

Public Defenders of Human Rights, Freedom of Expression and Public Officials.

*Case of Baraona Bray
v. Chile, Judgment of
November 24, 2022,
Series C No. 481.*

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Public defenders of human rights in Latin and South America continue to be regularly subjected to a broad spectrum of State, State-sponsored and private suppression, and reprisals, ranging from extra-judicial killing and disappearance to conventional legal proceedings, penalties and punishments through the formal judicial institutions of the State. As public defenders, an essential element of their advocacy and representation

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is public expression (freedom of expression), and this rendering public regularly involves allegations of inappropriate, irregular, if not potentially criminal, activities by public officials. Insofar as the response of the public official or officials is recourse to legal proceedings, based upon the commission of a domestic criminal offence or offences by the public defender, through these public statements, the question becomes the foundation and extent of the protection of this freedom of expression.

The Inter-American Court of Human Rights has considered and determined this aspect of the right to freedom of expression of public defenders of human rights in *Álvarez Ramos v. Venezuela* and *Palacio Urrutia et al. v. Ecuador*.¹ In the recent decision of *Baraona Bray v. Chile*, Inter-American Court of Human Rights explicitly develops and extends this position with the intention of establishing a definitive framework of protection for this situation in which the right to freedom of expression is exercised by public defenders of human rights.²

The case resulted from the public, reported interviews and statements, by Carlos Baraona Bray, a lawyer and environmental defender, which contained claims that a Chilean senator had utilised pressure and influence upon the relevant authorities to enable the illegal logging of the alerce (Patagonian cypress) an ancient tree species in Chile. The senator then initiated a criminal complaint against Baraona. He was convicted of the crime of “serious insults” through the media. The conviction led to a “sentence of 300 days imprisonment, which was suspended, a fine, and the additional penalty of suspension from holding public positions or public office during the term of the sentence”.³ The later appeal against the conviction was unsuccessful. Baraona then submitted an individual petition to the Inter-American Commission on Human Rights, and, on receipt of the Merits Report, but prior to the proceedings before the Inter-American Court of Human Rights, there was further judicial consideration of Baraona’s case. This involved, the domestic court of first instance, after the expiry of the period of the imposition of the suspended sentence, definitively dismissing the case against Baraona and the annulment of the conviction.⁴

The Inter-American Court of Human Rights rejected this further judicial dismissal and annulment as a basis for the first preliminary objection by Chile to the

1 *Álvarez Ramos v. Venezuela*. Merits, reparations and costs. Judgment of August 30, 2019. Series C No. 380. *Palacio Urrutia et al. v. Ecuador*. Merits, reparations and costs. Judgment of November 24, 2021. Series C. No. 446. For the more general consideration of the human rights framework of public defenders of human rights, see, Corte Interamericana De Derechos Humanos, *Cuadernillo De Jurisprudencia De La Corte Interamericana De Derechos Humanos N° 30: Personas Defensoras De Derechos Humanos*, San José, C.R.: Corte IDH, 2020.

2 *Baraona Bray v. Chile*, Judgment Of November 24, 2022, Series C No. 481, §§95-98. It should also be noted that the Court explicitly indicates its concern “that more than 14 years have elapsed since the filing of the initial petition before the Commission and the submission of the case to the Court” (§4).

3 *Baraona Bray v. Chile*, §1.

4 *Baraona Bray v. Chile*, § 64. A further Chilean national television programme in which Carlos Bray recounted the criminal proceedings against him, led to the initiation of new criminal proceedings by the same Chilean senator, but these were dismissed by the court of first instance. See, *Baraona Bray v. Chile*, § 65.

proceedings⁵; and, as an integral aspect of the Inter-American Court's subsequent judgment, the Court considered the adequacy of Chile's later judicial response to the initial domestic, criminal proceedings in relation to the relevant provisions of the Convention relating to freedom of expression.

The Inter-American Court considered Baraona's right to freedom of expression in four interconnected stages. It commenced by considering the position from which Carlos Bray made these public statements, as a public defender of the environment. Here, the Court affirms its preceding case-law, emphasising the importance and broad definition of human rights defender, and indicates the other relevant international and regional legal instruments which confirm this together with the intrinsic connection of the environment to this position.⁶ Thus, for the Court, Baraona's roles as a public official involved in environmental protection, and then a private lawyer for a forestry company, are irrelevant to the determination of this position. The simple articulation of statements referring to "illegal logging of alerce trees", irrespective of a role as a human rights defender, represents "an issue related to environmental protection, which constituted a debate of public interest at the time of the facts"⁷

Then, it proceeded to examine the compatibility with the Convention of the then Chilean domestic legislation, under which Baraona had originally been prosecuted and convicted, imposing criminal liability for certain forms of public expression.⁸ The importance of the Court's considerations relate to the character of the right to freedom of expression, under Article 13, which is not an absolute right.⁹ For, whilst the Court acknowledges the capacity for a State-Party, contained in Article 13(2), to regulate and proscribe forms of public expression, it specifically emphasises the incompatibility of State-Party's recourse to criminal law, and the criminalisation of forms of expression in relation to situations such as those in Baraona (a human rights defender (speech in public interest) and the actions of public official in the public sphere). Thus, that the provisions of the then Chilean domestic criminal law under Baraona was prosecuted were incompatible with Article 13 of the Convention: it made no "exception to the application of the crimes of libel and slander in the case of speech of public interest".¹⁰

The compatibility of the then domestic criminal law, under which Baraona was prosecuted, with the principle of legality (Article 9) and freedom of expression (Article 13) were then considered. Here, the Court holds that the legislation's definition of the

5 *Baraona Bray v. Chile*, §18, §22, §24.

6 *Ibid.*, §§70-80.

7 *Ibid.*, §80.

8 *Ibid.*, §§81-133

9 *Ibid.*, §103.

10 *Ibid.*, §132. Another important aspect of this element of the judgment relates to the phenomenon of judicial dialogue with the case-law of the European Court of Human Rights and the African Court of Human and People's Rights with regard to the legitimacy of public statements against, and criticism of, public officials and the illegitimacy of criminalisation of these statements. *Ibid.*, §112-113

criminal offence lacks clear, precise definition, and is based upon vague, indeterminate definitions of the prohibited forms of public expression.¹¹ For the Court, the legislation is, therefore incompatible with Articles 9 and 13 of the Convention.

The Court then turned to the conduct of the initial appeal and its compatibility with Article 25(1) which imposes upon a State-Party the positive obligation to guarantee an effective judicial remedy for violations of Convention rights. In relation to the Chile appellate court's judgment, the Inter-American Court of Human Rights considers that its judicial analysis was undertaken without effective reference to the right to freedom of expression under the Inter-American Convention as interpreted by the Court.¹² The appellate court remained within the incorrect confines of the then domestic legislation and the first instance decision, and, thereby, without "an adequate assessment of the scope of the freedom of expression"¹³: a breach of an effective remedy under Article 25(1).

Finally, the Court considered the adequacy of Chile's subsequent actions in relation to Baraona under the right to reparation (Article 63(1)). The Court engages in a comprehensive presentation of the requirements and obligations placed upon Chile in relation to the finding of the breaches of the Articles of the Convention in relation to Baraona's prosecution, conviction and rejection of appeal against conviction. This involves the judicial and legislative elements of the State in measures of restitution¹⁴, satisfaction¹⁵, guarantees of non-repetition (legislation¹⁶ and training¹⁷) together with the payment of compensation and costs and expenses¹⁸ to Baraona.

The case marks a very significant and sophisticated consideration and protection, under the Convention, of freedom of expression by human rights defenders in relation to the actions of public officials in the public sphere. In its exclusive focus upon criminal law, it leaves open whether civil law can violate this freedom of expression of human rights defenders.

11 *Ibid.*, §§139-141.

12 *Ibid.*, §§149-150.

13 *Ibid.*, §152.

14 *Ibid.*, §§160-164.

15 *Ibid.*, §§165-169.

16 *Ibid.*, §§170-176; *Ibid.*,

17 *Ibid.*, §177.

18 *Ibid.*, §§180-195.