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Institution: Inter-American Commission on Human Rights  
File Number(s): Report No. 1/03; Petition 12.221  
Session: Hundred and Seventeenth Regular Session (17 February – 7 March 2003)  
Title/Style of Cause: Jorge Omar Gutierrez v. Argentina  
Doc. Type: Decision  
Decided by: First Vice-President: Marta Altolaguirre;  
Second Vice-President: Jose Zalaquett;  
Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, Susana Villaran.  
Pursuant to the terms of Article 17(2) of the Rules of Procedure of the Commission, its President, Juan E. Mendez, a national of Argentina, did not participate in the discussion or decision on the present case.

Dated: 20 February 2003  
Citation: Omar Gutierrez v. Argentina, Petition 12.221, Inter-Am. C.H.R., Report No. 1/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)  
Represented by: APPLICANTS: Nilda Maldonado, the Centro de Estudios Legales y Sociales and the Center for Justice and International Law

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## I. SUMMARY

1. The present report addresses the admissibility of petition 12.221. Its processing was initiated by the Inter-American Commission on Human Rights (hereinafter “Inter-American Commission, “Commission” or “IACHR”) pursuant to the receipt of a petition on May 12, 1999 and supporting information on October 6, 1999, filed by Francisco Gutiérrez, Nilda Maldonado, the Centro de Estudios Legales y Sociales (CELS) and the Center for Justice and International Law (CEJIL) (hereinafter “the petitioners”), against the Republic of Argentina (hereinafter “Argentina” or “State”).

2. The petitioners allege that Jorge Omar Gutiérrez, then a Deputy-Captain (Subcomisario) of the Police of the Province of Buenos Aires, was killed on August 29, 1994 by state agents, namely a police officer acting in conspiracy with other officers, in order to stop the victim’s investigation of corruption involving high-ranking government officials and large sums of money. The petitioners contend that the investigation of the killing was obstructed by the Federal Police, and that the prosecution of the presumed killer was partial and deficient to the point of allowing those responsible to escape punishment and denying justice to the Gutiérrez family. The petitioners emphasize that their contentions are supported by the findings of a Special Investigative Commission of the National Chamber of Deputies constituted to investigate alleged corruption in the customs administration. The petitioners maintain that the facts alleged constitute violations of the rights to life, and judicial protection and guarantees, as well as of the

State's obligation to respect and ensure protected rights, recognized in Articles 4, 25, 8 and 1(1) of the American Convention on Human Rights (hereinafter "American Convention").

3. The State, for its part, maintains that the judicial proceedings with respect to the person formally accused of having killed the Deputy-Captain were handled by the proper jurisdictional organs acting within their sphere of competence, and thus neither merit nor permit review by the Commission, and that the petitioners have failed to present a sufficient foundation in law or fact to demonstrate State responsibility for the violation of the right to life they allege. Further, the State indicates that because its competent authorities continue to investigate, the applicable domestic remedies have yet to be exhausted and the rights to judicial protection and guarantees are being respected.

4. As set forth below, pursuant to its examination, the Commission concluded that it is competent to take cognizance of the petitioners' complaints concerning alleged violations of Articles 4, 8, 25 and 1(1) with respect to the killing of Jorge Omar Gutiérrez and the response of the State thereto, and that the case is admissible pursuant to the terms of Articles 46 and 47 of the American Convention.

## II. PROCESSING BEFORE THE COMMISSION

5. The Commission acknowledged receipt of the petition received on May 12, 1999 by note of May 18, 1999. On October 6, 1999, the Commission received additional information and documentary evidence in support of the petition. On November 9, 1999, the Commission transmitted the pertinent parts of the petition and supporting materials to the State, with information in response requested within 90 days. By note of that same date, the petitioners were informed that the processing of the petition had been initiated.

6. By a note dated February 14, 2000, the State requested an extension to submit its response. By notes of February 24, 2000, the Commission granted the State an additional 45 days, and informed the petitioners that this had been done. By note of April 11, 2000, the State requested an additional extension. By notes of April 24, 2000, the Commission granted an extension until May 9, 2000, and informed the petitioners accordingly.

7. On May 8, 2000, the Commission received a note from the State dated May 4, 2000, indicating that the subject of the petition had been addressed by the domestic courts, and that relevant information had been requested from the corresponding authorities. Accordingly, the State requested an exceptional extension in which to respond, in the understanding that it had not accepted any of the petitioners' contentions of law or fact. The Commission responded with a note of May 16, 2000, indicating that the period provided for in Article 34(6) of its then-applicable Regulations had expired on May 9, 2000.[FN1]

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[FN1] The Rules of Procedure currently in effect entered into force on May 1, 2001.

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8. On August 28, 2000, the petitioners addressed the Commission in order to request a hearing. By note of September 13, 2000, the Commission indicated that it would be unable to grant the hearing due to the large volume of requests already accepted. In a communication dated December 26, 2000, the petitioners requested that the Commission apply the terms of Article 42 of its then applicable Regulations, providing that, in the absence of a response by the State, the Commission could presume the facts alleged in the petition to be true, as long as those were consistent with other available information.

9. By note of February 1, 2001, the petitioners reiterated their request that the facts alleged be presumed true, and asserted that, by reason of its failure to respond, the State had waived its chance to controvert the admissibility of the petition. Receipt of this and the previous communication were acknowledged by note of March 26, 2001.

10. By note of March 23, 2001, the State presented information in response to petition 12.221. The State indicated that it had directed three requests for information to the Provincial authorities, and that the latter had responded in September of 2000, with the indication that their delay had been due to the requests having been filed with another case. The State indicated that domestic remedies had not been exhausted and that the presumption of truth provided for in the event of a State's failure to respond did not apply.

11. The State's communication was transmitted to the petitioners on May 25, 2001, with any observations in response requested within one month. On June 25, 2001, the petitioners responded, contesting the assertions of the State. The petitioners' observations were transmitted to the State by note of August 17, 2001, with any observations in response requested within one month. By note of August 8, 2001, the petitioners requested a hearing to discuss the admissibility of the present petition. By note of September 5, 2001, the Commission indicated that it was unable to accept the request.

12. By note of September 26, 2001, the State submitted additional information and arguments. A copy of the judicial case file against the person formally accused was received on October 24, 2001. These materials were transmitted to the petitioners on October 29, 2001, with any observations in response requested within one month. By a note received on November 29, 2001, the petitioners requested an extension in which to file their observations. They were granted until February 15, 2002. In the interim, by note of January 22, 2002, the petitioners requested a hearing before the Commission to discuss the admissibility of the petition. On February 13, 2002, the Commission informed the petitioners that it would be unable to grant their request.

13. On February 15, 2002, the petitioners' observations were received. Due to an involuntary filing error, they were transmitted to the State on July 26, 2002, with any observations in response requested in one month. During a working visit carried out by the Commission's Rapporteur for Argentina from July 29 through August 6, 2002 to address a number of friendly settlement processes and other matters, the Commission's delegation met with the family of Deputy-Captain Gutiérrez.

14. By notes of August 28 and September 9, 2002, the State submitted further observations, which, in turn, were transmitted to the petitioners on October 10, 2002, with any observations in response requested within one month. By note of November 27, 2002, the petitioners filed an additional response reiterating previously expressed positions. This was transmitted to the State for its information by note of January 23, 2003.

### III. POSITION OF THE PARTIES

#### A. The Petitioners

15. The petitioners relate that, the night he was killed, Deputy-Captain Gutiérrez worked his shift at the Second Precinct in Avellaneda. He took the General Roca Train (Constitución to La Plata line) to return to his home in Quilmes, where he lived with his wife and three children. His body was found on that same train by an off-duty guard shortly after midnight, the morning of August 29, 1994. He had been wearing his uniform, and with him were found his 9 mm. service pistol, shield, briefcase, ring and gold watch.

16. The judicial investigation was conducted by the Fifth Criminal and Correctional Court of the City of La Plata. The petitioners allege that it was deficient from the start, indicating, for example, that investigators failed to note or attribute importance to certain evidence. They note that, while the initial theory pursued was that the victim had been killed by a stray bullet fired from outside the train, it was clear to anyone who examined the position of the body and the entry and exit wounds that he had been killed by a shot fired at close range from behind. The bullet was allegedly fired from a distance of less than 50 cm., entered at the base of the neck and exited near the forehead—what the petitioners call a “death shot” (“tiro de la muerte”), premeditated and intended to kill. The petitioners note that other similarly unfounded theories were propounded in the effort to obscure the truth.

17. The petitioners report that two witnesses to the killing were later found. The first, Gabriel Ramón (“David”) Silva, was located not by the police but by the family of the victim. In his statement to the authorities, he indicated that the killers had been two members of the Argentine Federal Police, nicknamed “Chiquito” and “Colorado.” He said the two were seen on the trains every Friday at a certain hour, requiring roving vendors such as himself to pay a ten-peso bribe. He indicated that those who didn’t pay had their merchandise confiscated and were detained for 24 hours. He said it was Chiquito—whom he subsequently identified as Alejandro Daniel Santillán, a member of the Federal Police—who had shot Gutiérrez. Silva partially retracted his statement during the trial, but later testified before the Special Investigative Commission of the National Chamber of Deputies that the retraction had been prepared with Santillán’s lawyers after having been imprisoned for three days in the Roca Division of the Headquarters of Railway Security of the Argentine Federal Police (hereinafter “SSF-PFA”), where he was tortured by two agents of the SSF-PFA.

18. The petitioners report that the other witness, Alejandra Chumbita, reported similar descriptions, including that the two men warned her after the shooting not to say anything. One showed her a police badge and told her they were from the police, and that the victim had been a drunk.

19. The petitioners further note that it was from the reconstruction of the facts carried out with witness Silva, that experts were able to locate the impact of the bullet fired in a pillar of a bridge. The petitioners maintain that the declarations of these two witnesses indicate that the officer known as “Colorado” approached Deputy-Captain Gutiérrez as he was sitting on the train. According to these versions, the two men spoke, then Santillán passed by and turned around to double-back behind Gutiérrez, whereupon he fired the fatal shot.

20. The petitioners report that, the day after Alejandro Daniel Santillán was arrested and detained on September 23, 1994, the SSF-PFA presented declarations given by two minors implicating two other individuals in the killing. The minors recanted during the trial, as well as before the Special Investigative Commission of the National Chamber of Deputies, alleging that they had been tortured by the same two agents of the SSF-PF identified by witness David Silva as his torturers. The petitioners maintain that the investigation opened against the two agents in question has produced no results, nor has any police officer ever been disciplined in relation to these events.

21. Alejandro Daniel Santillán was held in preventive detention for just over two years. The hearing in his trial was held on November 11 and 12, 1996. He was absolved on the basis of “insurmountable doubts” (“dudas insalvables”) produced, the petitioners allege, principally as a result of the partial retraction by witness Silva, other doubts in relation to the testimony of Silva and Chumbita, and the alibi provided by his partner and her mother.

22. The petitioners maintain that the facts in question demonstrate the obstruction of justice by the Federal Police, which was patently obvious at the time of the trial, but was disregarded by the judiciary and has remained unanswered. They argue that the judiciary, for its part, conducted an investigation that was incomplete and deficient. The petitioners emphasize that no serious effort was made to identify the other alleged perpetrator referred to as “Colorado,” notwithstanding physical descriptions and related information provided by various witnesses. These factors ensured a prosecution that was partial and defective. Accordingly, they maintain that the State failed to comply with its obligations to investigate the killing, and prosecute and punish those responsible in accordance with due process.

23. The petitioners emphasize that their position with respect to the investigation and prosecution draws from and is supported by the findings of the “Special Investigative Commission on the probable commission of illegal acts perpetrated or produced in the National Customs Administration” formed by the Chamber of Deputies of the National Congress of Argentina. They report that the Special Commission found serious irregularities in the investigation into the killing of Jorge Omar Gutiérrez, and for that reason addressed the President of the Supreme Court of Justice of Buenos Aires to request that consideration be given to reopening the investigation. The petitioners further note that one of the judges who tried Alejandro Daniel Santillán referred in the sentence itself to investigative deficiencies that had impeded his ability to come to a conclusion about responsibility for the crime. In this sense, the petitioners contend that the human rights violations they set forth have in fact been recognized by the State.

24. They maintain that the case is admissible before the Inter-American Commission, in particular, because the domestic remedies corresponding to their claims were invoked and exhausted with the final sentence confirming the absolution of Santillán. With their presentations, the petitioners included a copy of the sentence issued by the First Court of the Chamber of Appeals in Criminal and Correctional Matters of Buenos Aires and some related appeals, all of which were unsuccessful. The petitioners note that, although the judicial investigation into the killing of Deputy-Captain Gutiérrez was reopened pursuant to written requests for investigative measures by the family, it has produced no advances. Further, while several cases were opened for false testimony in relation to the prosecution of Santillán, the file in one was lost, and charges were dismissed in two others.

25. Finally, the petitioners contend that, because the State failed to file its response before the Commission within the initial 90 days provided, it thereby waived its right to contest the admissibility of the claims or controvert the facts alleged. Citing Article 42 of the Commission's former Regulations, and Article 39 of the current Rules of Procedure, as well as case law of the Inter-American Court of Human Rights, they argue that any allegations on the part of the State with respect to the nonexhaustion of domestic remedies should have been filed within that first opportunity, and that the delay in the State's response means it waived its right to contest the allegations of law and fact set forth in the petition.

B. The State

26. The State's position may be summarized in six points. First, the State contends that the petitioners' claims concerning the absolution of Alejandro Daniel Santillán due to insufficient proof are inadmissible because they would require the Commission to act as a so-called "fourth instance" of review. The State maintains that the judicial process against Santillán, and the investigation which preceded it, were carried out by the appropriate jurisdictional organs acting within the spheres of their competence and in accordance with domestic law. For the Commission to review this process would be for it to intervene in assessments of fact and internal law that properly correspond to the domestic legal system. The State emphasizes that the trial of Santillán produced his absolution because the prosecution was unable to produce sufficient evidence to overcome the presumption of innocence in his favor, and took place with the full participation of the parties, including the family of the victim.

27. Second, the State notes that, while the absolution of Alejandro Daniel Santillán produced a final decision that is now *res judicata*, that decision only closed the inquiry as far as that accused was concerned. The State indicates in this regard that the investigation process into the death of the Deputy-Captain was reopened at the request of the Prosecutor's Office, and remains open, and that the Gutiérrez family continues to participate in it as a party. Accordingly, the investigation can follow its course if new evidence becomes available. The State thus concludes that the prosecution of Santillán and the ongoing investigation demonstrate that domestic remedies have proven available and effective.

28. Third, the State argues that the petitioners' claims concerning the right to life in the present petition are manifestly unfounded. The State characterizes the petitioners' positions with respect to the motives for the killing and responsibility of state agents as speculative, and

maintains that they have provided no basis in law or fact to demonstrate the participation of any state agent in the killing of Deputy-Captain Gutiérrez, or the failure of the domestic legal system to respond to the crime.

29. Fourth, the State notes that its authorities have demonstrated their commitment to this situation in various ways. It reports, for example, that the Police of the Province of Buenos Aires modified the administrative classification of Gutiérrez' death--initially listed as unrelated to service--to being imputable to his service, thereby giving rise to a right to compensation for his heirs. (The State notes that this administrative evaluation in no way implies any acceptance of responsibility by the Province with respect to the present petition.) The State further notes the actions of the Special Investigative Commission of the National Chamber of Deputies as evidence of its interest in the full resolution of the matter.

30. Fifth, the State indicates that the petitioners themselves have demonstrated that domestic remedies have yet to be exhausted, as they continue to pursue their claims before both the domestic judicial authorities and the Inter-American Commission. The State characterizes the petitioners' actions in this regard as contradictory, indicating that had the petitioners truly exhausted the available domestic remedies they would no longer be participating in the ongoing judicial investigation. Rather, the State maintains that the petitioners have manifested nothing more than their disagreement with the results of certain aspects of the jurisdictional process. Thus, the State concludes that the petitioners have failed to exhaust domestic remedies, or to set forth any violation of the rights to judicial protection and guarantees under Articles 8 and 25 of the Convention. The State emphasizes that the duty to investigate is one of means rather than results, and has been fully complied with in the present case.

31. Sixth, with respect to the petitioners' allegations that the State's failure to respond to the Commission's request for information in a timely manner means it waived its right to controvert the admissibility of the petition or the facts alleged, the State maintains that this is incorrect as a matter of fact and law. It notes that its May 4, 2000 request for an extension contained an express reservation that the same did not imply any acceptance of the petitioners' allegations, and that the relevant information was thereafter presented as soon as it could be made available. It further notes that the presumption set forth in Article 39 of the Commission's current Rules of Procedure as to the truth of the facts alleged in the case of the non-response of the state concerned applies only once the merits stage of a case has been reached.

#### IV. ANALYSIS OF ADMISSIBILITY

##### A. Competence of the Commission

32. In accordance with the terms of Article 44 of the American Convention, the petitioners have standing to present a petition before the Commission. The petition under study indicates that the alleged victim was subject to the jurisdiction of the Argentine State at the time of the alleged facts. With respect to the State, the Commission observes that Argentina is a State Party to the American Convention, having duly deposited its instrument of ratification on September 5, 1984. Accordingly, the Commission has the competence *ratione personae* to examine the claims

presented. The Commission is competent *ratione materiae* because the petitioners allege violations of rights protected under the American Convention.

33. The Commission has temporal jurisdiction to review the claims. The petition is based on allegations that date to August 29, 1994, the time of Jorge Gutiérrez' death. The facts alleged thus arose subsequent to the entry into force of the State's obligations as a Party to the American Convention. Furthermore, given that the petition alleges violations of rights protected under the American Convention that have taken place in the territory of a State Party, the Commission concludes that it has the competence *ratione loci* to take cognizance of it.

B. Other requirements for the admissibility of the petition

a. Exhaustion of domestic remedies

34. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement exists to ensure the state concerned the opportunity to resolve disputes within its own legal framework. As indicated above, the petitioners contend that the petition satisfies this requirement, and that in failing to respond to the petition in a timely way, the State waived its right to contest this point. The State maintains that it expressly noted in its May 4, 2000 request for an extension that the delay in its response did not constitute a waiver, and that it submitted the relevant information once able to do so.

35. In this connection, it is well-established in the jurisprudence of the inter-American system that the requirement that domestic remedies be exhausted is considered a means of defense and, as such, may be waived by a state, even tacitly.[FN2] As the Inter-American Court has indicated, "in order to be timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding or, to the contrary, it will be presumed that the interested State has waived its use tacitly."[FN3] The Commission's case law confirms that, in the absence of a timely response by a state, it is not obliged to consider potential bars to admissibility that might have been raised in this regard.[FN4] Moreover, the Commission wishes to emphasize the obligation of OAS member states, as reflected in the general procedures set forth in Article 48 of the American Convention as well as Articles 18 and 19 of its Statute, to respond in a timely manner to the Commission's requests for information.

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[FN2] See IACtHR, Castillo Páez Case, Preliminary Objections, Judgment of January 30, 1996, para. 40; Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, para. 40.

[FN3] IACtHR, The Mayagna (Sumo) Awas Tingni Community Case, Preliminary Objections, Judgment of February 1, 2000, para. 53 (citing the decisions listed in note 2, *supra*).

[FN4] See e.g., IACHR, Report N° 89/01 (admissibility), case 12.342, Balkissoon Roodal, Trinidad and Tobago, October 10, 2001, para. 29.

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36. In this regard, the Commission observes that by virtue of the delay in presenting its response, the State risked the preclusion that attaches to a presumed waiver. However, taking

into consideration that: (a) the State indicated as from May 4, 2000 that its domestic authorities were seized of the subject matter and that it did not waive its right to respond;<sup>[FN5]</sup> (b) the State delivered a response to the petition with a copy of the judicial file prior to the preparation of the present report; (c) both parties have had the opportunity to submit further observations during the admissibility stage; and (d), that it is important to ensure that the petition benefits from thorough processing, the Commission will consider the parties' submissions on this issue.

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[FN5] This is not a situation in which the State declined to file an objection with respect to this requirement in the initial stage of proceedings only to argue nonexhaustion at a later stage, thereby having been presumed to have tacitly waived the objection. See e.g., IACHR, Report N° 81/01 (admissibility), case 12.228, Alfonso Martín del Campo Dodd, Mexico, October 10, 2001, paras. 15-19.

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37. To the extent the petition complains about alleged deficiencies in the criminal process against Santillán, the parties are in agreement that the relevant domestic remedies were exhausted.<sup>[FN6]</sup> The parties disagree, however, as to whether the exhaustion of those remedies fulfills the requirements of Article 46 with respect to the petition as a whole. The State maintains that the pendency of the investigation that remains open as of the date of the present report means the requirement has not been satisfied. The petitioners maintain that, notwithstanding the passage of over eight years since the victim's death, the pending investigation has produced no conviction for the killing, and no advances with respect to clarifying or imposing sanctions for the obstruction of justice they allege, and has thus proven ineffective.

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[FN6] Following the decision at first instance, family members of the victim acting as a party filed extraordinary appeals of unconstitutionality and inapplicability of law before the Supreme Court of the Province, which were denied. They then sought an extraordinary federal appeal, which was granted by the Chamber of Appeals in Criminal and Correctional Matters of Buenos Aires. That appeal was dismissed by the Supreme Court of Justice of the Nation on November 12, 1998, as having been granted in error because it was not challenging the sentence of a superior court.

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38. When domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused.<sup>[FN7]</sup> Article 46(2) of the Convention specifies that this exception applies: if the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; if the party alleging violation has been hindered in his or her access to domestic remedies; or if there has been unwarranted delay in the issuance of a final judgment. Consequently, when a petitioner alleges that he or she is unable to exhaust domestic remedies, Article 31(3) of the Commission's Rules of Procedure establishes that the burden then shifts to the Government to demonstrate which specific domestic remedies continue to offer effective relief for the harm alleged.

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[FN7] See IACtHR, *Exceptions to the Exhaustion of Domestic Remedies* (Article 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Ser. A No. 11, para. 17.

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39. The remedies the petitioners must exhaust are thus those that are available and effective. As the settled case law of the system affirms, remedies that are not timely are not available or effective. On the basis of: its examination of the positions of the parties; the status of the investigation that remains open; the passage of over eight years since the killing of the Deputy-Captain; and the absence of specific information from the State as to which or whether any concrete measures remain to be completed, the Commission concludes that the requirement of exhaustion of this process is excused pursuant to Article 46(2).

40. The invocation of exceptions to the requirements of Article 46 is closely linked to the examination of the substance of possible violations of rights enshrined therein, particularly the guarantees relative to access to justice. Nonetheless, given its nature and purpose, the review under Article 46(2) is autonomous vis á vis the substantive norms of the Convention. The determination as to whether the exceptions to the requirement of exhaustion of domestic remedies apply in a given case requires an analysis of the claims raised in advance of and apart from the determination of the merits of the case, and according to a standard distinct from the one used to determine whether the State bears responsibility for the violation of the rights to judicial protection or guarantees set forth in the Convention. The causes that have impeded the exhaustion of domestic remedies, and the consequences thereof, shall be analyzed to the extent appropriate when the Commission examines the merits of this case.

b. Time period for submission of the petition

41. In accordance with Article 46(1)(b) of the Convention, a petition must be presented in a timely manner to be admitted, namely, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. The rule does not apply when it has been impossible to exhaust internal remedies due to a lack of due process, denial of access to remedies, or unwarranted delay in issuing a final decision. In such a case, Article 32 of the Commission's Regulations establishes that the deadline for presentation shall be "within a reasonable period of time, in the Commission's judgment, as from the date on which the alleged violation of rights has occurred, considering the circumstances of each specific case." Nor does this rule apply where the allegations concern a continuing situation--where the rights of the victim are allegedly affected on an ongoing basis.

42. The present petition was filed on May 12, 1999, within six months from the November 12, 1998 decision of the Supreme Court of Justice of the Nation denying the extraordinary appeal filed by the Gutiérrez family against the decision absolving Santillán. Moreover, the petition also addresses an investigation into the killing that remains pending. The Commission thus concludes that the requirement of timely filing set forth in Article 46(1)(b) has been met.

c. Duplication of proceedings and res judicata

43. Article 46(1)(c) sets forth that admission of a petition is subject to the requirement that the subject “is not pending in another international proceeding for settlement,” and Article 47(d) of the Convention stipulates that the Commission shall not admit a petition which “is substantially the same as one previously studied by” it “or by another international organization.” In the present case, the parties have not claimed and the proceedings do not indicate the existence of either of these circumstances of inadmissibility.

d. Characterization of the facts alleged

44. Article 47(b) of the American Convention sets forth that allegations that do not state facts tending to establish a violation shall not be admitted. In the present case, the State has argued in general terms that the petition should be found inadmissible for failing to state cognizable claims. More specifically, the State argues that the petitioners are seeking that the Commission act as a “fourth instance,” outside the scope of its mandate, and that the petitioners have failed to demonstrate the participation of any state agent in the killing of the victim.

45. For the purposes of admissibility, the Commission must decide if the events can be characterized as a violation, as stipulated in Article 47(b) of the American Convention, or if the petition is “manifestly groundless” or “obviously out of order,” pursuant to subparagraph (c) of that Article. The standard for evaluating these requirements is different from that for deciding on the merits of a petition; the Commission must conduct a *prima facie* evaluation to determine whether the petition establishes grounds for the apparent or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation.[FN8] This determination involves a summary analysis that does not imply a prejudgment on the substance of the matter. In establishing two stages, one involving admissibility and the other the merits, the Commission’s Rules of Procedure reflect this distinction.[FN9]

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[FN8] IACHR, Report N° 128/01, Herrera and Vargas [“La Nación”], Costa Rica, case 12.367, December 3, 2001, para. 50.

[FN9] *Id.*

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46. With respect to whether review of this petition would place the Commission in the position of acting as a “fourth instance” of review, the Commission’s case law clearly sets forth that it is “not competent to review judgments handed down by national courts acting within the scope of their jurisdiction and observing due judicial guarantees.”[FN10] The Commission “cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction.”[FN11] However, within its mandate to ensure the observance of the rights set forth in the Convention, the Commission is necessarily “competent to declare a petition admissible and rule on its merits when it portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial,” or alleges other violations of rights protected thereunder[FN12]--as is the case in the present petition. The State’s argument questioning whether the petitioners have presented sufficient elements of fact and law to support a violation of the right to life will be addressed in the merits stage of these proceedings. The Commission finds in the present case that the

petitioners have stated claims concerning alleged violations of the right to life, and judicial protection and guarantees, which, if consistent with other requirements and shown to be true, could tend to establish the violation of rights protected under Articles 1, 4, 8 and 25 of the American Convention.

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[FN10] See generally, IACHR, Report N° 101/00, case 11.630, Arauz et al., Nicaragua, October 16, 2000, para. 56, citing IACHR, Report N° 39/96, case 11.673, Marzioni, Argentina, October 15, 1996, paras. 50-51.

[FN11] IACHR, Report N° 7/01, case 11.716 Güelfi, Panama, February 23, 2001, para. 20, quoting Marzioni, supra, para. 51.

[FN12] Id.

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## V. CONCLUSIONS

47. The Commission concludes that it is competent to take cognizance of the instant case and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention.

48. Based on the factual and legal arguments set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible with respect to the alleged violation of the rights recognized in Articles 4, 8, 25 and 1(1) of the American Convention.
2. To notify the parties of this decision.
3. To continue with the analysis of the merits of the case.
4. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on this the 20th day of February 2003. Signed: Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts and Susana Villarán, Commission members.