

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 45/02; Petition 12.219
Session:	Hundred and Sixteenth Regular Session (7 – 25 October 2002)
Title/Style of Cause:	Cristian Daniel Sali Vera, Claudio Salvador Fabrizzio Basso Miranda and Javier Andres Garate Neidhardt v. Chile
Doc. Type:	Decision
Decided by:	President: Juan E. Mendez; First Vice-President: Marta Altolaguirre; Commission members: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, Susana Villaran de la Puente. In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commission member Jose Zalaquett, a Chilean national, did not participate in the discussion of this matter or in the decision taken thereon.
Dated:	9 October 2002
Citation:	Sali Vera v. Chile, Petition 12.219, Inter-Am. C.H.R., Report No. 45/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by:	APPLICANTS: the Center for Justice and International Law, the Corporacion de Derechos del Pueblo and a Chilean conscientious objectors' group called "Ni Casco ni Uniforme"
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I. SUMMARY

1. On October 6, 1999, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition lodged by the Center for Justice and International Law (CEJIL), the Corporación de Derechos del Pueblo (CODEPU) and a Chilean conscientious objectors' group called "Ni Casco ni Uniforme" (NCNU) (hereinafter "the petitioners"). The petition alleges that the State of Chile (hereinafter "the State" or "the Chilean State") violated Articles 1(1), 2, 11 and 12 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") to the detriment of Cristián Daniel Salí Vera, Claudio Salvador Fabrizzio Basso Miranda and Javier Andrés Garate Neidhardt.

2. The petitioners allege that the State denied the alleged victims' right to conscientious objection, thereby directly violating their right to freedom of conscience and religion and their right to privacy. In so doing, the State did not comply with its obligation to respect the rights protected under the Convention and to ensure their free and full exercise. The State is not raising any objection alleging a failure to comply with the admissibility requirements. It considers that there has been no violation of Articles 1(1), 2, 11 and 12 of the Convention, as the alleged victims have not been summoned before a court or been penalized in any way for their failure to

perform their mandatory military service. The State also contends that the obligation of military service is a limitation of rights that the American Convention itself authorizes.

3. After analyzing the parties' positions, the Commission concludes that the petition is admissible under Articles 46 and 47 of the American Convention, and decides to continue with the analysis of the merits of the case.

II. PROCESSING BEFORE THE COMMISSION

4. The original petition was received at the Commission on October 6, 1999, and transmitted to the Government on October 14, 1999, which was given a period of 90 days in which to submit information. The Commission sent another communication to the State on April 25, 2000, reiterating the request for information and setting a period of 30 days for the State to respond.

5. On June 5, 2000 the State requested a 60-day extension to respond to the petition. On June 7, 2000 the Commission advised the State that the maximum time period allowed under Article 34(6) of the Commission's Rules of Procedure had already expired. It therefore asked the State to submit its observations within as short a time as possible. The State submitted its observations on July 11, 2000. The Commission transmitted that information to the petitioners and set a time period of 30 days for the petitioners to respond.

6. On October 10, 2000 during its 108th regular session, the Commission held a hearing to discuss the admissibility of the present case.

7. On December 7, 2000 the Commission received the petitioners' brief, containing their observations on the State's response. In that communication the petitioners added the Servicio de Paz y Justicia (SERPAJ) as another co-petitioner. On December 13, 2000 the Commission transmitted the pertinent parts of that brief to the State, and set 30 days as the time period for it to send its comments. On January 18, 2001 the Commission received a communication from the State asking for a 30-day extension to answer the petitioners' observations. That extension was granted on February 2, 2001.

8. The Commission received the State's observations on May 23, 2001 and forwarded them to the petitioners on May 25, 2001 setting a one-month time period for the petitioners to submit their observations. The petitioners' response was received on June 25, 2001 and transmitted to the State on July 17 of that year. The State was given one month in which to present its observations. On August 31 the Commission received a final communication from the petitioners.

III. THE PARTIES' POSITIONS

A. The petitioners' position

9. The petitioners allege that under Chile's current laws, once the alleged victims reached the age of 18 they were compelled to do mandatory military service. The petitioners contend that

in December 1998, before the State put together the list it publishes in March of each year containing the names of those citizens who will be called into active military service, each of the alleged victims filed individual requests with the Oficina de Partes del Departamento de Reclutamiento de la Dirección General de Movilización del Estado de Chile, wherein they expressed their conscientious objection to mandatory military service and to their participation therein.

10. The petitioners state that the alleged victims never received any reply to their requests and that despite their express conscientious objection, their names were included in the regular list of individuals called to start their compulsory military service. The three young men were ordered to report at 8.00 a.m. on March 18 and 19, 1998, to begin the normal period of compulsory military service.

11. Concerning the requirement of exhaustion of local remedies, the petitioners point out that the alleged victims filed an appeal with the Santiago Appellate Court seeking protection of their right to freedom of conscience, recognized in Article 19(6) of the Constitution of Chile. On March 22, 1999, the Santiago Appellate Court declared their appeal inadmissible, whereupon the alleged victims filed an appeal with the court asking it to reverse its own decision. The Santiago Appellate Court rejected this appeal on March 29, 1999.

12. The petitioners argue that the facts stated in the petition tend to establish a violation of the right to freedom of conscience of the young Salí, Basso and Garate, inasmuch as they have been subject to restrictive measures that might impair their freedom to maintain their beliefs as regards the manner in which they carry forward their life plan. The petitioners further contend that this constitutes an arbitrary interference in the private life of the alleged victims, inasmuch as "the right to privacy constitutes an area of moral autonomy within which every individual can develop, without arbitrary interference, all those issues that are a manifestation of one's free will and that represent that individual's particular personal identity." [FN2]

[FN2] The petitioners' brief of October 6, 1999, p. 11.

13. The petitioners also contend that the fact that there are no laws to protect the alleged victims' situation is itself a violation of Article 2 of the American Convention. Lastly, they argue that by failing to provide grounds to allow conscientious objectors to be exempt from military service, the State is violating its duty to ensure the rights recognized in the Convention, particularly its duty to effectively protect the right to freedom of conscience.

B. The State's position

14. The State has not raised any objection alleging failure to comply with the remedies under domestic law or the other requirements for the admissibility of this petition.

15. The State also acknowledges that Chilean domestic law does not provide any guarantee to those persons who believe that they cannot perform compulsory military service by reason of

conscientious objection. During the hearing held to discuss the admissibility of the case, the State explained that in order to allow conscientious objection a constitutional amendment would be required, and that such a process is a complex one. On the other hand, the State reported that the military service system is undergoing reform, that, in principle, military service would become voluntary, and that the State would resort to a conscription by drawing only if the volunteer system failed to achieve the minimum number of enlistments necessary. This process would treat everyone the same.

16. As to the specific case of the young Salí, Basso and Garate, the State contends that thus far none of them "has received any summons from the Armed Forces or from a military or civil court; nor have they been threatened, coerced, followed, prosecuted, deprived of their liberty or subjected to any civil, administrative or criminal sanction for the reason that is the cause of the petition in question." The State therefore considers that the complaint is unfounded and unwarranted and should consequently be rejected on the grounds that it does not tend to establish facts that constitute violations of the American Convention.

17. The State also contends that the American Convention provides that limitations on freedom of conscience are allowable, for certain reasons, security being one of them, as stipulated in Article 32(2) of the American Convention. It also asserts that military service does not require a person to do anything contrary to his/her innermost beliefs; "it is simply military preparation or training for a predetermined period of time."

18. The State argues that military service does not violate the right to a privacy since it does not constitute arbitrary or abusive interference in a person's private life; instead, that it is governed by law and is part of the cultural background of the young people who must perform it.

IV. ANALYSIS ON COMPETENCE AND ADMISSIBILITY

A. Competence

a. The Commission's competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*

19. Under Article 44 of the American Convention, the petitioners are entitled to lodge petitions with the Commission. The petition refers as the alleged victims to persons whose Convention-recognized rights Chile undertook to respect and ensure. As for the State, Chile has been a party to the American Convention since August 21, 1990 the date on which its instrument of ratification was deposited. The Commission, therefore, has competence *ratione personae* to examine the petition.

20. The Commission is competent *ratione loci* to examine the petition because the latter alleges violations of rights protected in the American Convention that were said to have occurred within the territory of a State party to the Convention.

21. The Commission is competent *ratione temporis* inasmuch as the obligation to respect the rights recognized in the American Convention and to ensure their free and full exercise was

already binding upon the State at the time the facts alleged in the petition are said to have occurred.

22. Finally, the Commission is competent *ratione materiae* because the petition denounces violations of human rights protected by the American Convention.

B. Admissibility requirements

a. Exhaustion of remedies under domestic law

23. Under Article 46(1) of the American Convention, one of the requirements that must be met for a petition to be admissible is that the remedies under a State's domestic laws have been pursued and exhausted. The State, however, did not raise any preliminary objections alleging a failure to exhaust domestic remedies. The Commission therefore considers that with respect to this petition, the Chilean State did not claim during the initial proceedings the failure to exhaust the remedies under domestic law.

24. The Inter-American Court of Human Rights has established that, in order to be timely, the objection asserting failure to exhaust domestic remedies must be raised during the first stages of the proceeding; otherwise, it is to be presumed that the interested State has tacitly waived the use of that objection.[FN3]

[FN3] See, for example, the Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community Case*, Nicaragua, Judgment on Preliminary Objections, February 1, 2000, par. 53. In that judgment, the Inter-American Court held that "in order to validly oppose the admissibility of the petition... the State should have expressly and in a timely manner invoked the rule that domestic remedies should be exhausted." (emphasis in the original). *Idem*, par. 54.

25. The Inter-American Commission considers, therefore, that in this matter, the Chilean State waived the objection asserting failure to exhaust domestic remedies, as it did not raise that objection, either within the established time periods or at the first opportunity it had during the proceeding, which would be in its response to the petition that started the process.

b. Time period for filing the petition

26. In the petition under study, the Commission has established that Chile tacitly waived its right to raise the objection asserting failure to exhaust domestic remedies. Therefore, the requirement set forth in Article 46(1)(b) of the American Convention is not applicable. However, the Convention's requirement that domestic remedies be exhausted is independent of the requirement that the petition be lodged within six months following the judgment exhausting domestic jurisdiction. The Inter-American Commission must therefore determine whether the petition was lodged within a reasonable period of time.

27. In this respect, the Commission notes that the original communication was received on October 6, 1999. The decision of the Santiago Appellate Court confirming the inadmissibility of the appeal seeking protection of a violated right is dated March 29, 1999. Given the particular circumstances of the petition under study, the Commission considers that the former was lodged within a reasonable period of time.

c. Duplication of proceedings and *res judicata*

28. There is nothing in the case file to suggest that the subject matter is pending in another international proceeding for settlement or is substantially the same as one already examined by this or another international body. Therefore, the requirements stipulated in Articles 46(1)(c) and 47(d) of the Convention have been met.

d. Characterization of the facts alleged

29. The State requested the Commission to declare the petition inadmissible on the grounds that the petition does not state facts that would tend to establish a violation of the American Convention. The State based its contention on the fact that none of the victims had been threatened, coerced, followed, prosecuted, deprived of their liberty or subjected to any civil, administrative or criminal sanction, the inference being that no harm had been done to the alleged victims.

30. The petitioners contend that the fact that the authorities have issued no summons does not mean that no harm has been done. They also assert that the violation of the Convention lies in the fact that the law does not recognize conscientious objection, not in any consequences that failure to abide by a law may have. They further contend that the fact that there are amnesty laws for those who do not serve the mandatory military tour of duty shows just how serious the situation is.

31. The Commission considers that this is not the proper stage in the proceedings to determine whether or not the American Convention has been violated. For purposes of admissibility, the IACHR has to determine whether the facts stated in the petition tend to establish a violation of rights set forth in the American Convention, as required under Article 47(b) thereof, and whether the petition is "manifestly groundless" or "obviously out of order," as paragraph (c) of the same Article provides.

32. The standard by which to assess these extremes is different from the one needed to decide the merits of a petition. The IACHR must do a *prima facie* evaluation, not to establish the existence of a violation but rather to examine whether the petition states facts that tend to establish a potential or apparent violation of a right guaranteed by the Convention. That examination is a summary analysis that does not imply any prejudgment or advance opinion on the merits of the petition. By establishing two clearly separate phases -one for admissibility and the other for the merits- the Commission's own Rules of Procedure reflect the distinction between the evaluation the Commission must make to declare a petition admissible, and the evaluation required to establish a violation.

33. The extensive argument made by the State is in itself proof that the petition is not "manifestly groundless," that it is not "obviously out of order" or that it does state facts that tend to establish an alleged violation. Indeed, the State's response is itself cause for a more in-depth examination of the petition in the merits phase of the proceedings. On the other hand, the Commission considers that, *prima facie*, the petitioners have met the tests stipulated in Article 47(b) and (c).

34. Accordingly, the Commission considers that the petitioners' allegations concerning violations of the right to freedom of conscience and religion and the right to a privacy, as well as the failure to adapt domestic legislation to the international commitments the State undertook, could tend to establish violations of the alleged victims' rights recognized in Articles 1(1), 2, 11 and 12 of the American Convention.

V. CONCLUSIONS

35. The Commission concludes that it is competent to examine the case presented by the petitioners alleging the State's violation of the right to freedom of conscience and religion and the right to privacy, and of its obligation to take the legislative or other measures necessary to give effect to those rights and its obligation to respect those rights and freedoms and ensure their free and full exercise to all persons subject to its jurisdiction.

36. Based on the arguments of fact and of law stated herein, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible as regards the alleged violations of the rights contained in Articles 1(1), 2, 11 and 12 of the American Convention.
2. To notify the State and the petitioners of this decision.
3. To begin proceedings on the merits of the case.
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., this 9th day of October 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vice-President; Commission members Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts and Susana Villarán de la Puente.