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REPORT No. 171/19

PETITION 1477-09

REPORT ON ADMISSIBILITY

ERNESTO YOLIZTLY LEJDERMAN ÁVALOS, BERNARDO MARIO
LEJDERMAN KONUJOWSKA AND MARÍA DEL ROSARIO ÁVALOS
CASTAÑEDA
CHILE

Approved by the Commission on December 5, 2019 in San Salvador, El Salvador.

Cite as: IACHR, Report No. 171/19, Petition 1477-09. Admissibility. Ernesto Yoliztly Lejderman Ávalos, Bernardo Mario Lejderman Konujowska and María del Rosario Ávalos Castañeda. Chile. December 5, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Ernesto Yoliztly Lejderman Ávalos and Tomás Ojea Quintana
Alleged victim:	Bernardo Mario Lejderman Konujowska, Ernesto Yoliztly Lejderman Ávalos y María del Rosario Ávalos Castañeda
Respondent State:	Chile ¹
Rights invoked:	Articles 8 (fair trial) and 25 (judicial protection) of the American Convention on Human Rights, ² in relation to its Article 1.1 (obligation to respect rights).

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	November 18, 2009
Additional information received at the stage of initial review:	December 1, 2009; February 9, 2011; May 9, 2011; October 18, 2013; October 28, 2013
Notification of the petition to the State:	May 23, 2013
State's first response:	June 19, 2014
Additional observations from the petitioner:	September 3, 2014; November 21, 2014; June 17, 2015; February 19, 2016; July 27, 2016

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 of Rights and Duties of Man ⁴ (ratification of the OAS Charter on June 5, 1953); American Convention on Human Rights (deposit of instrument of ratification on August 21, 1990); Inter-American Convention on the Forced Disappearance of Persons (deposit of instrument of ratification on January 26, 2010) ⁵

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
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¹ As established under Article 17.2.a of the Rules of Procedure of the Commission, Commissioner Antonia Urrejola Noguera, a Chilean national, did not take part in the discussion or decision of the instant matter.

² Hereinafter, "the American Convention" or "the Convention".

³ The observations submitted by each party were duly transmitted to the opposing party. Also, after his last substantive filing on June 2015, the petitioner has submitted several written communications requesting information on the procedural status of his petition, the last on July 27, 2016.

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

⁵ Hereinafter, "IAFDP"

Rights declared admissible	Articles 3 (juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial) and 25 (judicial protection) of the American Convention in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects); Articles I (life, liberty and personal security), V (honor, personal reputation, and private and family life), VI (right to a family and to the protection thereof), VII (protection for mothers and child), XVII (recognition of juridical personality and civil rights), XVIII (fair trial) and XXV (protection from arbitrary arrest) of the American Declaration; and Article I of the Inter-American Convention on the Forced Disappearance of Persons.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes. May 25, 2009.
Timeliness of the petition:	Yes. November 18, 2009.

V. ALLEGED FACTS

1. The petitioner claims that the State of Chile is responsible for the extra-judicial execution and subsequent concealment of the bodies of Bernardo Mario Lejderman Konujowska and María del Rosario Ávalos Castañeda (hereinafter, “alleged victims” or “Lejderman Ávalos couple”) at the hands of members of the Chilean armed forces. The petitioner claims that the couple was executed in the presence of their son Ernesto Yoliztly Lejderman Ávalos, (also “petitioner” and “alleged victim”) who was two years old at the time of the events; and that, after the extra-judicial execution of his parents, the child was illegally abducted by the security forces and delivered two days later to the care of some nuns. In addition to this, the petitioners claim that the State is responsible for violations of the rights of access to justice, judicial protection and fair trial and for the lack of just reparation for the damages caused to the detriment of the alleged victims and their family members. The petitioners allege that the facts of the instant case occurred in the framework of a pattern of general and systematic human rights violations that took place in Chile during the military dictatorship of General Pinochet.

2. According to the petitioner, Bernardo Mario Lejderman Konujowska, an Argentine national, and María del Rosario Ávalos Castañeda, a Mexican national, were supporters of the Government of President Salvador Allende while residing together in the city of Santiago de Chile. At the time of the *coup d'état*, on September 11, 1973, the couple’s involvement with the deposed Government resulted in a situation of risk for them, and for that reason they decided to cross the border to return to Argentina, temporarily taking refuge at the Valley of Elqui. In that place, they remained hidden and counted on the support of people who provided them with food and clothing.

3. The petitioners point out that, on December 8, 1973, one of these persons was captured and forced under torture to deliver the Lejderman Ávalos couple, guiding a military patrol -under the command of Captain Fernando Polanco Gallardo- to caves in the *Quebrada de Angostura*, in the commune of Vicuña, where the family was hiding. The military ordered such person to wait at a reasonable distance while the military group located the couple, who were executed with machine gun fire in front of their two years old son.

4. The petitioners inform that the witness was forced to carry a pick and a shovel to dig a grave and bury the remains of Miss Ávalos Castañeda at the location where she was murdered. She was buried at about one hundred and fifty meters from the caves, with her chest evincing several bullet wounds and bleeding abundantly. With regards to the body of Mister Lejderman Konujowska, the soldiers did not allow his burial but rather ordered that his remains were left outdoor to be taken care of by animals. However, the witness later returned with a neighbor to bury the body. According to documents filed by the petitioners, after burying the remains of Bernardo Lejderman, whose body was bloody and decomposing, the witness marked the location of the burial site with a cross made with tree branches that he tied with his shoelaces.

Mr. Bernardo Lejderman body was 17 years as disappeared, as his remains were eventually exhumed in August, 1990, as a result of a complaint for the crime of illegal burial that was filed by the petitioner before the Criminal Court of Elqui-Vicuña.

A. On the abduction of the child

5. According to the petitioners, after the murder of the Lejderman Ávalos couple, the soldiers removed the child Ernest Yoliztly Lejderman Ávalos from the scene of the crime to an unknown location and left him a few days later in the care of the nuns of the *Casa de la Providencia* in La Serena, while hiding the facts related to his parents to justify his delivery. The petitioners explain that this was ordered by the *Chief of Section* and Mayor of the Province, Lieutenant Coronel Ariosto Lapostol Orrego, who was also de the Commander of the Arica Regiment and Supreme Authority of the IV Region; nevertheless, it was Lieutenant Juan Emilio Cheyre, who was later the Head of the Army of Chile, who personally delivered the child to the nuns, under the false premise that his parents had committed suicide. According to additional information filed by the petitioners, the nuns received direct orders to prevent the child from leaving the religious residence and to not provide any type of information about his existence to third parties.

6. The petitioners allege that Mister Herz León Lejderman, the paternal grandfather of the petitioner, requested and filed for information about the whereabouts of the Lejderman Ávalos and his grandchild before the Ministry of Foreign Affairs of Chile on several occasions; but such information was refused and kept hidden from him until the months of January and February of 1974 when, thanks to diplomatic efforts from the Argentine Consulate, Ernesto Lejderman was transferred to the city of Buenos Aires to meet their paternal grandparents. The petitioners point out that, until then, the child had remained in the *Casa de la Providencia* in La Serena and that both his existence and location had remained hidden.

B. On the whereabouts of the mortal remains of Bernardo Lejderman Konujowska and María del Rosario Ávalos Castañeda

7. The petitioners argue that the State of Chile kept the truth secret about what had happened to the Lejderman-Avalos couple. According to them, the intent of the Government was to disappear the bodies, undertaking different actions to that end – including the concealment of information and the relocation of the bodies of the alleged victims. Additionally, the petitioners claim that false information was disseminated, indicating that Miss María del Rosario Ávalos was alive and imprisoned. It is indicated that in this context, Mister Herz Lejderman continue to take steps to recover his daughter in law and his grandchild, with support from the Mexican government. The petitioners report that, responding to filings and questions undertaken by the Embassy of Argentina about Mister Bernardo Lejderman, on January 3, 1974, the Undersecretary of Foreign Relations of Chile reported on his death. In an official statement of the time, it was indicated that Mister Lejderman “*was a dangerous activist sought by a military patrol in the mountain area who, upon being located, attempt to escape and, when unable to do so, detonated a dynamite cartridge that he had in his clothes to take his own life*”. Subsequently, the official version was updated to indicate that, as the remains of Mister Bernardo Lejderman were disseminated around the place where the facts occurred as a result of the explosion, the military patrol had to collect and bury them, preventing an autopsy from being undertaken.

8. The petitioners add that the version about the alleged suicide by dynamite of Mr. Bernardo Lejderman was held by the State of Chile for many years. However, after the intervention of the local judiciary on August 1, 1990, his remains were located in the vicinity of the town of Gualliguaica, *Quebrada de Angostura*. His remains were full, lying at forty centimeters of depth and, although the bones were disjointed due to the passage of time, none had lesions. The bone remains from the face, head, legs, arms, chest and pelvis were complete, and there were only obvious marks of bullets going through his body.

9. In parallel, the petitioners inform that the State of Mexico undertook continuous procedures to find out the fate of Miss Ávalos. The petitioners claim that the official version of the Ministry of Foreign Relations of Chile was that Miss Ávalos Castañeda had committed suicide by detonating a dynamite cartridge

that she was carrying on her. The petitioners inform that, after multiple diplomatic efforts, the body of Miss María del Rosario Ávalos Castañeda was exhumed and illegally transferred to the General Cemetery of Santiago, without the participation or knowledge of his family members, during the month of April of 1974. The petitioners inform that, through Resolution 397 dated on April 10, 1974, the Regional Director of the Public Health Ministry established the cause of death as “dynamite explosion” which, together with other public versions issued at the time, recorded the death as an alleged suicide with explosives.

10. The petitioner points out that, without consultations and disregarding the background of the facts that surrounded the assassination of his mother, her remains were transferred to a general tomb and later cremated by the authorities of the General Cemetery of Santiago in the month of December of 1998, two months after Pinochet’s detention in London. In this way, the petitioners point out that, unknown to the petitioner who had since 1991 traveled constantly to Chile to try to find her mother, all traces and evidence of her body were eliminated. The petitioner highlights that information about the remains of his mother was systematically denied, which prevented him from finding her whereabouts.

11. According to the petitioners, the Rettig Report published by the Commission on Truth and Reconciliation in 1991, established that the Lejderman-Ávalos couple was executed by State agents operating outside the law.

C. Judicial Processes

12. The petitioners indicate that, with the objective of seeking justice, on July 31, 1990, it was filed a criminal complaint for the crime of illegal burial of Mister Bernardo Mario Lejderman Konujowska in the Criminal Court of Elqui-Vicuña. In addition to describing the circumstances of the death of the victim, his illegal burial and his condition of disappeared during seventeen years, it was requested that his remains be exhumed. The complaint was accepted and on August 1, 1990, the judge and a team of experts traveled to *Quebrada de Angostura* and undertook a series of excavations that culminated in the finding of Mr. Bernardo Lejderman’s bones.

13. On August 8, 1990, Ernesto Yoliztly Lejderman Ávalos, filed a complaint for the crimes of homicide, illegal burial and illegal exhumation of his parents, which was added to the procedure. The petitioner declares that, on March 14, 1991, the Judge of Elqui-Vicuña ordered the Civil Registry of Vicuña to record the death of Bernardo Lejderman, indicating that his death had taken place in the early hours of the morning of December 8, 1973, in the vicinity of Gualliguaica, presumably from multiple gunshot wounds. Likewise, the Judge requested the Joint Chief of Staff of the Chilean Army to provide information about the members that took part in the execution of the Lejderman Ávalos; to which it was replied that the institution did not possess records about the members of the military patrol or on who had ordered this operation.

14. The petitioners recount that on February 20, 1991, the Military Judge of the Second Military Court of Santiago, intervened in the investigation, requesting the recusal of the Judge to continue investigation the facts as those involved personnel of the Army.⁶ Although the Judge rejected the request for recusal and submitted the case to the Supreme Court of Chile, on May 5, the Supreme Court of Chile accepted the recusal and transferred the procedure from Ordinary Justice to Military Justice. Subsequently, on March 10, 1992, the Military Judge of the Second Military Court of Santiago, decided to fully and definitively dismiss the case, as the crimes being investigated fell within the Amnesty Law of 1978 and the criminal responsibility of the accused was extinct.

15. On December 4, 2000, the petitioner filed a complaint before the Criminal Justice of Santiago, against General Augusto Pinochet Ugarte; former Commander of the Arica Regiment of La Serena, Coronel (Retired) Ariosto Lapostol Orrego; former Captain of the Army Intelligence, Fernando Polanco Gallardo; Army Lieutenant Rubén Fiedler Alvarado; Army Second Lieutenant Mario Larenas Carmona; and others

⁶ The petitioner contends that at that procedural stage, the judicial efforts to exhume the body of María del Rosario Ávalos, her autopsy, determining the effectiveness of the pre-operative detention of two professors from La Serena who had collected clothes for him when he was a child, and identifying Captain Polanco and other members of the military patrol were still pending.

responsible for the homicides of the Lejderman-Ávalos couple.⁷ The petitioner point out that after four years of virtual processing, four of the seven accused were indicted and subjected to pre-trial detention on May 26, 2004: Ariosto Alberto Francisco Lapostol Orrego, Fernando Guillermo Santiago Polanco Gallardo, Héctor Omar Vallejos Birtiola and Luis Humberto Fernández.

16. Additionally, the petitioner informs that he filed a civil complaint for a sum of 1,5 billion Chilean pesos (1,500,000,000.00) against the Treasury of Chile for the moral damage caused to him by the events, annexing it to the criminal complaint.

17. The petitioner alleges that one year after the indictments, on May 25, 2005, the Special Magistrate, issued a judgment accepting the *res judicata* exception raised by the petitioners – basing his arguments on the judgment of dismissal issued by the Military Judge in 1992 – and acquitted them. He also rejected the civil complaint, as it was dependent on the criminal action.

18. The petitioner points out that he initiated an appeal process against this judgment and that, on Jun 28, 2005, the Appeals Court reversed the judgment, declaring the inapplicability of *res judicata* and ordering that a new judgment be issued in the case. However, on July 14, 2006, the Judge once again issued a judgment accepting the *res judicata* exception, acquitting the accused and rejecting the civil action. The petitioner informs that faced with this judgment it appealed it, which resulted in that, on December 18, 2007, the Ninth Chamber of the Santiago Appeals Court, reversed the first instance judgment and convicted Fernando Polanco, Luis Fernández and Hector Vallejos to ten years and one day imprisonment for the crime of homicide, to acquit Ariosto Lapostol as it found that his involvement in the execution of the operation had not been duly established; and to accept the action for compensation, establishing a sum of three hundred million Chilean pesos (300,000,000.00) plus adjustments and interests.

19. The petitioner explains that, after three appeals for cassation filed by the affected parties, the Supreme Court of Chile issued a judgment on May 25, 2009, through which it annulled the judgment issued on December 18, 2007, by the Appeals Court and replaced it by a new one. Such judgment confirmed the appealed decision with regards to the conviction of the accused that had been established but reduced the period of imprisonment by application of the gradual statute of limitation (or half statute of limitations), on the basis of Article 103 of the Chile Criminal Code.⁸ At the same time, it revoked the compensation for moral damage reasoning that the criminal justice was not the most adequate jurisdiction to decide on the complaint. The petitioner explains that the Supreme Court of Chile founded its decision of applying a gradual statute of limitations by indicating that “*this finds its reason for being on how senseless such a high penalty is for facts that took place such a long time ago*”. For that reason, it reduced the penalties for those convicted to 5 years and 1 day.

20. The petitioner highlights that, during the judicial process, General Augusto Pinochet – the Military Chief of the group that committed the crimes and the supreme head of the Chilean dictatorship – was never indicted. He also highlights that Coronel Ariosto Lapostol was exculpated for acting “in good faith” even though there existed contradictions in his statement in court and having been accused of setting up the torture operation against the professors and the witness to obtain information about the Lejderman-Ávalos couple, in addition to having omitted the transfer of their remains and the performance of the relevant autopsies. Likewise, the petitioner indicates that in his complaint he identified several material authors that were called upon for interrogation and, on the basis of such interrogations, were excluded from the facts;

⁷ The petitioner explains that these names were taken from a complaint made by the retired military officer Pedro Rodríguez Bustos, who, in the months prior to the filing of the complaint, denounced before the tribunals the list of military personnel previously cited as the perpetrators of the crime against the Lejderman-Ávalos couple.

⁸ Article 103” “If the person responsible presents himself or is held before completing the statute of limitations of the criminal action or the penalty, but having already passed half of what is required, in their respective cases, for such statute of limitations, the court shall consider the fact as covered by two or more highly qualified mitigating circumstances and no aggravating circumstances and apply the rules of arts. 65, 66, 67 and 68, either in the imposition of the penalty, or to reduce the one already imposed. This rule does not apply to the requirements of short-term offenses and specials.”

with the peculiarity that Army Second Lieutenant Mario Larenas Carmona, was never interrogated by the judiciary. The petitioner argues that the intellectual authors of the crime were never convicted and that only some of the material authors received a criminal conviction.

21. For its part, the State alleges that the petition is inadmissible as the petitioner has not exhausted the local jurisdictional remedies foreseen by the Chilean legal order. The State did not controvert the facts denounced by the petitioner and did not pronounce itself on the criminal procedures. However, the State claims that the petitioner was able to file a civil complaint for the compensation for damages the reparation that he requests, given that having pursued jointly with the criminal action (where it was rejected) did not preclude him from filing an exclusively civil action. In addition, the State holds that the civil action filed by the petitioner was rejected because an exception for lack of competence of the court was accepted, pointing out that the alleged facts on which the action was based exceeded those that could be heard in criminal jurisdiction.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

22. The petitioner reports that he exhausted the domestic remedies with the judgment of May 25, 2009 issued by the Supreme Court of Chile, which reduces the term of the sentence to the defendants who were prosecuted (under the application of the gradual statute of limitations); as well as the revocation of the compensation requested for damages. The criminal proceedings took place both in the ordinary courts and in the military jurisdiction. For its part, the State did not comment on the criminal proceedings carried out, but stated that, in respect of the reparation actions, the petitioner did not exhaust all the local remedies offered by Chilean legislation, since the petitioner could demand compensation through civil proceedings for damages to pursue the requested reparation.

23. The Commission reiterates, in first place, that in situations such as the instant one, the local remedies that should be taken into account for the purposes of the admissibility of the petition are those related to the investigation; establish the circumstances and criminal sanction of those responsible for the alleged facts. In this sense, whether or not the alleged victims had resort to the civil jurisdiction to request a financial compensation is not decisive for the analysis about the exhaustion of local remedies in the instant case. Likewise, the Commission reiterates that the military jurisdiction is not an adequate forum and, therefore, does not provide an adequate remedy to investigate, judge and sanction human rights violations allegedly committed by members of the Armed Forces.⁹

24. On this basis, the Commission considers that local remedies were exhausted by the definitive judgment of May 25, 2009, and concludes that this petition meets the requirements established under Articles 46.1.a of the Convention and Article 31.2 of the Rules of Procedure. Likewise, in relation to the timeliness, the petition was filed before the IACHR on November 19, 2009, and local remedies were exhausted on May 25, 2009, by the judgment on the appeal for cassation. Therefore, it is appropriate to consider that the requirement has been met.

VII. ANALYSIS OF COLORABLE CLAIM

25. In relation to the *ratione temporis* and *ratione materiae* competence, the Commission will analyze the facts of the instant case in light of the obligations established in the American Convention, and in the Inter-American Convention on the Forced Disappearance of Persons, with regards to those facts that took place after their entry into force or whose performance continued after the entry into force of such instruments for the State of Chile. The Commission will analyze all facts that fully took place before the entry into force of the American Convention for said State in light of the obligations derived from the American Declaration.

⁹ IACHR, Report No. 47/13 (Admissibility). Petition 1266-06. Ángel Díaz Cruz and others. Mexico. July 12, 2013. Para. 24.

26. The Commission considers that the arguments relating to the legal nature and the effects of the application of the institute of half or gradual statute of limitations, which the petitioners consider has been applied by the Supreme Court of Chile when deciding appeals for cassation in the instant cases associated to crimes against humanity committed during the dictatorship, should be analyzed at the merits stage.

27. In this sense, and in light of the factual and legal elements submitted by the parties and of the nature of the matter submitted to it, the Commission considers that, if the alleged facts are established by the petitioner, they may constitute violations to the rights established in Articles 3 (juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial) and 25 (judicial protection) of the American Convention in relation to its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects); Articles I (life, liberty and personal security), V (honor, personal reputation, and private and family life), VI (right to a family and to the protection thereof), VII (protection for mothers and child), XVII (recognition of juridical personality and civil rights), XVIII (fair trial) and XXV (protection from arbitrary arrest) of the American Declaration; and Article I of the Interamerican Convention on Forced Disappearance of Persons.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 3, 4, 5, 7, 8 and 25 of the American Convention in relation to its Articles 1.1 and 2; Articles I, V, VII, XVII, XVIII and XXV of the American Declaration; and Article I of the Inter-American Convention on the Forced Disappearance of Persons.

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 5th day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Margarette May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva and Flávia Piovesan, Commissioners.