

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 3/03; Petition 12.257
Session:	Hundred and Seventeenth Regular Session (17 February – 7 March 2003)
Title/Style of Cause:	Carlos Saul Menem v. Argentina
Doc. Type:	Decision
Decided by:	First Vice-President: Marta Altolaguirre; Second Vice-President: Jose Zalaquett; Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, Susana Villaran. Pursuant to the terms of Article 17(2) of the Regulations of the Commission, its President, Juan E. Mendez, a national of Argentina, did not participate in the discussion or decision on the present case.
Dated:	20 February 2003
Citation:	Saul Menem v. Argentina, Petition 12.257, Inter-Am. C.H.R., Report No. 3/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by:	APPLICANT: Ana Maria I. Herren
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I. SUMMARY

1. The present report addresses the admissibility of petition 12.257. Its processing was initiated by the Inter-American Commission on Human Rights (hereinafter “Inter-American Commission,” “Commission” or “IACHR”) pursuant to the receipt of a petition on October 19, 1999, filed by Zulema Fátima Yoma, mother of Carlos Saúl Menem (son), and her attorney Ana María I. Herren (hereinafter “the petitioners”), against the Republic of Argentina (hereinafter “Argentina” or “State”).

2. The petitioners maintain that the State of Argentina bears international responsibility for alleged human rights violations related to the death of Carlos Saúl Menem (son) on March 15, 1995. In summary, they allege that the State failed to provide Carlos Saúl, then 26 years old, with the security measures necessary for the son of the then-President of the country, particularly given that he had received threats in connection with his father’s duties. They allege that the State has failed to investigate the cause of death with due diligence, and to provide effective judicial protection and guarantees in the substantiation of that investigation and related judicial processes. Further, they maintain that the State bears responsibility for having failed to respect the dignity and personal integrity of Carlos Saúl, and of his mother Zulema Yoma. The petitioners maintain that the facts alleged constitute violations of the rights to life, personal integrity, and judicial protection and guarantees recognized in Articles 4, 5, 25 and 8 of the American Convention (hereinafter “American Convention”), in conjunction with the obligation to respect and ensure protected rights set forth in Article 1(1).

3. The State, for its part, has yet to address the merits of the claims raised. During the processing to date, the State has largely limited itself to reporting on negotiations with the petitioners designed to seek solutions to the concerns they have indicated, or to the steps it has taken to keep relevant officials informed of the petition and to seek information within the internal sphere. It nonetheless maintains that the petition is inadmissible because available domestic remedies have not been exhausted.

4. As set forth below, pursuant to its examination, the Commission concluded that it is competent to take cognizance of the petitioners' complaints concerning the violations alleged with respect to the investigation of the death of Carlos Saúl Menem (son) and related claims, and that the case is admissible pursuant to the terms of Articles 46 and 47 of the American Convention.

II. PROCESSING BEFORE THE COMMISSION

5. The Commission acknowledged receipt of the petition on October 20, 1999. On November 16, 1999, the Commission received additional information and documentation amplifying the petition. Receipt was acknowledged on December 20, 1999.

6. On March 22, 2000, the Commission transmitted the pertinent parts of the petition to the State, with the presentation of information in response requested within 90 days. By note of that same date, the petitioners were informed that the processing of the petition had been initiated. By note of June 23, 2000, the State requested an extension of time in which to present its response. By notes of July 11, 2000, the Commission granted the State an additional 30 days, and informed the petitioners accordingly.

7. By note of August 9, 2000, the State presented a brief communication indicating that its authorities were engaged in a constructive dialogue with the petitioners aimed at exploring possible solutions to the concerns set forth in the petition. It thus declined to respond on procedural or substantive grounds. This information was transmitted to the petitioners by note of August 15, 2000, with the presentation of observations in response requested within 60 days.

8. The petitioners' response was received on October 12, 2000. The information presented was transmitted to the State on October 26, 2000, with observations in response requested within 60 days. By notes received on December 14 and 28, 2000, the petitioners presented very brief updates on the continuation of dialogue with representatives of the State and interim developments at the internal level.

9. In a communication dated March 12, 2001, the State presented arguments concerning the admissibility of the petition. This information was transmitted to the petitioners on May 25, 2001, with observations requested within one month. The petitioners' response was received on July 3, 2001.

10. By note of July 23, 2001, the petitioners requested a hearing before the Commission's upcoming period of sessions. By note of September 5, 2001, the Commission responded that it

was unable to accede to the request due to the large number of hearings already scheduled. By note of September 10, 2001, the Commission transmitted the petitioners' July 3, 2001 response to the State, with observations requested within one month. By notes of October 10 and 22, 2001, the State presented its response, which was duly transmitted to the petitioners on October 29, with any observations requested within one month.

11. During a working visit carried out by the Commission's Rapporteur for Argentina from July 29 through August 6, 2002 to deal with a number of friendly settlement processes and other matters, the Commission's delegation met with the petitioners. Written information presented by the latter at that time was subsequently transmitted to the State on December 16, 2002, with any observations requested within one month. By note received on January 9, 2003, the State requested an extension to file its response. By note of February 12, 2003 the Commission indicated that an extension of one additional month from the expiration of the deadline had been granted, and informed the petitioners accordingly.

12. In the interim, in brief notes of July 3 and November 6, 2002, the petitioners requested that the Commission issue its determination as to the admissibility of the petition.

III. POSITION OF THE PARTIES

A. The Petitioners

13. The petitioners contend that the State bears responsibility for failing to provide Carlos Saúl Menem (son) adequate security; conducting an investigation into his death characterized by deficiencies and irregularities; permitting the obstruction of justice, including by state agents; and failing to properly investigate those irregularities or to hold those responsible accountable. They allege irregularities in this regard committed by the Argentine Air Force, the Civil Aviation Board of Accident Investigation (JIAAC), the Medical Forensic Corps, the Argentine Federal Police and the judicial authorities charged with the investigation. The overarching claim is that the authorities are unwilling or unable to investigate with due diligence what the petitioners characterize as significant evidence that the helicopter was shot at before it crashed, and that Zulema Yoma is consequently unable to establish the truth about what happened to her son and obtain justice.

14. With respect to the obligation of the State to respect and ensure the right to personal integrity, the petitioners indicate that, as the son of the serving President, Carlos Saúl Menem (son) required the corresponding measures of security. They report that this obligation was heightened in the instant case because he had been threatened in connection with his father's position. The petitioners allege that a month prior to the crash, on February 16, 1995, a former intelligence agent had sent a written message to the Minister of the Interior warning that the children of President Menem should be given special measures of protection because they were at risk. The petitioners also report on a telegram sent from Tucuman by a sect with confusing language about threats and actions that would be carried out through March 15, 1995. The petitioners allege that the March 1992 attack on the Israeli Embassy in Buenos Aires, and the July 1994 attack on the headquarters of the Asociación Mutual Israelita Argentina (AMIA) were

precursors for a third attack, namely the shooting down of the helicopter in which Carlos Saúl was traveling on March 15, 1995.

15. The petitioners report that on March 15, 1995, Carlos Saúl left the Presidential Palace, piloting a helicopter with the intention of traveling to Rosario. He was accompanied by Silvio Héctor Oltra. They indicate that the guards assigned to accompany Carlos that day did not travel in the helicopter, by order of their supervisor, and that there was no security assigned on the helicopter. They maintain that Presidential security was supposed to follow the helicopter by land, but that, given the contradictory testimony given in this regard, doubts remain about the actions of the agents during the hours up to and following the crash.

16. They indicate that the crash took place at approximately 11:40 a.m. along national route 9 that links Buenos Aires and Rosario. Silvio Héctor Oltra died in the crash. Carlos Saúl was taken from the wreckage to the hospital. The petitioners indicate that witnesses reported that he moved his arms and head, and spoke. The petitioners allege that there remain contradictions about which authorities arrived first at the scene and why. They allege delay in his transfer, and that, while there were various options available for his transfer and treatment, in each case the inadequate option was selected. They allege that he was taken off a respirator some 15 minutes before he died. Further, they report that the death was not followed by a timely autopsy, because the judge deemed it unnecessary, or by the taking of photographs of the body or of fingerprints. They state that while the external examination of the pathologist pointed to a cranial fracture as a cause of death, further tests reportedly showed no such fracture.

17. Following the crash, an investigation was initiated before the Sixth Court of Criminal and Correctional Matters of the Judicial Department of San Nicolás, and by virtue of the federal jurisdiction in aeronautical matters, was transferred to the Federal Court of First Instance of San Nicolás de Arroyos. The petitioners maintain that, notwithstanding the indications suggesting criminal acts, the judge charged with the investigation pursued it with the sole view that it was an accident, and dismissed any evidence suggesting the contrary.

18. They allege that the fuselage of the helicopter bore the perforation of a projectile, but that the remains of the helicopter were improperly disposed of precisely to destroy that and other relevant evidence. They report that the scene of the crash was not sealed off promptly, that the parts of the helicopter were never inventoried, and that the photographs taken at the scene were inadequate. The report of the expert initially designated to examine the parts of the helicopter was presented to the investigating judge after those parts had already been disposed of. Although a separate judicial investigation was initiated with respect to the pieces of the helicopter following the intervention of Zulema Yoma as a private prosecutor, the petitioners allege that it was effectively too late, and that only 20% of the pieces were ever recovered in the context of that separate investigation. They allege that the irregularities with respect to the disposal and destruction of the parts of the helicopter were not subjected to due investigation and prosecution. The impeachment of the relevant judge and prosecution of the relevant official were sought in this regard, but reportedly produced no effective results. The petitioners maintain that the expert reports concerning the crash attributed it to contact with cables that run above route 9, without investigating why the helicopter came into contact with those cables in the first place.

19. The petitioners have presented a series of allegations concerning a subsequent autopsy of the remains of Carlos Saúl Menem that was carried out by judicial order on July 12, 1996. The allegations concern what they characterize as strange anomalies with respect to the condition of the casket and remains, contradictions in findings with earlier reports, missing elements such as teeth, problems with the identification of the remains, and expert testimony questioning whether the remains all corresponded to the presumed victim or even to one and the same person.

20. They have also presented a series of allegations about subsequent expert tests by a privately contracted expert and the Gendarmería Nacional on the 20% of the parts of the helicopter that could be recuperated. The principal allegation is that a number of the pieces showed perforations, and when tested, revealed the presence of the substances found in projectiles, namely lead, antimony, copper and zinc in the proportions that correspond to projectile casings, and trace amounts of phosphorous that would correspond to incendiary projectiles.

21. The petitioners allege that a number of individuals who have offered testimony or pursued the theory of a homicide have been threatened, pressured or mistreated. The petitioners further indicate that a number of persons with some link to this case – a witness to the crash, one of the experts and the presumed criminal who shot that expert, and several others – have died or been killed in strange circumstances.

22. The petition maintains that Zulema Yoma has been subjected to pressure, disrespect, mistreatment and threats in her capacity both as mother of Carlos Saúl and as private prosecutor. It emphasizes that, given contradictions in the relevant information, she is, even to date, unsure as to whether the remains in Carlos Saúl's tomb are his, and whether his cranium is in that tomb or the Judicial Morgue.

23. In accordance with the foregoing allegations, the petitioners maintain that the State of Argentina bears responsibility for violations of the right to life with respect to Carlos Saúl, the right to personal integrity with respect to Carlos Saúl and Zulema Yoma, and the right to judicial protection and guarantees for the victim and his family.

B. The State

24. The State has limited its response to the petition to contesting its admissibility on the basis that the applicable domestic remedies have yet to be exhausted. It has indicated at various points that it reserves its right to address the merits at the given procedural stage.

25. In its first substantive presentation of March 12, 2001, the State indicated that domestic remedies had not been exhausted. Its position was based at that point on the fact that the Supreme Court had before it an extraordinary appeal, filed by Zulema Yoma, seeking to overturn the October 1998 decision of the presiding judge to archive the investigation into her son's death.

26. In its second substantive presentation of October 22, 2001, the State indicated that this extraordinary appeal had been dismissed by the Supreme Court because the decision to archive an investigation was not a final judicial decision, and was therefore not susceptible to such an

appeal. The State indicated that this decision was taken by the Supreme Court acting within its sphere of competence and in accordance with applicable law. The State noted that, precisely as the Supreme Court had indicated, the decision to archive the investigation had no preclusive effects; consequently, should the mother of the victim be in a position to produce additional information, that investigation could be reopened. Accordingly, the State maintains its position that the applicable domestic remedies have not been exhausted.

27. The State indicates that it has kept the competent authorities, such as the Attorney General, apprised of developments with respect to the present petition so they could pursue the involvement corresponding to their functions. Finally, it underlines that it has provided full cooperation in terms of meeting with the petitioners and seeking solutions within the applicable legal framework, and maintains its commitment to collaborate with respect to the possibilities available within that framework.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission

28. In accordance with the terms of Article 44 of the American Convention, the petitioners have standing to present a petition before the Commission. The petition under study indicates that the alleged victim and his mother were subject to the jurisdiction of the Argentine State at the time of the alleged facts. With respect to the State, the Commission observes that Argentina is a State Party to the American Convention, having duly deposited its instrument of ratification on September 5, 1984. Accordingly, the Commission has the competence *ratione personae* to examine the claims presented. The Commission is competent *ratione materiae* because the petitioners allege violations of rights protected under the American Convention.

29. The Commission has temporal jurisdiction to review the claims. The petition is based on allegations that date to March of 1995, the time of Carlos Saúl's death. The facts alleged thus arose subsequent to the entry into force of the State's obligations as a Party to the American Convention. Furthermore, given that the petition alleges violations of rights protected under the American Convention that have taken place in the territory of a State Party, the Commission concludes that it has the competence *ratione loci* to take cognizance of it.

B. Other requirements for the admissibility of the petition

a. Exhaustion of domestic remedies

30. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement exists to ensure the state concerned the opportunity to resolve disputes within its own legal framework.

31. The only challenge to the admissibility of the present petition raised by the State is compliance with the foregoing requirement. The State maintains that, notwithstanding the October 1998 decision to archive the investigation, the mother of the victim is free to request that

it be reactivated if she can produce new evidence. In the State's view, this remains an available and effective remedy that has not been exhausted.

32. The petitioners argue that they invoked the remedies provided for under law. They note that in relation to the facts denounced, Zulema Yoma has acted as the private prosecutor in five judicial processes concerning, respectively, the investigation into the cause of Carlos Saúl's death; the disappearance of evidence from the judicial file; the robbery of personal effects during the time Carlos was in the crashed helicopter; the desecration of his tomb; and the denunciation seeking the impeachment of the investigating judge. They indicate, however, that these investigations have been so deficient, irregular and subject to delay as to be incapable of producing clarification, and that it has been impossible to bring any of them to a final conclusion.

33. When domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused.[FN1] Article 46(2) of the Convention specifies that this exception applies: if the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; if the party alleging violation has been hindered in his or her access to domestic remedies; or if there has been unwarranted delay in the issuance of a final judgment. Consequently, when a petitioner alleges that he or she is unable to exhaust domestic remedies, Article 31(3) of the Commission's Rules of Procedure establishes that the burden then shifts to the Government to demonstrate which specific domestic remedies continue to offer effective relief for the harm alleged. In this regard, the State has made reference only to the possibility that the investigation into the death in question could be reopened were further information to become available.[FN2]

[FN1] See IACtHR, Exceptions to the Exhaustion of Domestic Remedies (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Ser. A No. 11, para. 17.

[FN2] It may be noted that, pursuant to the burden of proof set forth in Article 31 of the Commission's Rules of Procedure and the applicable case law, the party alleging non-exhaustion must raise specific rather than generic allegations concerning the remedies available and report on their effectiveness. The allegations of the State with respect to the efficacy of the possibility of reopening the investigation into the death have been generic at best. See IACHR, Report N° 72/01 (admissibility), Case 11.804, Juan Angel Greco, Argentina, October 10, 2001, Annual Report of the IACHR 2001, para. 49, citing Report N° 52/97 (merits), Case 11.218, Arges Sequeira Mangas, Nicaragua, Annual Report of the IACHR 1997, para. 95.

34. The remedies the petitioners must exhaust are thus those that are available and effective. The principal remedy that has been placed at issue in these proceedings is the investigation into the cause of death of Carlos Saúl Menem (son). It has not been disputed that this is the remedy that would, in principle, correspond to the central claims raised by the petitioners. The petitioners indicate that the presiding judge decided to archive the investigation on October 16, 1998. In her capacity as private prosecutor, Zulema Yoma appealed that decision before the Federal Chamber of Appeals of the City of Rosario, as well as in casation and through an extraordinary appeal to the Supreme Court. As noted above, the latter was dismissed on April 10, 2001, on the basis that

the decision to archive the investigation was not a final decision or its equivalent subject to extraordinary appeal. Accordingly, that investigation has been closed since October of 1998.

35. The ability of a particular remedy to reach a timely final conclusion is one aspect of the analysis of whether it is available and effective. In this regard, the Commission notes that, while the State maintains that the archived investigation remains an effective remedy, it has not indicated any present or planned measures to pursue the obstruction of justice complained of by the petitioners. According to the record, over four years have passed since the investigation was archived, with no interim measures having been taken by the competent authorities since that closure. On the basis of: its examination of the positions of the parties; the investigation having been archived; the passage of almost eight years since the death of Carlos Saúl Menem (son); and the absence of specific information from the State as to any concrete pending or planned measures, the Commission concludes that the requirement of exhaustion of this process is excused pursuant to Article 46(2)(c).

36. The invocation of exceptions to the requirements of Article 46 is closely linked to the examination of the substance of possible violations of rights enshrined therein, particularly the guarantees relative to access to justice. Nonetheless, given its nature and purpose, the review under Article 46(2) is autonomous vis á vis the substantive norms of the Convention. The determination as to whether the exceptions to the requirement of exhaustion of domestic remedies apply in a given case requires an analysis of the claims raised in advance of and apart from the determination of the merits of the case, and according to a standard distinct from the one used to determine whether the State bears responsibility for the violation of the rights to judicial protection or guarantees set forth in the Convention. The causes that have impeded the exhaustion of domestic remedies, and the consequences thereof, shall be analyzed to the extent appropriate when the Commission examines the merits of this case.

b. Time period for submission of the petition

37. In accordance with Article 46(1)(b) of the Convention, a petition must be presented in a timely manner to be admitted, namely, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. The six months rule ensures legal certainty and stability once a decision has been taken. The rule does not apply when it has been impossible to exhaust internal remedies due to a lack of due process, denial of access to remedies, or unwarranted delay in issuing a final decision. In such a case, Article 32(2) of the Commission's Rules of Procedure establishes that the deadline for presentation shall be within a reasonable period of time, in the Commission's judgment, as from the date on which the alleged violation of rights has occurred, considering the circumstances of each specific case. Nor does this rule apply where the allegations concern a continuing situation--where the rights of the victim are allegedly affected on an ongoing basis.

38. With respect to this requirement, the Commission observes that the present petition was filed before the Commission in 1999, while Ms. Yoma was engaged in appealing the 1998 decision to archive the investigation. That appeals process ended with the 2001 rejection of the Supreme Court. Given that this investigation forms a central part of the petitioners' complaint, the Commission concludes that the petition was filed in a timely manner. Moreover, given the

findings set forth in the preceding section concerning domestic remedies, and the petitioners' allegations that the case involves an ongoing denial of justice, the Commission considers that the petition was filed within a reasonable time under the specific circumstances.

c. Duplication of proceedings and res judicata

39. Article 46(1)(c) of the American Convention sets forth that admission of a petition is subject to the requirement that the matter "is not pending in another international proceeding for settlement," and Article 47(d) stipulates that the Commission shall not admit a petition which "is substantially the same as one previously studied by" it "or by another international organization." In the present case, the parties have not claimed and the proceedings do not indicate the existence of either of these circumstances of inadmissibility.

d. Characterization of the facts alleged

40. Article 47(b) of the American Convention sets forth that allegations which do not state facts tending to establish a violation shall not be admitted. In this regard, the Commission finds in the present case that the petitioners have stated claims which, if consistent with other requirements and shown to be true, could tend to establish the violation of rights protected under the American Convention.

V. CONCLUSIONS

41. The Commission concludes that it is competent to take cognizance of the instant case and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention.

42. Based on the factual and legal arguments set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible with respect to the alleged violation of the rights recognized in Articles 4, 5, 8, 25 and 1(1) of the American Convention with respect to the death of Carlos Saúl Menem (son), and the efforts of Zulema Yoma to pursue a full investigation.
2. To notify the parties of this decision.
3. To continue with the analysis of the merits of the case.
4. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on this the 20th day of February 2003. Signed: Marta Altolaguirre, First Vice President; José Zalaquett, Second Vice President; Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts and Susana Villarán, Commission members.