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REPORT No. 36/19
PETITION 1214-09
REPORT ON ADMISSIBILITY

FRANKLIN BUSTAMANTE RESTREPO AND FAMILY
COLOMBIA

Approved electronically by the Commission on April 13, 2019.

Cite as: IACHR, Report No. 36/19. Petition 1214-09. Admissibility. Franklin Bustamante Restrepo and Family. Colombia. April 13, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Oscar Darío Villegas Posada
Alleged victim:	Franklin Bustamante Restrepo and family ¹
Respondent State:	Colombia ²
Rights invoked:	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 11 (privacy), 25 (judicial protection) of the American Convention on Human Rights, ³ and Articles I (life, liberty and personal security) and XVIII (fair trial) of the American Declaration of the Rights and Duties of Man ⁴

II. PROCEDURE BEFORE THE IACHR⁵

Filing of the petition:	September 26, 2009
Additional information received at the stage of initial review:	November 4, 2010
Notification of the petition to the State:	July 13, 2011
State's first response:	October 14, 2011
Additional observations from the petitioner:	November 22, 2011
Additional observations from the State:	June 26, 2012
Notification of the possible archiving of the petition:	March 27, 2017
Petitioner's response to the notification regarding the possible archiving of the petition:	April 3, 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 Convention (deposit of instrument on July 31, 1973)

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, under the terms of Section V
Rights declared admissible	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 19 (rights of the child) and 25 (judicial protection) of the American Convention, in relation to its Article 1.1 (obligation to respect rights)

¹ According to the petitioner, the alleged victim's next-of-kin are María del Socorro Restrepo Velásquez (mother), Denir Arley Bustamante Restrepo (brother) and Fainory Calle Restrepo (brother).

² In accordance with Article 17, paragraph 2.a of the IACHR Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not partake in the discussion or the decision on this matter.

³ Hereinafter "Convention," "American Convention" or "ACHR."

⁴ Hereinafter "American Declaration" or "Declaration."

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

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, the exception in Article 46, paragraphs 2.b and c of the American Convention is apply
Timeliness of the petition:	Yes, under the terms of Section VI

V. ALLEGED FACTS

1. The petitioner claims the responsibility of the State of Colombia due to the extrajudicial killing of the 14 year old child Franklin Bustamante Pérez (“the alleged victim,” “Bustamante Pérez,” or “Bustamante Restrepo”) in Medellin, Antioquia, by officers of the Administrative Security Department (“DAS”), and alleged lack of effective investigation. Petitioner asserts that on July 28, 1989, Franklin Bustamante was quarreling with a sales colleague at Berrio park when two DAS officers came out of a van, license plate LG 15-81 and threatened the presumed victim making him kneel, and then one of the officers shot him to death. Petitioner affirms that the persons responsible escaped, although witnesses identified them as well-known DAS officers. He claims that “in Colombia, it is not uncommon that State agents kill Colombian citizens from a low academic and socio-economic background.”

2. Petitioner indicates that the 18th Magistrates’ Court of Medellin undertook an investigation but closed it on January 28, 1991, for lack of evidence. According to him, several people eye-witnessed the events and identified those responsible. Petitioner explains that, for reasonable fear of reprisal by DAS officers, they refused to testify in the criminal proceedings, but later (in the administrative trial) they appeared in court and gave more details. Witnesses indicated that one of the said officers had been a bodyguard of the then-governor of Antioquia. The petitioner claims that, by closing the investigation, the State violated the right to access justice and failed to prosecute the alleged victim’s death. Moreover, he argues that on September 7, 1989, the alleged victim’s mother filed a disciplinary complaint before the Provincial Attorney General’s Office in Medellin, regarding the conduct of DAS officers, which led to an investigation based on the criminal proceedings and whose results eventually led to the dismissal of proceedings.

3. He indicates that on July 21, 1991, the alleged victim’s family filed a claim for damages before the Administrative Court of Antioquia and on June 30, 1999, the court rejected it on considering that there was nothing to prove the alleged failure in conduct and duty performance by the DAS concerning the reported events. In August 1999, an appeal was filed. He submits that on February 25, 2009, the Administrative Chamber of the State Council upheld the dismissal. He claims that the State Council’s decision considered the initial investigations by the criminal and disciplinary courts that led to the closing of proceedings despite the testimonies given by several eyewitnesses who reportedly identified the alleged persons responsible as DAS officers.

4. He affirms that the criminal, disciplinary, and administrative investigations were not diligently conducted and wrongfully closed. Accordingly, he seeks the applicability of the exception to the requirement of exhaustion of domestic remedies under Article 46, paragraph 2.c of the Convention.

5. For its part, the State claims the inadmissibility of the instant petition since the reported events do not violate the rights enshrined in the Convention, for there is nothing to indicate that the State is internationally responsible for the alleged facts. It also asserts that all the investigations were lawfully conducted, and their results led to the closing of proceedings as there was no proof that state agents were involved in the alleged victim’s death. It contends that, although in the criminal proceedings, documentary and testimonial evidence, as well as expert opinions, were analyzed, it was impossible to establish the facts and determine the ownership of the plate of the van, the investigations being dismissed for lack of evidence against the state agents. As to the disciplinary investigation, it indicates that it was closed because there was nothing to incriminate any state agent, and because it was found that the vehicle seen at the crime scene did not belong to the DAS and that its plates were fake.

6. Regarding the claim for damages, the State submits that it was dismissed through a resolution of June 30, 1999, and that an appellate court upheld this decision on February 25, 1999, on considering that there was no proof of failure in conduct or performance of duties by DAS officers in relation to the events reported in the claim. In particular, the State holds that never has the petitioner presented documents where the alleged state agents were identified by their full names even though eyewitnesses had reportedly identified them. Therefore, the State argues that the petitioner seeks that the IACHR work as an appellate court (fourth-instance formula) to question the grounds considered by the ordinary courts, the Attorney General's Office and the Administrative Court.

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

7. The petitioning party claims that the alleged victim's family resorted to the criminal, disciplinary, and administrative jurisdictions, adding that in neither the criminal proceedings nor the proceedings filed by the prosecution and the Attorney General's Office were the facts duly investigated and the persons responsible punished. Thus, the petitioner argues that the exception to the requirement of prior exhaustion of domestic remedies established in Article 46, paragraph 2.c of the American Convention applies regarding both the criminal and the administrative proceedings, as the situation of denial of justice and the resulting lack full reparation persists.

8. For its part, the State argues that a claim for damages is an appropriate and effective remedy to obtain compensation for pecuniary or non-pecuniary losses faced by victims as a result of state agents' acts or omissions. It also claims that such type of remedies is not suitable for restoring the right to justice. It alleges that, on the contrary, its applicability and effectiveness are limited to the right of reparation and, partly, to contributing to the determination of the facts; thus, the importance complementarity of domestic remedies is worth considering. The State claims that although remedies in the administrative jurisdiction are not, by themselves, suitable to obtain full redress for human rights violations, they may contribute to obtaining full reparation if presented along with other remedies. It indicates that, therefore, in a given case, such remedies must not be assessed under the criterion of whether they meet all the standards of full reparation. As a result, it requests that the instant petition is found inadmissible, at least regarding the claims for pecuniary and non-pecuniary losses given the exhaustion of the said remedy in the administrative jurisdiction.

9. The Commission has previously established that, in the case of offenses subject to ex officio prosecution, the State concerned must initiate and further criminal proceedings, and that such is the remedy suitable for establishing the facts, prosecuting the persons responsible, and imposing the appropriate punishment, in addition to enabling other forms of compensation. Since the events alleged by the petitioning party are subject to ex officio prosecution, a criminal investigation must be exhausted in the domestic venue, and it must be promptly and effectively filed and furthered by the State.

10. Therefore, the Commission notes that, according to the information submitted by the parties, the facts have not been duly investigated, hence it appears that neither were these established nor have the persons responsible been found criminally guilty. The Commission finds the exceptions to the requirement of prior exhaustion of domestic remedies specified in Article 46.2 of the Convention applicable. The claim on the applicability of the exceptions provided for in Article 46, paragraph 2 of the Convention is closely connected to the finding of possible violations of rights enshrined in it, such as the right to a fair trial. However, given its nature and object, Article 46.2 is a self-standing norm as compared with the substantive rules in the Convention. Consequently, the applicability of the exceptions to the requirement of prior exhaustion of domestic remedies must be decided before and separately from the report on the merits of the case, because it is subject to a criterion other than that used for determining the possible violation of Articles 8 and 25 of the Convention. It is worth mentioning that, in its report on the merits, the Commission will analyze the causes and effects preventing the exhaustion of domestic remedies of the case, to determine if violations of the American Convention exist. Therefore, the Commission decides that, in the instant case, the exceptions to the requirement of prior exhaustion of domestic remedies established in Article 46, paragraphs 2.b and 2.c of the American Convention apply to this case.

11. In this case, the petitioner has filed claims referring to the denial of justice because 29 years after the facts, the truth about them has not yet been established and the persons responsible have not been found; thus, the alleged victim's death remains unpunished. As a result, given the context and the characteristics of the instant case, the Commission deems that the petition was presented within a reasonable period and that the provisions of Article 32 of the IACHR Rules of Procedure on the timeliness of the petition must be declared met.

VII. ANALYSIS OF COLORABLE CLAIM

12. Due to the elements of fact and law submitted by the parties, and the nature of the matter brought to its attention, the IACHR finds that the claims on the alleged violation of the rights to life, humane treatment, fair trial, and judicial protection could establish violations of the rights protected through Articles 4, 5, 8 and 25 as well as Article 19 (rights of the child) of the American Convention—because the alleged victim was aged 14 at the time of the facts. All in connection with Article 1, paragraph 1 of the same instrument.

13. As for the claim about the alleged violation of Articles I (life, liberty, and personal security) and XVIII (fair trial) of the American Declaration, the Commission reiterates that once the Convention comes into force in relation to a State, it is this, not the Declaration, that becomes the primary source of law to be applied by the Commission provided that the petition concerns alleged violations of substantially identical rights set forth both instruments.

14. Regarding the alleged violation of Article 11 (privacy) of the American Convention, the Commission observes that the petitioner has not filed claims or evidence for the Commission to prima facie consider such possible violation.

15. Concerning the observation about the fourth-instance formula, the Commission recognizes its lack of competence to supervise decisions by domestic courts acting within the sphere of their jurisdiction and in conformity with the principle of due process and judicial safeguards. However, the Commission reiterates that it is competent to find a petition admissible and rule on its merits when it refers to domestic proceedings that may violate the rights guaranteed by the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 19 and 25 of the American Convention, in connection with the obligations set forth in Article 1.1 of the same treaty.

2. To find the instant petition inadmissible in connection with Article 11 of the American Convention.

3. 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 13th day of the month of April, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren Praeli, and Flávia Piovesan, Commissioners.