

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 58/05; Petition 350/02
Session:	Hundred Twenty-Third Regular Session (11 – 28 October 2005)
Title/Style of Cause:	Leopoldo Garcia Lucero v. Chile
Doc. Type:	Decision
Decided by:	President: Clare K. Roberts; First Vice-President: Susana Villaran; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Freddy Gutierrez, Florentin Melendez. Commissioner Jose Zalaquett, a Chilean national, did not participate in the discussion or decision of the case, in accordance with Article 17(2)(a) of the Commission's Rules of Procedure.
Dated:	12 October 2005
Citation:	Garcia Lucero v. Chile, Petition 350/02, Inter-Am. C.H.R., Report No. 58/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANT: "Seeking Reparation for Torture Survivors"
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## I. SUMMARY

1. On May 20, 2002 the organization Seeking Reparation for Torture Survivors ("REDRESS") (hereafter "the petitioners") presented a complaint to the Inter-American Commission on Human Rights (hereafter "the Commission") against the Republic of Chile (hereafter "the State") for the alleged violation of the rights to a fair trial (Article 8) and judicial protection (Article 25), together with violation of the obligations to respect rights and adopt appropriate measures (Articles 1(1) and 2) provided in the American Convention on Human Rights (hereafter "the American Convention") through failure to provide reparation and compensation for the injury suffered by Mr. Leopoldo Garcia Lucero who was allegedly captured by the Chilean authorities on September 16, 1973 and unlawfully detained in the First Police (Carabineros) Precinct and then at the National Stadium, where he was tortured. In December 1973, Mr. Garcia was transferred to the concentration camp at Ritoque and from there to Tres Alamos, and was subsequently expelled to the United Kingdom on June 12, 1975.

2. The petitioners argue that the conditions of admissibility have been fulfilled and that the rule of Article 46(1) (a) of the American Convention requiring prior exhaustion of domestic remedies is not applicable because Chilean law lacked effective remedies for providing adequate reparation to victims of torture. With respect to the time limit for submitting the petition, they argued that this should not prevent the admissibility of the petition because it related to continuing violations. The petitioners also argued that the severity of the violations, the lack of

reparations and the impunity that surrounds the crime of torture in Chile, and the procedural steps taken by Mr. Garcia to obtain compensation through the only recourses available, as well as his personal circumstances as a refugee, are sufficient to consider that the petition was presented within a reasonable time.

3. In response, the Chilean State asked that the petition be declared inadmissible, pursuant to Article 47(c) of the American Convention, on the grounds that the petitioner's allegations were wholly out of order because they relate to events that occurred prior to the deposit of the instrument of ratification and that began prior to March 11, 1990. Consequently, and in keeping with the declaration of recognition of jurisdiction made by the State when it ratified the American Convention, the facts of the complaint are expressly excluded from the jurisdiction of the Commission and of the Inter-American Court of Human Rights ("Inter-American Court").

4. After examining the positions of the parties, the Commission has concluded that it is competent to decide the complaint presented by the petitioners and that the case is admissible, in light of Article 46 of the American Convention. Consequently, the Commission has decided to notify its decision to the parties and to publish this admissibility report and include it in its Annual Report.

## II. PROCEEDINGS BEFORE THE COMMISSION

5. On May 20, 2002 the Commission received a petition submitted by "Seeking Reparation for Torture Survivors" ("REDRESS") against the Chilean State for the alleged violation of the rights established in Articles 5, 7, 8 and 25 of the American Convention, taken in concordance with Articles 1(1) and 2 of that instrument. The Commission assigned the petition the number 350/02 and requested additional information from the petitioners in order to establish its admissibility.

6. On June 25, 2003 the petitioners presented additional information as requested. On June 30, 2004 the Commission acknowledged having received from the petitioners, for presentation to the government of Chile, the following documentation in English: "Petition to the Inter-American Commission of Human Rights. Leopoldo Garcia, 15 May 2002" and "Additional Information to the Inter-American Commission on Human Rights (Ref. 0350/2002)". The Commission requested the petitioners to submit that documentation in Spanish, the language that must be used in presentations to the Government of Chile.

7. On November 3, 2004 the Commission acknowledged receipt from the petitioners of the Spanish translation of the documents in question. That information was transmitted to the State on November 23, 2004, giving it three months to present its observations.

8. On March 15, 2005 the Commission acknowledged receipt of Note 059 dated February 16, 2005 from the Ministry of Foreign Relations of Chile whereby the State submitted its observations opposing the admission of the petition. On March 16, the Commission transmitted the pertinent portions of the State's response to the petitioners for their observations. The response of the State was presented late: the State did not request an extension of the time limit for responding, nor did it attempt to justify its delay in doing so.[FN2]

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[FN2] Article 30(3) of the Commission's Rules of Procedure provides: "The State shall submit its response within two months counted from the date the request is transmitted. The Executive Secretariat shall evaluate requests for extensions of this period that are duly founded. However, it shall not grant extensions that exceed three months from the date of the first request for information sent to the State." The Commission is not supposed to accept a late response from the State but in this case, because of the importance of the issue, it will take it into account.  
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9. On April 19, 2005 the petitioners presented their observations to the response of the State. In that communication, the petitioners clarified the scope of their complaint and reiterated their position with respect to the Commission's jurisdiction to declare admissibility and to examine the merits of the case. On May 25, 2005 the information submitted by the petitioners was presented to the State without requesting its observations, given that the petitioners' observations merely reiterated the arguments contained in the petition. There has been no further correspondence with the parties since that date.

### III. POSITIONS OF THE PARTIES

#### A. Position of the petitioner

10. The original complaint alleged that the State of Chile was responsible for violations of Articles 5, 7, 8 and 25 of the American Convention, taken in concordance with Articles 1(1) and 2 of that statute, and for violation of Articles 1 and 9 of the Inter-American Convention to Prevent and Punish Torture. On April 19, 2005, the petitioners presented a communication clarifying the scope of the petition, as follows:

The facts alleged against the democratic government relate, on one hand, to failure to fulfill the obligations assumed by the State of Chile to adapt its domestic legislation to the precepts of the American Convention, thereby violating Articles 1(1) and 2 of the Convention; and on the other hand, the application of this legislation, which denies the petitioner's right to justice, thereby violating Articles 8 and 25 in relation with Article 1(1).

By virtue of the petitioners' clarification, the Commission did not pursue its examination of the alleged violations of Articles 5 and 7 of the American Convention, or the alleged violations of Articles 1 and 9 of the Inter-American Convention to Prevent and Punish Torture.

11. The petition alleges that on September 16, 1973, Mr. Garcia Lucero was arbitrarily arrested by militarized police ("Carabineros") in the city of Santiago. During his initial detention he was held incommunicado and was not informed of any charges against him. The petition alleges that Mr. Garcia was tortured in various ways by members of the Carabineros. Every two or three hours they tied up his hands and feet, blindfolded him, hit him on the head, and immersed him in water. On one occasion, when he was falling semi-conscious to the floor, one of the Carabineros hit him with a rifle and cut open his forehead. He almost lost the sight of one eye, and his face is still disfigured by scars.

12. The complaint declares that Mr. Garcia was subjected to other forms of torture, such as being placed on a chair covered with blood stains that, his torturers said, came from persons they had previously killed, and that if Mr. Garcia did not confess his daughter would be killed right there in front of him. According to the petitioners, after two days of continuous torture and degrading treatment, the police transferred the petitioner to the National Stadium, where the torture intensified. One of the forms of torture repeatedly inflicted upon him was to tie his hands to a wooden pole lifted by a crane. Another repeated torture was the application of electric shocks: he was submerged in a barrel of water and then taken out and, with his clothes still wet, electricity was applied to him with an instrument called the "picana" (cattle prod). Mr. Garcia was held in the National Stadium for approximately, two months cut off from any contact with his family. When his wife finally found out where he was and went to visit him, she was allowed to visit him for only half an hour before he was moved to "Chacabuco", a concentration camp in Antofagasta, 2000 km from Santiago. Mr Garcia spent approximately 13 months in the concentration camp. While there, he underwent an operation to repair a hernia in the groin resulting from the torture inflicted upon him.

13. The petition also states that in November 1974 the Ministry of the Interior issued its first decree ordering the expulsion of an initial 100 persons, including Mr. Garcia, from Chilean territory. Pursuant to that decree, Mr. Garcia was escorted from Tres Alamos to the airport on June 12, 1975, and departed with his family for the United Kingdom, where he has been living since that date. The petitioner is still unable to work as result of the injuries caused by the torture inflicted upon him while detained for fifteen months in Chile.

14. Subsequent to these events, on April 8, 1978, the Military Government issued Decree Law No. 2191 (the "Self Amnesty Law") which, the petitioners argue, rendered all judicial proceedings futile and ineffective. The Chilean courts have repeatedly applied that Decree and the Supreme Court has affirmed its constitutionality, eliminating any prospect of success for an appeal to the domestic courts, and thereby erecting a final obstacle to any type of reparations in the present case.

15. According to the petitioners, after the reestablishment of democratic government in Chile in March 1990 there began a period of transition which produced numerous reforms to the country's legal system. Nevertheless, the reparations measures undertaken by democratic governments to address human rights violations of the past did not include torture survivors, leaving them deprived of any legal remedy and any other form of compensation. Thus, the torture victims are today still without access to justice and they have received no compensation through any administrative act or procedure. The petitioners argue that, more than 15 years after its ratification of the American Convention, the State has not provided effective remedies for the victims of torture, and has thereby violated its international obligations.

16. The petitioners maintain that, despite the Government's publication on November 10, 2004 of the report of the National Commission on Political Imprisonment and Torture (the "Valech Commission"), in which the Mr. Garcia is included in the list of persons recognized as victims, that report does not in itself constitute a full measure of preparation, nor do the measures that it proposes. Specifically, the Valech Commission report reveals the atrocities reported by

more than 35,000 Chileans, including more than 3,000 women who were raped, but it omits the names of the torturers. On December 24, 2004, Law 19,992, "Law on reparations for recognized victims of political imprisonment and torture", was adopted, establishing a compensatory pension and other benefits in favor of persons on the "list of political prisoners and torture victims" in the Valech report. That law specifies that the pension "will be incompatible with those granted under Laws 19.234, 19.582 and 19.881, and persons in such situation may opt for one of these benefits in the manner determined by the corresponding regulation.

17. In August 1993, the Chilean Congress approved Law 19.234 ("Program to Recognize Politically Exonerated Persons"). The petition claims that on December 23, 1993, Mr. Garcia submitted an application under that program, with the required documentation, and that he added a letter outlining his particular situation, explaining in detail the torture that he had suffered and the disabilities that this had produced. In December 1994 Mr. Garcia received a letter acknowledging receipt of his application and requesting additional documentation to demonstrate that he has been dismissed on political grounds. On August 19, 1995, Mr. Garcia received a letter informing him that he was recognized as "politically exonerated". On February 13, 1996, Mr. Garcia received a further communication advising him that he would not receive a compensatory pension ("noncontributory pension"), but merely an additional time bonus (abono por tiempo de gracia) for his retirement, covering a period of eight months, even though he was dismissed in 1973.

18. According to the petition, Mr. Garcia was able to return to Santiago on a visit in 1998, and a friend working with the government helped him to submit his case under Law 19,582, which amended Law 19,234. In October 2000, Mr. Garcia received a letter confirming that he met the necessary conditions to obtain a "noncontributory pension". In January 2001, Mr. Garcia received a certificate awarding him a "noncontributory pension" in the ludicrous amount of \$79,776 pesos a month (approximately £71 sterling). For Mr. Garcia, who had been expelled from Chile and was living in the United Kingdom, this amount was not only meaningless but made "a mockery of his suffering as a torture survivor who had been waiting for justice for more than 30 years in exile".

19. The petitioners maintain that this amount failed not only to recognize the amount of his lost savings and salaries, but also to take into account his disabled status. The torture he suffered not only affected his mobility but also his capacity to learn and his memory. Thus, although he has lived in the United Kingdom for 30 years, he has been unable to learn English and has had to rely on his wife to translate for him in matters ranging from day-to-day activities to the most complex affairs. Upon further inquiries he was advised that, while Law 19.234 and 19.582 did take into account mental or physical incapacity, the causes of such incapacity were not considered in determining the awards, and that the Ministry has discretionary powers to decide such matters. In May 2001, Mr. Garcia was advised by the Ministry of Social Services to seek further compensation through the Ministry of Justice, but he has not obtained an outcome favorable to his interests.

20. The petitioners explained in their submissions to the Commission that the object of their complaint "does not relate to violations of human rights flowing from the illegal detention,

torture and expulsion of the petitioner as described in his complaint", but is focused on three questions:

- a) The non-repeal, and hence the continued validity, of Amnesty Law (Decree Law 2191), which the military government issued to amnesty itself, but which continues in effect and application during the democratic Government, even after Chile ratified the American Convention and assumed the commitment to comply with it.
- b) The failure to identify and prosecute those responsible, and to punish the perpetrators of the acts, which began during the military government and continue under the democratic and constitutional government; and
- c) The failure to make civil reparations for victims of torture and, until four months ago, to offer any official recognition and any possibility for administrative compensation.
- d) The facts alleged against the democratic Government relate, on one hand, to the failure to fulfill the obligations assumed by the State of Chile to adapt its domestic legislation to the norms of the American Convention, thereby violating Articles 1(1) and 2 of the Convention; and on the other hand, the application of this legislation, which denies the petitioner's right to justice, thereby violating Articles 8 and 25 in relation with Article 1(1).[FN3]

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[FN3] See communication of the petitioners dated April 15, 2005, and received by the Executive Secretary at on April 19, 2005, which the Chilean State has not contested since its response of March 15, 2005.  
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21. As to the requirements for admissibility of the petition, it is argued that the rule of prior exhaustion of domestic remedies, contained in Article 46(1) of the Convention, is not applicable to this case because Chilean legislation lacks effective remedies to afford adequate reparations for torture victims, and that this case thus falls under the exception to that rule contained in Article 46(2)(a) of the Convention. With respect to the time limit for presenting petitions, it is argued that, because the petition complains of continuing violations, the reasonable time test cannot prevent its admissibility. The petitioners also argue that the severity of the violations, the lack of reparations and the impunity that surrounds the crime of torture in Chile, and the procedural steps taken by Mr. Garcia to obtain compensation through the only recourses available, as well as his personal circumstances as a refugee, are sufficient to warrant consideration that the petition was presented within a reasonable time.

22. By virtue of the facts and considerations related, the petition asks that the case be declared admissible because of violations of the rights of Leopoldo Garcia Lucero to a fair trial and to a judicial remedy course established in Article 8 and 25 of the American Convention, taken in relation with Articles 1(1) and 2 of that instrument.

#### B. Position of the State

23. The State observed that, as is well known, the reestablishment of democracy in Chile marked the beginning of a lengthy and arduous process of updating and adapting its conduct and its internal rules to bring them into accord with international human rights treaties. The most

important fact in this connection was approval of a constitutional reform providing for general recognition of international treaties in this area. Once the democratic government was installed, the new Parliament approved and subsequently ratified a series of treaties relating to human rights, including the American Convention on Human Rights, which Chile ratified on August 21, 1990.

24. The State notes that, in the specific case of the Pact of San Jose, Chile deposited its instrument of ratification with the OAS, accompanied by the following declaration or reservation:

a. The Government of Chile declares that it recognizes, for an indefinite period of time and on the condition of reciprocity, the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed a violation of the human rights established in the American Convention on Human Rights, as provided for in Article 45 of the Convention.

b. The Government of Chile declares that it recognizes as legally binding the obligatory jurisdiction of the Inter-American Court of Human Rights in cases dealing with the interpretation and application of this Convention pursuant to Article 62.

c. On formulating said declarations, the Government of Chile notes that the recognition of jurisdiction it has accepted refers to situations occurring subsequent to the date of deposit of this instrument of ratification, or, in any event, to circumstances which arose after March 11, 1990. Likewise the Government of Chile, on accepting the competence of the Inter-American Commission and the Inter-American Court of Human Rights declares that these organs, in applying Article 21(2) of the Convention, shall refrain from judgments concerning the concept of public use or social interest cited in cases involving the expropriation of an individual's property.

25. The State maintains that this reservation is valid in accordance with the rules of the Vienna Convention on the Law of Treaties, because it is not incompatible with the object and purpose of the American Convention. That reservation, validly entered by the State, imposes two limitations on the jurisdiction of the Commission for hearing individual petitions: "a restriction *ex ratione temporis* and a restriction *ex ratione materiae*".

26. In the present case, the State argues that the first of these limitations applies, in that the jurisdiction of the oversight bodies was recognized only as of the deposit of the instrument of ratification, and as regards events that began prior to March 11, 1990, such events are expressly excluded from such jurisdiction.

27. The State noted that this decision relating to sovereignty did not deny the utility of the mechanisms of the International Community in the handling of such situations, but that it was convinced that the Chilean people and their democratically elected bodies were the appropriate ones to attempt to heal the wounds left by the human rights violations that were committed during the military régime. The State also explained that "inclusion of the reservation does not imply that events prior to 1990 cannot be held against the State as an uninterrupted entity".

28. Consequently, Chile asked the Commission, pursuant to Article 47 (c) of the American Convention, to declare this petition inadmissible because the petitioner's own statement reveals it

to be wholly out of order, on the grounds that it relates to events that occurred before the deposit of the instrument of ratification and that began prior to March 11, 1990.

#### IV. ANALYSIS OF ADMISSIBILITY

##### A. General considerations

29. Before examining the admissibility of the complaint, the Commission deems it necessary to clarify that the petitioners' complaint in this case is not addressed to the illegal detention, torture and expulsion of Leopoldo Garcia, at the hands of agents of the State agency during the military régime, but rather questions the lack of access to civil reparations for torture victims, particularly after recognition of State responsibility for the cases of torture documented in the Report of the Commission on Political Imprisonment and Torture. The petitioners maintain that that Commission offers a possibility for obtaining economic compensation for the victims of systematic torture by the military régime, but that it fails to consider aggravating circumstances such as those of victims who were rendered incapable of working or those who, in addition to being tortured, were expelled from the country and are residing in countries where the basic cost of living is higher than in Chile.

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

30. The petitioners are entitled by Article 44 of the American Convention to present complaints before the Commission. The petition names as the alleged victim Mr. Leopoldo Garcia, with respect to whom Chile is committed to respect and guarantee the rights enshrined in the American Convention. The Commission notes that Chile has been a State Party to the American Convention since August 21, 1990, when it deposited its instrument of ratification. The Commission therefore has jurisdiction *ratione personae* to examine the petition.

31. The Commission has jurisdiction *ratione loci* inasmuch as the alleged violations took place within the territory of Chile, a State party to the American Convention. The petitioner argues that the Chilean State is liable for payment of reparations to him that will recognize the higher cost of living in the United Kingdom, imposed upon him by his illegal expulsion from Chile, which also prevented him from working to support his family. In the past, the Commission has decided various cases in which it found that the expulsion of Chilean nationals by their own State was contrary to the rights established in the American Declaration on the Rights and Duties of Man.<sup>[FN4]</sup> Consequently, the fact that Mr. Garcia finds himself in the United Kingdom as a result of State action must be taken into consideration.

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[FN4] See for example Resolution 10/85, Case 8095 (Chile), March 5, 1985; Resolution 11/85, Case 9269 (Chile), March 5, 1985.

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32. The Commission has jurisdiction *ratione temporis* because the petition does not ask the Commission to pronounce itself on events that occurred prior to August 21, 1990. The principal

argument presented in the State's response of February 18, 2005, is that Chile is not responsible, under the American Convention, for violations allegedly committed during the period between September 11, 1973 and March 11, 1990. In the course of their admissibility arguments, the petitioners clarified the scope of their petition, excluding from it all allegations relating to such events.[FN5] The Commission considers that in this case the allegations refer only to events that occurred after August 21, 1990.

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[FN5] The petitioners declared: "The acts or omissions that the petitioner submits for examination by the Commission were committed after Chile's ratification of the Convention, which according to the response of the government dated March 15, 2005, is the moment as of which it may respond for acts committed within its realm".

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33. The State of El Salvador filed a preliminary objection in the Serrano Cruz case similar to the Chilean State's response in the present case, to the effect that the Inter-American Court lacked jurisdiction *ratione temporis*. In that case, the State asked the Court, on the basis of its declaration recognizing the contentious jurisdiction of the Court, not to examine events that occurred prior to the date of that declaration, and that began before the deposit of the declaration of recognition.[FN6] The Inter-American Court interpreted that declaration not as a "reservation" but as a "time constraint" with respect to cases that could be submitted to the court, excluding from its jurisdiction events or facts prior to the date of deposit of the declaration, and admitting events or facts that allegedly occurred after the recognition of the court's jurisdiction, such as the failure to conduct a civil or criminal investigation to determine what happened.[FN7]

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[FN6] I/A Court HR, Sisters Serrano Cruz case, Judgment (merits) of November 23, 2004.  
[FN7] *Id.* para. 62

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34. The principal argument presented in the response by the State on February 18, 2005 is that Chile is not responsible, under the American Convention, for violations allegedly committed during the period between September 11, 1973 and March 11, 1990. The Commission considers that in the case at hand the allegations refer only to the judgments handed down by the Chilean courts between 1999 and 2003, when the Convention was already in effect for Chile. As to the State's argument that the Commission should declare the petition inadmissible because the events began prior to March 11, 1990, the Commission rejects this argument because the judicial proceedings constitute events independent of the summary executions. The Commission bases this conclusion on the judgment of November 23, 2004 in the case of the Sisters Serrano Cruz v. El Salvador, in which the Inter-American Court held:

84. The Court considers that the events that occurred after recognition of the Court's jurisdiction by El Salvador, referring to the alleged violations of Articles 8 and 25 of the Convention in relation with Article 1(1) thereof, are not excluded by the limitation imposed by the State, because what is at issue are judicial decisions constituting independent events that began after El Salvador's recognition of the Court's jurisdiction, and that could constitute specific

and independent instances of the denial of justice occurring after recognition of the Court's jurisdiction.

35. If persons in a situation similar to that of Mr. Garcia, but living in Chile, had succeeded in obtaining substantial reparations through the courts, it would have been reasonable to demand that Mr. Garcia exhaust judicial remedies in Chile as well. Moreover it is evident, given his straightened circumstances, that Mr. Garcia has tried to exhaust all possibilities within his reach to secure reparations for the injuries suffered, and that he did manage to obtain a pension granted to politically exonerated persons.

36. Finally, the Commission has jurisdiction *ratione materiae* because the petition complains of possible violations of human rights protected under the American Convention that, if proven, could constitute violations of Articles 1(1) 2, 8 and 25 of the Convention.

B. Requirements of admissibility

1. Exhaustion of domestic remedies

37. As a requirement for admissibility, Article 46(1) of the American Convention requires that the remedies under domestic law have been pursued and exhausted. The petitioners argue that the application of Decree Law 2191 be prevented Mr. Garcia from exhausting domestic remedies (*supra*, paragraph 20). As well, the consequences of application of the amnesty law in practice meant that, in Mr. Garcia's case, the Chilean justice system would not identify and punish the persons who committed the alleged violations. Moreover, that same law prevented the filing of any lawsuits for civil reparations to compensate for the damage suffered.

38. The petitioners point out that, under Chilean law, the possibility of initiating a civil action does not necessarily depend on the results of the criminal proceedings. Nonetheless, the civil claim must be lodged against a specific person in order to establish that person's responsibility for the acts and to determine the payment of compensation.[FN8] The unanimous jurisprudence of the Chilean courts holds that civil actions may only proceed once the *corpus delicti* has been produced and the guilty party against whom such action is to be taken has been determined.[FN9]

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[FN8] IACHR, Report 61/01. Case No. 11.771 Samuel Alfonso Catalan Lincoleo (Chile), April 16, 2001, footnote 13.

[FN9] IACHR, Report 36/96, Case No. 10.843 Garay Hermosilla, (Chile), October 15, 1996, para 9,

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39. The petitioners emphasize that domestic Chilean legislation contains no effective legal remedies for obtaining compensation for torture victims. In the Chilean Civil Code there are no specific provisions on reparation for torture victims. The only way a victim can obtain compensation is through the provisions in Section XXXV, Book IV, regarding monetary

obligations as a consequence of torts. These provisions do not afford remedies for torture victims because they treat torture as a simple tort and allow no claims against the State.

40. Art 254(3) of the Code of Civil Procedure makes it mandatory that a civil suit must contain the name, address and profession or office of the individual against whom the suit is brought. Clearly, this provision is inadequate for cases involving grave human rights violations (especially if systematic and widespread), but when the violations are acts of torture, these requirements are particularly unreasonable since identifying the perpetrator is almost impossible in the majority of the cases. Moreover, Article 40 of the Code of Criminal Procedure states that civil action may be taken against the responsible party himself and against his heirs; the courts have interpreted this provision, together with Article 254 (3) of the Code of Civil Procedure, as limiting the scope of civil suits to identifiable individuals, thereby preventing claims against the State itself.

41. The Chilean Supreme Court has applied the statute of limitations (*prescripción*) to dismiss claims for compensation for mental suffering caused by executions committed by State agents during the military dictatorship.[FN10] It is argued that the Chilean judicial system has systematically applied such statutory limitations to judicial actions for reparations for damages involving human rights.

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[FN10] See Report No. 36/96, Case 10.843 (Chile), October 15, 1996, paras. 65-66: “The petitioners allege furthermore that the Amnesty Decree-Law prevented the families of the victims from seeking reparations in the civil courts. (...) In Chile, the ability to bring civil action is not necessarily linked to the results of the criminal proceedings. Civil charges, however, must be brought against a specified person in order to establish the responsibility for the alleged deeds and to determine the payment of compensation. The failure of the State to conduct an investigation made it virtually impossible to establish any such responsibility before the civil courts. Notwithstanding the fact that the Supreme Court stressed that civil and criminal proceedings are independent, the manner in which the amnesty was applied by the courts clearly affected the right to seek reparations in the civil courts, by making it impossible to individualize or identify those responsible.”

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42. The petitioners also assert that Decree Law No. 2191 bans investigations of past violations necessary to determine individual responsibility in the present case. The Chilean amnesty only applies to criminal responsibilities, but without identification of the perpetrator, it is impossible to establish civil liability in Chilean courts. Civil claims must be lodged against a specific person in order to establish that person’s responsibility for the alleged acts and to determine the payment of compensation. Consequently, the petitioners argue, the right to compensation for damages is not only illusory but also juridically impossible. In fact, not a single civil suit brought by torture survivors for damages has succeeded.

43. The State did not invoke the failure to exhaust domestic remedies. Consequently, the Commission considers that the Chilean State did not invoke this objection in the initial stages of the proceedings.

44. The Inter-American Court has repeatedly held that in order to be timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding; otherwise, it will be presumed that the respondent State tacitly waived this defense.

45. The Commission therefore considers that the Chilean State waived the objection of failure to exhaust domestic remedies, because it did not present this objection at the first procedural opportunity, i.e. in its response to the petition that initiated the proceedings.

## 2. Timeliness of the petition

46. Article 46(1)(b) of the Convention provides that a petition must be lodged within a period of six months from the date on which the petitioners are notified of the final judgment exhausting domestic remedies.

47. In the case at hand, the Commission has established that the State has tacitly waived its right to invoke the exception to the failure to exhaust domestic remedies, for which reason Article 46(1)(b) of the Convention does not apply. Nevertheless the requirements for exhaustion of domestic remedies and for presentation of the petition within six months of the judgment exhausting those remedies are independent. The Commission must, therefore, determine whether the petition was presented within a reasonable time.

48. The situation of Mr. Garcia is distinct from that of Chileans who were tortured but were not expelled from Chile. Under the second assumption, it would be reasonable to expect that the presumed victim would have exhausted domestic remedies within six months after the date of notification. However, in the present case, the facts show that Mr. Garcia was so severely tortured that he was physically and psychologically incapacitated for work, he was unable to learn English despite living in Great Britain for nearly 30 years, and his persistent efforts to secure compensation reveal his financial situation. The Commission considers that it is not reasonable to require a person under such circumstances to travel from United Kingdom to Chile and initiate a legal action for reparations, when no person in the same situation as Mr. Garcia has been compensated as the result of a judicial decision. Finally, the Chilean State began, in 2004, to address the situation of persons who were tortured in the prisons and detention centers of Chile in the 1970s, and Law 19.992, establishing a compensatory pension for the victims of political imprisonment and torture, was adopted in December 2004, some 30 years after the facts took place. Consequently, the Commission concludes that the petition at hand was presented within a reasonable time.

## 3. Duplication of proceedings and res judicata

49. There is nothing in the file to indicate that the substance of the petition is pending in any other international proceeding for settlement, or that it is substantially the same as any petition previously studied by the Commission or other international body. Hence, the requirements set forth in Articles 46(1)(c) of the Convention have been met.

## 4. Characterization of the facts alleged

50. The Commission notes that the petition raises questions about the denial of justice through failure to make civil reparations to the relatives of a victim of grave human rights violations, and that these are compounded by criminal impunity through application of an amnesty law. The petitioners argue that the American Convention guarantees access to justice to all persons to indicate rights that have been violated. Consequently, the Commission concludes that the petitioners' complaint describes facts that, if proven, could constitute violations of the rights protected by Articles 8 and 25 of the American Convention, in relation with the obligations of Articles 1(1) and 2, and that the requirements of Article 47(b) are thereby fulfilled.

## V. CONCLUSION

51. The Commission concludes that the case is admissible and the Commission is competent to examine the claim submitted by the petitioners relating to alleged violations of Articles 8 and 25, in relation with the obligations of Articles 1(1) and 2 of the American Convention, in accordance with the requirements established in Article 46 of that treaty

52. By virtue of the arguments of fact and of law set forth above, and without prejudging the merits of the case,

## THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

### DECIDES:

1. To declare the petition admissible with respect to 8 and 25 of the American Convention, taken in concordance with Articles 1(1) and 2 of that instrument.
2. To transmit this report to the State and to the petitioners.
3. To continue its examination of the merits of the case.
4. To publish this decision and to include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on the 12th day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Commissioners Evelio Fernández Arévalos, Freddy Gutiérrez, and Florentín Meléndez.