



Organization of  
American States



## Inter-American Commission on Human Rights

Application to the Inter-American Court of Human Rights  
in the case of  
Juan Gelman, María Claudia García Iruretagoyena de Gelman y María Macarena  
Gelman García Iruretagoyena  
(Case 12.607)  
against the Oriental Republic of Uruguay

### DELEGATES:

Luz Patricia Mejía, Commissioner  
Santiago A. Canton, Executive Secretary

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1889 F Street, N.W.  
Washington, D.C., 20006

**APPLICATION FROM THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS  
AGAINST URUGUAY  
CASE N° 12.607  
JUAN GELMAN, MARÍA CLAUDIA GARCÍA IRURETAGOYENA DE GELMAN Y  
MARÍA MACARENA GELMAN GARCÍA IRURETAGOYENA**

**I. INTRODUCTION**

1. The Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission" or the "IACHR") submits to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court" or "the Tribunal") the petition lodged in case 12.607, Juan Gelman, María Claudia García Iruretagoyena de Gelman and María Macarena Gelman García Iruretagoyena (hereinafter, "the victims" or "the injured party"), against the Republic of Uruguay (hereinafter "the State," "the Uruguayan State" or "Uruguay") for its international responsibility arising from the forced disappearance of María Claudia García Iruretagoyena de Gelman (hereinafter "the disappeared victim" or "María Claudia García de Gelman"), carried out by government agents from the end of 1976 to date, given that the victim's whereabouts remain unknown, and the circumstances under which the victim disappeared; for suppressing the identity and the nationality of María Macarena Gelman García Iruretagoyena, daughter of María Claudia García de Gelman and Marcelo Gelman; and for the denial of justice, impunity and, in general, for the suffering caused to Juan Gelman, his family, María Macarena Gelman García Iruretagoyena and the next of kin of María Claudia García de Gelman, as a result of the failure to investigate the facts, and to prosecute and punish the responsible individuals, by virtue of the provisions of Law No. 15.848 or *Ley de Caducidad (Ley de Caducidad de la Pretension Punitiva del Estado)*, promulgated in 1986 by the democratic government of Uruguay.

2. The Inter-American Commission asks the Court to establish the international responsibility of the State of Uruguay, which is responsible for the following violations of human rights:

a. the right to a fair trial and to judicial protection (Articles 8(1) and 25 in connection with Articles 1(1) and 2 of the American Convention on Human Rights; Articles I(b), III, IV, and V of the Inter-American Convention on Forced Disappearance of Persons, and Articles 1, 6, 8 and 11 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Juan Gelman, María Claudia García de German, María Macarena Gelman and their next of kin;

b. the right to life, to personal liberty, to humane treatment, to juridical personality, and the obligation to seriously and effectively punish such violations (Articles 3, 4, 5, 7 and 1(1) of the American Convention on Human Rights; Articles I(b), III, IV and V of the Inter-American Convention on Forced Disappearance of Persons, and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of María Claudia García de Gelman;

c. the right to humane treatment (Article 5(1) in connection with Article 1(1) of the American Convention) with regard to Juan Gelman, María Macarena Gelman and their next of kin; and

d. the right to special measures of protection of the child, to juridical personality, to a name, to privacy and to nationality (Articles 3, 11, 18, 19 and 20 in connection with Article 1(1) of the American Convention on Human Rights) with

regard to María Macarena Gelman; as well as the rights of the family (Articles 1(1) and 17 of the American Convention on Human Rights and Article XII of the Inter-American Convention on the Forced Disappearance of Persons), with regard to Juan Gelman, María Macarena Gelman and their next of kin.

3. The case has been processed in accordance with the provisions of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and is submitted to the Court in accordance with the temporary provision contained in Article 79(2) and other relevant provisions of the in force Court’s Rules of Procedure. A copy of Report No. 32/08<sup>1</sup> adopted by the Commission on July 18, 2008, with the concurring opinion of Commissioner Florentin Melendez, is attached to this petition as an Appendix.

4. The submission of this case to the Court is based on the need to carry out a diligent investigation for the purpose of uncovering the truth, obtaining justice, and providing reparation to the victims and their next of kin for the damage caused by the violations committed. The forced disappearance of Mrs. María Claudia García de Gelman is a continuous violation of several of her fundamental and non-derogable rights that extends to this date. Furthermore, the fact that the truth remains unknown and that the perpetrators of the facts in the present case have not been prosecuted, is a contributing factor in prolonging the suffering caused by the violation of the fundamental rights to the detriment of the victims and their next of kin even though the State’s obligation to provide a judicial resolution to the case and adequate reparation.

## II. PURPOSE OF THE APPLICATION

5. The purpose of the application is to request the Court to conclude and declare that, as a result of the facts in the present case, the Uruguayan State is responsible for the violation of the following human rights:

a. the right to a fair trial and to judicial protection (Articles 8(1) and 25 in connection with Articles 1(1) and 2 of the American Convention on Human Rights; Articles I(b) III, IV and V of the Inter-American Convention on Forced Disappearance of Persons; and Articles 1, 6, 8 and 11 of the Inter-American Convention to Prevent and Punish Torture) to the detriment of Juan Gelman, María Claudia García de German, María Macarena Gelman and their next of kin;

b. the right to life, to personal liberty, to humane treatment, to juridical personality, and the obligation to seriously and effectively punish such violations (Articles 3, 4, 5, 7 and 1(1) of the American Convention on Human Rights; Articles I(b), III, IV and V of the Inter-American Convention on Forced Disappearance of Persons, and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of María Claudia García de Gelman;

c. the right to humane treatment (Article 5(1) in connection with Article 1(1) of the American Convention) with regard to Juan Gelman, María Macarena Gelman and their next of kin; and

d. the right to special measures of protection of the child, to juridical personality, to a name, to privacy and to nationality (Articles 3, 11, 18, 19 and 20 in connection with Article 1(1) of the American Convention on Human Rights) with

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<sup>1</sup>See: IACHR, Report on the Merits No. 32/08, Case 12.607, Juan Gelman, María Claudia García Iruretagoyena de Gelman and María Macarena Gelman García Iruretagoyena, July 18, 2008. Concurring Opinion of Commissioner Florentín Meléndez, The Right to the Truth, Case Juan Gelman, María Claudia García de Gelman and María Macarena Gelman against Uruguay. Appendix 1.

regard to María Macarena Gelman; as well as the rights of the family (Articles 1(1) and 17 of the American Convention on Human Rights and Article XII of the Inter-American Convention on Forced Disappearance of Persons), with regard to Juan Gelman, María Macarena Gelman and their next of kin.

6. As a result of the abovementioned, the Inter-American Commission requests that the Court order the State to
  - a. determine the responsibility for the forced disappearance of María Claudia García de Gelman and the removal of her newborn daughter, Maria Macarena Gelman, by due process of law and by a complete and impartial judicial investigation of the facts in order to identify those responsible for the violations of human rights referred in this case, and therefore they can be duly punished.
  - b. adopt the necessary measures, legislative and of other kind,, in accordance with its constitutional procedures and the American Convention´s provisions as to leave without effect the Law N° 15.848 or *Ley de Caducidad*.
  - c. create an effective domestic mechanism with legal binding powers and authority over all the State´s organs to ensure the full compliance with what the Court orders in its judgment.
  - d. provide a full reparation to the victim´s next of kin, that includes compensation for pecuniary and non-pecuniary damages, costs and expenses of litigation, both at the national and international level, as well as the celebration of certain acts of symbolic importance to guarantee the non-repetition of the acts committed in this case, which can only be determined through negotiations between the petitioners and the State, such as the celebration of an annual day on commemoration and remembrance of the victims of the *de facto* government.

### III. REPRESENTATION

7. In accordance with the provisions of Article 24 of the Court's Rules of Procedure, the Commission has appointed Commissioner Luz Patricia Mejía and its Executive Secretary Santiago A. Canton to serve as its delegates in this case. Assistant Executive Secretary Elizabeth Abi-Mershed, and specialists Christina Cerna and Lilly Ching have been appointed to serve as legal advisers.

### IV. JURISDICTION OF THE COURT

8. Under Article 62(3) of the American Convention, the Inter-American Court is competent to hear all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, provided that the states parties to the case recognize or have recognized the jurisdiction of the Tribunal. Uruguay is party to the American Convention since April 19, 1985, when it also accepted the Court's contentious jurisdiction.

9. In accordance with its reiterated case law, the Court is competent to rule on those violating acts that occurred after the date in which the State recognized the jurisdiction of the Court, April 19, 1985 in the instant case, or on violations that continue to exist as of the date the State recognizes the jurisdiction of the Court. On this last point, the Court has considered in several occasions that it is competent *ratione temporis* to examine those acts that constitute continuous or

permanent violations, in other words, violations that took place before the date the jurisdiction of the Court was recognized, and that continue even after that date.<sup>2</sup>

10. The Court has considered the continuous nature of the phenomenon of forced disappearance when it established that it “constitutes a multiple and continuing violation of a number of rights protected by the Convention, because not only does it produce an arbitrary deprivation of liberty, but it also endangers personal integrity, safety and the very life of the detainee.”<sup>3</sup>

11. The petition submitted to the Court refers to the forced disappearance of María Claudia García de Gelman and to the removal of her newborn daughter, María Macarena Gelman, as well as to the suppression of personal identity and nationality of the newborn baby beginning in 1976, the circumstances and consequences of which have not been investigated to this day. Therefore, the Court is competent *ratione temporis* to hear the case since it refers to continuous or permanent violations whose effects and actions extend beyond the date in which the State recognized the jurisdiction of the Court.

12. Furthermore, Uruguay is party to the Inter-American Convention on Forced Disappearance of Persons (hereinafter “the Forced Disappearance Convention”) since April 2, 1996, and to the Inter-American Convention to Prevent and Punish Torture (hereinafter “the Convention on Torture”) since November 10, 1992. Therefore, the Commission requests that the Court establishes the violation of the alleged provisions beginning on the date the respective treaties entered into force for the Uruguayan State, that is, April 2, 1996, and November 10, 1992, respectively.

## V. PROCESSING BY THE INTER-AMERICAN COMMISSION

13. On May 8, 2006, the Commission received a petition lodged by María Macarena Gelman and Juan Gelman, and their representatives, Dr. José Luis González González and the Center for Justice and International Law (CEJIL), which was registered as number P-438/06. The Commission transmitted the pertinent parts of the petition to the State on June 22, 2006, and granted it two months to reply.

14. 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 22, 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.

15. On September 22, 2006, the State submitted its response to the petition, which was transmitted 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. In this phase, no further correspondence was received from the parties.

<sup>2</sup>See: IA Court H.R., *Case of the Sisters Serrano Cruz Vs. El Salvador. Preliminary Exceptions*. Judgment issued on November 23, 2004. Series C No. 118, par. 65; IA Court H.R. *Case Nogueira de Carvalho et al Vs. Brazil*. Judgment issued November 26, 2006. Series C No. 161, par. 45, and IA Court H.R., *Case Vargas Areco Vs. Paraguay*. Judgment issued on November 26, 2006. Series C No. 155, par. 63.

<sup>3</sup>IA Court H.R., *Case Bámaca Velásquez Vs. Guatemala*. Judgment issued November 25, 2000. Series C No. 70, par. 128; IA Court H.R., *Case Trujillo Oroza Vs. Bolivia. Reparations* (art. 63(1) American Convention on Human Rights). Judgment issued February 27, 2002. Series C No. 92, Concurring Opinion of Judge Sergio García Ramírez, par. 10; and IA Court H.R., *Case Goiburú et al. Vs. Paraguay*. Judgment issued on September 22, 2006. Series C No. 153, paras. 82-84.

16. On March 9, 2007, the Commission approved Admissibility Report N° 30/07 declaring that the petition was admissible.<sup>4</sup> On May 10, 2007, the admissibility report was transmitted to the State and to the petitioners and the parties were notified that the Commission was at its disposition to assist them in reaching a friendly settlement, pursuant to Article 48(1)(f) of the Convention, should they be interested in such an arrangement. The Commission requested the parties to respond to this offer as soon as possible. Neither the State nor the petitioners expressed interest in negotiating a solution of this sort and neither party submitted any further observations, consequently, the Commission decided to proceed with the preparation of its merits report.

17. On July 10, 2007, the petitioners requested a one month extension of time to present their final observations on the merits which was granted by letter dated July 31, 2007. The final observations of the petitioners were received on August 30, 2007 and transmitted to the State on September 1, 2007 with a request for the State's final observations on the merits due within a period of two months. The State presented its final observations on November 9, 2007 and they were transmitted to the petitioners on December 4, 2007 without a request for additional observations. On March 14, 2008, the State presented additional observations on the case which were transmitted to the petitioners on April 2, 2008.

18. On July 18, 2008, during the 132<sup>nd</sup> regular period of sessions, the Inter-American Commission approved Report No. 32/08 on the merits of the instant case in accordance with Article 50 of the American Convention, and issued a series of conclusions and recommendations to the Uruguayan State.<sup>5</sup> Said report was transmitted to the State on August 21, 2008, granting it a period of two months in order to comply with the recommendations contained in it.

19. On the same date, the Commission transmitted the pertinent parts of the report to the representatives of the victims and, based on Article 43(3) of the Commission's Rules of Procedure, requested that they present their position regarding the [eventual](#) submission of the case to the Inter-American Court. On a communication dated September 19, 2008, the representatives informed the victim's interest on the case to be submitted to the Court.

20. On September 17, 2008, the Commission transmitted to the parties the Concurring Opinion of Commissioner Florentín Meléndez, issued in accordance with the provisions of Article 19 of the Rules of Procedure of the Inter-American Commission on Human Rights, with regard to Report No. 32/08<sup>6</sup>.

21. On October 20 and 24, 2008, the State referred to the measures adopted in order to comply with the recommendations of the Commission. The State attached a letter dated September 25, 2008, from Dr. Pedro Salazar Delgado, Judge, to Dr. Jorge Ruibal Pino, President of the Supreme Court of Justice, in which the Second Criminal Court Judge decided in August 2008 to authorize the reopening of the case.

22. On November 21, 2008, the Uruguayan State requested an extension "in order to better comply with the recommendations on the merits issued by the Commission in Report No. 32/08" accepting that the granting of the extension suspended the deadline established in Article 51(1) of the Convention to submit the case to the Court, and expressly waiving the right to file preliminary exceptions alleging non-compliance with the deadline established therein. On the same

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<sup>4</sup>See: IACHR, Admissibility Report N° 30/07, Petition 438-06, Juan Gelman, María Claudia García de Gelman and María Macarena Gelman against Uruguay, March 9, 2007. Appendix 2.

<sup>5</sup>See: IACHR, Report on the Merits No. 32/08, *supra* note 1.

<sup>6</sup>See: Concurrent Opinion of Commissioner Florentín Meléndez, The Right to the Truth, Case Juan Gelman, María Claudia García de Gelman and María Macarena Gelman against Uruguay with regard to the Report on the Merits No. 32/08 issued in the instant case, in Appendix 1.

day, the IACHR granted the extension requested and the new deadline which was set to expire on January 21, 2009.

23. On December 29, 2008, Uruguay requested an additional six-month extension to comply with the recommendations because it was summer season in Uruguay and both the Legislature and the Judicial Branch were in recess at the time. On January 15, 2009, the Commission granted the State a six-month extension to comply with the recommendations. On April 21, 2009, and on June 19, 2009, the State submitted reports on the measures adopted to comply with the recommendations.

24. Via communication dated July 17, the State requested an additional extension until November 2009 – with express acceptance of the fact that the extension requested would suspend the deadline established in Article 51(1) and waiving the right to allege such non-compliance with the deadline in the event an application was later filed – in order to comply with the recommendations contained in the report on the merits. According to the State, the extension would allow sufficient time to:

see the outcome of the plebiscite of October 25, 2009, to annul the Amnesty Law, the eventual decision of the Supreme Court of Justice regarding the constitutionality of the Amnesty Law in a specific case (Sabalsagaray) and the debate and action in the National Parliament on the bill to provide integral reparation to the victims of State terrorism, as well as to analyze the evolution of the case that investigates the kidnapping and forced disappearance of Maria Claudia García de Gelman.

25. On July 21, 2009, the Commission granted the State a third extension and requested that the State submit a preliminary report on November 5, 2009, and a final report on January 5, 2010. On November 3, 2009, the State submitted a report on the measures adopted to comply with the recommendations.

26. On December 23, 2009, the Inter-American Commission examined the information submitted by the parties and, without lessening the Commission's appreciation of the fact that the State has reopened the case as well as other measures taken and informed by the State, the IACHR determined that the Uruguayan State had not fully complied with the recommendations contained in the report adopted in accordance with the provisions of Article 50 of the American Convention, and, therefore, under the provisions of Article 51(1) of the Convention and Article 45 of its Rules of Procedure, it decided to submit the instant case to the jurisdiction of the Inter-American Court of Human Rights.

27. Via communication sent on December 30, 2009, and on January 5, 2010, the State indicated that "the State had provided information that it had complied with the recommendations in the preliminary report it had submitted" on November 3, 2009. After the decision of submitting the case to the Court, the State did not submit any allegation of fact and/or of law that would motivate a change on the decision to submit the case to the Tribunal.

## **VI. CONSIDERATIONS OF FACT**

28. As described in its Report on the Merits No. 32/08<sup>7</sup>, the Commission has established that the facts of the instant case occurred within the context of a military dictatorship. In fact, on June 27, 1973, a civilian-military coup took place in Uruguay; the military seized power by a coup d'état constitutionally protected by the elected President, Juan María Bordaberry. The dictatorship retained the reigns of power until 1985, and, during this period, illegal detentions, generalized torture, murders and the disappearance of more than 100 persons took place. In 1976, it was

<sup>7</sup>See: IACHR, Report on the Merits No. 32/08, *supra* note 1, par. 79 referring to par. 10.

estimated that the State had more than 6,000 political prisoners. Several human rights organizations, including the Inter-American Commission in its report published in 1978, documented the human rights violations perpetrated by the State during that period.<sup>8</sup> In its 1978 Annual Report, the Commission described the complaints it had received with regard to the cooperation among the armed forces of different countries of the Southern Cone.<sup>9</sup>

#### A. General considerations on the “Caducidad” Law<sup>10</sup>

29. As regards the legal issue of whether the amnesty law, known as Law N° 15.848 or *Ley de Caducidad de la Pretensión Punitiva del Estado*,<sup>11</sup> approved by the Uruguayan Parliament on December 22, 1986 (submitted to a national referendum, and approved in April 1989) is compatible with the State’s obligations under the American Convention, this issue is not one of first impression in the inter-american system. The Inter-American Court of Human Rights considered this issue in the “*Barrios Altos Case*”, involving an amnesty law in Peru and in the “*Almonacid Case*” involving an amnesty law in Chile.<sup>12</sup>

30. When considering the nature and gravity of the crimes implicated, we must not lose sight of the fact that the military government in power from June 27, 1973 till March 1<sup>st</sup>, 1985, pursued in Uruguay, in conjunction with other countries in the Southern Cone, a systematic policy of repression against persons considered “subversives.”<sup>13</sup> The intelligence forces of these countries cooperated in the elimination of these subversives under the umbrella of “Operation Condor” that produced thousands of victims of forced disappearance, summary executions and torture. Referring to the State’s practices during that period, the Commission has stated:

The numerous complaints received from Uruguay (...) enable (the Commission) to affirm that there have been serious violations of the following human rights in Uruguay: the right to life, to personal liberty and security, and to humane treatment; the right to freedom of opinion, expression and dissemination of ideas; the right to justice; the right to due process of law; the right of assembly and association, and the right to vote and to participate in government.<sup>14</sup>

31. In addition, a Parliamentary Commission on the Situation of “Disappeared” People and Its Causes reported in November 1986 that 164 Uruguayans, including eight children, had “disappeared” between 1973 and 1982. Thirty-two had “disappeared” after arrest in Uruguay, 127 after having been abducted in Argentina, as well as three in Chile and two in Paraguay under similar circumstances. The Parliamentary Commission said that it had evidence implicating Uruguayan security forces in these crimes. It concluded that “all of the adults died as a result of the brutal treatment to which they were submitted, or were directly executed.” The Parliamentary

<sup>8</sup>See: IACHR, Report on the human Rights Situation in Uruguay, OEA/Ser.L/V/II.43, doc. 19 corr. 1, January 31, 1978, available at: <http://www.cidh.oas.org/countryrep/Uruguay78sp/indice.htm>. Appendix 6.

<sup>9</sup>See: IACHR, Cooperation with the Security Forces of Other Countries, section IV, Uruguay, of the Annual Report of the Inter-American Commission on Human Rights, 1978, OEA/Ser.L/V/II.47 Doc.13, rev. 1, June 29, 1979, available at: <http://www.cidh.oas.org/annualrep/78sp/indice.htm> (“The Commission has received several complaints of alleged operations by the specialized Uruguayan Police in foreign countries with apparent authorization and with the alleged participation of the authorities of those countries. The complaints allege that the objective of these operations is to suppress all forms of opposition to the military government of Uruguay and to eliminate any person suspected of engaging in such opposition”). Appendix 5.

<sup>10</sup>See: IACHR, Report on the Merits No. 32/08, *supra* note 1, par. 49 and subsections.

<sup>11</sup>See: Law No. 15.848 or Amnesty Law (*Ley de Caducidad de la Pretensión Punitiva del Estado*), approved by the Uruguayan Parliament on December 22, 1986. Annex 8 to the petitioners’ claim of May 8, 2006, in Appendix 3.

<sup>12</sup>See: IA Court H.R., *Case Barrios Altos Vs. Perú*. Judgment issued on March 14, 2001. Series C No. 75 and IA Court H.R., *Case Almonacid Arellano et al. Vs. Chile*. Judgment issued September 26, 2006. Series C No. 154.

<sup>13</sup>The Inter American Court received testimony to the effect that under “Operation Condor” the militaries and intelligence services of Argentina, Bolivia, Paraguay and Uruguay cooperated in joint operations to eliminate subversive terrorists. See I/A Court H.R., *Goiburú et al. v. Paraguay Case*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 61(8).

<sup>14</sup>IACHR, *Report on the Situation of Human Rights in Uruguay*, *supra* note 8, Conclusions at page 69.

Commission's conclusion that all the "disappeared" were dead amounts to a presumption, since it did not make specific evidentiary findings in each case and lacked the power to subpoena records or compel testimony from the Armed Forces.<sup>15</sup>

32. The Commission concluded that the Uruguayan justice, --the civilian courts, not the military justice system--, dismissed the complaint filed by Juan Gelman, in accordance with the amnesty law, which led to the lodging of the complaint with the Commission on May 8, 2006. In its Report on the Merits, the Commission concluded that the amnesty law is incompatible with the American Convention. In that sense, the IACHR considered that the present case raises important questions as to the nature of the democratic State's obligations as a successor government to a military dictatorship in reviewing the laws and legal decisions of the previous *de facto* government. The Commission will proceed to analyze these arguments.

### 1. The separation of powers argument

33. The petitioners requested the Commission to determine whether Law N° 15.848, the *Ley de Caducidad*, and the manner in which it was applied by the Uruguayan courts, is in accordance with the obligations imposed upon by the State in becoming a party to the American Convention.

34. The State has denied all responsibility for the violations that derived from the failure to investigate this case, such as the right to due process, to judicial protection and the right to the truth and the other alleged violations of the American Convention, arguing that it had adopted a posture of openness and transparency and had actively investigated and, was continuing to investigate, the facts of this case, including the disinterment of cadavers on military bases, for the purpose, and in the hopes, of locating Maria Claudia Gelman's remains.

35. In the year 2000, the State established a Commission for Peace to investigate the fate of the detained-disappeared, for the purpose of determining the truth regarding these violations and publicizing the result. This Commission for Peace "partially confirmed the facts of the complaint" relating to the forced disappearance of Maria Claudia Gelman and presented to the public the "official version of the Facts".<sup>16</sup>

36. The State has insisted that the democratic governments in Uruguay were unable to modify or repeal the amnesty law or Law N° 15.848, and that the State had to respect the independence and the decisions of the Judiciary. With regard to the application of the amnesty law, the State has claimed that it can only act within the law and the Constitution, which establish the framework of its authority, responsibilities and powers and also the autonomy and independence of the Judiciary. The State also claimed that the measures it adopted were both effective and sufficient to fulfill Uruguay's obligations under the American Convention. While the petitioners

<sup>15</sup>See: Americas Watch Report, "*Challenging Impunity: The Ley de Caducidad and the Referendum Campaign in Uruguay*", March 12, 1989, at p. 25 citing Amnesty International, AMNESTY INTERNATIONAL REPORT 1986, pp.202-3.

<sup>16</sup>The Peace Commission was created by Presidential Resolution No. 858/2000 of August 9, 2000, by former President Jorge Batlle Ibáñez for the purpose of "receiving, analyzing, classifying and compiling information on the forced disappearances that took place during the *de facto regime*". The official report of the Peace Commission was made public on April 10, 2010, and presented to President Batlle. Final Report of the Peace Commission, April 10, 2003, para. 54, is available at: [www.presidencia.gub.uy/noticias/archivo/2003/abril/Informe\\_final.doc](http://www.presidencia.gub.uy/noticias/archivo/2003/abril/Informe_final.doc) [last visit, January 18, 2009]. See: Presidential Resolution No. 858/2000 of August 9, 2000. Creation of the Peace Commission. Annex 10 to the petitioners' claim of May 8, 2006, in Appendix 3; Final Report of the Peace Commission, April 10, 2003. Annex 11 to the petitioners' claim of May 8, 2006, in Appendix 3; Presidential Resolution of April 11, 2003. Conclusions of the Final Report of the Peace Commission are accepted, Annex 31 to the petitioners' claim of May 8, 2006, in Appendix 3; and Decree of April 16, 2003. Conclusions of the Final Report of the Peace Commission are accepted. Annex 30 to the petitioners' claim of May 8, 2006, in Appendix 3.

recognized the efforts made by Uruguay, they maintain that such efforts have been insufficient, and that, to date, it has not met the obligation of investigating the facts, identifying those responsible, and punishing the perpetrators of the violations of the instant case.

37. The State constructed its argument on the theory of the separation of powers in a democratic government. It alleged that the Executive had no competence to interfere with the powers of the Judiciary or the Legislature. Nevertheless, the IACHR considered, in accordance with the Inter-American case law, the international responsibility of the Uruguayan State as a whole, for the acts of its organs and agents, whose active and passive participation in the crimes committed against Maria Claudia Gelman and her daughter have not been disputed.

## 2. The *Ley de Caducidad* and International Law

38. Under Uruguayan law, the Executive, Legislative and Judicial branches of government are separate and independent. From the point of view of international law, however, they must be considered as a single entity for the purpose of determining responsibility for the violation of international norms.<sup>17</sup> The State cannot justify its lack of compliance with the American Convention with the excuse that a previous government approved the amnesty law, the *Ley de Caducidad*. Nor can the State justify its failure to repeal the amnesty law and its continued application, on the inaction or omission of the Legislature or on the actions of the Judiciary.

39. Article 27 of the Vienna Convention on the Law of Treaties enshrines the principle of customary international law whereby States Parties to a treaty may not invoke provisions of their domestic laws as a justification for failing to comply with their obligations under a treaty.<sup>18</sup> The Inter-American Court has held that "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."<sup>19</sup>

40. The Uruguayan State is responsible for any denial of justice that Law N° 15.848 may have caused, irrespective of the regime that enacted it or the branch of government that applied it or made its application possible. Even though the abduction and forced disappearance took place under the past military government, the Government, currently in power, is internationally responsible, under the international law principle of the continuity of the State, for fulfilling its obligation to administer justice and to punish those responsible.

41. In accordance with the principle of the continuity of the State, international responsibility exists independently of changes in government. In that regard, the Inter-American Court of Human Rights has stated that:

According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.<sup>20</sup>

42. The responsibility in this case is on the part of the Uruguayan State for the continued existence of the amnesty law which has impeded the judicial investigation of the *Gelman*

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<sup>17</sup>See: Part III of the VIENNA CONVENTION ON THE LAW OF TREATIES, 63 A.J.I.L. 875 (1969).

<sup>18</sup>See: pertinent part of article 27 of the Vienna Convention on the Law of Treaties which provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

<sup>19</sup>I/A Court H.R., *Velásquez Rodríguez Case Vs Honduras*, Judgment of July 29, 1988, Serie C No. 4, para. 170.

<sup>20</sup>*Id.* at para. 184.

case at the domestic level. The Inter-American Court in its Advisory Opinion No. 6 of May 9, 1986 held that the word “laws” in Article 30 of the American Convention means “a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the Constitution of the States Parties for that purpose.”<sup>21</sup> In addition, in a

democratic society, the principle of legality is inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention as it relates to the “effective exercise of representative democracy,” which results in the popular election of legally created organs, the respect of minority participation and the furtherance of the general welfare.<sup>22</sup>

43. Judge Cançado Trindade noted in his Concurring Opinion in the *Almonacid Case* that

it is important to remember that true laws may not be arbitrary; they do not bear the name of those who hold themselves above them. They have some level of abstraction, essential to the operation of law. They embody principles, which form and inform them, and are apprehended by human reason, i.e. the *recta ratio*, and give them a life of their own. They give expression to everlasting values. As pointed out in a famous study of statutory construction, ‘Laws remain identical to themselves, while the ever-changing course of history and life flows beneath them.’<sup>23</sup>

44. Judge Cancado Trindade evoked the great German legal philosopher, Gustav Radbruch, who stated that “the three values that Law must serve” are justice, the common good and legal certainty. However, there are “laws” that have shown to be so detrimental to the common good and so unfair, that they appear to be devoid of “legality.” Radbruch added that “There are also fundamental principles of law that are above any and all positive precepts, so that any law that violates such principles cannot but be set aside.”<sup>24</sup> “Radbruch’s Formula” holds that where statutory law is incompatible with the requirements of justice to an intolerable degree, or where statutory law was designed in a way that deliberately negates the equality that is the core of all justice statutory law must be disregarded by a judge in favor of the justice principle.<sup>25</sup>

45. In Germany, following the defeat of the Nazi dictatorship, the problem existed of how to deal with the laws and legal decisions of the Third Reich. “Radbruch’s Formula” provided an elegant, though controversial resolution of the conflict between positive law and justice in the context of Nazi laws and enabled the post war German Courts to strike down the Nazi laws. Radbruch’s Formula was invoked more recently by the Courts of unified Germany who convicted of homicide former East German border guards who claimed to have acted pursuant to the shoot to kill laws in force at the time in East Germany.<sup>26</sup>

46. Many countries in Latin America are faced with the similar dilemma of determining what legal value to ascribe to the laws and legal decisions that emanated from previous military dictatorships. Although the Uruguayan *Ley de Caducidad* is presented by the State as not being a self-amnesty law, but rather the product of transition and reconciliation, since it was adopted by the democratic government and not by the military dictatorship, and then affirmed in a referendum, it is clear from the history of the adoption of this law that it constituted an integral part of the political

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<sup>21</sup>I/A Court H.R., *The Word “Laws” in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86 of May 9, 1986 at para. 38.

<sup>22</sup>*Id.* at para. 32.

<sup>23</sup>I/A Court H.R., *Almonacid Case et al. Vs. Chile*, *supra* note 18, Concurring Opinion of Judge Cançado Trindade at p. 2.

<sup>24</sup>*Id.* at p. 3.

<sup>25</sup>See: I/A Court H.R., *Almonacid Case et al. Vs. Chile*, *supra* note 18, Concurring Opinion of Judge Cançado Trindade at p. 3, citing G. Radbruch, *Fünf Minuten Rechtsphilosophie*, first published as a circular addressed to the students of the University of Heidelberg in 1945.

<sup>26</sup>See reference to the German federal Constitutional Court case in ECHR, *Streletz, Kessler and Krenz v. Germany*, Judgment of March 22, 2001.

transaction negotiated between the military and civilian parties in order to facilitate Uruguay's return to representative democracy.<sup>27</sup>

47. As the Inter American Court has determined,

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>28</sup>

48. In the instant case, the Executive branch, availing itself of the opportunity of providing the political opinion required by Article 3 of the *Ley de Caducidad*, determined that the *Gelman Case*, because it occurred outside of Uruguay (*supra* para. 22), was not covered by the amnesty law, permitting the legal proceedings to go forward. The Judiciary, however, rather than advancing the legal proceedings, adopted a positivistic view of the situation and sought to maintain the more conservative and politically tainted decision that resulted from the brokering of the political transaction, and that resulted in the State granting impunity to the military for these crimes. As a consequence, the Judiciary, by failing to afford the petitioners in this case their rights to due process and access to justice, produced the violations for which the Uruguayan State is here held responsible.

### 3. The *Ley de Caducidad*

49. Law 15.848, or *Ley de Caducidad* provides as follows:

Article 1. It is recognized that, as a consequence of the logic of the events stemming from the agreement between the political parties and the Armed Forces signed in August 1984, and in order to complete the transition to full constitutional order, the State relinquishes the exercise of penal actions with respect to crimes committed until March 1, 1985, by military and police officials either for political reasons or in fulfillment of their functions and in obeying orders from superiors during the *de facto* period.

Article 2. The above article does not cover:

- a) judicial proceedings in which indictments have been issued at the time this law goes into effect;
- b) crimes that may have been committed for personal economic gain or to benefit a third party;

Article 3. For the purposes contemplated in the above articles, the court in pending cases will request the Executive branch to submit, within a period of thirty days of receiving such request, an opinion as to whether or not it considers the case to fall within the scope of Article 1 of this law.

If the Executive branch considers this law to be applicable, the Court will dismiss the case. If, on the other hand, the Executive branch does not consider the case to fall under this law, the court will order judicial proceedings to continue.

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<sup>27</sup>After the report on the merits was adopted, the State reported that a plebiscite on the annulment of the law had been held to which the IACHR will refer *infra*.

<sup>28</sup>I/A Court H.R., *Barrios Altos v. Peru Case*. Judgment of March 14, 2001. Series C No. 75, para. 41.

From the time this law is promulgated until the date the court receives a response from the Executive branch, all pretrial proceedings in cases described in the first paragraph of this article will be suspended.

Article 4. Notwithstanding the above, the court will remit to the Executive branch all testimony offered until the date this law is approved, regarding persons allegedly detained in military or police operations who later disappeared, including minors allegedly kidnapped in similar circumstances.

The Executive branch will immediately order the investigation of such incidents.

Within a 120-day period from the date of receipt of the judicial communication of the denunciation, the Executive Branch will inform the plaintiffs of the results of these investigations and place at their disposal all information gathered.<sup>29</sup>

## **B. Consideration of Facts**

50. There is no dispute among the parties as regards the establishment of the following facts in this case:

- i) The Argentine citizen, MARÍA CLAUDIA GARCÍA IRURETAGOYENA or IRURETA GOYENA CASINELLI (C.I. 7.808.422) was forcibly disappeared. She was detained at dawn on August 24, 1976 with her husband, Marcelo Ariel Gelman, (who was also disappeared and whose remains were subsequently located in Argentina) at their home in Buenos Aires and transferred to the clandestine detention center known as AUTOMOTORES ORLETTI.
- ii) Despite the fact that Maria Claudia was not a political militant as regards Uruguay, she was transferred to Uruguay during the second week of October 1976, in an advanced state of pregnancy, and was placed in the headquarters of the Defense Information Service (SID), located on the Boulevard Artigas Avenue at the corner of Palmar.
- iii) She was kept in the headquarters of the SID, separated from the other detainees, and held on the main floor of the building.
- iv) At the end of October or the beginning of November she was removed from the clandestine detention center and taken to the Military Hospital for the delivery, where she gave birth to a baby girl.
- v) After giving birth, she was returned with the baby to the SID, where she continued to be held separately from the other detainees.
- vi) At the end of December 1976 she was removed from the SID, together with her daughter, who was taken from her and given to a police officer, who registered her as his legitimate daughter.
- vii) After removing her daughter, one version – confirmed by military sources – states that María Claudia García Irureta Goyena Casinelli was taken to a military base where she was killed and where her remains were buried.

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<sup>29</sup>Unofficial translation from the Spanish, from the Americas Watch Report, *supra* note 21.

- viii) Another version, also from military sources, who are considered implicated in the operation, maintain that after removing the baby, the mother was turned over to the Argentine security forces of the AUTOMOTORES ORLETTI, who came to Montevideo to fetch her and to return her to Argentina in a boat, from the port of Carmelo, having killed her in the neighboring country.

51. With regard to what happened to María Macarena, as it was described in the Report on the Merits No. 32/08<sup>30</sup>, 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 as their own, and baptized her as Maria Macarena Tauriño Vivian.<sup>31</sup> Twenty three years later, in February 2000, four months after the death of the man who raised her, Juan Gelman, her paternal grandfather, made contact with Esmeralda Vivian, the widow of Angel Tauriño - a contact facilitated by Monsignor Pablo Galimberti-, at which time Esmeralda Vivian admitted that Maria Macarena was not her biological daughter.<sup>32</sup>

52. On March 31, 2000, Juan Gelman and his wife met for the first time with Maria Macarena, who thus learned of the events that transpired with her biological parents. Without rejecting the family that raised her, Maria Macarena agreed to a DNA test which resulted in a positive identification that she was the granddaughter of Juan Gelman (99.998%). As a consequence, 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.<sup>33</sup>-

53. With regard to the investigations conducted as a result of the facts, the Commission took into account in its Report on the merits No. 32/08<sup>34</sup>, that a number of complaints were filed in Argentina but it was not until 2002 that the case was denounced in Uruguay.<sup>35</sup> On June 19, 2002, Juan Gelman, filed a criminal complaint denouncing the detention-disappearance and then homicide perpetrated against Maria Claudia Gelman and the dispossession of her daughter and the suppression of her civil status before the Fourth Criminal Court in Montevideo (*Juzgado Letrado en lo Penal del Cuarto Turno*).<sup>36</sup>

54. 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.<sup>37</sup> The Judge did not accede to the Prosecutor's request, due to the fact

<sup>30</sup>See: IACHR, Report on the Merits No. 32/08, *supra* note 1, par. 138 in reference to par. 17.

<sup>31</sup>See: Baptism Certificate of María Macarena Tauriño Vivian issued on December 17, 1999. Annex 6 to the petitioners' claim of May 8, 2006, in Appendix 3.

<sup>32</sup>See: Seventeenth Family Court, Tauriño Vivian María Macarena c/Vivian Esmeralda – Gelman Burichson Juan, Schubaroff Berta- García Iruetagoiena Juan A., Civil Status actions, Judgment issued on March 8, 2005. Annex 13 to the petitioners' claim of May 8, 2006, in Appendix 3.

<sup>33</sup>See: Written testimony of María Macarena Gelman García, May 3, 2006. Annex 7 to the petitioners' claim of May 8, 2006, in Appendix 3.

<sup>34</sup>See: IACHR, Report on the Merits No. 32/08, *supra* note 1, par. 78 in reference to paragraphs 23 and 24. Paragraphs 21 and 22 have also been included in this section to provide a better understanding of the reference paragraphs.

<sup>35</sup>The kidnapping and illegal detention of Maria Claudia, her husband Marcelo Ariel Gelman and her sister in law, Maria E. Cassinelli de García Iruetagoiena were denounced by Maria Teresa Laura Moreira on August 25, 1976 to the Argentine Police, then by Juan Antonio García Iruetagoiena, 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.

<sup>36</sup>See: Written complaint filed in Criminal Court on July 19, 2002. Annex 14 of the petitioners' claim of May 8, 2006, in Appendix 3.

<sup>37</sup>See: Request to close proceedings made by Public Ministry, September 1, 2003. Annex 15 to the petitioners' claim of May 8, 2006, in Appendix 3.

that pursuant to article 3° of Law N° 15.848, only the Executive 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.<sup>38</sup> In November 2003 the Executive branch informed the Court that the Amnesty Law applied<sup>39</sup> 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.<sup>40</sup>

55. 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 who had “disappeared” during the dictatorship.<sup>41</sup> 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 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.<sup>42</sup> Consequently, the investigation was reopened.

56. 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>43</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 essentially a deferral to prosecutorial discretion.<sup>44</sup> Juan Gelman’s lawyer was personally notified of the Appeals Court decision on November 9, 2005.<sup>45</sup>

57. In summation, the criminal investigation was reopened in 2005 and the Executive branch, under the Presidency of Dr. Tabaré Vasquez, authorized the reopening of the case.

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<sup>38</sup>See: Decision of the Second Court of First Instance, October 15, 2003. Annex 16 to the petitioners’ claim of May 8, 2006, in appendix 3 and Law No. 15.848 or Amnesty Law (Ley de Caducidad de la Pretensión Punitiva del Estado), adopted by the Uruguayan Parliament on December 22, 1986. Annex 8 to the petitioners’ claim of May 8, 2006, in appendix 3.

<sup>39</sup>See: Written communication from the Executive Branch dated November 28, 2003. Response to request made by the Second Criminal Court. Annex 17 to the petitioners’ claim of May 8, 2006, in appendix 3.

<sup>40</sup>See: Supreme Court of Justice, Judgment No. 332, November 15, 2004. Annex 20 to the petitioners’ claim of May 8, 2006, in appendix 3.

<sup>41</sup>See: Request to the Second Criminal Court for the reactivation of proceedings and prosecution in the pre-summary proceedings stage, “González José Luis representing Juan Gelman”. Annex 21 to the petitioners’ claim of May 8, 2006, in appendix 3.

<sup>42</sup>See: Note from the Executive Branch to the President of the Supreme Court of Justice of the Republic of Uruguay, June 23, 2005. Annex 25 to the petitioners’ claim of May 8, 2006, in appendix 3.

<sup>43</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>44</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. See: Court of Appeals, Judgment No. 268 of October 19, 2005. Annex 26 to the petitioners’ claim of May 8, 2006, in appendix 3.

<sup>45</sup>See: Notification No. 934 of the Second Criminal Court to José Luis González, November 9, 2005. Annex 27 to the petitioners’ claim of May 8, 2006, in appendix 3.

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 judicial 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.<sup>46</sup>

## VII. CONSIDERATIONS OF LAW

### A. General considerations regarding forced disappearance of persons

58. In determining the State's obligation with regard thereto, the Inter-American Court has stated that

Forced or involuntary disappearance is one of the most serious and cruel human rights violations, in that it not only produces arbitrary deprivation of freedom but places the physical integrity, security and the very life of the detainee in danger. It also leaves the detainee utterly defenseless, bringing related crimes in its wake. Hence, it is important for the State to take all measures as may be necessary to avoid such acts, to investigate them and to sanction those responsible, as well as to inform the next of kin of the disappeared person's whereabouts and to make reparations where appropriate.<sup>47</sup>

59. The forced disappearance of persons is deemed to be continuous or permanent as long as the fate or whereabouts of the victim has not been determined. The characteristics of this crime place the State in a continuous violation of its international obligations as the State has a permanent obligation to investigate the facts in order to identify and punish those responsible for the detention-disappearance that occurred within its jurisdiction.<sup>48</sup> The fact denounced in the instant case began in 1976. Nonetheless, the juridical nature of the crime committed --forced disappearance--created a situation that continues in time. The consequences of this situation continue until the present and persist as an indivisible whole, since they are continuous acts or facts, the effects of which persist in time, well beyond the date on which they were produced. These facts constitute a "continuing situation" which can be characterized as "continuing omissions" which enter into the temporal ambit of the American Convention.<sup>49</sup>

60. The Inter-American Court has emphasized that the "phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion."<sup>50</sup> The case law of the inter-American system has consistently stated that "the forced disappearance of persons constitutes a multiple and continuing violation of a number of rights

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<sup>46</sup>According to the information submitted by the State to the Commission in communication dated October 24, 2008, after the Report on the Merits No. 32/08 had been issued, the Second Criminal Court Judge issued a ruling in August 2008, authorizing the reopening of the case which was in the pre-summary proceedings stage. The State maintained that it was continuing with the investigation to determine the responsibility of the perpetrators of the acts and the location of the remains of the victim, and that it had not encountered any obstacles in the process of investigation as a result of the Amnesty Law. In October 2009, a plebiscite was held to determine whether the Amnesty Law should be annulled but it did not get the number of votes needed to annul it. The State argued that it did not have "the actual or legal ability to fully implement" the recommendation of the IACHR to void the Amnesty Law. This argument was made although, in the same report, the State makes reference to a decision by the Supreme Court of Justice (Sabalsagaray case) whereby it was specifically established that "the citizenry's rejection of the derogation of the law does not extend to the point of authorizing constitutional cover," and, therefore, it was understood that the Legislative Branch retained the power to annul the Amnesty Law. In that sense, it is worth noting that it is the opinion of the IACHR that, as it was when the previous plebiscite was held in 1989, that the plebiscite does not prevent and should not be interpreted as preventing, the application of the other mechanisms the State has within its power to annul the Amnesty Law. In that regard, see: IACHR, Report on the Human Rights Situation in Uruguay, *supra* note 8, Appendix 6.

<sup>47</sup>I/A Court H.R., *Blake v. Guatemala Case*. Judgment of January 24, 1998. Series C No. 36, para. 66.

<sup>48</sup>See: Commission Report No. 26/99, Case No. 11.123 *José Carlos Trujillo Oroza* (Bolivia), March 9, 1999 para. 24.

<sup>49</sup>*Id.*, at para. 27.

<sup>50</sup>I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Judgment of July 29, 1988. Series C No. 4 at para. 150.

protected by the Convention. Forced disappearance also evinces a disregard of the duty to organize the apparatus of the State in such a manner as to guarantee the rights recognized in the Convention.”<sup>51</sup>

**B. The State has violated the right to due process and the judicial protection of Maria Claudia García de Gelman and her family**

61. The American Convention on Human Rights provides:

Article 1(1). The States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[...]

Article 2. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

[...]

Article 8(1). Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

[...]

Article 25(1). Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

62. The States Parties to the American Convention have undertaken the obligation of respecting and guaranteeing all the rights and freedoms set forth in the Convention with respect to persons under their jurisdiction. Article 1 of the American Convention obliges States Parties to Undertake to respect the rights and freedoms recognized in the Convention and to “ensure to all persons subject to their jurisdiction the free and full exercise of those rights.” Article 2 of the Convention establishes the obligation of the States Parties to adopt “such legislative or other measures as may be necessary” to give effect to the rights and freedoms enshrined therein. Thus, the Inter-American Commission must examine the compatibility of the States Parties’ domestic legislation with the rights enshrined in the American Convention.

63. In its pilot judgment of March 14, 2001 in the *Barrios Altos Case*, the Inter-American Court declared the Peruvian amnesty laws to be without legal effect.<sup>52</sup> The reasoning of the Court in *Barrios Altos* applies with equal force to the facts set forth in the instant case, as follows:

42. The Court (. . .) considers that the amnesty laws adopted by Peru prevented the victim’s next of kin and the surviving victims in this case from being heard by a judge, as

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<sup>51</sup>I/A Court H.R., *Blake v. Guatemala Case*. Judgment of January 24, 1998. Series C No. 36, para. 65.

<sup>52</sup>I/A Court H.R., *Barrios Altos v. Peru Case*. Judgment of March 14, 2001. Series C No. 75 at para. 44.

established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. Finally the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention.

43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention, which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1), and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kind from knowing the truth and receiving the corresponding reparation.

44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.<sup>53</sup>

64. The Inter-American Court, in its judgment of September 26, 2006 in the *Almonacid Case* involving the compatibility of the Chilean amnesty law with the American Convention, held that the law was incompatible with the State's obligations undertaken by ratifying the Convention and, in addition, declared the killing of Mr. Almonacid to be a "crime against humanity".<sup>54</sup> By October 19, 2005, when the Court of Appeals confirmed the application of Law No. 15.848, Amnesty Law (*Ley de Caducidad de la Pretensión Punitiva del Estado*) to the instant case, Uruguay was already a State Party to the Rome Statute (ratification date: June 28, 2002). Article 7 of the Rome Statute includes within the definition of "crimes against humanity," "murder" as well as "forced disappearance of persons."

65. The Court emphasized the important role of the Nuremberg Charter in establishing the elements that characterize a crime as a "crime against humanity,"<sup>55</sup> such as murder, committed in the context of generalized or systematic attacks against civilians.<sup>56</sup> In 1976, Uruguay was ruled by a military government, there were approximately 6,000 political prisoners and over a hundred

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<sup>53</sup>*Id.* at paras. 42-44.

<sup>54</sup>IA Court H.R., *Case Almonacid Arellano et al.* Judgment issued September 26, 2006. Series C No. 154, par. 90 and subsections. The Court determined that in 1973, when Mr. Almonacid died, the commission of crimes against humanity, homicide included, violated a binding rule of international law. In the instant case, the death occurred three or four years later. Also see: IA Court H.R., *Case Goiburú et al.* Judgment of September 22, 2006. Series C No. 153.

<sup>55</sup>Article 6 - The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

[...]

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

<sup>56</sup>IA Court H.R., *Almonacid-Arellano et al. v. Chile Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 96.

persons had been “disappeared,” killed or otherwise eliminated. Consequently, applying the reasoning of the Court in the *Almonacid Case*, there is sufficient evidence to reasonably state that the killing of Maria Claudia Gelman by State agents who had custody of her in the context of a state policy that targeted sectors of the civilian population was a crime against humanity. A single illegal act committed within such a context brings about individual criminal liability and it is not necessary for the perpetrator to commit numerous offenses in order to be considered responsible.<sup>57</sup> In addition, the Court emphasized that the UN International Law Commission’s Principles of International Law recognized by the Charter of the Nuremberg Tribunal classified murder as a crime against humanity in 1950.<sup>58</sup>

66. These referents, established by the Court, lead the Commission to conclude that in 1976 or 1977 when Maria Claudia García de Gelman presumptively was killed during her detention, her death was part of a generalized or systematic attack against certain sectors of the civilian population and in violation of a binding rule of international law. The prohibition of committing crimes against humanity, the Court stated in the *Almonacid Case*, is a *jus cogens* rule and the punishment of such crimes is obligatory pursuant to the general principles of international law.<sup>59</sup>

67. As the Inter-American Court held in the *Almonacid Case*

[S]ince the individual and the whole of mankind are the victims of all crimes against humanity, the General Assembly of the United Nations has held since 1946 that those responsible for the commission of such crimes must be punished. The obligation to punish the perpetrators of certain international crimes, among which are crimes against humanity, the Court has stated, derives from the duty of protection embodied in Article 1(1) of the American Convention.<sup>60</sup>

68. The “duty of protection” requires State Parties “to organize the entire government system, and in general, all agencies through which the public power is exercised, in such manner as to legally protect the free and full exercise of human rights.”<sup>61</sup> The Inter-American Court emphasized that States cannot neglect their duty to investigate, identify and punish those persons responsible for crimes against humanity and the “investigation must be conducted resorting to all legal means available and must be focused on the determination of the truth and the investigation, prosecution, arrest, trial and conviction of those persons that are responsible for the facts, both as perpetrators and instigators, especially when State agents are or may be involved in such events.”<sup>62</sup> Consequently, States cannot “neglect their duty to investigate, identify and punish those persons responsible for crimes against humanity by enforcing amnesty laws.”<sup>63</sup>

69. The Commission established that the crime committed against Maria Claudia García de Gelman is a crime against humanity and that such crimes cannot be susceptible of amnesty. The Court has stated that pursuant to Article 2 of the American Convention the State must adopt the following measures: either 1) the annulment of laws and practices that may imply the violation of

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<sup>57</sup>*Id.* at para. 96, see also International Criminal Tribunal for the Former Yugoslavia, Case of Prosecutor v. Dusko Tadic, IT-94-1-T, Opinion and Judgment, May 7, 1997, at para. 649.

<sup>58</sup>UN, Principles of International Law recognized by the Charter of the Nuremberg Tribunal, adopted by the International Law Commission of the United Nations in 1950 (A/CN.4/34).

<sup>59</sup>I/A Court H.R., *Almonacid-Arellano et al. v. Chile Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 99. Also see Article 53 of the Vienna Convention on the Law of Treaties and Article 25 of the Rome Statute.

<sup>60</sup>I/A Court H.R., *Almonacid-Arellano et al. v. Chile Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 110. (considero q tb deberia decir 106)

<sup>61</sup>*Id.*

<sup>62</sup>*Id.* at para. 111.

<sup>63</sup>*Id.* at para. 114.

the rights protected by the Convention, or 2) the passing of laws and the development of practices tending to achieve an effective observance of such guarantees.<sup>64</sup>

70. The Commission considers that the Uruguayan amnesty law prevented the victim's next of kin from being heard by a tribunal, as established in Article 8(1) of the Convention; the law violated the right to judicial protection embodied in Article 25 of the Convention; it prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred to Maria Claudia García de Gelman, thus failing to comply with Article 1(1) of the Convention; and it obstructed the clarification of the facts of the case, specifically the fate and whereabouts of Maria Claudia. The adoption of the amnesty law, Law No. 15.848 on December 22, 1986, after the date of Uruguay's ratification of the American Convention, meant that Uruguay failed to comply with the obligation to adapt internal legislation as required by Article 2 of the Convention.

71. In addition, the Commission relies on its own case-law, having already decided the same issue in 1992. At that time, in Report 29/92, eight petitions alleged that the Uruguayan amnesty law denied "them their right to turn to the courts as a last resort, [and denied them] a thorough and impartial investigation of the human rights violations that occurred during the past de facto government."<sup>65</sup> The Commission, recognizing that the amnesty law eliminated 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, invoked its general position on the subject and stated that:

one of the few matters that the Commission feels obliged to give its opinion in this regard is the need to investigate human rights violations committed prior to the establishment of the democratic government. Every society has the inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed, in order to prevent a repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the judiciary itself may undertake whatever investigations may be necessary.<sup>66</sup>

72. In Report 29/92, the Commission found a violation of Article 8(1), 25(1) and 1(1) and recommended to the Uruguayan State that "it adopt the necessary measures to clarify the facts and identify those responsible for the human rights violations that occurred during the de facto period." The State ignored the recommendations formulated and now, sixteen years later, the same issue is again presented to the Commission for its consideration.

73. In the instant case, the Commission considers that the State has kept Law N° 15.848, the *Ley de Caducidad* in force for 22 years, violating the obligations set forth in the American Convention. The fact that the *Ley de Caducidad* has not been applied by the Uruguayan Courts in several cases is a significant step forward, but it does not suffice to meet the requirements of Article 2 of the American Convention.<sup>67</sup> Not only has the State failed to annul the amnesty law, or to render it without effect, for being incompatible with its obligations under the American Convention, but the State has also failed to provide a remedy allowing for the reopening

<sup>64</sup>*d.* at para. 118.

<sup>65</sup>See: Report 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay), October 2, 1992 at para. 9, available at: <http://www.cidh.oas.org/annualrep/92span/Uruguay10.029.htm>. See also Annual Report of the Inter-American Commission on Human Rights, 1992-1993, Report 29/92.

<sup>66</sup>ACHR, report 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay), October 2, 1992 at para. 37. See also Annual Report of the Inter-American Commission on Human Rights, 1985-1986, page 205.

<sup>67</sup>*I/A Court H.R., Almonacid-Arellano et al. v. Chile Case. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 121.*

of judicial proceedings that have been closed pursuant to the *Ley de Caducidad*. The October 19, 2005 decision of the Uruguayan Court of Appeals, barring the reopening of the investigation surrounding the disappearance of Maria Claudia García de Gelman must be made subject to a judicial recourse which will allow for the reopening of a decision deemed to be *res judicata* when crimes against humanity are implicated. As the Inter-American Court stated in the *Almonacid Case*,

[T]he observance by State agents or officials of a law which violates the Convention gives rise to the international liability of such State, as contemplated in International Human Rights Law, in the sense that every State is internationally responsible for the acts or omissions of any of its powers or bodies for the violation of internationally protected rights, pursuant to Article 1(1) of the American Convention.<sup>68</sup>

74. In light of the general obligations established in Articles 1(1) and 2 of the American Convention, the Commission determines that Uruguay has incurred in a violation of Articles 8 and 25 of the Convention, since April 19, 1985, for failing to take all measures to ensure that Juan Gelman and Maria Macarena Gelman were not deprived of judicial protection and the exercise of the right to a simple and effective recourse. In addition, by permitting the *Ley de Caducidad* to remain in force for more than 22 years, Uruguay violated Articles 8 and 25 in relation to Articles 1(1) and 2 of the Convention because it precluded the identification of the perpetrators responsible for these human rights violations and obstructed the investigation and access to justice which would have allowed the victim and her family to know the truth<sup>69</sup> and receive the corresponding reparation.

75. Uruguay has undertaken additional obligations with regard to due process and judicial protection of victims by depositing its instrument of ratification to the Inter-American Convention on Forced Disappearance of Persons on April 2, 1996, and to the Inter-American Convention to Prevent and Punish Torture on November 10, 1992.

76. Articles I(b), III, IV and V of the Inter-American Convention on Forced Disappearance of Persons establish:

**Article I.** The States Parties to this Convention undertake:

[...]

b. To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories.

[...]

**Article III.** The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim

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<sup>68</sup>*Id.* at para 123.

<sup>69</sup>In its Report on the Merits No. 32/08, *supra* note 1, the Commission considered that the right to the truth of the victims' relatives should be taken into consideration when it is determined that Articles 8.1 and 25 of the Convention have been violated in relation to Article 1(1), and not as a violation of Article 13 of the same instrument as alleged by the petitioners. See paragraphs 107-111. *Cfr.* Concurring Opinion of Commissioner Florentín Meléndez, The Right to the Truth (El Derecho a La Verdad), Case Juan Gelman, María Claudia García de Gelman and María Macarena Gelman against Uruguay.

to reappear alive or provide information that sheds light on the forced disappearance of a person.

**Article IV,** The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

- a. When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
- b. When the accused is a national of that state;
- c. When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

This Convention does not authorize any State Party to undertake, in the territory of another State Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other Party by its domestic law.

**Article V.** The forced disappearance of persons shall not be considered a political offense for purposes of extradition.

The forced disappearance of persons shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties.

The States Parties undertake to include the offense of forced disappearance as one which is extraditable in every extradition treaty to be concluded between them in the future.

Every State Party that makes extradition conditional on the existence of a treaty and receives a request for extradition from another State Party with which it has no extradition treaty may consider this Convention as the necessary legal basis for extradition with respect to the offense of forced disappearance.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offense as extraditable, subject to the conditions imposed by the law of the requested state.

Extradition shall be subject to the provisions set forth in the constitution and other laws of the request state.

77. Articles 1, 6, 8 and 11 of the Inter-American Convention to Prevent and Punish Torture establish:

**Article 1** The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

**Article 6** In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

**Article 8** The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

**Article 11** The States Parties shall take the necessary steps to extradite anyone accused of having committed the crime of torture or sentenced for commission of that crime, in accordance with their respective national laws on extradition and their international commitments on this matter.

78. As the facts reveal, the victims did not have access to effective judicial protection in order to establish the circumstances of Maria Claudia García de Gelman's kidnapping, detention, transfer and forced disappearance, nor has there been an investigation of the circumstances of Maria Macarena's birth and suppression of her identity. All attempts by her father in law, Juan Gelman, to advance the investigation of these facts since 2002, have been blocked by the application of Law N° 15.848, the *Ley de Caducidad*. In light of the State's failure to investigate the circumstances of Maria Claudia García de Gelman's fate as well as that of Maria Macarena and the failure to provide access to effective judicial protection in order to clarify the circumstances of these events, the Commission finds a violation of Articles I.b, III, IV and V of the Inter-American Convention on Forced Disappearance of Persons and Articles 1, 6, 8 and 11 of the Inter-American Convention to Prevent and Punish Torture.

### **1. The adoption of the Uruguayan *Ley de Caducidad* in historical context**

79. The Inter-American Commission considers that Law N° 15.848, the *Ley de Caducidad*, and its legal effects are a continuation of a systematic policy of human rights violations pursued by the military regime that governed Uruguay from June 27, 1973 to March 1, 1985.<sup>70</sup>

80. In 1980, Uruguayans voted 58% to 42% against the new Constitution proposed by the military in a 1980 plebiscite and forced the regime to initiate a period of transition to civilian rule.<sup>71</sup> In advance of the 1984 elections, a broad coalition of social forces backed by all the political parties adopted a platform stipulating that human rights abuses be investigated, prosecuted and punished. On August 3, 1984, the Armed Forces signed what has become known as the "Naval Club Pact" with the Colorado Party, the partially reconstituted Broad Front (*Frente Amplio*) and also some smaller parties, a political transaction that created the blueprint for a return to democracy and

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<sup>70</sup>IACHR, *Report on the Situation of Human Rights in Uruguay*, *supra* note 8.

<sup>71</sup>The information in this section is from Americas Watch Report, "Challenging Impunity," *supra* note 15.

which called for Presidential and Legislative elections on November 25, 1984 and the inauguration of a civilian government on March 1, 1985. As the 1989 Americas Watch surmised: "It was widely known, though never publicly confirmed, that the parties to the [Naval Club] Pact agreed that the Executive branch of the future elected government would not itself prosecute members of the security forces for human rights violations, although it could not interfere with the adjudication of such cases by civilian courts."<sup>72</sup> The leader of the National or *Blanco* party was in military detention and "proscribed" from all political activity, as was the presidential candidate of the *Frente Amplio*; both of these parties publicly rejected the Pact and were committed to the prosecution of human rights violations. During the election campaign the four leading presidential candidates publicly committed themselves to bring to justice those responsible for human rights violations during the military regime.

81. Julio Maria Sanguinetti was elected President and moved to restore democratic institutions. He reinstated the 1967 Constitution, reestablished the independence of the civilian judiciary, reinstated with back pay thousands of civil servants fired by the military and legalized trade unions, political parties and others who had been banned by the military. In addition, he pardoned all persons awaiting trial by military courts and received overwhelming legislative approval of the Law of National Pacification (*Ley de Pacificación Nacional*), which pardoned all but 65 of the country's remaining 800 political prisoners, but contained a provision expressly excluding from the amnesty members of the military and police responsible for human rights abuses during the period of the military dictatorship. Unlike those freed from prison, the security forces had not been subjected to any punishment or condemnation for their acts. Attorneys representing victims of human rights violations and relatives of "disappeared" persons presented evidence to civilian courts which opened legal proceedings in some forty cases involving, eventually, 180 military and police personnel. These cases progressed slowly, in part, because Defense Minister Hugo Medina ordered many military officers *not* to appear personally before the civilian courts and to communicate with them only in writing. Proceedings were virtually halted in August 1985 when military courts challenged the civilian courts assertion of jurisdiction over all armed forces personnel. The dispute was submitted for resolution to the Supreme Court.

82. Despite his government's pledges, reportedly President Sanguinetti did an about-face in mid-1986 and began seeking a political solution in the Parliament to the issue of the military's accountability for past abuses.<sup>73</sup> In June 1986 he introduced in the Senate a draft law providing an amnesty for the combined security forces for most crimes, but not for grave crimes whose perpetrators would be tried by military, not civilian, courts. The bill faltered because Sanguinetti needed opposition support and most opposition party members were on record against an unconditional amnesty.

83. Under increasing pressure from the military, Sanguinetti introduced another more sweeping draft amnesty bill on August 6, 1986. This bill would have provided unconditional amnesty to the security forces for all crimes committed during the period January 1, 1962 and March 1, 1985 and would have terminated ongoing legal actions. The two opposition parties, the *Blancos* and the *Frente Amplio*, defeated the measure by 16 votes on September 29<sup>th</sup>. The Senate then provisionally approved a substitute amnesty bill sponsored by the *Blancos*, known as Defense of Democracy and Human Rights (*Defensa de la Democracia y los Derechos Humanos*) which limited trials to only the most serious human rights abuses, such as murder, rape, disappearances and serious injury, provided that such cases had been filed with the civilian courts before September 22, 1986. Another provision nullified the exercise of the State's prosecutorial powers for "lesser" offenses such as torture. During the Senate debate on the measure, the Armed Forces reportedly advised leaders of the National Party that they would not tolerate any inquiry by civilian or military

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<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

courts into the Armed Forces' actions during "the war against subversion." The *Colorados*, who supported a full amnesty, and the Broad Front, which unsuccessfully attempted to amend the bill, defeated the *Blanco* substitute bill in a Senate vote. This impasse paved the way for high level talks between the leaders of the *Colorado* and *Blanco* parties.

84. In November 1986 the Uruguayan Supreme Court upheld the civilian courts claim to jurisdiction in two key cases, implicating members of the Uruguayan armed forces in disappearances. The decision cleared the way for these cases to proceed in the civilian courts and it was expected that the Supreme Court would rule similarly in the remaining cases.

85. On December 1, 1986, President Sanguinetti made public a statement issued by seventeen retired generals who had held top command positions during the military dictatorship, in which they acknowledged and assumed full responsibility for human rights abuses committed by their subordinates during the anti-subversive campaign and indicated that such excesses would not be repeated. Sanguinetti declared that the statement deserved "a response of equal grandeur of spirit." By this time, Sanguinetti knew that several military and police officers who were scheduled to appear before the civilian courts on December 23d would fail to do so, on direct orders from his Defense Minister. The President, in a race against the clock to win legislative approval of an amnesty law before the December 23d deadline in order to avert what he publicly called an "imminent institutional crisis" convinced National Party leader Wilson Ferreira to drop his opposition to such a law and, on December 22d, just hours before the officers' scheduled court appearances, a majority of *Colorado* and *Blanco* legislators in both chambers of the Parliament passed Law N° 15.848, sponsored by the *Blancos*, by a vote of 81 to 46. The law was opposed by 1 out of 54 *Colorados* and 16 of 44 *Blancos*, as well as by all *Frente Amplio* and *Union Civica* legislators.

## **2. The impact of Law N° 15.848, the *Ley de Caducidad***

86. The impact of Law N° 15.848, the *Ley de Caducidad* was to terminate the State's power to prosecute and punish members of the military and police responsible for human rights violations during the period of the military dictatorship. The Legislature, having considered earlier "amnesty" bills that had been rejected, was prevented by Uruguayan law from using the term "amnesty" again for a revised draft during the same parliamentary session.

87. The Law did not cover judicial proceedings in which indictments had been issued at the time the law went into effect and crimes that may have been committed for personal economic gain or to benefit a third party. In fact, no person was known to have been indicted before the Law was adopted.

88. The Law also incorporated a political device by which the Judiciary was required to request an opinion of the Executive with regard to "pending cases" to determine whether the specific case fell within the scope of the amnesty law or not. The decision of the Executive, however, by the provisions of the law, was to have the impact of a decision and not merely an "opinion." If the Executive branch considered the amnesty law applicable to the pending case then the Court was required to dismiss the case. If, on the other hand, the Executive branch did not consider the case to fall under the law, then the Court would order the judicial proceedings to continue. All pending proceedings would be suspended until the Executive branch issued its opinion, for which a period of thirty days from the date of submission of the Judiciary's request, was established.

89. This political device allowed the Executive branch to inhibit the prosecutorial power of the Judiciary for political reasons. It can only be deduced that the *Ley de Caducidad*, on its face, was designed to terminate the approximately *forty pending cases* involving approximately 180

members of the military and police and to overturn the November 1986 Supreme Court decision in two key cases upholding civilian jurisdiction over the military in disappearances.

90. At the time of the enactment of the *Ley de Caducidad*, the Americas Watch Report notes that the civilian courts were investigating the involvement of security forces in the “disappearance” of six persons in May 1987, and the Sanguinetti government reportedly ordered the Courts to dismiss all six cases, on the grounds that they involved crimes committed by the security forces for political reasons or in carrying out superior orders.<sup>74</sup>

91. In fact, however, not only the Government of President Sanguinetti, but also all successive democratic governments in Uruguay have been asked to give their opinions as to the applicability of the *Ley de Caducidad*. For the purposes of the instant case, in 2002, when Juan Gelman denounced the kidnapping and disappearance of Maria Claudia García de Gelman before the Fourth Criminal Court in Montevideo, the case was opened to receive evidence. The Prosecutor, Mr. Enrique Möller Méndez, sought to have the proceedings closed due to the applicability of the *Ley de Caducidad*. The Judge did not accede to the Prosecutor’s request and sought the opinion of President Jorge Battle. On November 28, 2003, the President informed the Court that the Law applied and on December 2, 2003, the Court filed the case.

92. As regards the instant case, in 2005, Juan Gelman’s attempt to have the investigation reopened was frustrated by the Prosecutor, Mr. Enrique Möller Méndez, who sought to prevent the reopening of the investigation on the grounds that the case was *res judicata*. The Judge did not follow the Prosecutor’s recommendation and the case was appealed by the Ministry of Justice. The Court of Appeals in a judgment dated October 19, 2005, revoked the impugned ruling and determined that the case be filed.

### **3. Challenges to the constitutionality of the *Ley de Caducidad***

93. Following the enactment of the *Ley de Caducidad*, lawyers representing victims and relatives of the disappeared filed writs with the Supreme Court attacking the law as unconstitutional.<sup>75</sup> It was argued that the only constitutional mechanism for the State’s desisting from punishing crimes was limited to an actual amnesty or pardon and that Article 3 of the Law, granting the Executive branch sole and conclusive authority to terminate judicial proceedings was an impermissible encroachment on powers exclusively vested in the judicial branch. The Supreme Court on May 2, 1988 upheld the Law’s constitutionality by a 3 to 2 vote.<sup>76</sup> The majority found that, despite omission of the term “amnesty” in the text, the legislative intent was to confer an “authentic amnesty” on the security forces.

94. As regards the instant case, Mr. Gelman’s lawyer also filed a request (*acción de inconstitucionalidad*) to have Article 3 of Law 15.848 declared unconstitutional for violating, inter alia, the principle of the separation of powers, the right to truth, the right to equality, the right to due process, but the Uruguayan Supreme Court, in a Judgment issued November 15, 2004, dismissed the request.<sup>77</sup>

95. The State, in its observations on the merits of the instant case before the Commission, suggested that the petitioners have failed to bring an action for the unconstitutionality

<sup>74</sup>See: Americas Watch Report, “*Challenging Impunity*,” supra note 15 at p. 26. The cases of the six “disappeared” individuals involved Fernando Miranda Pérez, Félix Sebastián Ortiz Piazoli, Omar Antonio Paitta Cardoza, Eduardo Pérez Pérez, Amelia Sanjurjo Casan and Roberto Julio Gomensoro Josmán.

<sup>75</sup>See: Americas Watch Report, “*Challenging Impunity*,” supra note 15

<sup>76</sup>See: Supreme Court of Uruguay, Judgment dated May 2, 1988. Annex 9 of the petitioners’ claim of May 8, 2006, in appendix 3.

<sup>77</sup>See: Supreme Court of Justice, Judgment No. 332, November 15, 2004. Annex 20 of the petitioners’ claim of May 8, 2006, in appendix 3.

of the amnesty law before the Uruguayan Supreme Court.<sup>78</sup> In its Report on the Merits No. 32/08, the Commission considered this argument specious in light of the fact that the constitutionality of the *Ley de Caducidad* was affirmed by the Uruguayan Supreme Court already in 1988.<sup>79</sup>

**C. Violation of the general obligation to investigate the breaches of the rights to life, to liberty and to physical and mental integrity, and to punish in a serious and effective manner these violations as regards Maria Claudia García de Gelman**

96. The Inter-American Court has consistently emphasized the special character of the rights to life and to humane treatment:

The rights to life and to humane treatment are central to the [American] Convention. According to Article 27(2) of the said treaty, these rights form part of the non-derogable nucleus, because they are established as rights that cannot be suspended in case of war, public danger or other threats to the independence or security of the States Parties.<sup>80</sup>

97. Because the right to life is so essential to the enjoyment of all other rights, the State has a particular obligation to protect and preserve this right and to prevent and punish violations thereof:

The States have the obligation to guarantee the establishment of the conditions to ensure that violations of this inalienable right do not occur and, in particular, the obligation to prevent its agents from violating it. In compliance with the obligations imposed by Article 4 of the American Convention, in relation to Article 1(1) thereof, this not only assumes that no one shall be deprived of his life arbitrarily (negative obligation), but also, in light of the State's obligation to guarantee the full and free exercise of human rights, it requires States to adopt all the appropriate measures to protect and preserve the right to life (positive obligation). This active protection of the right to life by the State involves not only its legislators, but all State institutions, and those responsible for safeguarding security, whether they are members of its police forces or its armed forces. Consequently, States must adopt the necessary measures, not only at the legislative, administrative and judicial level, by issuing penal norms and establishing a system of justice to prevent, eliminate and punish the deprivation of life as a result of criminal acts, but also to prevent and protect individuals from the criminal acts of other individuals and to investigate these situations effectively.<sup>81</sup>

98. The relationship between the American Convention and the Inter-American Convention against Torture was set forth by the Inter-American Court in the *Tibi* Case.<sup>82</sup> The Court pointed out that the State was under an obligation, when it received a complaint alleging torture, *de officio*, to investigate and punish. The Inter-American Court found authority for this obligation to take action in Articles 5 and 1(1) of the American Convention and also in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture:

It is the understanding of the Court that, in light of the general obligation of the States party to respect and ensure the rights of all persons under their jurisdiction, contained in Article 1(1) of the American Convention, the State has the duty to immediately and *ex officio* begin an effective investigation to identify, try, and punish those responsible, when there is a complaint

<sup>78</sup>See: IACHR, Report on the Merits No. 32/08, *supra* note 1, par. 46.

<sup>79</sup>See: Supreme Court of Justice of Uruguay, Judgment of May 2, 1988. Annex 9 of the petitioners' claim of May 8, 2006, in appendix 3.

<sup>80</sup>I/A Court H. R., *Massacre of Pueblo Bello v. Colombia Case*. Judgment of January 31, 2006. Series C No. 140, para 119. See also: I/A Court H.R., *Bámaca Velásquez v. Guatemala Case*. Judgment of November 25, 2000. Series C No. 70.

<sup>81</sup>I/A Court H. R., *Massacre of Pueblo Bello v. Colombia Case*. Judgment of January 31, 2006. Series C No. 140, para. 120.

<sup>82</sup>I/A Court H. R., *Tibi v. Ecuador Case*. Judgment of September 7, 2004. Series C No. 114.

or there are grounds to believe that an act of torture has been committed in violation of Article 5 of the American Convention. [...] This action is also specifically set forth in Articles 1, 6 and 8 of the Inter-American Convention against Torture, which place the States Party under the obligation to take such effective measures as may be necessary to prevent and punish all acts of torture under their jurisdiction. Since said Inter-American Convention against Torture entered into force in Ecuador (December 9, 1999), the State is demandable regarding compliance with the obligations set forth in that treaty. It has been proven that, in the period since that date, the State has not investigated, tried, or punished those responsible for the tortures suffered by the alleged victim. Therefore, the Court deems that this conduct constitutes a violation of Article 5 of the American Convention, in combination with Article 1(1) of this same Convention, as well as non-compliance with the obligations set forth in Articles 1, 6 and 8 of the Inter-American Convention against Torture.<sup>83</sup>

99. Uruguay deposited its instrument of ratification to the Inter-American Convention against Torture on November 10, 1992. Ten years later, on June 10, 2002, Juan Gelman filed a complaint before the Uruguayan courts concerning the kidnapping and forced disappearance of Maria Claudia García de Gelman but, despite the fact that Uruguay was now under a democratic form of government, no serious effort was made to investigate the fate of the disappeared persons such as Maria Claudia, in violation of Articles 6 and 8 of the Inter-American Convention against Torture read in conjunction with Article 1 of said Convention. As regards the complaint regarding an act of torture, the act of kidnapping and detaining a woman in advanced stage of pregnancy in a clandestine detention center, killing her husband, transporting her to another country, detaining her in a second clandestine center, and then removing her new born daughter from her, constitutes cruel and inhumane treatment tantamount to torture.

100. In this same line of reasoning, following Uruguay's deposit of its instrument of ratification to the Convention on Forced Disappearance of Persons on April 2, 1996, the State was obliged to criminalize the act of forced disappearance and to investigate the circumstances of any forced disappearance. Uruguay, however, did not criminalize the act of forced disappearance until 2006. Had it done so earlier, it would have provided Juan Gelman with a cause of action in the Uruguayan Courts for the forced disappearance of Maria Claudia García de Gelman. The Uruguayan Parliament enacted Law N° 18.026 on September 25, 2006, which in Article 21 criminalizes the forced disappearance of persons. In accordance with Article 24 of the Rome Statute, "[N]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute."<sup>84</sup> The nature of forced disappearance, however, appears to provide an exception to Article 24 of the Rome Statute and Article 21 of Law N° 18.026, concerning "the forced disappearance of persons," in that it provides that "the crime of forced disappearance will be considered as a permanent crime until the fate or whereabouts of the victim are established." In addition, Article 8 of Law N° 18.026 provides that the crime of forced disappearance, *inter alia*, cannot be extinguished by an amnesty or similar provision that impedes the prosecution of the alleged perpetrators or the effective compliance with the punishment imposed upon the convicted. Consequently, the Commission concludes that the State has incurred in a violation of Articles 1.b, III, IV and V of the Inter-American Convention on Forced Disappearance of Persons for failing to criminalize the act of forced disappearance in its Criminal Code during the period April 2, 1996 until September 25, 2006, and for failing to thoroughly investigate the fate of Maria Claudia García de Gelman.

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<sup>83</sup>*Id.* para. 159.

<sup>84</sup>In the document presented by the Executive branch to the Parliament proposing the implementation of the Statute of Rome in domestic law, the non retroactive nature of the crime of forced disappearance is underlined: "*lo que permite inferir claramente que la irretroactividad alcanza también a los delitos calificables como de naturaleza permanente que hayan tenido comienzo de ejecución con anterioridad a la entrada en vigor del Estatuto.*" (01/17/03 Procedures are established for the domestic implementation of the provisions of the Rome Statute of the International Criminal Court).

**1. The State has violated the right to life, the right to a juridical personality, the right to humane treatment and the right to liberty of María Claudia García de Gelman**

101. In its constant case law, beginning with its first judgment in the *Velasquez Rodriguez Case*,<sup>85</sup> the Inter-American Court has reiterated that the crime of forced disappearance constitutes an illegal act that gives rise to a multiple and continuing violation of a number of rights protected by the American Convention and places the victim in a state of complete defenselessness. The State's international responsibility is increased when the forced disappearance forms part of a systematic pattern of such violations, which are not investigated by the State but instead are acquiesced in. The crime of forced disappearance of persons is a crime against humanity.<sup>86</sup> It is even described as such by Article 7(1)(i) of the 1998 Statute of the International Criminal Court, when committed as part of a widespread or systematic attack directed against any civilian population.<sup>87</sup> This description of the offense has been reiterated in Articles 5 and 8(1)(b) of the United Nations International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the United Nations Human Rights Council in June 2006.<sup>88</sup>

102. The Inter-American Court has reiterated the need to consider forced disappearance as an autonomous, continuing or permanent crime, composed of multiple elements. Article II of the Convention on Forced Disappearance of Persons defines this crime as the "act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees. Article III of the Convention on Forced Disappearance of Persons provides that this offense "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined."

103. The illegal and arbitrary detention or abduction, torture and forced disappearance of María Claudia Gracia de Gelman was the result of a police-military intelligence operation, planned and executed undercover by members of the Argentine security forces apparently in close collaboration with Uruguayan security forces. This is consistent with the *modus operandi* of the systematic practice of illegal detentions, torture and forced disappearances verified at the time of the facts within the framework of "Operation Condor."<sup>89</sup>

104. A situation of general impunity reigned in Uruguay in 1976, at the time of the abduction of María Claudia García de Gelman, due to the fact that the military was not inclined to investigate itself for violations of human rights. It was only after 1990, when the military turned over power and permitted a return to a democratic form of government that the investigations into the facts of this case started.

105. The relevant parts of Articles 1, 4, 5 and 7 of the American Convention provide as follows:

**Article 1. Obligation to Respect Rights**

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<sup>85</sup>I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Judgment of July 29, 1988. Series C No. 4.

<sup>86</sup>*Cf.* Resolution AG/RES. 666 (XIII-0/83) of November 18, 1983, and Resolution AG/RES. 742 (XIV-0/84) of November 17, 1984, of the General Assembly of the Organization of American States.

<sup>87</sup>*Cf.* Rome Statute of the International Criminal Court adopted on July 17, 1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an international criminal court, A/CONF.183/9.

<sup>88</sup>*Cf.* United Nations Human Rights Council. International Convention for the Protection of all Persons from Forced Disappearance. First session, agenda item 4, A/HRC/1/L.2, June 22, 2006.

<sup>89</sup>I/A Court H.R., *Goiburú et al. v. Paraguay Case*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 87.

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

#### **Article 4. Right to Life**

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

#### **Article 5. Right to Humane Treatment**

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

#### **Article 7. Right to Personal Liberty**

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

106. In this case, the lack of a judicial investigation into the circumstances of the abduction and forced disappearance of Maria Claudia García de Gelman in Uruguay contributed to the impunity of those responsible. There exists doubt as to whether Maria Claudia remained in Uruguay or was turned over to the Argentine authorities. In either case, the Commission considers that the Uruguayan State is responsible for clarifying her whereabouts since she was in its custody and that it failed to do so. Consequently, the Commission concludes that the State is responsible for the illegal and arbitrary detention, torture and forced disappearance of Maria Claudia García de

Gelman, which constitutes a violation of Articles 4(1), 5(1) and (2), and 7(1), (2) and (3) of the American Convention, in conjunction with the State's obligations under Article 1(1) thereof, since April 19, 1985.

107. The Commission also considers that the State violated Article 3 of the American Convention which provides that "Every person has the right to recognition as a person before the law." The Commission is of the view that a forced disappearance leaves the victim in a situation of extreme vulnerability in that the victim is excluded from the legal and institutional order of the State. The forced disappearance in itself negates the very existence of the human being and his or her juridical personality.<sup>90</sup> Consequently, the Commission concluded that in the instant case the State violated Maria Claudia García de Gelman's right to recognition as a person before the law.<sup>91</sup>

**D. The State has violated the right to humane treatment respect to Juan Gelman, Maria Macarena Gelman and other next of kin of Maria Claudia García de Gelman**

108. The Inter-American Court has consistently maintained that the relatives of the victims of human rights violations can, in turn, also be victims of violations of the right to their physical and moral integrity by reason of the intense suffering that they have experienced for the violations perpetrated against their loved ones, as well as the failure of the State to investigate their whereabouts.

109. In the *Blake Case*, the leading case on this issue, the Inter-American Court stated that:

the violation of those relatives' mental and moral integrity is a direct consequence of his forced disappearance. The circumstances of such disappearances generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate.<sup>92</sup>

110. Since the decision in the *Blake Case*, the Inter-American Court has consistently considered immediate relatives, and even distant relatives of the victims to be victims themselves and deserving of reparations.<sup>93</sup> Although Nicholas Blake was an United States citizen, the fact that his remains were cremated is considered a violation of the cultural values prevailing in Guatemala and was stated to have increased the suffering of his United States parents. The Court concluded in the *Blake Case* that such suffering, to the detriment of the mental and moral integrity of Mr. Nicholas Blake's relatives, constitutes a violation by the State of Article 5 of the Convention in relation to its Article 1(1).

111. Following this reasoning, the Commission considers that the suffering and pain of Juan Gelman, his family, Maria Claudia García de Gelman's relatives, and Maria Macarena Gelman were caused by the forced disappearance of Maria Claudia and the lack of investigation of her

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<sup>90</sup>Cf. Article 16 of the International Covenant on Civil and Political Rights which establishes the right to juridical personality in terms similar to those set forth in Article 3 of the American Convention. Also see United Nations Human Rights Committee, CCPR/C/90/D/1327/2004, Communication 1327/2004 (Grioua v. Algeria), decided on August 16, 2007, paragraphs 7(8) and 7(9), available at: <http://daccessdds.un.org/doc/UNDOC/DER/G07/436/56/PDF/G0743656.pdf?OpenElement>. Cf. Human Rights Committee, Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche, on his and his son's behalf, Mourad Kimouche v. Algeria, Communication 1328/2004, decision of July 10, 2007, paragraphs 7(8) and 7(9).

<sup>91</sup>See: I/A Court H.R., *Case of Anzualdo-Castro v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para. 90 and I/A Court H.R., *Case of Radilla-Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, párr. 157.

<sup>92</sup>I/A Court H.R., *Blake v. Guatemala Case*. Judgment of January 24, 1998. Series C No. 36, para. 114.

<sup>93</sup>See: I/A Court H. R., *Juan Humberto Sánchez v. Honduras Case*. Judgment of June 7, 2003. Series C No. 99; I/A Court H. R., *Ximenes Lopes v. Brazil Case*. Judgment of July 4, 2006. Series C No. 149, para. 156; I/A Court H. R., *Ituango Massacres v. Colombia Case*. Judgment of July 1, 2006. Series C No. 148, para. 289; and I/A Court H. R., *López Álvarez v. Honduras Case*. Judgment of February 1, 2006. Series C No. 141, párr. 119.

disappearance despite the return to democracy in Uruguay. The failure of the State, be it the Judicial or the Executive branch, to determine the whereabouts of Maria Claudia, contributed to the suffering of her family. The Commission concludes that the State is responsible for the suffering and pain of the relatives of Maria Claudia García de Gelman due to its failure to carry out an effective judicial investigation of her whereabouts, in violation of the State's obligations under Article 5(1) in conjunction with Article 1(1) of the American Convention since April 19, 1985.

**E. The State has violated the rights to special measures of protection for children, to juridical personality, to a name and to nationality respect to María Macarena Gelman, as well as the rights to privacy and to the protection of the family as regards to Juan Gelman, María Macarena Gelman and their next of kin**

112. This case affects the rights to special measures of protection for children and to the recognition as a person before the law,; the right to privacy,; the right to a name and to the protection of the family. All of these rights need to be considered together with Article XII of the Inter-American Convention on Forced Disappearance of Persons.

113. The American Convention provides:

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

[...]

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

[...]

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

[...]

Article 17. Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

#### Article 18. Right to a Name

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

#### Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

#### Article 20. Right to Nationality

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

114. Article XII of the Inter-American Convention on Forced Disappearance of Persons provides:

Article XII The States Parties shall give each other mutual assistance in the search for, identification, location, and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians.

115. The facts of the instant case also refers to the suppression of Maria Macarena's identity for twenty-three years of her life and the subsequent recognition that the persons whom she considered for those twenty-three years to be her parents were, in fact, not her biological parents but somehow affiliated with the persons who killed her biological mother. Even if her mistaken parents were not accomplices of the individuals who killed her mother, they contributed to the suppression of her identity and caused her to live a lie.

116. Article XII of the Inter-American Convention on Forced Disappearance of Persons provides that States shall assist each other in the search for, identification, location and return of minors who have been removed to another state as a consequence of the forced disappearance of their parents. The fact that this practice was so widespread to have resulted in the mistaken

identities of hundreds of children motivated the adoption of this provision in the Inter-American Convention on Forced Disappearance.

117. The appropriation of Maria Macarena by the security forces of Uruguay prevented her from knowing her real family, her real mother, her real name, identity, nationality and assuming her real juridical personality once she came of age, --all the trappings of her identity. Maria Macarena did not know her real identity since she lived under a false name, with a false family, a false identity and false private life, although she was not aware that all this was false. Not knowing the truth that her biological mother had been disappeared, Maria Macarena's juridical personality did not assist her in seeking a remedy from the Uruguayan judicial system for the investigation of the circumstances of her birth in captivity and the circumstances that led to her mother's death while in the custody of the Uruguayan security forces. The impunity granted by the State to the perpetrators of the crimes of kidnapping, arbitrary and illegal detention and extrajudicial execution perpetuated the false superstructure of the lie that Maria Macarena lived for the first twenty-three years of her life.

118. The fact that the State did not investigate the fate of María Claudia García de Gelman and the disappearance of her daughter, who was born in captivity, also contributed to the distress and suffering of Juan Gelman and his family, since they did not know whether their granddaughter was dead or alive, and they were not able to enjoy life as a family during all the years of María Macarena's childhood and adolescence, a situation made all the more emotionally difficult given what had happened to her parents.

119. In this case, the Uruguayan State also failed to provide Maria Macarena Gelman with the special measures of protection required by children. The Inter-American Court has underlined the special vulnerability of children:

This Court has stated that the cases in which the victims of human rights violations are children are particularly serious. The prevalence of the child's superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children. Moreover, the State must pay special attention to the needs and the rights of the alleged victims owing to their condition as girl children, who belong to a vulnerable group.<sup>94</sup>

120. Moreover, Article 11 of the Convention prohibits any abusive or arbitrary interference in the lives of persons, and outlines various other areas of a person's life where such interference is prohibited, such as in the private life of his family, his home, or his correspondence. The Court has held that the sphere of privacy is characterized by being exempt from and immune to abusive and arbitrary invasion or attack by third parties or by the public authorities,<sup>95</sup> situation that was not respected in the instant case with regard to María Macarena Gelman.

121. The Commission also alleges that the Uruguayan State violated the right to nationality given that María Macarena is the daughter of Argentinean parents born in Uruguay, but, due to the fact that the State never made clear the circumstances of her birth, she was deprived of her Argentinean nationality and identity in violation of Article 20 of the American Convention.

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<sup>94</sup>I/A Court H.R., *Case of the Yean and Boscio Children v. The Dominican Republic*, Judgment of September 8, 2005, para.134.

<sup>95</sup>I/A Court H.R. *Case Tristán Donoso vs. Panamá*. Judgment of January 27, 2009, and I/A Court H.R., *Case of the Ituango Massacres vs. Colombia*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, paragraphs 193 and 194.

122. The Commission concludes that the obstacles created by the State to the investigation of the facts constitutes a violation of the rights enshrined in Articles 1(1), 3, 11, 17, 18, 19 and 20 of the American Convention beginning on April 19, 1985, and of Article XII of the Convention on Forced Disappearance beginning on April 2, 1996.

## VIII. REPARATIONS AND COSTS

123. Based on the facts alleged in the instant petition and on the constant case-law of the Inter-American Court which provides that "it is a principle of International Law that any violation to an international obligation that has caused injury generates an obligation to repare it adequately,"<sup>96</sup> the IACHR submits to the Court its position on the reparations and costs the Uruguayan State should provide as a consequence of its responsibility for the violations committed to the detriment of the injured party.

124. The Inter-American Commission will now proceed to outline the general criteria with regard to reparations and costs that it considers the Court should apply in the instant case in accordance with the Court's Rules of Procedure which grant the individual autonomous representation. The Commission is keenly aware that it is the responsibility of the injured party to substantiate its claims in accordance with the provisions of Article 63 of the American Convention, and Article 25 and other applicable articles of the Rules of Procedure of the Inter-American Court. In the event that the injured party does not exercise this right, the IACHR requests that, during the proceedings, the Court grant the Commission the opportunity to quantify the pertinent claims.

### A. Obligation to make reparation and measures of reparation

125. Article 63(1) of the American Convention establishes that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

126. This provision contains a customary norm "that constitutes one of the basic principles of contemporary international law on State responsibility."<sup>97</sup> Reparation of the injury caused by the infringement of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the situation before the violation. If this is not possible, the Court must order adoption of measures that ensure respect for the rights that were abridged and provide reparation of the consequences caused by the violations by paying compensation for the damages caused.<sup>98</sup> Reparations have the additional purpose, although no less important, of avoiding and preventing future violations.

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<sup>96</sup>I/A Court H.R., *Case of the Gómez Paquiyauri Brothers Vs. Perú*. Judgment of July 8, 2004. Series C No. 110, paragraph 187; I/A Court H.R., *Case Myrna Mack Chang Vs. Guatemala*. Judgment of November 26, 2003. Series C No. 101, paragraph 141; I/A Court H.R., *Case Bulacio Vs. Argentina*. Judgment dated September 18, 2003. Series C No. 100, paragraph 72 and I/A Court H.R., *Case Juan Humberto Sánchez Vs. Honduras*. Judgment dated June 7, 2003. Series C No. 99, paragraph 147.

<sup>97</sup>I/A Court H.R. *Case Carpio Nicolle et al Vs. Guatemala*. Judgment of November 22, 2004. Series C No. 117, par. 86; I/A Court H.R., *Case Masacre Plan de Sánchez Vs. Guatemala. Reparations* (Art. 63(1) (American Convention on Human Rights). Judgment dated November 19, 2004. Series C No. 116, par. 52 and I/A Court H.R., *Case De la Cruz Flores Vs. Perú*. Judgment dated November 18, 2004. Series C No. 115, par. 139.

<sup>98</sup>I/A Court H.R., *Case of Gómez Paquiyauri Brothers Vs. Perú*. Judgment dated July 8, 2004. Series C No. 110, paragraph 189; I/A Court H.R., *Case of 19 Tradesmen Vs. Colombia*. Judgment dated July 5, 2004. Series C No. 109, par. 221; I/A Court H.R., *Case Molina Theissen Vs. Guatemala. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment dated July 3, 2004. Series C No. 108, paragraph 42.

## **B. Measures of reparation**

127. The Court has indicated that measures of reparation are intended to erase the effects of the violations committed.<sup>99</sup> Those measures encompass the various ways a State can redress the international responsibility it incurred, which, according to international law, consist of restitution, compensation, rehabilitation, satisfaction and measures of non-repetition<sup>100</sup>.

### **1. Measures of compensation**

128. The Court has established the essential criteria that must guide just compensation for the purpose of providing effective and adequate monetary compensation for harm inflicted as a result of human rights violations.<sup>101</sup>

#### **i. Pecuniary damages**

129. The Court's case law on reparations has consistently established that pecuniary damages include consequential damages and loss of earnings, as well as non-pecuniary or moral damage both to the victims and to their family nucleus.<sup>102</sup>

130. Consequential damages are understood to mean the direct and immediate pecuniary consequences of the facts on a person's estate. According to this concept, consideration is given to the pecuniary effect on the estate immediately and directly derived from the facts in relation to the expenses incurred by the injured party in order to obtain justice<sup>103</sup>, in this case, relating to the disappearance of their loved one.

131. On the other hand, loss of earnings is understood as the loss of future economic earnings or benefits due to the forced disappearance of María Claudia García de Gelman, that can be quantified by certain measurable and objective indicators.<sup>104</sup>

132. Notwithstanding any claims filed by the representatives of the victims at the appropriate time during the proceedings, the IACHR requests that the Court, pursuant to the broad powers vested in the institution in this area, set a fair and equitable amount as compensation for consequential damages and loss of earnings.

#### **ii. Non-pecuniary damages**

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<sup>99</sup>I/A Court H.R. *Case Carpio Nicolle et al Vs. Guatemala*. Judgment dated November 22, 2004. Series C No. 117, par. 89; I/A Court H.R., *Case De la Cruz Flores Vs. Perú*. Judgment dated November 18, 2004. Series C No. 115, par 141 and I/A Court H.R., *Case of the Hermanos Gómez Paquiyaury Vs. Perú*. Judgment dated July 8, 2004. Series C No. 110, par. 190.

<sup>100</sup>See: United Nations, *Final Report presented by Theo Van Boven, Special Rapporteur for the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, E/CN.4/Sub2/1990/10, July 26, 1990. See also: I/A Court H.R., *Case Blake. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment dated January 22, 1999. Series C No. 48, par. 31; I/A Court H.R., *Case Suárez Rosero, Reparations (Art. 63(1) American Convention on Human Rights)*, Judgment dated January 20, 1999. Series C No. 44, par. 40, and I/A Court H.R., *Case Castillo Páez. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment dated November 27, 1998. Series C No. 43.

<sup>101</sup>See: I/A Court H.R., *Case Hilaire, Constantine y Benjamin et al*, par. 204; *Case of the "Panel Blanca" (Paniagua Morales et al). Reparations*, par. 80; *Case Castillo Páez. Reparations*, par. 52 and *Case Garrido y Baigorria. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment dated August 27, 1998, Series C No. 39, par. 41.

<sup>102</sup>I/A Court H.R., *Case Tibi*. Judgment dated September 7, 2004. Series C No. 114, par. 237; I/A Court H.R., *Case of the Caracazo. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment dated August 29, 2002, Series C No. 95; and I/A Court H.R., *Case Hilaire, Constantine y Benjamin et al*. Judgment dated June 21, 2002. Series C No. 94.

<sup>103</sup>I/A Court H.R., *Case Loayza Tamayo. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment dated November 27, 1998. Series C No. 42, par. 147; *Case Aloeboetoe et al. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment dated September 10, 1993. Series C No. 15, par. 50.

<sup>104</sup>*Ibidem*.

133. With regard to non-pecuniary damage, the Court has established that:

[...] can include the suffering and hardship caused to the direct victims and to their next of kin, the harm of objects of value that are very significant to the individual and also changes, of a non-pecuniary nature, in the living conditions of the victims. Since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated in two ways in order to make integral reparation to the victims. First, by the payment of a sum of money that the Court decides by the reasonable exercise of judicial discretion and in terms of fairness. Second, by performing acts or implementing projects with public recognition or repercussion, such as broadcasting a message that officially condemns the human rights violations in question and makes a commitment to efforts designed to ensure that it does not happen again. Such acts have the effect of restoring the memory of the victims, acknowledging their dignity, and consoling their next of kin.<sup>105</sup>

134. In the instant case, the non-pecuniary damage caused by the disappearance of María Claudia García de Gelman is evident, as are the damaging consequences of the denial of justice to the family members. The relatives have presumably endured intense psychological suffering, anguish, sadness, and changes to their life plans as a result of government actions and the lack of justice within a reasonable period of time, as well as the absence of punishment of those involved in the facts that originated the instant case.

135. Also evident is the damage done to María Macarena Gelman as a result of her kidnapping, the suppression of her identity during 23 years of her life, and the continuing impunity with regard to those facts and, more broadly, with regard to the violations committed against her which include the impossibility of assuming her juridical personality, the violation of her right to privacy, to family protection, to a name, to nationality, and to measures of protection while she was a child.

136. Lastly, the damage done to Juan Gelman and his next of kin is also evident, as they have dedicated more than 32 years of their lives to the search for María Claudia García de Gelman, to securing justice, to establishing the truth, and to locating their granddaughter, which did not happen until the year 2000, and then only as a result of their own actions.

## **2. Satisfaction measures and guarantees of non-repetition**

137. Satisfaction is understood to mean any measure that the perpetrator of a violation must adopt in accordance with international instruments or with customary law, for the purpose of recognizing the commission of an illicit act.<sup>106</sup> Satisfaction is achieved when three actions are taken, usually in aggregate form: an apology or any other gesture that demonstrates acknowledgment of authorship of the violation in question; prosecution and punishment of the individuals responsible, and the adoption of measures to prevent the repetition of the damage inflicted.<sup>107</sup>

138. In that sense, the IACHR considers that among the measures of reparation, the Uruguayan State should take the necessary measures to acknowledge its international responsibility for the violations denounced in the instant case by carrying out a public and amendment act to the victim and her relatives, in consultation with them, in an effort to restore the historical memory. Moreover, it is extremely important that the State conducts a prompt, full, impartial, and effective investigation of the facts in order to establish and punish the intellectual and material responsibility of all persons who took part in the kidnapping and forced disappearance of María Claudia García de

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<sup>105</sup>I/A Court H.R., *Case Plan de Sánchez Massacre*. Judgment dated November 19, 2004. Series C No. 116, par. 80; I/A Court H.R., *Case De la Cruz Flores*. Judgment dated November 18, 2004. Series C No. 115, par. 155; Also see, I/A Court H.R., *Case Carpio Nicolle et al.* Judgment dated November 22, 2004. Series C No. 117, par. 117.

<sup>106</sup>Brownlie, *State Responsibility, Part 1*. Clarendon Press, Oxford, 1983, pg. 208.

<sup>107</sup>*Idem*.

Gelman, and in the kidnapping of María Macarena Gelman. At the same time, the State must employ all necessary means to investigate, identify and communicate the whereabouts of Maria Claudia Garcia de Gelman or of her remains, as the case may be.

### **C. Beneficiaries of the reparation owed by the State**

139. Article 63(1) of the American Convention demands reparation for the consequences of a violation and that "fair compensation be paid to the injured party." The persons who have a right to such compensation are generally those who have been directly harmed by the facts of the violation in question.

140. Based on the nature of the instant case, the injured party or the beneficiaries of the reparations ordered by the Court as a result of the human rights violations committed by the Uruguayan State are the next of kin of María Claudia García Iruretagoyena de Gelman, Juan Gelman and María Macarena Gelman. According to the information provided by the injured party, the relatives of María Claudia García Iruretagoyena de Gelman are her father, Juan Antonio García Irureta-Goyena and her brother, Alejandro Martín García Cassinelli<sup>108</sup>.

### **D. Costs and expenses**

141. In accordance with the Court's consistent case law, costs and expenses should be interpreted as included within the concept of reparations enshrined in Article 63(1) of the American Convention, since the efforts made by the injured party, his successors or representatives to accede to international justice entail expenses and financial commitments that must be compensated.<sup>109</sup>

142. The Inter-American Commission requests the Court to, once the injured party has been heard, order the Uruguayan State to pay the costs and expenses properly documented by the injured party.

## **IX. CONCLUSIONS**

143. Based on the considerations in the present application, the Commission requests the Inter-American Court to conclude and declare the international responsibility of the State for violating the following human rights:

a. the right to a fair trial and to judicial protection (Articles 8.1 and 25 in relation to Articles 1.1 and 2 of the American Convention on Human Rights, Articles I(b), III, IV and V of the Inter-American Convention on Forced Disappearance of Persons and Articles 1, 6, 8 and 11 of the Inter-American Convention to Prevent and Punish Torture) to the detriment of Juan Gelman, María Claudia García de German, María Macarena Gelman and their relatives;

b. the right to life, to personal liberty, to humane treatment, to juridical personality, and the obligation to punish these violations in a serious and effective manner (Articles 3, 4, 5, 7 and 1.1 of the American Convention on Human Rights, Articles I(b), III, IV and V of the Inter-American Convention on Forced Disappearance of Persons, and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture) to the detriment of María Claudia García de Gelman;

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<sup>108</sup>See: communication from the petitioners dated September 19, 2008, in appendix 3.

<sup>109</sup> I/A Court H.R., *Case Carpio Nicolle et al.* Judgment dated November 22, 2004. Series C No. 117, par. 143; I/A Court H.R., *Case Plan de Sánchez Massacre.* Judgment dated November 19, 2004. Series C No. 116, par. 115; I/A Court H.R., *Case De la Cruz Flores.* Judgment dated November 18, 2004. Series C No. 115, par. 177.

c. the right to humane treatment (Article 5(1) in relation to Article 1(1) of the American Convention) with regard to Juan Gelman, María Macarena Gelman and their relatives: and

d. the right to special protection measures for children, to juridical personality, to a name, to privacy and to nationality (Articles 3, 11, 18, 19 and 20 in relation to Article 1(1) of the American Convention on Human Rights) with regard to María Macarena Gelman; as well as the rights of the family (Articles 1(1) and 17 of the American Convention on Human Rights and Article XII of the Inter-American Convention on Forced Disappearance of Persons), with regard to Juan Gelman, María Macarena Gelman and their relatives.

## **X. PETITION**

144. As a result of the abovementioned, the Inter-American Commission requests that the Court order the State to:

- a. determine responsibility for the forced disappearance of María Claudia García de Gelman and the removal of her newborn daughter, María Macarena Gelman, through due process of law and a full and impartial judicial investigation of the facts, in order to identify those responsible for the human rights violations referred in the instant case and to duly punish those who are found guilty.
- b. adopt legislative and other types of measures necessary to, in accordance with the State's constitutional procedures and the provisions of the American Convention, vacate Law No. 15.848 or *Amnesty Law*.
- c. create an effective domestic mechanism, with binding legal powers and authority over all government entities, to ensure full compliance with the judgment issued by the Court.
- d. grant full reparation to the victim's next of kin, that includes not only compensation for pecuniary and non-pecuniary damages and the expenses and costs of national and international litigation of the case, but also the celebration of certain events of symbolic importance that guarantee the non-repetition of the violations committed in the instant case, events that can only be determined through negotiations between the petitioners and the State, such as observing an annual day of commemoration and remembrance of the victims of the *de facto* government.

## **XI. EVIDENTIARY SUPPORT**

145. In support of the arguments of fact and of law set forth in the instant case, the Commission attaches the documentary evidence listed below:

### **A. Appendices**

**Appendix 1.** Report on the Merits No. 32/08, Case 12.607, Juan Gelman, María Claudia García Iruretagoyena de Gelman and María Macarena Gelman García Iruretagoyena, July 18, 2008. Concurring Opinion of Commissioner Florentín Meléndez, The Right to the Truth, Case Juan Gelman, María Claudia García de Gelman y María Macarena Gelman contra Uruguay.

**Appendix 2.** Report on Admissibility No. 30/07, Petition 438-06, Juan Gelman, María Claudia García de Gelman and María Macarena Gelman against Uruguay, March 9, 2007.

**Appendix 3.** Copy of the file on the processing of the case before the Inter-American Commission on Human Rights. The file also includes the annexes to the petitioners' claim of May 8, 2006, which, for the most part, are cited in the claim and consist of:

1. General Power of Attorney granted by Mr. Juan Gelman to Doctor González José Luis, June 21, 2002.
2. Testimony of Mrs. Mara Elda Magdalena Lamadrid before the Clerk of the Court. March 19, 2003. Incorporated into the case file of the Second Court of First Instance of Montevideo (pgs. 126 to 155).
3. Open letter from Mr. Juan Gelman to the President of the Republic, published in the newspaper La República on February 28, 2000.
4. Office of the President of the Republic of Uruguay. Peace Commission. Annex 5(2).
5. Newspaper Página 12, Buenos Aires, Section El País, Saturday, October 22, 2005, "Para no consagrar la impunidad" ("In order to not consecrate impunity") by Nora Veiras. Portal Mujeres Hoy (Women Today Web Page). "Searching for Maria Claudia" (Buscando a María Claudia). May 14, 2003. Newspaper La República, Montevideo, Politics Section, June 13, 2005, pages 1 to 5, "Ricardo 'Conejo' Medina Blanco, the murderer of Gelman's daughter-in-law" by Roger Rodríguez.
6. Baptism Certificate of María Macarena Tauriño Vivian issued on December 17, 1999.
7. Written testimony of María Macarena Gelman García, May 3, 2006.
8. Law No. 15.848 or Amnesty Law (Ley de Caducidad de la Pretensión Punitiva del Estado), adopted by the Uruguayan Parliament on December 22, 1988.
9. Supreme Court of Justice of Uruguay, Judgment of May 2, 1988.
10. Resolution of the President of the Republic No. 858/2000, August 9, 2000. Creation of the Peace Commission.
11. Final Report of the Peace Commission, April 10, 2003.
12. Transcription of the letter of Julio Sanguinetti addressed to Mr. Gelman. November 5, 1999.
13. Final Report of the Peace Commission, April 10, 2003.
14. Written complaint filed with the Criminal Court on July 19, 2002.
15. Request to close proceedings by the Public Ministry, September 1, 2003.
16. Decision of the Second Court of First Instance, October 15, 2003.
17. Letter of the Executive Branch dated November 28, 2003. Response to the request made by the Second Criminal Court.
18. Appeal requesting reversal of administrative act of November 28, 2003. "González José Luis c/Ministry of Defense." December 2003.
19. Request for Declaration of Unconstitutionality of Article 3 of Law No. 15.848.
20. Supreme Court of Justice, Judgment No. 332, November 15, 2004.
21. Request for reactivation of the proceedings and prosecution of the pre-summary stage to the Second Criminal Court, "González José Luis representing Juan Gelman".
22. Weekly Brecha, "Ahora sí se puede" ("Now we can") by Samuel Blixen. April 29, 2005.
23. El Observador newspaper. "Prosecutor Moller will request to have the Gelman Case closed," May 18, 2005.
24. La República newspaper. "Valparaiso Base, María Claudia's last stop," May 29, 2005.

25. Note of the Executive Branch to the President of the Supreme Court of Justice of Uruguay, June 23, 2005.
26. Court of Appeals, Judgment No. 268, October 19, 2005.
27. Notification No. 934 of the Second Criminal Court to José Luis González, November 9, 2005.
28. Constitutional Brief as Plaintiff lodged by the Secretariat for Human Rights of the Ministry of Justice and Worship. Argentine Republic. Request for declaration of unconstitutionality of Law No.23.492 and Law No. 23.521, request for interrogations, request for arrest and extradition.
29. IACHR, Report No. 29/92. Case 10.029, Uruguay, October 2, 1992.
30. Decree of April 16, 2003. The conclusions of the Final Report of the peace Commission are accepted.
31. Resolution of the President of the Republic, April 11, 2003. The conclusions of the Final Report of the Peace Commission are accepted.

**Appendix 4.** Americas Watch Report, *“Challenging Impunity: The Ley de Caducidad y the Referendum Campaign in Uruguay”*, March 12, 1989.

**Appendix 5.** IACHR, Cooperation with the Security Forces of Other Countries, section IV, Uruguay, of the **Annual Report of the Inter-American Commission on Human Rights, 1978**, OEA/Ser.L/V/II.47 Doc.13, rev. 1, June 29, 1979, available at: <http://www.cidh.oas.org/annualrep/78sp/indice.htm>.

**Appendix 6.** IACHR, **Report on the Human Rights Situation in Uruguay**, OEA/Ser.L/V/II.43 doc. 19 corr.1, January 31, 1978, available at: <http://www.cidh.oas.org/countryrep/Uruguay78sp/indice.htm>.

**Appendix 7.** Powers of Attorney for representation.

**Appendix 8.** CV of the expert.

146. The Commission requests that the Court transfer to the instant case the evidence produced in Case 11.560, Goiburú et al. vs. Paraguay, with regard to Operation Condor, specifically, the book *En los sótanos de los generales* ( In the basements of the Generals) and the sworn testimony given by the expert Alfredo Boccia Paz.

147. The Inter-American Commission also offers the expertise of Dr. Hugo Lorenzo to testify on the context and pattern of human rights violations that occurred in Uruguay during the military dictatorship from 1973 to 1985, as well as to the lack of investigation and punishment of those responsible for the violations, afterwards. Specifically, the Commission offers this expert to testify on the adoption of Law No. 15.848 or Amnesty Law (Ley de Caducidad de la Pretensión Punitiva del Estado) adopted by the Uruguayan Parliament on December 22, 1986, its application, effects and its incompatibility with the American Convention on Human Rights. It is the opinion of the Commission that the instant case raises significant questions with regard to the application and effects of the amnesty laws that were promulgated in Latin America, which have been an obstacle to the efforts to serve the interests of justice and have ensured impunity.

## **XII. INFORMATION ON THE ORIGINAL PETITIONERS, THE VICTIM AND THEIR RELATIVES**

148. Pursuant to the provisions of the Rules of Procedure of the Court, the Inter-American Commission informs the Court that the original petitioners are María Macarena Gelman and Juan

Gelman, and their representatives, Dr. José Luís González and the Center for Justice and International Law (CEJIL). The representatives of the victim and her relatives have given a unified address at the offices of the Center for Justice and International Law (CEJIL), located at [REDACTED]

Washington, D.C.  
January 21, 2010