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REPORT No. 66/19
PETITION 338-09
REPORT ON ADMISSIBILITY

GUILLERMO RIVERA FÚQUENE AND FAMILY
COLOMBIA

Approved electronically by the Commission on May 5, 2019.

Cite as: IACHR, Report No. 66/19, Petition 338-09. Admissibility. Guillermo Rivera Fúquene and family. Colombia. May 5, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Reiniciar Corporation
Alleged victim:	Guillermo Rivera Fúquene and family
Respondent State:	Colombia ¹
Rights invoked:	Articles 4 (life), 5 (humane treatment), 8 (judicial guarantees), 11 (honor and dignity), 17 (protection of the family), 25 (judicial protection) of the American Convention on Human Rights ² in relation to its Article 1(1) (obligation to respect the rights); Article 13 of the Inter-American Convention on Forced Disappearance of Persons ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	March 24, 2009
Additional information received at the stage of initial review:	January 27, 2011; March 28, 2012
Notification of the petition to the State:	June 26, 2012
State's first response:	November 7, 2012
Additional observations from the petitioner:	August 30, 2012; February 28, 2013; May 15, 2014
Additional observations from the State:	December 30, 2014; March 21, 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 (deposited instrument of ratification July 31, 1973), Inter-American Convention to Prevent and Punish Torture ⁵ (deposit of instrument of ratification January 19, 1999), and the Inter-American Convention on Forced Disappearance of Persons (deposit of instrument April 12, 2005)

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 In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in the debate or decision in the instant matter.

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

³ Hereinafter "IACFDP."

⁴ The observations submitted by each party were duly transmitted to the opposing party.

⁵ Hereinafter "IACPPT."

Rights declared admissible	Articles 3 (recognition of juridical personality), 4 (life), 5 (humane treatment), 7 (liberty), 17 (protection of the family), 25 (judicial protection) of the American Convention in relation to its Article 1(1); Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and 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, the exception at Article 46(2)(c) of the ACHR
Timeliness of the petition:	Yes, in the terms of section VI

V. FACTS ALLEGED

1. This petition refers to the alleged forced disappearance and extrajudicial execution of Mr. Guillermo Rivera Fúquene (hereinafter “the alleged victim”), who was president of the *Sindicato de Servidores Públicos* (Union of Public Servants) and a member of the *Unión Patriótica*, the *Partido Comunista*, and the political party *Polo Democrático Alternativo*. According to the petitioner, even though no threats against him were known of, by being an active member of the political opposition and a trade union leader, in a context of violence against social leaders that the State was aware of, his life was at risk.

2. The petitioner alleges that on April 22, 2008, at approximately 6:20 a.m., the alleged victim took his minor daughter to school, situated in the Tunal neighborhood of the city of Bogotá, and then headed to the gym, but never made it there. It states that his wife reported his disappearance the same day to various authorities (Vice-presidency of the Republic, Office of Human Rights Ombudsman, Office of the Procurator General of the Nation, Ministry of Interior, Office of the Mayor of Bogotá, the Metropolitan Police, and the Office of the District Ombudsman [*Personería Distrital*]), and that the same day an urgent search mechanism (hereinafter “MBU”, *mecanismo de búsqueda urgente*) was activated with the Human Rights Unit of the Office of the Attorney General, entrusted to the 98th Prosecutor. Petitioner indicates that on the same day the alleged victim’s family members distributed photographs of him at the place where he was last seen.

3. It notes that even though the MBU was activated just a few hours after his disappearance, the alleged victim was not protected, for reasons attributable to state agents. Petitioner says that on April 23, 2008, the alleged victim’s wife received a phone call from an unknown person, from Mr. Rivera’s cell phone; that person stated that Mr. Rivera was under his control. It argues that even though the prosecutor was immediately informed, it was not until two days later that the judicial police requested the report of calls from the telephone company COMCEL, and that it was not until 11 days later than an investigative commission was sent to the place from which that call was made.

4. Petitioner further states that on May 1, 2008, a resident of the Tunal neighborhood, on recognizing the alleged victim in one of the photographs, contacted his family and informed them that a police patrol had handcuffed and detained him. It indicates that the Office of the Attorney General, after seven days, performed an inspection at the police station of Tunjuelito, and that subsequently the witness refused to testify for fear of possible reprisals by the National Police. In addition, it notes that the authorities in charge of implementing the MBU did not fully exercise their special powers, especially those that make it possible to request information by the most expeditious measures possible. It notes that the 98th Prosecutor did not inspect the places where it was presumed the victim could be found, or the information that might lead to him. It states that it was not until May 13, i.e. three weeks after the MBU was activated, that a judicial inspection was made of the sixth station (Tunjuelito-Fátima) of the National Police. Similarly, it argues that no actions were reported to identify the police patrols that were seen in the place where the facts unfolded.

5. Petitioner further indicates that the difficulties of the MBU noted above were communicated in timely fashion to the competent authorities in several writings and complaints. It alleges that what happened in the context of the MBU constitutes a failure to act on the State’s obligation to bring about the conditions and

muster the means that effectively, promptly, and effectively guarantee the protection of persons from forced disappearance.

6. In tandem with these facts, the petitioner argues that on April 24, 2008, a partially dressed corpse was found at a precipice near the Combeima river. It says that the forensic exam of April 25, 2008 found signs of torture, that the person had been dragged, and determined that the cause of death was asphyxia. It also indicates that the body was then buried as an unidentified person in the city of Ibagué.

7. Petitioner further states that on May 21, 2008 it filed a writ of *habeas corpus* that was rejected that same day by the Sixth Criminal Court of the Specialized Circuit of Bogotá, arguing that no annotation or record was found to account for the deprivation of liberty of Mr. Rivera Fúquene at the Tunjuelito police station. It notes that the judge in charge did not take any step aimed at corroborating what was said by the National Police, did not inspect the police stations, or the logs, or the cameras installed in neighboring streets, nor did he request the logbooks of the patrols in the area, nor did he interview the patrol members.

8. Petitioner states that almost three months after it was found, on July 15, 2008, the authorities identified the corpse that had been buried in Ibagué as Guillermo Rivera Fúquene. It notes that after the corpse was identified the Office of the 30th Prosecutor of the National Unit on Human Rights and International Humanitarian Law initiated a preliminary inquiry for the crime of homicide, but that it has obtained no results to date because the investigation has not been conducted with due diligence.

9. Petitioner indicates that on September 3, 2008 it filed a petition (*recurso de petición*) with the Director General of the National Police requesting information on the patrols that were in the place where the alleged victim was detained; and that on September 11, 2008, by a note it was informed that the case had been referred to the Office of the 30th Prosecutor Specialized in Human Rights. Nonetheless, it indicates that on October 6, 2008 that office said that no information had been produced by the National Police. Accordingly, petitioner notes it filed a writ of protection of constitutional rights (*acción de tutela*), which on final appeal was analyzed by the Constitutional Court, which by Judgment T-511 of 2010, considered the right of access to information violated and ordered the National Police to provide the information requested. They state that in carrying out that decision, the wife and daughter of the alleged victim were sent two communications, dated September 13 and 15, 2010. Nonetheless, it adduces that those responses do not comply with what was ordered by the Constitutional Court, as the books were illegible, no information was provided on the radios that operated in the area, and information was provided about only three of the six patrol cars that were in the neighborhood.

10. In addition, petitioner states that the disciplinary proceeding instituted by the National Police and subsequently forwarded to the Office of the Procurator General of the Nation did not obtain any request either, as it did not identify the persons presumably responsible for the disappearance and death of the alleged victim. It argues that in response to a request by the Office of the Procurator Delegate for the Disciplinary Defense of Human Rights (*Procuraduría Delegada Disciplinaria para la defensa de los Derechos Humanos*), the prosecutor assigned to the case rejected issuing copies of the notebook of investigations, as he considered that they cannot be taken into account as evidence.

11. It says that as a result of their actions to clarify the facts the alleged victim's wife and daughter received threats, which led them to request measures of protection, which were granted by the State. Petitioner alleges that where these threats are coming from has not been clarified in the internal investigation.

12. The State notes that the criminal investigation was performed diligently. It argues that there is no evidence to lend credibility to the hypothesis that Mr. Guillermo Rivera Fúquene was disappeared by members of the National Police. It defends the notion that in the context of the MBU, initiated April 22, 2008 and finalized July 15, 2008, several actions were taken to find the alleged victim, including investigative activities at the place where he resided, interviews, and locating the call that his wife received on April 23, 2008. It also emphasizes that the mortal remains of Mr. Rivera Fúquene were recovered, identified, and handed over to his next-of-kin.

13. It considers that there is no evidence in the criminal investigation of unwarranted delay, for it has been carried out seriously, impartially, and such that it does not depend on the procedural activity of the victim. It argues that the reasonable lines of investigation were exhausted, including the one requested by the petitioners, which suggests the participation of the National Police in the facts. The State maintains that one should consider the complexity of the matter, insofar as Mr. Rivera did not receive threats, and also recognizes that no one has been identified as a possible perpetrator. It adduces bad faith in the action of the petitioners for not having helped identify the witness, which would have helped to speed up the investigation.

14. Finally, the State notes that the alleged victim's family members did not file an action for direct reparation until July 19, 2010, before the Administrative Tribunal of Cundinamarca, which was rejected on April 9, 2014, on the grounds that there was no evidence to show that the police were responsible for the disappearance. It refers that said decision was contested by the petitioners and that the Council of State on August 17, 2017 confirmed the judgment of first instance. The State defends, therefore, that the Commission can not act as a court of appeal, in a process in which the judicial guarantees have been respected and the result has not been favorable for the petitioners.

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

15. The Commission has established that whenever a crime is committed in which there is purported involvement of state authorities, the State has the obligation to promote and give impetus to the criminal justice process; and that this is precisely the suitable means for clarifying the facts and establishing the corresponding criminal sanctions, in addition to making possible other non-monetary forms of reparation. With respect to the facts set forth, the Commission observes that a criminal complaint was lodged on April 22, 2008, for the purported disappearance and subsequent death of Mr. Rivera Fúquene allegedly at the hands of state agents; and that more than 10 years after the facts the State has not sanctioned the persons responsible and the criminal investigation is still in the preliminary inquiry phase. Moreover, it takes into account that a writ of *habeas corpus* was filed on May 21, 2008, and rejected by the Sixth Criminal Court of the Specialized Circuit of Bogotá that same day. In view of the foregoing, the exception to the exhaustion of domestic remedies requirement provided for at Article 46(2)(c) of the American Convention applies in the instant case.

16. In view of the failure to exhaust alleged by the State, in relation to the contentious-administrative remedy, the Commission recalls that in a claim like the instant one for the purposes of admissibility the action for reparation does not constitute a suitable remedy, and therefore it need not be exhausted, since it is not adequate for providing integral reparation and justice to the family members.

17. As regards the timeliness of the petition, the Commission observes that the petition was filed on March 24, 2009, and the underlying events occurred on April 22, 2008, and their effects extend to the present day. In view of the context and characteristics of the instant case, the Commission considers that the petition was filed within a reasonable time, and therefore satisfies that admissibility requirement.

VII. ANALYSIS OF COLORABLE CLAIM

18. In view of the arguments of fact and law set forth by the parties and the nature of the matter, the Commission considers that the alleged participation of police agents in the illegal detention, torture, forced disappearance, and subsequent death of Mr. Guillermo Rivera Fúquene, in his capacity as a political leader, the lack of judicial protection in relation to these facts, the alleged lack of access to the case file, and the alleged threats against his family members tend to establish violations of the rights enshrined in Articles 3 (recognition of juridical personality), 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees), 13 (freedom of expression), 17 (protection of the family), and 25 (judicial protection) of the American Convention in relation to its Article 1(1); Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture; as well as Article I of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of the alleged victim and his family members.

19. As regards the claim of an alleged violation of Article 11 (honor and dignity) of the American Convention; the Commission observes that the petitioner has not offered arguments or sufficient support so as to consider, *prima facie*, its possible violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 3, 4, 5, 7, 8, 13, 17, and 25 of the American Convention in conjunction with its Article 1(1); Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture; and Article I of the Inter-American Convention on Forced Disappearance of Persons;

2. To find this petition inadmissible in relation to Article 11 of the American Convention;

3. To notify the parties of this decision; to proceed to analyze the arguments 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 April, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli, and Flávia Piovesan, Commissioners.