

REPORT Nº 29/92
CASES 10.029, 10.036, 10.145, 10.305, 10.372
10.373, 10.374 and 10.375
URUGUAY
October 2, 1992

On October 4, 1991, during its 80th session, the Inter-American Commission on Human Rights (hereinafter "the Commission"), approved, by a vote of six to one, Report Nº 35/91, pursuant to Article 50 of the American Convention on Human Rights (hereinafter "the Convention"). That report was thereupon sent to the Government of Uruguay on October 8, 1991. The Government of Uruguay communicated its views and the Commission studied and took account of them in the present Report Nº 29/92, provided for in Article 51.1 of the Convention, which was adopted unanimously.

I. BACKGROUND

1. Between June 16, 1987 and April 7, 1989, the Inter-American Commission on Human Rights, (hereinafter "the Commission") received a total of eight petitions, filed against the Uruguayan State:

Case Nº 10.029: Hugo Leonardo de los Santos Mendoza

Case Nº 10.036: Alvaro Balbi

Case Nº 10.145: Enrique Rodríguez Larreta Pieri

Case Nº 10.305: Noris Alejandra Menotti Cobas

Luis Alberto Estradet

Josefina Mirta Detta Paolino

Rita Ibarburu

Federico Martínez

Jorge Burgell

William Torres Ramírez

Guillermo Francisco Stoll

Osiris Elías Musso Casalas

Clarel de los Santos Flores

Case Nº 10.372: Juan Manuel Brieba

Case Nº 10.373: Félix Sebastián Ortíz

Case Nº 10.374: Amelia Sanjurjo Casal, and

Case Nº 10.375: Antonio Omar Paitta, respectively

2. The petitions denounced the legal effects of Law Nº 15,848 (hereinafter "the Law") and its application by the judiciary, which they allege violated rights upheld in the American Convention (hereinafter "the Convention"): the right to judicial protection (Art. 25) and the right to a fair trial (Art. 8), among others.

3. The first article of that law states that: "It is hereby recognized that as a consequence of the logic of the events stemming from the agreement between the political parties and the Armed Forces in August 1984 and in order to complete the transition to full constitutional order, any State action to seek punishment of crimes committed prior to March 1, 1985, by military and police personnel for political motives, in the performance of their functions or on orders from commanding officers who served

during the *de facto* period, has hereby expired."

4. Article 3 states the following: "For the purposes set forth in the preceding articles, the judge hearing the case shall require the Executive Branch to inform the court, within a period of no more than thirty days from receipt of the communication, whether it considers that the facts under investigation fall under the provisions of the first article of this law. If the Executive Branch so states, then the judge shall dismiss the case. If, on the other hand, the Executive Branch does not reply or reports that the matter under investigation does not fall under the provisions of this law, the judge shall order that the proceedings continue. From the time this law is enacted up until the time the judge receives the communication from the Executive Branch, all pretrial proceedings in the cases described in the first paragraph of this article shall be suspended."

5. While Article 4 states that: "The foregoing notwithstanding, the judge hearing the case shall remit to the Executive Branch all testimony offered in the complaint as of the date of enactment of this law, regarding measures involving individuals alleged to have been detained in military or police operations and who have since disappeared, as well as minors alleged to have been abducted under similar circumstances. The Executive Branch shall immediately order investigations to ascertain the facts. Within 120 days of the date of the communication received from the court, the Executive Branch shall advise the plaintiffs of the findings of these investigations and provide them with the information compiled."

6. Since the Executive Branch entrusted the investigation to military judges, doubts were raised as to the seriousness and impartiality of the investigative proceeding, and as to whether the duty to provide the essential judicial guarantees has been observed (Articles 8 and 27 of the Convention).

7. The law was declared constitutional by the Uruguayan Supreme Court and was approved by a national referendum called for that purpose pursuant to the provisions of Article 79 of the Uruguayan Constitution.

II. SUMMARY OF THE PETITIONS AND THE GOVERNMENT'S REPLY

8. Seven of the eight petitions are individual cases, while the other is a joint action presented on behalf of ten victims. The first three have one element in common, which is that they were the subject of decisions previously adopted by this Commission in application of the American Declaration of the Rights and Duties of Man (henceforth "the American Declaration"). Those decisions, *inter alia*, cited the Government of Uruguay for very grave violations of the right to life, liberty and personal security (Article I of the American Declaration) and recommended to the Government that it undertake an "investigation" of the facts and have those responsible "brought to trial."

9. All the petitions, however, cite the effects of the law as a fundamental violation of the Convention. The petitioners contend that inasmuch as the law denies them their right to turn to the courts as a last resort, a thorough and impartial investigation of the human rights violations that occurred during the past *de facto* government is being obstructed.

10. Consequently, the petitioners allege that the law violates Articles 25 and 8 of the Convention in relation to Article 1.1 thereof, in that its judicial effect has been to deny them their right to judicial protection from the courts and to dismiss proceedings against those responsible for past human rights violations.

11. The basic position of the Government of Uruguay (hereinafter "the Government") has been that this legislative measure, which constitutes an exercise of its sovereign right to grant clemency, violates neither the Convention nor any other rule of international law. The Government alleged that the petitions were inadmissible because the domestic remedies had not been exhausted. It argued that the petitioners could have filed suit for civil damages and that some of the petitioners took their cases as far as the Supreme Court. As for the merits of the case, it argued that the law was the result of a democratic decision and was found to be constitutional. It further alleged that the Convention provides for the suspension of the rights recognized therein and that this law was an integral part of a national reconciliation process.

III. THE PROCESSING IN THE COMMISSION

12. The Commission duly conveyed to the parties the observations formulated by the Government and petitioners. Basically, both parties restated their original positions.

13. At its 76th, 77th and 78th regular sessions, the Commission held hearings during which it received the petitioners and government representatives.

14. Because the question that each petition raises is basically the same in all the petitions, the Commission has decided to join the cases and regard them as a single case.

IV. ADMISSIBILITY

15. In the Commission's judgment, the formal admissibility requirements set forth in Article 46.1 of the Convention and in Article 32 of the Commission's Regulations have been satisfied inasmuch as the domestic legislation does not provide suitable and effective means under which it would be at least legally possible to declare the effects of the law null and void; those effects make it impossible to obtain an impartial and exhaustive judicial investigation into the very serious human rights violations that have occurred in the past. The Uruguayan Supreme Court of Justice dismissed the cases that argued the unconstitutionality of the law.

16. As for the allegation that the domestic remedies have not been exhausted, the Commission would note that once the law was declared constitutional, its effect was to prevent continuation of the proceedings underway in the courts of the land. While Article 46.1.a of the Convention requires that the remedies under domestic law be pursued and exhausted first, Article 46.2.a stipulates that said requirement shall not apply when "the domestic legislation of the State concerned does not afford due process of law for the protection of rights that have allegedly been violated." Therefore, the petitions cannot be considered inadmissible on the ground of a failure to exhaust the remedies under domestic law.

17. The petitions were presented to this organ in due form, since the "fact" denounced is that it has become impossible to bring the military and police offices accused of past human rights violations to trial. The petitions do not constitute a duplication of proceedings, inasmuch as the same question, i.e., the compatibility of the law with the Convention, is not pending settlement in any other international forum.

18. As for "friendly settlement," the Commission cites the observations made by the Court in the Velásquez Rodríguez case to the effect that "the Commission should attempt such friendly settlement only when the circumstances of the controversy make that option suitable or necessary, at the Commission's sole discretion."¹ In the instant case, the subject concerns a complete legislative program which the State actively defends. Hence, the Commission is of the view that the friendly settlement procedure is neither necessary nor suitable.

19. On October 4, 1991, during its 80th session, the Commission, by a vote of 6 to 1, gave preliminary approval to Report N° 35/91, based on Article 50 of the Convention. The report was then sent to the Government of Uruguay, on a confidential basis, in accordance with the second part of that same article, to guard against its publication. The dissenting opinion of Dr. Gilda M.D. de Russomano, then a member of the Commission, was attached to this report.

20. On December 4, 1991, the Government sent its observations on Report N° 35/91.

V. OBSERVATIONS OF THE GOVERNMENT ON THE REPORT ADOPTED IN ACCORDANCE WITH ARTICLE 50

21. Essentially, the Government contends that the Commission has failed to consider the "democratic juridical-political context" inasmuch as it has not taken into account the domestic legitimacy of the law and has failed to consider important aspects of the present political situation, as well as the higher ethical ends of the Caducity Law. What follows is a summary of the principal arguments in the Government's reply.

22. The Government avers that the amnesty question should be viewed in the political context of the reconciliation, as part of a legislative program for national pacification that covered all actors involved in past human rights violations, i.e., "political crimes and related common and military crimes;" that the Caducity Law was adopted for "the sake of legal symmetry and for very justified and serious reasons of the utmost political importance," with "unqualified adherence to its constitutional system and its international commitments." Uruguay emphasizes the fact that this law, approved by the necessary parliamentary majority, was also "the subject of a plebiscite" by the electorate; that it cannot accept the Commission's finding that while the domestic legitimacy of the law is not within the Commission's purview, the legal effects denounced by the petitioners are; "the express will of the Uruguayan people to close a painful chapter in their history in order to put an end, as is their sovereign right, to division among Uruguayans, is not subject to international condemnation."

¹ Inter-American Court of Human Rights, Velázquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, paragraph 44.

23. The Government pointed out that as with any treaty, the Convention must be interpreted in accordance with the principles embodied in the Vienna Convention on the Law of Treaties, in good faith and in the light of its object and purposes. Accordingly, it pointed out that Articles 8.1 and 25.1 of the Convention should be interpreted in the light of Articles 30 and 32 of the Convention, whereby the enjoyment and exercise of the rights recognized in the Convention can be restricted when such restrictions are the product of laws enacted for reasons of general interest or when those rights are limited by the rights of others, by the security of all and by the just demands of the general welfare in a democratic society. The Government pointed out that the Caducity Law was enacted in exercise of an authority recognized in international law (Articles 6.4 and 14.6 of the International Covenant of Civil and Political Rights and Article 4.6 of the Convention).

24. The Government contends that Article 8.1 of the Convention refers to the rights of the accused in a criminal proceeding and not to someone filing a criminal action. The Government contends further, that the right to bring a criminal action, independently of the case brought by the public prosecutor, does not exist in Uruguayan procedural law; it further asserts that this right is not protected by international human rights law. It stated that private parties are not the owners of a criminal action and that only in exceptional cases is a private interest allowed to intervene. Criminal proceedings are public and only the State has the authority to waive the exercise of that right. The only thing that the law declared expired was the power of the public prosecutor to bring charges in a court of criminal law.

25. As for Article 25.1 of the Convention, the Government argued that its purpose was to "redress the injured right and, if not, secure reparation for the damage suffered;" that since, in the cases being denounced, it is impossible to redress rights injured during the de facto regime, all that remains is the right to damages, which the Caducity Law has in no way impaired.

26. The Government alleges that it did not violate its obligation to investigate and punish violations of human rights in accordance with the interpretation of Article 1.1 of the Convention as rendered by the Inter-American Court of Human Rights. It asserted that the Caducity Law "waived exercise of the State's punitive power and regulated the duty to investigate in the spirit of and in keeping with the objectives of that legislative act of sovereign clemency." Therefore "the law had not in any way affected the individual human right in question, since criminal law is confined to the denunciation of the crime." Consequently the duty to investigate and the question of an amnesty law must be analyzed as a whole. In this case, the expiry of the State's punitive intention is for the sake of the common good, since "investigating facts that occurred in the past could rekindle the animosity between persons and groups," and obstruct the reconciliation, pacification and strengthening of democratic institutions. Knowledge of the truth is a legitimate aspiration on anyone's part and the legal system should make available to the interested party the procedural means to that end; but, for those same reasons, the State may opt "not to make available to the interested party the means necessary for a formal and official inquiry into the facts in a court of law."

27. The Government further contended that the Commission had failed to note that the Caducity Law does not prevent the injured party from seeking damages in a civil court; hence, the recommendation made to the Government that the victims be

awarded just compensation for past human rights violations was out of order.

V. THE OPINION AND CONCLUSIONS OF THE COMMISSION

28. In accordance with Article 51.1 of the Convention, the Commission is to set forth its opinions and conclusions concerning the question submitted for its consideration.

29. The Commission considers that the petitions raise a point of law, since no facts need be confirmed and none of the facts alleged is disputed; instead the petitions are asking the Commission to determine whether the law is compatible with the Convention.

30. The question in these cases is not the domestic legitimacy of the legislation and other measures adopted by the Government to achieve the effect herein denounced. Under long-standing principles of international law and under specific provisions contained in the Convention, the Commission is obliged to determine whether certain of its effects constitute a violation of the obligation undertaken by the Government under the Convention (Article 27 of the Vienna Convention on the Law of Treaties).

31. As for the domestic legitimacy and the "approval of the Caducity Law by a popular referendum," it should be noted that it is not up to the Commission to rule on the domestic legality or constitutionality of national laws. However, application of the Convention and examination of the legal effects of a legislative measure, either judicial or of any other nature, insofar as it has effects incompatible with the rights and guarantees embodied in the Convention or the American Declaration, are within the Commission's competence.

32. That competence follows from the Convention itself, when it gives the Commission (and the Inter-American Court of Human Rights as well) competence "with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention" (Article 33). In other words, the Commission "takes action on petitions and other communications pursuant to its authority under the provisions of Articles 44 and 51 of this Convention" (Article 41.f). Further, Article 2 stipulates that the States Parties are obliged to adopt "such legislative or other measures as may be necessary to give effect to those rights or freedoms" (Article 2). *A fortiori*, a country cannot by internal legislation evade its international obligations. Therefore, the Commission and the Court are authorized to examine --in light of the Convention-- even domestic laws which allegedly abrogate or violate rights and freedoms embodied therein.

A. As to the interpretation of the Convention

33. Article 29 of the Convention stipulates the following:

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this

Convention or to restrict them to a greater extent than is provided for herein;

b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention to which one of the said States is a party;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

34. The Commission notes that any interpretation of the Convention must be rendered in accordance with this provision.

B. As to the right to a fair trial

35. The law in question has the intended effect of dismissing all criminal proceedings involving past human rights violations. With that, the law eliminates any judicial possibility of a serious and impartial investigation designed to establish the crimes denounced and to identify their authors, accomplices, and accessories after the fact.

36. The Commission must also consider the fact that in Uruguay, no national investigatory commission was ever set up nor was there any official report on the very grave human rights violations committed during the previous *de facto* government.

37. It is fitting, in this regard, to cite the Commission's general position on the subject, as set forth in its Annual Report of 1985-1986:

...one of the few matters that the Commission feels obliged to give its opinion in this regard is the need to investigate the human rights violations committed prior to the establishment of the democratic government. Every society has the inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed, in order to prevent a repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the judiciary itself may undertake whatever investigations may be necessary.² (Emphasis added.)

² Annual Report of the Inter-American Commission on Human Rights, 1985-1986, page 205.

38. The Commission must also weigh the nature and gravity of the events with which the law concerns itself; alleged disappearances of persons and the abduction of minors, among others, have been widely condemned as a particularly grave violation of human rights. The social imperative of their clarification and investigation cannot be equated with that of a mere common crime [See: AG/RES. 443 (IX-0/79); 666 (XIII-0/83); 742 (XIV-0/84) 950 (XVIII-0/88); 1022 (XIX-0/89) and 1044 (XX-0/90) and IACHR Annual Reports 1978; 1980/81; 1982/83; 1985/86; 1986/87 and Special Reports such as those on Argentina (1980), Chile (1985) and Guatemala (1985), all approved by the General Assembly].

39. The law under examination had various effects and adversely affected any number of parties or legal interests. Specifically the victims, next-of-kin or parties injured by human rights violations have been denied their right to legal redress, to an impartial and exhaustive judicial investigation that clarifies the facts, ascertains those responsible and imposes the corresponding criminal punishment.

40. What are denounced as being incompatible with the Convention are the legal consequences of the law with respect to the right to a fair trial. One of the law's effects was to deny the victim or his rightful claimant the opportunity to participate in the criminal proceedings, which is the appropriate means to investigate the commission of the crimes denounced, determine criminal liability and impose punishment on the those responsible, their accomplices and accessories after the fact.

41. The Commission is not taking issue with the public and official nature of criminal proceedings. However, in Uruguay the victim or injured party does have a right to participate in the criminal proceeding beyond the indictment. The Uruguayan Code of Criminal Procedure authorizes the injured party to request, during the summary proceedings, all measures that may be useful in ascertaining the crime and determining those responsible (Article 80). Consequently, in systems that allow it, the victim of the crime has access to the courts because of a citizen's fundamental right, which becomes particularly important as a dynamic of the criminal process.

42. To answer the question of whether the rights of the victim or his next-of-kin, guaranteed under domestic law, are protected by international human rights law, one must determine: a) whether the rights embodied in the constitution and the laws of that State at the time the violations occurred became subject to international protection through subsequent ratification of the Convention, and b) whether those rights can be abrogated absolutely through subsequent enactment of a special law, without violating the Convention or the American Declaration.

43. Article 1.1 of the Convention makes it the duty of the States Parties "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..."

44. Article 8.1 of the Convention states the following:

Every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.

45. The intended effect of the law, and the effect that was in fact achieved, was to prevent the petitioners from exercising the rights upheld in Article 8.1.

46. By enacting and applying the law the Uruguayan Government failed to abide by the obligation to guarantee observance of the rights recognized in Article 8.1, and thereby infringed those rights and violated the Convention.

C. With respect to the right to judicial protection

47. Article 25.1 of the Convention stipulates the following:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

48. Article 25.2 stipulates the following:

The States Parties undertake:

a. To ensure that any person claiming such remedy shall have his right determined by the competent authority provided for by the legal system of the State;

b. To develop the possibilities of judicial remedy; and

c. To ensure that the competent authorities shall enforce such remedies when granted.

49. When it enacted the law, Uruguay ceased to guarantee the rights stipulated in Article 25.1 and violated the Convention.

D. With respect to the obligation to investigate

50. When interpreting the scope of Article 1.1, the Inter-American Court of Human Rights stated that "the second obligation of the States Parties is to `ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction.... As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention...."³ The Court elaborates upon that concept in several paragraphs that follow:

What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible;⁴The State has a legal duty to take reasonable steps to prevent human rights violations, and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation⁵If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.⁶

As for the obligation to investigate, the Court notes that: "An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government."⁷ (Emphasis added by the Commission.)

51. When it enacted this law, Uruguay ceased to comply fully with the obligation stipulated in Article 1.1 and violated the petitioners' rights upheld in the Convention.

52. As for the interpretation of Article 1.1, Article 8.1 and Article 25.1, and the possible restrictions on those rights as set forth in Articles 30 and 32, the Commission respects but nevertheless disagrees with the Uruguayan Government's interpretation of those provisions.

53. As for compensatory damages, the Commission points out that while it is true that the text of the law did not affect the possibility of filing a suit for such damages, the

³ Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C, No. 4, paragraph 166.

⁴ Ibid, paragraph 173.

⁵ Ibid. paragraph 174.

⁶ Ibid. paragraph 176.

⁷ Ibid. paragraph 177.

ability to establish the crime in a civil court has been considerably curtailed since vital testimony from the moral and material authors, military and police personnel of the State, cannot be adduced or used. The Commission also noted that four years after the fact, the State invoked the caducity exception, even though at the time the crimes were committed a dictatorial government was in power whose judiciary lacked any independence, especially in matters of this nature. In the past year, the Commission has noted, with satisfaction, a number of important damages agreements that the Uruguayan State and certain victims of past human rights violations have reached, including three petitioners in these cases. Nevertheless, the Commission must make clear that the purpose of these petitions is to object to the denial of justice (Articles 8 and 25 in relation to Article 1 of the Convention) with enactment and application of the 1986 Law, and not to the violations of the rights to life (Article 4), humane treatment (Article 5) and liberty (Article 7), among others, which triggered the right to a fair trial and the right to judicial protection, but that occurred before the Convention entered into force for Uruguay on April 19, 1985, and therefore were not a subject of these complaints.

54. The Commission has carefully weighed the political and ethical dimensions of the measure adopted by the Uruguayan Government and reached a conclusion different from that of the Government as to whether, with the law, the Government's highest mission according to the obligations of the American Convention, which is to defend and promote human rights, is being served.

Given the foregoing considerations, the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

1. Concludes that Law 15,848 of December 22, 1986, is incompatible with Article XVIII (Right to a Fair Trial) of the American Declaration of the Rights and Duties of Man, and Articles 1, 8 and 25 of the American Convention on Human Rights.
2. Recommends to the Government of Uruguay that it give the applicant victims or their rightful claimants just compensation for the violations to which the preceding paragraph refers.
3. Recommends to the Government of Uruguay that it adopt the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the de facto period.
4. Orders publication of this report.