

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 60/04; Petition 12.316
Session:	Hundred Twenty-First Regular Session (11 – 29 October 2004)
Title/Style of Cause:	Marcela Irene Rodriguez Valdivieso v. Chile
Doc. Type:	Decision
Decided by:	First Vice-President: Clare K. Roberts; Second Vice-President: Susana Villaran; Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Freddy Gutierrez Trejo, Florentin Melendez. Commissioner Jose Zalaquett, a Chilean national, did not participate in the consideration of or vote on the case, in keeping with Article 17(2) of the Commission's Rules of Procedure.
Dated:	13 October 2004
Citation:	Rodriguez Valdivieso v. Chile, Petition 12.316, Inter-Am. C.H.R., Report No. 60/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by:	APPLICANTS: Hugo Gutierrez Galvez, Myrian Reyes Garcia and Julia Urquieta Olivares
Terms of Use:	Your use of this document constitutes your consent to the Terms and Conditions found at <a href="http://www.worldcourts.com/index/eng/terms.htm">www.worldcourts.com/index/eng/terms.htm</a>

---

## I. SUMMARY

1. On July 3, 2000 Marcela Rodríguez Valdivieso, a Chilean national, 47 years of age, and a resident of Santiago, Chile, with the assistance of her lawyers, Drs. Hugo Gutierrez Galvez, Myrian Reyes Garcia and Julia Urquieta Olivares of the Corporación de Promoción y Defensa de los Derechos del Pueblo (CODEPU) (hereinafter “the petitioners”) submitted a petition, by fax, to the Inter-American Commission on Human Rights (hereinafter “the Commission”) against the Republic of Chile (hereinafter “the State”) in which they alleged the violation of the right to humane treatment (Article 5(1)(2) and (6)), the right to personal liberty (Article 7(2) and (3), the right to equal protection before the law (Article 24), and the right to judicial protection (Article 25) protected by the American Convention on Human Rights (hereinafter “the American Convention”), in violation of the obligations set forth in Article 1(1) “to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion or other opinion, national or social origin, economic status, birth, or any other social condition.”

2. The petitioner in this case alleges violations of the right to a fair trial and she also complains about the conditions of detention. The events occurred on November 14, 1990, eight months after the government in Chile was returned to civilians. The petitioner, a member of MAPU-Lautaro, a political-military organization, carried out an action to rescue Mr. Marco Ariel Antonioletti, in the Hospital Sotero del Rio, in Santiago. During the events, 5 policemen (4

guards (gendarmes) and 1 policeman (carabiniere)) were killed and the petitioner was shot in the back, which rendered her a spastic paraplegic, with 75% immobility of her body. Given her serious health situation, she was placed in provisional liberty in 1992, during which time she underwent some 20 operations and claims that her quality of life deteriorated progressively and that she did not receive the full and permanent rehabilitation treatment required to enable her to live autonomously. On September 29, 1999 and January 2000, Ms. Marcela Rodríguez, a civilian, was convicted by two military courts to two sentences of ten years and one day imprisonment, respectively; consecutive sentences to be served over a twenty year period. She was serving her sentence, at the time the complaint was filed, in the Hospital Infeciososo Lucio Cordova, under the surveillance of 6 guards (gendarmes). The State requests the Commission to declare the petition inadmissible or in the alternative, to reject it outright, for failure to state a claim which implicates the responsibility of the Chilean State.

3. In this report, the Commission analyzes information submitted in accordance with the American Convention and it concludes that the petition complies with the requirements set forth in article 46 of the American Convention. Consequently, the Commission decides to declare the case admissible, to notify the parties of this decision, and to continue with the analysis of the merits relative to the possible violations of articles 1(1), 8 and 22 of the American Convention. Also, the Commission decides to publish the report in its Annual Report.

## II. PROCESSING BEFORE THE COMMISSION

4. The Commission received the petitioners' complaint by fax on July 3, 2000 and the original by mail on August 7, 2000. On August 9, 2000, the Commission transmitted the complaint of Ms. Marcela Irene Rodríguez Valdivieso to the Government of Chile and requested that the State provide information on the complaint within a period of 90 days, pursuant to the Commission's Rules of Procedure in force at the time.[FN2] The State did not respond to the complaint within the time period provided, but requested a 60 day extension on October 24, 2000; the Commission on November 3, 2000 granted a 30 day extension. The State did not reply within the 30 day period, nor within the 60 day period requested; but replied on January 26, 2001. The State's response was transmitted to the petitioner on February 6, 2001 and any observations were requested within a 30 day period. On April 3, 2001, the petitioners requested a hearing before the Commission, which was denied.

-----  
[FN2] The Commission's Rules of Procedure were amended on May 1, 2001.  
-----

5. The transmission of the State's response was sent to the incorrect address, consequently, on April 25, 2001, the Commission again sent the petitioner, CODEPU, the response of the State dated January 26, 2001, and requested observations within 30 days.

6. Mr. Victor Espinoza, the Executive Secretary of CODEPU submitted the petitioner's observations on the State's response on May 25, 2001. The petitioner's observations were transmitted to the State on May 29, 2001, with a request that any further observations be submitted within one month. The petitioner submitted additional observations on October 1,

2001, which were transmitted to the State on November 28, 2001, again with a request that any further observations be submitted within one month. On December 28, 2001 the State requested an extension of time of one month in order to respond. On January 8, 2002, the Commission granted the State an additional extension of one month in which to respond. The State responded on February 8, 2002 and informed the Commission that Ms. Rodriguez's sentence had been commuted by means of a law, which pardoned her in exchange for accepting exile from Chile for the remainder of her sentence. This information was transmitted to the petitioner on March 5, 2002, and any observations requested within one month. On July 3, 2002, the State sent additional information to the Commission informing it that Ms. Marcela Rodriguez left Chile for Italy on June 26, 2002. Ms. Rodriguez informed the Commission, by letters from Italy dated January 3, and June 23, 2003, that she wished to continue with her complaint.

### III. POSITIONS OF THE PARTIES

#### A. Position of the Petitioner

7. The events occurred on November 14, 1990, eight months after the government in Chile was returned to civilians. The petitioner, a member of MAPU-Lautaro, a political-military organization created in 1982 against the military government, carried out an action in order to rescue Mr. Marco Ariel Antonioletti, whom it considered a "political prisoner," and whom it claimed had been tortured by the now dissolved Central Nacional de Informaciones (CNI). In the rescue attempt, which was carried out in the Hospital Sotero del Rio, in Santiago, 5 policemen (4 guards (gendarmes) and 1 policeman (carabinero)) were killed and the petitioner was shot in the back, seriously injuring her and rendering her a spastic paraplegic. Given her serious health situation, she was placed in provisional liberty in 1992 and had some 20 operations, but she claims that her quality of life has deteriorated progressively and that she has not received the full and permanent rehabilitation treatment required.

8. The petitioner was detained the same day, November 14, 1990, accused of participating in the unlawful acts of helping a prisoner escape; aggravated homicide of the guards Ricardo Briceño Bustamante, Juan Mondaca Figueroa, Benjamín Hernández Avilés, and Manuel Acuña Leal; attacking an on-duty police officer, causing the death of Alfonso de la Cruz Villegas Muñoz; robbery of government firearms; and membership in an armed combat group. The investigation into the criminal act was performed, initially, by the Special Visiting Judge, Mr. Jorge Medina Cuevas, who was designated by the Court of Appeals of San Miguel at the request of the Ministry of Interior. Even so, the Second Military Prosecutor of Santiago also began an investigation into the same facts. This led to a jurisdictional dispute in 1991, which was resolved by the Supreme Court in favor of the military justice system.

9. She was held in pre-trial detention for more than one year and three months, after which she was released on provisional liberty thanks to the intervention of the Colegio Médico of Chile and the European Parliament, which took several initiatives on her behalf before judicial and administrative authorities. The judgment of first instance was handed down on April 2, 1998, by Brigadier General Adolfo Vásquez Moreno, who sentenced her to 20 years imprisonment, in its maximum degree, for the crime of killing an active-duty police officer. The judgment of first instance was appealed.

10. The judgment on appeal, of December 28, 1998, was handed down by the Military Appeals Court, made up of civilian judges Camposano and Pérez, and military judges Canales, Ibarra, and Acuña. That court affirmed the judgment of first instance with the following declaration: “That the imprisonment imposed on Marcela Irene Rodríguez Valdivieso be reduced to 10 years and one day, in medium degree and accessory penalties, for attacking an active duty police officer which resulted in his death.”

11. The judgment of second instance was appealed in a motion for cassation, on both procedural and substantive grounds. On July 27, 1999, the motion for cassation on procedural grounds was declared inadmissible, insofar as it should have been brought against the judgment of first instance, where the flaw alleged was already present. On September 1, 1999, the motion for cassation on substantive grounds was dismissed for containing contradictory pleadings.

12. On September 29, 1999 and January 2000, almost ten years after the events, the 2d and 4th Military Courts of Santiago issued two sentences of imprisonment of 10 years and one day each, to be served consecutively, for the death of the carabinero, pursuant to article 416 of the Military Criminal Code, and for illicit terrorist association, set forth in Law N° 18.314:

(a) case Rol 1469-90 of the Second Military Prosecutor of Santiago for the crime of attack on an active duty police officer, at Article 461(1) of the Code of Military Justice. In this case, she was sentenced to 10 years and one day in prison.

(b) case Rol 94-97 of the Fourth Military Prosecutor of Santiago for the crime of illicit terrorist association, provided for in Law 18,314. She was sentenced to 10 years and 1 day in prison in this case.

On September 29, 1999, the Military Prosecutor of the 2d Military Court issued an arrest warrant for the petitioner in order for her to begin serving her sentence. The petitioner states that she was informed of the second judgment on January 5, 2000.

13. Ms. Rodriguez claims that she was denied due process in that she was acquitted of the charges imputing responsibility for the deaths of the four gendarmes, as well as of the other charges against her. She was convicted of a crime that occurred outside the premises of the hospital, which resulted in the death of the carabinero and which she alleges is based on pure presumptions since no witness testified to having seen an armed woman. She claims that she is innocent of the charges of causing the death of the carabinero or anyone else, and claims that she was not armed. She states that she admitted from the beginning that it was her role in the operation to accompany the “political prisoner” to a safe house after his rescue, an action that was truncated due to her having been wounded and detained, and that she should only have been tried on the charges of helping a prisoner escape.

14. The petitioner alleges that the two military proceedings that resulted in her conviction and sentence to twenty years in prison, violated her constitutional guarantees and also her rights under the American Convention, in particular, they constituted:

(a) A violation of the right to be judged by an independent and impartial court, which is evidenced in the trial of a civilian by military courts;

(b) A violation of the right to due process, as Law 18,314 was misconstrued, extending the concept of illicit association to a situation where it was inappropriate to do so. This violation is evident in the words of the former Minister of Justice of Chile, Francisco Cumplido Cereceda, who promoted the reform of Law 18,314 of January 24, 1991, and who, in the debate, stated: "That is, it is not sufficient for the associated persons to commit a terrorist crime for such conduct to be characterized as terrorist association, rather, such association must have among its purposes committing such crimes. Thus, if the aim is to replace the political regime or system of government by means other than those established in the Constitution, such association is criminal, but its objective is political and not terrorist, though in certain cases terrorist methods might be used. In such a situation, the crime of homicide, kidnapping, arson, etc., will be terrorist, but it may not be characterized, in addition, as terrorist association.

15. The petitioner sets forth in extensive detail her medical problems, which she claims were aggravated by the lack of specialized attention available in the detention center, where she was held in preventive detention for a year and three months.

16. Until her conviction, the petitioner spent 8 years (1992-1999) in provisional liberty, during which time she worked in a workshop named Armamater, which employed handicapped persons to make toys for children. During this period the petitioner underwent 17 operations. The petitioners state that the petition does not concern the events in which Marcela Rodriguez was injured and detained, and in which four members of the Gendarmeria and one employee of the Carabineros were killed. The purpose of the petition, they assert, is to vindicate Marcela Rodriguez's rights, in that the military justice system, during the ten years that the legal proceedings lasted in Chile, arbitrarily and illegally convicted her, causing her significant damage as regards multiple legal rights, as well as damage to her health and life.

17. At the end of September 1999, in the face of the warrant issued for her arrest, the petitioner sought asylum in various countries in order to continue with her physical rehabilitation. She sought political asylum in Norway, but was rejected on the grounds that Chile had returned to democratic rule, but the State of Norway permitted her to remain on the Embassy grounds for some 60 hours. Norway, in lieu of political asylum offered her residence, for humanitarian reasons, since a charitable organization offered to provide her the necessary rehabilitation treatment. Chile, however, demanded a bond that would guarantee her return in six months, of some \$12 million pesos. On October 1, 1999, the petitioner entered the Hospital Barros Luco, under the protection of the Norwegian Embassy, where she began to serve her prison sentence. From there she was transferred to the Hospital Lucio Córdova.

18. The petitioner agreed to accept a pardon and exile in a foreign country in lieu of serving her sentence in Chile, because reportedly European countries had facilities to treat paraplegics that were absent in Chile and these facilities could provide her with the necessary rehabilitation. In this context, on occasion of Jubilee 2000, and at the initiative of the Catholic Church, on July 5, Law 19,736 was issued, on general pardon, and published in the official gazette of July 19, 2001. Article 6 notes:

In addition, general pardon should be granted, consisting of the forgiving of the balance of penalties not yet served of imprisoned convicts who suffer from any type of disabling, grave, or irrecoverable disease that impedes them from moving about on their own, duly certified by report issued by the Instituto Médico Legal and whose sentence is not for violations of Law No. 18,314, which defines terrorist conduct and sets the penalties for it. In this last case, the balance of the sentence that has yet to be served shall be commuted to exile. That commutation shall only have effect once it is shown in the respective proceeding that a foreign State will accept receiving the person or persons benefited in its territory.

19. On September 27, 2001 the petitioner's request for political asylum and provisional residence in Belgium was rejected due to her lack of connections to Belgium and the absence of financial means to cover her medical expenses, which would be costly. The petitioner requested reconsideration of the rejection issued by the Belgian government, but this was refused on March 11, 2002.

20. On April 29, 2002, the Italian Ambassador to Chile informed the petitioner that the Italian government was willing to grant her a visa to live in Italy in order to continue the medical rehabilitation that she required. The Catholic Church in Chile and the socialist Chilean Senator, Antonio Viera Gallo, helped to facilitate this arrangement. On June 26, 2002 the petitioner and her husband were taken to the International Airport, placed on a LAN Chile flight and sent to Buenos Aires and from there on an ALITALIA flight to Milan, Italy. On June 27, 2002, the petitioner entered the Unitá Spinale Unipolare del Ospedale Niguarda ca' Granda of Milan. On October 5, 2002, after three months of medical examinations and rehabilitation, the conclusion was reached that it would not be appropriate to submit the petitioner to further surgery given the high risks and few results that could be expected. The petitioner emphasizes in this regard the "cruel, inhuman and degrading" treatment that she received in Chile, which destroyed her chances for rehabilitation and eventual autonomy. The petitioner alleges that if the Chilean government had not denied her the possibility of leaving the country when she received invitations from Cuba (1992) and Norway (1998) that her health would not have deteriorated to the level that it has and she would have received the rehabilitation treatment required.

21. The petitioner was granted asylum in Italy for health reasons and must remain in exile for 17 years before she is permitted to return to Chile or, presumably, she may return but must spend the remaining years of her sentence in a prison hospital.

#### B. Position of the State

22. In its reply dated January 26, 2001, the State maintained that the petition should be declared inadmissible.

23. The State indicated that the petitioner had been convicted by the 2d Military Court of Santiago on the charges brought by the 2d Military Prosecutor, and sentenced to twenty years in prison, but that the sentence had been reduced to 10 years and one day, on December 28, 1998, by the Military Appeals Court. A second prosecution, brought to the 2d Military Court of Santiago by the 4th Military Prosecutor, resulted in a second conviction and a second 10 year

and one day prison sentence, for the crime of illicit terrorist association. The latter case reached the Chilean Supreme Court on cassation.

24. The State notes that one of the requisites for the admissibility of a petition, set forth in Article 46(b) of the American Convention, requires that the petition or communication 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. The State argues that the petitioner presented her complaint to the Commission on July 3, 2000 and that this date violated the six months rule because during the previous nine months she was already serving her sentence in the military hospital:

The quote of the paragraph transcribed above shows that as of the date on which the complaint in question was filed, July 3, 2000, Ms. Marcela Irene Rodríguez Valdivieso was serving a sentence, since three months earlier, in her words, she had been notified of the final decision of the trial in which she had been convicted, and that corresponds to the proceeding known as Rol No. 1,469-90 of the Second Military Court, which refers to the assassination of an on-duty police officer, and in which the final judgment was handed down on September 1, 1999.

The State argues further in this regard that “the Commission should refrain from examining, for all appropriate purposes, the presentations that refer to that proceeding, as its arguments in this respect are time-barred, and cannot be considered or admitted, as they are manifestly out of order. To do otherwise would be to extend or expand the Commission’s purview to cases and/or situations that the Convention itself disallowed, in addition to constituting a violation of Article 38(1) of the Rules of Procedure that the Convention itself laid out in its session 660, held April 8, 1980, during the 49th session.”

25. In addition, the State alleges that the facts presented by the petitioner do not characterize a violation of the American Convention in violation of Article 47 of the Convention. Consequently, the State submits, for that reason as well, the Commission should declare the petition inadmissible.

26. The State requests that the Commission declare the petition inadmissible, but should the Commission declare it admissible, it responded to the specific allegations of violations of the rights set forth in the Convention.

27. As regards the alleged violations of Article 5, regarding personal integrity, the State maintains that it provided the petitioner with adequate treatment in conformity with her precarious condition, keeping her in hospitals and providing her with necessary medication. It notes that during the 8 years that she was in provisional liberty, before the convictions were issued, that she had had a number of operations, which were solely her own responsibility. She cannot assume, the State submits, that the State would put her into a specific clinic or send her abroad for rehabilitation treatment. The State notes that the punishment does not comply with the re-education and reformist aims of criminal punishment due to her delicate health situation. The conditions prevailing in the hospital may not be as good as one might expect, the State noted, since she was placed, under guard, in a State hospital and such institutions provide basic health care and attention, but not the material comforts available in private institutions.

28. As regards the alleged violations of Article 7, regarding arbitrary detention, the State maintains that military jurisdiction and the Code of Military Justice are applicable to all crimes committed against military personnel and the uniformed police in Chile. Article 6 of the Code provides that members of the Army, Navy, Air Force and the Carabineros are to be considered members of the military. Article 416 of the same Code sets forth that anyone who uses violence or mistreats a carabiniere, in the exercise of his functions as a guardian of order and public safety, will be punished by a prison term of between 10 to 15 years, or death, in cases where the death of a carabiniere is caused. The State suggests that the punishment applied to the petitioner was minimal and similar to that contemplated by the Penal Code for an ordinary case of homicide. Article 391 of the Penal Code provides that the punishment for homicide will be imprisonment, in the medium or long term, up to a maximum of life imprisonment.

29. The above explanation is proffered, the State notes, to rebut the petitioner's assertion that she was prejudiced simply because she was submitted to military justice; this position is refuted by a simple and sober analysis of the applicable punishments set forth in the respective criminal codes and by reference to the punishment which was, in fact, applied to her.

30. In addition, the State suggests that reference to the Code of Criminal Procedure reveals the petitioner's ignorance of the law, in that she alleges that she was convicted purely on the basis of "presumptions." Article 485 of the Code of Criminal Procedure, according to the State, provides "that presumption in a criminal proceeding is the consequence that, from facts known or brought out in the trial, is deduced by the court either in terms of the act of committing a crime, or in terms of the circumstances in which it was committed, or in terms of its imputability to a given person. This same concept regarding presumptions and the requirements for them to constitute legally sufficient evidence, detailed below, are applicable to the Code of Military Justice."

31. Moreover, the State notes that Article 488 of the Code of Criminal Procedure "spells out the requirements for judicial presumptions to be able to constitute the complete evidence of a fact. This precept requires that they be grounded in real and proven facts, and not on other legal or judicial presumptions, that there be several and various such facts, that they be direct, such that they lead logically and naturally to the fact deduced from them, and that they be consistent with one another, such that the facts are interconnected, and that all induce, with no contraposition whatsoever, the same conclusion, in the event that the one in question had existed.

32. The State concludes that it is not uncommon for convictions to be based on presumptions since few individuals confess to crimes, and in fact, they deny any connection to the crime. It is an undeniable reality, the State argues, that but for presumptions, most crimes would remain unpunished. The petitioner, the State notes, was deprived of her liberty for reasons and conditions set forth in the Chilean Constitution and laws, which were promulgated prior to the events which resulted in her conviction. Consequently, she cannot claim that her detention or conviction was arbitrary since she participated in a crime of violence and was a member of an illegal paramilitary organization. She was promptly placed before a judge who was competent to exercise judicial functions.

33. As regards the alleged violations of article 8, regarding due process, the petitioner claims that the military court that tried her lacked independence and impartiality. The State points out that the events occurred during a democratic government in Chile, not during the dictatorship. The civilian government was studying a series of legal initiatives that were intended to improve the situation of the so-called political prisoners. Certain laws were modified, the State noted, such as law 18.314 was modified by law 19.027 on January 24, 1991; law 12.971 was modified by law 19.047 on State Security; and law 19.029, published on January 23, 1991, abolished the death penalty for certain crimes.

34. These laws, among others, the State adds, eliminated military jurisdiction over civilians for certain crimes set forth in the Military Code of Justice. They eliminated certain punishments for acts considered crimes by military courts, they abolished crimes that arose from legislation adopted during the military regime, and they permitted the transfer of a large number of cases from military to ordinary courts, and they also referred to presidential pardons. The State also cited comments from a number of Chilean NGOs condemning the operation carried out by MAPU-Lautaro, in attempting the bloody rescue of one of its members, to describe the political climate at the time. In its view, the State concluded, the petitioner cannot claim that she was tried unfairly since she was tried by tribunals and under laws that existed prior to the events, and consequently, there was no arbitrariness on the part of the State.

35. As regards the alleged violations of article 24, regarding the petitioner's claims that she was a victim of discrimination because the State subjected her to a military court out of political motives, the State responds that the petitioner was convicted because she killed a policeman, in the line of duty, in an armed conflict, in which a prisoner, who was under the custody of members of the Gendarmeria, was rescued. At the same time, the State notes, it must be kept in mind that the petitioner was a militant in an armed paramilitary organization, the defining characteristic of which was military preparation in order to engage in combat.

36. The State responds that the treatment given the petitioner did not violate, in the least, the right to equality before the law, since all persons who committed similar crimes were submitted to the same tribunals and received the same legal protection as the petitioner received. No special court was constituted to try her, nor was she sanctioned with punishments different from those previously established in the respective legal codes. The State submits that the petitioner and her group rejected the political solution offered by the State, preferring recourse to armed conflict. Consequently, the State concludes that the Commission must reject the petitioner's arguments by which she self-defines herself as a political prisoner and attributes political connotations to her armed action.

37. As regards the alleged violations of article 25, regarding judicial protection, the petitioner claims that she never received the necessary protection due to the fact that the Supreme Court did not protect her from arbitrariness. The State replies that the judgment issued by the Supreme Court, in cassation, should be reviewed closely, both as regards procedure and substance:

That motion arguing nullity on procedural grounds was filed pursuant to the ninth ground in Article 541 of the Code of Criminal Procedure, in relation to sections 3, 4, and 5 of Article 500 of the same statute, which is to say for the possible omission in the ruling of first instance on the

legal bases for which Miss Rodríguez Valdivieso was convicted. The Court held that even had such a vice existed, the appellant did not file, in timely fashion, before Military Appeals Court, a motion of cassation on procedural grounds, even though that Court heard the matter, and reduced the sentence imposed by the court of first instance, such that she did not comply with the requirement of preparation provided for at Article 769 of the Code of Civil Procedure, applicable to the criminal trial, in keeping with Article 535 of the Code of Criminal Procedure, and so it lawfully declared it inadmissible. In this way, the Court noted that the petition was time-barred, as the proper court for taking cognizance of it, and the procedural opportunity for alleging it, was the Military Appeals Court.

As regards the motion for cassation on substantive grounds, the Supreme Court, on September 1, 1999, held that the motion filed was confusing and contradictory, since it requested that the ruling be voided, and that, accordingly, a judgment be issued in its place, acquitting Miss Rodríguez of the crime of which she was convicted, yet at the same time it asked that the judgment in the same motion acknowledge the irreproachable prior conduct of the appellant, which tacitly implies acknowledgment of the characterization of the crime. The Court stated that “on the one hand it recognizes that the judgment characterized the crime lawfully, and, on the other hand, it expresses that the judges have rendered a mistaken characterization of the crime. That, in summary, the grounds invoked by Rodríguez’s defense are incompatible with one another, as proposed, which impedes this Court from getting into an analysis of it, which is sufficient to dismiss the motion.”

38. According to the State, “there is no doubt that there was judicial protection and that it was provided, since the Military Appeals Court reduced the sentence 10 years, i.e. it cut it in half, and since the Supreme Court deemed it was improper to make use of its powers to act on its own initiative, considering that there was no grounds for doing so.” Further, the State argues that the petitioner distorted (*tergiversa*) the sense of article 25 of the American Convention. The Court has interpreted Article 25(1) in the *Gangaram Panday* case to refer to “the procedural institution of *amparo*, as a simple and brief judicial procedure whose purpose is to protect fundamental rights.” The petitioner, however, invokes Article 25, the State claims, “to refer to the motion of cassation on procedural and substantive grounds that it filed before the Supreme Court, which distorts the letter and spirit of the law under analysis, and renders Article 25 inapplicable to the instant case.”

39. In conclusion, the State requests that the Commission declare the petition inadmissible or reject it outright in recognition of the fact that the alleged violations of fundamental rights are not imputable to the State and consequently, do not implicate Chile’s international responsibility.

#### IV. ANALYSIS OF ADMISSIBILITY

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

40. The Commission is competent *ratione materiae* because the petition denounces violations of human rights protected by the American Convention.

41. Under Article 44 of the American Convention, the petitioner is authorized to lodge a complaint with the Commission. In the instant case, the alleged victim is an individual whose rights Chile has undertaken to respect and ensure. As for the State, the Commission notes that Chile has been a party to the American Convention since August 21, 1990, the date on which the instrument of ratification was deposited. The Commission, therefore, has competence *ratione personae* to examine the petition.

42. The Commission is competent *ratione temporis* inasmuch as the obligation to respect the rights recognized by 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.

43. 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.

#### B. Other Requirements for Admissibility

##### 1. Exhaustion of Domestic Remedies

44. 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.

45. The State in its observations filed with the Commission on July 15, 2002, indicated that all domestic remedies had been exhausted and in addition, that the petitioner was the beneficiary of Law 19.736, which granted her a pardon. The State informed the Commission that:

Marcela Rodríguez Valdivieso was convicted and sentenced to 10 years and one day imprisonment, in its medium degree, as perpetrator of the crime of attacking an active duty police officer, resulting in death, pursuant to the firm judgment handed down in the proceeding known as Rol No. 1460-90, before the Second Military Prosecutor of Santiago, and to 10 years and one day for her participation in the crime of illicit terrorist association, provided for and sanctioned by Law No. 18,314, imposed by firm judgment handed down in the proceeding known as Rol No. 94-97 before the Fourth Military Prosecutor of Santiago.

...

The petitioner began to serve these sentences on September 30, 1999, and would complete them on July 17, 2018. On July 14, 2008, she would have served the minimum time to apply for parole.

As already indicated, Law No. 19,736, which granted a general pardon on the occasion of Jubilee 2000, in Article 6, provides for commuting the balance of a sentence of imprisonment to exile for those persons who suffer a disabling, grave, and irrecoverable disease that keeps them from moving by their own means, as determined by the Servicio Médico Legal, and who have been

convicted of crimes that constitute a violation of Law No. 18,314, on terrorist conduct. This benefit is translated, in practice, and in keeping with the legal provisions in force in Chile, into the person in question having to leave the country, with a prohibition on returning for a given time.

Pursuant to the provisions of the above-mentioned Article 6, Marcela Rodríguez was evaluated by specialists from the Servicio Médico Legal of Santiago, who verified that she complied with the circumstances required for being granted the benefit of commutation of her sentence to exile.

46. The Commission considers that the information provided by the State indicates that the petitioner exhausted her domestic remedies and was sentenced to serve twenty years and two days in prison by the respective military tribunals that tried her. The petitioner subsequently sought a pardon under the provisions of Law N° 19.736, due to the fact that she was suffering from a serious and irreversible condition, which impeded her from moving about on her own. She was granted the pardon sought and in exchange for accepting exile, the remainder of her prison term was commuted, and as part of this arrangement the petitioner is prohibited from returning to Chile until July 17, 2018. As a consequence, the Commission considers that domestic remedies have been exhausted in this case pursuant to the requirements stipulated in Article 46(1)(a) of the American Convention.

## 2. Timeliness of the petition

47. Article 46(1)(b) of the Convention states that a petition must be lodged within a period of six months from the date on which the petitioner is notified of the final judgment exhausting domestic remedies. The petitioner filed her petition with the Commission on July 3, 2000. The State argues a failure of compliance with the six months rule since on the date of filing the petitioner had already been serving her sentence for the past nine months:

At paragraph 10 under the title “Situation of deprivation of liberty and health” of the complaint, the petitioner states: “Finally, given the refusal of the Norwegian authorities to grant me political asylum and thanks to the mediation of my attorney, Mr. Hugo Gutiérrez, I was transferred as a prisoner to the Hospital de Infecciosos Lucio Córdova, where I received preventive care for a worsening septic picture. For the last nine months I have been serving my sentence at that hospital under permanent guard by seven armed guards (gendarmes).

The quote in the foregoing paragraph shows that as of the date on which the complaint in question was filed, July 3, 2000, Miss Marcela Irene Rodríguez Valdivieso was serving a sentence, since, in her words, three months earlier she had been notified of the final decision of the proceeding in which she was convicted, which was classified as Rol No. 1,469-90 of the Second Military Court, and which refers to the murder of an active-duty police officer, in which the final judgment was handed down on September 1, 1999.

In view of the foregoing evidence, the Commission should refrain from examining, for all appropriate purposes, the presentations referring to that trial, considering that the arguments in this respect are time-barred, and cannot be nor should they be considered or admitted given that they are manifestly out of order. To act otherwise would extend or expand the competence of the

Commission to cases and/or situations that the Convention itself prohibited, in addition to constituting a violation of Article 38(1) of the Regulations that the Commission approved in its session 660, held April 8, 1980, during the 49th regular session.

48. The petitioner states that there were two military judicial proceedings against her, one identified as Rol N° 1.469-90 which resulted in a conviction and sentence of ten years and one day for attacking an active duty police officer, resulting in death, and the second, identified as Rol N° 94-97 for illicit terrorist association, which also resulted in a conviction and sentence of ten years and one day. The two sets of judicial proceedings involved the same set of facts, which occurred on November 14, 1990. The petitioner presents a court document attesting to the fact that the proceedings identified as Rol No. 94-97 had become *res judicata* as of December 17, 1999, and that she was notified of affirmation of the appellate court decision on January 5, 2000. This document from the Second Military Court, which accompanies the petition, is dated April 27, 2000.

49 The State alleges, in the excerpts of its response cited above, that the petitioner was notified of the final decision, “in her words” three months earlier (i.e. April 2000), while she was already serving her sentence. This is not entirely accurate since the petitioner stated that she was notified of the decision on January 5, 2000, the Court document attesting to this fact is dated April 2000. The State claims that for this reason the Commission must consider the petition extemporaneous, or else it would be violating Article 38 of its (former) Rules of Procedure.

50. Article 38 of the Commission’s (former) Rules of Procedure provide in relevant part:

The Commission shall refrain from taking up those petitions that are lodged after the six-month period following the date on which the party whose rights have allegedly been violated has been notified of the final ruling in cases where the remedies under domestic law have been exhausted.

This Rule is derived from Article 46(1)(b) of the American Convention which provides that a petition will be admitted, if it complies, *inter alia*, with the requirement that it “is 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.”

51. The petitioner states that she spent eight years in provisional liberty until the conviction in the military proceedings identified as Rol N° 1,469-90 was ratified by the appeals court on September 1, 1999. The ratification of her conviction ended her provisional liberty and an arrest warrant was issued for her detention. At that time she entered the Norwegian Embassy and sought political asylum, claiming a threat to her health and life. Following negotiations between her lawyer and the Embassy, on Thursday September 30, 1999, she left the Embassy and entered the hospital to beginning serving her sentence.

52. The State is correct in asserting that the petitioner filed her petition with the Inter-American Commission on July 3, 2000, while she was serving her sentence under the conviction and sentence in the military proceedings identified as Rol N° 1,469-90. Since the final decision in the second military proceedings, identified as Rol N° 94-97 was still pending and the proceedings involved the same purported victim and the same set of facts, the Commission sees no bar to

consideration of both military proceedings in this case. The State and the petitioner submit that the petitioner was notified of the final decision in the latter proceedings on either January 5, 2000, or in April 2000, either date sufficiently complying with the six-month admissibility requisite set forth in Article 46(1)(b) of the American Convention.

3. Duplication of proceedings and international res judicata

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

4. Characterization of the alleged facts

54. The State requests 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. Specifically, the State argues that the alleged victim was given a fair trial and appropriate sentence by the Chilean judicial system, and suggests that even though she was subjected to military jurisdiction, given the peculiarities of Chilean law, the proceedings and the sentence were comparable or even more favorable to the petitioner than if she had been tried by an ordinary civilian tribunal for the same crime. Further, the State argues that the petitioner's conditions of detention, under guard in a State hospital, were appropriate to the circumstances, given the precarious state of her health. The State maintains that she cannot expect to have been allowed to leave the country for the purposes of seeking and receiving medical treatment more appropriate to her condition than that available in Chile.

55. The petitioner's case is constructed on two principal arguments: first, that the conditions of her detention in a State hospital that specialized in infectious diseases, both aggravated and even imperiled her health by subjecting her to infections, and second, that as a civilian, she was unfairly tried for a crime that she did not commit, by military judges who were neither independent nor impartial. She claims that she should have been permitted to leave Chile in 1992, before the criminal proceedings against her were completed, in order to accept the offer of the Frank Pais Institute, in France, which had offered to provide her with rehabilitation treatment.

56. 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 Commission is required to determine whether the facts stated in the petition tend to establish a violation of the rights set forth in the American Convention, as required under Article 47(b) thereof, or whether the petition, as the State argues, is "manifestly groundless" or "obviously out of order," as paragraph (c) of the same Article provides.

57. On the one hand, the Commission considers that the petitioner has not presented sufficient facts that tend to characterize a possible violation of the right to humane treatment (Article 5) of the American Convention. The petitioner suffered a severe and apparently irreversible injury during the events of November 14, 1990, and she failed to substantiate either

that she did not receive medical attention in Chile or that Chile is obligated by the terms of the American Convention to permit her to seek and be granted asylum in France in order to seek rehabilitation in that country or that France would have granted her asylum and that the Frank Pais Institute and the Danielle Mitterand Foundation would have financed her rehabilitation in 1992, especially in light of the difficulties she later encountered in seeking asylum, in Europe, in order to take advantage of the pardon granted her in the year 2000. Further, the Commission considers the petitioner's claims that a European hospital would have enabled her to become physically autonomous, purely speculative.

58. Further in this line, the Commission considers that the petitioner has not presented sufficient facts that tend to characterize a possible violation of the right to personal liberty (Article 7), the right to equal protection of the law (Article 24) or the right to judicial protection (Article 25). The petitioner was in provisional liberty for approximately eight years during the period 1992-1999, and although she clearly could not have been considered "dangerous", she had been detained in flagrante, and was a prime suspect in a crime that involved five killings. Also, the Commission considers that the petitioner has not presented sufficient facts to show that she was treated differently from persons in similar circumstances in order to substantiate a claim under Article 24 of the Convention, or that she was denied the right to judicial protection (Article 25), since her case reached the Chilean Supreme Court. As regards these claims, the Commission considers that the State has effectively refuted these allegations of potential violations of the American Convention.

59. On the other hand, the Commission considers that the petitioner has presented facts that tend to characterize a possible violation of the right to a fair trial (Article 8) and the right to freedom of movement and residence (Article 22) under the American Convention. The Commission has examined a number of cases in recent years involving the imposition of military jurisdiction on civilians, and despite the State's arguments that the treatment of the petitioner in this case was the same as, or perhaps, even more favorable than that which would have been accorded in an ordinary civilian tribunal, the facts presented by the petitioner establish a prima facie violation of a right guaranteed by Article 8(1) of the American Convention, specifically the right to be tried by a "competent, independent, and impartial tribunal." Similarly, as regards the prohibition on the petitioner to return to Chile until the year 2018, in exchange for the commutation of her sentence, the Commission considers that the petitioner has presented facts that tend to characterize a possible violation of Article 22(5), which provides that: "No one shall be expelled from the territory of the state of which he is a national or be deprived of the right to enter it".

60. The examination on the merits in this case in regard to the right of freedom of movement, will involve a weighing of the arguments of the State and the petitioner in order for the Commission to reach a determination as to whether the State's interests are sufficiently compelling to warrant interference with the exercise of the petitioner's fundamental rights. The Commission considers that the petitioner's claims merit strict scrutiny and describe a situation that could tend to establish a violation of the rights protected by Articles 1, 2, 8 and 22 of the American Convention. The Commission includes a possible violation of Article 2 of the American Convention ex officio.

## V. CONCLUSION

61. The Commission concludes that it is competent to examine the case presented by the petitioners alleging that the State subjected the petitioner, a civilian, to an inappropriate (military) jurisdiction, thereby depriving her of the right to a fair trial and also that the State has deprived the petitioner of the right to enter the territory of the State of which she is a national.

62. Based on the above legal and factual considerations, the Commission concludes that the case at hand satisfies the admissibility requirements set forth in Article 46 of the American Convention and, without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible with respect to the alleged violations of the rights set forth in Articles 1, 2, 8 and 22 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 to include it in the Commission's Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C. on the 13 of October, 2004. (Signed): Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice -President; Commissioners Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez Trejo and Florentín Meléndez.