

**REPORT N° 30/07<sup>1</sup>**

PETICIÓN 438-06

ADMISSIBILITY

JUAN GELMAN, MARIA CLAUDIA GARCÍA DE GELMAN AND

MARIA MACARENA GELMAN GARCÍA IRURETAGOYENA

March 9, 2007

**I. SUMMARY**

1. On May 8, 2006, Maria Macarena Gelman Garcia Iruretagoyena (hereinafter "Maria Macarena Gelman") and Juan Gelman, represented by Dr. José Luis González and the Center for Justice and International Law (CEJIL), (hereinafter, "the petitioners"), lodged on their own behalf and on behalf of Maria Claudia García Iruretagoyena de Gelman (hereinafter "Maria Claudia Gelman") a petition with the Inter-American Commission on Human Rights (hereinafter, "the Commission") against the Republic of Uruguay (hereinafter, "the State") for alleged violation of the following rights protected by the inter-American system: the right to due process of law and judicial protection of the victims (Articles 1(1), 2, 8(1) and 25 of the American Convention on Human Rights (hereinafter "American Convention") and articles I(b), III, IV, V and XII of the Inter-American Convention on the Forced Disappearance of Persons (hereinafter "Forced Disappearance Convention") and articles 1, 6, 8, and 11 of the Inter-American Convention to Prevent and Punish Torture (hereinafter "Torture Convention"); the right to truth (Articles 1(1), 8, 13 and 25 of the American Convention); the general obligation to investigate violations of the right to life, liberty and physical and psychological integrity and to punish seriously and effectively such violations (Articles 1(1), 4, 5 and 7 of the American Convention; Articles 6 and 8 of the Torture Convention and Articles I(b), III and VI of the Forced Disappearance Convention); the right to personal integrity of Mr. Juan Gelman, his family and Maria Macarena Gelman (Articles 1(1) and 5(1) of the American Convention); the rights to special measures of protection for children, to the recognition of juridical personal, to the protection of honor and dignity, to a name and to the protection of the family with regard to Mr. Juan Gelman and his family and Maria Macarena Gelman (Articles 1(1), 3, 11, 17, 18 and 19 of the American Convention and Article XII of the Forced Disappearance Convention).

2. The acts that occurred between August 24, 1976 and April 19, 1985, the date of Uruguay's ratification of the American Convention, petitioners request be analyzed pursuant to the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"), at which time petitioners contend that the State violated the following rights: the right life, liberty and personal security (Article I), the right to a family and to protection thereof (Article VI), the right to protection for mothers and children (Article VII), the right to recognition of juridical personality and civil rights (Article XVII), the right to a fair trial (Article XVIII), the right to protection from arbitrary arrest (Article XXV) and the right to due process of law (Article XXVI).

3. The State's responsibility for said violations is alleged to arise from the forced disappearance of Maria Claudia Gelman, the suppression of the identity of Maria Macarena, the daughter of Maria Claudia and Marcelo Gelman, the lack of effective judicial response as regards the rights of the victims and their relatives and the torments suffered by the victims and their relatives as a result of the events that purportedly occurred in this case.

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<sup>1</sup> Commission member Victor Abramovich, of Argentine nationality, did not participate in the review or voting on this case in accordance with Article 17(2)(b) of the Rules of Procedure of the IACHR.

4. As regards the admissibility of the complaint, the petitioners argue that the petition meets all of the requirements contained in Article 46 of the Convention, except that of prior exhaustion of domestic remedies. As regards exhaustion, the petitioners note that the Uruguayan Amnesty Law (“Ley de Caducidad de la Pretensión Punitiva del Estado” - Ley N° 15.848) closed off any possibility of judicial investigation into the majority of violations alleged to have been committed by the military and police during the *de facto* government in Uruguay, until the end of that government, on March 1, 1985. Despite the fact that President Tabaré Vasquez permitted the criminal investigation of the disappearance of Maria Claudia Gelman, the Judiciary definitively denied the judicial protection of the rights of the victims on October 19, 2005. The State, for its part, responded that it was actively investigating the disappearance of Maria Claudia Gelman and that eight officers (6 military and 2 police) were charged with participating in the operations of the so-called “Plan Condor”, of which the disappearance of Maria Claudia Gelman was one prominent victim. The State did not specifically argue failure to exhaust domestic remedies, but the Executive branch of Government indicated that it intended to do everything in its power to locate the remains of Maria Claudia Gelman and to clarify her disappearance, whereas the Judicial branch of Government, in the October 19, 2005 decision of the Court of Appeals closed off the criminal investigation by application of the Amnesty Law.

5. Having analysed the petition, the Commission concludes that it has competence to deal with it. The Commission declared that the petitioners' allegations concerning the alleged violations of Articles 1, 2, 3, 4, 5, 7, 8, 11, 17, 18, 19 and 25 of the American Convention, Articles I, VI, VII, XVII, XVIII, XXV and XXVI of the American Declaration, Articles 1, 6, 8 and 11 of the Torture Convention, and Articles I, III, IV, V and XII of the Forced Disappearance Convention were admissible. The Commission further decided to notify the parties of its decision and to continue the in-depth examination of the supposed violations of the American Convention, publish this decision and include it in its Annual Report to the OAS General Assembly.

## **II. PROCESSING BY THE COMMISSION**

6. On May 8, 2006, the Commission received a petition lodged by Maria Macarena Gelman and Juan Gelman, and their representatives, Dr. José Luis González González and the Center for Justice and International Law (CEJIL), which it registered as number P-438/06. The Commission transmitted the pertinent portions of the petition to the State on June 22, 2006, and granted it two months in which to reply. On June 23, 2006 the State argued that it had not received the petition until Friday June 23, 2006 instead of on Thursday June 22, 2006, and that the two month period to respond should be calculated from that date. On August 21, 2006, the State requested an extension of the time in which to present its response. On August 28, 2006, the Commission granted the State an extension until September 22, 2006, in accordance with article 30(3) of its Rules of Procedure. On September 22, 2006, the State submitted its response to the petition, which was forwarded to the petitioners on September 22, 2006. By fax dated October 27, 2006, the Commission received the observations of the petitioners on the response of the State and conveyed them to the latter on November 16, 2006. On December 14, 2006, the Commission received the final observations from the State which were sent to the petitioners on January 17, 2007. No further correspondence was received from the parties.

## **III. POSITIONS OF THE PARTIES**

### **A. The Position of the Petitioners**

7. The petitioners alleged that the Uruguayan State has incurred international responsibility as a result of the forced disappearance of Maria Claudia Gelman, which began in 1976, the suppression of the identity of her daughter, Maria Macarena, followed by the absence of

an effective judicial response for the protection of the rights of the victims and their relatives which caused them grave anguish and other prejudice.

8. The petitioners alleged the violation a number of articles of the American Declaration on the Rights and Duties of Man during the period August 24, 1976 and April 19, 1985, specifically they charge that during this period the Uruguayan State violated the right to life, liberty and personal security (Article I), the right to a family and to protection thereof (Article VI), the right to protection for mothers and children (Article VII), the right to recognition of juridical personality and civil rights (Article XVII), the right to a fair trial (Article XVIII), the right of protection from arbitrary arrest (Article XXV) and the right to due process of law (Article XXVI).

9. The petitioners further alleged that the Uruguayan State had incurred in the violation of a number of articles of the American Convention on Human Rights following April 19, 1985, the date on which Uruguay ratified the American Convention on Human Rights. In this line of thinking, the petitioners also alleged that following April 2, 1996, the Uruguayan State violated a number of articles of the Forced Disappearance Convention and following November 10, 1992, it violated articles of the Torture Convention.<sup>2</sup> Specifically, the petitioners alleged that the facts of the case comprise the following violations: a) -the right to due process and judicial protection of the victims (Articles 1(1), 2, 8(1) and 25 of the American Convention and Articles I (b), III, IV, V and XII of the Forced Disappearance Convention) and Articles 1, 6, 8 and 11 of the Torture Convention; b) -the right to truth (Articles 1(1), 8, 13 and 25 of the American Convention); c) -the general obligation to investigate violations of human rights and to sanction them (Articles 1(1), 4, 5 and 7 of the American Convention; Articles 6 and 8 of the Torture Convention and Articles I (b), III and VI of the Forced Disappearance Convention; d) -the right to the personal integrity of Mr. Juan Gelman, his family and of Maria Macarena Gelman (Articles 1(1) and 5(1) of the American Convention); and e) -the right to special measures of protection for children, the recognition of juridical personality, to the protection of honor and dignity, to a name and the protection of the family as regards Mr. Juan Gelman and his family and of Maria Macarena Gelman (Articles 1(1), 3, 11, 17, 17 and 19 of the American Convention and Article XII of the Forced Disappearance Convention).

10. The petitioners alleged that these events occurred in the context of a military dictatorship. On June 27, 1973, the military seized power in Uruguay by means of a *coup d'état*, which was carried out under the constitutional cover provided by the elected President, Juan María Bordaberry. The dictatorship perpetuated itself in power until 1985 and during this period there were illegal detentions, generalized torture, assassinations and disappearances of more than a hundred individuals. In 1976 it was calculated that the State was holding more than 6,000 political prisoners. Many human rights organizations, including the Commission, in its report published in 1978, documented the violations of human rights being committed by the State during this period.<sup>3</sup> In its 1978 Annual Report, the Commission commented on complaints that it had received regarding the cooperation among armed forces in different countries in the southern cone.<sup>4</sup>

<sup>2</sup> Uruguay ratified the Forced Disappearances Convention on April 2, 1996 and the Inter-American Torture Convention on November 10, 1992.

<sup>3</sup> IACHR, *Report on the Situation of Human Rights in Uruguay*, OEA/Ser.LV/II.43 doc. 19 corr.1, 31 January 1978.

<sup>4</sup> See, Cooperation with the Security Forces of other Countries In Section IV, Uruguay, of the Annual Report of the Inter-American Commission on Human Rights, 1978, OEA/Ser.LV/II.47 Doc.13, rev. 1, 29 June 1979 ("The Commission has received several denunciations of alleged operations of a specialized police force in Uruguay in foreign countries, apparently with the authorization and alleged participation of the foreign authorities. According to these denunciations, the purpose of these operations is to suppress any form or manifestation of opposition to the military government of Uruguay and to eliminate any person suspected of such opposition.")

11. According to the petitioner, the “Archive of Terror”, discovered in Paraguay, revealed the extent of the cooperation and collaboration of military governments in the Southern Cone against their supposed enemies.<sup>5</sup> Despite the cooperation of military governments in the events set forth in this case, the petitioners charge only Uruguay with purported international responsibility.

12. On August 24, 1976, Maria Claudia Gelman, approximately seven months pregnant, was kidnapped with her husband Marcelo Ariel Gelman and her sister in law, Maria E. Cassinelli de García Iruretegoiena, by members of the security forces who broke into their residence in the city of Buenos Aires. They were taken to a secret detention center in Argentina known as “Automotores Orletti”. A week later, Maria Cassinelli was freed; Marcelo had been tortured and was removed to a cell with other detainees, where he remained until the end of September 1976, when he was again transferred to an unknown destination.

13. In 1989, the remains of Marcelo Ariel Gelman were discovered by the Argentine Team of Forensic Anthropologists in a suburban cemetery in the province of Buenos Aires, where, at the end of October 1976, he had been buried with seven additional unidentified (“N.N.”) persons. Maria Claudia had been seen in the secret detention center, Automotores Orletti, until October 7, 1976 by another detainee who was then freed.

14. Maria Claudia Gelman was reportedly removed from the secret detention center known as “Automotores Orletti” and transferred by officers of the Uruguayan Air Force to Montevideo, Uruguay, where she was held with other Uruguayans at the seat of the III Division of the Information Service of the Department of Defense (SID), located on the Artigas Boulevard and Palmar in Montevideo, despite the fact that she had no connection with Uruguay and had never been active in a militant organization that had anything to do with Uruguay. At the end of October or early November she was taken to the Military Hospital, where she gave birth to a girl. Subsequently, Maria Claudia and the baby were returned to the SID detention center, where they remained until approximately the end of December 1976, at which time the Uruguayan security forces removed the child and transferred Maria Claudia again. Different versions of Maria Claudia’s fate have been proffered, it has been suggested that she was returned to the Argentine Armed Forces and it has also been suggested that she was killed and buried on a military base in Uruguay. It is generally believed, however, that Maria Claudia Gelman is dead. Until the present, Maria Claudia’s remains remain unknown.

15. Petitioners argue that on January 14, 1977, the baby of Maria Claudia and Marcelo Gelman was placed in a basket and left at the door of the house of the family of Angel Tauriño, a policeman, in the Punta Carretas neighborhood of Montevideo. There was a note in the basket which stated that the baby had been born on November 1<sup>st</sup> but that the mother could not take care of her. Angel Tauriño and his wife –who had no children-- took the basket and registered the child

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<sup>5</sup> In October 1975, the Directorate of National Intelligence (DINA) of Chile organized the First Working Meeting of National Intelligence with a view to creating an information mechanism at the regional level. In October 1975, the XI Conference of American Armies was held in Montevideo and in November the First Inter-American Meeting of National Intelligence was held in Santiago. The petitioners claim that the militaries of Argentina, Chile, Uruguay, Brazil, Paraguay, Peru and Ecuador collaborated, initially in the creation of a centralized data base in order to exchange and update information regarding those persons who could be considered enemies or supposed threats to the established regimes, --a classification which included militants and groups that opted for armed struggle or leaders of traditional political parties to any conscientious objector, friend or relative. In early 1975, well known political leaders and other anonymous militants sought refuge in Buenos Aires. In 1976 Zelmar Michelini and Hector Gutierrez Ruiz, two well known Uruguayan politicians were assassinated in Buenos Aires, as well as two members of the Tupamaros militant organization who were living in Argentina.

as their own, and baptized her as Maria Macarena Tauriño. Twenty three years later, four months after the death of the man who raised her, Juan Gelman, her paternal grandfather, made contact with the woman who raised her, a contact facilitated by Monsignor Pablo Galimberti. Juan Gelman made contact with Maria Macarena and she learned of the events that transpired with her biological parents, and without rejecting the family that raised her, she sought a judicial nullification of her birth certificate and its re-issuance as the legitimate child of Marcelo Ariel and Maria Claudia Gelman. Maria Macarena seeks the truth regarding the last days of her mother's life and the first days of her own.

16. According to the complaint, on December 22, 1986, the Uruguayan Parliament approved Law N° 15.848, an Amnesty Law (*Ley de Caducidad de la Pretensión Punitiva del Estado*), which was further approved by a national referendum.<sup>6</sup> By means of Presidential Resolution N° 858/2000 of August 9, 2000, former President Jorge Battle Ibáñez created the Commission for Peace in order to "receive, analyze, classify and compile information about the forced disappearances that occurred during the *de facto* regime." The official report was made public on April 10, 2003 and presented to President Battle; *inter alia*, it established that Maria Claudia Gelman had been detained in Argentina at Automotores Orletti and despite the fact that she was not found to have been involved in any political activity related to Uruguay, she was transferred to Uruguay and detained at the headquarters of the Defense Intelligence Service (SID) until she was taken to the Military Hospital where she gave birth to a baby girl. The child was taken from her and given to a Uruguayan family and there are different versions of what happened to the mother; either she was killed in Uruguay or returned to the Argentine authorities who killed her in Argentina.

17. A number of complaints were filed in Argentina but it was not until 2002 that the case was denounced in Uruguay.<sup>7</sup> On June 19, 2002, Juan Gelman, denounced the kidnapping and disappearance of Maria Claudia before the Fourth Criminal Court in Montevideo (*Juzgado Letrado en lo Penal del Cuarto Turno*). On December 13, 2002, the case was officially opened to receive evidence. The Prosecutor sought to have the proceedings closed due to the applicability, in his opinion, of the Uruguayan Amnesty Law. The Judge did not accede to the Prosecutor's request, due to the fact that pursuant to article 3° of Law N° 15.848, only the Executive branch could decide on the closing of such cases and as a result the issue was sent to President Jorge Battle to determine whether the facts fell within the scope of the Amnesty Law or not. On November 2003 the Executive branch informed the Court that the Amnesty Law applied and on December 2, 2003 the Court filed the case. Juan Gelman filed a writ seeking to have the decision to file the case declared unconstitutional, *inter alia*, for having violated the principle of the separation of powers, but the Supreme Court, in a judgment issued November 15, 2004, rejected the writ.

18. On June 10, 2005, Juan Gelman sought to have the investigation reopened and filed a request for the reactivation of the case before the Second Criminal Court in Montevideo (*Juez Letrado de Primera Instancia en lo Penal de Segundo Turno*) based on new evidence consisting of three newspaper articles relating to the killing of Maria Claudia and other persons

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<sup>6</sup> This law was submitted to a referendum in April 1989 and affirmed by a vote of 55.44% of the electorate in favor of ratification of the law versus 42.42% for the nullification of the law. As a consequence of the law, human rights violations committed by military and police officials until March 1, 1985, could not be punished.

<sup>7</sup> The kidnapping and illegal detention of Maria Claudia, her husband Marcelo Ariel Gelman and the sister in law, Maria E. Cassinelli de García Ireretagoyena were denounced by Maria Teresa Laura Moreira on August 25, 1976 to the Argentine Police, then by Juan Antonio García Ireretagoyena, the father of Maria Claudia, on September 12, 1977 before the Investigating Court in Argentina (*Juzgado Instructor*) and by Nora Eva Gelman Schubaroff (the sister in law of Maria Claudia who was also detained in Automotores Orletti) on May 20, 1987 before the Investigating Court.

who had “disappeared” during the dictatorship. The Court again requested the Executive branch to decide whether these acts were covered by the Amnesty Law and, by note dated June 23, 2005, the new administration of President Tabaré Vázquez informed the Court that they were not covered by the Amnesty Law. The Executive branch explained that three specific situations were excluded from the scope of the Amnesty Law: 1) crimes that were committed for the purpose of economic gain by the perpetrator or a third person, 2) crimes committed by civilians or high ranking military or police during the dictatorship established between June 27, 1973 and March 1, 1985; and 3) crimes committed outside the national territory. Consequently, the investigation was reopened. On August 8, 2005, the Prosecutor again requested that the investigation be closed because, in his view, the case came under the Amnesty Law, and he argued that the earlier decision to close the investigation was *cosa juzgada*.<sup>8</sup> The Judge did not consider that the Amnesty Law covered the crimes alleged, but rather established a *sui generis* proceeding that granted the Executive the power to authorize or not a judicial proceeding. Since the Executive had issued a decision to proceed in this case, that act permitted the Judiciary to continue with the investigation. The Ministry of Justice (*Ministerio Público*) appealed and the Court of Appeals in a judgment dated October 19, 2005, revoked the impugned ruling and determined that the case be filed. The rationale of the Appeals Court’s decision was a deferral to prosecutorial discretion.<sup>9</sup> Juan Gelman’s lawyer was personally notified of the Appeals Court decision on November 9, 2005.

19. In summation, the criminal investigation was reopened in 2005 and the Executive branch, under the Presidency of Dr. Tabaré Vázquez, authorized the reopening of the case. Nevertheless, the investigation was truncated by the intervention of the Ministry of Justice (*Ministerio Público*), which sought to have the case filed. The decision to file the case issued by the Court of Appeals on October 19, 2005 formally terminated the domestic proceedings in this matter. As regards the Court of Appeals’ decision, Mr. Gelman’s lawyers were not granted access to present a challenge or to seek its modification.

## **B. The Position of the State**

20. The State, in its response to the petition dated September 20, 2006, stated that it did not violate the rights alleged by the petitioners as regards the purported victims Maria Claudia Gelman, María Macarena Gelman and Juan Gelman. The State pointed out from the time that President Tabaré Vázquez assumed office a vast and intense process of investigation has been undertaken in relation to this case. The State indicated that it was actively investigating the disappearance of Maria Claudia Gelman and that eight officers (6 military and 2 police) were charged with participating in the operations of the so-called “Plan Condor”, of which the disappearance of Maria Claudia Gelman was one prominent victim. As noted above, the State did not specifically argue failure to exhaust domestic remedies, but in effect, the elements of its response were tantamount to an assertion that domestic remedies were still in the process of being exhausted.

21. The investigation, according to the State, began with the search by the grandfather of Maria Macarena, the Argentine poet, Juan Gelman. He received active support and assistance from the Commission for Peace, created in April 2003 in Uruguay, for the purpose of determining

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<sup>8</sup> The petitioners point out that the Prosecutor, Enrique Moller Méndez, was the same Prosecutor who requested that the investigation be closed in September 2003.

<sup>9</sup> The Appeals Court determined that the Justice Ministry, which is obliged to carry forward the prosecution, did not consider that the prerequisites for a prosecution were present. The investigating Judge’s investigation only serves to facilitate the Justice Ministry’s indictment. If the Prosecutor is of the view that the bases for the prosecution do not exist, the Judge is bound by this decision and cannot pursue the prosecution on his own.

the situation of the detained-disappeared during the military dictatorship (1973-1985). The Commission was created to collect information in a confidential and voluntary manner and in which the organization of Mothers and Relatives of the Disappeared (*Madres y Familiares de Desaparecidos*) played a fundamental role. Facts relating to the detention of Maria Claudia Gelman, her transfer to a detention center in Uruguay while pregnant, the birth and the removal of her daughter and her subsequent killing were facts confirmed by the Commission for Peace.

22. María Macarena Gelman was located in February 2000. Juan Gelman sought the intermediation of the Bishop of San José, Monsignor Pablo Galimberti, who contacted Mrs. Tauriño and explained the situation to her. On March 31, 2000, Mr. Gelman and his wife met with Maria Macarena privately in Montevideo. Maria Macarena agreed to a DNA test and her identity was restored several months later. The State has been seeking to clarify the facts and to locate the remains of her disappeared mother, as well as the circumstances of her kidnapping and the expropriation of her child. The seriousness of this investigation and the determination to find the truth about these facts, according to the State, are undertakings that this Government considers imperative.

23. The State informed the Commission that Dr. Gonzalo Fernández, the Assistant of the President, assumed the legal representation of the grandparents and served as their advisor. Accordingly, Maria Macarena was able to get a Court judgment that restituted her true identity which was duly registered in the Civil Registry (*Registro de Estado Civil*).

24. On March 1, 2005, when President Tabaré Vázquez assumed office, in his inaugural speech, he declared that the Gelman case was excluded from the scope of Law 15.848, the Amnesty Law. The State further explained that this meant that the Gelman case could not seek protection from the law that exonerated members of the military and police from criminal prosecution for crimes that were committed during the military regime for political reasons, in compliance with their functions or by reason of superior orders. At the same time, the State noted that the President announced the decision to immediately begin an investigation for the purpose of exhausting the search of the detained-disappeared citizens, within which context the localization of the remains of Maria Claudia Gelman constituted a central aspect.

25. In this context, the State explained, the new Government understood that the Amnesty Law was in effect and that it was required to comply with the morally transcendent legal obligation contained in Article 4 of the Law, on which the reconciliation of all Uruguayans depended. This article, ignored by previous governmental administrations mandated the Executive Branch to facilitate investigations designed to clarify the facts relating to "acts regarding persons allegedly detained and disappeared in military or police operations in addition to the facts regarding minors who had presumably been kidnapped under similar conditions".

26. The responsibility for carrying out the investigations, the State explained, had been in the hands of the Commission for Peace –without the power to investigate— and it passed directly to the Presidency, entrusting Dr. Gonzalo Fernandez, the President's Assistant with the principal responsibility for the distinct tasks involved in this huge undertaking. In order to facilitate these decisions, the President issued a Resolution by means of which he decided to carry out the pertinent investigations in order to advance in the clarification of the final destiny of these detained-disappeared citizens during the military dictatorship. In order to do so, he ordered the excavation of places identified by specific complaints as clandestine cemeteries, a task to be carried out with scientists from the universities and the cooperation of an Argentine team of forensic anthropologists. In addition, the Government ordered that military bases be entered in order to determine whether any remains of disappeared persons could be found. The Commanders in Chief of the three branches of the Armed Forces were ordered to prepare reports

on the activities of their respective branches, in writing, during the period of the military dictatorship. The reports produced officially recognized the reality of the facts, admitting, for the first time, the existence of torture and of clandestine grave sites.

27. The excavations of these sites that served as clandestine cemeteries during the military dictatorship had two objectives: 1) to locate the remains of persons who had been assassinated; 2) to confirm, whether there had been an exhumation in these sites followed by the removal of the cadavers, who were removed in order to not leave any traces thereof, as the reports prepared by the Armed Forces maintained. The Armed Forces reported that in the process of the exhumation of the remains, difficulties existed in determining the exact place of burial which permits the conclusion that not all of the remains had been exhumed, since it was not possible to exactly determine which ones were exhumed and which ones were not exhumed. One of the priorities of this Government was to exhume the remains of Maria Claudia Gelman, by means of a large excavation in Battalion No. 14 of the Army, located outside Montevideo. The State notes that the memory of the disappeared mother was honored with a homage celebrated on June 6, 2005 in the Uruguayan Parliament.

28. As a result of the excavations carried out, the State explains that the remains of Maria Claudia Gelman were not discovered, however the remains of the disappeared citizens, Ubegesner Chávez and Fernando Miranda, who were assassinated while in detention, were recovered. Despite the efforts involved in these excavations that were carried out over a period of 14 months, the State indicated that it is committed to locating the remains of these individuals and restoring them to their family members. This commitment, the State reiterated, is an imperative and will lead to determining exactly the bitter and heartrending circumstances of the death of Maria Claudia.

29. The State concluded that the President had announced the exclusion of the Gelman case from Law 15.848. The Executive Branch on June 23, 2005 issued its opinion in response to a consultation made by the Supreme Court regarding the instant case. The Presidential Resolution expressly established that for the Executive Branch, the Gelman case is not included in Article 1 of Law 15.848 of December 22, 1986, criminal proceedings have not been extinguished and the Judiciary is competent to assume consideration of the case. The Court of Appeals however, filed the case, and the Government, affirming its respect for the independence of the Judiciary, stated that it did not share the decision of the Judicial Branch, reaffirming its determination to continue with the investigations to recover the remains of Maria Claudia Gelman (referring to declarations made on October 25, 2005 by Mr. Rodolfo Nin Novoa, the Vice President).

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

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

30. The petitioners are entitled, under Article 44 of the American Convention, to lodge complaints with the Commission. The petition names the alleged victims as being "Maria Macarena Gelman, Maria Claudia Gelman and Juan Gelman," three individually identified persons, whose rights allegedly were violated by the Uruguayan State, under the terms of Article 1(2) of the American Convention. The Commission concludes that it has competence, *ratione personae*, to examine the petition as regards the obligations of the Uruguayan State vis-à-vis Juan Gelman, Maria Macarena Gelman and Maria Claudia Gelman.

31. The Commission has competence, *ratione materiae*, because the petitioners alleged violations of rights protected by the American Convention in Articles 1(1), 2, 4, 5, 7, 8, 11,

17, 18, 19 and 25 said Convention; Articles I, III, IV, V and XII of the Forced Disappearance Convention and Articles 1, 6, 8, and 11 of Torture Convention. In addition, prior to the ratification of these Conventions, during the period between August 24, 1976 until April 19, 1985, the petitioners allege that the State violated the following rights set forth in the American Declaration: the right life, liberty and personal security (Article I), the right to a family and to protection thereof (Article VI), the right to protection for mothers and children (Article VII), the right to recognition of juridical personality and civil rights (Article XVII), the right to a fair trial (Article XVIII), the right to protection from arbitrary arrest (Article XXV) and the right to due process of law (Article XXVI). Since this case involves the forced disappearance of Maria Claudia Gelman and it is not clear whether Ms. Gelman was killed prior to April 19, 1985 (the date of Uruguay's ratification of the American Convention) or thereafter, both Articles I of the American Declaration and Articles 4, 5 and 7 of the American Convention in conjunction with Article 1(1) are implicated.

32. The Commission has competence, *ratione temporis*, because the obligations of the State to respect and ensure the rights protected in the American Convention, the Forced Disappearance Convention and the Torture Convention were in force for the State at the time the events alleged in the petition are said to have occurred. Uruguay has been a party to the American Convention since April 19, 1985, to the Forced Disappearance Convention since April 2, 1996 and to the Torture Convention since November 10, 1992. In addition, the Commission interprets the American Declaration to be legally binding on States Parties until they ratify or accede to the American Convention.

33. It must be noted that the facts in this case are not yet completely known. Most notably, the remains of Maria Claudia Gelman have not yet been located. Furthermore, it is not known, for example, whether Uruguayan officials participated in the detention of Maria Claudia and her husband in Argentina or whether Uruguayan officials brought her to Uruguay, whether they collaborated with Argentine officials in the transfer, or whether Argentine officials brought her to Uruguay and then turned her over to Uruguayan officials. The clarification of the facts is generally part of the process of a criminal justice proceeding, the purpose of which is to clarify the facts of the crime and to allocate responsibility therefore. Since the criminal proceedings were truncated in Uruguay in 1995, the facts have never been satisfactorily determined and this fact prevents the Commission from defining, at this point, at what moment alleged Uruguayan responsibility commenced.

34. The Commission has competence, *ratione loci*, because the petition alleges violations of rights that occurred in the territory of a State Party to the American Convention. The petitioners allege that the Uruguayan State has incurred in international responsibility for the forced disappearance of Maria Claudia Gelman, which began in the year 1976, the suppression of the identity of Maria Macarena Gelman, followed by the absence of an effective judicial response for the protection of the rights of Juan Gelman and his relatives by the Uruguayan State. In addition, should the facts reveal that the Uruguayan authorities functioned in conjunction with the Argentine authorities in Argentina, under the umbrella of the "Plan Condor", in the detention of Maria Claudia and her husband, and the transfer of Maria Claudia from Argentina to Uruguay, then the Commission could find that the Uruguayan authorities are also responsible for activities conducted outside of Uruguayan territory, in Argentina, and with possible Argentine complicity.

**B. Other admissibility requirements**

**1. Exhaustion of domestic remedies**

35. The Uruguayan Amnesty Law (*Ley de Caducidad de la Pretensión Punitiva del Estado*, Ley N° 15.848) closed off any possibility that military or police officers who committed human rights violations until March 1, 1985 would be investigated, tried and sanctioned. This was facilitated by the position of the Executive branch, which systematically impeded the criminal prosecution of serious violations of human rights perpetrated by military and police officers during the military dictatorship. What distinguishes this case is that the current head of the Executive branch, President Tabaré Vázquez, responding to the procedure established by the Amnesty Law, permitted the criminal investigation of the disappearance of Maria Claudia Gelman to go forward by excluding this case from the protection of the Amnesty Law. Nonetheless, the judiciary applied the Amnesty Law to this case, in spite of the Presidential directive, and domestic remedies were exhausted with the issuance of the decision of the Uruguayan Court of Appeals to file the case on October 19, 2005.

36. On June 19, 2002, Dr. Gonzalez Gonzalez, the legal representative of Mr. Juan Gelman, filed a complaint in the Fourth Criminal Court for the kidnapping and disappearance of his daughter in law, Maria Claudia Gelman. The complainants presented evidence and alleged that the case should not be covered by the Amnesty law, since they occurred as a result of the personal intentions of the military officers, far from the repressive context that was being carried out as State policy. The State's response at the time, articulated by the then President of Uruguay, Jorge Battle, and consolidated in a judicial decision, was that these facts were covered by the Amnesty Law and, therefore, it was appropriate to file the case.

37. Subsequently, Dr. Gonzalez Gonzalez sought to have the case reopened based on the presentation of new evidence to the Court. The Judge requested the Executive branch, under the Presidency of Tabaré Vázquez, to give his opinion as to whether the facts of the case were included or not under the effects of the Amnesty law. The Executive branch responded that the facts were not covered by Article 1 of Law 15.848, the Amnesty Law. Nonetheless, this decision of the Executive branch was not sufficient to permit the investigation and trial of these serious crimes to go forward. Despite the fact that a request to file the case had been denied by the Judge at First Instance, the Court of Appeals decided that the case should be filed.

38. The State's response to the petition (*supra* para. 20) was that, under the administration of President Tabaré Vasquez, it was conducting a serious and thorough investigation of the Gelman case and seeking the exhumation of Maria Claudia Gelman's remains. While the good intentions of the Uruguayan Government are worthy of recognition, and currently both Argentine and Uruguayan Courts are in the process of investigating the operations of "Plan Condor", it cannot be ignored that the Uruguayan judiciary filed the specific case of the disappearance of Maria Claudia Gelman on October 19, 2005. That case has not been reopened. Consequently, the Commission considers that the requirement of the exhaustion of domestic remedies, stipulated in Article 46(1) (a) of the American Convention, has been met by the petitioners in this case and that the State's argument is not persuasive on this point.<sup>10</sup>

## **2. Time limit for the presentation of the petition**

39. Article 46(1)(b) of the American Convention provides that the petition must be lodged within a period of six months from the date on which the petitioners were notified of the

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<sup>10</sup> See IACHR, Report N° 29/92 of October 2, 1992, para. 35 ("The law in question [Law 15.848] has the intended effect of dismissing all criminal proceedings involving past human rights violations. With that, the law eliminates any judicial possibility of a serious and impartial investigation designed to establish the crimes denounced and to identify their authors, accomplices, and accessories after the fact.").

final judgment that exhausted domestic remedies. In the instant petition, the Commission has determined that the petitioners exhausted domestic remedies.

40. The decision to file the case was taken by the Uruguayan Court of Appeals on October 19, 2005. The decision was notified personally to Mr. Gelman's lawyer, Dr. José Luis Gonzalez, on November 9, 2005. The petition was filed with the Commission on May 8, 2006. The Commission concludes that the petition was presented within the six-month time limit set in Article 46(1)(b) of the Convention.

### **3. Duplication of proceedings and *res judicata* at the international level**

41. There is nothing in the record to suggest that the subject matter of the petition is pending in another international proceeding for settlement, or is substantially the same as one previously studied by the Commission or by another international human rights body. The Commission, therefore, concludes that the requirements established in Article 46(1) (c) are met.

### **4. Characterization of the alleged facts**

42. The Commission notes that the petition raises important questions regarding the rights of members of a family to be protected from allegedly "arbitrary" actions of the State. The facts concern violations allegedly committed against members of a family by a *de facto* government in which members of the family were destroyed and eliminated by members of the military dictatorship who cooperated and collaborated with neighboring militaries. The facts concern specifically the forced disappearance of Maria Claudia Gelman, the suppression of the identity of Maria Macarena, the daughter of Maria Claudia and Marcelo Gelman, the lack of effective judicial response as regards the rights of Juan Gelman and his relatives and the torments suffered by the victims and their relatives as a result of the events that purportedly occurred in this case.

43. Following the return to democracy in 1995, access to justice continued to be barred by an Amnesty law adopted by the democratic state and reportedly ratified in a referendum by the Uruguayan people. Given the Commission's substantial jurisprudence on the issue of amnesty laws, the Commission decides that, at a minimum, the petitioners' claims describe acts that, if proven to be true, could tend to establish a violation of the rights of Juan Gelman and his family protected by Articles 1(1), 2, 8 and 25 of the American Convention; thus, the admissibility requirements of Article 47(b) have been satisfied.

44. For the purposes of admissibility, the Commission concludes that there is sufficient evidence that the allegations regarding the removal of Maria Macarena from her legitimate family and country and giving her in adoption to a police officer in another country for 23 years, if proven, could tend to establish violations of Articles 1(1), 3, 11, 17, 18 and 19 of the American Convention, obligations which the State owed to Maria Macarena and her mother, Maria Claudia Gelman. In addition, the petitioners include further allegations, that, if proven to be true, could tend to establish a violation of Articles I, III, IV, V and XII of the Inter-American Convention on Forced Disappearance of Persons for failure to prevent, punish and eliminate the practice of forced disappearance within its jurisdiction, Articles 1, 6, 8 and 11 of the Inter-American Convention to Prevent and Punish Torture for failure to prevent torture and failure to punish those responsible for torture and to extradite them to a jurisdiction where they will be tried, and lastly, Articles I, XVII, XVIII, XXV and XXVI of the American Declaration on the Rights and Duties of Man for possible violations of the right to life, right to a juridical personality, right to justice, right to protection against arbitrary arrest and right to a fair trial in the period August 24, 1976 to April 19, 1985, when Uruguay ratified the American Convention. Since this case

involves the forced disappearance of Maria Claudia Gelman and it is not clear whether Ms. Gelman was killed prior to April 19, 1985 (the date of Uruguay's ratification of the American Convention) or thereafter, both Articles I of the American Declaration and Articles 4, 5 and 7 of the American Convention in conjunction with Article 1(1) are implicated.

## **V. CONCLUSION**

45. The Commission has determined in the instant report that it is competent to take up the complaint lodged by the petitioners alleging violations of their human rights under multiple instruments, but, in particular, the rights to a fair trial and judicial protection (Articles 8 and 25) as regards Juan Gelman and his family, in conjunction with Articles 1(1) and 2 of the American Convention, as regards Maria Claudia Gelman, and further violations of the rights set forth in Articles 1(1), 3, 11, 17, 18 and 19 of the American Convention, as regards, Maria Macarena Gelman. In addition, if the allegations are proven true, the State may be found responsible for violations of Articles I, III, IV, V and XII of the Inter-American Convention on Forced Disappearance of Persons, Articles 1, 6, 8 and 11 of the Inter-American Convention to Prevent and Punish Torture and lastly, Articles I, XVII, XVIII, XXV and XXVI of the American Declaration on the Rights and Duties of Man with regard to Maria Claudia and Maria Macarena Gelman in the period prior from August 24, 1976 to April 19, 1985 or violation of Articles 4, 5 and 7 of the American Convention in conjunction with Article 1(1) in the period subsequent to April 19, 1985.

46. Based on the factual and legal arguments given above and without prejudging the merits of the case,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

#### **DECIDES:**

1. To declare the instant petition admissible the rights to a fair trial and judicial protection (Articles 8 and 25), in conjunction with Articles 1(1) and 2 of the American Convention, as regards Juan Gelman and his family. At the same time, the Commission declares the petition admissible regarding possible additional violations of the rights set forth in Articles 1(1), 3, 11, 17, 18 and 19 of the American Convention, as regards, Maria Macarena Gelman. In addition, if the allegations are proven true, the State may be found responsible for violations of Articles I, III, IV, V and XII of the Inter-American Convention on Forced Disappearance of Persons, Articles 1, 6, 8 and 11 of the Inter-American Convention to Prevent and Punish Torture, and lastly, Articles I, XVII, XVIII, XXV and XXVI of the American Declaration on the Rights and Duties of Man, with regard to Maria Claudia and Maria Macarena Gelman for acts that occurred during the period from August 24, 1976 to April 19, 1985, and Articles 4, 5, and 7 in conjunction with Article 1(1) for acts that occurred subsequent to April 19, 1985.

2. To notify the parties of this decision.

3. To proceed with its analysis on merits.

4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed by the Inter-American Commission on Human Rights in Washington, D.C., on the 9<sup>th</sup> day of the month of March 2007. (Signed) Florentín Meléndez, President; Paolo Carozza, First Vice-President; Sir Clare K. Roberts, Evelio Fernández Arévalos, and Freddy Gutiérrez, Commissioners.