

**REPORT N° 7/07**  
PETITION 208-05  
ADMISSIBILITY  
FLORENCIO CHITAY NECH *ET AL.*  
GUATEMALA  
February 27, 2007

**I. SUMMARY**

1. On March 2, 2005, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission" or the "IACHR") received a petition from Pedro Chitay Rodríguez, Alejandro Sánchez Garrido, Astrid Odete Escobedo Barrondo and the Azmitia Dorantes Comprehensive Development and Promotion Association [Asociación Azmitia Dorantes para el Desarrollo y Fomento Integral] represented by Irma Graciela Azmitia Dorantes (hereinafter "the petitioners") alleging the responsibility of the Republic of Guatemala (hereinafter "the State" or "the Guatemalan State") because personnel of the Guatemalan army allegedly took part on April 1, 1981, in the forced disappearance of the indigenous political leader Florencio Chitay Nech (hereinafter "the alleged victim") presumably as a reprisal for his activities in the cooperative movement and the Guatemalan Christian Democratic Party.

2. The petitioners allege that the facts of the case constitute a violation of Articles 4, 5, 7, 8, 17, 23 and 25 of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention") in conjunction with the obligations prescribed by Article 2 thereof, and Article II of the Inter-American Convention on Forced Disappearance of Persons. Regarding admissibility, the petitioners maintain that 25 years after the events took place the Guatemalan authorities have neither investigated the disappearance of Florencio Chitay Nech nor compensated his family.

3. The State asked for the petition to be ruled inadmissible because of failure to exhaust internal remedies, and proposed transferring the case of Florencio Chitay Nech to the National Compensation Program (hereinafter the "PNR") in order to compensate his family.

4. After reviewing the positions of the parties the Commission ruled the case admissible with respect to Florencio Chitay Nech and his family, under Article 46 of the American Convention in connection with Articles 4, 5, 7, 8, 17, 19, 23 and 25, along with Article 1(1) thereof, as well as in relation to Article I of the Inter-American Convention on Forced Disappearance of Persons. Consequently, it decided to so notify the parties, to continue examining the substance of the alleged violations of the American Convention, to publish this Admissibility Report and to include it in its Annual Report to the OAS General Assembly.

**II. PROCEEDINGS BEFORE THE COMMISSION**

5. The Commission received the petition on March 2, 2005, and assigned it number P-208-05. On May 12, 2005, it conveyed the petition to the State, requesting comments within two months. On July 6, 2005, the State asked for a 30-day extension to file its answer. The IACHR granted it on August 3, 2005. On September 19, 2005, the State presented its comments on admissibility, which were conveyed to the petitioners on September 22, giving them a month to comment. On October 24, 2005, the IACHR received the petitioners' reply, which was made available to the State for comments to be filed within a month. On January 18, 2006, the IACHR received the State's comments and forwarded them to the petitioners on February 14, 2006, giving them 15 days to comment. On March 6, 2006, the petitioners replied, and on March 23, 2006, the State was asked to comment. On April 7, 2006, the petitioners' reply of March 6, 2006 was again transmitted to the State, giving it one month to comment. On April 24, 2006, the IACHR received the State's comments. On May 4, 2006, it forwarded those comments to the petitioners.

### III. POSITION OF THE PARTIES

#### A. The petitioners

6. The petitioners allege that on April 1, 1981, in Zone 19 of Guatemala City, Florencio Chitay Nech, a Kaqchikel Maya, was kidnapped and became a victim of forced disappearance at the hands of Guatemalan army personnel.

7. The alleged victim, the petitioners say, was born in the village of Quimal, hamlet of emetabaj, on March 2, 1935. For many years he farmed corn, beans and sugar cane on land inherited from his parents. Towards 1973 he joined the peasant movements in the region and began to take part in political activity, joining the Guatemalan Christian Democratic Party. He also participated actively in the cooperative movements; following the 1976 earthquake he even set up within the house he owned the co-op store he worked in. In 1977 a group of indigenous persons decided to field candidates in the 1978 municipal election. They ran Mr. Felipe Álvarez Tepaz for mayor of San Martín de Jilotepeque, in the department of Chimaltenango, and Mr. Florencio Chitay for the office of First Councilman. Both were elected, and the council became the first Municipal Council to be 99% made up of indigenous persons.

8. According to the petitioners, repression against members of the Municipal Corporation of San Martín de Jilotepeque began in mid-1979. Mr. Álvarez Tepaz, the Mayor,<sup>1</sup> was kidnapped in 1980. Mr. Chitay Nech, as First Councilman (Deputy Mayor) took over as Mayor. Starting in 1980 the alleged victim is said to have received anonymous notes inviting him to remove himself from all his activities, namely, to step down as Mayor of the municipality and withdraw from the co-op and peasant movement, activities labeled subversive.<sup>2</sup> By November 1980, attempts to kidnap him had begun. The first attempt was apparently thwarted when armed men came to his house in a jeep-type vehicle but were unable to come in because the entry door had been reinforced, prompting them to fire their weapons at the house before leaving. Subsequently, as a precaution, members of the Chitay Rodríguez family began to spend the night at various other houses. Even so, strangers apparently gained access to Florencio Chitay's house twice and destroyed his belongings. He decided to flee to Guatemala City, where he settled with his family in a rented room and got a job in a refrigeration repair shop.

9. The petitioners allege that a few days before he was kidnapped, Mr. Chitay told his older children that government forces, through army personnel, were watching him and that he believed he could be kidnapped, even though he had left his job in the social organizations of the municipality in his hometown.

10. With regards to the day of the kidnapping, April 1, 1981, the petitioners claim that Mr. Chitay went out with his five-year-old son Esmeterio to buy firewood in the neighborhood where they lived. At the intersection of Ninth Avenue and Seventh Streets in Zone 19, a jeep-style vehicle had parked. From it descended armed men came out and questioned Mr. Chitay, and after struggling with him they pointed their guns at his son Esmeterio and threatened to shoot if Mr. Chitay did not climb into the vehicle. The alleged victim obeyed, and the kidnappers pushed his son to the ground and left in a hurry.

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<sup>1</sup> IACHR, Resolution No. 15-82, Case 7777, Guatemala, March 9, 1982. The IACHR decides:

1. Based on Article 39 of its Rules, to presume as true the events reported in the communication of November 24, 1980, concerning the machine-gun attack on the home, and the subsequent kidnapping and disappearance, of Mr. Felipe Álvarez, Mayor of San Martín de Jilotepeque, department of Chimaltenango, Guatemala.

2. That the Government of Guatemala violated Articles 5 (Humane Treatment) and 7 (Right to Personal Liberty) of the American Convention on Human Rights.

3. To recommend to the Guatemalan Government that it order the most thorough investigation of the reported events, so as to establish who is directly or indirectly responsible for them and punish them as provided by law, and to let the Commission know the steps taken within 60 days.

4. To give notice of this Resolution to the Government of Guatemala and the applicants.

5. That if, after the time limit set in (3.) above, the Guatemalan Government presents no comments, the Commission would include this Resolution in its Annual Report to the General Assembly, as prescribed in Article 59(g) of the Commission's Rules.

<sup>2</sup> Petitioners' brief of March 2, 2005.

11. The alleged victim's wife, after going to the place where he had been kidnapped and questioning a street seller who was there,<sup>3</sup> reported the kidnapping to the local police station and began the next day to look for Mr. Chitay Nech in the morgue and hospitals, without success.

12. According to the petition, Mr. Chitay's kidnapping was reported as well in the media on April 25, 1981, at a press conference given by high officials of the Guatemalan Christian Democratic Party to which the alleged victim belonged.<sup>4</sup>

13. Fearing reprisals, Mr. Chitay's family refrained from inquiring about the status of the investigation into the kidnapping, because forced disappearances were common in Guatemala at that time, as were threats against people who reported them. In 1985 Juan Carlos Chitay Nech became a victim of forced disappearance; in 1988, Eleodoro Ordón Nech, husband of María Chitay Nech, was kidnapped and murdered, as was in 1990 Martín Chitay, all of them family members of the alleged victim. Consequently, it was not until October 14, 2004, that they dared seek justice again and tried to find out what had happened with the investigation of Florencio Chitay's disappearance. The habeas corpus application they filed on that date, however, was ruled irreceivable because there was no evidence that Mr. Chitay had been arrested.<sup>5</sup>

14. Regarding the participation of Guatemalan army personnel in the events, the petitioners maintain that their participation can be deduced from Mr. Chitay's profile: he belonged to the Guatemalan Christian Democratic Party, and several members of the Municipal Council of San Martín de Jilotepeque had already been kidnapped and had disappeared.<sup>6</sup> Furthermore, the alleged victim had received between June and December 1980 many threats in writing to get him to give up his job and withdrawal from the cooperative peasant movement. As for Esmeterio Chitay Rodríguez, his son, the petitioners argue, the fact that he was only five years old at the time of the events should not detract from the validity of his testimony.<sup>7</sup>

15. Concerning the possibility of bringing the case to the National Compensation Program, the petitioners contend that the program lacks the necessary legal stability to guarantee full compensation to the family for the disappearance of Mr. Chitay. Since the program was established, there has been no full compensation to the victims of the conflict, its regulations have been changed three times by the government, and the Congress has yet to include the program in a law. Furthermore, the purposes of the PNR do not include justice and uncovering the truth, which are a fundamental part of the remedies sought by victims.

16. The petitioners conclude that their claim is admissible because the internal remedies have been exhausted, the disappearance of the alleged victim has not been investigated, and his family has not been compensated to this day.

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

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<sup>3</sup> According to Encarnación Chitay Rodríguez, when Esmeterio Chitay returned home after his father's kidnapping, "with my mother and other members of her family we went to the place where it had happened and asked about it, because the firewood seller was there, and he confirmed what my brother had said. In the morning we went to the police station, which is on Calzada San Juan, and reported the matter; hours later, police officers from the station went to the place, but when the firewood seller was asked about it, he said he had seen nothing." This testimony was cited in the petitioners' communication of October 20, 2005, received by the IACHR on October 25, 2005.

<sup>4</sup> The petitioners cite press articles of April 25, 1981, in the following Guatemalan newspapers: *La Hora*, pp. 2 and 23; *Prensa Libre*, p. 2; *El Gráfico*, p. 8.

<sup>5</sup> The Second Judge of the Lower Court Circuit for Criminal, Drug and Environmental Offenses ruled the habeas corpus application inadmissible, a decision of which Pedro Chitay was advised on November 23, 2004.

<sup>6</sup> The report by the Historical Truth Commission includes the following account: "The municipal Council of San Martín Jilotepeque was completely dismantled. The forced disappearance of Felipe Álvarez was followed by that of the First Councilman, Mr. Florencio Chitay Nech on December 10, 1980, and of the Second Councilman, Mr. Mario Augusto García Roca on March 6, 1981. Finally, the surviving members of the Municipal Council of San Martín Jilotepeque resigned in a body and asked for new elections to be held on January 8, 1981." Historical Truth Commission, Guatemala, "Memory of Silence," Volume VIII, cases presented in Annex II, case 707, (1999).

<sup>7</sup> According to the petitioners, Esmeterio Chitay was unable to testify in court because he was five years old at the time of the events.

17. The State asked for a ruling of inadmissibility. It argued, first, that there is no case file on Mr. Florencio Chitay Nech at the Attorney General's Office; consequently, there was no complaint that would have made it possible to launch an investigation.

18. Secondly, the State claims that there is no evidence to back up the assumption that Mr. Chitay was kidnapped by army personnel or that the abduction was the result of a government strategy, inasmuch as the only witness was five years old at the time. According to the State, Esmeterio Chitay Rodríguez's age prevented him from remembering names and dates in connection with the events, or identifying the persons involved, since his mind at that age "does not retain images of places and persons."<sup>8</sup>

19. The State alleges that the filing of a habeas corpus application in behalf of the alleged victim 24 years after his kidnapping proves inaction on the part of his family, hampering any subsequent investigation. That inaction should not be charged to the State. In addition, the habeas corpus application was filed by the petitioners to reactivate the time frame governing access to the inter-American human rights system.

20. As for internal remedies, the State contends that they were not exhausted, because the victim's family must report the matter to the Attorney General's Office and there are, moreover, various ways of compensating the family. The State recognizes the victims' right to compensation and affirms its commitment to do so through the National Compensation Program, proposing that Mr. Chitay's case be referred to that program.

21. The State maintains that the PNR is the proper way, under domestic law, to obtain compensation for victims of the internal armed conflict, and that it is stable and legal, as shown by the reparations already paid in the departments of El Quiché and Chimaltenango.<sup>9</sup> The issue of justice would be resolved by filing a complaint with the Attorney General's Office, which, through the office of the prosecutor for human rights, would conduct the proper investigation. The State points out in this connection that the 2006-2016 National Plan to Search for Persons who Disappeared During the Internal Armed Conflict (hereinafter "the National Search Plan") is intended to locate missing people and facilitate the task of reuniting thousands of victims of the internal armed conflict.<sup>10</sup>

22. The State points out the discrepancy between the date of the alleged victim's disappearance reported by the petitioners and the date shown not only in the report of the Historical Truth Commission [Comisión de Esclarecimiento Histórico] but in the complaint filed with the National Civil Police and the habeas corpus application for Mr. Chitay.<sup>11</sup>

23. Based on the above considerations, the State asked the Commission to rule the petition inadmissible under Article 31 of the IACHR Rules of Procedure, because there was a single criminal complaint on record and the internal remedies, consequently, had not been exhausted.

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<sup>8</sup> State comments dated September 14, 2005, received by the IACHR on September 19, 2005.

<sup>9</sup> In a note dated April 21, 2006, received by the IACHR on April 24, 2006, the State reports that in those departments of Guatemala the PNR has made payments to 209 families affected by the internal armed conflict.

<sup>10</sup> On May 25, 2006, Government Decision No. 264-2006 set up a temporary "Commission of the Executive to Search for Persons who Disappeared during the Internal Armed Conflict." Article 4 of that decision provides that the "Search Commission will operate for a term of one year, which may be extended by decision of the President of the Republic. In any event, the Commission will operate until the Congress of the Republic approves the establishment of a National Commission for the same purpose and on the same or a larger scale."

<sup>11</sup> According to the State, the report from the Historical Truth Commission provides an account of the disappearance of Florencio Chitay Nech on December 10, 1981, whereas the petition filed with the IACHR states that the alleged victim was kidnapped on April 1, 1981. On March 6, 2006, the petitioners explained the discrepancy as follows: "Florencio Nech Chitay disappeared on April 1, 1981; the report by the Historical Truth Commission shows the date December 10, 1980. That date is the date on which Mr. Chitay Nech underwent the second attempt to kidnap him at his home in San Martín de Jilotepeque. Mr. Chitay's family does not know who gave that testimony to the Historical Truth Commission. Nevertheless, the report already shows his disappearance."

#### **IV. ADMISSIBILITY**

##### **A. Jurisdiction *ratione personae*, *ratione temporis*, *ratione loci* and *ratione materiae* under the American Convention**

24. The petitioners are in principle authorized by Article 44 of the American Convention to file petitions with the Commission. The petition names as the alleged victim a physical person, Florencio Chitay Nech, whose rights under the American Convention the State undertook to respect and guarantee. As for the State, the Commission notes that Guatemala has been a party to the American Convention since May 25, 1978, when it deposited its instrument of ratification. Consequently, the Commission has jurisdiction *ratione personae* to examine the case.

25. The Commission has jurisdiction *ratione loci* because the petition alleges violations of rights said to have occurred within the jurisdiction of a state party to the American Convention. It has jurisdiction *ratione temporis* because the obligation to respect and guarantee rights protected by the American Convention was already in force for the State when the events allegedly took place.

26. The Commission has jurisdiction *ratione materiae* because the petition reports possible violations of human rights protected by the American Convention. It also has jurisdiction to hear this case under Article XIII of the Inter-American Convention on Forced Disappearance of Persons, ratified by Guatemala on February 25, 2000, which provides that the crime of forced disappearance is to be considered a continual or permanent crime so long as the fate or whereabouts of the victim remain unknown.<sup>12</sup>

##### **B. Other admissibility requirements**

###### **1. Exhaustion of internal remedies**

27. According to Article 46(1)(a) of the American Convention, for a petition to be admitted by the Commission under Article 44 domestic law remedies must have been pursued and exhausted in line with generally recognized principles of international law. The purpose of this requirement is that national authorities should be aware of the alleged violation of a protected right and, where appropriate, should resolve the matter before it is raised internationally.

28. The State maintains that the petition is inadmissible because internal remedies were not exhausted in Guatemala. In its first comments,<sup>13</sup> the State argued that inasmuch as the Attorney General's Office had no case file on Mr. Florencio Chitay Nech, it should be presumed that no complaint had been filed regarding the events. In later communications, however, the State acknowledged the existence of a criminal complaint filed over the kidnapping with the National Police.<sup>14</sup> In addition, the State contends that the 2004 habeas corpus application filed for Mr. Chitay by his family sought to reactivate the time frame for access to the Inter-American human rights system. Lastly, it argues that a complaint lodged with the Human Rights Prosecutor of the Attorney General's Office, in particular, would trigger an investigation, and that referring the case to the National Compensation Program and the 2006-2016 National Search Plan would lead to comprehensive redress for the family of the victim and perhaps establish his whereabouts.

29. The petitioners, in turn, argue that internal remedies have been exhausted because, immediately after the events, Mr. Chitay's family filed with the police the required complaint, which was publicized by the media in a press conference given by leaders of the Guatemalan Christian Democrats. In addition, Mr. Chitay's disappearance was noted in the report of the

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<sup>12</sup> IACHR, Report No. 91/06, Admissibility, Edgar Fernando García, Guatemala, October 21, 2006, para.16.

<sup>13</sup> State brief of September 14, 2005, received by the Commission on September 19, 2005

<sup>14</sup> State brief of April 21, 2006, received by the IACHR on April 24, 2006: "As shown by the petitioners, internal remedies have not been exhausted in this case; as we indicated earlier, there is a single criminal complaint."

Historical Truth Commission. Furthermore, if they did let a number of years go by before returning to the Guatemalan judicial system to file a habeas corpus application, it was because for many years they felt afraid and insecure as a result of the Guatemalan internal situation. Lastly, they believe that their rights to learn the truth, to justice and to compensation are not sufficiently guaranteed by the PNR, which has a limited mandate, or by the National Search Plan, which has yet to be set up.

30. The record shows that Mr. Chitay's arrest and disappearance were reported by his wife, Marta Rodríguez Quex to the National Police station in the area where the kidnapping took place, a fact that the State acknowledges in its comments.

31. Under the laws in force at the time of the kidnapping, the National Police had to advise the judiciary of complaints of criminal offenses it had received. The first paragraph of Article 112 of the Criminal Code then in force provided:

Article 112: Police officers and policemen legitimately authorized to operate in the country have an obligation to immediately assist in cases of punishable offenses that they witness or that are reported to them. To that end they will take the necessary steps to ascertain the facts, find and arrest the perpetrators and collect the items, instruments or evidence of a crime that could disappear, placing them at once at the disposal of the judiciary; all of this aside from their obligation, before, during or after doing the above, as the case may be, to immediately report to the proper authorities the steps taken.<sup>15</sup>

32. Furthermore, under Article 68 of the Criminal Code in effect in 1981 kidnapping was a crime subject to *ex officio* prosecution by the State; consequently, it behooved the Attorney General's Office to institute criminal proceedings.

Article 68, second paragraph: The ability to bring a criminal action belongs, essentially, to the Attorney General's Office. Injured parties and any Guatemalan may also bring it.<sup>16</sup>

33. Article 77 (1) of that Code provided that victims of crimes had to file a complaint in order to bring criminal and civil actions. However, the same article provided that if the victims did not do so or declared themselves unable to take part in the proceedings, the Attorney General's Office would bring both actions, that is to say, the criminal and the civil action.<sup>17</sup>

34. Judges had the obligation to open, on their own initiative, an investigation if they learned by any means of the commission of a crime subject to public prosecution.

Article 68 (3): Judges and officials are legally bound to proceed on their own initiative to investigate whenever they learn by any means of the commission of a crime or misdemeanor subject to public prosecution.<sup>18</sup>

35. The documentation provided by the petitioners show that Mr. Chitay's forced disappearance was publicly reported on April 25, 1981, by the media, during a press conference conducted by leaders of the Guatemalan Christian Democratic Party, to which the alleged victim belonged. It is also a matter of record that on April 25, 1981, the newspapers "La Hora," "Prensa Libre" and "El Gráfico" published articles on the kidnapping and subsequent disappearance of Mr. Chitay.

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<sup>15</sup> Article 112, Code of Criminal Procedure in effect in 1981 in Guatemala.

<sup>16</sup> Article 68 (2), Code of Criminal Procedure in effect in 1981 in Guatemala.

<sup>17</sup> Article 77, Code of Criminal Procedure in effect in 1981 in Guatemala:

Victims of a criminal offense must, within the time frame established in this Code, file charges in order to bring criminal and/or civil actions. Failure to do so will not imply that the civil action is waived.

However, if the injured parties fail to do so or declare themselves unable to take part in the proceedings, the Attorney General's Office will institute the two legal actions for them; the injured parties will retain their right to be kept informed by the Office and to cooperate with it by taking such steps as they deem necessary to the success of their claim.

<sup>18</sup> Article 68 (3), Code of Criminal Procedure in effect in 1981 in Guatemala.

36. In addition, the forced disappearance of Mr. Chitay was acknowledged in the report of the Guatemalan Historical Truth Commission titled "Memory of Silence," published in 1999.<sup>19</sup>

37. It is also a matter of record that on October 12, 2004, Pedro Chitay, son of the alleged victim, filed a habeas corpus application with the First Criminal Justice of the Peace in Guatemala City, seeking an order to have the officials who had illegally arrested his father submit a detailed report on the reasons for his arrest. On October 14, 2004, the court acknowledged receipt of the habeas corpus application, ordered that Florencio Chitay should be brought before the court, and that the authorities, "officials or persons presumably responsible should produce him, present the original or a copy of the existing proceedings or record, and report on the reasons for these events."<sup>20</sup> Case file No. 2452-2004, the habeas corpus application in favor of Florencio Chitay, shows that the court made inquiries with the National Civil Police<sup>21</sup> and the General Bureau of the Penitentiary System.<sup>22</sup>

38. After taking those steps, the court requested assignment of the case to the proper tribunal and it was assigned to the Second Court of the Lower Circuit for Criminal, Drug and Environmental Offenses. This court, on November 4, 2004, ruled found the habeas corpus application inadmissible because there was no evidence that Mr. Chitay had been arrested. Notice of this decision was given to Pedro Chitay on November 23, 2004.

39. Under Article 109 of Decree 1-86 on the Legal Protection, Habeas Corpus and Constitutionality Law, if as a result of steps taken in habeas corpus proceedings indications surface that a person has disappeared, the court must immediately order an investigation.

Article 109: **Investigation in case of missing persons.** If the steps taken lead to indications that the person in whose behalf the application was filed has disappeared, the court will immediately order an investigation of the case.

Police authorities must inform the court, the Human Rights Solicitor and the interested parties about the investigation made, which must continue until there is definite information on the whereabouts of the missing person; the Habeas Corpus Court, in turn, will send a report on the steps taken and any subsequent news to the Supreme Court of Justice.

40. The Inter-American Court has held that habeas corpus may be an effective means of locating a person even after a long time has gone by since the person disappeared.

The Court considers that habeas corpus may be an effective means of locating a person or ascertaining whether the person's personal freedom has been violated, even if the person is no longer in the custody of the State but has been placed in the custody of a private party, or even if a long time has gone by since the person disappeared.<sup>23</sup>

41. Accordingly, the Commission finds that, from the very moment Mr. Chitay's kidnapping was reported to the National Police, the State was under an obligation to open an investigation, and this obligation continues to this day because forced disappearance of persons is a crime of an ongoing nature.

42. Guatemalan courts, furthermore, were duty-bound to investigate as well, because the matter was publicly reported in April 1981, included in the 1999 public report from the Historical Truth Commission, and again reported to the courts in 2004 when the habeas corpus application was filed.

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<sup>19</sup> Historical Truth Commission, Guatemala, Memory of Silence, Volume VIII, cases presented, Annex II, case 707 (1999).

<sup>20</sup> Ruling dated October 14, 2004, First Criminal Justice of the Peace on duty in Guatemala City. Document in the record.

<sup>21</sup> Habeas Corpus Affidavit No. 2452-2004 dated October 15, 2004. Document in the record.

<sup>22</sup> Habeas Corpus Affidavit No. 2452-2004 dated October 15, 2004. Document in the record.

<sup>23</sup> I/A Court H.R., *Case of the Serrano Cruz Sisters*. Judgment of March 1, 2005, Series C No. 120 para. 79.

43. According to the information supplied by the parties, to this day the State has not opened a diligent investigation into the arrest and subsequent disappearance of Mr. Chitay. The investigation that a State is required to launch, the Inter-American Court has held, must be conducted with due diligence, because it must be effective. Due diligence requires that the investigating agency take all steps and make all inquiries necessary to try to achieve the end in view. Otherwise the investigation is not effective within the meaning of the Convention.<sup>24</sup>

44. The Commission finds as well that the alleged victim's family set in motion the internal remedies prescribed by Guatemalan law for cases of arrest followed by disappearance. They reported the matter to the police, which was duty-bound to report it to the proper judge, so that a criminal investigation would be launched. In other words, once the event was reported, it became the State's obligation to investigate.

45. As to the State's argument that Mr. Chitay's case should be considered by the National Compensation Program before it is heard by the inter-American human rights system, the Commission notes that it has so far received no information indicating that the family of the victim has been compensated through that program.

46. It is therefore a matter of record that the internal remedies initiated since 1981 by the alleged victim's family, including the report filed with the National Police in 1981 and the habeas corpus application of 2004 have been fruitless in terms of locating Florencio Chitay Nech,

47. The record also shows that the Guatemalan judiciary was made specifically aware, at least in 1981, 1999 and 2004, of the matter and did not take the necessary steps to investigate the arrest and subsequent disappearance of Mr. Chitay.

48. Consequently, since forced disappearance is a crime of a continual or permanent nature<sup>25</sup> so long as the whereabouts or fate of the victim remain unknown, and since the legal actions taken by the alleged victim's family have been fruitless, the Commission concludes that the exception in Article 46(2)(c) of the American Convention applies, because there has been an unwarranted delay in deciding the internal remedies.

## **2. Filing deadline**

49. Under Article 46(1)(b) of the Convention, for a petition to be admitted it must be filed within six months from the date the petitioner received notice of the final domestic judgment. This requirement guarantees legal certainty once a decision has been taken.

50. Under Article 32(2) of the Commission's Rules of Procedure, where exceptions apply to the requirement of prior exhaustion of domestic remedies and no final decision is consequently available, the petition must be filed within a reasonable time, as determined by the Commission. For this purpose "the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

51. The Commission has established that the exception contained in Article 46.2.c applies in this case. It must consequently decide whether the petition was filed within a reasonable time under the specific circumstances.

52. In terms of specific circumstances, the documents furnished by the petitioners and corroborated by the Historical Truth Commission report, show that in 1978 Mr. Chitay was elected First Councilman of the municipality of San Martín Jilotepeque, department of

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<sup>24</sup> Inter-American Court, *Carpio Nicollet et al.* Judgment of November 22, 2004, Series C No. 117, para. 129; *Plan de Sánchez Massacre. Reparations* (Article 63.1, American Convention on Human Rights). Judgment of November 19, 2004, Series C No. 116, para 98; *Tibi Case.* Judgment of September 7, 2004, Series C No. 114, para. 258; *Case of the Serrano Cruz Sisters.* Judgment of March 1, 2005, Series C, No. 120, para. 65.

<sup>25</sup> Inter-American Convention on Forced Disappearance of Persons, Article III.

Chimaltenango. On November 21, 1980, Felipe Álvarez, the Mayor of that municipality, became a victim of forced disappearance<sup>26</sup> at the hands of a group of military personnel and civilians, a disappearance that Guatemalan justice failed to investigate. On January 6, 1981, Mario Augusto García Roca, Second Councilman of the municipality of San Martín Jilotepeque, also became a victim of forced disappearance.

53. In this context, Florencio Chitay left San Martín Jilotepeque to seek refuge in Guatemala City, where he became a victim of forced disappearance on April 1, 1981. Because of these events the remaining members of the municipal council resigned in a body.<sup>27</sup>

54. Other victims of forced disappearance were, similarly, three children of Mr. Felipe Álvarez: Jorge Álvarez on April 27, 1981, Mario Álvarez on November 13, 1981, and Mateo Álvarez on December 13, 1981.<sup>28</sup>

55. These events took place during the internal armed conflict in Guatemala (1962-1996) of which the most violent period was 1978-1983, under the de facto regimes of generals Romeo Lucas García (1978-1982) and Efraín Ríos Montt (1982-1983).<sup>29</sup> Military operations at the time focused on Quiché, Huehuetenango, Chimaltenango, Alta and Baja Verapaz, the Southern coast, and Guatemala City, accounting for 91% of the violence recorded by the Historical Truth Commission.

56. The petitioners have argued that fear of reprisals kept Mr. Chitay's family from inquiring about the status of the investigation, because forced disappearances were common in Guatemala at the time, as were threats against those reporting them. It is a reasonable surmise that the situation in Guatemala<sup>30</sup> at the time of Mr. Chitay's disappearance and, in particular, what happened to the family of the above-mentioned Mayor of San Martín Jilotepeque and to the Chitay family itself, made the family justifiably afraid of inquiring with the authorities about the investigation into Mr. Chitay's whereabouts and the punishment of his kidnapers.

57. The record shows, however, that Mr. Chitay's wife reported the disappearance to the National Police the day it happened, and that in 2004 his son filed a habeas corpus application. To this day, however, the Guatemalan judiciary has not investigated the matter.

58. The reasonableness of the deadline set for filing petitions in the inter-American human rights system must be weighed in each case against the procedural activity of the alleged victim's family, the behavior of the State, and the situation and context in which the alleged violation occurred.

59. Considering that Florencio Chitay Nech is the alleged victim of forced disappearance, a crime that is ongoing in nature and not subject to the statute of limitations, and that there has

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<sup>26</sup> See IACHR, Resolution No. 15-82, Case 7777, Guatemala, March 9, 1982.

<sup>27</sup> See note 6 above.

<sup>28</sup> On November 21, 1980, in the seat of the municipality of San Martín Jilotepeque, department of Chimaltenango, the municipal mayor, Mr. Felipe Álvarez, was kidnapped. A contingent of 15 men made up of members of the G-2 and civilians from San Martín Jilotepeque, went into the home of the Álvarez family, wounding Mr. Álvarez in the back and repeatedly beating him and his daughters Ester and Antonia. Subsequently, Mr. Álvarez was dragged into a car and his son into another, and they were taken in the direction of Chimaltenango. The family reported the attack to the National Police, which did not investigate. The Lower Court of Chimaltenango opened case file No. 1482/80 but did not investigate. Later, the family of Felipe Álvarez suffered several attacks culminating in the forced disappearance of Felipe Álvarez's three sons: Jorge Álvarez on April 27, 1981, Mario Álvarez on November 13, 1981, and Mateo Álvarez on December 13, 1981. Finally, a witness who was part of the group responsible for the forced disappearance, told one of Felipe Álvarez's sons that his father had been burnt [sic] at Roosevelt Street and 23rd Ave., in the Zone 7 section of the capital, and that his remains had been thrown into the Pino Lagoon, in the department of Santa Rosa, something that has not been verified. Historical Truth Commission, Guatemala, Memory of Silence, Volume VIII, cases presented, Annex II, case 707 (1999)

<sup>29</sup> It has been estimated that there were more than two hundred thousand victims of arbitrary executions and forced disappearance during the political violence in this period. In ethnic terms, members of the Maya indigenous people accounted for 83% of these victims. Historical Truth Commission, Memory of Silence, Volume V, Conclusions and Recommendations, p. 21.

<sup>30</sup> IACHR, Fifth Report on the Human Rights Situation in Guatemala, April 6, 2001.

been to this date no investigation, trial or punishment of the perpetrators; and considering the context in which the events took place, the Commission concludes that this petition was filed within a reasonable time.

### **3. Duplication of procedures and international *res iudicata***

60. Nothing in the record indicates that the subject of the petition is pending in another international settlement procedure or that it duplicates a petition already examined by this or another international agency. Consequently, the requirements of Articles 46(1)(c) and 47(d) of the Convention are met.

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

61. It is not appropriate for the Commission at this stage of the procedure to establish whether the alleged violations of the American Convention took place. For admissibility purposes, the IACHR must simply decide whether the alleged events, if proven, could amount to a violation of the American Convention, as prescribed in Article 47(b), and whether the petition is "manifestly groundless" or "obviously out of order," in the words of paragraph (c) thereof.

62. The standard to be used for such findings differs from the standard required to decide the merits. At this stage the Commission must make a summary *prima facie* assessment and determine whether there are grounds for an apparent or potential violation of a right protected by the Convention, without establishing the existence of that violation. The review that is called for at this point is simply a summary analysis that does not prejudice or advance an opinion on the merits. The Commission's own Rules of Procedure, by establishing two different stages for admissibility and substance, reflect this distinction between assessments made to admit a petition and to establish State responsibility for a violation.

63. Considering the information supplied by the petitioners, as well as the principle *iura novit curia* that empowers the judge to determine the law applicable to the specific case, the Commission decides, without prejudging the merits, that the alleged events, if proven, could be characterized as violations of the rights to life, humane treatment, personal liberty, a fair trial and judicial protection under Articles 4, 5, 7, 8, and 25 of the American Convention, in conjunction with Articles 1(1) and 2 thereof. In addition, in view of the profile of the alleged victim and the circumstances of his detention and subsequent disappearance, the Commission finds that the reported events could characterize violations of rights protected by Articles 23, 19 and 17 of the American Convention. Furthermore, the Commission finds that those events tend to characterize a violation of the commitments undertaken by the Guatemalan State under Article I of the Inter-American Convention on Forced Disappearance of Persons. Accordingly, the IACHR finds that this requirement has been met.

## **V. CONCLUSIONS**

64. The Commission concludes that the case is admissible and that the IACHR has jurisdiction to hear the petitioners' claims of violation of Articles 4, 5, 7, 8, 17, 19, 23 and 25 of the American Convention, in conjunction with Articles 1(1) and 2 thereof, as well as Article I of the Inter-American Convention on Forced Disappearance of Persons.<sup>31</sup>

65. By virtue of the above facts and law and without prejudging the merits of the matter,

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

1. To find the present case admissible with respect to Articles 4, 5, 7, 8, 17, 19, 23 and 25 of the American Convention, in conjunction with Articles 1(1) and 2 thereof, and in relation to

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<sup>31</sup> See IACHR, Report No. 91/06, Admissibility, Edgar Fernando García, Guatemala, October 21, 2006, para. 34.

Article I of the Inter-American Convention on Forced Disappearance of Persons, in prejudice of Florencio Chitay Nech and his next of kin.

2. To submit this report to the petitioners and the State.

3. To continue examining the merits of the case.

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

Done and signed in the city of Washington, D.C., on the 27<sup>th</sup> day of the month of February, 2007. (Signed): Florentín Meléndez, President; Paolo Carozza, First Vice-president; Victor E. Abramovich, Second Vice-president; Evelio Fernández Arévalos, Sir Clare K. Roberts, Paulo Sérgio Pinheiro, and Freddy Gutiérrez Trejo, Commissioners.