



# INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT N° 70/99

CASE 12.059

CARMEN AGUIAR DE LAPACÓ

ARGENTINA

May 4, 1999

## I. SUMMARY

1. On October 7, 1998, a petition was filed before the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") by Carmen Aguiar de Lapacó, sponsored by the Grandmothers of Plaza de Mayo, the Permanent Human Rights Assembly (APDH), the Center for Legal and Social Studies (CELS), the Center for Justice and International Law (CEJIL), Families of Detainees Missing for Political Reasons, the Argentine League for the Rights of Man, the Mothers of Plaza de Mayo–*Línea Fundadora* Group–, Ecumenical Human Rights Movement (MEDH), and the Peace and Justice Service (Serpaj) (hereinafter "the petitioners"), against the Argentine Republic (hereinafter "the State," "the Argentine State," or "Argentina").

2. The petitioners claim that Argentine judicial authorities denied Mrs. Carmen Aguiar de Lapacó's request to determine the fate of her daughter, Alejandra Lapacó, who was detained and disappeared on March 17, 1977, based on the right to the truth and the right to mourn. The petitioners consider that the judicial authorities' rejection of that request violates the right to a fair trial (Article 8(1)), the right to judicial protection (Article 25), and the obligation to respect the rights (Article 1(1)) enshrined in the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"). The petitioners further allege violation of the following rights protected in the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration" or the "American Declaration"): the right to equality before the law (Article II) and the right to a fair trial (Article XVIII). The State claims that the appropriate domestic remedies were not exhausted and that incidental proceedings "*un incidente judicial*" are still pending. It further claims that the alleged events do not tend to establish a violation of rights established in the Convention.

3. In examining the admissibility of the petition, the Commission concluded that it is competent to hear this case and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention.

## II. PROCESSING BY THE COMMISSION

4. On October 21, 1998, the Commission forwarded the petition to the State and requested that it supply information thereon within 90 days. On January 19, 1999, the Argentine State requested an extension for presenting its observations. A 30-day extension was granted on January 27, 1999. On February 25, 1999, the State requested another extension. The Commission granted that request and pushed back the deadline until March 3, 1999. On March 16, 1999, the Commission received the State's reply, which was forwarded to the petitioners that same day. The petitioners were given 60 days to present their observations on the State's response.

## III. POSITIONS OF THE PARTIES

### A. Petitioners

5. As background information to their complaint, the petitioners claim that on March 16, 1977 twelve armed men broke into Mrs. Lapacó's home and took Alejandra Lapacó, Marcelo

Butti Arana, Alejandro Aguiar, and Mrs. Lapacó to a detention site called “*Club Atlético*.” It was there that Mrs. Lapacó last heard and saw her daughter Alejandra. On March 19, 1977, Mrs. Lapacó and her nephew Alejandro Aguiar Arévalo were released. Over the years, Mrs. Lapacó has taken many steps to find her daughter, to no avail.

6. The petitioners indicate that when democracy was restored in 1983 the executive branch established the National Commission on Disappeared Persons (hereinafter “Conadep”). Its report entitled *NUNCA MÁS* [Never Again] revealed the existence of many secret detention centers, including the so-called “*Club Atlético*” where Alejandra Lapacó was held. They argue that “although Conadep conducted a huge investigation, it did not reconstruct the individual stories of each of the missing detainees” and consequently did not determine what happened to Alejandra Lapacó.

7. The petitioners further allege that decree 158/83 called for criminal proceedings against the persons responsible for the State terrorism. The duly-presented claim regarding the kidnapping, unlawful imprisonment, and torture of Alejandra Lapacó was one of many that made up lawsuit N° 450, which looked into the events that took place at the “*Club Atlético*.” When signed statements from the defendants had been taken and strict temporary detention of the accused had been ordered, testimony was taken in the case. On June 4, 1987, law 23.521 known as the “Law on Due Obedience” was passed, releasing most of the defendants from criminal liability. The Federal Criminal and Correctional Court of Appeals of the Federal Capital ordered that statements be taken from those still on trial. Finally, on October 7, 1989, the executive branch signed decree 1002/89 pardoning those being charged in lawsuit N° 450.

8. On May 12, 1995, Mrs. Lapacó requested that the Federal Court of Appeals send an official communication to the Office of the Army Chief of Staff in the Ministry of Defense requesting that it submit all existing information within that force and within the intelligence and security forces that operated under the First Army Corps between 1976 and 1983 on the ultimate fate of the missing detainees. The petition was based on the right of family members to know the ultimate fate of their loved ones, the right of society to gain detailed knowledge of the methods used by the military dictatorship to exterminate thousands of Argentines, and finally the right to the truth.

9. On May 18, 1995, the National Criminal and Correctional Court of Appeals of the Federal Capital declared the request admissible, stating “it was incumbent upon it to exercise its jurisdiction.” Although laws 23.492 and 23.521 and decree 1002/89 benefiting members of the military precluded prosecution, the Court found this did not mean the proceedings were over. The Secretary General of the Army responded to the Court's request stating that “the military has no background information on the specific matter raised in the request.” As a result of that response, on July 14, 1995 Mrs. Lapacó suggested that official communications be sent to different organizations that might have information that could further the investigation. In response to the new request, on August 16, 1995 the Court stated that this was outside of its jurisdiction, because of the issuance of due obedience standards, the *Punto Final* [“Full Stop”] law, and the pardons. Furthermore, it decided to bear in mind the report from the Office of the Army Chief of Staff; it also decided to continue the process as it was upheld and ordered that a copy of the decision be transmitted to the Subsecretariat for Human Rights of the Ministry of the Interior, inasmuch as the request could be adequately fulfilled in the executive branch.

10. In light of this decision, on September 8, 1995 the petitioners filed an extraordinary appeal with the Supreme Court. On July 8, 1997, the Attorney General, the highest authority within the “*Ministerio Público*”, issued an opinion upholding the importance of protecting the right to the truth and confirming that continuing with the investigation in no way violated the principle of *non bis in idem* [double jeopardy].

11. On August 13, 1998, the Supreme Court found the extraordinary appeal inadmissible, on the grounds that the purpose of investigative proceedings is to prove that punishable acts were

committed and determine the perpetrators and that, given the current status of the lawsuit, in which that purpose had been nullified, the appeal could not be admitted. The judgment stated that "taking the requested steps would require reopening the case and the consequent exercise of jurisdictional activity against persons definitively acquitted of the acts giving rise to this suit. There is no point in accumulating evidence without anyone to use it against."

12. The petitioners allege that the Argentine State, through the Supreme Court decision, has denied their right to the truth and to a hearing. The petitioners maintain that the domestic barriers--the two laws and the presidential pardon--cannot be invoked to block the determination of what happened to Alejandra Lapacó and the final whereabouts of her body, since the crime of forced disappearance continues in effect until the victim appears. They therefore claim that the Supreme Court's decision is unlawful in that it obstructs the appearance of the victim.

13. With regard to the petition's admissibility, the petitioners indicated that the Supreme Court decision exhausted domestic remedies.

#### **B. State**

14. The State admits that the decision of the Federal Court of Appeals of the Federal Capital was based on the fact that "the Court did not have the authority to gather evidence and obtain information about events and the circumstances thereof, as requested by the petitioner, because this complaint does not constitute a 'case' to be decided by the Court given the barriers established in Article 116 of the Constitution and Article 2 of Law 27." With regard to the evidence summoned by Mrs. Lapacó, the State argues that "the evidence would emerge from simply reconstructing the fate of missing detainees" and that "if made available would weaken the provisions of the 'punto final' and due obedience laws and run the risk of committing undue double jeopardy, thus affecting the principle of *non bis in idem*."

15. The State indicated that when Mrs. Lapacó lodged the extraordinary appeal against the Court's judgment, the Attorney General of Argentina advised that it be found admissible, because "the justice system must effectively address the need to mourn, which starts with knowing the truth." However, the Supreme Court endorsed the Court of Appeal's argument and found the extraordinary appeal inadmissible: "since the purpose of the investigation is to prove that a punishable act was committed and find the perpetrators, such an investigation is not admissible in this case because the purpose of the proceedings has been nullified."

16. On September 10, 1998, the Public Defender of Argentina filed a motion for clarification with the Supreme Court. On September 29, 1998 the Court maintained that its decision "denying the evidentiary measures requested by the appellant is restricted to the suit in question, because the purpose of the proceedings was nullified. This certainly neither opened nor closed the various potential judicial and administrative avenues available to the complainant to obtain the information she has pursued through an inadmissible avenue."

17. The State rejected the petitioners' allegations and maintained that the Supreme Court, in both decisions, did not deny the victims' right to the truth, "since it merely ruled that the issue should be raised through a judicial or administrative avenue other than criminal proceedings that have been concluded," since if new evidence emerged in a criminal suit that is over, it would affect the constitutional guarantee of *res judicata*. To support this position, the State highlighted the following facts:

18. Firstly, the State cites the October 15, 1998 judgment of the Supreme Court in the *habeas data* summary proceedings in the "Urteaga, Facundo Raúl vs. The Argentine State-Joint Chiefs of Staff of the Armed Forces - on Law 16.986" case. In that case, the High Court refers to the Lapacó case and indicates that that decision "obviously restricted the impact of the denial to the evidence in that criminal suit, leaving other judicial and administrative avenues open."

19. Secondly, the State mentioned the statements made by Minister Adolfo Vázquez, published in the morning edition of *Clarín* on November 3, 1998, in which he maintains that "there was no change in the position on this issue (...) the Supreme Court upheld the same

principles in the two cases (Lapacó and Urteaga). The State also cites the opinion of constitutional expert Miguel Padilla published in El Derecho on October 5, 1998 that “in virtue of laws 23.492 and 23.521 the alleged perpetrators of the offenses set forth in the cases cannot be investigated or punished (...); without a doubt the criminal proceedings are over; it is therefore legally impossible to order the measures proposed by Mrs. Lapacó.”

20. The State also argues that it is impossible to interpret that the right to the truth was denied, when only the procedural avenue selected was rejected. The State therefore claims this does not constitute a violation of the rights enshrined in Articles 8 and 25 of the American Convention. The State indicates that the Federal Court adopted certain measures in 1996, such as establishing incidental search of evidence, identification proceedings and taking charge of investigations into the fate of victims, so as to reach the decision to activate what could be construed as jurisdiction to pursue the right to the truth. The State maintains that this jurisdiction is in place in the country, and new developments cannot be ruled out.

21. With regard to the admissibility of the petition, the State requests that the petitioners' complaint be found inadmissible and alleges that the judicial avenue used and exhausted by the petitioners was not the correct one for the claim lodged. It argues that the desired goal—determining the fate of Alejandra Lapacó—should have been pursued through a different avenue—and defers to its observations mentioned above. The State therefore concludes that domestic remedies were not exhausted. It further claims that there are still judicial proceedings pending, through which the measures to determine her whereabouts can still be requested or ordered and defers to the annexes to its letter, listing Mrs. Lapacó's incidental proceedings.

#### **IV. ANALYSIS OF ADMISSIBILITY**

22. The purpose of the Commission's decision on the admissibility of the cases brought before it is not only to produce more clarity and legal security in its procedures, but also to focus the parties on the central issues in the case.<sup>1[1]</sup>

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<sup>1[1]</sup> See, among others, Inter-American Commission on Human Rights, Annual Report 1998, Report N° 49/97, Case 11.520, Tomás Porfirio Rondín and others, "Aguas Blancas" (Mexico), OEA/Ser/L/V/II.98, February 18, 1998, para. 50, page 8.

<sup>2[2]</sup> The Inter-American Court of Human Rights found that "for the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself." Advisory Opinion OC-10/89 (Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights) of July 14, 1989, para. 46.

<sup>3[3]</sup> The Inter-American Court stated that "these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto." Advisory Opinion OC-10/89 of July 14, 1989, para. 46.

<sup>4[4]</sup> The Commission has established that it is competent to examine violations of the Declaration and the Convention when there is confirmed, on-going violation of rights protected in these instruments, such as for example when justice is denied in acts originating before the State in question ratified the Convention that continue after the State has expressed its adherence to the Treaty and that Treaty has entered into force. See, for example, Res. 26/88, Case 10.190, Argentina, Annual Report of the IACHR 1987-1988.

<sup>5[5]</sup> The Inter-American Court of Human Rights has found that victims' family members also have the right to a hearing. Blake case, judgment of January 24, 1988, para. 96 and 97.

<sup>6[6]</sup> Inter-American Court of Human Rights, judgment in the Velásquez Rodríguez Case, July 29, 1988, Series C N° 4, para. 61.

<sup>7[7]</sup> Velásquez Rodríguez Case, para. 64.

<sup>8[8]</sup> In this regard, the Inter-American Court of Human Rights found that "the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective." Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, para. 88.

**A. Competence *ratione materiae*, *ratione personae*, and *ratione temporis* of the Commission**

23. Given its mandate, the Commission is competent *ratione temporis* to examine this case, inasmuch as the petitioners maintain that the Argentine State is responsible internationally for the August 16, 1995 judgment of the Federal Criminal and Correctional Court of Appeals of the Federal Capital and the August 13, 1998 judgment of the Supreme Court upholding the decision of the lower court. The judicial decisions that are the basis of the petitioners' complaint were handed down after the State had deposited the instrument of ratification with the General Secretariat of the Organization of American States on September 5, 1984.

24. The Commission is also competent *ratione materiae*, since the petition alleges the violation of rights enshrined in the Convention and the American Declaration. The petitioners denounce the violation of the right to a fair trial (Article 8(1)), the right to judicial protection (Article 25), and the obligation to respect the rights protected by the American Convention on Human Rights (Article 1(1)). The petitioners further allege the violation of the following rights enshrined in the American Declaration of the Rights and Duties of Man: equality before the law (Article II) and the right to a fair trial (Article XVIII).

25. The Commission finds that when the American Convention entered into force in Argentina on September 5, 1984 it became the primary source of law applicable by the Commission,<sup>2[2]</sup> provided the petition refers to an alleged violation of rights substantially the same in both instruments,<sup>3[3]</sup> and the violation is not on-going.<sup>4[4]</sup> In this case, the rights allegedly violated by the Argentine State that are enshrined in the Declaration are also protected under the Convention, and the situation is not recurrent. Since the rights invoked by the petitioners in this case are protected in a similar manner in both instruments, the Commission will refer only to the standards in the Convention and not those in the Declaration.

26. Thirdly, regarding active and passive competence *ratione personae*, the Commission notes that the petitioners attribute the violations of Mrs. Lapacó's rights to a State Party, in this case Argentina, and claim that her capacity as victim stems from the fact that she is the mother of Alejandra Lapacó, who disappeared in 1977.<sup>5[5]</sup>

**B. Other admissibility requirements for the petition**

**a. Exhaustion of domestic remedies**

27. Article 46(1)(a) of the Convention establishes as an admissibility requirement for a petition "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding, such as in the inter-American system for the promotion and protection of human rights, because the latter "reinforces or complements" the domestic jurisdiction.<sup>6[6]</sup>

28. During the Commission's processing of this case, the petitioners have alleged that the Supreme Court ruling exhausted domestic remedies. The State, however, rejects the petitioners' arguments and alleges that domestic remedies were not exhausted as provided for in Article 46(1)(a) of the Convention, inasmuch as the correct avenue was not used for the complaint.

29. Article 46(1)(a) cites generally recognized principles of international law, which do not refer to the formal existence of such remedies, but rather that they be adequate and effective. The Inter-American Court of Human Rights found that "*adequate* domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance."<sup>7[7]</sup> The Commission finds that whenever the petitioner alleges the exhaustion of domestic remedies, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted.<sup>8[8]</sup>

30. With regard to the remedy the petitioner should have used, the State argues that the

goal—determining the fate of Alejandra Lapacó—should have been pursued through a different avenue than the one selected, which furthermore is open. The State also defers to the arguments made in its observations. The Commission understands that the State is referring to the Supreme Court's findings in the Lapacó case, when it mentioned “different potential judicial and administrative avenues” and in the Urteaga case, which dealt with *habeas data* summary proceedings.

31. However, the Commission finds that, while the State asserts the above, it does not deny that the remedy used by Mrs. Lapacó has been exhausted. In fact, the State indicated that “incidental proceedings are pending”—and attached a copy of Mrs. Lapacó's incidental proceedings—through which “the measures aimed at determining the fate of Alejandra Lapacó could be requested or ordered.” The Commission finds that in this case the State had indicated the possibility of Mrs. Lapacó using either judicial or administrative avenues. The State even indicates that new developments are possible. However, it does not clearly indicate which remedy Mrs. Lapacó should take and its suitability. Given the facts examined, the Commission finds that there is no reason to reject the petitioners' claim to have exhausted domestic remedies, which is closely related to the merits of this case.

**b. Deadline for lodging the petition**

32. Article 46(1)(b) of the American Convention requires that a petition be “lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.” In this case, the Supreme Court issued its judgment on August 13, 1998, and neither party reported the date on which Mrs. Lapacó was notified of that decision. The petition was lodged with the Commission on October 7, 1998, within the six-month deadline. The Commission therefore finds that the requirement to lodge a petition within six months was met.

**c. Duplication of proceedings and *res judicata***

33. Article 46(1)(c) on admissibility stipulates that the subject of the petition or communication must not be pending in another international proceeding for settlement. Article 47(d) of the Convention establishes that a petition is inadmissible if it is substantially the same as one previously studied by the Commission or by another international organization. In this case, the parties have neither alleged nor proven that the matter submitted to the Commission for its consideration is pending settlement or has been decided on by another international organization. Furthermore, it is not the same as a petition already examined by the Commission. The Commission therefore concludes that these requirements have been met.

**d. Characterization of the allegations**

34. Article 47(b) of the Convention stipulates that the Commission shall consider inadmissible any petition or communication that “does not state facts that tend to establish a violation of the rights guaranteed by this Convention.” The petitioners have alleged that as a result of the decisions of the Argentine judicial authorities in the Lapacó case, the State violated the right to due process (Article 8), the right to judicial protection (25), and the duty to respect the provisions of Article 1(1) of the Convention. The Commission finds that the events alleged by the petitioner, if true, could constitute a violation of rights enshrined in the American Convention and therefore finds this petition admissible.

**V. CONCLUSIONS**

35. The Commission concludes that it is competent to hear this case and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention.

36. Based on the foregoing *de facto* and *de jure* arguments, and without prejudging the merits of the case,

**THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS,  
DECIDES TO:**

1. Declare this case admissible.
2. Notify the parties of this decision.

3. Continue to examine the merits of the case.

4. Place itself at the disposal of the parties, with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention. The Commission invites both parties to reply on the possibility of initiating such a settlement, and

5. Publish this decision and include it in the Commission's Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in Washington, D.C. on May 4, 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice-Chairman; Claudio Grossman, Second Vice-Chairman; and Members Carlos Ayala Corao, Alvaro Tirado Mejía, and Jean Joseph Exumé.

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