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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 9/02; Petition 11.856
Session:	Hundred and Fourteenth Regular Session (25 February – 15 March 2002)
Title/Style of Cause:	Aucan Huilcaman, Juana Santander Quilan, Fernando Perez Huilcaleo, Carlos Catrigan Curin, Alejo Chanapi Llancafilu, Manuel Antilao Marileo, Jorge Pichinal Painecura, Juan H. Traipe Llancapan, Jose Luis Huilcaman H. and Francisco Antileo Pitriguan v. Chile
Doc. Type:	Decision
Decided by:	President: Juan Mendez; First Vice-President: Marta Altolaguirre; Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts. In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commission member Jose Zalaquett Daher, a Chilean national, did not participate in the discussion of or vote taken on this matter.
Dated:	27 February 2002
Citation:	Huilcaman v. Chile, Petition 11.856, Inter-Am. C.H.R., Report No. 9/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by:	APPLICANT: Roberto Celedon Fernandez
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I. SUMMARY

1. On September 18, 1996, Mr. Aucan Huilcaman Paillama and nine other members of the Mapuche organization Aukiñ Wallmapu Ngulam (Council of All Lands)[FN1], with Roberto Celedón Fernández serving as their attorney (hereinafter jointly referred to as “the petitioners”), sent a communication to the Inter-American Commission on Human Rights (hereinafter “the IACHR” or “the Inter-American Commission”) wherein they allege that the Republic of Chile (hereinafter “the State”) is responsible for violating the rights of more than one hundred persons belonging to that ethnic group. They complain of “unjust persecution via the courts”, said to have started in June 1992 and ended in March 1996, as punishment for “having peacefully claimed the traditional rights associated with their existence and culture.” They are referring to acts organized and conducted by the Council of All Lands in April 1992, to protest the quincentennial of the arrival of the Spanish in the American hemisphere. These included the formation of a “first Mapuche tribunal” and the so-called “land reclamation process” in which they occupied various properties adjacent to their communities.

[FN1] Mr. Huilcaman Paillama signed the communication as the person in charge of international relations of the Collinke community, Lumaco municipality. The other persons that signed the communication sent to the IACHR were the following: Juana Santander Quilan,

Fernando Pérez Huilcaleo, Carlos Catripán Curin, Alejo Chañapi Llancafilu, Manuel Antilao Marileo, Jorge Pichiñal Painecura, Juan H. Traipe Llancapan, José Luis Huilcaman H. and Francisco Antileo Pitriguan.

2. In response, Chile's judicial branch of government appointed a visiting magistrate who heard a number of criminal complaints brought by the governor of Region IX of that country against more than one hundred Mapuche and against the organization called Council of All Lands. Proceedings were conducted on charges of land grabbing. The magistrate declared the Council of All Lands to be an unlawful organization. The judgment of first instance, of March 11, 1993, convicted 141 persons of the Mapuche ethnic group, and was confirmed by a decision of the Temuco Appellate Court on September 6, 1994. Then, on March 27, 1996, the Chilean Supreme Court rejected the appeal filed by the attorneys for the alleged victims, seeking reversal of the lower courts' decisions.

3. The petitioners allege serious procedural irregularities, as in the case of two Mapuches who were convicted of land grabbing without ever being charged with that crime, and another who was convicted in the court of second instance, although he was not tried or even named in the judgment of first instance. Other persons were prosecuted, but their names do not appear in any judgment of conviction, leaving their situation undefined.

4. The petitioners allege that the facts reported are violations of various articles of the American Convention on Human Rights (hereinafter the "American Convention"): the right to personal liberty (Article 7); the right to a fair trial (Article 8); freedom of association (Article 16), and the right to equal protection (Article 24). They further contend that all the admissibility requirements set forth in the Convention have been fulfilled. The Chilean State, for its part, does not deny the facts denounced. It argues, however, that these facts are not imputable to the State and asks the Commission to so find. The State also asks the Commission to regard the creation of the Corporación Nacional de Desarrollo Indígena [National Indigenous Development Corporation] and the enactment of Indigenous Law N° 19,253 as measures to ensure respect for the human rights of the alleged victims.

5. Without prejudging the merits of the case, in this report the Commission concludes that the case is admissible, as it meets the requirements stipulated in Articles 46 and 47 of the American Convention. The Commission, therefore, decides to notify the parties of the decision and to proceed with the analysis of the merits of the alleged violation of Articles 1(1), 7, 8, 10, 16, 24 and 25 of the American Convention.

II. PROCESSING BY THE INTER-AMERICAN COMMISSION

6. The original petition was received on September 23, 1996. On November 8 of that year, the Commission asked the petitioners to supply additional information on the alleged violations and identify the victims by name. That information was sent to the Commission in communications dated March 18 and October 18, 1997.

7. In accordance with the Rules of Procedure in effect at that time, on December 22, 1997, the Inter-American Commission forwarded the pertinent parts of the petition to the Chilean State, assigned it case number 11.856 and requested information from the State within 90 days. At the State's request, on April 1, 1998 the Commission granted it a 60-day extension.

8. The State submitted its response on June 5, 1998. In a communication dated July 30, 1998, the petitioners forwarded their observations on the State's response. The Inter-American Commission forwarded that communication to the State on August 21, 1998.

9. On October 6, 1998, a hearing on this matter was held at Commission headquarters. The document "IACHR proposal for a friendly settlement" was signed there by both parties and the representatives of the Inter-American Commission. Again at the State's request, a 30-day extension was granted on November 18, 1998.

10. On March 3, 1999, another hearing was held at Commission headquarters on the same matter. On April 16 of that year, the Chilean State requested another extension to compile the information requested by the Commission. On May 20, 1999, it was granted a 45-day extension.

11. On March 1, 2001, another hearing on this matter was held at Commission headquarters. There, an agreement to advance the friendly settlement procedure forward was signed. In that agreement, the parties pledged to finalize a friendly settlement of the matter within 90 days of the date of the agreement, and to file a "preliminary joint report" with the Commission during the latter's 111th regular session, to be held in Santiago, Chile, in April 2001.

12. On March 8, 2001, the Inter-American Commission received a communication from the Director of Human Rights of the Ministry of Foreign Affairs of Chile, wherein he requested an amendment to the text of the aforementioned agreement to advance the friendly settlement procedure. The Commission consulted the petitioners that same day, who had no objection to the change.[FN2]

[FN2] Paragraph 3, whose elimination the State requested, read as follows: "For the record, the Government states its position to the effect that the judicial irregularities committed in this case in Chile are errors committed solely by that branch of government and not a conflict between the executive branch of government and the Mapuche community." Mr. Aucan Huilcaman Paillama and Mr. Roberto Celedón Fernández agreed to have that paragraph removed from the text, although they regretted that it may have been misinterpreted and said that "dialogue, negotiation and agreement are facilitated when the parties share the same moral and legal appreciation of the facts, and see matters for what they are."

13. In Santiago, Chile, on April 5, 2001, the petitioners delivered a report to the Commission wherein they expressed regret at the fact that it was not possible to form the inter-ministerial commission for a friendly settlement of the matter. They did, however, reassert their willingness to conclude the friendly settlement process via that avenue. The State did not submit any information on the matter at that time.

14. On May 31, 2001, the Chilean State submitted a friendly settlement proposal that included clauses concerning land, expunging of criminal records and symbolic reparation. The Inter-American Commission forwarded the proposal to the petitioners on June 1, 2001.

15. On August 14, 2001, the petitioners requested a hearing, which the Commission granted in order to advance the friendly settlement of the matter. However, on October 9, 2001, before the hearing was held, the State sent the Commission a communication wherein it stated that it had not received any commentary from the petitioners concerning the State's friendly settlement proposal. The State asserted that because of that, it would not send its representatives to the hearing set for November 15, 2001, unless it received a "clear signal" from the petitioners as to the document in question. On October 12, 2001, the Commission sent communications to both parties requesting that they advise the Commission, before October 26 of that year, whether they were interested in pursuing the friendly settlement procedure; if not, the hearing would be canceled and the Commission would continue to process the case.

16. On October 26, 2001, the State replied, indicating its interest in participating in the hearing and arriving at a friendly settlement of the matter. On that same day, the petitioners sent a note in which they examined, point-by-point, the proposal the State submitted on May 31, 2001, and concluded that it was insufficient and unacceptable. Because of that position, the Commission notified the parties of its decision to end the friendly settlement phase, to cancel the hearing convened for that purpose, and to continue to process the case.

III. THE PARTIES' POSITIONS ON ADMISSIBILITY

A. The petitioners' position

17. The petitioners argue that the facts denounced establish violations of human rights committed by agents of the State. Specifically, they contend that in Case N° 24,486, which visiting Magistrate Antonio Castro Gutiérrez instituted on June 23, 1992 for land grabbing, unlawful association and other charges, Aucan Huilcaman Paillama was charged with establishing an unlawful association called Consejo de Todas las Tierras [Council of All Lands], land grabbing and the theft of two head of cattle. The petitioners go on to list another 140 persons of Mapuche ancestry who were accused of land grabbing, unlawful association, contempt, theft and battery.

18. The petitioners allege that the judgement of first instance delivered on March 11, 1993, and convicting 141 Mapuche, had a number of "irremediable procedural flaws" that constitute "serious violations of the rules of due process." For example, they allege that in item 17 of the operative part of the judgment of first instance, which was confirmed by a higher court, Mr. Juan Humberto Traipe Llancapan and Mr. Juan Carlos García Catrimán are convicted of land grabbing even though neither of them was charged with that crime; furthermore, the record shows that they were acquitted. Likewise, although Mr. Nelson R. Catripán Aucapan was allegedly charged with land grabbing, his name does not appear in the final judgment, leaving him in a kind of "judicial limbo."

19. In the case of Ceferino O. Jhuenchiñur Nahuelpi, the petitioners state that he was charged with stealing two head of cattle; but again, the magistrate did not pronounce judgment in his case in the ruling. As a result, the alleged victim's "procedural status vis-à-vis this crime was left completely undefined, which had serious consequences for his personal life, because an entry of cattle rustling or animal theft appears in his record, although no court has delivered any judgment on his case." [FN3] They add that the court of first instance has not delivered its judgment in the cases of Berner Alfonso Curin Llanquinao, Víctor Manuel Reimar Cheque, Ernesto Orosman Cayupán Huenchiumur and Lorenzo del Carmen Reima Muñoz who were charged with aiding and abetting the crime of cattle rustling or animal theft.

[FN3] Communication from the petitioners, dated September 18, 1996, p. 13.

20. The petitioners allege that these procedural irregularities are violations of the right to a fair trial and "reflect blindness and carelessness in the courts' conduct." The petitioners go on to say the following:

The examination of the merits of the accusations made in case N° 24,486 of the Third Criminal Court of Temuco, simply reveals a perverted administration of justice whereby Chile's aboriginal ethnic group, the Mapuche, is being denied justice.

Mr. Castro's conduct is a painful demonstration of bias and utter subordination to the regional political power, which transformed the court into an echo chamber of the political power that the governor at that time, Mr. Joaquín Fernando Chuecas Muñoz, wielded to persecute and control. The trial court denied the accused the right that is the lynchpin of the right to a fair trial: the right to a hearing by an impartial judge or tribunal. We are not referring here to the deposition of the accused; instead, we are referring to the attitude that is born of the sense of rectitude inherent in every person who administers justice with honor: a willingness to hear the favorable and the unfavorable. [FN4]

[FN4] Communication from the petitioners, September 18, 1996, p. 14.

21. The allegations summarized here concern the alleged violations of Article 8 of the American Convention. The petitioners also contend that the State violated, to the detriment of the victims in this case, the right protected under Article 16 of the American Convention: in an utter abuse of their authority, the organs of the administration of justice have declared a Mapuche association to be unlawful, namely the Council of All Lands, whose members are the ancestral authorities of that people. They also contend that this measure is a violation of the Mapuches' right to equal protection recognized in Article 24 of the American Convention and other international conventions, [FN5] and also violates "the spirit, sense, and content of the new Indigenous Law N° 19,253." [FN6]

[FN5] The petitioners also invoke the following principle:
All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice

Art. 1(2) of the Declaration on Race and Racial Prejudice, approved by the General Conference of the United Nations Educational, Scientific and Cultural Organization, November 27, 1978.

[FN6] Article 1 of the Indigenous Law that the petitioners invoke provides the following:
The State recognizes that Chile's indigenous people are descendants of human groups that have lived within the national territory since Pre-Colombian times, that they preserve their own ethnic and cultural expressions. For them, the land is the fundamental principle of their existence and culture.

B. The State's position

22. In its original communication, the State writes the following:

It is important to begin by making it clear that the Constitutional Government of Chile does not deny the facts upon which the communication from the representatives of the Council of All Lands is based. However, this statement cannot and should not be interpreted to mean that the State is prohibited from using all legal means at its disposal to restore public order when it is threatened or disrupted.[FN7]

[FN7] Communication from the State, dated June 5, 1998, p. 2.

23. In its response, the State underscores the fact that when democracy was restored in Chile, the government initiatives promoted lead to the creation of what is now the National Commission for Indigenous Development [Comisión Nacional de Desarrollo Indígena] (CONADI), established by Law 19,253 of October 5, 1993.[FN8] It goes on to say that "the democratic State of Chile has demonstrated its intention to promote the development of the indigenous peoples who live within its territory" through other measures, over and above its enactment of the aforementioned law and creation of CONADI.[FN9]

[FN8] The State writes the following:

The Indigenous Law establishes, inter alia, provisions intended to guarantee respect for the major ethnic groups that live within Chilean territory. It also contains provisions that recognize indigenous status, their culture and the indigenous communities. Particular mention must be made of the chapter concerning recognition, protection and development of indigenous lands.

Idem.

[FN9] The specific measures mentioned by the State are:

- Creation of the Indigenous Development Fund to finance special development programs to assist indigenous persons and communities.

- Establishment of Indigenous Development Areas, which are parts of the national territory where the State focuses its indigenous development projects.
- Recognition of and respect for the indigenous cultures and languages and their incorporation into the system of formal education.
- Creation of the Fund for Indigenous Lands and Waters, to procure lands for indigenous persons or communities and to finance the formation, normalization, or purchase of water rights or finance works to obtain this resource.

Idem, p. 3.

24. As for the allegations of violations of the American Convention, the State asserts that the alleged victims were detained “on orders issued by the competent court authority and carried out by the Chile’s National Police (Carabineros)” and were then “brought before a competent, independent and impartial tribunal.” It adds the following:

Any errors that may have been committed during the proceedings in the case, as might have happened with any case being heard by courts composed of fallible human beings, cannot and should not be taken out of the context in which they occurred. As the petitioner points out, there were apparently errors in the identification of some of those who stood trial; but this is far from a deliberate plot to violate the rights or judicial guarantees, much less a policy of discrimination against members of the Mapuche ethnic group, as the communication portrays it.[FN10]

[FN10] Idem, p. 4.

25. The State’s position with respect to the alleged violation of Article 16 of the American Convention is that “the Chilean courts have not tried to deny the Mapuche their right to associate among themselves or with other persons.” On the contrary, the State maintains that its action in this case is legitimate and conforms to the applicable rules, inasmuch as “it is directed against certain actions taken by members of the indigenous organization that are contrary to the principles established in the Constitution, the American Convention on Human Rights and the law.”

26. With regard to Article 24 of the Convention, the State contends that its action “should not be interpreted as discrimination against a particular ethnic group” and that its intention “was not to outlaw the Council of All Lands, but rather to penalize, through the courts, the commission of acts that constitute crimes under Chile’s domestic law.”[FN11] It goes on to say that “the present Administration is fully respectful of the independence of the judicial branch of government and cannot invalidate or nullify its decisions, even when those decisions are contrary to its interests or policies.”

[FN11] The State describes those acts as follows:

The land grabbing that the Council of All Lands encouraged and that members and leaders of that organization carried out, created commotion in the country, especially in region IX, and

caused the authorities charged with preserving public order considerable concern. It is important to recall that during the Agrarian Reform process in the 1970s, there were similar cases of land grabbing or squatting that triggered escalating violence and ultimately resulted in the coup d'etat of September 11, 1973.

Idem, p. 6.

27. Finally, the State requests that the Commission declare that “the violation of human rights reported in the communication that led to Case N° 11.856 is not imputable to the Chilean State, nor does the latter bear any responsibility therein” and that it regard the creation of CONADI and the enactment of the Indigenous Law as “measures adopted to ensure respect for the petitioners’ human rights.”

IV. ANALYSIS

A. The Inter-American Commission’s competence ratione personae, ratione materiae, ratione temporis and ratione loci

28. Under Article 44 of the American Convention, the petitioners are authorized to lodge complaints with the IACtHR. In the instant case, the alleged victims named in the petition are individuals whose rights under the Convention Chile undertook to respect and guarantee. With regard to the State, the Inter-American Commission notes that Chile has been a party to the American Convention since August 21, 1990, the date on which the respective instrument of ratification was deposited. The Commission, therefore, is competent ratione personae to examine the petition.

29. The Commission is also competent ratione loci to take up the petition, inasmuch as it alleges violations of rights protected under the American Convention, said to have occurred within the territory of a State Party to that international instrument. The IACtHR is also competent ratione temporis since the obligation to respect and ensure the rights protected by the American Convention was already binding upon the State at the time the events alleged in the petition occurred. Finally, the Commission is competent ratione materiae, inasmuch as the petition denounces violations of human rights protected under the American Convention.

B. Other requirements for the admissibility of the petition

a. Exhaustion of remedies under domestic law

30. The petitioners allege that with the Supreme Court decision of March 27, 1996, which denied the appeal filed by the representatives of the alleged victims seeking reversal of the lower court rulings, the remedies under Chilean domestic law were exhausted. The State did not contest that argument. Consequently, the Commission considers that the requirement stipulated in Article 46(1)(a) of the American Convention has been met.

b. Time period for submitting a petition

31. The petition was received at the Commission on September 23, 1996, which is within the time period stipulated in the American Convention. Here again, the State did not contest this point. Therefore, the Inter-American Commission considers that the requirement established in Article 46(1)(b) of the Convention has been satisfied.

c. Duplication of proceedings and res judicata

32. There is nothing in the case file to suggest that the present matter is pending in another international proceeding for settlement or that it is substantially the same as one previously decided by the Inter-American Commission. Therefore, the Commission concludes that the exceptions provided for in Article 46(1)(c) and 47(d) of the American Convention do not apply.

d. Characterization of the facts alleged

33. The Inter-American Commission considers that the facts that the petitions state tend to establish violations of the rights to personal liberty, to due process, freedom of association, and to equal protection.

34. Although not asserted by the petitioners, in application of the principle iuria novit curia the Inter-American Commission also believes that the facts described could also constitute violations of the rights to compensation for miscarriages of justice and the right to judicial protection.

35. The Commission therefore considers that if true, the facts alleged in the present case would constitute violations of the rights guaranteed in Articles 7, 8, 10, 16, 24 and 25 of the American Convention, in connection with the general obligation to respect and ensure all rights enshrined in Article 1(1) of that international instrument.

V. CONCLUSIONS

36. The Inter-American Commission concludes that it is competent to take up the merits of this case and that the petition is admissible under Articles 46 and 47 of the American Convention. Based on the foregoing arguments of fact and of law, and without prejudging the merits of the question,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible, inasmuch as it concerns alleged violations of the rights protected under Articles 1(1), 7, 8, 10, 16, 24 and 25 of the American Convention.
2. To notify the parties of this decision.
3. To proceed with its analysis of the merits of the case, and
4. To publish this decision and include it in the Commission's 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., the 27th day of February 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vicepresident; Robert K. Goldman, Julio Prado Vallejo, and Clare K. Roberts, Commission members.