

OEA/Ser.L/V/II.

Doc. 259

31 December 2019

Original: Spanish

REPORT No. 232/19

PETITION 720-08

REPORT ON ADMISSIBILITY

SERGE BERTEN AND FAMILY

GUATEMALA

Electronically approved by the Commission on December 31, 2019.

Cite as: IACHR, Report No. 232/19, Petition XXX-XX. Admissibility. Serge Berten and family. Guatemala. December 31, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Immaculate Heart of Mary congregation (CICM), Mutual Support Group (GAM)
Alleged victims:	Serge Berten and his family
Respondent State:	Guatemala
Rights invoked:	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 25 (judicial protection) of the American Convention on Human Rights, ¹ in connection with its Article 1.1 (obligation to respect rights); Articles I, II, and III of the Inter-American Convention on Forced Disappearance of Persons ²

II. PROCEDURE BEFORE THE IACHR

Filing of the petition:	June 19, 2008
Additional information received at the stage of initial review:	July 3, 2008; August 19, 2011
Notification of the petition to the State:	January 9, 2013
State's first response:	April 12, 2013
Additional observations from the petitioner:³	May 31, 2013; January 6 and May 22, 2017
Additional observations from the State:⁴	April 10 and August 8, 2013, January 17, 2019

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 Convention (deposit of instrument of ratification on May 25, 1978); ICFDP (deposit of instrument of ratification on February 25, 2000)

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 3 (juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 25 (judicial protection) of the American Convention in connection with its Article 1.1; Article I of the Inter-American Convention on Forced Disappearance of Persons
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, exception in Article 46.2.c of the ACHR applies
Timeliness of the petition:	Yes, under the terms of Section VI

¹ Hereinafter "American Convention" or "Convention."² Hereinafter "ICFDP."³ These observations were duly transmitted to the State.⁴ These observations were duly transmitted to the petitioner.

V. ALLEGED FACTS

1. The petitioners allege the international responsibility of the State of Guatemala for the purportedly forced disappearance of Serge Berten (hereinafter “the alleged victim”). According to them, Serge Berten was born in Belgium, where he graduated as a social worker. At the age of 23, he moved to Guatemala as a seminarian of the Immaculate Heart of Mary congregation (CICM), with which he had signed a contract to work as an “Animator of grassroots communities and rural development.” During the internal armed conflict, he worked as such in the city of Nueva Concepción, Escuintla department. His mission was to form local leaders.

2. On January 19, 1982, members of the Guatemalan security forces arrested the alleged victim on the second avenue in front of house 1-75, area 4, Mixco city, Guatemala department. Allegedly, officers forced him to get in a vehicle and took him away, and his whereabouts remain unknown. The petitioners claim that the alleged victim’s purportedly forced disappearance occurred amid state repression of the civil population and that before the events of January 19, 1982, other CICM members—parish priest Conrado de la Cruz and sacristan Herlindo Cifuentes—had disappeared under similar circumstances in May 1980.

3. Regarding the search efforts to find the alleged victim, the petitioners indicate having searched in prisons, hospitals, the premises of several security forces, morgues, and military bases without positive results. They even denounced his disappearance through the media and had paid notices published in Guatemalan newspapers more than once. Later in February 1989, Serge Berten’s parents met with the former Guatemalan president, Vinicio Cerezo Arévalo, and the human rights prosecutor (“PDH”), Gonzalo Menéndez de la Riva, to discuss the alleged victim’s disappearance.

4. Regarding the legal proceedings filed, the petitioners have submitted information on two remedies. Firstly, on October 19, 2005, they filed a habeas corpus petition in favor of the alleged victim, which the Ninth Court for Criminal and Environmental and Drug-related Matters declared inadmissible on November 21, 2005. Secondly, on February 23, 2006, they applied for a special investigation procedure (“PEA”) to the Criminal Division of the Supreme Court of Justice; on July 26, 2007, this court issued a legal mandate for the PDH to undertake the applicable investigation. To date, that investigation has not produced any results.

5. In turn, the State mentions the steps taken by state bodies to investigate the alleged victim’s disappearance. It refers to the exchange of diplomatic notes between the Belgian Embassy in Guatemala and Guatemala’s Foreign Affairs Ministry (1982-2005), the proceedings pursued by the Prosecutor-General’s Office that resulted in the design of an investigation plan and a strategy to gather information from different state bodies; the proceedings filed by the Supreme Court of Justice regarding the PEA; and the proceedings by the Human Rights Prosecutor’s Office, as a result of which the State claims to have accessed “the names of the possible perpetrators” and “the police record of the possible masterminds,” which the State did not submit for confidentiality issues. In its additional observations from August 8, 2013, the State does not submit further details on the outcome of the above proceedings.

6. The State contends that, since the duty to investigate is an obligation of means or conduct, not of result, all the information gathered about the several proceedings undertaken by several state bodies proves the State’s fulfillment of its duty to investigate the facts of January 19, 1982.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

7. The petitioners allege that in this case, the exceptions established in Article 46.2, paragraphs (b) and (c), of the Convention apply. They claim the application of Article 46.2.b given the general context of impunity in Guatemala at the time of the events, as it was dangerous for anyone daring to report such type of events. In this regard, they quote the Historical Clarification Commission (CEH) “[T]he failure of Guatemala’s administration of justice to protect human rights during the internal armed confrontation has been clearly and fully established, by the thousands of violations registered by the CEH that were not investigated, tried, or punished by the Guatemalan State.” They claim the application of Article 46.2.c because it should be considered that filing a habeas corpus petition means that an adequate remedy has been pursued and that its dismissal led the petitioners to file a PEA, which to date has not been useful to determine the alleged victim’s whereabouts.

8. The State indicates that the petitioners have not exhausted the domestic remedies and moreover seek immediate results despite the difficulty that the elapsed time poses to obtain them quickly. It alleges that the exception in Article 46.2.b of the Convention does not apply in this case because the alleged victim's rights were not violated, nor were his rights to access or exhaust the domestic remedies. Finally, it claims that the exception in Article 46.2.c does not apply either because the petitioners did not pursue the internal mechanisms available in cases of delay and that they seek to blame the State for the elapsed time without recognizing that they filed legal actions many years after the alleged victim disappeared.

9. In this regard, the Commission has established that whenever a crime is committed that allegedly involves state officials, the State is obliged to initiate and further a criminal proceeding with diligence. In the instant case, the IACHR takes note that, based on the information gathered by the PDH and submitted by the State, former army officers (Group 6) could be involved in the alleged victim's disappearance. However, according to the information submitted, the Commission observes that, to date, the State has not criminally investigated the suspects. Based on the information available, the PEA—postponed 16 times at the PDH's request to undertake new investigations—has not produced any results to identify the alleged victim's whereabouts or criminally prosecute those possibly responsible.

10. As 36 years have passed since Serge Berten disappeared, the Commission considers that the elapsed time is well beyond a reasonable time necessary for a criminal proceeding leading to establish the circumstances of Mr. Berten's disappearance. Therefore, according to the Commission, the exception to the exhaustion of domestic remedies foreseen in Article 46.2.c of the Convention applies in this case. Considering that, to date, that proceeding is pending, the IACHR believes that this petition was filed in a reasonable time under Article 32.2 of the IACHR Rules of Procedure and Article 46.2 of the American Convention.

VII. COLORABLE CLAIM

11. In view of the factual and legal elements presented by the parties and the nature of the matter brought to its attention, the Commission believes that the alleged facts presented by the petitioner regarding: that the alleged victim was forcibly disappeared by state agents; and that the State has not acted with due diligence or within reasonable time to investigate and clarify the facts, are not manifestly unfounded and could characterize possible violations of 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 Article 1.1. Likewise, concerning the events happening before the date of deposit of the instrument of ratification of the Inter-American Convention on Forced Disappearance of Persons, related to the alleged continuity and lack of clarification of the crime of forced disappearance, the Commission deems that the alleged facts may constitute possible violations of Article I of the said instrument to the detriment of Serge Berten.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 3, 4, 5, 7, 8, and 25 of the American Convention, in connection with the obligations in its Article 1.1; and Article I of the Inter-American Convention on Forced Disappearance of Persons; 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 31st day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.