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REPORT No. 239/23

PETITION 467-12

REPORT ON ADMISSIBILITY

ERNESTO CRUZ GUEVARA AND NEXT OF KIN
COLOMBIA

Electronically approved by the Commission on October 20, 2023

Cite as: IACHR, Report No. 239/20. Petition 467-12. Admissibility. Ernesto Cruz Guevara and next of kin. Colombia. October 20, 2023.



I. INFORMATION ABOUT THE PETITION

Petitioner	Centro Jurídico de Derechos Humanos (“CJDH”) ¹
Alleged victim	Ernesto Cruz Guevara and next of kin ²
Respondent State	Colombia ³
Rights invoked	Articles 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty) 8 (right to a fair trial), 11 (right to privacy) and 25 (right to judicial protection) of the American Convention on Human Rights, ⁴ in relation to article 1.1

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition	March 22, 2012
Additional information received during the study phase:	May 15, 2017
Notification of the petition	July 5, 2017
State’s first response	October 27, 2017
Additional observations of the petitioner	May 7, 2021
Additional observations of the State	September 24, 2018

III. COMPETENCE

<i>Ratione personae</i>	Yes
<i>Ratione loci</i>	Yes
<i>Ratione temporis</i>	Yes
<i>Ratione materiae</i>	Yes, American Convention (deposit of instrument of ratification 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
Rights declared admissible	Articles 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty) 8 (right to a fair trial), 11 (right to privacy) and 25 (right to judicial protection) of the American Convention on Human Rights, in relation to article 1.1
Exhaustion or exception to the exhaustion of domestic remedies	Yes, as detailed in Section VI
Timeliness of the petition	Yes, as detailed in Section VI

¹ The initial petition was filed by Mr. Rafael Alberto Gaitán Gómez of Gaitán Gómez & Asociados. However, on September 6, 2022, Mr. Gaitán Gómez and the CJDH informed the IACHR that the latter would assume the representation of the alleged victims in the present proceedings.

² María Del Tránsito Guevara (mother), Tobías Cruz Castro (father), Lucenia Alfonso Cruz (permanent partner); Angie Carolina Cruz Alfonso, Brayhan Fabian Cruz Alfonso (children); Ana Milena Cruz Guevara, Briceida Cruz Guevara, Luz Mary Cruz Guevara, María Isabel Cruz Guevara, José Tobías Cruz Guevara, Mery Lilibian Cruz Guevara (siblings); Nelson Vega Sánchez, Milton Barrera Cuta, Adelfo Alfonso Cruz, Héctor Pérez (brothers-in-law), Diana Patiño (wife of José Tobías Cruz Guevara).

³ Based on article 17.2.a of the Rules of Procedure of the Commission, commissioner Carlos Bernal Pulido, a Colombian national, did not participate in the decision of the current matter.

⁴ Hereinafter, “the Convention” or “the American Convention”.

⁵ The observations of each party were duly notified to the other party.

V. POSITION OF THE PARTIES

Position of the petitioner party

1. The petitioner claims that the State is responsible for the kidnapping and extrajudicial execution of Ernesto Cruz Guevara, the failure to investigate and punish those responsible, and the consequent suffering of his next of kin, in the context of the so-called 'false positives'.⁶

2. The petitioner states that on July 16, 2006, members of the security forces arbitrarily detained Mr. Ernesto Cruz Guevara and issued death threats against him and his family members. On October 29, 2006, Mr. Cruz Guevara filed a disciplinary complaint against members of the National Army belonging to Battalion 29, attached to Brigade 16, with headquarters in Yopal (Casanare), for the aforementioned arbitrary detention and death threats. The petitioner does not inform before which authority Mr. Cruz Guevara filed this complaint.

3. On the morning of April 22, 2007, troops of the National Army belonging to the 16th Brigade, Tactical Platoon Unit "Huracán 1" were moving through the "Retiro-milagro" hamlet of the Municipality of Aguazul (Casanare) in order to establish the truthfulness of the version given by a reinserted person regarding the presence of hiding places (or caches) with weapons. These troops, however, were attacked by an illegal armed group that fired at them from the top of a mountain.

4. That same day, April 22, Mr. Cruz Guevara was at home with his family when they heard gunshots nearby and took cover on the ground. At that moment, members of the National Army entered his house and asked Mr. Cruz Guevara to accompany them; he refused, and the agents forced him to leave dressed in camouflage. Subsequently, Mr. Cruz Guevara appeared dead, dressed in camouflage and wearing rubber boots, with a rifle, a vest and a backpack, and was reported by the military as having been discharged in the course of the "Andromeda" tactical mission.

5. On April 23, 2007, Mrs. Luz Mary Cruz Guevara, sister of Mr. Cruz Guevara, recognized the body. On April 30, 2007, Mrs. Carmen Elisa Bernal Gil, Prosecutor 30 sectional URI Yopal (Casanare), by means of official letter 0244 addressed to forensic doctor Jhony Currea Angarita, certified that the deceased described in the corpse recognition act No. 061 belonged to the body of Ernesto Cruz Guevara.

6. The 44th Court of Military Criminal Instruction, based in Yopal, initiated an investigation - the petitioner does not indicate the date on which the investigation was initiated - in which it is indicated that members of the National Army in the course of the tactical mission "Andromeda" killed someone who was later identified as Ernesto Cruz Guevara. Court 44 initiated the criminal investigation and sought to hear the military members who participated in the operation at the preliminary investigation level. However, the Criminal Court refrained from taking any action against the military involved.

7. In November 2007, the criminal investigation was taken over by the 61st Prosecutor's Office of the National Human Rights Unit, based in Villavicencio, and carried out under process no. 4191. In its petition to the IACHR, presented in March 2012, the petitioner informed that upon hearing some of the defendants in the investigation stage, Prosecutor 61 issued them a security measure consisting of preventive detention without the benefit of release.

8. In its May 2021 brief, the petitioner adds that Prosecutor's Office 61 was able to collect evidence regarding one of the soldiers involved, who was brought to trial before the Specialized Criminal Court of Yopal (Casanare), under file no. 2011-0013, in which a conviction was handed down.

9. The petitioner also refers to the action for direct reparation brought by Mr. Cruz Guevara's next of kin. Said action was processed before the administrative jurisdiction based in the Second Administrative

⁶ In Colombia, a series of extrajudicial executions of civilians committed by State security forces and then presented as combat casualties are known as 'false positives'. In this regard see: IACHR, Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia, December 31, 2013, para. 21, and paras. 122 et seq.

Court of the Circuit of Yopal (Casanare) under file number 850013331002-2009-00130-00. On June 15, 2011, the aforementioned Administrative Court ruled in favor of the relatives of the deceased; which, later appealed by the Ministry of Defense, was essentially confirmed in the second instance on February 16, 2012, through a decision issued by the Administrative Court of Casanare. -In general, the petitioner presents little information on the internal judicial proceedings.

10. In its communication of June 2023, the petitioner informs that, despite the fact that there were three convictions against those responsible for the execution of Mr. Cruz Guevara, the Special Jurisdiction for Peace (hereinafter "SJP") assumed jurisdiction over this case and, since then, the process has been suspended. They state that the state agents who were convicted were released under the benefit of parole for their submissions to the SJP, and their convictions would be reviewed by said jurisdiction, which meant that these ceased to be enforceable. Thus, they state that on July 14, 2022, the SJP issued a selection order of the Recognition Chamber by which it assumed jurisdiction over the facts regarding 296 victims of the so-called 'false positives' in the department of Casanare between 2005 and 2008. They state that this process is pending the holding of the public hearing for the recognition of truth and responsibility of those responsible linked to Case 003 of the JEP - sub-case Casanare.

11. In view of this, the petitioner invokes the exception to the exhaustion of domestic remedies provided for in Article 46(2)(a) of the Convention, arguing that the proceedings before the SJP are incompatible with international standards of access to justice and, therefore, become an inadequate remedy. It also replies to the State's observations, arguing that the instant petition does not fall under the fourth instance doctrine, inasmuch as it presents specific allegations regarding the lack of an effective remedy to redress the situation denounced, and the impunity surrounding the extrajudicial execution of Mr. Cruz Guevara after 16 years, since the State has not identified or punished all those responsible for the act.

Position of the Colombian State

12. The State, for its part, refers to the facts denounced by the petitioner and provides additional information on the domestic criminal and administrative proceedings.

13. With regard to the criminal investigation, the State indicates that the Office of the Prosecutor 30 of the URI of Yopal initiated the respective investigation. Subsequently, the process was referred to the military criminal jurisdiction, to Court 44 of Military Criminal Instruction. After seven months, it was again referred to the Office of the Attorney General of the Nation - National Human Rights and International Humanitarian Law Unit.

14. On February 15, 2011, the investigation was referred to the Criminal Court of the Specialized Circuit of Yopal; authority that advanced the investigation under File 4779. On September 20, 2013, a conviction was issued against:

(i) Nelson Bladimir Hernández, sentenced to 540 months of imprisonment and a fine of 2000 minimum monthly legal wages (hereinafter "smlm") (approximately USD\$624,700.00⁷), for homicide of a protected person in concurrence with aggravated simple kidnapping, ideological falsehood in public document and procedural fraud; in addition to the payment of 50 smlm (approximately USD\$15,617.50⁸) as compensation for moral damages in favor of the parents and heirs of the victim.

(ii) Jaime Alexander Romero Vargas and Pedro Antonio Sarmiento Becerra, detectives of the Administrative Department of Security (hereinafter "DAS"), to 240 months of imprisonment and a fine of 600 smlm (approximately USD\$. 187,410.00⁹) for aggravated simple kidnapping, falsification of public documents and procedural fraud, as well as disqualification for 20 years; in addition, to the payment of 20 smlm

⁷ At the date of the judgment, according to public information, the legal monthly minimum wage was equivalent to 589,500.00 Colombian pesos (<https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=51035>). In turn, the U.S. dollar was equivalent to 1,887.30 Colombian pesos (<https://www.banrep.gov.co/es/estadisticas/trm>).

⁸ Ibidem.

⁹ Ibidem.

(approximately USD\$. 6,247.00¹⁰) for moral damages in favor of the parents and heirs of the victim, the aforementioned were acquitted for homicide of a protected person.

15. On December 3, 2013, the process was sent to the Superior Court of Yopal (Casanare) appealing the sentence. On January 21, 2014, the Court resolved:

(i) to revoke numeral 2 of the sentence, and acquit Jaime Alexander Romero Vargas and Pedro Antonio Sarmiento, for the crime of aggravated kidnapping that they were charged with;

ii) to revoke paragraph 5 of the sentence and, in its place, to sentence Jaime Alexander Romero Vargas and Pedro Antonio Sarmiento to 408 months imprisonment and 2001 smlm (approximately USD\$ 609,864.78¹¹) as perpetrators of homicide of protected person, procedural fraud, and ideological falsehood in public document;

iii) to partially revoke numeral 6, to sentence Jaime Alexander Romero Vargas, Senior Officer of Major Grade, as perpetrator of homicide in protected person to 360 months of imprisonment and a fine of 2000 smlm (approximately USD\$. 609,560.00¹²); and

iv) to sentence Jorge Alexander Gómez Bernal, as perpetrator of the crime of homicide of a protected person, to 360 months of imprisonment and a fine of 2000 smlm (approximately USD\$. 609,560.00¹³).

16. On May 24, 2017, the file was referred to resolve the cassation claims filed on behalf of Jaime Alexander Romero Vargas and Jorge Alexander Gómez Bernal. On May 31, 2017, the Criminal Cassation Chamber dismissed the cassation claim. Consequently, the appealed judgment became formally and materially enforceable against all the accused.

17. On July 17, 2017, the file of Jaime Alexander Romero Vargas and Pedro Antonio Sarmiento was sent to the Sentence Execution Court of Yopal, for supervision and control of their sentence. On July 26, 2017, the file of Jorge Alexander Gómez Bernal was sent to the Sentence Execution Court of Bogotá, for supervision and control of his sentence. On the same day, July 26, 2017, the file of Nelson Bladimir Hernández was sent to the Sentence Execution Court of Cúcuta, Norte de Santander, for supervision and control of his sentence.

18. With respect to the administrative litigation process, Colombia reports that on June 26, 2009, the representative of the alleged victims, Mr. Juan Carlos Nifio Camargo, filed a lawsuit against the Nation for the alleged facts. The lawsuit was admitted on July 30, 2009. The Second Administrative Court of the Circuit of Yopal, Casanare, took cognizance of the case under file number 850013331002-2009-00130-00.

19. On June 15, 2011, the Court issued a first instance sentence and condemned the Nation-Ministry of Defense-National Army, for the death of Ernesto Cruz Guevara. The referred sentence affirmed that it was proven in the process that Mr. Cruz Guevara was taken from his home alive, mistreated in front of his family and taken by the military in order to kill him later and present him as a criminal discharged in combat. Due to the foregoing, the causal link between the damage and the irregular conduct of the members of the National Army who participated on April 22, 2007, in the "Andromeda" operation, "Hurricane 1" platoon, of the Sixteenth Army Brigade, would be characterized.

20. Accordingly, the judgment ordered the compensation of Mr. Cruz Guevara's next of kin for moral damages, damage to life and material damages, in the following terms: the amount of 10 smlm USD\$.

¹⁰ Ibidem.

¹¹ At the date of the judgment, according to public information, the legal monthly minimum wage was equivalent to 589,500.00 Colombian pesos (<https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=51035>). In turn, the U.S. dollar was equivalent to 1,934.16 Colombian pesos (<https://www.banrep.gov.co/es/estadisticas/trm>).

¹² Ibidem.

¹³ Ibidem.

30,187¹⁴) in favor of Maria del Tránsito Guevara (mother), Lucenia Alfonso Cruz (permanent partner), and Angie Carolina Cruz Alfonso and Brayhan Fabián Cruz Alfonso (children); the amount of 50 smlm (approximately USD\$. 15,093.50¹⁵) in favor of Ana Milena Cruz Guevara, Luz Mary Cruz Guevara and María Isabel Cruz Guevara (sisters). The Ministry of Defense appealed the decision; but on February 16, 2012, the Administrative Court of Casanare confirmed the first instance ruling in favor of Mr. Cruz Guevara's relatives.

21. Regarding the admissibility of the petition, the State argues that the petition incurs in the so-called 'fourth international instance formula' and, therefore, becomes inadmissible in light of the provisions of Article 47(b) of the American Convention. The State argues that when a human rights violation is resolved and repaired at the domestic level, it is not necessary to bring it before the international jurisdiction, since this would infringe the subsidiary and complementary nature of the Inter-American System for the Protection of Human Rights. Thus, Colombia understands that, in the instant case, the alleged violation was redressed through the convictions issued in the criminal proceedings and the awarding of compensation to the next of kin of the alleged victim in the contentious-administrative sphere. Consequently, it requests that the present petition be declared inadmissible.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

22. For the analysis of the exhaustion of domestic remedies in the instant case, the IACHR recalls that in cases in which claims are made for the death of persons and the resulting impunity, the appropriate remedy to be exhausted at the domestic level is the criminal proceeding, through the informal and diligent conduct of investigations to determine those responsible for the violation of the right to life and to subject them to prosecution and punishment in accordance with the American Convention;¹⁶ this burden must be assumed by the State as its own legal duty, and not as a management of private interests or depending on the initiative of the latter or on the provision of evidence by them.¹⁷

23. In the instant case, according to the information provided by the parties, the Commission observes that: (i) following the death of the alleged victim in April 2007, Prosecutor's Office 30 of the URI of Yopal initiated the respective investigation; subsequently, the process was referred to the military criminal jurisdiction, and after seven months, it passed to the National Human Rights and International Humanitarian Law Unit of the Office of the Attorney General of the Nation; (ii) on September 20, 2013, the Criminal Court of the Specialized Circuit of Yopal issued convictions against six persons, with custodial and pecuniary sanctions; (iii) on January 21, 2014, the Superior Court of Yopal decided the appeals filed against the first instance ruling and upheld custodial and pecuniary sentences against four persons; (iv) on May 31, 2017, the Criminal Cassation Chamber dismissed the appeals filed against the decision of the Superior Court of Yopal, which resulted in the final conviction of all the defendants in the ordinary jurisdiction; and, v) in July 2022, the JEP assumed jurisdiction over the case, suspending the sentences issued, and, as alleged by the petitioner, the three persons convicted of this act were granted conditional release.

24. The State considers that the judgment of May 31, 2017 decided the criminal investigation and punishment of those responsible for the death of Ernesto Cruz Guevara. The petitioner, in turn, invokes the exception to the exhaustion of domestic remedies of non-existence of due process of law, inasmuch as it

¹⁴ At the date of the judgment, according to public information, the legal monthly minimum wage was equivalent to 535,600.00 Colombian pesos (<https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=41276#1>). In turn, the U.S. dollar was equivalent to 1,774.24 Colombian pesos (<https://www.banrep.gov.co/es/estadisticas/trm>).

¹⁵ *Ibidem*.

¹⁶ IACHR, Report No. 13/22. Petition 1332-11. Admissibility. Orlando Hernández Ramírez and family members. Colombia. February 9, 2022, para. 7; IACHR, Report No. 72/18, Petition 1131-08. Admissibility. Moisés de Jesús Hernández Pinto and family. Guatemala. June 20, 2018, para. 10; IACHR, Report No. 70/14. Petition 1453-06. Admissibility. Maicon de Souza Silva. Renato da Silva Paixão et al. July 25, 2014, para. 18; Report No. 3/12, Petition 12,224, Admissibility, Santiago Antezana Cueto et al, Peru, January 27, 2012, para. 24; Report No. 124/17, Petition 21-08, Admissibility, Fernanda López Medina et al, Peru, September 7, 2017, paras. 3, 9-11.

¹⁷ IACHR, Report No. 13/22. Petition 1332-11. Admissibility. Orlando Hernández Ramírez and family members. Colombia. February 9, 2022, para. 7; IACHR, Report No. 159/17, Petition 712-08. Admissibility. Sebastián Larroza Velázquez and family. Paraguay. November 30, 2017, para. 14.

considers that the submission of the case to the SJP constitutes a remedy incompatible with international standards, and, therefore, inadequate.

25. In this regard, the Inter-American Commission on Human Rights considers that the domestic remedy before the SJP, that is, the criminal process of acknowledgment of truth and responsibility, has not been exhausted, and has prevented the decisions adopted in the ordinary justice system from becoming enforceable. Therefore, the Commission understands that the appropriate domestic remedy for cases of serious human rights violations is the criminal proceeding, and this has not been exhausted due to the initiation of a new proceeding before the SJP. In view of the fact that 16 years have passed since the event that initiated the criminal investigation, and the process is still open, taking the criminal proceedings before the ordinary jurisdiction and before the SJP as a whole, the IACHR concludes that there is an unwarranted delay in the adoption of a final decision at the domestic level, and therefore the exception provided for in Article 46(2)(c) of the American Convention is applicable.

26. Regarding the alleged lack of a suitable and effective judicial remedy, the Commission considers that this allegation is inextricably linked to the substantive legal determinations on possible human rights violations in the framework of the criminal proceedings for the execution of Mr. Cruz Guevara; and, therefore, it is not appropriate to make a pronouncement in this regard at this stage.

27. Regarding the reasonableness of the time period in which the instant petition was presented, in accordance with Article 32(2) of its Rules of Procedure, the IACHR concludes that it complies with this requirement, since it was presented on March 22, 2012, when the criminal proceeding in the ordinary courts was still open.

VII. ANALYSIS OF COLORABLE CLAIM

28. The State asserts that the petition is inadmissible under the provisions of Article 47(b) of the American Convention, due to the configuration of the fourth instance formula. For the State, the facts were known and resolved in the domestic venue, in a definitive manner, both by the ordinary criminal jurisdiction as well as the contentious-administrative jurisdiction. In this regard, it notes that the Administrative Court of Casanare convicted the Nation for the facts of this case and ordered compensation to the family as reparations; and that the Superior Court of Casanare convicted those responsible for the acts of homicide of a protected person, procedural fraud, and ideological falsification of public documents, and ordered the delivery of compensation to the family for moral damages. The petitioner contends that the formula of the fourth instance does not apply because violations are alleged in the criminal proceedings before the JEP.

29. For the purposes of admissibility, the Commission must decide whether the alleged facts may characterize a violation of rights, as stipulated in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order", in accordance with paragraph (c) of said article. The criterion for evaluating these requirements differs from those used to rule on the merits of a petition. Likewise, within the framework of its mandate, it is competent to declare a petition admissible when it refers to domestic proceedings that could violate rights guaranteed by the American Convention. That is to say that, in accordance with the aforementioned conventional norms, in accordance with Article 34 of its Rules of Procedure, the admissibility analysis focuses on the verification of such requirements, which refer to the existence of elements that, if true, could constitute prima facie violations of the American Convention.

30. In the instant case, the Commission observes that the petitioner's main claim focuses on the failure to investigate and punish the kidnapping and murder of Ernesto Cruz Guevara, as well as the failure to compensate his next of kin for the associated damages. In this regard, taking into account the information submitted by both parties, the IACHR notes that there is still a dispute regarding the submission of the case to the SJP and whether that jurisdiction can provide a suitable and effective remedy to investigate and redress the human rights violations arising from the alleged extrajudicial execution of Mr. Cruz Guevara, in accordance with international standards on the right of access to justice and the punishment of international crimes.

31. In this regard, the Commission considers that it is not appropriate to analyze the arguments raised by the petitioner at this stage; therefore, it will defer its analysis to the merits stage and will admit the articles invoked on the occasion of the extrajudicial execution and the processing of the criminal proceeding for the execution of Mr. Ernesto Cruz Guevara that occurred on April 22, 2007.

32. In view of these considerations and after examining the elements of fact and law presented by the parties, the Commission considers that the allegations of the petitioner are not manifestly unfounded and require a study of the merits, since the alleged facts, if corroborated as true, could constitute violations of Articles 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 11 (right to privacy) and 25 (right to judicial protection) of the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to articles 4, 5, 7, 8, 11 and 25 of the American Convention in relation to article 1.1,

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 20th days of the month of October 2023. (Signed:) Margarette May Macaulay, President; Esmeralda Arosemena de Troitiño, First Vice President; Roberta Clarke, Second Vice President; Julissa Mantilla Falcón and Stuardo Ralón Orellana, Commissioners.