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Title/Style of Cause: Alejandra Marcela Matus Acuna, Miguel Artech Salinas, Pia Barros Bravo, Alejandra Basualto Percy, Carlos Bolton Garcia, Teresa Calderon Gonzalez, Alfonso Calderon Squadritto, Rodrigo Eduardo Codoceo Hernandez, Jorge Contesse Singh, Marjorie Charlotte Cooper Lapierre, Jose Angel Cuevas Estivil, Carlos Franz Thorud, Jaime Hales Dib, Thomas Harris Espinosa, Miguel Kottow Lang, Camilo Marks Alonso, Jorge Montealegre Iturra, Esteban Navarro, Nain Nomez Diaz, Ximena del Pilar Palma Corrales, Carolina Parto Sas, Floridor Perez Lavin, Daniel Rapiman Asserella, Grinor Rojo de la Rosa, Federico Schopf Ebensperger, Antonio Skarmela Vranicic, Guillermo Trejo Maturana, Virginia Vidal Vidal, Luis Weinstein Crenovich, Faride Zeran Chelech, Veronica Zondek Damstadter, Jorge Bofill Gensch, Juan Ignacio Correa, Julian Lopez Masle, Claudio Moraga Kienner, Javier Ovalle Andrade and Pablo Ruiz Tagle Vial v. Chile

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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.
Commission member Jose Zalaquett Daher, from Chile, took no part in the review or voting on this case in accordance with Article 17(2)(a) of the Rules of Procedure of the IACHR.

Dated: 24 October 2005
Citation: Matus Acuna v. Chile, Case 12.142, Inter-Am. C.H.R., Report No. 90/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by: APPLICANTS: the Center for Justice and International Law and the Legal Clinic for Public Interest Actions of the Diego Portales University in Chile

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I. BACKGROUND

1. On April 26, 1999, the Inter-American Commission on Human Rights (“the IACHR” or “the Inter-American Commission”) received a request for precautionary measures presented by the Center for Justice and International Law (“CEJIL”) and the Legal Clinic for Public Interest Actions of the Diego Portales University in Chile (“PIA Clinic”) on behalf of thirty persons^[FN2] whose right to receive information was alleged to be endangered as a result of the seizure, by judicial order, of a book published that day called “El Libro Negro de la Justicia Chilena” [The Black Book of Chilean Justice] (hereinafter “The Black Book”). On June 30,

1999, the Commission received a request on behalf of Alejandra Marcela Matus Acuña, author of the above mentioned book, represented by lawyer Jean Pierre Matus Acuña, applying for precautionary measures in her favor.

[FN2] The group of 30 persons, on behalf of whom the precautionary measures were requested, is the same as the one that in Chile had appealed against the “Black Book” legal requisition order, and comprises writers and students: Miguel Arteché Salinas, Pía Barros Bravo, Alejandra Basualto Percy, Carlos Bolton García, Teresa Calderón González, Alfonso Calderón Squadritto, Rodrigo Eduardo Codoceo Hernández, Jorge Contesse Singh, Marjorie Charlotte Cooper Lapierre, José Angel Cuevas Estivil, Carlos Franz Thorud, Jaime Hales Dib, Thomas Harris Espinosa, Miguel Kottow Lang, Camilo Marks Alonso, Jorge Montealegre Iturra, Esteban Navarro, Naín Nómez Díaz, Xímena del Pilar Palma Corrales, Carolina Parto Sas, Floridor Pérez Lavin, Daniel Rapiman Asserella, Grinor Rojo de la Rosa, Federico Schopf Ebensperger, Antonio Skarmela Vranicic, Guillermo Trejo Maturana, Virginia Vidal Vidal, Luis Weinstein Crenovich, Faride Zerán Chelech and Veronica Zondek Damstadter.

2. On April 28, 1999, IACHR received a petition from the Association of Attorneys for Public Freedoms in Chile (“AALP”) on behalf of 5 Chilean lawyers, [FN3] in which is alleged that the confiscation of “The Black Book” constitutes an arbitrary and unlawful measure in violation of Articles 1 (1), 2, and 13 of the American Convention on Human Rights, and requests the IACHR to establish the international responsibility of the Republic of Chile (“Chilean State” or “the State”). On October 6, 1999, CEJIL and the PIA Clinic together presented a petition alleging the violation of the rights to freedom of expression of Alejandra Marcela Matus Acuña and of all members of society (Article 13), by the prior censorship of “The Black Book of Chilean Justice”, as well as the violation of the right of the above journalist to property (Article 21), because she was deprived by judicial decision of the earnings that were due to her as a result of the contract she signed with Editorial Planeta.

[FN3] The lawyers who signed the petition as victims were Jorge Bofill Gensch, Juan Ignacio Correa, Julián López Masle, Claudio Moraga Kierner, Javier Ovalle Andrade and Pablo Ruíz Tagle Vial, the last of these being the President of AALP.

3. The Chilean State did not contest the facts of the case. It reported that the two owners of Editorial Planeta were freed two days after their arrest and their case dismissed. It stated that no arrest warrants were pending against Alejandra Matus and that a draft law had been drawn up to modify the Law of State Security which it claimed would rescind those norms that restrict freedom of expression. Finally, the State claimed that the intellectual ownership of the journalist of her book is not in contention.

4. On May 4, 2000, the Commission decided to process the petitions and to open case 12.142. On October 2, 2000, having established the basis of the proceedings, the Commission approved Report 55/00 on admissibility in which it determined that it had competence to

evaluate the merits of the case and that the petition complied with the requisites for admissibility established in Article 46 of the American Convention. Hereinafter, in reference to the position of the petitioners, the IACHR will outline the allegations made by the representatives of the journalist Matus Acuña, and where relevant, in the other communications it has received.

5. The IACHR concludes in this report that the “Black Book of Chilean Justice”, written by Mrs. Alejandra Marcela Matus Acuña, was impounded by judicial order and its circulation prohibited for more than two years. It concludes furthermore that Mrs. Matus Acuña was subjected to a judicial process that forced her to leave her country in order to avoid being imprisoned. It also states that Chilean society was deprived of its right to information. The Commission concludes that the right to freedom of expression and the right to property were not respected. The facts established in the present report constitute violations of Articles 13 and 21 of the American Convention, all of which is in violation of the duty to respect and protect rights enshrined in Article 1(1) and the duty to give effect in domestic law to the same Convention (Article 2).

II. PROCEEDINGS AFTER THE ADMISSIBILITY REPORT

6. In its Report 55/00, the Commission put itself at the disposal of the parties in order to achieve a friendly settlement in accordance with the principles enshrined in the American Convention, and granted the parties a period of 30 days in which to present their comments.

7. On November 9, 2000, the petitioners expressed their wish to submit the petition to a procedure for friendly settlement and proposed an outline of an agreement. Specifically, they requested that the Chilean State should commit itself to implementing within six months the legislative changes necessary to bring domestic law into line with the rights protected by the American Convention. For her part, Mrs. Matus Acuña would renounce all compensation for damages resulting from the violation of her rights and her lawyers would renounce any right to claim fees.

8. This communication was transmitted to the State on November 13, 2000, with a period of 30 days in which to reply. On December 18, 2000, the State requested an extension of 30 days, which request was granted.

9. On January 23, 2001, the petitioners requested that the friendly settlement process should be ended and that the Commission should continue with the proceedings necessary for issuing the report on the merits of the case. They claimed, basically, that “the Chilean State has not demonstrated a willingness to reach a friendly settlement in this case based on respect for human rights, as can be seen from ...the persistent insistence of its representatives to this Commission on requesting extensions merely in order to delay proceedings, and has not yet even complied with the request for urgent protection measures for my client that were ordered by the Commission more than a year ago.” On January 24, 2001, the Commission communicated to the State that the petitioners had decided to abandon the friendly settlement process.

10. On February 2, 2001, the government presented its observations on the extended allegations made by the petitioners on June 14, 2000. On February 6, 2001, this response was

transmitted to the petitioners, who, in their communication of April 25, 2001, stated they had no comments.

11. By note received on September 24, 2001, the petitioners requested that the corresponding report on the merits should be issued. They stated that the Chilean State had repealed the clauses of the law of State Security that had provided the basis for the criminal case against Alejandra Matus Acuña. The violations of her human rights, however, had not been remedied.

12. On October 2, 2001, the IACHR transmitted this communication to the State. At the same time, it requested the petitioners to present their additional observations on the merits of the case, allowing, for this purpose, a period of two months. On November 29, 2001, the IACHR repeated its request to the petitioners for information. On December 2, 2001, the petitioners sent their observations. The following day these were transmitted to the State, which was given two months to reply. On February 6, 2002, the State requested an extension, which was granted for a further month as from February 14. The State, to date, has not yet presented its observations on the merits of the case.

III. POSITIONS OF THE PARTIES

1. The petitioners

13. Mrs. Alejandra Marcela Matus Acuña alleges that the Chilean State has violated her right to freedom of expression, enshrined in Article 13 of the American Convention, as well as her right to property guaranteed in Article 21 of the same Convention. Additionally, the Association of Attorneys for Public Freedoms in Chile, the Center for Justice and International Law, and the Legal Clinic for Public Interest Actions of the Diego Portales University in Chile claim that a broad interpretation of the concept to the right to freedom of expression should be applied to this case and they allege that the Chilean State has also infringed the right to access to information of the persons named in their petitions.

14. The petitioners allege that the Chilean State has violated the rights of Marcela Matus Acuña to freedom of expression and to property and that “in spite of the legal modifications introduced by the Chilean government in order to put an end to the violations of human rights denounced in this case, the violations have continued.” They claim that “it was only finally possible to remedy the unlawful situation which had existed for more than two years when Congress passed Law 19.733 and it was published as law and revoked the provisions that provided the basis for the criminal action that gave rise to this rights violation [and] almost a further six months were needed for the procedures needed to bring an end to the confiscation that had been decreed.” The petitioners also claim that the confiscation prevented the marketing of the book and so “deprived the author of the legitimate enjoyment of those dues deriving from the sale of her work.” Furthermore, they state that “no claim is made for the violation of the right of property of Editorial Planeta with regard to specific physical goods (the books themselves), but for the objective fact of having prevented the sale of an intellectual work, and consequently, the enjoyment of the right to its intellectual property by the seizure of the physical goods and by the existence of an order of seizure which made it judicially impossible to replace the books seized from the market.”

15. Furthermore, they claim that “Chile continues to have in force a large number of laws that operate like “laws of contempt” and sanction public criticism of democracy...such as: Articles 263 and 264 of the Criminal Code, and Article 284 of the Code of Military Justice. These laws, which are also subject to the Law of State Security in their proceedings, are still “available” to the authorities and allow them to take legal action against either journalist Alejandra Matus Acuña or any other person who might publicly criticize government authorities.”

16. They claim that “the nature and gravity of the violation of the right to freedom of expression...which persisted for more than two and a half years, in addition to the existence of other legal provisions that allowed the authorities to take action against her or against any other person who might openly criticize the government or its employees, make it necessary for there to be a declaration by this Commission and the Inter-American Court of Human Rights to ensure that similar events do not reoccur in Chile or in other countries that are signatories to the Convention, and to make good as far as possible the damage done to the journalist Alejandra Marcela Matus Acuña.”

2. The State

17. In its report, the State indicated the existence of a draft law that would “define public order crimes and the authority of courts to seize books or texts, in crimes against state security.” Having referred to the requests for precautionary measures, the State claims that although Mrs. Matus had been declared in contempt because she did not appear before the judge, no order was issued for her arrest.

18. It admits that Article 6 b) of the Law of State Security, and Articles 263, 264, and 265 of the Penal Code “infringe freedom of expression and thought, by introducing distortions of the right according to the American Convention on Human Rights which is binding on the Chilean State.” It claims, however, that the State has not failed in its international obligations because “of course, the will to rescind or modify said provisions is a demonstrable decision to comply which the provisions of Article 2 of the Convention concerning the adoption of those legislative measures as may be necessary to give effect to the rights and freedoms defined in the Convention.”

19. Furthermore, the State denies any violation of the right to property. It explains that the confiscation was imposed simply as a precautionary measure given that circulating the book could have constituted a crime within the terms of the Law of State Security. Therefore, confiscation did not amount to a denial of the intellectual ownership or the proprietary equity of the author of her work. However, the State claims that the right to intellectual ownership is not defined in the American Convention. Similarly, it claims that the seized books were not the “property” of the author of the written work, but of the publishing company that was trading them in the market.

IV. FACTS

20. The different presentations undertaken in this case indicate that on April 13, 1999, the book titled “The Black Book of Chilean Justice” was released in Chile, written by the journalist Alejandra Matus Acuña, and published by the Chilean publishing company, Editorial Planeta.

21. On the same day, the Supreme Court judge, Mr. Servando Jordán López, brought proceedings against the author and the publishing house before the Court of Appeal in Santiago for contravention of Article 6, paragraph b) of the law of State Security 12.927.[FN4] The same day, Judge Rafael Huerta was named Supreme Court Judge [Ministro de Fuero] to establish the facts that gave rise to the proceedings.

[FN4] Article 6 of the Law of State Security states: Any person who publicly offends the flag, the coat of arms, the name of the mother country, or the national anthem and any person who defames, insults, or slanders the President of the Republic, Ministers of State, Senators, or Deputies, members of the High Courts of Justice, the Treasury Inspector of the Republic, Commanders-in-Chief of the Armed Forces, or Director General of the Police, whether or not the defamation, insult, or slander is committed in connection with the offended party’s official function.

22. On the same day, April 13, 1999, Judge Huerta, as a precautionary measure, ordered the seizure of all existing copies and banned the republishing of the book, in accordance with the terms of Articles 16 (1) and 30 of the Law of State Security.[FN5] Consequently, on April 14, with the help of the police force, all the copies that were for sale in the bookshops of Santiago were seized, along with 1,141 copies held by the publishers in their warehouses.

[FN5] Article 16 of the Law of State Security said:

1) If an offense against the security of the State is committed in print, on the radio, or on the television, the competent court can suspend publication of up to ten editions of a guilty newspaper or magazine and up to ten days’ transmissions of the offending radio or television channel. In serious cases, the Court without prejudice may order the immediate seizure of any broadcast that contains any public offense that is punishable under this law. The court may exercise similar powers with regard to any another edition that may appear to have been produced in order to replace the one sanctioned under the terms of this provision.

Article 30 of the same law stated:

In all proceedings undertaken in accordance with this law, the first step of the trial judge must be to order, without prejudice to the provisions of Article 7 of the Code of Criminal Proceedings, that all the printed matter, books, pamphlets, disks, films, tapes, and any object that might have been used to commit the crime, be collected and put at the disposition of the Court.

23. On June 16, 1999, as part of the same proceedings, Messrs. Bartolo Ortiz and Carlos Orellana, directors of the publishing company Editorial Planeta de Chile, were arrested. They were both released two days later and their case dismissed on July 29, 1999.

24. Journalist Matus Acuña left Chile on the same day, April 13, 1999, for fear of arrest. Mrs. Matus was called to testify on May 6, 1999, and was subsequently declared in contempt of court on May 14, 1999, because she did not appear before the court to testify.

25. During the same month of April 1999, members of the government and opposition put forward a draft law to modify the Law of State Security, and proposed revoking the definition of contempt, contained in Article 6(b) and the modification of Article 16 of the same law, that was used to prohibit publications.

26. On November 10, 2000, as part of the proceedings opened following the publication of the “Black Book”, an order was issued for the apprehension of Alejandra Marcela Matus Acuña.

27. On May 18, 2001, Law 19.733 was published in Chile, and this revoked, amongst others, Articles 6(b) and 16 of the Law of State Security, that had provided grounds for the case taken against Mrs. Matus Acuña. The representatives of the alleged victim on June 2, 2001, requested that her case should be dismissed, and the order for her apprehension rescinded. This request was granted partially on June 29 of the same year when the partial definitive dismissal was issued with regard to the provisions of the Law of State Security, but leaving open the possibility of trial under other laws of contempt. At the same time, the requests for the suspension of the apprehension order and for the lifting of the ban on circulating the book were turned down until such time as the Court of Appeal should confirm the finding of the partial dismissal.

28. Once this finding had been appealed, the order for the apprehension of Mrs. Matus was rescinded on July 6, 2001.

29. However, the Court of Appeal of Santiago on July 25, 2001, declared inadmissible the protective remedy intended to lift the ban on circulating the book. The book therefore continued to be banned. On September 29, 2001, the representatives of Mrs. Matus Acuña again asked the judge in charge of the case to order an end to the seizure of the book, which took place on October 19, 2001.

30. Although the State made several presentations to the Commission regarding this case, at no time did it dispute the facts as detailed by the petitioners. In this regard, the Commission considers that this amounts to an assumption of silence concerning the facts of the case. The Commission has already pronounced with regard to the silence of the State, quoting jurisprudence of the Inter-American Court of Human Rights that states that “the silence of the accused...may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law,”[FN6] which is reaffirmed by Article 39 of the Rules of Procedure of the Commission.[FN7] Bearing in mind that in its replies the State has not contested the facts, and that there are no records on file that in any way detract from what the petitioners have said, the Commission considers the events described by the petitioners to be true.

[FN6] Velásquez Rodríguez, judgment July 29, 1988, paragraph 138.

[FN7] IACHR, Report 13/69, Case 10.948, Comadres, El Salvador, paragraph 18. See also in general, IACHR, Report 55/97, Case 11.137, Juan Carlos Abella, Argentina.

V. CONSIDERATION OF THE MERITS

31. The Commission will examine whether in the present case the State of Chile has infringed the rights enshrined in Articles 1(1), 2, 13, and 21 of the American Convention.

A. The right to impart information and ideas of all kinds without prior censorship

32. Article 13 of the American Convention recognizes the right of everyone to freedom of expression as follows:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

33. Article 13 of the American Convention prohibits prior censorship.[FN8] The Court understands that the duty not to interfere with the enjoyment of the right to enjoy freedom of expression extends to the free circulation of information, ideas, and the exhibition of works of art that may or may not be approved by state authorities.[FN9] In its Advisory Opinion No. 5, the Court interpreted that “Article 13(2) stipulates in the first place that prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13, but for the exception provided for in subparagraph 4 dealing with public entertainments, even if the alleged purpose of such prior censorship is to prevent abuses of freedom of expression. In this area any preventive measure inevitably amounts to an infringement of the freedom guaranteed by the Convention.”[FN10]

[FN8] The only exception to the prohibition of prior censorship is for the regulation of access of underage minors to public entertainments for their moral protection. See Article 13, paragraph 4. The present case does not fall within this exception.

[FN9] See, I/A Court of Human Rights, Case “The Last Temptation of Christ” (Olmedo Bustos et al, vs. Chile). Judgment February 5, 2001, VIII Article 13: Freedom of Expression, paragraph 61c.

[FN10] AO-5, paragraph 38.

34. The Commission, for its part, has found along similar lines: The Declaration of Principles on Freedom of Expression[FN11] states in Principle 5 that prior censorship must be prohibited by law, and furthermore, has recently upheld:

Article 13 of the American Convention contains a virtually complete ban on prior censorship, which is not found in other international human rights instrument and which indicates the high regard the drafters of the Convention had for the right to freedom of expression.[FN12]

[FN11] See in “IACHR Annual Report 2000”, Volume III, Report from the Office of the Special Rapporteur for Freedom of Expression, Chapter II, (OAS/Ser.L/V/II.111 Doc. 20 rev. April 16, 2001).

[FN12] IACHR, Report on Terrorism and Human Rights, OAS/Ser.L/V/II.116, Doc. 5, rev. 1, corr. October 22, 2002, paragraph 312.

35. Other international courts have found along similar lines, finding that prior censorship implies restricting or preventing expression before it has been circulated, so preventing not only the individual whose expression has been censored, but also all of society, from exercising their right to the information. In other words, prior censorship produces “a radical suspension of freedom of expression through preventing the free circulation of information, ideas, opinions, or news.” As has been stated previously, this constitutes a radical violation not only of the right of each person to express himself, but also of the right of every person to be well informed, and therefore constitutes one of the basic conditions of a democratic society.[FN13]

[FN13] See I/AcourtHR, Feldek vs. Slovakia, Judgment July 12, 2001, paragraph 54.

36. Article 16 of the Chilean Law of State Security stated that “if a crime is committed against the security of the State either in print, radio or on the television...the court may order the immediate seizure of all material which contains evidence of a public offense punishable under this law.” Based on this legal provision, in this case, the Trial Judge in the case brought against the journalist Matus Acuña, issued a seizure warrant to order the confiscation of all the existing copies of the book, and in addition, to prohibit its further publication. This judicial

process prevented the free circulation of the book before the existence of any alleged crime had been proved.

37. Given these circumstances, the Commission is of the opinion that this judicial measure amounted to an act of prior censorship, in violation of the freedom of expression[FN14] of Alejandra Marcela Matus Acuña and that Article 16 of the Law of State Security, in as far as it provided the basis for the imposition of this illegitimate restriction, was incompatible with Article 13 of the American Convention.”[FN15]

[FN14] See similarly, IACHR, Report 11/96, Case No. 11.230, May 3, 1996, Francisco Martorell vs. Chile in the IACHR Annual Report 1996.

[FN15] See similarly, IACHR Annual Report 1999, Report of the Office of the Special Rapporteur for Freedom of Expression, April 13, 2000, Chapter II, page 30. The Rapporteur maintains that this norm is incompatible with the Convention and considers that “this article confers wide discretionary faculties on the instructing judge by allowing him to order the seizure of publications or other means of expression merely by claiming or stating that ‘it contains evidence of a public offense’...and this in turn becomes an established norm that allows or permits judges to prior censor a publication.”

16 See I/A Court HR, Compulsory Membership in an Association (Articles 13 and 19 American Convention on Human Rights). Advisory Opinion OC-5/85, November 13, 1985. Series A, No 5, paragraph 30. Annex A.

B. The Right to Access to Information

38. In accordance with Article 13 of the Convention, freedom of expression not only covers the right of a person to express his own ideas and opinions, but also the right and freedom to seek and receive information and ideas of all kinds. Therefore, as the Inter-American Court has stated, “when an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”¹⁶

39. Given these circumstances, the order for seizure of “The Black Book of Chilean Justice) not only amounted to an illegitimate restriction of the right of its author to impart “information and ideas of all kinds,” but also infringed the right of the community in general and of Jorge Bofill Gensch, Juan Ignacio Correa, Julián López Masle, Claudio Moraga Klenner, Javier Ovalle Andrade and Pablo Ruiz Tagle Vial, who are named individually in the petitions from the AALP, and of Miguel Arteché Salinas, Pía Barros Bravo, Alejandra Basualto Percy, Carlos Bolton García, Teresa Calderón González, Alfonso Calderón Squadritto, Rodrigo Eduardo Codoceo Hernández, Jorge Contesse Singh, Marjorie Charlotte Cooper Lapierre, José Angel Cuevas Estivil, Carlos Franz Thorud, Jaime Hales Dib, Thomas Harris Espinosa, Miguel Kottow Lang,

Camilo Marks Alonso, Jorge Montealegre Iturra, Esteban Navarro, Nain Nómez Díaz, Ximena del Pilar Palma Corrales, Carolina Pardo Sas, Floridor Pérez Lavin, Daniel Rapiman Asserella, Grinor Rojo de la Rosa, Federico Schopf Ebensperger, Antonio Skarmeta Vranicic, Guillermo Trejo Maturana, Virginia Vidal Vidal, Luis Weinstein Crenovich, Faride Zerán Chelech and Verónica Zondek Darmstadter, who are individually named in the petition from CEJIL and the AIP Clinic, in particular, from receiving all kinds of information and opinions, as guaranteed by Article 13 of the American Convention.

C. The Compatibility of Article 6(b) of the Law of State Security with the American Convention

40. The Commission considers that Article 6(b) of the Law of State Security[FN16], as applied to the journalist Alejandra Matus Acuña was in violation of Article 13 of the American Convention. The Office of the Special Rapporteur for Freedom of Expression has also indicated on numerous occasions that it amounts to a “law of contempt”[FN17] in as much as it fits into a class of legislation that penalizes any expression that offends, insults, or threatens a public functionary in the exercise of his official functions.”

[FN16] Article 6(b) of Law 12.927 Domestic Security of the State, states that:

An offense against public order is committed by: Any person who publicly offends the flag, the coat of arms, the name of the mother country, or the national anthem, and any person who defames, insults, or slanders the President of the Republic, Ministers of State, Senators, or Deputies, members of the High Courts of Justice, the Treasury Inspector of the Republic, Commanders-in-Chief of the Armed Forces, or Director General of the Police, whether or not the defamation, insult, or slander is committed in connection with the offended party’s official function.

[FN17] See IACHR, 1998 Annual Report, Report of the Office of the Special Rapporteur for Freedom of Expression, April 16, 1999, Chapter IV, page 4, note 62, and IACHR, 1999 Annual Report, Report of the Office of the Special Rapporteur for Freedom of Expression, April 13, 2000, Chapter II, pages 29 and 30.

41. In its 1994 annual report, the Commission examined the compatibility of laws of contempt with the American Convention[FN18] and concluded that this class of law is not compatible with the right to freedom of expression. Consequently, the Commission recommended to the member states of the OAS that they should be revoked.

[FN18] IACHR, Report on the Compatibility of Laws of Contempt with the American Convention on Human Rights, OAS/ser L/VII.88, Doc. 9, rev (1995), pages 210 to 223. Annex D.

42. The Commission notes with approval that the above mentioned article of the Law of State Security has been revoked and calls on the State to continue its efforts to revoke the remaining

provisions of domestic law that are incompatible with its obligations under the American Convention.

D. Obligation to Guarantee the Rights Protected under the Convention and to give effect in domestic law to the Provisions of the American Convention on Human Rights

43. Article 1(1) of the American Convention lays down: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and 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, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

44. Likewise, Article 2 of the Convention lays down that: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

45. In this respect, the Inter-American Court stated that “the general obligations of the State, established in Article 2 of the Convention, include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.”[FN19]

[FN19] See I/A Court H.R., Case “The Last Temptation of Christ.” Judgment February 5, 2001, paragraph 85.

46. In the case in question, as has been indicated, the provisions of the Law of State Security which permitted the seizure of the book “The Black Book of Chilean Justice” and which provided the grounds for the legal case against its author and the directors of Editorial Planeta, were clearly incompatible with Article 13 of the American Convention.

47. It should be emphasized in this respect that by law 19.733, the State of Chile revoked Articles 6(b) and 16 of the Law of State Security. With this new legislation, and with regard to this particular case[FN20], the State of Chile has adopted the legal measures necessary to give effect in domestic law to Article 13 of the American Convention.

[FN20] As has been observed by the Office of the Special Rapporteur for Freedom of Expression, the crime of contempt is still on the statute books in Chile, in the Penal Code as well as in the Code of Military Justice. See IACHR, 2002 Annual Report, Report from the Office of the Special Rapporteur for Freedom of Expression, March 7, 2002, Chapter V, page 9.

48. However, the Commission considers that the State of Chile is responsible for not having complied at the appropriate time with its obligation to guarantee the effective enjoyment of the right enshrined in Article 13 of the Convention, and therefore has violated Articles 1 and 2. In effect, the failure to comply on the part of the Chilean State has permitted the continuation of the illegitimate restrictions on the right to freedom of expression for more than two and a half years. During this period, the provisions in force made it possible to prevent the free circulation of the book and consequently infringed the right to freedom of expression of both the author and Chilean society.

E. The Right to Private Property

49. The petitioner alleges that the State of Chile has also infringed her right to private property. He claims that the right to intellectual property of Alejandra Marcela Matus Acuña of “The Black Book of Chilean Justice” should be considered an asset, and that, as such, should be protected by Article 21 of the American Convention. He states that the seizure prevented the marketing of the book “and so deprived the author of the legitimate enjoyment of the dues deriving from the sale of her work,” and clarifies that “no claim is made for the violation of the right of property of Editorial Planeta with regard to specific physical goods (the books themselves), but for the objective fact of having prevented the sale of an intellectual work, and consequently, the enjoyment of the right to its intellectual property by the seizure of the physical goods and by the existence of an order of seizure which made it judicially impossible to replace the books seized from the market.”

50. Likewise, the Government claims that the journalist’s right to intellectual property “goes beyond the protective scope of the American Convention on Human Rights.” In this respect it claims that “the copies confiscated or seized are not the property of the author of the literary work – Alejandra Matus Acuña – but of the publishing company (Editorial Planeta) marketing them. In point of fact, the books were seized from the company’s warehouses. Second, the confiscation or seizure is a measure adopted within the framework of a judicial process and is in accordance with provisions currently in effect and therefore is not an arbitrary or abusive measure but one made legitimate by legal process. Third, the seizure order, is a measure that does not affect ownership but is a precautionary measure that temporarily withdraws from the market those goods that are the subject of litigation or that provide proof or grounds for a specific judicial action, in accordance with the social interest determined by a judicial resolution.”

51. Article 21 of the American Convention guarantees the right of persons to private property, which implies the right to dispose of their goods in any legal way, to possess them, use them, and prevent any other person from interfering with their enjoyment of this right. This right covers all a person’s proprietary assets, that is to say, those that have to do with material goods as well as intangible goods that are capable of value (susceptible de valor).[FN21] The Commission therefore considers that the right of the author to market her work and to receive her share of the earnings derived from its sale is protected by Article 21 of the American Convention.

[FN21] See also I/A Court H.R., Case Barush Ivcher Bronstein vs. Peru. Judgment February 6, 2001, paragraph 122.

52. The journalist Alejandra Matus Acuña signed a contract with the publishing company under which she was entitled to a percentage of the sale price of the book. This was to have been paid to the author according to the sale records, within 60 days of each statement.[FN22]

[FN22] See the contract signed between the journalist Matus Acuña and the Editorial Planeta Chilena S.A., on January 21, 1998, Art. 3.

53. The order for seizure of the book provided for the confiscation of all existing copies and prohibited its republishing. This prevented the marketing of the book and liquidation of earnings and the subsequent payment of royalties assigned to the author under the terms of her contract with Editorial Planeta. Consequently, the journalist Matus Acuña was prevented from exercising one of the fundamental attributes of her right to property: dispose freely of her work. Furthermore, as has been demonstrated, the seizure order was based on a law that violated the right to freedom of expression, the revoked Article 16 of the Law of State Security. In these circumstances, the Commission considers that the journalist Matus Acuña has suffered an illegitimate interference of her right to private property and that the State of Chile is responsible for the violation of Article 21 of the American Convention.

VI. ACTS SUBSEQUENT TO THE REPORT N° 46/03

54. The Commission approved the Report on the Merits No 46/03 on the present case on October 8, 2003, during its 118th Regular Session. This report, with the recommendations of the Commission was transmitted to the State of Chile on January 5, 2004, and a period of two months was granted for it to comply with the recommendations, counted from the date of sending the report. When this period was complete, the State made no report to the IACHR regarding its compliance with the recommendations made by the Commission. Therefore the Commission notified the petitioners of the adoption of the aforementioned report on the merits and requested an opinion regarding the possible submission of the case to the Inter-American Court of Human Rights. On January 22, 2004, the petitioners responded and requested the IACHR to submit the case for the consideration of the Inter-American Court of Human Rights on the basis of the legal grounds indicated.

55. In accordance with the stipulations of Article 51(1) of the Convention, it is for the Commission to determine, during this stage of the process, if the State has fulfilled its obligations. In this respect, the IACHR observes that to date, the Chilean State has not reported on any action that it might have taken in relation to complying with the recommendations of the IACHR in the report on the merits of the present case. On September 20, 2004, the Commission was informed by Mrs. Matus that the State has not complied with Report No. 46/03.

56. Furthermore, the IACHR wishes to report that given the specific circumstances of the present case that include the promulgation of Law 19.733 which revoked amongst others, Articles 6b), and 16 of the Law of State Security that provided the legal basis for the case taken against Mrs. Matus Acuña, the Inter-American Commission, in accordance with the provisions of its Rules of Procedure, decided by absolute vote of the majority of its members not to submit the present case to the Inter-American Court of Human Rights.

VII. CONCLUSIONS

57. Therefore, the Inter-American Commission concludes that Marcela Alejandra Matus Acuña was the victim of censorship on account of her “Black Book of Chilean Justice”, and that her books were seized by judicial order and were out of circulation for more than two years. Furthermore, Mrs. Matus Acuña was subjected to a judicial process that caused her to leave her country so as not to be imprisoned. Finally, the Commission finds that Chilean society was deprived of its right to access to information, in particular, the persons named in paragraph 39 supra.

58. The facts established in the present report constitute violations of Articles 13 and 21 of the American Convention and are in violation of the duty to respect and ensure enshrined in Article 1(1) of the American Convention, and the duty to give effect in domestic law to the obligations assumed by the State, in accordance with Article 2 of the same Convention.

59. The Commission notes with pleasure that the State of Chile has revoked articles 6b) and 16 of the Law of State Security that, as has been demonstrated, are incompatible with Article 13 of the American Convention on Human Rights and exhorts the State of Chile to continue its reform of legislation that is incompatible with the abovementioned article.

VIII. RECOMMENDATION

60. Based on the examination and conclusions of the present report, the Inter-American Commission on Human Rights conveys the following recommendation to the State of Chile: To make adequate compensation to Alejandra Matus Acuña for the consequences of the violations of the rights to freedom of expression and to property, to the prejudice of journalist Alejandra Matus Acuña.

IX. PUBLICATION

61. On October 8, 2003, the Commission approved the preliminary report, Report No. 46/03, in accordance with Article 51 of the American Convention.

62. On January 5, 2004, the Commission transmitted this report to the Chilean State and to the petitioners, in accordance with the provisions of Article 51(1) of the American Convention and Article 45(1) of the Rules of Procedure of the Commission, and granted a period of one month for the State to comply with the above-mentioned recommendations. Since this period expired, the Commission has received no response from the State regarding this matter.

63. On February 27, 2004, during the 119th Regular Session, the Commission decided by unanimous vote of the six voting members, not to put the case before the Court and to proceed according to the Rules of Procedure.

64. By virtue of the lack of a response from the State, the Commission, during its one hundredth and twenty-second regular session approved Report No. 44/05, the final version of the report, in accordance with Article 51(1) and Article 45(1) of the Rules of Procedure of the Commission. The final version was transmitted to the Chilean State and to the petitioners on April 29, 2005, granting a further period of one month to the State in which to comply with the recommendations, in accordance with Article 51(2) of the American Convention and Article 45(2) of the Rules of Procedure. When this period expired, the Commission had again received no reply from the State.

65. By virtue of the abovementioned conclusions and in accordance with Articles 51(3) of the American Convention and Article 45 of its Rules of Procedure, the Commission decided to re-state the conclusions and recommendation in paragraphs 57-60, to publish this report and to include it in its Annual Report to the General Assembly of the OAS. In accordance with its mandate, the Commission will continue to evaluate the steps taken by the Chilean State in relation to the abovementioned recommendation, until such time as there is full compliance.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on the 24th day of October, 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.