Eduardo Manuel Martinez, Jorge Carlos Augusto Toledo, Mario Alberto D'Fabio Fernandez, Roberto Wilson, Ruben Dario Rodriguez, Juan Carlos Carrizo, Haydee Cristina Monier, Horacio Manuel Carrizo, Alberto Rogelio Carrizo, Luis Alberto Bereciarte and Fernando Hallgarten v. Argentina
Doc. Type: Report
Decided by: Chairman: Dr. Marco Tulio Bruni Celli;
First Vice-Chairman: Dr. Oscar Luján Fappiano;
Second Vice-Chairman: Prof. Michael Reisman
Members: Dr. Patrick Robinson; Mr. Oliver H. Jackman; Dr. Leo Valladares Lanza; Dr. Alvaro Tirado Mejía.
Dated: 02 October 1992
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On October 4, 1991, during its 80th session, the Inter-American Commission on Human Rights (hereinafter "the Commission") approved, by a vote of five to one, Report No. 34/91, under Article 50 of the American Convention on Human Rights (hereinafter "the Convention"). That report was forwarded to the Argentine Government on October 8, 1991. On January 20, 1992, the Government of the Argentine Republic sent its observations on that report. This Report No. 28/92, provided for in Article 51.1 of the Convention, was adopted by a unanimous vote. Dr. Oscar Lujan Fappiano, member of the Commission, abstained from participating in the discussion of the two reports and the votes taken thereon.

I. INTRODUCTION

1. In late 1987, the Commission began to receive petitions against the Government of the Argentine Republic (hereinafter "the Government"), which denounced the legislature's passage of laws No. 23,492, enacted on December 24, 1986, and No. 23,521, enacted on June 8, 1987, and their enforcement by the judiciary; the petitioners alleged that this violated, inter alia, their right to judicial protection (Article 25) and their right to a fair trial (Article 8) recognized by the Convention. In total six cases were opened. The petitioners were as follows:

Case No. 10.147:	Alicia Consuelo Herrera
Case No. 10.181:	Rosaria Valenzi de Sanchez
Case No. 10.240:	Case of the Naval Mechanic School
Case No. 10.262:	Fundacion Servicio Paz y Justicia (90 cases)
Case No. 10.309:	Luis Adolfo Holmquits Graciela Bustamante de Argacaraz Gloria Constanza Curia Fernando Ramiro Curia Luisa Ana Ibacez Adriana C. Mitrovich de Torres Correa Ricardo Torres Correa Francisco Rafael Diaz Ramon Oscar Bianchi Maria Isabel Jimenez de Soldatti Rondoletto Family (5) Julio Cesar Campopiano Ana Cristina Corral Carlos Severino Soldatti
Case No. 10.311:	Rosa Ana Frigerio Omar Tristan Roldan Elena Delia Garaguso] Carlos Alberto Oliva Laura Susana Martinelli Liliana Carmen Pereyra Eduardo Alberto Cagnola Jorge Candeloro Marta Haydee Garcia Omar Alejandro Marocchi Susana Valor Eduardo Manuel Martinez Jorge Carlos Augusto Toledo Mario Alberto D'Fabio Fernandez Roberto Wilson Ruben Dario Rodriguez Juan Carlos Carrizo Haydee Cristina Monier Horacio Manuel Carrizo Alberto Rogelio Carrizo Luis Alberto Bereciarte Fernando Hallgarten

2. Law 23,492 set a 60-day deadline for terminating all criminal proceedings involving crimes

committed as part of the so-called "dirty war". Law 23,521 established the irrefutable presumption that military personnel who committed crimes during the "dirty war" were acting in the line of duty, thereby acquitting them of any criminal liability. The law even extended that protection to high-ranking officers who did not have decision-making authority or any role in drawing up orders. Unless otherwise indicated, the instruments in question will be referred to as "the laws".

3. Starting in November 1989, some of the petitioners, alleging the same violations, elaborated upon their petitions by protesting the effects of the Presidential Decree of Pardon No. 1002, of October 7, 1989 (hereinafter the "Decree"), which ordered that any proceedings against persons indicted for human rights violations who had not benefited from the earlier laws be discontinued.

4. In all, six cases were opened. Some were individual petitions, while others were filed by institutions representing a group of petitioners. Some of the petitioners' grievances concerned the application of one of the laws, while the others challenged the application of both laws and the Decree. However, the fundamental grievance in all the petitions was the same: the effect of laws No. 23,492, No. 23,521 and Decree No. 1002/89 was denounced as a violation of the Convention, inasmuch as they curtailed and ultimately extinguished the criminal proceedings involving the egregious human rights violations that occurred during the de facto government.

5. Inasmuch as the grievances are substantially the same and the issue is basically a question of law, since it is not the facts that are in dispute but rather whether a type of law and a decree are compatible with the Convention, the Commission has decided to join the petitions and consider them as one.

II. SUMMARY OF THE PETITIONS AND OF THE GOVERNMENT'S REPLIES

6. In all six cases, the petitioners alleged that the criminal proceedings for human rights violations -- disappearances, summary executions, torture, kidnapping-- committed by members of the armed forces were canceled, encumbered or obstructed by the laws and the Decree, and that this constituted a violation of rights guaranteed to them under the Convention.

7. In all six cases, the Government maintained that the alleged violations occurred before the Argentine State's ratification of the Convention and therefore were inadmissible *ratione temporis*. The Government also argued that some of the cases had already been heard in other international fora. As for the merits, the Government stated that an exhaustive official investigation was conducted and former military leaders convicted, so that there was no breach of the Convention. As for the OAS Charter and the American Declaration of the Rights and Duties of Man, Argentina insisted that while these instruments do recognize rights, they reserve enforcement of those rights for the national courts.

III. ADMISSIBILITY AND PROCESSING WITH THE COMMISSION

8. The Commission forwarded the replies to the respective parties, who basically restated their original positions. At its 76th, 77th and 78th sessions, the Commission received representatives for those petitioners who had asked to be heard, as well as the Government's representatives. Those received answered the questions put to them by the members of the Commission.

9. From the briefs and the oral proceedings, the Commission was able to determine the petitioners' basic grievance and the Government's position. The petitioners complained that the laws and the Decree violated the Convention since their effect was to deny the petitioners' their rights under Articles 8 and 25 of the Convention, in respect of Article 1.1 thereof. The Government's fundamental position was that the Convention did not apply because of the time element involved, i.e., the events to which the petitions referred occurred before the Argentine Government's ratification of the Convention.

10. In the Commission's judgment, the formal requirements for admissibility stipulated in Article 46.1 of the Convention and Article 32 of the Commission's Regulations have been satisfied. There are no suitable and effective domestic remedies to nullify the measures being challenged, since the Argentine Supreme Court has dismissed those cases submitted to it that had argued that the instruments were unconstitutional. The Commission also considers that the petitions were presented at the proper time, given the peculiar nature of the complaint in this set of cases. The violation alleged was not consummated at the same moment for all the petitioners, since each one was affected in turn over the course of time. In fact, the effect of the laws and the Decree was that cases against those charged with the crimes were thrown out, trials already in progress were closed, and no judicial avenue was left to present or continue cases.

11. The petitioners in the present case stated that they had never filed a petition with any other intergovernmental human rights group. Other individuals denounced the laws to the Human Rights Committee.

12. The Government alleges that the petitions should be declared inadmissible *ratione temporis*, arguing that the Convention was not violated because the facts attributed to the present government occurred before the Convention's ratification.

13. The bulk of the human rights violations (disappearances, summary executions, torture and unlawful deprivation of freedom) occurred in the 1970s. The military government took over in Argentina in 1976, and democratic institutions were only restored with the inauguration of the civilian government on December 10, 1983.

14. For Argentina, the Convention entered into force on September 5, 1984, with deposit of the instrument of ratification of the Convention.

15. Law No. 23,492 was enacted on December 24, 1986, Law No. 23,521 on June 8, 1987, and Presidential Decree No. 1002 on October 7, 1989.

16. The violation at issue in the instant case is the denial of the right to judicial protection and of the right to a fair trial, since the laws and Decrees in question paralyzed the judicial inquiry. Therefore, the disputed measures were adopted at a time when the Convention was already in force for the Argentine State.

17. Argentina alleges that the present government is being blamed for "events that occurred prior to ratification of the Convention." In this regard, it invokes Article 28 of the Vienna Convention on the Law of Treaties (1969), the jurisprudence on the subject and the body of international practice concerning the non-retroactivity of treaties. It therefore asks that the petitions be declared inadmissible *ratione temporis*.

18. The petitioners argue that the violations being denounced did not predate the Convention's entry into force, but came after, upon approval of the laws and the Decree being challenged, which had the effect of denying them their rights to judicial protection and to a fair trial (Articles 25 and 8, in relation to Article 1.1 of the Convention). Article 8.1 of the Convention states the following:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Article 25.1 of the Convention reads as follows:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

19. The articles of the Convention that the petitioners invoke relate to events that occurred after Argentina became a State Party to the Convention. Therefore, the petitions are admissible *ratione temporis*.

20. As for friendly settlement, the Commission endorses the finding of the Inter-American Court of Human Rights in the Velasquez Rodriguez case, where it states: "... the Commission should attempt such friendly settlement only when the circumstances of the controversy make that option suitable or necessary, at the Commission's sole discretion." [FN1] In the instant case, where the issue is part of a Government policy that the State still supports, the Commission is of the view that friendly settlement is neither necessary nor appropriate.

[FN1] Inter-American Court of Human Rights, Velasquez Rodriguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C, No. 1 (paragraph 44).

21. On October 4, 1991, during its 80th session, the Commission gave preliminary approval to Report No. 34/91, pursuant to Article 50 of the Convention. The report was then forwarded to the Government, on a confidential basis, for the purposes set forth in the second paragraph of said article, to guard against its publication.

22. By notes dated October 23 and November 19, 1991, the Government asked the Commission to "inform it of the plan that it [the Commission] has in mind" regarding compensatory damages. By a note dated December 6, 1991, the Government asked that the Commission extend the deadline set for the Government to present its observations on the report.

23. In a note dated December 16, 1991, the Commission informed the Government that the program for compensatory damages should be developed by the Government itself, and then presented to the Commission for comments. The requested extension was also granted.

24. On January 20, 1992, the Government forwarded its observations on Report No. 34/91.

IV. THE GOVERNMENT'S OBSERVATIONS ON THE REPORT PREPARED PURSUANT TO ARTICLE 50

25. The Argentine Government contends that the Argentine State has been the one that has best dealt with the "difficult problem" of finding a solution to past human rights violations through a response that came from the "very sectors of the nation that were affected" and that laws No. 23,492 and No. 23,521 and Decree 1002/89 were approved by "only the appropriate democratic institutions" (IACHR Report 1985-1986). It underscores the fact that these were actions taken by democratic bodies because of the compelling need for national reconciliation and consolidation of the democratic system.

26. The Government points out that the Argentine State has said "never again" and has enacted laws that benefit the victims of the National Reorganization Process, mentioning the following:

- a) Law 23,466 (pensions for families of the disappeared);
- b) Law 24,043 (compensatory damages for persons who were arrested on orders from the National Executive Power or who, as civilians, were arrested by virtue of warrants issued by military tribunals);
- c) Decree 70/91 (to benefit persons who had instituted legal proceedings because they had been arrested on orders from the National Executive Power during the National Reorganization Process);
- d) Decree 2151/91 (intended to benefit those not covered by Decree 70/91).

27. The Government notes that the violations denounced in the report were the result of acts of State terrorism in Argentina in the period from 1976 to 1983, but that once the rule of law was restored, the State assumed responsibility and paid fair compensation for the violations committed.

28. The Government believes that there was redress because of the laws and decrees enacted for that express purpose; because of the international commitments honored and because of its resolve to instill the notion "never again" in the national consciousness and to mirror it in this Government's every action. Consequently, it asks that the Commission find that the appropriate measures have been taken.

V. THE MERITS

29. Because the petitioners' grievances were essentially the same, i.e., that the effects of Laws No. 23,492 and No. 23,521 and Decree No. 1002 violate the Convention, the Commission has decided to join the petitions and consider them as one case. Moreover, inasmuch as the complaints do not seek to denounce or prove disputed facts but rather to challenge the compatibility of the laws and the Decree with the Convention, the Commission considers that the issue here is a point of law.

30. Consequently the question the Commission has before it is whether or not the laws and the Decree are compatible with the Convention.

A. As to the Convention's interpretation

Article 29 of the Convention reads as follows:

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

31. The Commission notes that any interpretation of the Convention must be rendered in accordance with this provision.

B. As to the right to a fair trial

32. The effect of passage of the laws and the Decree was to cancel all proceedings pending against those responsible for past human rights violations. These measures closed off any judicial possibility of continuing the criminal trials intended to establish the crimes denounced; to identify their authors,

accomplices and accessories after the fact, and to impose the corresponding punishments. The petitioners, relatives or those injured by the human rights violations have been denied their right to a recourse, to a thorough and impartial judicial investigation to ascertain the facts.

33. What are denounced as incompatible with the Convention are the legal consequences of the laws and the Decree with respect to the victims' right to a fair trial. One of the effects of the disputed measures was to weaken the victim's right to bring a criminal action in a court of law against those responsible for these human rights violations.

34. In a good number of the criminal law systems in Latin America, the victim or his or her attorney has the right to be the party making the charge in a criminal proceeding. In systems that allow it -such as Argentina's-, the victim of a crime has a fundamental civil right to go to the courts. That right plays an important role in propelling the criminal process and moving it forward.

35. The question of whether the rights of the victim or his or her relatives, as guaranteed by the domestic laws, are protected by international human rights law, means determining: a) whether those rights recognized in the constitution and laws of that State at the time the violations occurred acquired international protection through ratification of the Convention, and then b) whether those rights can be abrogated through subsequent enactment of a special law, without violating the Convention or the American Declaration.

36. Under Article 1.1 of the Convention, the States Parties are obliged "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...."

37. The laws and the Decree sought to, and effectively did obstruct the exercise of the petitioners' right under Article 8.1 cited earlier. With enactment and enforcement of the laws and the Decree, Argentina has failed to comply with its duty to guarantee the rights to which Article 8.1 refers, has abused those rights and has violated the Convention.

C. As to the right to judicial protection

38. Article 25.2 reads as follows:

The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

39. With passage of the laws and the Decree, Argentina has failed in its obligation to guarantee the rights recognized in Article 25.1 and has violated the Convention.

D. As to the obligation to investigate

40. When interpreting the scope of Article 1.1, the Inter-American Court of Human Rights stated that "The second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction.... As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention...." [FN2] The Court elaborates upon this concept in several paragraphs that follow:

What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible....; [FN3] The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation; [FN4]If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. [FN5] As for the obligation to investigate, it states that the investigation "must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government." [FN6] (Emphasis added by the Commission).

[FN2] Inter-American Court of Human Rights, Velasquez Rodriguez Case, Judgment of July 29, 1988. Series C, No. 4, paragraph 166.

[FN3] Ibid. paragraph 173.

[FN4] Ibid. paragraph 174.

[FN5] Ibid. paragraph 176.

[FN6] Ibid. paragraph 177.

41. By its enactment of these laws and the Decree, Argentina has failed to comply with its duty under Article 1.1 and has violated rights that the Convention accords to the petitioners.

VI. THE COMMISSION'S OPINION AND CONCLUSIONS

42. The Commission is aware of the exemplary measure taken by the Argentine State when it established the official national commission (CONADEP) that investigated and documented the disappearances that occurred during the so-called "dirty war" in its historic report "NUNCA MAS".

43. The Commission was also pleased to observe the historic precedent the Argentine Government set when it put on trial high-ranking officials of the de facto government and convicted them of human rights violations.

44. The Government argues that it has taken adequate measures by enacting provisions to benefit the victims of the National Reorganization Process.

45. Among those measures, the Government cites enactment of Law 23,466, of October 30, 1986, which grants a pension equal to 75% of the minimum lifetime salary to the next-of-kin of the disappeared, which pension can also be claimed by minors under the age of 21 who demonstrate that one or both parents were the victim of forced disappearance prior to December 10, 1983, as demonstrated by a complaint duly filed with the institutions that the law stipulates. A surviving spouse and children under the age of 21, parents and/or siblings, and orphaned sibling minors with whom the victim lived prior to the disappearance can also qualify to receive the pension. The law stipulates that its beneficiaries may claim the coverage provided by the National Social Services Institute for Retirees and Pensioners.

46. The Government also mentions Law 24,043, of December 23, 1991, which awarded a pension to persons who, during the previous dictatorship, were arrested on orders from the National Executive Power during the state of siege or who, as civilians, were arrested by virtue of warrants issued by military

tribunals. The benefit consists of one thirtieth of the monthly remuneration at the highest category on the civil service scale. This law stipulates that the indemnizations are to be paid in the form of bonds, in accordance with Law 23,982 on Public Debt and Consolidation of Economic Securities. According to the Government's estimates, this law will benefit some 8,500 people.

47. Reference is also made to Decrees 70/91 and 2151/91, executive decrees similar to the previous law but that benefited only a certain number of victims who, after having filed an action for economic compensation - without success - in the domestic courts, filed a complaint with the Commission.

48. The Commission is pleased with the measures adopted by the Government to redress and compensate the victims of the "dirty war." It refers here not only to the celebrated trials of the principal guilty parties under the previous dictatorship, but also to CONADEP's investigation, and the various measures adopted to compensate victims of human rights violations under the de facto government.

49. Nevertheless, the Commission must make clear that the issue in the instant cases is not only economic compensation for damages and injuries caused by the State.

50. In this report, one of the facts denounced is the legal consequence of the passage of the laws and the Decree, in that it denied the victims their right to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly. Therefore, the violation of the right to a fair trial (Article 8) and of the right to judicial protection (Article 25), in relation to the obligation of the States to guarantee the full and free exercise of the rights recognized in the Convention (Article 1.1), is denounced as incompatible with the Convention. These violations occurred with the enactment of the disputed legal measures in 1986, 1987 and 1989, after the Convention had entered into force for Argentina in 1984.

51. On the other hand, the question of economic compensation - to which the petitioners have a right - concerns reparation for the original or substantive violations, most of which took place during the 1970s, before Argentina's ratification of the Convention and before enactment of the laws and Decree denounced. It is a question of the right to be compensated by the State for its failure to ensure the right to life, humane treatment and freedom, but not the denial of justice that was the legal consequence of the laws and the Decree at issue in the instant case. Compensation was not the only purpose of the petitions and not the only issue in this report.

52. While both questions (denial of justice upon cancellation of the criminal proceedings and the compensation for violations of the rights to life, humane treatment and liberty) are intimately related, they must not be confused. Each question is materially distinct and moreover concerns events that occurred at different times; the rights or provisions of the Convention affected also differ.

Given the foregoing, the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

1. Concludes that Laws No. 23,492 and No. 23,521 and Decree No. 1002/89 are incompatible with Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man and Articles 1, 8 and 25 of the American Convention on Human Rights.

2. Recommends that the Argentine Government pay the petitioners just compensation for the violations referred to in the preceding paragraph.

3. Recommends to the Argentine Government that it adopt the measures necessary to clarify the

facts and identify those responsible for the human rights violations that occurred during the past military dictatorship.

4. Orders publication of this report.