Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 6/05; Petition 285/03
Session:	Hundred Twenty-Second Regular Session (23 February – 11 March 2005)
Title/Style of Cause:	Omar Humberto Maldonado Vargas, Alvaro Yanez del Villar, Mario Antonio Cornejo Barahona, Belarmino Constanzo Merino, Manuel Osvaldo Lopez Ovanedel, Ernesto Augusto Galaz Guzman, Mario Gonzalez Rifo, Jaime Donoso Parra, Alberto Salustio Bustamante Rojas, Gustavo Raúl Lastra Saavedra, Victor Hugo Adriazola Meza and Ivar Onoldo Rojas Ravanal v. Chile
Doc. Type:	Decision
Decided by:	President: Clare K. Roberts; First Vice-President: Susana Villaran; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Freddy Gutierrez, Florentin Melendez. Commissioner Jose Zalaquett Daher, a Chilean national, did not participate in the discussion or decision of the case, in accordance with Article 17(2)(a) of the Rules of Procedure of the Commission.
Dated:	9 March 2005
Citation:	Maldonado Vargas v. Chile, Petition 285/03, Inter-Am. C.H.R., Report No. 6/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANTS: Corporacion de Promocion de Defensa de los Derechos del Pueblo and the International Federation for Human Rights
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I. SUMMARY

1. On April 15, 2003, two human rights organizations, Corporación de Promoción de Defensa de los Derechos del Pueblo ("CODEPU"), headquartered in Chile and represented by its president, Paz Rojas Baeza, and lawyers María Alejandra Arriaza Donoso and Hugo Humberto Gutiérrez Gálvez, and the International Federation for Human Rights ("FIDH"), headquartered in France, filed a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission") on behalf of their clients, 12 members of the Chilean Air Force, who were tried and convicted by a Military Court in Chile following the military coup of September 11, 1973, and who sought nullification of the proceedings before the Supreme Court of Chile in September 2001. The crux of their complaint is the allegation that they suffered a denial of justice as a result of the Supreme Court decision. The 12 persons represented by the above-mentioned lawyers and organizations, are: (1) Omar Humberto Maldonado Vargas; (2) Alvaro Yañez del Villar; (3) Mario Antonio Cornejo Barahona; (4) Belarmino Constanzo Merino; (5) Manuel Osvaldo López Ovanedel; (6) Ernesto Augusto Galaz Guzmán; (7) Mario González Rifo; (8) Jaime Donoso Parra; (9) Alberto Salustio Bustamante Rojas; (10) Gustavo Raúl Lastra Saavedra; (11) Víctor

Hugo Adriazola Meza; and (12) Ivar Onoldo Rojas Ravanal (hereinafter, "the petitioners"), in which the international responsibility of the Republic of Chile (hereinafter, "the State" or "the Chilean State") was alleged due to the fact that the Chilean Supreme Court is an organ of the State. The petitioners allege that the failure of the Chilean Supreme Court to grant judicial review of the decision taken by the military Courts Martial constituted a violation of their rights, as set forth in Articles 1(1), 2, 8(1), 8(2)(h), 9, 11(1), 24, 25, and 27(2) of the American Convention on Human Rights (hereinafter, "the American Convention" or "the Convention"), pursuant to the obligations assumed by the State in connection with Article 1(1) of this instrument.

2. The alleged victims are officers and non-commissioned officers of the Chilean Air Force. During the military regime, the petitioners were accused of the crimes of sedition and treason. The accused were subject to the Court Martial (Consejo de Guerra), the military tribunal in charge of trying certain offenses in times of war, and two proceedings were opened. In 1974 and 1975 verdicts were handed down in each case, finding the accused guilty. The Commander in Chief of the Air Force affirmed the convictions but reduced the death sentences to life imprisonment. Finally, the judgments became res judicata.

3. On September 10, 2001, several of the officers convicted filed a motion to reopen the case based on new facts (recurso de revisión) before the Supreme Court, in the terms of Article 657 of the Code of Criminal Procedure, for the purpose of having the proceedings annulled. They alleged, mainly, that after the firm judgment, new facts had been uncovered that showed that the proceeding had been vitiated by serious irregularities, such as the confession extracted through torture, and retroactive application of the criminal law. For those purposes, they presented evidence that included, among others: the report of the Truth and Reconciliation Commission; declassified documents from the Central Intelligence Agency of the United States; and a court judgment from which it appeared that several of the officers directly involved with the petitioners' detention was part of an illicit association, called "Joint Command," that was involved in repressive acts during the years of the military dictatorship.

4. The Supreme Court denied the motion for formal reasons. In so deciding, it held that according to the Code of Military Justice and the Constitution, the judgments handed down by military tribunals, in time of war, are non-reviewable, and, therefore, that Court did not have jurisdiction to hear the motion.[FN2] Against that decision, the petitioners filed a motion to reopen (recurso de revisión), which was denied on December 9, 2002. The State responded to the Commission's request for its observations on the admissibility of this petition by note dated February 18, 2005, in which it requested the Commission to declare the petition inadmissible because it dealt with events that occurred prior to March 11, 1990. In this report, the Commission analyzes the information submitted in accordance with the American Convention and it concludes that the petition complies with the admissibility 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 alleged violations of Articles 8(1), 8(2)(h), 9, 11(1), 24, 25, and 27(2) of the American Convention in breach of the State's obligations under Article 1(1) of the same instrument. In addition, the Commission decides to publish the report in its Annual Report.

[FN2] The Supreme Court of Chile cites Art. 70-A of the Code of Military Justice in its ruling. Art. 70-A notes: "It is also up to the Supreme Court, made up by the Auditor General of the Army or whomever is to subrogate him, to also exercise the maintenance, discipline, and economic powers referred to in Article 2 of this code, in relation to the administration of military justice in times of peace, and to take cognizance of:
2. Motions to reopen cases, against the firm judgments on military jurisdiction in peacetime.

II. PROCESSING BEFORE THE COMMISSION

5. On June 25, 2003, the Commission transmitted the complaint concerning Mr. Omar Humberto Maldonado Vargas et al. to the Government of Chile and requested it to reply within two months. On September 15, 2003, after the expiration of the two-month deadline, the Government of Chile requested a 30-day extension from the Commission to reply to the allegations in the complaint. On December 1, 2003, the Commission informed the State that it had granted the requested 30-day extension to respond. On February 18, 2005, the Government of Chile responded to the petition.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

6. The petitioners state that on September 11, 1973, a military coup overthrew the constitutional government of Salvador Allende Gossens. As a consequence, a policy of political persecution was implemented against the adherents of the deposed government that affected not only civilians but also members of the military who were loyal to the Constitution and the law. Within this context of political repression, the de facto government proceeded to arrest the individuals who are the subjects of this case and brought them before a Court Martial.

7. The petitioners state that the de facto government, by Decree Law No. 5 of 1973, established the state of siege throughout the national territory, arguing its similarity to a state of war, by reason of which not only would the special powers of any constitutional state of emergency be in force, but also in time of war the courts act, using procedures similar to those of a summary proceeding. The original complaint described political meetings held by civilians and personnel of the Chilean Air Force (Fuerza Aérea de Chile, or "FACH"), in the offices of the former vice-president of the Bank, Carlos Lazo Frias. As a result of the complaint, the Air Force Prosecutor brought charges against the members of the FACH who are the subject of this petition. And so, on September 14, 1973, a Court Martial was convened – based on the complaint by the then-President of the Banco del Estado de Chile, Air Brigade General Enrique González Battle, to the Office of the Air Force Prosecutor – the proceedings captioned "Aviación/Bachelet et al. ROL 1-73."

8. The petitioners state that the constitutionalist officers and non-commissioned officers who opposed the military coup by Augusto Pinochet were accused of sedition and treason. On July 30, 1974, a judgment was handed down in the first part and on January 27, 1975, a judgment

was handed down in the second part of the proceeding. The judgments included five death sentences, and in addition, life sentences, and prison sentences for the longest periods recognized by Chilean legislation. These judgments were forwarded to the Commander in Chief of the Air Force, who on September 26, 1974, and April 10, 1975, respectively, reduced the death sentences to life imprisonment, which, according to the petitioners, constitutes an excessive penalty. The petitioners note that in criminal proceedings held during wartime, active-duty officers, who are non-lawyers and who, at the same time, are commanders in chief of the zone known as the theater of operations, act as an appellate court. In addition, they observed that from the formal standpoint, the proceeding before the Supreme Court was divided into two parts, each with its own defendants and different members of the respective Courts Martial, despite the fact that they constituted a single case. Guilty verdicts were handed down against all the accused, except for Air Brigade General Alberto Bachelet M., due to his death in the course of the proceeding as a result of the torments suffered.

9. The petitioners state that on September 10, 2001, with a constitutional government reinstalled, the officers and non-commissioned officers filed a motion for annulment (recurso de revisión) to reopen the case before the Supreme Court of Chile, making use of an extraordinary remedy, a special motion for annulment, that makes it possible, on an exceptional basis, to modify firm and final judgments when new facts arise that clearly show they are in error or null, or that clearly show the innocence of one convicted. A declaration of nullity would also imply doing away with the accessory effects of the conviction, and vindicate one's good name, and that of the persons who have died who were tried and convicted in this proceeding.

10. Article 657 of the Code of Criminal Procedure of Chile indicates:

The Supreme Court may review, on an extraordinary basis, for purposes of annulment, the final judgments in which a person has been convicted for a crime or misdemeanor, under the following circumstances:

No. 4 When, after a conviction of guilt, there should occur or come to be discovered some fact, or some document should appear, unknown during the trial, that is such as to suffice to demonstrate the innocence of the person convicted.

11. The petitioners substantiate the seeking of nullification of the above-mentioned judgments of the Courts Martial on new facts that came to light following the issuance of the sentences. Specifically, in the years 2000 and 2001, the Ninth Criminal Court of Santiago and the Special Judge (Ministro de Fuero), Juan Guzmán Tapia, processed cases 12,806 MV and 2122-98, respectively, where it was shown that a group of Chilean Air Force intelligence officers functioned as a paramilitary command, in legal terms --an illicit association—, and instituted a trumped up judicial proceeding against the individuals who are the subjects of this complaint, using their dual capacity as intelligence agents and members of the judicial apparatus in time of war, in addition to being members of this illicit association.[FN3] This concocted judicial proceeding had the following defects: (1) Confessions extracted under torture; (2) Grave breaches of evidence law and due process; (3) Lack of the court's jurisdiction or competence; (4) Retroactive application of the criminal law; (5) Aberrant criminal definition. The information presented to the court was not sufficient to support a conviction, and consequently, the

presumption of innocence enshrined in Article 11 of the Chilean Constitution of 1925 enjoyed a renewed relevance.[FN4]

[FN3] In relation to the investigation into the kidnapping and disappearance of José Luis Baeza Cruces, and others, case 12,806-MV was investigated in the Ninth Criminal Court; the crime of genocidal illicit association, by members of the Office of the Air Force Prosecutor, which operated at the Aerial Warfare Academy, who were directly involved with the detentions and interrogations of the group of retired officers and non-commissioned officers in the instant case.
[FN4] Article 657 of the Code of Criminal Procedure of Chile notes that the circumstances that constitute the background should be so compelling so as to make it possible to affirm that the persons convicted are not guilty. The criminal nature of the political extermination scheme that was behind the convictions, the nature of a proceeding aimed at securing a conviction that does not answer to legal justification and logic, but to a previously-made political decision, implied that it was not possible to uphold, in law, a proceeding to determine guilt.

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12. The petitioners based their request for nullification of the judgment of the Court Martial on the following evidence: (1) A resolution handed down by the Ninth Criminal Court of Santiago, which recognized the existence of an illicit association; (2) Statements by Andrés Valenzuela, a former agent who participated in this illicit association; (3) Declassified CIA documents that showed serious procedural irregularities in the trials; (4) A report issued by the National Truth and Reconciliation Commission ("Rettig Report") – the entire Chapter III, part two of volume I, is dedicated to Courts Martial, noting their blatant irregularities; (5) The testimony of survivors from the Academy of Aerial Warfare, which indicates that the Air Force Prosecutor's Office and the Courts Martial operated in the context of the War Academy of the FACH as a clandestine detention and torture center. Accordingly, at that same place of detention and torture were the Offices of the Air Force Prosecutor, which meant that the accusers were judge and party in the complaints against the detainees; (6) Complaints filed on acts perpetrated by this illicit association, and their investigations in the wake of the proceedings instituted with respect to these complaints.

13. In response to the motion to reopen the case, and without examining the merits, on September 2, 2002 the Supreme Court refrained from reviewing the judgments. The petitioners allege that it was "evident" that the prohibition on taking cognizance of judgments handed down by military tribunals in time of war lasted only as long as there was a state of emergency, and that once the state of emergency was lifted, the Court would once again have full jurisdiction to take cognizance of the rulings of the military courts. This resolution was challenged through a motion to set aside (recurso de reposición), which was also rejected by the Supreme Court.

14. The petitioners claimed that the decisions of the Supreme Court violated their rights to due process (Article 8) and judicial guarantees (Article 25), protected by the American Convention. Petitioners also claim that the State violated the principle of non- discrimination protected by Articles 1(1) and 24 of the Convention, read together with the due process guarantees of Article 8, which are to be exercised "in full equality," because the Supreme Court discriminated against them as a class of persons who were denied the judicial protection for no

legitimate reason. In addition, the petitioners allege that their rights to due process and effective remedies, set forth in Articles 8 and 25(1), have been violated, as well as their right to appeal their judgment to a higher tribunal (Article 8(2)(h)). The petitioners also allege a violation of their right to honor (Article 11) since these convictions have turned them into criminals with all the stigma that this classification implies. Lastly, the petitioners allege a violation of Articles 9 and 27(2), regarding states of emergency, arguing that the State is not authorized to suspend judicial guarantees that are indispensable for the protection of rights. Article 9 sets forth the principles of legality and the prohibition on retroactive application of the laws, which petitioners claim were violated in these proceedings.

B. Position of the State

15. As mentioned, the State replied to the petition after the prescribed time period had expired. The State noted in its response that it was providing information regarding a complaint that was filed about events that occurred during the military regime in power in Chile from September 1973 until March 1990.

16. The State noted that the return to a democratic form of government marked the beginning of a long and arduous process of updating and accommodating its conduct and domestic norms to international standards in the field of human rights. The most important event in this process was the approval of the reform of Article 5 of the Constitution, which implied a general recognition of international treaties in this area. It was agreed among the political forces in Chile that the exercise of sovereignty recognizes, as a limitation, respect for essential rights, which emanate from human nature. It is the obligation of state organs to respect and promote such rights, as guaranteed by the Constitution and also by international treaties to which Chile is a party and which are in force.

17. Once the new government was installed in power, the new legislature approved and subsequently ratified a series human rights treaties. In particular, the members of Congress unanimously approved the American Convention on Human Rights and deposited the respective instrument of ratification on August 21, 1990.

18. The Government of Chile deposited its instrument of ratification with the OAS subject to the following declarations and reservations:

a. The Government of Chile declares that it recognizes, for an indefinite period of time and on the condition of reciprocity, the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed a violation of the human rights established in the American Convention on Human Rights, as provided for in Article 45 of the Convention.
b. The Government of Chile declares that it recognizes as legally binding the obligatory jurisdiction of the Inter-American Court of Human Rights in cases dealing with the interpretation and application of this Convention pursuant to Article 62.

On formulating said declarations, the Government of Chile notes that the recognition of jurisdiction it has accepted refers to situations occurring subsequent to the date of deposit of this

instrument of ratification, or, in any event, to circumstances which arose after March 11, 1990 (cuyo principio de ejecución sea posterior). [Emphasis in the State's response] Likewise the Government of Chile, on accepting the competence of the Inter-American Commission and the Inter-American Court of Human Rights declares that these organs, in applying Article 21(2) of the Convention, shall refrain from judgments concerning the concept of public use or social interest cited in cases involving the expropriation of an individual's property.

19. Chile notes that the Vienna Convention on the Law of Treaties specifically permits the ratification of an international treaty with a reservation that is in conformity with the object and purpose of the treaty. Chile maintains that the reservation arises from the position of democratic governments that it is necessary to resolve human rights violations that occurred in the recent past at the domestic level. In that context, the Chilean State has undertaken a number of initiatives such as the Truth and Reconciliation Commission ("The Rettig Commission"), Law No. 19,123 on reparation for the victims of human rights violations, the Dialogue Table (La Mesa de Diálogo), and the recently-created Commission on Political Imprisonment and Torture. The State emphasized that it did not intend to discount the usefulness of the international community in dealing with these situations, but that it was convinced that the Chilean people and their democratically- elected organs were the appropriate ones to attempt to treat the wounds left by the violations of human rights committed during the military regime.

20. Consequently, Chile requested the Commission to declare this complaint inadmissible, along with 13 others that it responded to at the same time, on the grounds that they involved "facts prior to the date of deposit of the instrument of ratification" and "which arose prior to March 11, 1990".

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission Ratione Materiae, Ratione Personae, Ratione Temporis, and Ratione Loci

21. The Commission has competence ratione materiae, in that the petitioners allege violations of rights protected in the American Convention that, if proven, could constitute violations of Articles 1(1), 8(1), 8(2)(h), 9, 11(1), 24, 25, and 27(2) of the American Convention. Specifically, the petitioners allege a denial of justice in this case, in that the Chilean Supreme Court, in 2001, rejected their request for a nullification of the proceedings that led to their convictions by means of Courts Martial conducted in 1974 and 1975, proceedings, which, it is alleged, were tainted by serious violations of due process guarantees.

22. The principal argument presented in the State's response of February 18, 2005, is that Chile is not responsible, under the American Convention on Human Rights, for violations allegedly committed during the period September 11, 1973 until March 11, 1990. The petitioners argue that Chile is not "exempt from responsibility for the acts that violate human rights, and that occurred prior to ratification, but which are guaranteed in the American Declaration of the Rights and Duties of Man [hereinafter 'the American Declaration'], which is binding, in keeping with the advisory opinion of the Inter-American Court of Human Rights." The Commission considers that in the instant case, the allegations only refer to the decision taken by the Chilean Supreme

Court in 2001, when the Convention was already in force for Chile, consequently, the convictions of these officials by the Courts Martial conducted in 1974 and 1975 are not at issue in this case. Furthermore, the petitioners, in their complaint, do not allege violations of any specific articles of the American Declaration, consequently the Commission need not pronounce itself on this issue.

23. The petitioners are entitled, under Article 44 of the American Convention, to lodge complaints with the Commission. The petition names the alleged victims as being "Mr. Omar Maldonado Vargas et al.," each of whom is an identified and individualized "person" under the terms of Article 1(2) of the American Convention. The Commission, therefore, has competence, ratione personae, to examine the petition.

24. The Commission has competence, ratione temporis, in that the decisions of the Chilean Supreme Court that are the basis for this complaint were issued on September 2, 2002, and December 9, 2002, when the obligation of respecting and ensuring the rights enshrined in the American Convention was already in force for the Chilean State. Chile has been a party to the American Convention since August 21, 1990, the date on which its instrument of ratification was deposited with the OAS.

25. In addition, the petitioners argued that Chile should be considered bound by the American Convention from November 22, 1969 and not from August 21, 1990. The petitioners state that "on November 22, 1969, the Government of Chile deposited the instrument of ratification of the Convention with the Secretariat of the OAS, perfecting the mechanism for triggering international obligations, and that the failure to publish it nationally in the official daily register, intentionally delayed by the military regime, was used as a pretext for repudiating its force in Chile, but on January 5, 1991, the enacting decree was issued, from which time it was in force without any doubt." The petitioners are mistaken in this allegation in that the Government of Chile only signed the American Convention on November 22, 1969, it did not ratify the Convention until August 21, 1990, the date on which the instrument of ratification was deposited.

26. The Commission has competence, ratione loci, insofar as the alleged violations have occurred within the territory of a State Party to the American Convention.

B. Other Requirements for Admissibility

1. Exhaustion of Domestic Remedies

27. The petitioners allege that with the Chilean Supreme Court decision dated December 9, 2002, which rejected the motion to reopen the Courts Martial of 1974 and 1975 for the purposes of judicial review, the remedies under Chilean domestic law were exhausted. The State did not contest that argument. Consequently, the Commission considers that the requirement stipulated in Article 46(1)(1) of the American Convention has been met.

2. Timeliness of the Petition

28. Article 46(1)(b) of the Convention provides that a petition must be lodged within a period of six months from the date on which the petitioners are notified of the final judgment exhausting domestic remedies. The petitioners allege that the denial of justice was consummated on December 9, 2002, the date of the Supreme Court's decision. The petitioners filed their complaint with the Commission on April 15, 2003. The State did not argue a failure to comply with the six months rule and thereby is considered to have tacitly waived this defense. Notwithstanding the above, the Commission finds that the petition was lodged within the period set forth in Article 46(1)(b) of the Convention.

3. Duplication of Proceedings and Res Judicata

29. The Commission understands that the substance of the petition is not pending in any other international proceeding for settlement, and that it is not substantially the same as any petition previously studied by the Commission or other international body. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have also been met.

4. Characterization of the Facts Alleged

30. The Commission notes that the petition raises important questions regarding the rights of members of the military to be protected from allegedly "arbitrary" actions of the State. The facts concern violations allegedly committed against members of the military by a de facto government that had deposed a constitutional government, which these military officers claim to have supported, and whether a civilian court in a subsequent democratic government may review the purportedly final judgments that were taken by the military courts during the de facto government. The Commission decides that the petitioners' claims describe acts that, if proven to be true, could tend to establish a violation of the rights protected by Articles 1(1), 8(1), 8(2)(h), 9, 11(1), 24, 25 and 27(2) of the American Convention; thus, the requirements of Article 47(b) have been satisfied.

V. CONCLUSION

31. 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 Articles 1(1), 8(1), 8(2)(h), 9, 11(1), 24, 25, and 27(2) of the American Convention.
2. To transmit this report to the petitioners and to the State.
3. To continue with its analysis of the merits of the case.
4. To publish this report 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., March 10, 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners Evelio Fernández Arévalos, Freddy Gutiérrez, and Florentín Meléndez.