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Decided by:	President: Jose Zalaquett; First Vice-President: Clare K. Roberts; Second Vice-President: Susana Villaran; Commissioners: Robert K. Goldman, Julio Prado Vallejo.
Dated:	22 October 2003
Citation:	Dominguez Domenichetti v. Argentina, Petition 11.819, Inter-Am. C.H.R., Report No. 51/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by:	APPLICANTS: the Coordinator Against Police Repression, and the Center for Legal and Social Studies
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I. SUMMARY

1. The present report addresses the admissibility of petition 11.819, opened by the Inter-American Commission on Human Rights (hereinafter “Inter-American Commission, “Commission” or “IACtHR”) pursuant to the receipt of a petition on 23 September 1997. The petition was filed by María Cristina Domenichetti against the Republic of Argentina (hereinafter “Argentina” or “State”) with respect to the death of her son Christian Daniel Domínguez Domenichetti. Ms. Domenichetti is represented by attorneys from the Coordinator Against Police Repression (Coordinadora Contra la Represión Policial (CORREPI)) and the Center for Legal and Social Studies (Centro de Estudios Legales y Sociales (CELS)). Hereinafter the foregoing are collectively referred to as “the petitioners.”

2. The petition alleges that on February 15, 1995, while incarcerated in the Unidad Penitenciaria No. XV del Servicio Penitenciario de la Provincia de Buenos Aires, Christian Daniel Domínguez Domenichetti was severely beaten by prison guards. As a consequence, he suffered a massive hemorrhage that led to his death. Criminal proceedings were subsequently initiated against five prison employees. Of the five, four were charged with the crime of torture followed by death. Two of the four were subsequently convicted of the crime of torture, the third was convicted of functional negligence and the fourth was acquitted. The fifth person was charged with the crime of functional negligence and subsequently acquitted. As a consequence, petitioners sustain that the State has never resolved the issue of responsibility for Christian Domínguez’ death. They argue that the trial court utilized standards incompatible with the State’s international obligations in declining to apply the aggravated penalty for torture followed by death. Further, they maintain that the State failed to uphold its obligations to investigate these

crimes with due diligence, specifically with respect to what they characterize as the failure of prison officials to prevent or stop the torture, and their complicity in efforts to cover up the crimes and obstruct justice.

3. The petitioners contend that the State is responsible for violating the rights of Christian Daniel Domínguez Domenichetti to life and humane treatment, and denying his family the right to effective judicial protection and guarantees, as recognized in Articles 4, 5, 8 and 25, respectively, of the American Convention on Human rights (hereinafter the "Convention" or the "American Convention"), all in relation to the general obligation set forth in Article 1(1) to respect and ensure the rights recognized in that treaty. They maintain that the facts denounced also give rise to violations of the Inter-American Convention to Prevent and Punish Torture, particularly Article 6 concerning the duty to punish torture in accordance with its severity.

4. The State, for its part, maintains that it has complied with its international obligations under the American Convention. The facts were investigated, and as a result several individuals were apprehended, charged, condemned and sentenced to lengthy prison terms for their responsibility in the torture of Mr. Domínguez. Consequently, the State maintains that the Commission is not competent to review the findings of fact and internal law made by its tribunals acting in accordance with due process. Further, the State contends that the petitioners have not exhausted the domestic legal avenues available, and, in particular, that civil actions remain pending, the outcome of which could nullify the contentions of the petitioners before the Commission.

5. Without prejudging the merits of the complaint, the Commission concludes that it is competent to take cognizance of the petition concerning alleged violations of Articles 8, 25 and 1(1) of the American Convention, relating to alleged deficiencies in the State's investigation. The claims concerning the standard applied in the domestic judicial proceedings to determine the prison sentences imposed are deemed inadmissible.

II. PROCESSING BEFORE THE COMMISSION

6. On October 14, 1997, the Commission initiated the processing of the petition by transmitting its pertinent parts to the State and requesting information in response within 90 days. The petitioners were informed accordingly by note of the same date. By a note of January 9, 1998, the State requested an extension of time in which to respond. The Commission granted an additional 30 days by note of February 11, 1998, and informed the petitioners to this effect. By note of March 20, 1998, the State requested a further extension. On April 1, 1998, the Commission granted an additional 30 days, and informed the petitioners accordingly. In brief notes of June 24, 1998 and July 27, 1998, the petitioners inquired as to the status of the State's response.

7. The State filed its response by means of a communication dated August 28, 1998. The pertinent parts were transmitted to the petitioners on September 16, 1998, with a request that they present their observations in response within 60 days. The petitioners presented observations on November 19, 1998, the pertinent parts of which were transmitted to the State on December 8, 1998, with any response requested within 60 days. By note of February 8, 1999, the

State requested an extension for its response. The Commission granted an additional 30 days by note of February 18, 1999, and informed the petitioners accordingly.

8. By note dated May 18, 1999, the State filed its response. The pertinent parts were transmitted to the petitioners on May 21, 1999 with the presentation of any observations requested within 60 days. The petitioners filed their observations by note of July 20, 1999. The pertinent parts were transmitted to the State on August 3, 1999, with the presentation of any observations requested within 30 days. The State filed its response in a communication dated September 16, 1999. The pertinent parts were transmitted to the petitioners on September 24, 1999, with any response requested within 60 days.

9. The petitioners presented additional observations on November 24, 1999. The pertinent parts of those observations were submitted to the State in a communication dated December 7, 1999, with a request to submit any observations within 60 days. By note of February 1, 2000, the State requested an extension of time in which to respond. The Commission granted an additional 45 days by note of February 7, 2000, and so informed the petitioners. By note of April 11, 2000, the State requested a further extension. By note of April 24, 2000, the Commission granted an extension until May 15, 2000, and the petitioners were informed accordingly.

10. The State filed a brief reiteration of its position via a note received on April 28, 2000. The pertinent parts were transmitted to the petitioners on May 19, 2000. The petitioners filed a brief reiteration of their position with a date of June 30, 2000. The pertinent parts were transmitted to the State on July 20, 2000, with the presentation of observations, if any, requested within 30 days. The State submitted a brief response dated August 17, 2000. The pertinent parts were submitted to the petitioners on August 24, 2000, with observations, if any, requested within 60 days. The petitioners submitted a brief response dated December 7, 2000. The pertinent parts were submitted to the State in a communication dated December 20, 2000, with a request for observations, if any, within 30 days.

11. The State submitted observations by means of a note dated February 6, 2001. The pertinent parts were transmitted to the petitioners on March 26, 2001, with a request for observations, if any, within 30 days. On April 25, 2001, the petitioners submitted a brief response, which was transmitted to the State on August 17, 2001. The State submitted a brief reiteration of its position on October 10, 2001, the pertinent parts of which were transmitted to the petitioners in a communication dated October 12, 2001.

12. In a communication dated October 31, 2002, the petitioners submitted additional observations, the pertinent parts of which were transmitted to the State on January 7, 2003. The petitioners filed complementary information via a communication received on February 28, 2003. This was transmitted to the State on April 29, 2003, with any observations in response requested within 30 days. The State filed a further submission on June 27, 2003, the pertinent parts of which were transmitted to the petitioners on July 9, 2003.

III. POSITION OF THE PARTIES

A. The Petitioners

13. The petitioners contend that the State is responsible for Christian Domínguez' death due to the injuries he sustained from a severe beating he received at the hands of prison guards on February 15, 1995, and has failed to comply with its international obligations to punish the torture he suffered in accordance with its severity. They contend that, because the sentence in the criminal case did not adequately sanction the violations of Mr. Domínguez' right to life and physical integrity, his family has been denied justice. More specifically, they allege that the State misapplied the applicable legal standards and terminated the investigation and prosecution without ever establishing responsibility for his death.

14. The petitioners allege that on February 15, 1995, while incarcerated in the Unidad Penitenciaria No. XV del Servicio Penitenciario de la Provincia de Buenos Aires, Christian Dominguez was held in the Prison's Psychiatric Unit. He got hold of a piece of glass, and used it to hold Prison Doctor Bladimiro Pawlum Czesjic hostage by pressing it against his throat. While holding Doctor Czesjic hostage, he ordered Nurse Oscar Alberto Basallo to open the cell doors enabling him to pass to the Maximum Security section. Once there, he managed to have a guard open the first of two cell doors, facilitating his access to the central area of the prison, the Control Zone. While this was taking place, another guard alerted the Control Zone as to the hostage situation. Alerted by the guard, the chief guard on duty, Hugo Anibal Melián, made his way to Domínguez. At the same time, Domínguez released the doctor and took the nurse hostage instead. Before Domínguez managed to open the second cell door, Melián and other guards arrived and tried unsuccessfully to persuade Domínguez to release his hostage and surrender. They then managed to apprehend him, the hostage was released, and Domínguez was forcibly taken to Admissions sector.

15. The petitioners report that he was then placed in a cell used for transfers in and out of the prison, and stripped of his clothes from the waist down, including his shoes. His hands were handcuffed behind his back and then handcuffed to a bar of the cell. Under these conditions he was savagely beaten all over his body by prison guards to punish him for the incident described. As a result of the beating, he suffered severe injuries to his liver, causing a massive hemorrhage that led to his death. At that point he had been transferred to another holding area. The autopsy report indicated that, apart from the injuries to Domínguez' liver, there were injuries to his head, neck, extremities, back, lungs, spleen and ribs, that were inflicted by hands, feet, and a blunt or semi-blunt object.

16. The petition recounts that the Argentine Criminal Code stipulates in Article 144 (3) (ii): "si con motivo u ocasión de la tortura resultare la muerte de la víctima, la pena privativa será de reclusión o prisión perpetua. Si se causare alguna de las lesiones previstas en el art. 91 [lesiones gravísimas], la pena privativa de libertad será de reclusión o prisión de 10 a 25 años". Criminal proceedings were initiated and the Prosecutor indicted five employees of the Unidad Penitenciaria No. XV del Servicio Penitenciario de la Provincia de Buenos Aires under the amended Criminal Code. Four persons were charged under the cited Article with the crime of torture followed by death, and one person was charged with the crime of functional negligence.

17. On March 24, 1997, the Cámara en lo Criminal y Correcional de la Ciudad de Mar del Plata delivered its sentence. Of the four persons charged with torture followed by death, two

were found guilty of torture, one of functional negligence, and the remaining person was acquitted. The fifth person originally charged with functional negligence was also acquitted. The persons found guilty of torture were sentenced to 13 years of imprisonment and 11 years, respectively, and both were permanently barred from holding similar security positions in the future. The person found guilty of functional negligence was sentenced to 1 year and 6 months, and was barred from holding such positions for three years.

18. The petitioners maintain that Argentina is obliged under the American Convention and the Inter-American Convention to Prevent and Punish Torture not only to classify acts of torture as grave offences, but also punish those responsible for torture with penalties that fully correspond with the gravity of the act. The petitioners contend that while Argentina has complied with the first aspect of its obligations, it has failed in the present case to adhere to the second.

19. The petitioners maintain that the sentence confirmed that at least two of the five accused persons actively participated in the torture and, according to the expert evidence presented, that Mr. Domínguez' death was a necessary consequence of the blows received. However, no one was held responsible for the death as a result of those proceedings, and no other proceedings to establish such responsibility have ever been initiated.

20. More specifically, the petitioners contend that the Court misapplied the law by insisting on the demonstration of proof as to which of the two persons who participated in the acts of torture delivered the fatal injuries. They assert that, given the inability to prove which blows from which perpetrator caused the injuries that were ultimately fatal, the court sentenced both for the crime of torture, as opposed to the crime of torture followed by death. The petitioners argue that the court in effect imposed requirements that did not exist in the law, and which would be impossible to fulfill in the circumstances of a torture case, thereby facilitating the imposition of the lesser penalty. The petitioners sustain that the provision concerning torture followed by death contains no requirement to prove intent to kill, only intent to torture that in fact resulted in death, and that the latter was fully established in the sentence. They affirm that, because it was established that the two agents convicted of torture each participated in the torture session, they were each responsible for his death and should have been punished accordingly. In this regard, they maintain that the legal standard applied by the trial court to establish responsibility for and punish the crimes committed against Christian Domínguez was incompatible with the requirements of the American Convention and the Inter-American Convention to Prevent and Punish Torture. Although the State had duly codified the crime of torture followed by death to provide for a heightened punishment in that circumstance, the aggravated punishment was not properly applied in practice. The petitioners allege that the judiciary purposely and arbitrarily failed to prosecute and punish the crimes committed against Christian Domínguez in accordance with their severity.

21. The petitioners further assert that appropriate, adequate sentences serve as a deterrent for future human rights violators. They argue that, in Argentina, in instances of torture followed by death, the sentences imposed do not have the necessary dissuasive effect. In support of their claims, the petitioners cite a report of the United Nations Committee Against Torture on the situation of torture in Argentina[FN1] which they characterize as confirming that the case of Domínguez is not unique, and that the State systematically fails to comply with the obligation to

punish those responsible for acts of torture in accordance with their severity. The petitioners report that the Committee found that the severity of the penalties that punish torture, as contemplated in Article 144(3)(iii), was weakened in application because judges tended to impose lesser sentences with a diminished dissuasive effect. The petitioners add that the Committee took into account that, of the “numerous cases of torture followed by death” that had occurred since the enactment of the amended Criminal Code, only six had been sanctioned with perpetual imprisonment, described in the Code as the only applicable punishment.

[FN1] They cite the Committee’s analysis of the third periodic report of Argentina, in sessions 303, 304 and 306 (held November 12 and 13, 1997).

22. The petitioners also rely on a report concerning the treatment of torture in the criminal system published in 2002 by the Secretariat for Human Rights of the Province of Buenos Aires.[FN2] They characterize the report as recognizing that the distortion of the classes of crimes charged in cases of torture leads to inadequate sanctions. The report indicates that in cases of torture, any charges brought are usually reduced.

[FN2] Secretaría de Derechos Humanos del Gobierno de la Provincia de Buenos Aires, Programa Provincial de Prevención de la Tortura, Informe Preliminar: El tratamiento de la tortura ante el Sistema Penal de la Provincia de Buenos Aires, octubre de 2002.

23. The petitioners allege other violations of the State’s duty to investigate the torture and death of Mr. Domínguez. They contend that, even though it was demonstrated that at least the Director, Deputy Director and the Medical Officer facilitated the torture by omission, failing to stop the torture when it was within their means to do so, the senior officials of the prison were completely absolved of involvement in the events. According to the petition, information in the judicial file demonstrates that various authorities took specific steps aimed at covering up the events, including providing tickets for those involved to “disappear” until the situation had calmed down, with the idea that they could return once the matter had been classified as a killing in a fight (thereby justifiable). Further, they argue that additional steps should have been taken to investigate and ensure accountability for the death of Mr. Domínguez.

24. The petitioners maintain that they have satisfied the admissibility requirements established in the American Convention and the Commission’s Rules of Procedure. They report that once the sentence of March 24, 1997 was issued, convicting two perpetrators of torture and one of functional negligence, the Domínguez family had no legal standing to file an appeal. They cite Article 87(6) of the Code of Criminal Process of the Province of Buenos Aires in effect at the time of the facts as indicating: “el particular damnificado en un juicio de acción pública podrá ... apelar el auto de sobreseimiento y la sentencia absolutoria...”. As long as a penalty had been imposed, no matter how much the Domínguez family questioned its validity, they had no legal basis to contest it. (The petitioners note that this prohibition continues to apply in Article 79

of the current Code, which provides for a right of the affected person to appeal “except in the case of a conviction.”) Only the prosecutor had the legal standing to appeal the penalty or question the adequacy of the penal classification for which responsibility was established, and in the present case declined to file any appeal.

25. They indicate that while it might have been theoretically possible to file an extraordinary appeal before the Supreme Court on the basis of errors in the application of the law, this would have had no real possibility to correct the provincial court’s application of the lesser crime. The petitioners consider that, while civil actions were filed by the Domínguez family, these have no bearing on the claims raised before the Commission, and in no way offer the possibility of adequate reparation for the violations alleged.

B. The State

26. The principle contention of the State is that it responded to the situation denounced as required under the American Convention and the Inter-American Torture Convention. The State recognizes that the injuries sustained by the victim, and that resulted in his death, were received at the hands of individuals employed by the Prison Services of the Province of Buenos Aires on the premises of the Unidad Penitenciaria No. XV del Servicio Penitenciario de la Provincia de Buenos Aires on February 15, 1995. As employees of the Prison Service, those responsible were State agents, although they acted independently and not under any order or plan. The facts denounced were subjected to due investigation and prosecution as crimes, and those convicted were subjected to due punishment.

27. The proceedings titled Melián Hugo y otros, Tormentos seguidos de muerte were initiated before the Juzgado en lo Criminal y Correccional N° 3. On March 24, 1997, sitting as a unitary trial court, the First Chamber of the Cámara en lo Criminal y Correccional de la Ciudad de Mar del Plata condemned three of the five persons charged in those proceedings. Carlos Alberto Laino was sentenced to a prison term of 13 years and absolute disqualification from holding a similar security position in the future, Gerardo Luis De Benedetti to 11 years and absolute disqualification, and Hugo Aníbal Melián to 1 year and 6 months and disqualification from such positions for three years. Melián had been released, as his sentence was deemed discharged on the basis of time spent in preventive detention awaiting trial. The State indicates that these sentences demonstrate its compliance with its international obligations under the American Convention.

28. The State asserts that it has complied with its international obligation under the American Convention and the Inter American Convention to Prevent and Punish Torture to classify acts of torture as offences. Under the Criminal Code, the offence of torture when followed by murder is the offence that carries the highest penalty under Argentine criminal law. The State contends that it has also complied with its international obligations to punish those involved in the facts denounced in accordance with the serious nature of the crimes. The right to judicial protection recognized by the Convention establishes the right to a simple, prompt recourse to a competent, independent, impartial tribunal that affords the possibility but never the guarantee of a favorable result. The State indicates that such recourse was indeed provided to the petitioners in this instance.

29. The State maintains that the penalties imposed in domestic judicial systems are exclusively a matter of domestic law and competence. Each State is required to establish adequate penalties for acts defined as offences within its jurisdiction, and within this context, judges are required to apply these penalties in accordance with due process. The State notes that there are no international norms setting forth specific terms for specific penalties, so that the alleged lack of severity of the penalty imposed in the present case provides no basis for a complaint within the jurisdiction of the Commission. The State notes, moreover, that as established in Article 5(6) of the American Convention, the “essential aim” of a prison sentence is the “reform and social readaptation” of the prisoner, not the number of years served.

30. The State asserts that the opinion of the UN Committee Against Torture cited by the petitioners contains generic information, and as such has no application to the court that pronounced the sentence in this case. The State notes that, in fact, the Committee’s reference to the six convictions obtained for the crime of torture followed by death demonstrate that the provision is not a “dead letter” as claimed by the petitioners. Furthermore, the contention that more severe penalties can prevent an offence is an unproven opinion that has been disqualified from various angles of social sciences and law.

31. The State maintains that it complied with its obligation to investigate. It affirms that while certain offences, like torture, may make it difficult or impossible to determine the main perpetrator, this does not translate into a violation of the State’s duty to investigate. It contends that in criminal cases the accused is innocent until proven guilty, and the burden of proof is beyond a reasonable doubt. Furthermore, the petitioners have not presented any evidence to substantiate their contention that the judges were partial in their application of the law in the present case in deliberately declining to apply the maximum penalty. From the evidence presented, the domestic Court complied with its international obligations and found there was sufficient evidence for a conviction but insufficient evidence to impose the maximum penalty desired by the petitioners.

32. The State alleges three principal grounds for inadmissibility in the present case. First, it argues that the petition should be declared inadmissible because the petitioners have failed to state facts that tend to establish a violation of the rights guaranteed by the American Convention. The State maintains that with respect to these crimes against Mr. Domínguez, perpetrated by State agents acting independently, it nonetheless assumed responsibility and adequately complied with its international obligations by investigating the facts, prosecuting those implicated and sentencing those responsible. Second, following this same line of argument, the State argues that the Commission is not competent to review the decisions taken by the Argentine judiciary acting within the sphere of its faculties. In this sense, the Government sustains that, were the Commission to admit and examine the case, it would be acting as a fourth instance of review--substituting its judgment on questions of fact and domestic law--a function outside its mandate. The State notes that the petitioners’ mere disagreement or dissatisfaction with a domestic sentence is not a sufficient basis for the admissibility of their claim.

33. Third, the State affirms that the petition should be declared inadmissible because the petitioners failed to properly exhaust local remedies in the criminal proceedings, and because

civil proceedings seeking damages for the death remain pending. With respect to the criminal proceedings, the State explains that under the then-applicable legislation, it was obligatory that cases concerning homicide or torture be tried before a court acting as the sole instance, with limited appeals (including concerning errors of law) being subject to review before the Supreme Court.

34. The State characterizes that what the petitioners are seeking is a second instance of review, which, in the case of a conviction, exists only for the accused. In this sense, the State indicates that there are no domestic remedies available to challenge the specific quantum of the penalty imposed. Nor did the prosecutor have any obligation to appeal the convictions. The State maintains, however, that the Domínguez family had the possibility to file an extraordinary appeal before the Supreme Court on the basis of errors in law in the proceedings. The State clarifies that if what the petitioners are complaining about concerns errors in the application of the law, recourses were available; while if they are in fact complaining about errors in the evaluation of the proof, that is not subject either to domestic appeal, or to the competence of the Commission. The State further notes that the sentence with respect to Carlos Alberto Laino (13 years) is not yet final, and remains pending before the Court of Criminal Cassation.

35. With respect to the civil proceedings, the State reports that each parent filed a civil action for damages arising as a result of their son's death. The actions were later accumulated for decision. A sentence was issued on October 5, 2001, and is pending on appeal before the Cámara Segunda de Apelación en lo Civil y Comercial of the judicial department of La Plata. The State maintains that these pending proceedings demonstrate that the Domínguez family has had full access to effective remedies, and that these are following their due course.

IV. ANALYSIS OF ADMISSIBILITY

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

36. The petitioner is entitled under Article 44 of the American Convention to file a petition with the IACtHR. The petition identifies as the alleged victim an individual with respect to whom Argentina had undertaken to respect and guarantee the rights enshrined in the American Convention. With respect to the State, the Commission notes that Argentina has been a party to the American Convention since September 5, 1984, the date on which it deposited the corresponding instrument of ratification. The Commission is therefore competent ratione personae to consider the petition.

37. The Commission is competent ratione loci to hear the petition, insofar as it alleges violations of rights protected in the American Convention that are affirmed to have taken place within the territory of a State Party. The IACtHR is also competent ratione temporis, insofar as the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State at the date on which the acts referred to in the petition are alleged to have occurred. Finally, the Commission is competent ratione materiae, since the petition denounces violations of human rights protected by the American Convention.

A. Other requirements for the admissibility of the petition

a. Exhaustion of domestic remedies

38. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [must] 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. When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted is excused.[FN3] 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.

[FN3] See IACtHR, Exceptions to the Exhaustion of Domestic Remedies (Articles 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 N° 11, para. 17.

39. The claims raised in the present petition principally concern the judicial process carried out to pursue criminal responsibility for the torture and death of Christian Daniel Domínguez Domenichetti, with related claims concerning the investigation that served as the basis for that process. The central issue underlying the claims is that the criminal proceedings produced no finding of responsibility for Domínguez' death, with the petitioners arguing that the trial court imposed standards of proof that contravened the requirements of national and international law, and that the State therefore failed to comply with its obligations to punish torture in accordance with its international obligations.

40. The State argues that the petition is inadmissible, first, because the Domínguez family did not pursue an extraordinary *recurso de inaplicabilidad* to challenge the convictions issued through the criminal proceedings—specifically to challenge the alleged misapplication of the category of the crime—and thereby failed to exhaust applicable domestic remedies. It further argues that civil proceedings concerning the death remain pending, further demonstrating the nonexhaustion of applicable remedies.

41. The petitioners maintain that the Domínguez family had no standing to pursue ordinary remedies against the sentence they challenge, and that the extraordinary *recurso de inaplicabilidad* suggested by the State did not offer any effective possibility of producing the relief they sought. With respect to the civil proceedings, they allege that these are extraneous to the case presented and do not offer the possibility to repair the violations of the right to life, to be free from torture and to due judicial protection that form the foundation of their complaint.

42. The Commission first notes that the Domínguez family invoked the remedies provided for under law by filing the initial complaint that led to the charges being filed and a case brought against five state agents in relation to the torture and death of Domínguez Domenichetti.

However, the law did not provide such persons with standing to file an ordinary appeal should they consider a sentence of conviction inadequate or defective. Accordingly, the family was unable as a matter of law to pursue ordinary remedies of review within those criminal proceedings. The admissibility of the present petition cannot be conditioned on the exhaustion of remedies that were unavailable to the petitioners because they were procedurally barred from exercising them.

43. In terms of the burden of proof with respect to the requirements of Article 46, it should be noted that, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31 of the Commission's Rules of Procedure establishes that the burden then shifts to the State to demonstrate which specific domestic remedies remain to be exhausted and offer effective relief for the harm alleged.[FN4] Where the State then makes a showing that a certain remedy should have been used, the burden shifts back to the petitioner to show that it was exhausted or that one of the exceptions under Article 46 applies.[FN5]

[FN4] See also, e.g., Inter-Am. Ct.H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C N° 4, para. 64.

[FN5] See generally, *id.*, para. 60.

44. The State contends that the extraordinary *recurso de inaplicabilidad* was available to the petitioners, and would have served as an effective means to challenge the relevant aspects of the sentence of conviction. While it is the responsibility of the petitioner in a given instance to ensure that the State is placed on proper notice of an alleged violation of the Convention, so as to have an adequate opportunity to resolve the complaint within its own legal system, it is the State that is obliged to advance the investigation of any crime, including torture, which may be prosecuted *de oficio*.[FN6] In this regard, it must be noted that an appeal challenging the applicability of a law is an extraordinary remedy, as stated in Article 362 of the Code of Criminal Procedure of the Province of Buenos Aires in force at the time of the judicial process in question.

[FN6] See e.g., Report N° 62/00, Case 11.727, Hernando Osorio Correa, Colombia (admissibility), published in Annual Report of the IACRH 2000, OEA/Ser.L/V/II.111, Doc. 20 rev., 16 April 2001, para. 24.

45. The jurisprudence of the system has established that while in some cases such extraordinary remedies may be suitable for addressing human rights violations, as a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right. In principle, these are ordinary rather than extraordinary remedies.[FN7] In this regard, the petitioners have alleged a series of what they characterize as irregularities in the scope of the investigation carried out concerning the torture and death, as well as in the prosecution and conviction. These allegations concern the depth of the torture investigation, alleged efforts to cover up the crime and obstruct the investigation, and that charges were not brought against

individuals allegedly involved in that cover-up. It is not the purpose of an extraordinary appeal to remedy alleged irregularities in the investigative or charging stages of a criminal case, nor are there arguments on record suggesting that these issues would be susceptible to extraordinary review.

[FN7] All domestic systems have multiple remedies, but not all are applicable in all circumstances. If, in a specific case, the remedy is not appropriate, then obviously it need not be exhausted. See IACtHR, Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C N° 4, paragraph 63; IACHR, Report on Admissibility N° 68/01, Case 12.117, Santos Soto Ramírez et al., Mexico, June 14, 2001, paragraph 14; and Report N° 83/01 (Admissibility), Case 11.581, Zulema Tarazona Arriate et al, Peru, October 10, 2001, paragraph 24.

46. Christian Domínguez' parents initiated separate civil proceedings against the State for the torture and death of their son, and these remain pending. With respect to the State's contention that the resolution of these actions will render the petition before the Commission moot, the Commission notes that while an award of civil damages may form an important component of reparation, it is but one of several aspects. Given the scope of the claims raised by the petitioners, concerning the investigation of the torture and death, as well as the judicial process carried out on the basis of that investigation, it is not clear, nor has the State specified the extent to which the civil actions would address that scope of claims.[FN8] Moreover, Christian Domínguez was tortured and died in 1995. While civil litigation necessarily has its own requirements: "The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless [alleged] victim ineffective." [FN9]

[FN8] It may further be noted in this regard that, pursuant to the burden of proof set forth in Article 31 of the Commission's Rules of Procedure and the applicable case law, a party alleging non-exhaustion must raise specific rather than generic allegations concerning the remedies available and report on their effectiveness. The allegations of the State with respect to the efficacy of an action seeking compensation in the present case have been generic. See IACHR, Report N° 72/01, Case 11.804, Juan Angel Greco (Argentina), October 10, 2001, at para. 49; Report N° 52/97, Case 11.218, Arges Sequeira Mangas (Nicaragua), Annual Report of the IACHR 1997, para. 95.

[FN9] IACtHR, Case of Velázquez Rodríguez, Preliminary Objections, *supra*, para. 93; Case of Fairén Garbi and Solís Corrales, Preliminary Objections, *supra*, para. 92; Case of Godínez Cruz, Preliminary Objections, *supra*, para. 95.

47. For the foregoing reasons, the Commission concludes that the exceptions provided for in Article 46(2)(b) and (c) of the American Convention apply in the present case. As it has on previous occasions, the Commission would like to point out that the application of the exceptions allowed under Article 46 of the Convention to determine the admissibility of a petition does not imply any prejudgment of the merits of the petition. The criterion used by the Commission to examine the petition during the admissibility phase is preliminary in nature. Consequently, while

the Commission concludes that the record of the case supports its admissibility, the causes and effects that impeded the exhaustion of domestic remedies will be examined, as appropriate, when dealing with the merits of the dispute, in order to determine whether they constitute violations of the American Convention.

b. Time period for submission of the petition

48. 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 six months rule ensures legal certainty and stability once a decision has been taken. 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 Rules of Procedure 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.

49. In the present matter, taking into account (1) the conclusion set forth above, that the petitioners were excused from exhausting domestic remedies by virtue of their lack of standing to file any ordinary appeals within the criminal process; and, (2) that the judgment on the criminal proceedings was handed down by the Cámara en lo Criminal y Correccional de la Ciudad de Mar del Plata on March 24, 1997, and the petition was lodged with the Commission on September 23, 1997, the Commission concludes that the present petition was filed within a reasonable time from the date of the violations alleged in compliance with Article 46(1)(b) of the Convention.

c. Duplication of proceedings and res judicata

50. 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

50. Article 47(b) of the American Convention provides that allegations that do not state facts tending to establish a violation shall not be admitted. The State presents two related arguments to support its contention that the petition is inadmissible under this standard. First, it contends in general terms that the petition fails to present facts tending to characterize the violation of any protected right. Second, it argues more specifically that the petition is essentially seeking that the Commission review a judicial decision with which the petitioners are dissatisfied. This would, in

the view of the State, require the Commission to act as a “fourth instance” of review, a function beyond the scope of its competence.

51. With respect to the State’s argument that review of this petition would require the Commission to act as a “fourth instance” beyond the sphere of its competence, it may be recalled that the IACtHR 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]

[FN10] See generally, IACtHR, Report № 101/00, Case 11.630 Arauz et al. (Nicaragua), Oct. 16, 2000, in Annual Report of the IACtHR 2000, para. 56, citing IACtHR, Report № 39/96, Case 11.673 Marzoni (Argentina), October 15, 1996, in Annual Report of the IACtHR 1996, paras. 50-51.

[FN11] IACtHR, Report № 7/01, Case 11.716 Güelfi (Panama), Feb. 23, 2001, in Annual Report of the IACtHR 2000, para. 20, quoting Marzoni, *supra*, para. 51.

[FN12] *Id.*

52. In the present case, the petitioners argue that the trial court misapplied domestic law, and in so doing, applied a standard for decision that violated both the American Convention and the Inter-American Convention to Prevent and Punish Torture. The Commission considers that examining their arguments on the merits would call into question both the interpretation and application of national law and the quantification of the prison sentences imposed. These are questions that correspond, in principle, to the national judiciary, absent a showing that the courts acted beyond their sphere of competence, or in a manner that was manifestly unfair.

53. Independently of their challenge with respect to the legal standards applied at trial, the petitioners allege serious irregularities in the investigation of the torture and death of Christian Domínguez. While the Commission will not review alleged errors of fact or internal law as such, it is competent to review allegations that the State failed to comply with its duty to conduct a prompt, thorough and effective investigation of facts including torture and death so as to ensure that they are effectively prosecuted and punished. More specifically, the petitioners allege that the responsibility of at least three high-ranking officials of the prison was not duly investigated or prosecuted, notwithstanding indicia of their negligence in failing to prevent or stop the torture, and complicity in attempts to cover up the torture and obstruct the judicial investigation.

54. The Commission’s review at this stage in the proceedings is not intended to establish whether a violation was committed, but whether the facts alleged, if shown to be true, could tend to establish the violation of a protected right. This is necessarily a summary or *prima facie* analysis and implies no prejudgment on the merits.[FN13] The Commission considers that the

requirements established in Article 47(b) and (c) of the American Convention have been satisfied with respect to the claims that the authorities failed to properly investigate allegations that other prison officials were complicit in the crimes or in the obstruction of justice. The Commission will review the merits of these claims in light of the terms of Articles 8, 25 and 1(1) of the American Convention. The claims under Articles 4 and 5 of the American Convention, and Article 6 of the Inter-American Convention to Prevent and Punish Torture, concerning the penalties applied to those convicted in the domestic proceedings, are deemed inadmissible.

[FN13] See IACtHR, Report N° 40/02, Arguelles et al. (Argentina), Petition 12.167, October 9, 2002, para. 54, citing Report N° 128/01, Herrera and Vargas ["La Nación"] (Costa Rica), Case 12.367, Dec. 3, 2001, para. 50.

V. CONCLUSIONS

55. The Commission concludes that it is competent to take cognizance of the instant case, and that the petition is admissible with respect to alleged violations of Articles 8, 25 and 1(1) as defined above, pursuant to Articles 46 and 47 of the American Convention.

56. 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 alleged violations of the rights recognized in Articles 8 and 25, in relation to Article 1(1) of the American Convention on Human Rights.
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 in the city of Washington, D.C., U.S.A., on the 22nd day of the month of October, 2003. (Signed): José Zalaquett, President; Clare Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.