REPORT No. 56/10
CASE 12.469
MERITS (ART. 51)
MARGARITA CECILIA BARBERÍA MIRANDA
CHILE[1]
March 18, 2010

I. SUMMARY

1. On April 8, 2003, Margarita Cecilia Barbería Miranda (hereinafter "the petitioner"[2]), a Cuban citizen with permanent residence in Santiago, Chile and married to Jaime Fernando Rovira Sota, a Chilean citizen, lodged a petition with the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission" or "the IACHR") against the Republic of Chile (hereinafter "the State"). The petition alleges violation of the right to equal protection of the law, recognized in Article 24 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), in relation to the State's obligation to respect and ensure the Convention-protected rights, stipulated in Article 1(1) thereof, and the obligation to take any domestic legislative or other measures necessary to give effect to those rights, stipulated in Article 2 of the Convention. The petitioner also alleges violation of articles 2, 3 and 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador").

2. The petitioner alleges violation of the right that guarantees that all persons are equal before the law and entitled, without discrimination, to equal protection of the law. She also alleges violation of the right to work and to engage in free economic initiatives, Ms. Barbería married Mr. Rovira Soto in Havana, Cuba, in 1985. Upon their return to Chile, the petitioner studied law at the Universidad Nacional Andrés Bello in Santiago and was qualified in every respect to practice law, except for the fact that she was a Cuban citizen. Article 526 of the Organic Code of Courts provides that only Chilean citizens shall be admitted to the practice of law, "without prejudice to the provisions of the international treaties in force." The State's answer to the allegations made in the petition was that the petitioner had failed to exhaust one of the remedies provided under Chilean law, which is an "appeal to a court seeking reversal of its own decision," which in this case would have been the decision to declare the petition filed on May 25, 2001 inadmissible." It also argued that she could have applied for Chilean citizenship. The State contends that having studied law in Chile, the petitioner can hardly argue ignorance of the law requiring Chilean citizenship in order to practice law in Chile; the State also asserted the principle that no one may plead ignorance of the law once the law has entered into force.[3] The State asks that the Commission declare the petition inadmissible or, failing that, dismiss it outright since it makes no claim that would engage the Chilean State's international responsibility.

3. In Report 59/04, the Commission decided to admit the petition and continue with the analysis of the merits of the case. As this report will state, after examining the information supplied by the two parties and their arguments on the merits of the case, the Commission concludes that the State has violated the right to equality before the law, recognized in the American Convention (Article 24), to the detriment of Ms. Margarita Barbería, and that it has failed to fulfill its obligation to respect and ensure rights (Article 1) and the duty to adopt domestic legislative or other measures to give effect to the rights protected under the Convention (Article 2).

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[1] Pursuant to Article 17(2)(a) of the Rules of Procedure of the IACHR, Felipe González, a Chilean national, did not participate in the discussion or decision in the present case.

[2] The petitioner was originally counseled by her attorney Cristián Adolfo Briceño Echeverría, Coordinator of the Center for Constitutional Guarantees of the Universidad de Artes y Ciencias Sociales de Chile [University of Arts and Social Sciences of Chile]. By note of October 15, 2003, she advised the IACHR that she had revoked the legal power of attorney and would herself become the petitioner in her own case.

[3] Article 8 of Chile's Civil Code.

II. PROCEEDINGS SUBSEQUENT TO THE ADMISSIBILITY REPORT

4. In Report 59/04, of October 13, 2004, the Commission declared the petition admissible with respect to articles 1, 2 and 24 of the American Convention and decided to proceed with its analysis of the merits of the case. It also expressed an interest in knowing 1) how many persons, if any, were authorized to practice law in Chile without having to acquire Chilean citizenship under Law No. 19,074, and 2) how many aliens, if any, continue to practice law in Chile and how their exemption is reconciled with Article 526 of the Organic Code of Courts.

5. The admissibility report was forwarded to the State and to the petitioner on November 2, 2004. The Commission made itself available to the parties with a view to arriving at a friendly settlement of the case, in keeping with the principles recognized in the American Convention. The petitioner was given two months to file her additional observations on the merits, which she did on March 21, 2005. Her observations were forwarded to the State on June 5, 2005. Later the Commission requested that the State file its additional observations on the merits within two months.

6. On December 23, 2005, the State informed the Commission that it was reasserting the arguments made in its communication of November 7, 2003, to the effect that the petition does not satisfy the rule requiring prior exhaustion of domestic remedies. The Commission forwarded the pertinent parts of the information supplied by the State to the petitioner on March 21, 2006, and gave her one month in which to present her observations.

7. The petitioner submitted her observations on the State's response on April 19, 2006. The pertinent parts of the petitioner's observations were forwarded to the State on May 4, 2006, which was given one month to present its observations. As of the date of this report, the State has not responded.

III. THE PARTIES' POSITIONS ON THE MERITS

A. The petitioner

8. The petitioner, Ms. Margarita Barbería Miranda, a Cuban citizen, arrived in Chile in December 1989, as a result of the mediation of the UN High Commissioner for Refugees. She was reunited with her husband, a Chilean citizen, who had returned to Chile after having been exiled from the country for political reasons during the military government of General Pinochet. The petitioner has been a permanent resident of Chile since 1990, and lives with her husband and three children, who are also Chilean citizens. In order to better provide for her family's needs, especially her three children, the petitioner enrolled in the School of Law at the Universidad Nacional Andrés Bello. In 1996 she completed her studies, passed the examination to be licensed as an attorney, and fulfilled the requirement of a semester of professional experience with the Metropolitan Region (Chile) Legal Aid Society, working at the San Miguel Preventive Detention Center in Santiago.

9. The petitioner submitted her qualifications to the Licensing Department of the Supreme Court of Chile, to be sworn in as an attorney. However, Prosecutorial Opinion No. 194 of May 7, 2001, written by the Alternate Prosecutor for the Supreme Court, Mr. Carlos Meneses Pizarro, and a decision of the Supreme Court dated May 10, 2001, held that she was not to be permitted to be sworn in as an attorney on the grounds that Article 526 of the Organic Code of Courts provides that "only Chilean citizens may practice the law, without prejudice to the international treaties in force."

10. The petitioner asserts that she has exhausted all available remedies in Chile, but to no avail, since both the Constitution and the laws of Chile expressly provide that only Chilean citizens may practice law in Chile, and she is a Cuban citizen.[4] The petitioner again points out that she has complied with the rule requiring exhaustion of local remedies and dismisses the State's argument that citizenship was one of the internal remedies that she should have exhausted. The petitioner alleges that citizenship

[4] Article 526 of the Organic Code of Courts provides that "only Chilean citizens may practice law, without prejudice to the international treaties in force."

is an administrative remedy, not a judicial remedy. Therefore, it is not a remedy that she is required to exhaust.

11. The petitioner alleges that the laws and the actions of the Chilean State that prohibited the petitioner from practicing law, are a violation of her right to equality before the law and to protection without arbitrary discrimination, because nationality is not sufficient cause to discriminate against a person in respect of that person's right to earn a living and to engage in free economic initiatives. The premise of her argument is the right to equality before the law, established in Article 24 of the American Convention, and the right to work, provided for in Article 6 of the Protocol of San Salvador.

12. Concerning the rights protected under the Protocol of San Salvador, the petitioner cites Article 1 thereof, which establishes the obligation of States parties to adopt the necessary measures, both domestically and through international cooperation, for the purpose of achieving progressively the full observance of the rights recognized in the Protocol. The petitioner also invokes Article 3 of the Protocol wherein States parties undertake to guarantee the exercise of the rights set forth therein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

13. The petitioner also invokes Articles 1(1) and 2 of the American Convention, and alleges noncompliance with the obligations imposed on States parties to respect the rights and guarantees therein recognized and to ensure the free and full exercise of those rights and guarantees to all persons subject to their jurisdiction, and to adopt, in accordance with their Constitutions and the provisions of the Convention, the legislative and other measures necessary to give effect to those rights and freedoms.

14. The petitioner is therefore asking the Inter-American Commission, "in exercise of its authorities under the Convention, to recommend to the Chilean State that the case be resolved, whether through legislation, administrative or judicial decisions, or some other measure, and that it be given no more than three months to do so; failing that, kindly take the case to the Inter-American Court of Human Rights."

B. The State

15. The State points out that under the Chilean legal system, a person can apply for Chilean citizenship with the proper administrative authority. The State contends that before turning to the Inter-American Commission, the petitioner did not exhaust one of the remedies she had under Chilean law, which is also a widely accepted remedy under international law: an application for Chilean citizenship, filed with the proper administrative authority, which in this case is the Office of the Chief of the Department of Alien Affairs and Immigration of the Ministry of the Interior.

16. As for the allegations regarding the right to work and to engage in free economic initiative, the State answers that neither of the two is guaranteed under the American Convention. Furthermore, the State cannot be held liable for the alleged violations of rights upheld in the Protocol of San Salvador, since Chile never ratified that document. The State argues that the only reference to economic, social and cultural rights in the American Convention is in Article 26 and relates to the issue of "progressive development" and is therefore not germane to the case that the petitioner is attempting to make.

17. As for the alleged violation of the right to equality before the law, protected under Article 24 of the American Convention, the State contends that articles 523 and 526 of the Organic Code of Courts, which provide that only Chileans may practice law in Chile, is based on Article 19, paragraph 16, of Chile's Constitution, which guarantees the right to freedom of work. That clause of the Constitution prohibits any discrimination not based on the individual's personal capability or adaptability, notwithstanding the fact that the law may require Chilean nationality or impose age limits in certain cases.

18. The State further contends that "no one may plead ignorance of the law once the law has entered into force" and that as a student of Chilean law the petitioner should have had knowledge of the

law that allows only Chilean citizens to practice law in Chile. Finally, the State argues that the School of Law at the Universidad Adolfo Ibáñez is culpable, as it allowed the petitioner to register for courses knowing full well that she was an alien and therefore not allowed to practice law in Chile unless she changes her citizenship. The Commission would like the record to show that the petitioner studied at the Universidad Nacional Andrés Bello, not the Universidad Adolfo Ibáñez.[5]

19. In its communication of December 21, 2005, the State restates the arguments it made in its communication of November 7, 2003, to the effect that the petition does not satisfy the rule of exhaustion of domestic remedies. It also points out that the Supreme Court reported that as of April 22, 2005, 715 foreigners have been allowed to practice law in Chile, either because they obtained degrees abroad that were revalidated in Chile, or because they were licensed to practice the profession.

20. As for the violation of the right to work and to engage in free economic initiative, in its communication of November 7, 2003 the State argues that "while the American Convention allows limitation or restriction of the exercise of certain rights, so does our own legal system, and following the same reasoning it puts certain restrictions on some rights and not others: one is the right to work and to engage in free economic initiative."

IV. THE FACTS

21. The State has not challenged the facts as alleged by the petitioner, particularly the central issue, which is that her alien status prevents her from practicing law in Chile. The position of the State is simply that the petitioner did not exhaust local remedies. That issue, however, was already decided at the admissibility phase. In report 59/04, the Commission found that the case was admissible and that the domestic remedies had been exhausted in accordance with the requirements set forth in Article 46(1)(a) of the American Convention. Since the facts in this case are not disputed, the Commission will briefly summarize those that are taken as givens:

22. On January 29, 1985, Margarita Barbería Miranda, a Cuban citizen, married Jaime Fernando Rovira, a Chilean citizen.[6] Ms. Barbería came to Chile in December of 1989, through the intermediation of the United Nations High Commissioner for Refugees. She was reunited with her husband, who had returned to Chile after having been exiled for political reasons during the military government of Augusto Pinochet. In 1990, Ms. Barbería obtained permanent residence in Chile, where she lives with her husband and three sons: Camilo, Sebastián and Elías. In order to better provide for her family's needs, especially her three children, the petitioner enrolled in the School of Law at the Universidad Nacional Andrés Bello. In 1996 she completed her studies,[7] passed the examination to be licensed as an attorney, and in 2000 fulfilled the requirement of a semester of professional practice with the Metropolitan Region (Chile) Legal Aid Society, working at the San Miguel Preventive Detention Center in Santiago.[8] On March 13, 2001, the university awarded her a degree in law.[9]

23. The petitioner submitted her qualifications to the Licensing Department of the Supreme Court of Chile, to be sworn in as an attorney. However, she was not allowed to take the oath because of the arguments made in a prosecutorial opinion written by the Alternate Prosecutor for the Supreme Court. The argument was that Article 526 of the Organic Code of Courts provides that "only Chilean citizens may practice the law, without prejudice to the international treaties in force." [10] The Commission would like to

[5] As it was named in Chile's observations of November 6, 2003, under point 11.2.g "Internal responsibility of the institution of higher learning where the petitioner studied law."

[6] Certificate of Marriage No. 74,636,084, issued by Chile's Bureau of Civil Records and Identification, May 28, 2001.

[7] Certificate of graduation, issued by the Universidad Nacional Andrés Bello, March 12, 2001.

[8] Certificate N° 0902 which the San Miguel Legal Aid Society issued on December 5, 2000..

[9] Certificate of Academic Degree, issued by the Universidad Nacional Andrés Bello on March 14, 2001.

[10] Opinion No. 194 of the Alternate Prosecutor of the Supreme Court, Carlos Meneses Pizarro, of May 7, 2001.

clarify that the State is not referring to international human rights treaties ratified by Chile, but to treaties on dual citizenship and conventions on the practice of the liberal professions.

24. On May 25, 2001, the petitioner brought a petition seeking constitutional relief, filed with the Court of Appeals. The petition's purpose was to challenge the Supreme Court's decision. The grounds for the petition were violation of her right to equality before the law, the right not to be discriminated against arbitrarily and the right to work, all guaranteed by the Chilean Constitution. The petition was declared inadmissible on the grounds that "the petition [was] not in keeping with the purposes that such petitions are intended to serve, since the petitioner's objective is a review of a decision taken by the Supreme Court, *en banc* and in the exercise of its powers."[11]

25. On March 27, 2002, the petitioner filed a special petition for reversal, invoking new sources of law and, as authorized under Article 181 of the Code of Civil Procedure, petitioning the Court to reverse its ruling. A motion of unconstitutionality, allowed under Article 80 of the Constitution and filed as part of this petition, asked the court to vacate its administrative ruling on the grounds that articles 526 and 521 (the latter makes reference to the former) of the Organic Code of Courts were unconstitutional. The Supreme Court, *en banc,* declared the petition inadmissible on the grounds that "(…) there is nothing here for the Court to declare inapplicable." [12]

26. On September 24, 2002, the petitioner filed with the Court of Appeals seeking economic *amparo* relief and reversal of a court's ruling. This petition was declared inadmissible on the grounds that "given the nature of the matter at issue in the petition, a precautionary measure seeking economic *amparo* relief is not the proper procedure since this is an attempt to challenge a ruling issued by the Supreme Court in exercise of its exclusive authorities under the Constitution and the Organic Code of Courts. This Court cannot, therefore, grant cert."[13]

V. THE MERITS

27. The Commission will now examine whether, in the present case, the Chilean State has violated articles 1(1), 2 and 24 of the American Convention.

A. Right to equal protection and the prohibition of discrimination (articles 24 and 1(1) of the American Convention)

28. Article 24 of the American Convention provides that "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." Article 1(1) of the American Convention, for its part, establishes the obligation that States parties 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."

29. The right to equality before the law and the obligation not to discriminate against any person are basic principles of the inter-American system of human right. In its preamble, the American Declaration states that "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another." Article II of the American Declaration provides that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Article 3 of the OAS Charter includes the following among the principles reaffirmed by the member States: "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex."

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[11] Ruling of May 30, 2001, delivered by the First Chamber of the Court of Appeals.

[12] Chilean Supreme Court Ruling of April 26, 2002.

[13] Decision of the First Chamber of the Court of Appeals, October 9, 2002.

30. The Inter-American Court has held that "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws." [14] The Court added the following:

> Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens.*[15]

31. Internationally, discrimination is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." [16]

32. In her observations, the petitioner reasons that "The principle of equality involves not just equality before the law, but also equality in the law, legal equality, equal rights, equal opportunities and *de facto* equality."[17] Article 19, paragraph 2 of Chile's Constitution provides that "In Chile there are no privileged persons or groups (…) Neither the law nor any authority may establish arbitrary differences." Because she is a Cuban citizen, the petitioner was not allowed to take the oath to practice law after having successfully completed her studies in the law; however, the figures provided by the State itself indicate that 715 aliens are practicing law in Chile.

33. The international law of human rights prohibits direct and indirect discrimination, as well as discriminatory effects. Article 526 of the Organic Code of Courts has discriminatory effects since foreigners are not permitted to practice law, unless their country has some arrangement with Chile or the individual has dual citizenship, one of them being Chilean.

34. In exercise of the authority given in Article 64 of the American Convention, the Inter-American Court of Human Rights adopted its Advisory Opinion OC-4/84 wherein it established the sense of the nondiscrimination clause contained in Article 1(1) of the American Convention. The Court explained that "[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character."[18]

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[14] I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 101.

[15] I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18., paragraph 101.

[16] United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature by resolution 2016ª (XX), of December 21, 1965). The inter-American system does not have an instrument intended to combat discrimination in general, but it does have an Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted in Guatemala City, June 7, 1999. In the preamble to that convention, the States party express concern at "the discrimination to which people are subject based on their disability," and their commitment "to eliminating discrimination, in all its forms and manifestations, against persons with disabilities."

[17] Complaint filed by the petitioner, April 30, paragraph 19.

[18] I/A Court H.R., *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 55.

35. However, the Court did clarify that not all difference in treatment is necessarily discrimination, since there are certain substantial factual differences that may carry over into differences in legal treatment.[19] This issue was revisited almost 20 years later in Advisory Opinion OC-18/03, where the Court held that "Distinctions based on *de facto* inequalities may be established; such distinctions constitute an instrument for the protection of those who should be protected, considering their situation of greater or lesser weakness or helplessness."[20]

36. The Court reasserted that "the principle of a peremptory law on equal and effective protection of the law and nondiscrimination means that States must refrain from enacting laws that discriminate or that have discriminatory effects on various population groups when they exercise their rights." The Court also held that "States must combat discriminatory practices and adopt the measures necessary to ensure that all persons are truly equal before the law."[21]

37. The Commission notes that the great majority of the member States of the Organization of American States do not make citizenship a requirement for the practice of law. For example, the laws regulating the practice of law in Argentina, Brazil, Canada, the member States of the Caribbean Community (CARICOM), Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Paraguay, Peru, the United States and Venezuela establish requirements such as passing some professional exam to qualify for the bar association in the country in question, or revalidation of their studies in recognized universities in the country where they want to practice. In some cases, two options are offered for a foreign attorney to practice outside his or her country: the first is revalidation of his or her studies in a recognized national university in the country where he or she wants to practice; the second is that the country of origin may have some international treaty or a principle of reciprocity. In Chile, on the other hand, attorneys trained in another country will only be able to practice in Chile if there is some international treaty with that country. In other words, revalidation of studies is not an option.

38. In the present case, the petitioner studied in Chile, although her nationality prevents her from obtaining the license to practice the profession for which she studied. Article 1 of Law No. 19,074 provides that studies abroad by Chileans who left the country prior to March 11, 1990, will be recognized. Under article 2 of that law, this provision will also apply to the foreign spouses of Chilean citizens who studied abroad. In the petitioner's case, she studied in a Chilean university, to learn the legal system of that country.

39. Chile's Organic Code of Courts provides the following:

> Article 521
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> The title of attorney shall be bestowed in a public ceremony, held by the Supreme Court, *en* banc, once the candidate shows and declares that he or she satisfies the requirements stipulated in articles 523 and 526.
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> Article 523
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> Candidates for licensing as an attorney must:
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> 1º Be at least 20 years old;
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> 2º Have a degree in Juridical Sciences, awarded by a university in accordance with the law.

[19] I/A Court H.R., OC-4/84, paragraph 57.

[20] I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 89.

[21] I/A Court H.R. *López Álvarez v. Honduras*, Judgment of February 1, 2006, paragraph 170 (translation by the Commission).

> 3º Never have been convicted of a crime or be currently standing trial for a crime that carries a penalty of imprisonment;
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> 4º Have a clean record.
> The Supreme Court may make such inquiries as it deems necessary into the candidate's personal background, and
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> 5º Have satisfactorily completed a six-month internship with the legal aid societies to which Law No. 17,995 refers, certified by the Director General of the respective legal aid society.
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> Regulations will be established spelling out the requirements, procedures and conditions that must be met for that internship to be approved.
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> The obligation set forth in No. 5 shall be understood to have been fulfilled by candidates who are staff or employees of the Judicial Branch or the labor courts and who have worked for five years in the first five categories of the employee or clerical system.
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> Article 526
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> Only Chilean citizens may practice law, without prejudice to any international treaties currently in force.

40. Nationality is expressly mentioned in Article 1 of the American Convention among the factors that must not be grounds for discrimination in the exercise of Convention-protected rights. The American Convention also includes the equal protection clause in Article 24. The Inter-American Commission has written that: "Distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby states must provide an especially weighty interest and compelling justification for the distinction."[22]

41. In international human rights law, not every difference or distinction is considered discriminatory. If the distinction serves some legitimate end and if applied in a manner that is proportional to that end, this is not discrimination. But because nationality is one of the factors that Article 1 of the Convention provides must not be grounds for discrimination, the State must explain what legitimate end is being served and the overwhelming social need that justifies it. As to the matter of proportionality, the State must use the least restrictive means possible to accomplish the end sought. In the present case, the Chilean State invoked Article 62 of Law No. 4409, on the Bar Association, the immediate precedent for Article 526 of the Organic Code of Courts, which was adopted for the following reasons which were regarded as matters of national interest: suppression and punishment of the illegal practice of law; enhancement of the practice of the law, and so that Chilean attorneys do not have to compete with foreign attorneys. [23]

42. As for the first part of the State's explanation, the Inter-American Commission believes that less burdensome and less discriminatory methods can be applied, such as revalidation of studies or a test of one's knowledge. In this way, only those attorneys who have a solid understanding of Chilean law will be able to practice, irrespective of nationality. By the same token, it makes no sense that a Chilean who has studied law abroad, under a different legal system, should be able to practice law in Chile, while a foreigner who studied law in Chile cannot practice in Chile. In the petitioner's case, she proved that she had the knowledge necessary to practice this profession, having completed her degree in

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[22] Report on Terrorism and Human Rights, Inter-American Commission on Human rights, October 22, 2002, paragraph 338.

[23] In its submission of November 7, 2003, the State explained that Law No. 69885 added this to the text of Law No. 4409. Later, Article 32 of Law No. 7200, of July 21, 1942, authorized the President of the Republic to combine in a single text the 1875 Law on the Organization and Functions of the Courts and all other laws that had amended it and added to it. The combined text would be numbered as a law and be titled the Organic Code of Courts. The Ministry of Justice issued a decree in the Official Gazette of July 9, 1943, containing the new text of the Organic Code of Courts, classified as Law No. 7421. Article 526 of the new law basically echoed Article 62 and is still in force today.

a university recognized by the State. The IACHR does not see how the State's argument with respect to the enhancement of the practice of law applies in the case of the petitioner, since she did all her studies in the law in Chile and would therefore, in theory, be the equal of any other Chilean attorney who had completed the same program. Furthermore, although the petitioner might be competing with her colleagues, the IACHR does not regard this as a legitimate reason for discriminating against her on the grounds of her nationality. Respect for the right to equality before the law and the prohibition of discrimination demand that restrictive measures of this type serve some overriding social need. Protecting Chilean attorneys from the competition of their foreign colleagues clearly does not qualify as an overriding social need.

43. Chile has not given a legitimate reason for such a measure, much less made the case that the means is proportional to the end. The arguments that Chile makes simply blame the petitioner for not knowing the law that established the restrictions; it went so far as to suggest that the academic institution that enrolled her in the program should have been aware of Article 526 of Chile's Organic Code of Courts. On the other hand, the other requirements stipulated in Article 523 of that law are, in principle, reasonable and may be said to be consistent with the jurisprudence of the inter-American system on the subject of the right to equality before the law. Certainly requirements like a test to prove one's professional skills and one's specific knowledge of Chilean law are justified. One solution the State suggested was that the petitioner should apply for Chilean citizenship, since she met all the other requirements. The petitioner's response was that she ought not to be required to change her citizenship for her right to equality before the law to be recognized and to be able to practice her profession in the country where she lives. The Inter-American Commission considers that the measure suggested by Chile is unacceptable, since the basic problem in this case is discrimination on the basis of nationality. The avenue that Chile suggests would not erase the discrimination that Ms. Barbería Miranda has suffered; on the contrary, it would reinforce it since she would be required to abandon her own nationality in favor of another in order to be considered an equal.

44. In this case, one cannot argue the need to strike a proper balance between the legitimate interests of Chilean attorneys in preserving their source of employment and the right of foreign attorneys to practice law in Chile provided they are qualified, especially since, as of April 22, 2005, there were 715 foreigners licensed to practice as attorneys in Chile, either because their studies were revalidated or because they were authorized to practice.[24] Therefore, the Inter-American Commission concludes that by applying the discriminatory rule contained in Article 526 of the Organic Code of Courts to Margarita Barbería Miranda, the Chilean State violates the right to equality before the law and fails to comply with its obligation to respect and ensure the protected rights, as provided in articles 24 and 1(1) of the American Convention, respectively.

B. Duty to adapt the domestic legal system (Article 2 of the American Convention – Domestic Legal Effects)

45. Article 2 of the American Convention provides 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.

46. The Court has held the following with regard to these obligations:

> 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

[24] Communication received from the State on December 28, 2005, p. 7.

> established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.[25]

47. The Court added the following:

> customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of *effet utile)*. This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection.

48. Based on the above analysis and the case law of the inter-American system, the Chilean State must adapt its domestic law to give effect to the rights and freedoms protected under the American Convention. Specifically, the State must take the necessary measures to eliminate Article 526 from the Organic Code of Courts and any other discriminatory provisions that prohibit the practice of law based solely on a person's alien status. The Organic Code of Courts dates back to 1941 and Chile ratified the American Convention on Human Rights in 1990. By doing so, the State freely undertook the commitment to adapt its laws to conform to its international human rights obligations as articulated in the American Convention.

49. The State has failed to comply with its duty to adapt articles 521 and 526 of the Organic Code of Courts to give effect to the right to equality before the law and to the prohibition of discrimination contained in Article 24 of the American Convention. Under Article 5 of Chile's Constitution, the international treaties it ratifies have the force of constitutional law, which merely reinforces the obligation to introduce the indicated legislative changes.

VI. CONCLUSIONS

50. The Inter-American Commission concludes that the Chilean State is responsible for violation of the right to equality before the law, to the detriment of Margarita Barbería Miranda, by having invoked a discriminatory law to prevent her from practicing the law in Chile simply because she is a foreigner. In so doing, the State has also violated, to the victim's detriment, the obligations *erga omnes* to respect and guarantee all human rights, without discrimination, as provided in Article 1(1) of the American Convention, and its duty to adopt domestic legislative and other measures to adapt its laws to its international commitments in this area.

VII. RECOMMENDATIONS

51. Based on the analysis and conclusions contained in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS MAKES THE FOLLOWING RECOMMENDATIONS TO THE CHILEAN STATE:

1. That Margarita Barbería Miranda is to be adequately compensated for the violations established in the present report.

2. That measures are to be taken to amend the Chilean law that precludes individuals from the practice of the law solely on the grounds that they are aliens.

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[25] I/A Court H.R., *"The Last Temptation of Christ" Case (Olmedo Bustos et al.).* Judgment of February 5, 2001. Series C No. 73, paragraph. 85.

3. That Margarita Barbería Miranda is to be permitted to take the oath of an attorney and practice the law in Chile.

52. The Commission decides to transmit this report to the Chilean State, which has two months to comply with the recommendations made herein. That time period shall begin as of the date of transmittal of this report to the State, which is not authorized to publish it. The Commission also decides to notify the petitioner that a report was approved under Article 50 of the American Convention.

VIII. PROCEEDINGS FOLLOWING REPORT No. 17/07

53. On March 8, 2007, during the 127th regular session and pursuant to article 50 of the American Convention, the Commission approved Report No. 17/07, of which it notified the State of Chile on March 14, 2007, granting it two months to comply with the recommendations made in paragraph 51 of this report.

54. On March 14, 2007, the petitioner was informed that the IACHR had approved Report No. 17/07 and she was requested to respond within one month what her position was regarding submission of the case before the Court, i.e., the victim's position and what, in her opinion, were the grounds for submitting the case to the Court. She was also requested to submit, within the same time period, the victim's personal details, the authorization to act as the victim's representative, available evidence in addition to that submitted during the processing of the matter before the Commission, witnesses' and expert witnesses' personal details, and the claims regarding reparations and costs. The petitioner presented the requested information in an April 8, 2007 communication. On April 10, 2007, the IACHR forwarded the relevant parts of Report No. 17/07 to the petitioner as a confidential document.

55. On May 15 and June 6, 2007, respectively, the IACHR received a communication from the State reporting on progress made regarding the recommendations of Report No. 17/07 and a request for an extension to comply with the these recommendations. This time the State said that it understood that, should the requested extension be granted, the deadline established by article 51(1) of the American Convention for submission of the case before the Court would be suspended for three months. The State also expressed that it expressly waived its right to file preliminary objections regarding compliance with the deadline provided for by article 51(1) of the aforementioned instrument. The Court informed the State of Chile on June 13, 2007 that it had granted a three-month extension for the State to comply with the recommendations set forth in Report No. 17/07. The IACHR also requested that the State submit a report on July 13 and August 13 of 2007 regarding progress made in this respect. The IACHR received the first requested progress report on compliance with the recommendations of Report No. 17/07 on July 13, 2007. This communication was forwarded to the petitioner on August 3, 2007. The State again submitted information in an August 14, 2007 communication.

56. Subsequently, on August 27, 2007, the State requested a new three-month extension from the IACHR for the purpose of compliance with the recommendations of Report No. 17/07. The State said that it was its understanding that, should the requested extension be granted, the deadline established by article 51(1) of the American Convention for submission of the case before the Court would be suspended for three months. Likewise, the State expressly waived its right to file preliminary objections regarding compliance with the deadline provided for by article 51(1) of the aforementioned instrument. On September 4, 2007, the petitioner filed her observations to the report submitted by the State of Chile, and these were forwarded to the State in a September 24, 2007 communication. On September 4, 2007, the IACHR informed the State of Chile that it had been granted a new three-month extension to comply with the recommendations made in Report No. 17/07.

57. During the Commission's 130th regular session, a working meeting was held in the IACHR headquarters regarding progress in compliance with the IACHR's recommendations contained in Report No. 17/07. On December 7, 2007, the State of Chile reported to the IACHR on the status of its compliance with the recommendations of the report and submitted to the IACHR a new request for an extension, and its waiver of its right to file the preliminary objection provided for by article 31 of the IACHR's Rules of Procedure should the case be submitted to the Court. On December 12, 2007, the

IACHR forwarded the aforementioned communication from the State to the petitioner and granted a new three-month extension to the State for it to comply with the recommendations laid out in Report 17/07. On February 20, 2008, the State reported to the Commission on progress made in compliance with the recommendations.

58. In a March 6, 2008 communication, the State submitted a report on the status of compliance with the Commission's recommendations and requested an extension of the time period originally established, along with its express waiver of its right to file the preliminary objection established by article 31 of the IACHR's Rules of Procedure. The IACHR granted the State a three-month extension in a March 14, 2008 communication, and informed the petitioner on that same date of the extension, as well as regarding the State's March 6, 2008 communication.

59. The State informed the IACHR on the status of its compliance with the recommendations in communications of April 11 and of May 13 and 15, 2008. The first communication was transmitted to the petitioner on May 21, 2008, granting her one month to submit observations. The Commission acknowledged receipt of the last two in a June 13, 2008 communication. On May 30, 2008, the State requested the IACHR to grant it a three month extension, waiving its right to file the preliminary objection established by article 31 of the IACHR's Rules of Procedure, should the case be brought before the Court. The Commission granted the three month extension on June 6, 2008. In a September 11, 2008 communication, the State requested an additional extension, waiving its right to file the preliminary objection established by article 31 of the IACHR's Rules of Procedure, should the case be brought before the Court. This extension was granted by the IACHR in a September 12, 2008 communication. The petitioner was informed of this extension in a September 15, 2008 communication. On September 22 and December 8, 2008, the petitioner reported on the status of compliance with IACHR's recommendations in Report No. 17/07. The State sent a new communication dated October 10, 2008, which was forwarded to the petitioner on January 8, 2009.

60. The State submitted a new communication to the IACHR on December 11, 2008, which was forwarded to the petitioner on February 23, 2009. The Commission decided on December 13, 2008 not to bring the case before the Court, based on its evaluation of the measures adopted by the State, which have substantially complied with the Commission's recommendations. It also decided to continue with its follow-up of the recommendations whose compliance is still pending, pursuant to article 51 of the American Convention. On January 21, 2009, the IACHR received a communication from the petitioner, which was forwarded to the State on February 23, 2008.

61. On March 20, 2009, the IACHR adopted Report No. 30/09, pursuant to Article 51 of the American Convention. On April 7, 2009, the Inter-American Commission transmitted the report to the State and to the petitioners, as stipulated in Article 51.2 of the American Convention, and granted the State one month to report on compliance with the recommendations of the Commission. It is to be noted that to the date of the adoption of the present report, the Commission has not received additional information regarding the State´s compliance with the recommendations.

IX. ANALYSIS OF COMPLIANCE WITH RECOMMENDATIONS

A. Regarding the amendment of Chilean legislation preventing persons from practicing the legal profession exclusively because they are foreign, in particular norms contained in the *Código Orgánico de Tribunales* of Chile

62. The State of Chile reported on December 7, 2007 that Law 20.211 had been enacted, amending article 526 of the *Código Orgánico de Tribunales* [Organic Code of the Judiciary], pursuant to the IACHR's recommendation in its Report No. 17/07. The State also indicated that the Supreme Court of Chile was preparing the necessary rules of procedure to establish the requirements that foreign residents in that country should comply with to obtain their license to practice as a lawyer. Based on the foregoing, the Commission considers that this recommendation has been fully complied with by the State of Chile.

B. That Margarita Barbería Miranda be allowed to practice law in Chile under conditions equal to those for the rest of the lawyers of the country

63. The State reported on May 30, 2008 that Ms. Barbería Miranda took her oath on May 16, 2008 before the Supreme Court of Chile, by which she became fully authorized to practice law as an attorney in that country. Consequently, the Commission concludes that this recommendation has been fully complied with by the State of Chile.

C. That Margarita Barbería Miranda be adequately compensated for the violations established in this report

64. The State, initially, on several occasions reiterated its position that the possibility that Ms. Barbería Miranda could legally practice as a lawyer in Chile constituted, *per se*, an act of reparation for the petitioner, and requested that the IACHR ask Ms. Margarita Barbería Miranda to state her claims regarding reparations.26 In a September 4, 2007 communication, the petitioner stated that, given all the circumstances and the years that the proceedings had taken, she considered the passage of a law eliminating discrimination against foreign lawyers in Chile to be insufficient reparation. In this respect she held that *restitutio in integrum* should include pecuniary damages, estimated at U.S. $400,000, to which should be added nonpecuniary damages. On October 12, 2007, a work meeting was held in the IACHR headquarters between the representatives of the State and the petitioner for the purpose of assessing the degree of the State's compliance with the recommendations contained in Report No. 17/07 and, especially, those regarding reparations for Ms. Margarita Barbería.

65. Subsequently, the Commission received several communications from the State[27] regarding different meetings that had been held in Chile with the petitioner, in order to reach an agreement regarding reparations. For her part, Ms. Margarita Barbería Miranda sent a communication to the IACHR on May 18, 2008, with a new proposal regarding reparations[28]. The petitioner later reported[29] that, during a meeting with State representatives, they had suggested to her to withdraw her complaint from the inter-American human rights system and to file an administrative lawsuit before the *Consejo de Defensa del Estado* [Council for the Defense of the State], similarly to the journalist Alejandra Matus, who had been declared by the Inter-American Commission on Human Rights to be a victim of several human rights violations[30], and who had received pecuniary compensation in 2008 after having filed suit before

[25] Communications from the State dated July 13 and August 14, 2007.

[27] Communications from the State dated March 6, April 11, and May 13 and 16, 2008.

[28] In a May 18, 2008 communication, the petitioner stated that the proposal regarding reparations that she presented to the State in the month of March, 2008 included: a scholarship for higher education for each of her three children, all of university age; a full scholarship for higher education: doctorate, master's or graduate certificate in a subject of the law of interest to the petitioner; a furnished office; an automobile, and the sum of U.S. $90,000.

[29] Communication from the petitioner dated September 22, 2008.

[30] See IACHR Report No. 90/05, Case 12.142, *Alejandra Matus Acuña* et al.

the Council for the Defense of the State. Based on the foregoing, the Commission concludes that its recommendation to provide Ms. Margarita Barbería Miranda with adequate compensation has not been complied with by the State of Chile.

IX. CONCLUSIONS AND NOTIFICATION

66. The Inter-American Commission concludes that the Chilean State is responsible for the violation of the right to equal protection, with prejudice to Margarita Barbería Miranda, provided for by article 24 of the American Convention, as a result of the application, in her case, of a discriminatory norm that prevented her from practicing the profession of the law in Chile exclusively because she was a foreigner. As a consequence, the State likewise violated, with prejudice to the victim, the general obligation to respect and guarantee all human rights, without discrimination, provided for by article 1(1) of the American Convention, as well as its duty to adopt legislative measures to adapt its domestic legislation to its international commitments in this matter as established in article 2 of the aforementioned Convention.

67. The Commission values highly the actions taken by the State of Chile with respect to compliance with the recommendations made in Report No. 17/07. However, to date, the State has not complied with the recommendation to adequately compensate Ms. Margarita Barbería Miranda for the violations established in the aforementioned report.

68. Based on the foregoing conclusions in fact and in law, the IACHR decides to reiterate its recommendation to the State of Chile, found in paragraph 51(2) of this report. The Commission also decides to publish this report and include it in its Annual Report to the OAS General Assembly. Pursuant to its mandate, the Inter-American Commission on Human Rights will continue to evaluate measures adopted by the State of Argentina until the recommendations have been fully implemented.

Done and signed in the city of Washington, D.C., on the 18th day of the month of March 2010. (Signed): Paulo Sérgio Pinheiro, First Vice-President; Dinah Shelton, Second Vice-President; María Silvia Guillén, Rodrigo Escobar Gil, and José de Jesús Orozco Henríquez, members of the Commission.