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REPORT No. 149/20
PETITION 829-10
REPORT ON ADMISSIBILITY

NELSON CURIÑIR LINCOQUEO AND FAMILY
CHILE

Electronically approved by the Commission on June 1, 2020.

Cite as: IACHR, Report No. 149 /20, Petition 829-10. Admissibility. Nelson Curiñir Lincoqueo and Family. Chile. June 1, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner	Jaime Madariaga De la Barra and Rafael Ferrada Henríquez
Alleged victim	Nelson Wladimiro Curiñir Lincoqueo and relatives ¹
Respondent State	Chile ²
Rights invoked	Articles 8 (fair trial) and 25 (judicial protection) of the American Convention on Human Rights, ³ in relation to Article 1.1 (obligation to respect rights) thereof

II. PROCEEDINGS BEFORE THE IACHR⁴

Date of filing	June 3, 2010
Notification of the petition	May 3, 2016
State's first response	August 19, 2016
Additional observations from the petitioner	September 14, 2017

III. COMPETENCE

<i>Ratione personae</i>	Yes
<i>Ratione loci</i>	Yes
<i>Ratione temporis</i>	Yes, in the terms of section VII
<i>Ratione materiae</i>	Yes, American Convention (instrument of ratification deposited on August 21, 1990) and American Declaration of Rights and Duties of Man ⁵ (instrument of ratification of the OAS Charter deposited on June 5, 1953)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL RES JUDICATA, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and international <i>res judicata</i>	No
Rights declared admissible	Articles 3 (juridical personality), 5 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof; and Articles 1 (right to life, liberty and personal security), XVII (recognition of juridical personality and civil rights), XVIII (fair trial) and XXV (protection from arbitrary arrest) of the American Declaration
Exhaustion or exception to the exhaustion of remedies	Yes, December 3, 2009
Timeliness of the petition	Yes

V. SUMMARY OF FACTS ALLEGED

1. The petitioners claim the international responsibility of the State of Chile for the alleged forced disappearance of youth Nelson Wladimiro Curiñir Lincoqueo in 1973 in the context of the military dictatorship in that country, as well as the violation of the alleged victim's relatives' rights to a fair trial and judicial protection, given the alleged material impunity surrounding this crime, regarding which the Supreme Court of Justice was the last court to adopt a ruling.

2. The petitioners state that the alleged victim, a 22-year-old Mapuche university student, was taken from his home by twenty military officers and allegedly taken to the Temuco Air Base to be questioned. Nelson's parents went to that air base; at first, they were told that no arrest had been made; however, at their insistence, military officials confirmed he had been arrested and said he would soon be transferred to that city's

¹ Petitioner identifies the following relatives of Nelson Curiñir Lincoqueo: (i) Zoila Lincoqueo Huenumán, mother; (ii) Bartolo Segundo Curiñir Painemal, father; and (iii) Hernán Curiñir Lincoqueo, brother.

² In accordance with the provision of Article 17.2.a of the IACHR Rules of Procedure, Commissioner Antonia Urrejola Noguera, a Chilean national, did not participate in the discussion or the debate on this matter.

³ Hereinafter the "American Convention" or the "Convention."

⁴ The observations submitted by each party were duly transmitted to the opposing party.

⁵ Hereinafter the "American Declaration" or the "Declaration."

public prison. The alleged victim's parents went every day to the air base, to ask about this transfer; but it appears that it never took place. In mid-October 1973, three members of the army who had known Nelson beforehand took his mother a note supposedly handwritten by him, in which he told her that he was fine and that he would be freed soon. Petitioners indicate that, as a result of this, Nelson's mother requested a meeting with the Intendent of Cautín, who *"in her presence telephoned the air base, after which the Intendent told her that Nelson Curiñir would be released on that same day or, at worst, transferred to the prison. Nevertheless, moments after the meeting, Mrs. Zoila learned, through a radio broadcast, of a Military Report communicating her son's alleged 'flight' from prison. All the efforts she made to obtain more information were fruitless, and for years she ignored the fate of her son at the hands of his captors."*

3. According to the petition, because of this news broadcast by the army, the house of Nelson Curiñir's family was repeatedly searched, and his relatives were repeatedly questioned about his whereabouts. Once in 1975, Nelson's parents and his sister were summoned to the Military Prosecutor's Office in Temuco, where they were asked about the whereabouts of Nelson's two brothers, though his name was never mentioned. According to the petition, the army officers there told Zoila Lincoqueo that her son *"was probably dead for being a communist."*

4. In 1978, the alleged victim's relatives filed a criminal report for "presumptive tragedy" with the First Criminal Court of Temuco. In April 1979, at the order of the Supreme Court of Justice, the case was accumulated to case no. 279, about persons detained and disappeared in the Temuco department, which was being investigated by Visiting Judge Alfredo Meynet. After a few preliminary proceedings, on October 25, 1979, the Visiting Judge declared himself without jurisdiction because the persons allegedly responsible were under military jurisdiction; thus, he sent the case to the Fourth Military Court of Valdivia, which, having claimed in turn lack of competence on December 19, 1979, sent the proceedings to the Air Force Court. On January 30, 1980, the Air Force Court assumed jurisdiction and ordered Puerto Montt's Air Force Prosecutor's Office to investigate case no. 780, on which a temporary suspension was ordered because the investigated criminal offense had not been proven. On October 20, 1981, the Court Martial upheld the suspension of proceedings.

5. Later, in 1990, as Nelson's mother was taking part in a manifestation of the Association of Relatives of Disappeared Detainees of Temuco, a woman approached and told her that in October 1973, her husband had participated as an assistant in the autopsy of a body at the hospital of Nueva Imperial, which would correspond to a young man who had been shot dead, and that it might be Nelson. In view of this information, Nelson's relatives went to the cemetery of Nueva Imperial, a township near Temuco, where they were able to corroborate that in 1973, an unidentified person had indeed been buried there, and that it could be the alleged victim. They requested the Courts of Justice that the body be exhumed, and it was concluded that the remains found belonged to Nelson Wladimiro Curiñir Lincoqueo. His corpse had been found by peasants on the banks of Cautín River on October 14, 1973. A subsequent autopsy revealed that the cause of death had been a gunshot wound on his head.

6. Thus, in 1991, a criminal complaint was filed for aggravated murder, with the Magistrate's Court of Nueva Imperial, and case No. 31.473 was open. The judge dismissed the case in that same year 1991, in application of the Amnesty Legislative Decree of 1978.

7. After the Inter-American Court of Human Rights issued some judgments, ruling that no statute of limitations can be applied to this type of serious crimes under international law, Nelson's relatives filed a complaint for aggravated murder and illicit association before the First Criminal Court of Temuco on August 4, 2005. On May 8, 2008, the trial court acquitted the only person prosecuted and rejected Nelson's parents' claims for civil damages against the defendant and the Chilean Treasury. The petitioners, the Chilean Treasury and the Human Rights Program of the Ministry of the Interior all appealed this judgment. On appeal, the Court of Appeals of Temuco revoked that judgment and, instead, sentenced the defendant as an accomplice to aggravated murder, to five years and one day in prison, in addition to imposing the pertinent accessory legal penalties. Likewise, it sentenced the defendant to pay 200 million pesos in damages, to be paid jointly with the Treasury. The defense challenged the court of appeal's decision before the Supreme Court, and so did the Attorney General's Office -the latter with regard to the civil part of the judgment-. The Chilean Supreme Court of Justice heard the appeal and, in a ruling of December 3, 2009, it voided the appellate court's judgment on the

grounds that the decision had a procedural error -which had not been raised in the appeals-. In its place, it issued a replacement judgment reducing the convict's prison sentence to three years and one day in prison at its minimal degree, and granting him the benefit of probation. The Supreme Court argued that the lower court's decision had only issued a ruling with regard to the statute of limitations as a ground for extinguishing criminal responsibility, but had failed to decide on the statute of limitations as a mitigating factor in sentencing, as set out by the law. Thus, in its replacement judgment, the Supreme Court applied Article 103 of the Code of Criminal Procedure, which enshrines the figure of "gradual statute of limitations" or "half-way statute of limitations", according to which the passage of time works as a mitigating factor or a legal ground for a reduction of the penalty imposed. The Supreme Court also declared the criminal court to be absolutely incompetent to entertain the claim for civil damages filed on this case, and therefore rejected that claim.

8. The petitioners submit that the Supreme Court's decision involved several concurrent violations of the rights enshrined in Articles 8 and 25 of the American Convention, namely:

a) This decision applied a form of statute of limitations for criminal prosecution -the "gradual statute of limitations" or "halfway statute of limitations" set out in the procedural legislation- as legal grounds for reducing the penalty imposed, even though the case dealt with crimes against humanity, whose nature excludes any type of statute of limitations. The decision also disregarded the domestic legal rule by which this institution applies only to crimes that are in the process of becoming barred by the statute of limitations, which was could not legally be the case of Nelson Curiñir's disappearance and murder;

b) The alleged victim's relatives were denied all forms of compensation despite the recognition of Chile's responsibility; yet in similar cases, civil damages have been paid;

c) The punishment imposed was disproportionately light in relation to the seriousness of the criminal behavior at issue, hence disregarding the requirements of reasonableness and proportionality of punishment *vis-á-vis* the legally protected values that were harmed with the crime under prosecution;

d) The Supreme Court exceeded the limits of its own jurisdiction in the case (*casación*), because it assumed the role of a lower trial court and completely modified the ruling issued by Temuco's Court of Appeals, on grounds that none of the appellants had raised. Such excess of jurisdiction simultaneously violated the right to a hearing by a competent and impartial court previously established by law;

e) Nelson Curiñir's parents' right to participate in the criminal procedure was violated because they were not given the opportunity to intervene nor to contest the grounds invoked to change the lower court's judgment or the application of the "half-way statute of limitations" figure as a mitigating factor in sentencing. Further, as this was a final judgment issued by the highest court of justice, they had no opportunity to challenge it; and

f) Their rights to truth and justice were rendered worthless, thus disregarding the State's obligation to effectively punish this type of behavior, after many years of litigation, searching, and hope in the administration of justice by the State, thereby violating their right to effective judicial protection. The petitioners provide a detailed account of several reasons of international law that support each one of these claims, and stress that the human rights violations at issue have caused serious material, psychological and moral damages to Nelson's relatives.

9. The State, in turn, expressly recognizes the admissibility of the petition with regard to the criminal trial; however, as for the denial of the relatives' claim for civil damages, it deems the petition inadmissible given the lack of exhaustion of domestic remedies. Indeed, in its response, the State of Chile states that, in relation to the alleged violations of Articles 8 and 25 of the American Convention, "*the State has no objections, without prejudice to the observations it may submit on the merits at the corresponding stage*"; and it later reiterates that "*concerning the criminal procedure aspect of the petition, the State has no objections at this stage, without prejudice to the observations it may submit on the merits in the corresponding stage.*" As for the claim for damages, it explains that "*in the view of the State of Chile, this honorable Commission lacks competence to entertain the civil reparations aspect of this matter, given that, in that connection, the petitioners have failed*

to properly exhaust the remedies provided under the domestic Chilean legal system." It indicates that the adequate remedy is a claim for civil damages filed with a national court, and that the petitioners did not present such a claim after their request for damages was rejected by the Supreme Court in the course of the criminal law complaint on the grounds of incompetence. However, the State claims that petitioners can still legally resort to a civil course of action.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

10. Considering the State's explicit recognition of the instant petition's admissibility regarding the criminal proceedings for the death of the alleged victim, and the fact that it has been clearly established that said proceedings concluded in a final manner with the judgment issued by the Supreme Court of Justice on December 3, 2009, notified on that same date, the Commission concludes that the instant petition meets the requirements set out in Articles 46.1(a) and 46.1(b) of the American Convention, regarding this part of the petition.

11. On the other hand, in their observations to the State's response, the petitioners expressly admit that they have not exhausted domestic remedies concerning the civil reparations arising from the murder of Nelson Curiñir, and they desist from this claim, stating that "*[a]s for the civil aspect and the admissibility of the corresponding claim for damages, the State remarks that domestic remedies may still be available for prosecuting the State's responsibility, which we accept, as civil courts can still entertain such claims, and they are the ultimate authority competent to entertain them.*" The IACHR takes note of this explicit statement by the petitioners concerning the lack of exhaustion of this remedy; therefore, this aspect will not be included within the factual framework of the instant report. Nevertheless, this circumstance does not affect the alleged victims' right to reparation, including their right to compensation, should the State be declared internationally responsible in the merits stage.⁶

VII. ANALYSIS OF COLORABLE CLAIM

12. As stated above, the petitioners allege that with the Supreme Court's ruling of December 3, 2009, the State violated Nelson Curiñir's relatives' rights to a fair trial and judicial protection as a result of several concurrent reasons not contested by the State at this stage. The State expressly accepts the admissibility of the petition. Based on these considerations, and having analyzed the legal and factual elements submitted by the parties, particularly the fact that the alleged victim's whereabouts were established in 1990, the Commission deems that the facts alleged, if corroborated, may constitute violations of Articles 3 (juridical personality), 5 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects), to the detriment of the alleged victims individualized in the instant report.

13. Further, the allegations of Nelson Curiñir Lincoqueo's detention, forced disappearance and murder at the hands of agents of the Chilean armed forces, as well as the possible violations of his relatives' rights to personal integrity and access to justice, which took place before the American Convention entered into force for Chile, may constitute violations of Articles I (right to life, liberty and personal security), XVII (recognition of juridical personality and civil rights), XVIII (fair trial) and XXV (protection from arbitrary arrest) of the American Declaration.

VIII. DECISION

1. To declare this petition admissible regarding Articles 3, 5, 8 and 25 of the American Convention, in relation to Articles 1 and 2 thereof;

⁶ IACHR. Report No. 124/06. Case 11.500 (Merits). Tomás Eduardo Cirio (Uruguay). October 27, 2006, par. 129.

2. To declare this petition admissible with regard to Articles I, XVII, XVIII and XXV of the American Declaration; and

3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 1st day of the month of June, 2020.
(Signed): Joel Hernández, President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.