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CASE 12.289

FRIENDLY SETTLEMENT

GUILLERMO SANTIAGO ZALDIVAR
ARGENTINA

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I. SUMMARY AND RELEVANT PROCEEDINGS OF THE FRIENDLY SETTLEMENT PROCESS

1. On October 28, 1999, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "IACHR"), received a petition presented by Guillermo Santiago Zaldívar, represented by Ricardo Néstor Wortman Varela (hereinafter "the petitioners") in which the international responsibility of the Argentinian State (hereinafter "Argentina" or "the State") was alleged for the violation of the rights enshrined in Article 8 (fair trial) of the American Convention on Human Rights (hereinafter "the Convention" or the "American Convention") to the detriment of Guillermo Santiago Zaldívar (hereinafter "the alleged victim") derived from the rejection of the appeal against the judgement that convicted him for manslaughter as well as the unjustified delays in the criminal proceeding.

2. On February 22, 2005, the Commission issued Admissibility Report No. 03/05, in which it declared the petition admissible and concluded it was competent to hear the claim filed by the petitioners regarding the alleged violation of the rights enshrined in Articles 8 (fair trial) and 25 (judicial guarantees) of the ACHR, in relation to the obligation established in articles 1.1 and 2 of the same instrument, to the detriment of Guillermo Santiago Zaldívar.

3. On October 15, 2018, the parties began a friendly settlement process facilitated by the Commission, which materialized in the signing of a friendly settlement agreement on March 18, 2021. On April 27, 2022, the State informed of the issuance of a Cabinet Decree approving the respective agreement and requested the corresponding approval from the Commission, as established in the FSA.

4. In this friendly settlement report, as established in Article 49 of the Convention and in Article 40.5 of the Commission's Rules of Procedure, a review of the facts alleged by the petitioner is made and the friendly settlement agreement, signed on March 18, 2021, by the petitioner and representatives of the Argentinian State is transcribed. Likewise, the agreement signed between the parties is approved and the publication of this report in the Annual Report of the IACHR to the General Assembly of the Organization of American States is agreed upon.

II. ALLEGED FACTS

5. According to the petitioner's allegations on December 11, 1988, Mr. Guillermo Zaldívar was sitting in his parked car with his friend Daniel Eduardo Ravarini, when the latter opened the glove compartment and removed a pistol from there. The petitioners indicated that Mr. Guillermo Zaldívar was authorized to carry this weapon, which he had obtained because he had been the target of threats. The petitioners added that Mr. Guillermo Zaldívar had a blood alcohol level of between 2.21 and 2.50 mg/l at the time of the events and that, presumably, both men tried to take the weapon, after which they would have fired a shot that wounded Mr. Ravarini in the abdomen. According to the petitioners' account, Mr. Guillermo Zaldívar would have taken Daniel Eduardo Ravarini to a hospital, a few blocks from where they were parked, where he died as a result of the wound.

6. The petitioners indicated that the authorities involved in the initial process had carried out the investigation under the criminal category of manslaughter, in accordance with Article 84 of the Criminal Code, which establishes a sentence of six months to three years in prison and that, in 1993, the prosecutor in charge requested that Mr. Guillermo Zaldívar be sentenced to three years' imprisonment. According to the petitioners, the first instance judge dismissed the accusation of manslaughter in a sentence dated April 30,

1997, on the grounds that the crime had reached the statute of limitations. Subsequently, according to the petitioners, the plaintiff appealed the decision, which would have been dismissed by the Prosecutor in charge.

7. According to the petitioners, the second instance tribunal, the Fifth Chamber of the National Court of Appeals, revoked the dismissal by decision of February 23, 1998, and found Mr. Guillermo Zaldívar guilty of simple murder in accordance with article 79 of the Criminal Code and sentenced him to eight years in prison and also sanctioned him with a lifetime ban to carry weapons.

8. The petitioners alleged that, during said process, there were two changes in the legal regime in force to date, which they considered particularly relevant. In this regard, they indicated that, in 1994, constitutional reforms were approved that gave the American Convention constitutional status above national laws. The second reform in the current legal regime occurred in the criminal procedure system, since the oral trial and the appeal of cassation were included. Within the framework of said legislative updates, Mr. Guillermo Zaldívar would have been given the option of continuing his criminal proceedings under Law 2.372 Code of Procedures in Criminal Matters or availing himself of the new criminal regulations under Law 23.984, through which the new Federal Criminal Procedure Code was approved in Argentina, to continue the process of investigation and trial in the new accusatory criminal system. The petitioners reported that Mr. Zaldívar had chosen to remain protected by the old system under Law 2.372.

9. The petitioners indicated that, in accordance with Law 2.372, the only recourse, in cases of second instance conviction, was the filing of an "extraordinary appeal". In the case of Mr. Zaldívar, although he would have chosen to remain in the old system under Law 2.372, the defense filed two appeals, including the "extraordinary appeal" provided for in Law 2.372 and an appeal of cassation only provided for in the new Law 23.984, based on the fact that the constitutional reforms that gave priority to the provisions of the American Convention necessarily incorporated the possibility of appealing the sentence that had been imposed. On the one hand, the "extraordinary appeal" would have been accepted by the Fifth Chamber but considered inadmissible by the National Supreme Court of Justice. On the other hand, his appeal of cassation would have been dismissed *in limine* by the Fifth Chamber of the National Court of Appeals, the National Court of Criminal Cassation, and the National Supreme Court of Justice. The petitioners argued that in all instances it would have been understood that said remedy was not provided for in the procedural rules applicable to the case.

10. According to the petitioners, there would be a series of evaluations of facts and testimonies in the conviction sentence, which they characterized as arbitrary and indicated that these should have been reviewed in appeal instances. The petitioners also added that the conviction sentence of simple homicide would have been pronounced without a proper evaluation of the nature of the intention of the conduct and indicated that the sentence establishes that the death occurred "with the intention of killing or without it", with which the necessary intentional element is ruled out, which constitutes, according to them, a judicial error.

11. The petitioners indicated that the procedural rules under which Mr. Guillermo Zaldívar would have been tried were applied in such a way that he was denied any review of his sentence. The petitioners cited domestic case law alleging that the Supreme Court itself recognized that the old criminal system under Law 2.372, which provided for limited possibilities for an extraordinary appeal, was unconstitutional because it did not guarantee the right of review established in Article 8(2)(h) of the American Convention. The petitioners also indicated that the foregoing demonstrates that the appeal of cassation could have been allowed.

12. The petitioners also alleged the undue delay in the process, given that the criminal investigation would have begun immediately after the events that occurred on December 11, 1988, and the first instance ruling, by which the charges were dismissed, would have been issued on April 30, 1997, while the judgment of second instance, by which Mr. Zaldívar was convicted, would have been issued on February 23, 1998 and the last judgment pronounced by the Supreme Court in relation to the case was notified to the petitioners on May 27, 1999, which means that the process would have lasted more than ten years. In this regard, the petitioners considered that the delay was not attributable to the defense, but to the violations of due process attributable to the State. Lastly, the petitioners affirmed that the impossibility of obtaining a judicial review and the undue delay established harmed Mr. Zaldívar, for which they requested compensation measures.

III. FRIENDLY SETTLEMENT

13. On March 18, 2022, the parties signed a friendly settlement agreement the text of which establishes the following:

FRIENDLY SETTLEMENT AGREEMENT
CASE N. 12.289 - GUILLERMO SANTIAGO ZALDIVAR -

In the city of Buenos Aires, on March 18, 2021, the parties in Case No. 12.289 of the registry of the Illustrious Inter-American Commission on Human Rights (hereinafter "IACHR" or the "Commission"): petitioner Guillermo Santiago Zaldívar, deceased and represented by his widow Alicia Delia Milanese, his daughters María Alejandra Zaldívar, Natalia Florencia Zaldívar and Alicia Valeria Zaldívar in their capacity as heirs, the latter being the legal counsel together with Dr. Ricardo Néstor Wortman Varela, and the Republic of Argentina , in its capacity as a State party to the American Convention on Human Rights (hereinafter the "Convention"), acting by express mandate of article 99 paragraph 11 of the National Constitution, represented by Ms. Undersecretary of Protection and International Liaison on Human Rights, Dr. Andrea Pochak, Ms. National Director of International Legal Affairs in Human Rights Matters, Dr. Gabriela Kletzel, both for the Secretariat Human Rights of the National Ministry of Justice and Human Rights, and Mr. Director of International Litigation in Human Rights of the Ministry of Foreign Affairs, International Trade and Worship, Dr. Alberto Javier Salgado, have the honor to inform to the Illustrious IACHR that they have reached an agreement for a friendly settlement on the matter, the content of which is set out below, requesting that, in accordance with the consensus reached, it be accepted and once the Decree of the National Executive Branch approving this agreement is issued, proceed to adopt the report provided for in Article 49 of the Convention.

I. Background

On February 22, 2005, the Inter-American Commission on Human Rights (hereinafter "Commission" or "IACHR"), pursuant to Article 36 of its Rules of Procedure, adopted Admissibility Report No. 03/05 on the Petition, and then Case No. 12.289 — "Guillermo Santiago Zaldívar"—.

In the aforementioned report, the IACHR declared the case admissible regarding the alleged violation of the right enshrined in Article 8 of the ACHR, in relation to the obligation established in Article 1.1 of the same instrument, to the detriment of Guillermo Santiago Zaldívar. This violation of the Convention would have taken place within the framework of the judicial process followed against Mr. Guillermo Santiago Zaldívar, in which he would not have had the possibility of accessing a review of the sentence handed down against him by a higher instance.

Likewise, the Commission warned that in its eventual decision on the merits, by applying the principle of iura novit curia and —to the extent that it corresponds— it would also examine the possible application of Article 25 of the American Convention, regarding the right to judicial protection, and article 2, linked to the obligation to adopt normative measures or of another nature, in order to adapt the internal legal system to the international standards derived from the Convention.

II. Failure to comply with the right to appeal a conviction (art. 8.2.h of the American Convention on Human Rights)

Having analyzed the legal merits of the petition in light of the admissibility report adopted by the Commission, the Inter-American standards in matters of due process, and the judicial records of the case that was carried out in the domestic jurisdiction, through Opinion SDH-DAI No. 51 /06 the National Directorate of International Legal Affairs in the Matter of Human Rights of the National Human Rights Secretariat concluded, in 2006, that the petitioner was correct in that, within the framework of the aforementioned judicial process, the right of Mr. Zaldívar to have his conviction reviewed by a higher court was not respected, a circumstance that allowed for the violation of Article 8.2.h of the Convention to be considered in relation to Article 1.1 of said international instrument. In view of this, the Argentine State undertakes to adopt the measures detailed below:

A. Non-pecuniary reparation measures.

The Argentine State undertakes to make this agreement public in the "Official Gazette of the Argentine Republic", and in two national newspapers through a press release, the text of which will be previously agreed upon with the petitioner party.

B. Pecuniary reparation measures.

1. The parties agree to set up an ad-hoc Arbitral Tribunal, in order to determine the amount of the pecuniary reparations owed to Mr. Zaldívar, derived from the violation of article 8.2.h of the American Convention in relation to article 1.1 of said instrument in the present case, which will be defined based on the criterion of equity.'

2. The Court will be made up of three independent experts of recognized expertise in human rights and high moral quality, one appointed at the proposal of the petitioner party, the second at the proposal of the State and the third at the proposal of the two experts appointed by the parties. The experts will act *ad honorem* in their functions.

3. In order to form the Arbitral Tribunal, the parties will send the resumés of the proposed person to the counterpart so that the latter can formulate the objections that it considers appropriate, in accordance with the requirements of paragraph 2 above.

4. The Arbitral Tribunal will initiate the process, within a period of one month, from the date the Inter-American Commission on Human Rights adopts the report contemplated in article 49 of the Convention, in accordance with the provisions of clause III of this agreement.

5. The procedure to be applied by the Arbitral Tribunal will be defined by common agreement between the parties, who will draw up its rules. The costs demanded by the Tribunal's actions will be paid by the State, without prejudice to what has already been indicated in relation to the *ad honorem* nature of the work of its members.

6. The award of the Arbitral Tribunal shall be final and unappealable, unless one of the cases of nullity contemplated in article 760 of the National Code of Civil and Commercial Procedure occurs. The award must contain the amount and modality of the agreed pecuniary reparations, and once notified, it will be put to the consideration of the Inter-American Commission on Human Rights, through the Ministry of Foreign Affairs, International Trade and Worship, within the framework of the process for monitoring compliance with the agreement, in order to verify that it follows the applicable international parameters.

7. The pecuniary reparations established in the arbitration ruling will be paid within the term and in accordance with the modalities that the Arbitral Tribunal determines, in accordance with the criteria established in the jurisprudence of the Inter-American Court of Human Rights.

8. Once this agreement has been approved by a Decree of the National Executive Power, the petitioning party definitively and irrevocably waives any other claim of a pecuniary or non-pecuniary nature against the State in relation to the facts that gave rise to this case.

III. Signature *ad referendum*

The parties state that this agreement must be approved by a Decree of the National Executive Power. Once the Decree is published in the Official Gazette of the Argentine Republic, the parties agree to request the Inter-American Commission on Human Rights, through the Ministry of Foreign Affairs and Worship, the adoption of the report contemplated in article 49 of the American Convention on Human Rights, opportunity in which the agreement will acquire full legal validity.

IV. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

14. The IACHR reiterates that according to Articles 48.1.f and 49 of the American Convention, the purpose of this procedure is "to reach a friendly settlement of the matter based on respect for the human rights recognized in the Convention." The acceptance of carrying out this procedure expresses the good faith of the State to comply with the purposes and objectives of the Convention by virtue of the principle *pacta sunt servanda*, by which the States must comply in good faith with the obligations assumed in the treaties.[1] The Commission also wishes to reiterate that the friendly settlement procedure contemplated in the Convention allows the termination of individual cases in a non-contentious manner, and has shown, in cases involving various countries, to offer an important vehicle for settlement, which can be used by both parties.

15. The Inter-American Commission has closely followed the development of the friendly settlement reached in the present case and highly values the efforts made by both parties during the negotiation of the agreement to reach this friendly settlement, which is compatible with the object and purpose of the Convention.

16. The Commission observes that, as agreed between the parties, on January 24, 2022, the Decree of the National Executive Power approving the friendly settlement agreement was issued and the State requested its approval, as established in clause III of the FSA. Given that compliance with the commitments established in the FSA depend on the approval of the agreement by the IACHR, the Commission considers that subparagraphs A and B of clause II of the agreement are pending compliance and so declares. On the other hand, the Commission considers that the rest of the content of the agreement is of a declaratory nature and so declares. Due to the foregoing, the Commission will continue to supervise the process of implementing these measures until they are fully complied with.

17. Finally, in relation to subclause B of the agreement, on the constitution of an ad-hoc Arbitral Tribunal, on April 14, 2021, the Argentine State sent the commission the roadmap for the setting-up and start-up of the arbitral tribunal, together with a proposal of rules of procedure for said tribunal. On September 2, 2021, the petitioner party expressed its agreement with the roadmap and the rules of procedure proposed by the State. In this regard, the Commission takes note of said roadmap, which will be taken into consideration in monitoring compliance with the agreement.

[1] Vienna Convention of the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), Article 26: "pacta sunt servanda". Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

18. Based on the aforementioned, the Commission considers that the rest of the content of the agreement is declarative in nature and therefore its monitoring is not appropriate.

V. CONCLUSIONS

1. Based on the foregoing considerations and pursuant to the procedure provided for in Articles 48.1.f and 49 of the American Convention, the Commission wishes to reiterate its deep appreciation for the efforts made by the parties and its satisfaction with the achievement of a friendly settlement in the present case, based on respect for human rights and compatible with the object and purpose of the American Convention.

2. By virtue of the considerations and conclusions set forth in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To approve the terms of the friendly settlement agreement signed by the parties on March 18, 2021.

2. To declare subclauses A (non-pecuniary reparation measures) and B (pecuniary reparation measures) pending fulfilment based on the analysis included in this report.

3. To continue with the supervision of the commitments established in subclauses A (non-pecuniary reparation measures) and B (measures of pecuniary reparation) of clause II of the friendly settlement agreement based on the analysis included in this report. With this aim, it reminds the parties of their commitment to periodically inform the IACHR of the compliance with said measures.

4. To declare that the friendly settlement agreement is pending compliance, according to the analysis contained in this report.

5. To publish this report and include it in its Annual Report to the General Assembly of the OAS.

Approved by the Inter-American Commission on Human Rights on July 25, 2022. (Signed): Julissa Mantilla Falcón, President; Edgar Stuardo Ralón Orellana, First Vice President; Margarette May Macaulay, Second Vice President; Esmeralda E. Arosemena de Troitiño; Joel Hernández Garcia; Carlos Bernal Pulido and Roberta Clarke Members of the Commission.