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HUMAN RIGHTS COMMITTEE
Sixty-sixth session
12 - 30 July 1999

DECISIONS

Communication Nº 717/1996

Submitted by:	Acuña Inostroza et al (represented by Fundación de Ayuda Social de las Iglesias Cristianas)
Alleged victim:	The authors
State party:	Chile
Date of communication:	18 April 1996
Documentation references:	Prior decisions - Committee's rule 91 decision, transmitted to the State party on 26 August 1996 (not issued in document form)
Date of present decision	23 July 1999

[ANNEX]

*Made public by decision of the Human Rights Committee.
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ANNEX*

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS
- Sixty-sixth session -

concerning

Communication Nº 717/1996**

Submitted by:	Acuña Inostroza et al (represented by Fundación de Ayuda Social de las Iglesias Cristianas)
Alleged victim:	The authors
State party:	Chile
Date of communication:	18 April 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1999

Adopts the following:

Decision on admissibility

1. The communication is submitted on behalf of Carlos Maximiliano Acuña Inostroza and 17 other individuals, all Chilean citizens who were executed in 1973. It is alleged that Mr. Acuña Inostroza et al are victims of violations by Chile of articles 2; 5; 14, paragraph 1; 15, paragraphs 1 and 2; 16 and 26 of the International Covenant on Civil and Political Rights. They are represented by Nelson G.C. Pereira of the Fundación de Ayuda Social de las Iglesias Cristianas.

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Cecilia Medina Quiroga did not participate in the examination of the case.

**The texts of two individual opinions are appended to the present document.

2.1 On 9 October 1973, a military convoy composed of several vehicles and approximately ninety soldiers drove towards an industrial complex in Panguipulli (Sector Sur del Complejo Maderero Panguipulli). The victims were rounded up by the police (Carabineros) of the towns of Chabranco, Curriñe, Llifen and Futrono, and handed over to the soldiers. Later the same night, the authors were taken to the property of a civilian situated in the mountains. At an unknown hour, the prisoners were taken from the trucks and made to enter the house. They were then led some 500 metres away from the house, and were executed.

2.2 On 10 October 1973, a witness identified several of the victims and testified that the bodies had been mutilated. The bodies remained at the place of execution, and were covered only with leaves and branches. Only 15 days later were they buried, by soldiers, in shallow graves.

2.3 Towards the end of 1978 or early in 1979, unidentified civilians arrived at the mountain property and asked the owner to indicate the location of the graves. They dug up the graves and removed the bodies; it is unknown where they were taken to. It is known that the victims had never been judged by a military tribunal, during time of war; they were simply summarily and arbitrarily executed.

2.4 On 25 June 1990, proceedings were initiated in the Criminal Court of Los Lagos (Juzgado Criminal de Los Lagos), with a view to ascertaining the whereabouts of the victims' remains. A special investigating magistrate was nominated (Ministro en Visita extraordinaria), but proceedings were aborted by a petition of 17 August 1990 emanating from a military jurisdiction. The special investigator was ordered to cease his investigations. This was officially confirmed by a decision of 3 September 1990. On 17 January 1991, the conflict of jurisdiction was resolved by the Supreme Court in favour of the military jurisdiction.

2.5 On 24 May 1993, the 4th Military Court of Valdivia (IV Juzgado Militar de Valdivia) formally decided to discontinue the case (sobreseimiento definitivo); on 13 October 1994, the Military Court (Corte Marcial)[1] endorsed this decision. One of the civilian judges dissented, holding that proceedings should be re-initiated as the facts appeared to support evidence to the effect that an act of genocide had been perpetrated.

2.6 A complaint (Recurso de Queja) was then filed with the Supreme Court (Corte Suprema), on grounds of abuse of power on the part of the Military Tribunal and the Military Court, by dismissing a case under the provisions of the Amnesty Decree of 1978. On 24 October 1995, the Supreme Court dismissed the complaint.

[1]Counsel explains that this Court is made up of five judges, three are officers, one each from the army, the air force and the Carabineros, the other two are civil judges from the Santiago Court of Appeal.

The complaint:

3.1 Before the Supreme Court, the case was based on violations by the Chilean authorities both of national law and international conventions. Reference was made in this context to the 1949 Geneva Conventions, in force for Chile since April 1951, under which certain illicit acts committed during an armed conflict without international dimensions, are not subject to an amnesty. In this respect, it was alleged that the events under investigation had taken place during a state of siege ("Estado de sitio en grado de 'Defensa Interna'") in Chile. Counsel alleges that by their acts, the present Chilean authorities are condoning, and have become accessories to, the acts perpetrated by the former military regime.

3.2 It is alleged that, regardless of how the events in question may be defined, i.e. whether under the Geneva Conventions or under article 15, paragraph 2, of the Covenant, they constitute acts or omissions which, when committed, were criminal acts according to general principles of law recognised by the community of nations, and which may not be statute-barred nor unilaterally pardoned by any State. Counsel states that with the application of the amnesty law, Decree no. 2191 of 1978, Chile has accepted the impunity of those responsible for these acts. It is alleged that the State is renouncing its obligation to investigate international crimes, and to bring those responsible for them to justice and thus determine what happened to the victims. This means that fundamental rights of the authors and their families have been violated. Counsel claims a violation of article 15, paragraph 2, of the Covenant, in that criminal acts have been unilaterally and unlawfully pardoned by the State.

3.3 Counsel alleges that the application of the amnesty law No.2.191 of 1978 deprived the victims and their families of the right to justice, including the right to a fair trial and to adequate compensation for the violations of the Covenant.[2] Counsel further alleges a violation of article 14 of the Covenant, in that the victims and their families were not afforded access on equal terms to the courts, nor afforded the right to a fair and impartial hearing. Since the cases were remitted to the military courts, the principle of equality of arms was violated.

3.4 To counsel, the decision of the military tribunals not to investigate the victims' deaths amounts to a violation of article 16 of the Covenant, i.e. failure to recognize the victims as persons before the law.

3.5 As to the reservation entered by Chile upon ratification of the Optional Protocol in 1992, it is alleged that although the events complained of occurred prior to 11 March 1990, the decisions challenged by the present communication are the judgments of the Supreme Court of October 1995.

[2] In this respect, reference is made to the Inter-American Commission's decision in the Velasquez Rodriguez case.

State party's observations and counsel's comments:

4.1 In submissions dated 6 December 1996, 12 February 1997 and 9 February 1998, the State party provides a detailed account of the history of the cases and of the amnesty law of 1978. It specifically concedes that the facts did occur as described by the authors. It was indeed in reaction to the serious human rights violations committed by the former military regime that former President Aylwin instituted the National Truth and Reconciliation Commission by Decree of 25 April 1990. For its report, the Commission had to set out a complete record of the human rights violations that had been brought to its attention; among these was the so-called "Baños de Chihuio" incident, during which Mr. Acuña Inostroza and the others were killed. The State party gives a detailed account of investigations into this incident.

4.2 The State party submits that the facts at the basis of the communication cannot be attributed to the constitutionally elected government(s) which succeeded the military regime. It provides a detailed account of the historical context in which large numbers of Chilean citizens disappeared and were summarily and extrajudicially executed during the period of the military regime.

4.3 The State party notes that it is not possible to abrogate the Amnesty Decree of 1978, and adduces reasons: first, legislative initiatives such as those relating to amnesties can only be initiated in the Senate (article 62 of the Constitution), where the Government is in a minority. Second, abrogation of the law would not necessarily have repercussions under criminal law for possible culprits, on account of the prohibition of retroactive application of criminal laws. This principle is enshrined in article 19 lit.3 of the Chilean Constitution and article 15, paragraph 1, of the Covenant. Three, the composition of the Constitutional Court. Four, the designation of the Commanders in Chief of the Armed Forces; the President of the Republic may not remove the present officers, including General Pinochet. Lastly the composition and attributions of the National Security Council (Consejo de Seguridad Nacional) restrict the attributions of the democratic authorities in all matters pertaining to internal or external national security.

4.4 The State party further observes that the existence of the amnesty law does not inhibit the continuation of criminal investigations already under way in Chilean tribunals. In this sense, the amnesty decree of 1978 may extinguish the criminal responsibility of those accused of crimes under the military regime, but it cannot in any way suspend the continuation of investigations that seek to establish what happened to individuals who were detained and later disappeared. This has been the interpretation of the decree both by the Military Court and by the Supreme Court.

4.5 The Government emphasizes that the Chilean Constitution (article 73) protects the independence of the judiciary. As such, the Executive cannot interfere with the application and the interpretation of domestic laws by the courts, even if the courts' decisions go against the interests of the Government.

4.6 With respect to the terms of the amnesty law, the State party points to the necessity to reconcile the desire for national reconciliation and pacification of society with the need to ascertain the truth of past human rights violations and to seek justice. These criteria inspired ex-President Aylwin when he set up the Truth and Reconciliation Commission. To the State party, the composition of the Commission was a model in representativity, as it included members associated with the former military regime, former judges and members of civil society, including the founder and president of the Chilean Human Rights Commission.

4.7 The State party distinguishes between an amnesty granted de facto by an authoritarian regime, by virtue of its failure to denounce or investigate massive human rights abuses or by adopting measures designed to ensure the impunity of its members, and an amnesty adopted by a constitutionally elected democratic regime. It is submitted that the constitutionally elected governments of Chile have not adopted any amnesty measures or decrees which could be considered incompatible with the provisions of the Covenant; nor have they committed any acts which would be incompatible with Chile's obligations under the Covenant.

4.8 The State party recalls that after the end of the mandate of the Truth and Reconciliation Commission, another body - the so-called "*Corporación Nacional de la Verdad y Reconciliación*" - continued the work of the former, thereby underlining the Government's desire to investigate the massive violations of the former military regime. The "Corporación Nacional" presented a detailed report to the Government in August of 1996, in which it added the cases of 899 further victims of the previous regime. This body also oversees the implementation of a policy of compensation for victims which had been recommended by the Truth and Reconciliation Commission.

4.9 The legal basis for the compensation to victims of the former military regime is Law No.19.123 of 8 February 1992, which:
* sets up the Corporación Nacional and mandates it to promote the compensation to the victims of human rights violations, as identified in the final report of the Truth and Reconciliation Commission;
* mandates the Corporación Nacional to continue investigations into situations and cases in respect of which the Truth and Reconciliation Commission could not determine whether they were the result of political violence;
* fixes maximum levels for the award of compensation pensions in every case, depending on the number of beneficiaries;
* establishes that the compensation pensions are readjustable, much like the general system of pensions;
* grants a "compensation bonus" equivalent to 12 monthly compensation pension payments;
* increases the pensions by the amount of monthly health insurance costs, so that all health-related expenditures will be borne by the State;
* decrees that the education of children of victims of the former regime will be borne by the State, including university education;
* lays down that the children of victims of the former regime may request to be exempted from military service.

In accordance with the above guidelines, the relatives of Mr. Acuña Inostroza and the other victims have received and are currently receiving monthly pension payments.

4.10 In the light of the above, the State party requests the Committee to find that it cannot be held responsible for the acts which are at the basis of the present communication. It solicits, moreover, a finding that the creation of the National Truth and Reconciliation Commission and the corrective measures provided for in Law No.19.123 constitute appropriate remedies within the meaning of article 2 of the Covenant.

4.11 By a further submission dated 29 July 1997, the State party reaffirms that the real obstacle to the conclusion of investigations into disappearances and summary executions such as in the authors' cases remains the Amnesty Decree of 1978 adopted by the former military government. The current Government cannot be held responsible internationally for the serious human rights violations which are at the basis of the present complaints. Everything possible to ensure that the truth be established, that justice be done and that compensation be awarded to the victims or their relatives has been undertaken by the present Government, as noted in the previous submission(s). The desire of the Government to promote respect for human rights is reflected in the ratification of several international human rights instruments since 1990, as well as the withdrawal of reservations to some international and regional human rights instruments which had been made by the military regime.

4.12 The State party further recalls that with the transition to democracy, the victims of the former regime have been able to count on the full cooperation of the authorities, with a view to recovering, within the limits of the law and the circumstances, their dignity and their rights. Reference is made to the ongoing work of the Corporación Nacional de Reparación y Reconciliación.

5.1 In his comments, counsel takes issue with several of the State party's observations. He contends that the State party's defence ignores or at the very least misconstrues Chile's obligations under international law, which are said to mandate the Government to take measures to mitigate or eliminate the effects of the amnesty decree of 1978. Article 2 of the American Convention on Human Rights and article 2, paragraph 2, of the Covenant impose a duty on the State party to take the necessary measures (by legislation, administrative or judicial action)to give effect to the rights enshrined in these instruments. To counsel, it is wrong to argue that there is no other way than to abrogate or declare null and void the 1978 amnesty decree: nothing prevents the State party from amnestying those who committed wrongs, except where the wrongs committed constitute international crimes or crimes against humanity. For counsel, the facts at the basis of the present communication fall into the latter category.

5.2 To counsel, it is equally wrong to argue that the principle of non-retroactivity of criminal laws operates against the possibility of prosecuting those deemed responsible for grave violations of human rights under the former military regime. This principle does not apply to crimes against humanity, which cannot be statute-barred. Moreover, if the

application of the principle of non-retroactivity of criminal legislation operates in favour of the perpetrator but collides with other fundamental rights of the victims, such as the right to a remedy, the conflict must be solved in favour of the latter, as it derives from violations of fundamental rights, such as the right to life, to liberty or physical integrity. In other words, the perpetrator of serious crimes cannot be deemed to benefit from more rights than the victims of these crimes.

5.3 Counsel further claims that from a strictly legal point of view, the State party has, with the modification of Chile's Constitution in 1989 and with the incorporation into the domestic legal order of international and regional human rights instruments such as the American Convention on Human Rights and the Covenant, implicitly abrogated all (domestic) norms incompatible with these instruments; this would include the Amnesty Decree D.L.2.191 of 1978.

5.4 In respect of the State party's argument relating to the independence of the judiciary, counsel concedes that the application of the amnesty decree and consequently the denial of appropriate remedies to the victims of the former military regime derives from acts of Chilean tribunals, in particular the military jurisdictions and the Supreme Court. However, while these organs are independent, they remain agents of the State, and their acts must therefore engage State responsibility if they are incompatible with the State party's obligations under international law. Counsel therefore considers unacceptable the State party's argument that it cannot interfere with the acts of the judiciary: no political system can justify the violation of fundamental rights by one of the branches of Government, and it would be absurd to conclude that while the executive branch of government seeks to promote adherence to international human rights standards, the judiciary may act in ways contrary to, or simply ignore, these standards.

5.5 Counsel finally argues that the State party has misleadingly adduced the conclusions of several reports and resolutions of the Inter-American Commission on Human Rights in support of its arguments. To counsel, it is clear that the Commission would hold any form of amnesty which obstructs the determination of the truth and prevents justice from being done, in areas such as enforced and involuntary disappearances and summary executions, as incompatible with and in violation of the American Convention on Human Rights.

5.6 In additional comments, counsel reiterates his allegations as summarized in paragraphs 3.2 and 3.3 above. What is at issue in the present case is not the granting of some form of compensation to victims of the former regime, but the denial of justice to them: the State party resigns itself to arguing that it cannot investigate and prosecute the crimes committed by the military regime, thereby foreclosing the possibility of any judicial remedy for the victims. To counsel, there is no better remedy than the determination of the truth, by way of judicial proceedings, and the prosecution of those held responsible for the crimes. In the instant case, this would imply ascertaining the burial sites of the victims, why they were murdered, who killed them or ordered them to be killed, and thereafter indicting and prosecuting those responsible.

5.7 Counsel adds that his interpretation of the invalidity of Amnesty Decree 2.191 of 1978, in the light of international law and the Covenant, has been endorsed by the Inter-American Commission on Human Rights in a Resolution adopted in March 1997. In this resolution, the Commission held the amnesty law to be contrary to the American Convention on Human Rights, and admonished the State party to amend its legislation accordingly. The Chilean Government was requested to continue investigations into disappearances that occurred under the former regime, and to indict, prosecute and try those held responsible. To counsel, the Commission's resolution perfectly sets out Chile's responsibility for facts and acts such as those at the basis of the present communications.

Admissibility considerations:

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party does not explicitly challenge the admissibility of the communication, although it does point out that the events complained of by the authors, including the Amnesty Decree of 1978, occurred prior to the entry into force of the Optional Protocol for Chile, which ratified that instrument on 28 August 1992 with the following declaration: "In ratifying the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990."

6.3 The Committee notes that the authors also challenge the judgments of the Supreme Court of Chile of 24 October 1995 denying their request for the revision of earlier adverse decisions rendered on their applications by military courts.

6.4 The Committee notes that the acts giving rise to the claims related to the deaths of the authors occurred prior to the international entry into force of the Covenant, on 23 March 1976. Hence, these claims are inadmissible *ratione temporis*. The Supreme Court judgement of 1995 cannot be regarded as a new event that could affect the rights of a person who was killed in 1973. Consequently, the communication is inadmissible under article 1 of the Optional Protocol, and the Committee does not need to examine whether the declaration made by Chile upon accessing to the Optional Protocol has to be regarded as a reservation or a mere declaration.

6.5 The question of whether the next of kin of the executed victims might have a valid claim under the Covenant notwithstanding the inadmissibility of the instant communication is not before the Committee and need not be addressed in these proceedings.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party, and to the authors' counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

Individual opinion by Committee member Hipólito Solari Yrigoyen
(dissenting)

I hold a dissenting opinion on paragraph 6.4, which should have read as folows: "With regard to the author's claim under article 16 of the Covenant, the Committee notes that the communication concerns the violation of the author's right to recognition everywhere as a person before the law, as a consequence of the lack of investigation of his whereabouts or location of the body. The Committee considers this a fundamental right to which anyone is entitled, even after his death, and one that should be protected whenever its recognition is sought. It therefore does not need to consider whether the declaration made by Chile upon accession to the Optional Protocol should be regarded as a reservation or a mere declaration, and can conclude that it is not precluded *ratione temporis* from examining the author's communication on the matter.

Regarding the claim under article 14, paragraph 1, of the Covenant, it is submitted that in the author's case the trial was not impartial in determining whether a violation of article 16 of the Covenant had occurred. The Committee considers it has been sufficiently substantiated for admissibility purposes that the author's case was not heard by an independent tribunal."

H. Solari Yrigoyen (signed)

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be translated also into Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Committee member Christine Chanet concerning communications Nos. 717/1996 and 718/1996

I challenge the decision taken by the Committee, which, in dealing with the two communications, dismissed the applicants on the grounds of the ratione temporis reservation lodged by CHILE at the time of its accession to the Optional Protocol.

In my view the question could not be addressed in this manner, in view of the fact that judicial decisions taken by the State party were adopted after the date it had specified in its reservation and that the problem raised in connection with article 16 of the Covenant relates to a situation which, as long as it is not permanently ended, has long-term consequences.

In the case in question, even if the actual circumstances referred to in the two communications diverge, the attitude of the State regarding the consequences to be drawn from the disappearances necessarily raised a question as regards article 16 of the Covenant.

Under article 16, everyone has the right to recognition as a person before the law.

While this right is extinguished on the death of the individual, it has effects which last beyond his or her death; this applies in particular to wills, or the thorny issue of organ donation;

This right survives a fortiori when the absence of the person is surrounded by uncertainty; he or she may reappear, and even if not present, does not cease to exist under the law; it is not possible to substitute civil death for confirmed natural death;

These observations do not imply that this right is of unlimited duration: either the identification of the body is incontestable and a declaration of death can be made, or uncertainty remains concerning the absence or the identification of the person and the State must lay down rules applicable to all these cases; it may, for example, specify a period after which the disappeared person is regarded as dead.

This is what the Committee should have sought to find out in this particular case by examining the matters in depth.

Ch. Chanet (signed)

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be translated also into Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]