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REPORT No. 407/20
PETITION 951-10
REPORT ON ADMISSIBILITY

JULIO ENRIQUE GERDING SALAS AND FAMILY
CHILE

Approved electronically by the Commission on December 10, 2020.

Cite as: IACHR, Report No. 407/20, Petition 951-10. Admissibility. Julio Enrique Gerding Salas and family. Chile. December 10, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Julio Enrique Gerding Salas
Alleged victim:	Julio Enrique Gerding Salas and family ¹
Respondent State:	Chile ²
Rights invoked:	Articles I (life, liberty and personal security) and XXV (protection from arbitrary arrest) ³ of the American Declaration of the Rights and Duties of Man ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	June 27, 2010
Additional information received at the stage of initial review:	September 19, 2017
Notification of the petition to the State:	June 28, 2018
State's first response:	January 18, 2019
Notification of the possible archiving of the petition:	September 19, 2017
Petitioner's response to the notification regarding the possible archiving of the petition:	September 19, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Declaration (instrument of ratification of the OAS Charter deposited on June 5, 1953); Inter-American Convention to Prevent and Punish Torture (instrument of ratification deposited on September 30, 1988) ⁶ ; and American Convention on Human Rights (instrument of ratification deposited on August 21, 1990)

¹ In an electronic communication of September 19, 2017, the petitioner informed that his mother, his sister and his brother, in addition to himself, were to be regarded as victims. The petitioner did not report the names of said relatives, which can be determined at further stages of the procedure.

² As set forth in Article 17.2.a of the Commission's Rules of Procedure, Commissioner Antonia Urrejola Noguera, a Chilean national, did not participate in the discussion nor in the decision of the present matter.

³ Although the petitioner did not expressly invoke the articles of the American Declaration that he considers to have been infringed, these can be directly inferred from his account of the facts.

⁴ Hereinafter, "the American Declaration" or "the Declaration".

⁵ The observations submitted by each party were duly transmitted to the opposing party.

⁶ Upon ratification of the Inter-American Convention to Prevent and Punish Torture, Chile presented a reservation to the third paragraph of Article 8, expressing: "a case may only be submitted to the international for a whose competence has been recognized by the state of Chile". The third paragraph of Article 8 states: "After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international for a whose competence has been recognized by that State". Chile is part of the OAS Charter, which confers competence to the IACHR as principal organ of the Organization, and also signed through its Foreign Minister the Final Declaration of the V Meeting of Ministers of Foreign Affairs, held in Santiago de Chile in 1959, where the creation of the Inter-American Commission on Human Rights was agreed. The Inter-American Convention to Prevent and Punish Torture entered into force on February 28, 1987, in accordance with its Article 22.

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles I (life, liberty and personal security), IX (inviolability of the home), XVIII (fair trial) and XXV (protection from arbitrary arrest) of the American Declaration; Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture; and Articles 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to its article 1.1 (obligation to respect rights)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exceptions of article 31.2, paragraphs (b) and (c), of the IACHR Rules of Procedure are applicable
Timeliness of the petition:	Yes, in the terms of Section VI

V. ALLEGED FACTS

1. The petitioner claims the international responsibility of the State for the arbitrary arrest and torture of which he was a victim in 1989. He states that on August 28 of that year he was arrested by agents of the Investigations Police in the town of Lolloe, San Antonio, and transferred to the Investigations Headquarters; the arrest was made pursuant to a warrant issued by the *ad hoc* Military Prosecutor of the Second Military Court of Santiago. Petitioner states that once he was detained in the Investigations Headquarters, the police agents handcuffed him, blindfolded him, stripped him naked, tied his arms and legs to a chair and placed electrical cables on his arms and on his genital area, in order to interrogate him as they applied electric discharges of different intensities. They also hit him on his ears during the interrogation. The petitioner explains that the State agents had confused him with another person, one of the main leaders of the Manuel Rodríguez Patriotic Front (FPMR), who was being required by justice for a case of arms trafficking to overthrow the regime of Augusto Pinochet. The identity mix-up was caused by the petitioner's physical resemblance to such individual. After five days of detention, during which interrogations continued and he was kept incommunicado, Mr. Gerding was given unconditional liberty on September 2, 1989. His arrest and release were closely followed by the national press, since at first it was thought that authorities had captured the aforesaid criminal, who was a notorious fugitive of justice. Mr. Gerding submits as annexes to his petition several newspaper cuttings from that time, where it is recorded that Mr. Gerding described the circumstances of his arrest, mistreatment and tortures to the press.

2. The petitioner informs that during his detention, his relative Tila Salas filed an *amparo* petition (i.e. the Chilean denomination of habeas corpus) in his favor, to obtain his release; along with his petition to the IACHR he submits a copy of a brief filed by him on September 4, 1989 before the Martial Court of Chile, which was hearing the case. In such brief, Mr. Gerding described in detail the circumstances of his detention, and the acts of torture of which he was the victim at the hands of police agents during the interrogation. He also described the damage that his detention and the tortures had caused both to him and to his family, and he reported that at the moment of his arrest, his family home had been raided by police and his wife had been retained for eleven hours. The *amparo* petition was decided after his release, by a judgment of September 6, 1989 in which the Martial Court of Chile denied the applicant's claims because they had lost their object with the release of the prisoner.

3. On the other hand, Mr. Gerding reports that he submitted his case to the Valech Commission. In an additional communication of September 19, 2017, he holds that under the Valech II Law, his mother and sister had been registered as victims, but neither himself nor his other brother had obtained such status, "*although all 4 of us lived the same situation (from beginning to end)*"; for which reason he considers that said legislation was not fairly applied to all family members since neither him nor his brother had been able to access the reparation established therein.

4. The State, in its response, opposes the admissibility of the petition, for two reasons: lack of *ratione temporis* competence of the IACHR to hear the case; and what it regards as the manifestly unfounded nature of the claim. As for the first aspect, it points out that Chile became a party to the American Convention through its deposit of the instrument of ratification on August 21, 1990, and that by means of reservation to the treaty Chile expressed that it would only recognize competence of the Inter-American Commission to hear petitions that were based on facts occurring after such date; for which reason, given that the facts denounced by Mr. Gerding took place in 1989, in the State's view the IACHR lacks temporal competence to issue a pronouncement.

5. As for the manifestly unfounded nature of the petition, the State explains that, in its reading of the petition, its main object is to achieve the inclusion of the petitioner and his brother among the victims recognized by the Valech II Commission; however, the State informs that Mr. Julio Enrique Gerding Salas has in fact already been recognized within the list of victims of the Valech I Commission, published in its final report of November 29, 2004. Therefore, the State claims that Mr. Gerding's status as victim of political imprisonment and torture has already been recognized by the State, and that it is not possible to request another such recognition, for which reason in the State's view *"the petitioner's argument according to which that Truth mechanism was unfairly applied lacks all logic"*.

6. The State also holds that, contrary to what the petitioner states in his additional communication of September 19, 2017, Mr. Gerding has in fact had the opportunity to access the administrative reparations regime established by Chile; and calls into question the fact that the petitioner has not reported whether he has filed other legal remedies for the purpose of enforcing his victim status and obtaining reparations. In this regard, the State argues that in Chile the recognition of a person's status as victim can also be obtained judicially, and it claims that the petitioner should not have resorted to the IACHR, which is a subsidiary organ vis-à-vis domestic legal mechanisms –but without specifying which were the domestic judicial mechanisms to which the petitioner should have resorted–. The State concludes that in the petitioner's account there is no evidence of violations of any right protected by the inter-American instruments, and consequently his petition is manifestly unfounded.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

7. The main object of the petition under study is that the State of Chile be declared internationally responsible for the detention and torture of which Mr. Julio Enrique Gerding was the victim between August 28 and September 2, 1989. Additionally, the petitioner holds that his status as victim was not recognized by the Valech Commission for the purpose of obtaining the legally-established administrative reparation, and that his brother was not recognized as victim either. Thus the IACHR disagrees with the State's position, since the attainment of Mr. Gerding's recognition as a victim by the Valech Commission is not the central object of his petition before the IACHR, but a secondary or consequential claim, derived from the principal claim relating to the arbitrary arrest and torture he allegedly suffered at the hands of the Investigations Police during the Pinochet regime.

8. In this regard, it is the IACHR's uniform jurisprudence that in cases of torture, the State has the duty to ex officio initiate, conduct and bring to a close a criminal investigation which can allow for the prosecution and punishment of the perpetrators of such crime⁷. The inter-American Commission has long considered this ex-officio duty of the State to be immediately activated when the victim, or whomever acts on his or her behalf, brings the alleged torture or mistreatment to the attention of the authorities, by any suitable means⁸; these suitable means may include a criminal complaint, a communication to the prison or

⁷ IACHR, Report No.37/18. Admissibility. Patricio Germán García Bartholin. Chile. May 4, 2018, par. 19; Report No. 156/17. Admissibility. Carlos Alfonso Fonseca Murillo. Ecuador. November 30, 2017, par. 13.

⁸ IACHR, Report No. 20/17. Admissibility. Rodolfo David Piñeyro Ríos. Argentina. March 12, 2017, par. 5.

administrative authorities⁹, a report to a judicial authority¹⁰, or even the conclusions of national human rights bodies¹¹. On the other hand, the IACHR takes into account that by means of the report of the Valech Commission (I) of 2004, the State obtained knowledge of the situation described in the petition.

9. In the instant matter, an analysis of the casefile of the present petition reveals that Mr. Gerding personally described the tortures of which he was the victim of in a brief -a copy of which he attached to this petition- addressed to the Martial Court of Chile in the course of the *amparo* proceedings that had been initiated on his behalf. Yet this claim was ignored by said judicial body, which ruled after his release dismissing the habeas corpus claims. It is also proven, as the State itself informed in its response, that Mr. Gerding was included as a victim of political detention and torture in the Report of Valech Commission I, published in 2004, in spite of which no criminal investigation whatsoever was initiated in order to clarify the denounced events. Thirdly, Mr. Gerding told the press in full detail about the ill-treatment he had suffered, and this public denunciation was disseminated by a national newspaper at least once, in an article published on September 8, 1989.

10. Thus, in light of the above, and of the fact that the State has not invoked the exception of lack of exhaustion of local remedies nor questioned the suitability of the remedies initiated by the petitioner in relation to the tortures and detention he reports in his petition, the IACHR considers that Mr. Gerding's case falls within the exception of unjustified delay in the exhaustion of domestic remedies set forth in article 46.2.c) of the American Convention and 31.2.c) of the IACHR's Rules for Procedure.

11. Regarding the allegedly arbitrary arrest of which Mr. Gerding was a victim, during which he allegedly was the victim of torture, it is proven that an *amparo* petition was filed in his favor by a relative of his, which was negatively decided four days after he was unconditionally liberated. Under Chilean law, an *amparo* petition is materially the equivalent of a *habeas corpus* remedy, which is designed to challenge the legality of an arrest, and such *amparo* remedy was decided by the Martial Court of Chile in a judgment of September 6, 1989, in which it denied the applicant's claims. The IACHR's uniform position, as set in preceding decisions, is that in cases where human rights violations by agents of the Armed Forces are claimed, the military justice authorities are not a proper forum to rule on the claims, insofar as they do not offer the minimum guarantees of independence and impartiality in accordance with international standards¹². Therefore, given that the claim relating to Mr. Gerding's detention was decided by the country's Martial Court, the exception to the rule of exhaustion of domestic remedies set forth in articles 46.2.b) of the American Convention and 31.2.b) of the IACHR Rules of Procedure is applicable, as has been decided in previous cases.¹³

12. The IACHR notes that the Valech Commission was created by Supreme Decree 1.040 of 2003 in the manner of a Truth Commission, for the purpose of determining who were the persons that suffered deprivation of liberty and torture for political reasons during the military dictatorship period, and of proposing reparation measures for them. It was not a judicial body, and its findings served as legal title to access administrative reparations. Mr. Gerding has claimed that he was not included in the list of victims recognized by said Commission, and that consequently he has not been able to access, along with his three immediate relatives, the reparations established by the Chilean legislation in force. The State, for its part, has contested this aspect of the petition, and has reported that Mr. Gerding was indeed included in the list of victims of the Valech Commission I. It has also argued that the petitioner had access to administrative reparation at his disposal, but has failed to inform whether he actually received any. A factual and evidentiary controversy has thus been established between the parties in relation to this point, concerning access to administrative reparation and the inclusion of Mr. Gerding's relatives in the list of recognized victims, a controversy that the

⁹ IACHR, Report No. 128/18. Petition 435-07. Admissibility. Antonio Lucio Lozano Moreno. Perú. 19 de November de 2018, par. 10; Report No. 166/17. Admissibility. Fausto Soto Miller. México. December 1st 2017, par. 11

¹⁰ IACHR, Report No. 14/08, Petition 652-04. Admissibility. Hugo Humberto Ruiz Fuentes. Guatemala. March 5, 2008, par. 64; Report No. 11/18. Admissibility. Nicolás Tamez Ramírez. México February 24, 2018, par. 6.

¹¹ IACHR, Report No. 15/18. Petition 1083-07. Héctor Galindo Gochicoa and Family. México. February 24, 2018, par. 8.

¹² IACHR, Report No. 70/14. Petition 1453-06. Admissibility. Maicon de Souza Silva. Renato da Silva Paixão and others. July 25, 2014, par. 18; Report No. 50/17. Petition 464-10B. Admissibility, José Ruperto Agudelo Ciro and Family, Colombia. May 25, 2017, par. 9; IACHR, Report No. 26/17, Petition 1208-08, Admissibility, William Olaya Moreno and Family. Colombia. March 18, 2017, par. 6.

¹³ IACHR, Report No. 122/19. Petition 1442-09. Admissibility. Luis Fernando Hernández Carvajal and others. Colombia. July 14, 2019; Report No. 162/17. Admissibility. María del Pilar Sulca Berrocal. Perú. November 30, 2017, par. 11, 12; Report No. 79/19. Admissibility. Carlos Hernando Casablanca Perdomo and Family. Colombia. May 23, 2019, par. 14.

IACHR shall decide in the merits stage of the present proceedings, and which shall therefore form part of the factual framework of the decision to be reached in due course.

13. Since the alleged facts took place in 1989, year in which Mr. Gerding informed the judicial authorities of the ill-treatment he was a victim of; that his situation, as the State points out, was allegedly included in the Final Report of the Valech Commission I, published in 2004, in which apparently Mr. Gerding ignores having been included; that the petition was received in June 2010; and that the effects of the impunity of the case would extend to the present date, the IACHR considers that the petition was presented within a reasonable period of time, thus complying with the provisions of Article 32.2 of the IACHR Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

14. The Commission notes that the State has claimed that the IACHR lacks *ratione temporis* competence, since the events that motivated the petition took place in 1989, and the instrument of ratification of the American Convention was deposited by Chile in August 1990. The Commission agrees that it is starting on that date that it has competence to hear possible violations of the American Convention attributable to the State of Chile, but it also recalls that, in light of the provisions of the OAS Charter, of its Statutes and its Rules of Procedure, it does have *ratione temporis* competence to examine, under the American Declaration, those events that occurred prior to 1990, given that its competence to hear individual petitions began in the year 1965. Therefore, taking into account that Chile became a Party to the OAS through the deposit of the instrument of ratification of the Charter of this organization on June 5, 1953, the IACHR shall examine in this case, in light of the American Declaration, those claims referring to acts that allegedly occurred in 1989. The Commission insists that the fundamental rights that the States which have not yet ratified the American Convention have pledged to respect as States Parties to the OAS Charter, are those rights stipulated in the American Declaration. According to the long-standing practice and jurisprudence of the Inter-American Human Rights System, the American Declaration is a source of international obligation for the member States of the OAS that are not Parties to the American Convention on Human Rights. It is understood that these obligations derive from the human rights commitments assumed by Member States in the OAS Charter, which the member States have agreed are contained and defined in the American Declaration, as well as from the customary legal nature of the rights protected by the basic provisions of the Declaration, for which reason the IACHR is authorized by articles 18 and 20 of its Statute to receive and evaluate claims of non-compliance with these commitments by States¹⁴. Lastly, the omissions of judicial authorities and other relevant facts that took place after August 1990, after the entry into force of the American Convention, or the effects of which continued after such treaty came into force for Chile, shall be analyzed in light of the Convention¹⁵.

15. The petitioner has invoked the international responsibility of Chile for the arbitrary arrest and torture of which he was the victim of, as well as for the simultaneous raid of his home and the retention of his wife there, and he has stated that neither him nor his immediate relatives have been treated fairly by the authorities in order to access an administrative reparation under the current Chilean legislation; also, it is understood from his petition that the crime of torture that he was the victim of remains in impunity. In view of these considerations, and after examining the factual and legal elements set forth by the parties, the IACHR considers that the petitioner's claims are not manifestly unfounded and require a study on the merits, since the alleged facts, if corroborated, may characterize violations of rights established in Articles I (life, liberty, and personal security), IX (inviolability of the home), XVIII (fair trial) and XXV (protection from arbitrary arrest) of the American Declaration; articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture; and Articles 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to its Article 1.1 (obligation to respect rights), in the terms of the present Report, to the detriment of Mr. Julio Enrique Gerding Salas and his next of kin –who will be duly identified in the merits stage of the present case–.

¹⁴ IACHR, Report 57/06, Petition No. 526-03, Hugo Armendáriz, United States, July 20, 2006, par. 30; Report No. 3/15, Petition 610-01, Admissibility, Natalio Kejner, Ramón Walton Ramis and others, Argentina, January 29, 2015, par. 52.

¹⁵ IACHR, Report No. 48/15, Petition 79-06, Admissibility, Pueblo Yaqui, Mexico, July 28, 2015, par. 45; Report No. 70/19, Petition 858-09, Admissibility, Luiz José da Cunha "Crioulo" and family, Brazil, 5 de May de 2019, par. 10-11.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles I, IX, XVIII y XXV of the American Declaration; Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture; and Articles 8 and 25 of the American Convention, in connection with its Article 1.1; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 10th day of the month of December, 2020. (Signed): Joel Hernández, President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.