Chile, Prosecution of Osvaldo Romo Mena

[**Source**: Appeal Court of Santiago, Case Lumi Videla, Role No. 13.597-94, 26 September 1994; original in Spanish, unofficial translation.]

Appeal Court of Santiago [de Chile]
(Third Criminal Chamber)
September 26, 1994

[...]

6. It should moreover be determined whether in this case the Geneva Conventions of 1949 are applicable, for pursuant thereto the illegal acts now under investigation should be declared imprescriptible and unamenable to amnesty.

7. The Geneva Conventions form part of our legislation since they were approved by the National Congress, promulgated by Decree 752, published in the Official Gazette on April 17, 18, 19 and 20, 1951 and have been in force for internal purposes from the latter date to the present.

8. Since the Geneva Conventions apply only in the event of war, it must be determined whether a state of war existed in Chile at the time when Lumi Videla was kidnapped on

September 21, 1974 and during her captivity, torture and eventual death on November 3, 1974; her body being subsequently dumped at the Italian Embassy in Santiago on November 4, 1974 [...].

For the above purposes the following should be borne in mind:

a) War is an exceptional state and entails the application of exceptional rules. In wartime the law of war which governs relations between enemies holds sway.

b) Minimum humanitarian principles which protect the intangible rights of the adversaries apply in the event of war and outlaw inhuman acts such as killing, torture and cruel treatment.

c) Article 418 of the Military Code of Justice was in force in Chile in 1974 and provides that for the purposes of the code a state of war shall be deemed to exist and wartime to prevail not only when war or a state of siege has officially been declared pursuant to the relevant laws but also when war is effectively taking place or mobilization therefore has been decreed even if war has not been officially declared.

d) A state of siege prevailed in Chile in 1974, having been applied since September 18, 1973 and regulated by Decree Law 640 of September 10, 1974, it being pointed out that war prevails in the country when the situations referred to in Article 418 of the Military Code of Justice arise and a state of siege takes place in the event of internal or external war; since there was no external war, an internal war situation clearly existed [...].

e) A state of siege for internal defence purposes existed between September 11, 1974 and 10 September 1975, which means that internal disturbances were being caused by organized rebel or seditious forces operating openly or clandestinely (Decree Law 640,

Article 6 (b)). [...]

h) In those circumstances the Geneva Conventions protecting the human rights of the organized enemy forces and the affected civilian population are fully applicable and punish war crimes, which are a form of abuse of the force produced within a substantive situation created by an internal or international armed conflict.

9. It is necessary to determine the meaning and scope of the international treaties under Chilean legislation: the Political Constitution of the Republic contains no express rule assigning them a given category among the sources of law, which means that the matter must be determined by interpretation.

To the above ends the following must be taken into account:

a) Our point of departure must be that since among Chilean legislation only the Political Constitution is empowered to determine the existence of other rules, the rules of international law would be valid in so far as the Constitution so decides. But as a basic rule the Fundamental Charter may also refer to international rules that are unavailable to it in its own validity, which would be applicable together with those produced through the internal procedures provided and regulated by the Constitution.

b) The Political Constitution of the Republic regulates the procedure for incorporating and integrating international rules in Chilean legislation; thus, once the procedure provided in the Fundamental Charter has been completed, an internationally valid rule becomes internally applicable.

c) Chile’s Fundamental Charter contains only rules for incorporating international treaty law; indeed, Article 32 No. 17 empowers the President of the Republic to conclude, sign

and ratify international treaties and Article 50 No. 1 of the Constitution stipulates that only the Congress is authorized to approve or reject any international treaty submitted to it by the President of the Republic prior to ratification, the approval of a treaty being subject to the enactment of a law.

This means that the treaty forms part of internal law once it has been approved by Congress; it must then be ratified by the President of the Republic and published in the Official Gazette. Moreover, Article 82 No. 2 of the Constitution grants the Constitutional Court the power to settle any issues of constitutionality that may arise during the negotiation of treaties submitted for approval to Congress, which verifies compliance with the principle of constitutional supremacy. Once the treaty has been validly incorporated in national legislation, it will cease to be a part of it only if it is denounced [...].

d) [...] It is for approval by parliament that a treaty must be subject to the enactment of a law, which is very different from maintaining that treaties are subject to the passage of a law [...].

e) National doctrine necessarily places international treaties and conventions in a hierarchy above the law in so far as, on incorporating a treaty in its internal legislation in accordance with the procedure provided in the Fundamental Charter, the State wants its organs to comply with that treaty for so long as there is no will to denounce it [...]

[...]

h) The Political Constitution of the Republic lays the foundations of not the validity but the applicability of international rules. Once validly incorporated in internal law, it is the international convention itself which decides how its rules should be applied once the Constitution has made them applicable and invalidated those laws which deal with the same

subject as the treaty incorporated in national legislation; this is suggested by the fact that it is the Congress itself which approves laws and must approve an international treaty prior to its ratification. In relation to subsequent laws, the rules of international conventions must be applied preferentially in accordance with the principle of applicability [...].

i) According to Article 27 of the Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for [not] complying with a treaty.

j) In accordance with the general *pacta sunt servanda* or *bona fide* principle of international law, *bona fide* States Parties must comply with treaties until such time as they are internationally declared inapplicable.

k) This implies that, once a treaty is incorporated in Chilean legislation, no internal rule may decide its inapplicability or loss of validity.

l) That does not mean that the national legislator is perpetually disempowered from dealing with the subject contained in the treaty but that, if he is to recover competence in the matter regulated by the treaty, the State must denounce the treaty in accordance with the procedures established in the treaty in question or in the rules of international law.

m) As a result, given a contradiction between the law and a treaty, the problem lies not in the scope of validity of such rules but in their field of applicability, within which an ordinary judge must rule and preferentially apply the treaty.

n) Any failure to comply with the content of an international treaty not only constitutes an infringement of international law which casts doubt on the honour or trustworthiness of the Chilean State but, in addition, is a clear infringement of its own national legislation.

10. [...]

l) Any clash or conflict between the principles of legal soundness and justice and the binding force of human rights necessarily forces the judiciary to declare invalid, or inapplicable, acts or rules handed down by political authorities who fail to recognize them or which reflect procedures in which such essential rights have been ignored.

11. The Geneva Conventions have been binding upon the Chilean State since April 1951 and their provisions protect the human rights of the contestants in the event of external war or a conflict between organized armed forces within the State, which latter situation effectively prevailed in the country in 1974 [...].

12. The 1949 Geneva Conventions are fully applicable and Article 3 common thereto lays down that, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party shall be bound to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves hors de combat for various reasons, and prohibits at any time and in any place violence to life and person, mutilation, cruel treatment and torture, humiliating and degrading treatment and the passing of summary sentences. Article 146 (of the Fourth Convention relative to the Protection of Civilian Persons in Time of War) states that each High Contracting Party shall be under obligation “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts”. Then again, Article 147 thereof stipulates that “grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health ...”, which is reinforced in Protocol II relating to the Protection of Victims of Non-International Armed

Conflicts. Article 158 [sic][148] of the same Convention stipulates that “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article” [...]. Accordingly, such offences as constitute grave breaches of the Convention are imprescriptable and unamenable to amnesty; the ten-year prescription of legal action in respect of the crimes provided for in Article 94 of the Penal Code cannot apply, nor is it appropriate to apply amnesty as a way of extinguishing criminal liability. Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State’s competence while it is a Party to the Geneva Conventions on humanitarian law. Such an attempt would be more serious still if it sought to cover up not only individual liability but also that of agents of the State or public officials, since that would be tantamount to self-absolution which is repugnant to every basic notion of justice for respecting human rights and international common and treaty human rights law; it would also infringe the basic values and principles of our own constitutional legislation, as maintained in the third preambular paragraph of this resolution. [...]

16. The American Human Rights Convention or Pact of San José (Costa Rica) forms part of our legislation [...] and places on all the organs of State and particularly the courts of justice a duty to apply Article 1 (1) thereof, which states that “the States Parties to the Convention thereby undertake to respect the rights and freedoms recognized therein and to guarantee the free and full exercise thereof to every person subject to their jurisdiction, with no discrimination whatever”. That rule establishes that the rights enshrined in the Convention are self-executing as determined by the Inter-American Court of Human Rights, except for a few provisions which require legislative development, which the States Parties undertake to ensure since failure to do so would be a breach of the Convention punishable at supranational jurisdictional headquarters by the Inter-American Court of Human Rights. Pursuant to the provision mentioned, the States Parties are under obligation

to investigate human rights violations and punish those responsible, as did the Inter-American Court of Human Rights when sentencing in the Velázquez Rodríguez case, stating that “an amnesty law which prohibits investigation and the establishment of liability and competence by responsible agents of the State would violate the obligation established under Article 1(1) of the Convention. If declared valid, amnesty laws of such scope would make national laws legal impediments to compliance with the American Convention and other international instruments”. This court shares that reasoning and, in maintaining the hierarchical supremacy and preferential application of human rights treaties over internal laws, it considers fundamental human rights to be part of the substantive Constitution pursuant to Article 5 of the Fundamental Charter which places a limit on State sovereignty by express provision [...].

17. The right to justice for criminal violations of human rights rules out any stay in accordance with Article 15 (2) of the International Covenant of Civil and Political Rights, which states that “nothing provided therein shall oppose the trial and sentencing of any person for acts or omissions which at the time they were committed were criminal according to the general principles of law recognized by the international community”. That rule admits no stay whatever, not even in a state of internal or external war. The principle of legality or non-retroactivity of the law cannot be upheld against that rule because justice must be exercised in accordance with the general principles of law recognized by the international community, which do and must take precedence over internal law wherever they conflict with it and even in the event of a threat to the very life of the nation, as established in Article 4, para. 6 of the United Nations International Covenant on Civil and Political Rights. [...]

20. The antecedents listed in charge sheet 503 and those produced subsequent to the above-mentioned resolution provide sound reasons for presuming that Osvaldo Enrique Romo Mena participated as a perpetrator in the offences of kidnapping and illegal association

established in Articles 141, 292 and 293 of the Penal Code, respectively. [...]

Given those reasons, constitutional provisions, international conventions and the legal provisions mentioned and, further, in view [...] of the Code of Criminal Procedure, [...] for the record this case is hereby restored to charge status so that the appropriate court may fully carry out the formalities indicated in [...] this resolution [...]; and, having regard to the formalities mentioned in preambular para. 20, the charge [...] against Osvaldo Enrique Romo Mena, against whom a prison order must be issued in this case, is hereby upheld.

Discussion

1. How does the Court qualify the situation in Chile in 1974? Is this qualification derived from IHL or from Chilean legislation? Did the killing and the torture allegedly committed by the accused violate Art. 3 common to the Conventions [1], even though the victim did not belong to the other party to the non-international armed conflict?

2. How were the Geneva Conventions incorporated into Chilean law? Are all provisions of the Conventions directly applicable now in Chile? Must a Chilean court apply them even if they are not self-executing?

3. Do the Geneva Conventions take precedence over Chilean laws? Even if the latter have been adopted subsequently? Why?

4. Are Arts 146 [2], 147 [3] and 148 of Convention IV [4] applicable to violations of Art. 3 of Convention IV [5]?

5.

a. If the Conventions had been denounced by Chile during the events of 1974, would they be inapplicable to this case? (GC IV, Art. 158 [6])

b. Is Art. 158 of Convention IV [6] applicable to Art. 3 of Convention IV [5]?

6.

a. Do Arts 146 [2] and 147 of Convention IV [3] imply that grave breaches are imprescriptible? Do national laws providing for statutory limitations for grave breaches violate IHL?

b. Do the said Convention articles imply that amnesty may not cover such crimes? Is that compatible with Art. 6(5) of Protocol II [7]? [See also South Africa, AZAPO v. Republic of South Africa [8], and Colombia, Constitutional Conformity of Protocol II [9]]

c. Is the reasoning of the Inter-American Court referred to in para. 16 of the decision equally valid for IHL? Does it exclude amnesty for human rights violations?

7. Does the subsequent non-application of statutory limitations covering grave breaches violate the prohibition of retroactive penal laws? At least if one considers, unlike the Court, that IHL does not prohibit such statutory limitations?

Links

[1] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BAA341028EBFF1E8C12563CD

[2] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6F96EE4C7D1E72CAC12563CD

[3] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F8D322BF3C0216B2C12563CD0

[4]
https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=27430ABFE71A2E92C12563CD0
[5]
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[8] https://casebook.icrc.org/case-study/south-africa-azapo-v-republic-south-africa
[9] https://casebook.icrc.org/case-study/colombia-constitutional-conformity-protocol-ii