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Inter-American Commission on Human Rights

REPORT No. 37/18
PETITION 1571-07

REPORT ON ADMISSIBILITY

PATRICIO GERMÁN GARCÍA BARTHOLIN
CHILE

Approved by the Commission at its session No. 2126 held on May 4, 2018.
168th Special Period of Sessions.

Cite as: IACHR, Report No. 37/18, Petition 1571-07. Admissibility. Patricio Germán García Bartholin. Chile. May 4, 2018.

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I. INFORMATION ABOUT THE PETITION

Petitioner:	María Elena Sánchez Ramírez
Alleged victim:	Patricio Germán García Bartholin
Respondent State:	Chile[1]
Rights invoked:	Articles XVI (Social Security) and XVIII (Fair Trial) of the American Declaration on The Rights and Duties of Man[2]

II. PROCEDURE BEFORE THE IACHR[3]

Filing of the petition:	December 10, 2007
Additional information received at the stage of initial review:	February 7, 2008; August 24, 2010; January 25, February 2 and May 12, 2011
Notification of the petition to the State:	November 3, 2011
State's first response:	June 22, 2012
Additional observations from the petitioner:	July 23, 2012; December 27, 2013; February 7, 2014; January 31, 2014; January 7 and December 21, 2015
Additional observations from the State:	November 22, 2013

III. COMPETENCE

Competence *Ratione personae:*	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes
Competence *Ratione materiae*:	Yes; American Convention on Human Rights (deposit of ratification instrument on August 21, 1990)

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

Duplication of procedures and International *res judicata*:	No
Rights declared admissible	Articles 5 (Humane Treatment), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in relation to its Article 1.1; and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

[1] In accordance with the provisions of Article 17.2.a of the Regulations of the Commission, Commissioner Antonia Urrejola Noguera, of Chilean nationality, did not participate in the debate or in the decision of the present case.

[2] Hereinafter "the American Declaration" or "the Declaration."

[3] The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The petitioner indicates that the alleged victim, Patricio Germán García Bartholin, her husband ("the alleged victim" or "Mr. Patricio García"), was a civil employee of the Chilean Army with administrative functions in the Curicó 3rd Telecommunications Regiment, in the Seventh Region of Maule, from November 2, 1983 to October 31, 1992, when he was allegedly tortured and forced to quit. The petitioner claims that Mr. Patricio García was in very good physical and mental health and that his health problems started in October 1992 as a result of him being harassed on a daily basis by his colleagues at work through physical and verbal attacks due to his wife's (the petitioner) background as a former political prisoner and victim of torture. The petitioner submits health certificates indicating that his husband was in good physical and mental health when he was admitted to the army.

2. The petitioner asserts that on October 29, 1992 the Health Officer of the military unit where Mr. Patricio García worked diagnosed him with "*endogenous depression and low awareness of his actions*." Said medical doctor ordered him to rest, giving him a seven-day sick leave, and recommended urgently seeing a medical specialist. On the third day of the alleged victim's leave, on October 31, a non-commissioned officer of the army went to Mr. Patricio García's house to pick him up and allegedly take him to see a specialist doctor at the military hospital. However, the alleged victim was allegedly taken to see the commander of the above military unit, where he was beaten, insulted calling him a traitor to his country and the army because of his marriage to a communist woman. He was subjected to electric shock torture, and forced to sign a letter of resignation from the army.

3. The petitioner asserts that the day after those events she and her husband went to the Carabineros Prefecture of Curicó to file the corresponding report. Nevertheless, she claims that the duty officer that served them refused to record their complaint, on the pretext that it was an internal affair of the army, and that therefore the complaint had to be filed before the corresponding military authorities. The petitioner underlines that the duty officer also refused to appoint a subordinate so that, as a representative of the security forces, he would come with them to the city hospital to attest to the alleged victim's injuries, a basic requirement for the legal validity of this procedure. As a result, she claims that the police did not take any measures in relation to the acts of torture against Mr. García Bartholin. Likewise, the petitioner indicates that, for obvious reasons, she did not file a complaint before the military authorities of the unit where her husband worked, because they would have tortured him; and that it would have been useless to do so before other military authorities at a time when the highest authority of the military was the very General Augusto Pinochet.

4. The petitioner alleges that they could not file a legal action immediately after the events took place because of their poor financial situation and because, in her own words, "*no state or private legal body wanted to represent us free of charge, as they explained that it was a complex issue given that the events happened in a period of democracy*."

5. Later, on January 3, 2000, represented by a private attorney, the petitioner and her husband filed a complaint for torture and inhumane treatment before the Third Court of Curicó, an ordinary court. However, due to a fire taking place at that court on February 4, 2000, a series of case files were burnt, including that concerning the complaint filed by the petitioners. The petitioner alleges that after this happened they were "*never again able to reconstruct the case*." Apparently, they did not insist in presenting another complaint or resuming these proceedings because the attorney that represented them allegedly withdrew from representation for fear of reprisals.

6. As to Mr. Patricio García's working life, she indicates that from December 1992 he worked successively with three employers until May 2002, when due to his health condition, which forced him to constantly go on sick leaves and miss work, he had to stop working. The petitioner explains that the continuing deterioration of his health could have been prevented had the initial diagnose issued in 1992 by the Health Officer of his military unit been duly considered—which was not the case, because a few days later, he was allegedly tortured by military officers from the same unit he belonged to.

7. She also indicates that the Committee on Preventive Medicine and Disability of the Office of Health Services of Maule, by Decree No. 598 dated April 15, 1996, determined that the alleged victim suffered from "permanent health damage" due to endogenous depression.

8. Later, the petitioner reported the alleged victim's situation to the Regional Medical Board of the Sixth District of Libertador Bernardo O'Higgins, which, by decision No. 006.0559 of July 26, 2007, established that Mr. Patricio García had an 85 per cent disability for work due to his mental disorder. As a result of this decision, the alleged victim started to earn a pension from the company "PLANVITAL" Pension Fund Administrator, which he still earns and which is the result of the contributions that he could make in his working years.

9. The petitioner indicates that she submitted a letter to the President's Office for Social and Cultural Affairs, including an account of the acts sustained by the alleged victim, and requesting the annulment of his letter of resignation from the army and his reinstatement. She did this in order that Mr. Patricio Garcia would be granted the benefits corresponding to his labor rights, which in principle he is entitled to because he was forced to resign and not officially dismissed. Her letter was transmitted to the Army Human Resources Directorate on October 12, 2006. On January 3, 2007, the Army Under-Secretariat of War replied that Mr. Patricio Garcia's resignation was voluntary, and that, by a legal provision,[4] it is impossible to have it annulled by the Ministry of Defense. Given this denial, on January 9, 2007 the alleged victim lodged an appeal for legal protection before the Court of Appeals of Santiago; however, on January 18 that year, it was rejected on the grounds that the attorney representing the petitioners was not authorized to practice law. On January 22, the petitioners requested a clarification and a rectification of the appeal for legal protection, claiming that their attorney was truly authorized. Nevertheless, on January 24, the court declared their request inadmissible for untimeliness. As a result of this last decision, the petitioners lodged an appeal for review before the same court, but on March 6 it was rejected, again, on grounds of the attorney's unsuitability.

10. The petitioner indicates that on August 10, 2007 they submitted another appeal for protection before the Court of Appeals of Talca to request Mr. Patricio García's reinstatement to the army, and the payment of the pension that he should earn because of the way in which he was forced to resign from the army as well as the permanent health damage caused by those acts. However, on August 22 that year, said court dismissed this appeal for untimely filing, as it considered that the reported facts took place in 1992. In view of this, on August 25, the alleged victim filed an appeal for reversal, which, on September 24, 2007, was dismissed by the same court. The petitioner affirms that this appeal for protection was truly submitted within the legally established period of 15 days following the official issue of the judgment on the alleged victim's permanent mental disorder (judgment on disability No. 006.0559 of July 26, 2007).

11. The petitioner moreover claims that on September 15, 2009 they lodged a request to the Superintendency of Pensions claiming that the pension paid to the alleged victim is unsuitable, and that he should be paid a non-contributory pension for persons dismissed for political reasons—due to his marriage to Mrs. María Elena Sánchez Ramírez—, which is a larger amount because his status of a "political exonerated person" has been recognized by the Ministry of the Interior. On May 4, 2010, the Superintendency of Pensions declined their request, explaining that all the benefits which Mr. Garcia is entitled to, such as that for "political exoneration," are already included in the pension that he earns because the situation of his pension has been settled by a disability pension; and that he is not entitled to a non-contributory pension because of its incompatibility with the above "social security contribution recognition bonds." On May 27, 210, the alleged victim filed an appeal for protection against the Superintendency of Pensions before the Court of Appeals of Rancagua, which dismissed it on May 28 at the same year the court considered that the facts that constitute the subject-matter of the appeal were not contrary to his fundamental rights. On May 28, 2010, the alleged victim lodged an appeal against that decision before the Supreme Court of Justice, which on June 2, 2010 declared it inadmissible for being out of order.

[4] Article 256 of the Army Personnel Rules establishes that, "Once an employee has been removed, the Decree or Resolution so ruling will not be revoked."

12. To conclude, the petitioner complains before the IACHR that Mr. Patricio García did not report the acts of torture initially for fear of again being arrested and tortured by the army. Likewise, she asserts that the State violated the alleged victim's rights to work and to access social security benefits because it refused to reinstate him to his job in the army (or to annul his forced resignation), and thus, the possibility that he would earn an appropriate final payment, compensation, and a pension from said institution in view of the damage he sustained and its physical consequences.

13. For its part, the State alleges that domestic remedies were not exhausted on the grounds that the alleged victim could have pursued other remedies within the domestic legal framework, such as an administrative trial, an action for damages, a civil claim for compensation for damages before the ordinary courts, and criminal proceedings against those who allegedly coerced the alleged victim; not to mention other appeals before the administrative and judicial courts, apart from the appeal for legal protection they lodged.

14. Concerning the purported irregularities in Mr. Patricio García's resignation from the army in 1992, the State indicates that it was an administrative procedure set forth in Article 147 of the Administrative Statute, under which resignation must be filed in writing and is effective as of the date of issue of the decree by which it is accepted; therefore, the petitioners should have pursued the corresponding administrative and judicial appeals at that moment. In regard to the administrative procedures, it submits that is through ordinary appeals for review by a higher court that decisions made by State organs are reviewed, and that the alleged victim failed to lodge these recourses.

15. Additionally, it claims that the petitioner admits to not having filed the above remedies in order to avoid drawing attention to the alleged victim's situation; that yet, later, she brought the case to the international jurisdiction. It mentions, by way of example, the fact that they waited until the alleged victim was declared disabled for work before filing an appeal for legal protection, although it was obvious that the filing was untimely, as the corresponding court declared.

16. Furthermore, the State claims that the remedies presented by the petitioners were fraught with manifest formal irregularities and were inadequate for their purposes, apart from groundless and untimely. For example, the filing of an appeal for review when the appropriate remedy would have been an appeal, or requesting the annulment of the decision by which the appeal for review was rejected, in order that the initial appeal for legal protection would be admitted. Finally, the State alleges that the petition brought before the IACHR is untimely because the judgment by which the appeal for legal protection was rejected was issued on March 14, 2007, and the petition to the IACHR was lodged on December 10, 2007.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

17. In this case, the Inter-American Commission notes, in the first place, based on the allegations and the information presented by the petitioner, that the main issue of the petition is the alleged failure of the State to reinstate Mr. Patricio García to his job in the army or to annul his forced resignation, and to pay him the benefits apparently owed in view of his alleged forced resignation.

18. In this regard, the Commission observes that the petitioner alleges that the initial acts that motivated her complaint are the purported acts of harassment and torture committed against her husband by members of the army, through which he was allegedly forced to file his letter of resignation from that institution. With respect to this, the State claims, basically, that the alleged victim should have pursued and exhausted criminal remedies against those who attacked him, and that his dismissal was an administrative procedure liable to other legal forms of challenge, and concludes that the alleged victim did not exhaust the domestic remedies.

19. In relation to this fundamental aspect of the petition, the Inter-American Commission believes that, regardless of the formal administrative-law aspects that may derive from the alleged victim's resignation or allegedly forced dismissal, the IACHR jurisprudence establishes that under international standards applicable in cases like the instant petition, where serious human rights violations such as torture are alleged, the appropriate and effective remedy is the filing and the undertaking of an effective criminal

investigation to clarify the facts and, if necessary, individualize those responsible and attribute the corresponding responsibilities.[5]

20. In the instant case, the Commission considers that according to the petitioner's allegations, on the day after the alleged acts of torture she and her husband went to the Prefecture of Carabineros of Curicó to lodge the corresponding report. However, it is alleged that they were denied any help on the pretext that the acts reported were to be exclusively dealt with by the army, and no investigation followed. Likewise, on January 3, 2000, the petitioner and the alleged victim, represented by a professional attorney, submitted a judicial complaint for these acts before the Third Court of Curicó; however, thirteen months later, their case file was lost in a fire occurred in that court. These acts were not contested by the State. Therefore, the Commission concludes that the exception concerning unwarranted delay in the exhaustion of domestic remedies, established in Article 46.2.c of the American Convention, is applicable in the instant case, in relation to the allegations of torture.

21. Likewise, the Commission observes that the petition was received on December 10, 2007 and that the alleged acts at issue happened from October 31, 1992 and their effects, regarding the purported lack of investigation and punishment of the acts and the reparation to the alleged victim, continue to date. Consequently, in light of the context and the characteristics of the instant case, the Commission believes that the petition was filed within a reasonable time-period, under the terms of Article 32.2 of the IACHR Rules of Procedure, and pursuant to Article 46.1.b of the American Convention.

22. Furthermore, in regard to the legal remedies that the alleged victim presented before the domestic courts to obtain compensation and other labor and pension benefits because of his allegedly forced dismissal from the army, the petitioner mentions as follows: a) the appeal for legal protection filed by the alleged victim on January 9, 2007 before the Court of Appeals of Santiago was declared inadmissible on the grounds that the alleged victim's representing attorney was not duly authorized to practice law—which was ruled twice by the same court; b) the appeal for legal protection filed by the alleged victim on August 10, 2007 before the Court of Appeals of Talca was dismissed for untimeliness—which was established twice by the same court; c) the appeal for legal protection filed by the alleged victim before the Court of Appeals of Rancagua was ruled contrary to the alleged victim's interests, because the court found that the none of the fundamental rights enshrined in the Chilean Constitution had been violated. The alleged victim challenged this last decision and, on June 2, 2010, the Supreme Court of Justice ruled it out of order. Likewise, the petitioner broadly mentions the filing of a complaint against the Chilean army before the Third Court of Curicó, which was allegedly lost in a fire. However, the petitioner does not submit additional information on these proceedings.

23. The Commission moreover notes that the petitioner did not submit allegations about possible irregularities or violations of due process of law occurred in the processing of the above remedies; that, instead, she manifests her discontent with the outcomes of these. In this regard, without analyzing the applicability of the domestic procedural norms, the information submitted indicates that the domestic remedies were several times unduly presented. Accordingly, the Commission concludes that, in this respect, the petition does not meet the admissibility requirement set forth in Article 46.1.a of the Convention.[6]

VII. COLORABLE CLAIM

24. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that, if proved, the acts reported may constitute violations of the rights enshrined in Articles 5 (Humane Treatment), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in relation to the general obligations established in its Article 1.1; and in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. Patricio García Bartholin and his wife, Mrs. María Elena Sánchez Ramírez. It is worth noting that even when the Commission

[5] IACHR, Report No. 156/17, Admissibility, Petition 585-08, Carlos Alfonso Fonseca Murillo, Ecuador, November 30, 2017, para. 13.

[6] IACHR, Report No. 71/14, Admissibility. Petition 537-03, Mayra Espinoza Figueroa, Chile, July 25, 2014; para. 41.

determines the inadmissibility of complaints regarding labor and personal benefits, it will analyze, if applicable, the effects of the alleged acts of torture, in the merits stage and in the light of the obligation to clarify them and grant reparations.

25. The IACHR has previously established that once the American Convention becomes effective in a State, it this the Convention, not the Declaration, the main source of law applicable by the Commission provided that the petition concerns an alleged violation of substantially identical rights enshrined in both instruments and is not an ongoing situation. Therefore, an analysis on the merits of the instant petition based on Article XVIII (Fair Trial) of the Declaration is not applicable. Regarding the complaint about the purported violation of Article XVI (Social Security) of the Declaration, the Commission notes that the petitioners did not submit allegations or evidence sufficient to *prima facie* establish its violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 8 and 25 of the American Convention, in connection with its Article 1.1; and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture;

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.

Done and signed in the city of Santo Domingo, Dominican Republic, on the 4th day of the month of May, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, and Flávia Piovesan, Commissioners.