Institution:	Inter-American Commission on Human Rights
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Session:	Hundred and Eighth Regular Session (2 – 20 October 2000)
Title/Style of Cause:	Marcelino Hanriquez, Sofía Ester Hanriquez, Abdon Zenon, Hanriquez and Ramon Arcangel Hanriquez v. Argentina
Doc. Type:	Decision
Decided by:	Chairman: Helio Bicudo; First Vice-Chairman: Claudio Grossman; Second Vice-Chairman: Juan E. Mendez; Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo The second Vice Chairman of the Commission, Juan E. Méndez, an Argentine national, did not participate in the discussion of and decision on this report, in compliance with Article 19(2)(a) of the Commission's Regulations.
Dated:	3 October 2000
Citation:	Hanriquez v. Argentina, Case 11.784, Inter-Am. C.H.R., Report No. 73/00, OEA/Ser.L/V/II.111, doc. 20, rev. (2000)
Represented by:	APPLICANT: Rafael Amadeo Gentilli
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I. SUMMARY

1. On January 4, 1996, attorneys Octavio Carsen and Myriam Carsen, members of the Social Research and People's Legal Advisory Services Center [Centro de Investigaciones Sociales y Asesorías Legales Populares] (CISALP), and Abdón Zenón Hanríquez, represented by attorney Rafael Amadeo Gentilli, also a member of CISALP (hereinafter "the petitioners"), filed a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") against the Argentine Republic (hereinafter "the State" or "Argentina") wherein they basically assert violation of the right to equal protection of the law (Article 24) protected under the American Convention on Human Rights (hereinafter "the Convention") and the right to equality before the law (Article II) under the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration"). The alleged victims are Sofía Ester, Abdón Zenón, Ramón Arcángel and Marcelino Hanríquez (hereinafter "the Hanríquez" or "the Hanríquez siblings").

2. The petitioners allege that during the last de facto government in Argentina, the Hanríquez were incarcerated by order of a federal judge who was neither independent nor impartial and who charged them with an offense criminalized in a law whose legal qualification made the law itself a violation of the right to freedom of expression. With restoration of democratic government, law 24.043, enacted on December 23, 1991, provided for reparations for

persons detained on orders of the executive branch of government during the de facto government. The petitioners exercised the remedy provided for in that law, seeking compensation for the days they were held in custody on orders from the aforementioned federal judge. Government authorities denied them any compensation for the court-ordered incarceration. However, their right to compensation for an eight-day period during which they were in executive custody was recognized. They went to court to appeal the government's decision and to have Law 24.043 declared unconstitutional on the grounds that it discriminated against them by making no provision for their predicament. The courts that heard the appeal upheld the government authorities' decision.

3. When it examined the admissibility of the present case, the Commission concluded that it met the requirements stipulated in Articles 46 and 47 of the American Convention. After examining the merits of the case, however, the Commission concluded that the facts alleged by the petitioners did not constitute violations of Article 24 of the Convention.

II. PROCEEDINGS WITH THE COMMISSION

4. The IACHR received the petition on January 4, 1996. The Commission requested additional information from the petitioners on February 9 of that year and received a note from them on April 7, 1997. The case was opened on August 1, 1997. On November 3 and December 8, 1997, the State requested successive 30-day extensions, granted on November 7 and December 16, respectively. On January 13, 1998, the State presented its reply. The Commission received a note from the petitioners on January 14, 1998, and sent them the State's reply on February 9, 1998. On March 23, the petitioners requested a 30-day extension, which they were granted on March 30. The petitioners presented their response to the State's reply on June 5, 1998.

5. In the meantime, on April 3, 1998, the IACHR sent the petitioners and the State a note placing itself at their disposal for purposes of arriving at a friendly settlement and requesting their opinion on the matter. On May 20, the State reiterated that in its judgment the case was inadmissible and asked the Commission to so find. It also indicated that it was not in a position to accept the offer to arrange a friendly settlement. The petitioners were advised of the State's response on April 22. Then, on July 6, 1998, the petitioners' observations were sent to the State. The State's observations, in turn, were received on August 20 and forwarded to the petitioners on August 25. At the petitioners' request, the State's observations were sent to them a second time on October 23. A note was received from the petitioners on November 16 and forwarded to the State. The State's reply to the petitioners' most recent observations was received on March 1, 1999, and forwarded to the petitioners. The petitioners' observations on the State's third brief were received on July 13, 1999 and forwarded to the State. The latter made its observations in a note received on August 18, 1999. On October 23, additional observations were received from the petitioners and forwarded to the State on November 8, 1999. The State was given 60 days in which to reply. On January 4, 2000, the State requested an extension, which was granted on February 1, 2000. The extension was for 45 days. The State requested another extension on April 11, 2000. On April 24, that second extension was granted, and was to expire on May 15, 2000.

III. THE PARTIES' POSITION

A. The petitioners

6. On October 17, 1974, the Hanríquez siblings were arrested at home, in the city of Resistencia in northeastern Argentina, for violation of law 20.840. Their provisional acquittal and release was ordered on December 31, 1974. After the 1976 military coup, the new federal judge in charge of Resistencia's Federal Court of First Instance (hereinafter "the federal court"), appointed to the bench by the military dictatorship, ordered that the Hanríquez siblings be detained again on July 29, 1976.

7. They remained in custody until December 4, 1979, when a ruling was handed down in the case of "Franco Jorge Ramón, Rípodas Crisanto, Cordisco Juan Carlos et al on/ Lawful association and violation of law 20840." That ruling acquitted the Hanríquez siblings of the crime with which they had been charged, which was possession of subversive printed material, criminalized under Article 2.c of law 20.840. On December 6, 1979, the federal court ordered the release of the Hanríquez siblings. However, on orders of the Military Chief for Area 233, they remained in custody until December 13, 1979, the date on which that Military Chief ordered their release. The Resistencia Federal Court made their acquittal final on October 7, 1980.

8. The Hanríquez siblings instituted steps to claim the compensation provided for under law 24.043 on State Reparation. However, for purposes of reparations, the Office of the Under Secretary for Human Rights of the Ministry of the Interior recognized only the eight days that the Hanríquez siblings were held at the exclusive disposition of the military authority; it refused to recognize the period they were held by court order. Under Article 3 of Law 24.043, the petitioners went to the Administrative Law Appellate Court to appeal the decision. They petitioned to have the law declared unconstitutional, arguing, inter alia, that the law violated the constitutional principle of equal protection of the law inasmuch as it did not make allowance for redressing situations such as the one they had endured. The Administrative Law Appellate Court upheld the Ministry's decision. The petitioners then filed an extraordinary appeal with the Supreme Court of Justice of the Nation to challenge this decision. The high court, however, upheld the appellate court's decision.

a. On admissibility

9. The Hanríquez siblings have obtained a ruling from the highest court in the land, which ruled that their case was groundless. On April 7, 1997, they presented a note to the Commission, attached to which were the Supreme Court rulings on the claims filed by Abdón Zenón, Marcelino and Ramón Arcángel Hanríquez. By a note received on January 14, 1998, the petitioners also sent a copy of the one remaining ruling, rendered on October 14, 1997, in the case of Sofía Ester Hanríquez.

10. The Hanríquez siblings contend that they have exhausted domestic remedies, since the administrative-law action and the appeal provided for in law 24.043 are the proper remedies in their case. They argue that they filed the claim under law 24.043 because they firmly believed that the de facto circumstances of their case merited the same treatment allowed under that law.

To substantiate the claim they filed with domestic authorities, they presented all the de facto and de jure circumstances related to application of law 20.840 and the failure of the courts to provide guarantees during that period. The petitioners claimed "compensation for the suffering endured during the period of incarceration. This claim invokes law 24.043 on the understanding that the law in question should cover the situation described in the case brief (…) The assertion of the right to redress cannot be separated from the other issues at stake since the former is predicated upon the latter."

11. The petitioners allege that the violated right they were asserting in the actions they brought was equal protection of the law. The court settlement they were seeking was not about the reasons for the arrest, the judiciary's lack of independence, the legal description of the law, the law in effect at the time, or the legality of the proceeding ordering temporary detention pending trial. The petitioners introduced these as collateral issues intended solely to shed light on the attendant de facto and de jure circumstances, when they presented their case before the various government and judicial authorities at the time the compensation claim was initiated

B. On the merits

12. First, the petitioners allege that the State did not give the same treatment to persons covered under the same case and in the same ruling: the Hanríquez siblings were acquitted, whereas Armando Atilio Benítez, Jorge Rearte and Escolástica Esperanza Riveros de Ferreira were convicted. In the case of the last three, the Office of the Assistant Secretary for Human Rights accepted their claim to compensation for the full period of their detention, including the time ordered by the court authorities. On an appeal filed with the Administrative Law Appellate Court under Article 3 of law 24.043, the Hanríquez siblings argued the case for the discriminatory treatment they received by comparison to the other three persons. The court rejected the argument on the grounds that law 24.043 was very clear as to the situations it contemplated. Because the situation of the Hanríquez siblings was not among the hypotheticals that the law posited, the Administrative Law Appellate Court could not include them without interfering in matters of State that were not within its competence.

13. The petitioners also challenge law 24.043. They argue that under the principles of the draft law, "when compensation is merited in a given case, the law must not make distinctions or benefit one sector of aggrieved parties over another; instead, the principle of equity demands that the law benefit all those who suffered the same injury." Nevertheless, arbitrary detentions did occur that would not qualify for reparations under that law; one such case was the Hanríquez' situation. The law made no provision for the victims of forced disappearance; an oversight recently corrected in another law. It made no provision for prisoners held by the armed forces, who were never in executive custody and never tried by military tribunals. The law did not provide for those forced to flee the country because of political persecution; it made no provision for the disappeared children recovered by their families. Nor did it cover persons tried by federal courts, by judges appointed by the dictatorship, who were required to take an oath of allegiance to the so-called "National Reorganization Process." The petitioners contend that the Hanríquez siblings fall into the last of these categories. The only difference between the situation of those who received the compensation and those who, like the Hanríquez, were precluded, is that the

former satisfied some purely formal requirement, which is that they were, at some point in time, under the control of the national executive power.

14. In detailing the factual and legal circumstances of the case, the petitioners state that the Hanríquez were arrested and tried by the judiciary under the dictatorship, which was not an independent judiciary. This was all in violation of Articles XVIII, XXV and XXVI of the Declaration and Articles 7(1), (2), (3), and (6) and 8(2) of the Convention. The federal judges, like the rest of the judiciary during that period, were not independent and the courts could offer no judicial guarantees. To back up their assertions, the petitioners cite what the Commission found in its 1980 "Report on the situation of human rights in Argentina." As that report stated, competent judges were removed from the bench and the new judges that the military government appointed to replace them were forced to swear to uphold the Charter of the National Reorganization Process rather than the Constitution. Among the principles not respected were the following: nullum crimen sine lege; the presumption of innocence, and the right to be brought before a judge within a reasonable period.

15. Furthermore, the crime for which they were prosecuted was that of "possession of subversive material," stipulated in Article 2.c of law 20.840.[FN1] The Defense of Democracy Act struck down Law 20.840 in 1985. When he proposed the new act in his inaugural address, the President said the following: "The laws that need to be struck down are those that are the unmistakable brainchild of a totalitarian mentality. These are laws so sweeping and elastic that they can be used for ideological persecution of dissidents. Their penalties are so draconian – death above all-that they become weapons for annihilating an enemy rather than tools for preventing the kinds of events that are so inimical to comity in a free society." Law 20.840, therefore, was a violation of freedom of thought and expression, upheld in Articles IV of the Declaration and 13(1) of the Convention.

[FN1] Article 2 of law 20.840 reads as follows: "The following shall be punishable with imprisonment of two to six years: c) possession, display, printing, editing, reproduction, distribution or handling, by whatever means, of printed or taped material reporting or circulating facts, communications or images of the conduct described under Article 1º." Article 1º, in turn, states the following: "Provided the action committed does not constitute an offense carrying a more serious punishment, the following conduct shall be punishable by incarceration of three to eight years: attempting or planning, by whatever means, to alter or bring down the institutional order and social peace of the Nation, via means not recognized in the Constitution and laws ordering the nation's political, economic and social life, all for the sake of achieving the ends of one's ideological principles."

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16. The petitioners argue that the anomalous situation of the Judiciary at the time was compounded by the inquisition-like quality of the law under which the petitioners were prosecuted. As a result, their detention was just as wrongful as the detentions effected by executive order. However, Law 24.043, to compensate victims, made allowance for the latter, but not for people like the Hanríquez. The distinction that the law made was based on a mere formality: whether there was an executive order of detention. Hence, Law 24.043 violated the

right to equal protection of the law established in Articles II of the Declaration and 24 of the Convention.

17. The petitioners cite the ruling in the Bufano Alfredo v. Ministry of the Interior case,[FN2] which recognized the petitioner's right to claim compensation for the full time he was in exile, even though Law 24.043 made no express provision for his situation. The ruling rejected a literal interpretation of the law and opted instead for an interpretation of the law's object and purpose. The Bufano Alfredo ruling held that "what matters is not how the act of authority was exercised (…) but rather the proof that freedom was effectively curtailed." The petitioners allege that the State was unable to show that the distinction created with the reparations system established under Law 24.043 is a function of different situations. The law in question covers only those persons who were held by executive order or civilians tried by military tribunals. It uses formal or procedural requirements to exclude persons thrust into precisely the same predicament.

[FN2] Appellate Court C.A.F., 18/2/98.

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18. The petitioners also allege that "although it is obvious that any law that would disregard everything done by judges during the prolonged state of siege that Argentina endured would create an enormous vacuum in the administration of justice, this does not mean that the judges did not themselves commit violations of civil and political rights, as in this case." They also assert that "in these cases, where the detentions were driven by ideologies that persecuted freedom of opinion, judges had fewer chances of administering justice impartially. All their decisions were subject to review by the executive branch. This meant that the same case, tried by a military tribunal, the executive branch, and the judiciary, while implicitly different, was essentially the same in the means used and ends sought."

19. The petitioners state that their intention is not to dwell upon the issue of whether all acts performed by de facto government authorities should be considered illegal. Instead, their intention is to bring to light a specific miscarriage of justice detrimental to the Hanríquez, not to cause the collapse of the entire judicial system. This particular case is one of ideological persecution by a judge lacking independence, invoking a law so broad and elastic that it could be used to persecute political dissidents. It is not a question, the petitioners contend, of reversing all civil, labor, and other rulings. Instead, what they seek is acknowledgement of the fact that the Hanríquez were the victims of political persecution and that the circumstances surrounding their criminal prosecution were a patent violation of their human rights. Hence, their situation is no different from that of those persons detained and held in custody by executive order.

B. The State

a. On admissibility

20. The State acknowledges that domestic remedies have been exhausted. It asserts, however, that the petitioners' claim concerns the administrative and judicial acts that were the

reason for the remedy filed under law 24.043, which provides for reparations for persons deprived of their freedom without a court order, under the conditions and at the times stipulated therein. Therefore, the State's acknowledgment that remedies have been exhausted is only with respect to the assumptions upon which law 24.043 is premised, and does not extend to situations not contemplated in the law, such as arrest by order of a federal judge, as the petitioners contend.

b. On the merits

21. The State notes that law 24.043 in principle redresses two types of arbitrary detention experienced by persons between November 6, 1974 and December 10, 1983: detention by executive order and civilians prosecuted by military tribunals. It further notes that the proper authority interpreted the spirit of the law and expanded the range of specific situations that the State should interpret the law as encompassing: persons deprived of their freedom by order of the military districts;[FN3] persons deprived of their freedom and held in clandestine detention centers, and persons brought before military tribunals while performing their mandatory military service. Some 1300 of the cases presented were of persons whose freedom was restricted by simultaneous order of both the executive branch and the judiciary. In all these cases, it was determined that the reparation was for the period during which the person in question was held by executive order; the period during which the person in question was being held exclusively by court order was not counted. This criterion was arrived at following a debate in which other agencies made the point that no compensation was owed for the period during which the two types of detention overlapped. Based on these criteria, the benefit was denied in some 600 cases filed by persons who had been detained exclusively by order of a court; reparation was partially denied in the remaining 50% of the cases.

[FN3] See regulatory decree 1023/92.

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22. Concerning the allegation of discrimination in the law's application, the State notes that the situation of Florencio Pacífico Herrera, Armando Atilio Benítez and Jorge Rearte, named by the petitioners, was in fact not the same as that of the Hanríquez. In the case of the first three, an executive decree ordered their arrest and a second ordered an end to their arrest. For purposes of compensation the number of days between the two decrees was counted. Their situations, therefore, are not the same as that of the Hanríquez, since no executive decree was ever issued ordering their arrest. The Hanríquez were held exclusively by order of the court.

23. Concerning the allegation that Law 24.043 is discriminatory, the State argues that the guarantee recognized in Article 24 of the Convention implies an obligation to ensure that persons in equal circumstances are treated equally. However, this does not prevent the lawmaker from making provision for differing consequences to situations that the lawmaker deems to be different, provided the law is not unfair, is not unduly slanted in favor of one group or against another, does not afford some personal or class privilege or disadvantage, or even unlawful persecution. The Hanríquez' situation is not the one covered under the law, which justifies differing treatment. In the extensive interpretations that the courts have given of the situations covered under the law (see ut supra para. 21), the criterion factored in has been the arbitrary

nature of the arrest by virtue of the illegitimacy of the authority ordering the arrest. By contrast, detentions ordered by competent judges are not prima facie vitiated, particularly when the case was later reviewed to determine whether the arrest was done lawfully.

24. As for the independence and impartiality of judges under the dictatorship, the State recognizes the environment in which the judges who ordered the Hanríquez' arrest were functioning. However, "elementary reasons of juridical security and continuity and the validity of the rulings handed down by the judges on the bench between 1976 and 1983–with the same authority and legitimacy as those of the magistrates on the bench under the de jure governments– counter the arguments to the effect that there was not administration of justice during that period." The State agrees with the Commission's statement that "the legality of the system decreed by the de facto government is a question that has profound and serious political and juridical implications, which the authorities of the democratic government must resolve."[FN4]

[FN4] The State is citing from Report Nº 30/97, Gustavo Carranza Case, para. 55.

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25. The State notes that the petitioners' generalized allegation that law 20.840 under which the Hanríquez siblings were prosecuted was unconstitutional and subsequently struck down and that the Judiciary under the de facto government was not independent, is not sufficient to show that a temporary detention pending trial, ordered by a judge with competence over the case, based on a law that predated the facts in the case, is unlawful. The State does not deny that under the de facto government, human rights violations may have occurred as a consequence of detention ordered by a court on the basis of a law that predated the facts in the case. "What it cannot accept is the reparations claim, unless local remedies are exhausted in an attempt to prove that the violation occurred." The petitioners, however, do not show that they attempted to prove the human rights violation at the domestic level.

IV. ANALYSIS ON ADMISSIBILITY

A. Competence ratione personae, ratione temporis, ratione loci and ratione materiae of the Commission

26. The Commission is competent to examine the present case. Concerning its competence ratione personae, ratione temporis and ratione loci, the petition alleges acts attributable to the State and committed within its territory. The acts purportedly occurred subsequent to Argentina's ratification of the Convention.[FN5] The Hanríquez siblings are natural persons and the acts were alleged to be directly detrimental to them, as Article 44 requires, in keeping with Article 1(2) of the Convention.

[FN5] The instrument of ratification was deposited with the General Secretariat of the Organization of American States on September 5, 1984.

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27. As for the Commission's competence ratione materiae, the petitioners are alleging a violation of the right to equal protection of the law, upheld in Article 24 of the Convention and Article II of the Declaration. The Commission considers that once the Convention entered into force for Argentina, the Convention–and not the Declaration-became the primary controlling law for the Commission insofar as the petition alleges violations of substantially identical rights set forth in both instruments and the claimed violations do not involve a continuing situation.[FN6] In the instant case, the provisions upholding the right to equal protection of the law are essentially the same in the Declaration and the Convention. The Commission will, therefore, base its finding on the Convention rather than the Declaration. The Commission further notes that the parties in the instant case concur that the petition does not concern the facts that led to the arrest, the judiciary's lack of independence, arguments concerning the legal classification of the law in effect at the time, or the legality of the proceeding whereby temporary detention pending trial was ordered.

[FN6] IACHR, Report 38/99, Víctor Saldaño petition, Argentina, Annual Report of the IACHR 1998, para. 13.

B. Other admissibility requirements

a. Exhaustion of domestic remedies

28. In order for the Commission to admit a petition, Article 46(1)(a) of the Convention stipulates that the remedies under domestic law are to have been pursued and exhausted in accordance with generally recognized principles of international law. The Commission considers that Article 46(1)(a) of the Convention only requires exhaustion of those domestic remedies that are the appropriate ones for the alleged infringements of Convention-protected rights; these remedies must also be adequate, in other words, they must be capable of providing an effective and sufficient remedy to those violations.[FN7]

[FN7] A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. Therefore, remedies that, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach, need not be exhausted. It is up to the State alleging a failure to exhaust the remedies under domestic law to prove that adequate and effective remedies are still available. Inter-American Court of Human Rights. Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraphs 63, 64 and 88.

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29. The petitioners allege that the suitable remedy in their case–the remedy of appeal provided for in law 24.043-was exhausted. Arguing that law 24.043 should have made allowance for their situation, the petitioners made their case before the administrative and judicial authorities, describing all the factual and legal circumstances that made their case similar to the situations that the law contemplates. Even so, they were denied the reparation provided for in that law.

30. The State contends that the petitioners turned to the courts to appeal an administrative decision, invoking law 24.043, which made provision for reparations for those persons who were denied their freedom, without a court order, under the conditions and at the times stipulated therein. The State therefore maintains that domestic remedies were not exhausted in respect of the issues not contemplated in law 24.043, such as the type of detention to which the petitioners were subjected, on orders from a federal court, with no executive order involved. This situation and the violations it implies should have been proven in the domestic courts through the suitable remedies. The remedy that law 24.043 provides is not the suitable remedy in their case.

31. The Commission considers that the parties are in agreement on the fact that the core issue being settled in this case is the fact that the remedies that the petitioners filed under law 24.043, to obtain reparation for the violation of their human rights during the dictatorship, were denied.[FN8] Specifically, the petitioners went to court alleging a violation of their right to equal protection of the law on the grounds that their situation was not contemplated in the law in question and that in applying the law, the treatment they had received had been different from the treatment accorded to Florencio Pacífico Herrera, Armando Atilio Benítez and Jorge Rearte, who were tried by the same court. The State has not alleged failure to exhaust internal remedies in relation to the alleged violations of Article 24 of the Convention. The Commission therefore finds that on this point, internal remedies have been exhausted in accordance with Article 46(1)(a) of the Convention.

[FN8] Law 24.043, enacted December 23, 1991, Article 1.

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32. The State's allegation of a failure to exhaust the suitable remedy to obtain reparation for the alleged violations committed against the Hanríquez siblings during the dictatorship, is closely intertwined with the question of whether the right to equal protection of the law that the petitioners allege was violated. If it is found that the right to equal protection of the law was violated, this would mean that the petitioners are entitled to have their case treated in accordance with the procedure established in law 24.043. If that is the case, then the avenue the petitioners chose to pursue, which is the one established in that law, will have been the suitable remedy; by extension, then, the suitable remedies will have been exhausted. If, on the other hand, it is found that law 24.043 is not discriminatory, this would mean that the petitioners have attempted to use the special procedure established in law 24.043 to claim a compensation based on circumstances different from those that would qualify them to avail themselves of that procedure. They would not, therefore, have used the suitable remedy, which would have been a civil suit for damages filed against the State in court.

c. Deadline for presentation

33. Under Article 46(1)(b) of the Convention, the petition must be lodged "within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment." In the instant case, the State has not alleged noncompliance with this requirement. It can, then, be assumed that the State has tacitly waived its right to challenge the

petition on the grounds of a failure to comply with this requirement.[FN9] For the record, however, the Supreme Court decisions in the cases of Abdón Zenón Hanríquez, Marcelino Hanríquez and Ramón Arcángel Hanríquez are dated February 11, 1997. Its ruling in the case of Sofía Ester Hanríquez is dated October 14, 1997 and was notified on November 7 of that year. The petition was filed with the Commission on January 4, 1996, in other words, before the Supreme Court handed down its rulings on the Hanríquez' cases. The Commission therefore considers that the requirement stipulated in Article 46(1)(b) concerning the deadline for filing has been met.

[FN9] See, inter alia, Inter-American Commission on Human Rights, Report Nº 22/00, Case 11.732, Argentina. Decision of March 7, 2000, para. 32.

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d. Duplication of proceedings and res judicata

34. The Commission has received no information to indicate that the subject of the petition is pending with any other international proceeding for settlement, as stipulated in Article 46(1)(c) of the Convention. The Commission therefore considers that the requirement in question has been met. The Commission also concluded that the requirement established in Article 47(d) has also been fulfilled, inasmuch as this petition is not substantially the same as another already examined by the Commission, and no information has been received to indicate that the case has been decided by another international proceeding.

e. Characterization of the facts

35. Article 47(b) of the Convention provides that the Commission shall declare inadmissible any petition or communication presented when it "does not state facts that tend to establish a violation of the rights guaranteed by this Convention." In the instant case, the Commission considers that the facts narrated by the petitioners relative to the right to equal protection of the law could tend to establish a violation of Article 24 of the Convention. The Commission, therefore, concludes that the case is admissible on this ground as well.

V. ANALYSIS ON THE MERITS

36. Article 24 of the Convention stipulates that "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." In interpreting Article 24 of the Convention, the Inter-American Court of Human Rights has held the following:

(…) there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be

arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.[FN10]

[FN10] Inter-American Court of Human Rights, Proposed amendments to the naturalization provisions of the Constitution of Costa Rica, Advisory opinion OC-4/84 of January 19, 1984, (Ser. A) No. 4 (1984); see also id. Separate vote of Judge Piza Escalante, para. 12 (citing the European Court: "It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized").

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37. Based on the foregoing, a distinction involves discrimination when:

a) the treatment in analogous or similar situations is different;[FN11]

[FN11] In the case of Johnston and others, the European Court's decision of 18 December 1986, states
the following in paragraph 60: "Article 14 (art. 14) safeguards persons who are 'placed in analogous situations'
against discriminatory differences of treatment (…) (see, as the most recent authority, the Lithgow and Others
judgment of 8 July 1986, Series A no. 102, p. 66, § 177)."

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b) the difference has no objective and reasonable justification;
c) the means employed are not reasonably proportional to the aim being sought.

38. The Commission will now examine: first, whether law 24.043 violates the right to equal protection of the law by not including the Hanríquez' situation among the hypothetical situations wherein it becomes applicable; and second, whether its application to the case is discriminatory vis-à-vis other cases named by the petitioners.

A. Law 24.043

39. In the instant case, the petitioners allege that law 24.043 is a violation of Article 24 of the Convention. They maintain that wrongful detentions occurred that were not covered by the

reparations allowed under the law, as in the Hanríquez' case. They were prosecuted by federal courts composed of judges appointed by the dictatorship, who had to swear an oath of allegiance to the so-called "National Reorganization Process." However, whereas the situation of persons detained by executive order is covered under law 24.043, the Hanríquez' situation is not. The distinction that the law establishes is based on a formal requirement: the existence or nonexistence, as the case may be, of an executive decree ordering the detention.

40. The petitioners contend that the Hanríquez' situation is similar to the situation covered under law 24.043, because their detention was as arbitrary as the detentions done by executive order. They argue that under the de facto government, the natural judges had been removed from the bench and the new judges that the military government appointed to replace them had taken oaths of allegiance to the Charter of the National Reorganization Process rather than the Constitution. Among the principles not respected were the following: nullum crimen sine lege, presumption of innocence, and the right to be brought before a judge within a reasonable period. The law under which they were prosecuted, law 20.840, was the brainchild of a totalitarian mentality. It was so broad and elastic that it could be used for ideological persecution of dissidents, which was one of the reasons the law was struck down in 1985.

41. The State argues that Article 24 of the Convention establishes the obligation to guarantee equal treatment to persons whose circumstances are the same, but does not prevent the lawmaker from establishing different rules for what he/she considers to be different situations, provided the law is not arbitrary, is not unduly slanted in favor of one group or against another, does not afford some personal or class privilege or disadvantage, or allow for unlawful persecution. Because the Hanríquez' situation is not among those that the law covers, differing treatment is permissible. The State cites examples of the expansive interpretations that the courts have given of the situations provided for in the law, in cases of persons deprived of their freedom by order of military authorities or confined to secret detention centers, or conscripts tried by military tribunals. It points out that in all these cases, the criterion has been the arbitrary nature of the detention by virtue of the illegitimacy of the authority ordering it. The State alleges that in cases of persons deprived of their freedom by order of a competent judge, on the other hand, the detention is not vitiated prima facie and a review of the proceeding to ascertain whether or not it was lawful could have been requested.

42. As to the independence and impartiality of the judges during the dictatorship, the State acknowledges the circumstances under which the judges who ordered the petitioners' detention were operating. However, "elementary reasons of juridical security and continuity and the validity of the rulings handed down by the judges on the bench between 1976 and 1983–with the same authority and legitimacy as those of the magistrates on the bench under the de jure governments–counter the arguments to the effect that there was not administration of justice during that period." It also argues that the petitioners' generalized allegation that law 20.840 under which the Hanríquez were prosecuted was unconstitutional and subsequently struck down, and that the Judiciary during the de facto government were not independent, is not sufficient to prove that preventive detention pending trial, ordered by judges with jurisdiction in a case on the basis of a law that predated the facts in the case is unlawful. The State does not deny that human rights violations may have occurred under the de facto government, as a consequence of detentions ordered by courts on the basis of a law that predated the facts. But it cannot consent

to a reparations claim unless an attempt is first made to prove the human rights violation by exhausting domestic remedies. The petitioners, however, do not show that they made any such attempt at the domestic level.

43. The Commission will examine the criteria established in paragraph 37: a) whether law 24.043 allows different treatment in analogous situations; b) if so, whether the distinction is justified and reasonable; and c) whether the means used are proportional to the ends sought. This is not a general and abstract judgment as to whether law 24.043 is compatible with Article 24 of the Convention; instead, the intent is to confirm whether or not the discrimination alleged by the petitioners is present in this specific case. Finally, the Commission's conclusions might turn out differently if the factual premises asserted differ from those made by the petitioners in the instant case.

a. Different treatment in similar or analogous situations

44. The Commission considers that no definitive finding need be reached on the question of whether the Hanríquez' situation was analogous or similar to the situations contemplated in law 24.043. Even assuming it was, the facts alleged by the petitioners would not constitute violations of Article 24 of the Convention, for the following reasons.

b. and c. Reasonable justification and proportionality between the means used and the ends sought

45. The Commission considers that no conclusion on this point can be reached without studying it in relation to the effects of law 24.043. It must begin, then, by examining the law's effects.

46. Law 24.043 recognizes reparation in the case of persons who fit into one of its stated categories and have not been awarded compensation by a court ruling based on the same facts.[FN12] Payment of the compensation to the interested party implies that the latter waives his/her right to compensation for any damages, injuries or death caused as a result of an executive-ordered detention or arrest, or other form of executive control. It prohibits any other benefit or compensation for the same facts.[FN13] To claim this benefit, one must pursue the very summary administrative proceeding that the law establishes.[FN14] The compensation owed to each beneficiary is a sum equal to the amount stipulated in the law, multiplied by the number of days that the executive-ordered detention, arrest, or confinement lasted.[FN15] Payment of the amount owed can be effected in accordance with law 23,982, concerning the debts of the State.[FN16]

[FN12] Law 24.043, enacted 23 December 1991, Article 1.
[FN13] Id., Article 9.
[FN14] Id., Article 3. Decree 1023/92 regulates the procedure.
[FN15] Id., Article 4.
[FN16] Id., Article 7. Under law 23982, the State may pay the compensation in public bonds.

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47. Even though the law uses the term "benefit"–as did the State on several occasions in the course of this proceeding-to refer to the compensation, the latter is not a payment ex-gratia. To the contrary, the restitution accorded through this proceeding is reparation for violation of one of the State's international obligations and as such is mandatory, not optional.

48. However, the effect of law 24.043 is not to establish a substantive right to a compensation for the persons it covers and preclude those not covered. Instead, law 24.043 merely regulates a special procedure that will be used to determine: a) whether compensation is owed, b) the amount of the compensation, and c) the manner of payment. In short, routinely the normal internal channel for a person to claim the compensation he is due for human rights violations attributable to the State is a lawsuit against the State for damages and injuries resulting from its wrongful acts and the like, which are on the whole applicable in the case of liability suits against the State. In this case, however, law 24.043 gives the persons it covers the right to opt instead for the procedure it establishes. Persons not covered under its provisions are in no way stripped of their right to file suit for compensation.

49. The Commission notes that persons who opt for the procedure ex-lege 24.043 enjoy certain prerogatives, but in exchange for conceding certain rights, among them the right to bring or prosecute an action for damages and injuries, a right they would have otherwise retained.

50. Because the procedure established by law 24.043 is voluntary, because the State and those who subscribe to the procedure ex-lege 24.043 make mutual concessions, and because the compensation paid by virtue of the mutual concessions is compensation in fulfillment of an international obligation, the Commission considers that law 24.043 represents an offer that the State makes to certain persons under the terms of the arrangement: payment of compensation on condition that the person in question accepts certain terms. By subscribing to the corresponding proceeding before the authority competent to apply the law, the person is giving his/her consent to the terms of the arrangement. This is consistent with the consequence that the law stipulates, which is that the beneficiary waives any right to bring any other suit against the State seeking any form of compensation for the situations contemplated in the law.

51. Against this backdrop, the IACHR will examine the State's argument that in the case of persons deprived of their freedom by executive order, the detention is prima facie illegitimate, whereas in the case of persons deprived of their freedom by order of a competent judge, the detention is not prima facie vitiated, which is what justifies the differing treatment. This is where the relationship that must exist between the justification of a law and its effects becomes relevant. If the intent of the law were to preclude persons not contemplated therein from the right to compensation, the Commission would have to disagree with the State's argument. In effect, the generalized absence of guarantees prevailing in the Argentine judicial branch of government during the era of the dictatorship has been well documented by the Commission, and was noted by the petitioners. Victims of the abuses perpetrated by that branch of government have the same substantive right to redress as the victim of any violation of a right protected by the Convention.

52. However, as already indicated, law 24.043 does anything but preclude an individual's right to compensation; instead, it creates a special procedure whereby some persons may opt to file a claim for compensation. The Commission must assess whether the State's justification for this effect is objective and reasonable.

53. The Commission considers that the justification offered by the State to make the distinction, i.e., that the executive-ordered detention is prima facie vitiated whereas the detention ordered by federal judges is not, is objective and reasonable, given the fact that the effect of the law is to give persons who qualify under its provisions the right to pursue a special procedure to arrange compensation for human rights violations. It also finds proportionality between the means used and the aim sought. Finally, the Commission concludes that the distinction embodied in law 24.043 does not violate Article 24 of the Convention.

B. Application of law 24.043

54. In addition to challenging the law, the petitioners contend that in the same case and same court ruling, the Hanríquez siblings were acquitted and the other persons convicted, namely Armando Atilio Benítez, Jorge Rearte and Escolástica Esperanza Riveros de Ferreira. In the case of the latter three, the Office of the Under Secretary for Human Rights recognized their entitlement to compensation for the full period of their detention, including their court-ordered detention. The petitioners argue that the State gave unequal treatment to persons included in the same judicial action.

55. The State argues that the persons named by the petitioners as examples of persons supposedly in their same predicament were in fact not in the same predicament at all. Law 24.043 theoretically redresses two types of arbitrary detention endured by persons during the period from November 6, 1974 and December 10, 1983:[FN17] detention by order of the national executive branch and civilians detained on orders of military tribunals. The authority for interpreting the spirit of the law expanded the scope of the specific situations that the State should consider. However, in all cases in which persons were detained by executive order and court order simultaneously, the standard followed was to recognize the benefit in respect of the period during which the party in question was held under an executive order, and to exclude any time period when the person was held solely by virtue of a court order. In the cases that the petitioners cite-Florencio Pacífico Herrera, Armando Atilio Benítez and Jorge Rearte-, an executive order put them under the control of the executive branch of government; a subsequent executive decree ordered their release. The period counted for purposes of the compensation was the interim between the two orders. Their situation, therefore, was not the same as the petitioners' in that there was no executive decree involved in the petitioners' case; their detention was exclusively by virtue of a court order.

[FN17] Provided for in statutory decree 1023/92.

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56. The Commission must begin by determining whether treatment is different in analogous or similar situations. In the instant case, it is a question of determining whether the Hanríquez'

situation at the time was analogous or similar to that of Florencio Pacífico Herrera, Armando Atilio Benítez and Jorge Rearte. The Commission notes that the cases of Florencio Pacífico Herrera, Armando Atilio Benítez and Jorge Rearte, which the petitioners cite, has one feature that distinguishes them from the Hanríquez' alleged situation. In the former case, the court order of arrest and the executive order of detention overlapped, as the State has demonstrated with copies of the respective decrees ordering detention and the end to the detention period. In fact, the situation of Florencio Pacífico Herrera, Armando Atilio Benítez and Jorge Rearte is one of those contemplated in Law 24.043. The Hanríquez, on the other hand, are claiming a right to compensation for a period of detention that was strictly court ordered. Moreover, although not part of the instant case, their claim for compensation for the eight-day period they were held on orders from the military authorities was granted. While in principle the Hanríquez' situation was neither similar nor analogous to that of Florencio Pacífico Herrera, Armando Atilio Benítez and Jorge Rearte, the Commission wishes to make the following points clear.

57. The Commission notes that the petitioners do not deny that the Hanríquez' situation does not fit into any of the hypotheticals posited in law 24.043. Under Article 1 of Law 24.043, persons who can invoke the law are: 1) those who, "during the state of siege, were under the control of the National Executive Power, by the latter's decision" and 2) those who, "as civilians, were in custody by order of military tribunals." The petitioners are seeking to have the benefit of compensation extended to those who, like themselves, were denied their freedom exclusively by court order and, in this specific case, for a violation of law 28,040, which was eventually struck down when democratic government was restored.

58. Furthermore, inasmuch as the petitioners did not challenge them, the Commission accepts the State's assertions concerning the criterion that internal organs are using to interpret and apply law 24.043 and the consistency with which that criterion has been applied. The State asserts that the criterion adopted has been to grant compensation to persons detained by executive order, for the period they were detained, as the law requires, regardless of whether those persons were being held simultaneously by order of another branch of government. By contrast, compensation is not being awarded in the case of persons detained solely by court order, with no concurrent executive order of detention.

59. The core issue, therefore, is the criterion used by the organs of the State to interpret a domestic law; a criterion applied across-the-board to persons whose circumstances are the same. The Commission, therefore, understands that the domestic organs' application of the law has not produced a violation of the right to equal protection of the law, upheld in the Convention.

60. The Commission considers that the petitioners have not shown that their situations were similar or analogous to that of the other persons prosecuted with them and who received the compensation. The Commission, therefore, concludes that the domestic courts' application of the law in the Hanríquez' case did not violate Article 24 of the Convention.

VI. CONCLUSIONS

61. The fact that the factual situation that the petitioners describe was not one of those covered under law 24.043 does not make the law discriminatory in the sense of Article 24 of the

Convention. Also, the petitioners have not shown that the Hanríquez' situation was similar or analogous to that of the individuals prosecuted with them and who received the compensation. Consequently, the Commission concludes that the facts alleged by the petitioners do not constitute a violation of Article 24 of the Convention.

62. Based on the foregoing arguments of fact and of law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare that the facts alleged by the petitioners do not constitute violations of Article 24 of the Convention.
2. To send the present report to the parties, make it public and include it in its annual report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the third day of October in the year 2000. (Signed): Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; Commissioners Marta Altolaguirre, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo.