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REPORT No. 94/20
PETITION 726-10
REPORT ON ADMISSIBILITY

FERNEY TABARES CARDONA AND FAMILY
COLOMBIA

Approved electronically by the Commission on April 22, 2020.

Cite as: IACHR, Report No. 94/20. Petition 726-10. Admissibility. Ferney Tabares Cardona and Family. Colombia. April 22, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner	Walter Raúl Mejía Cardona
Alleged victim	Ferney Tabares Cardona and family ¹
Respondent State	Colombia
Rights invoked	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (due process), 11 (privacy) of the American Convention on Human Rights ² and articles I (life, liberty and personal security) and XVIII (fair trial) of the American Declaration on the Rights and Duties of Men. ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition	May 14, 2010
Additional information received during initial review	October 26, 2011
Notification of the petition	May 3, 2016
State's first response	May 25, 2017
Additional observations from the petitioner	August 9, 2017 and September 27, 2018
Additional observations from the State	July 5, 2018 and February 12, 2019

III. COMPETENCE

<i>Ratione personae:</i>	Yes
<i>Ratione loci:</i>	Yes
<i>Ratione temporis:</i>	Yes
<i>Ratione materiae:</i>	Yes, American Convention (instrument of ratification deposited 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 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy) and 25 (judicial protection) of the American Convention on Human Rights, in relation to its article 1.1.
Exhaustion or exception to the exhaustion of remedies	Yes. Exception under article 46.2.c of the American Convention is applicable.
Timeliness of the petition	Yes, in the terms of Section VI

V. ALLEGED FACTS

1. The petitioner alleges that on March 30, 2008, Mr. Ferney Tabares Cardona (hereinafter, "the alleged victim" or "Mr. Ferney") was arrested, disappeared and murdered by Infantry Battalion N° 18 of the National Police in the Guamo Municipality of the Tolima Department. He points out that the alleged victim was disappeared for several days until his family members learned about his death from the media, which reported that the alleged victim had been killed in a confrontation and that the Army had identified him as a "bandit killed in combat". He holds that this case is evidenced of and fits within the modus operandi of the Colombian

1 The petition identifies the following family members of the alleged victim: José Benedito Tabares Cardona and Amparo Cardona de Tabares (father and mother), and his sisters and brothers Claudia, María, Sandra Lilibian and Carlos Alberto Tabares Cardona.

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

3 Hereinafter, "American Declaration" or "Declaration".

4 The observations from each party were duly notified to the other party.

Army in the so-called “false positives”. He alleges that the State has neither investigated nor punish those responsible, nor clarified the facts or provided full reparations to the family members of the alleged victim.

2. He alleges that on March 27, the alleged victim travelled to Calarcá-Quindío to attend to personal matters, informing her mother about the reasons for his trip and that, in a telephone communication with one of his sisters on March 28, 2008, he mentioned to her that he would return to his work on March 31 of the same year. However, the alleged victim did not return and, for that reason, his sister attempted to contact him again over the phone and was connected to an unknown person that requested him the contact information of the mother of the alleged victim to inform her that the body of the alleged victim had been taken to a morgue in Ibagué. He holds that as a result of that this communication, the mother of the alleged victim travelled to the municipal morgue where she was handed the cadaver of her son. He points out that in the local press (*Diario de Ibagué*) it was reported that “two extortionist were killed during an Army operation in a rural area of the Guamo municipality”.

3. An investigation in the military criminal justice was started on account of these facts, which was then, on February 15, 2011, transferred to the competence of the ordinary criminal jurisdiction after a conflict of competence. He points out that the file was sent to the Office of the Prosecutor N°89, attached to the National Human Rights and International Humanitarian Law based in Ibagué-Tolima and that, to this date, the facts have not been clarified nor have those responsible been tried. He holds that the complexity alleged by the State does not justify the delay in delivering prompt and effective justice, considering the magnitude of the phenomenon of extrajudicial executions in Colombia.

4. The petitioner reports, in relation to disciplinary proceedings, that the Deputy Prosecution Office for Disciplinary Matters in the Defense of Human Rights begun a preliminary investigation against the members of the Battalion that took part in the confrontation, which was closed on June 26, 2015, when the investigation was archived as no evidence was found of the alleged responsibility of the members of the Battalion.

5. The petitioner points out that the family members of the alleged victim filed a direct reparation suit before the administrative litigation jurisdiction, which was submitted to the Third Administrative Decongestion Court of the Judicial Circuit of Facatativá. In its judgment of August 14, 2015, the court established that it was not possible to grant the claims of the claimants as there was not sufficient evidence to prove that the death of the alleged victim had been caused by state agents. This decision was appealed and submitted to the Administrative Tribunal of Talima which, through a judgment adopted on November 4, 2016, decided in favor of the family members of the alleged victims, declaring the responsibility of the State – National Army, Ministry of Defense – for the death of the alleged victim and ordering the payment of compensation for moral damages causes, with a 50% reduction as it identified the alleged victim to be concurrently responsible. The petitioner informs that, in arriving at this conclusion, the Chamber considered that the deceased received a total of 10 shots, the majority of which went in through his back, except for 2, that were received in his wrist and left arm.

6. For its part, the State holds that the petition is inadmissible. In particular, the State points out: i) that adequate and effective remedies for the protection of the rights that the petitioner alleges were violated are available in the legal order of Colombia and that they are decided with due process of law; ii) that the petitioner was not prevented from resorting to criminal proceedings and that there is no evidence of any obstacles that would have made it impossible for him to exhaust such remedy; iii) that it is not possible to establish that there exists an unwarranted delay in rendering a final judgment over the remedy, due to the complexity of the case and the several changes of competence, which render the period of time that has elapsed since the facts took place is reasonable; and, iv) that an international fourth instance is configured in relation to the direct reparation suit and that the State has a margin of appreciation of processes, requisites and procedures to pay compensations according to the number in which the obligation enters.

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

7. The petitioner points out that no adequate and effective criminal proceedings resulting from the denounced facts have been carried out to this date and that this has resulted in impunity in relation to the facts of the case and in the failure to provide full reparations to the family members of the alleged victim. For its part, the State holds that it has facilitated, driven and concluded the adequate criminal remedies and that, given the complexity of the case, it continues to be investigated and, thus, domestic remedies have not been exhausted. With regards to the administrative litigation, the State expresses that domestic remedies have been exhausted.

8. The Commission reiterates that, in situations involving possible violations of the right to life, the domestic remedies that should be considered for the purposes of the admissibility of the petition are those related to the investigation and punishment of those responsible, which are enshrined in domestic legislation as ex officio prosecutable crimes. In the present case, the Commission notes that, according to information submitted by the parties, 11 years after the facts that caused the death of the alleged victim, the facts of the case have not been clarified and the responsibility of the authors has not been established. Therefore, the Commission considers that the exception enshrined in articles 46.2(c) of the Convention and 31.2(c) of the Rules of Procedure is configured.

9. On the other hand, in relation to the direct reparation suit filed at the administrative litigation jurisdiction by the petitioners, the Commission has repeatedly held that such action is not in and of itself an adequate remedy for the purposes of evaluating the admissibility of a claim of a nature such as this one, as it is not adequate to provide full reparation and justice to the family members. Notwithstanding the previous considerations, the IACHR takes into account that in the administrative litigation jurisdiction, domestic remedies were exhausted with the judgment of November 4, 2016, passed by the Administrative Tribunal of Talima, which found the Nation, Ministry of Defense, National Police, economically responsible for damages caused to the family of the alleged victim, as a consequence of his death.

10. Finally, with regard to timeliness of the petition, the IACHR observes that the petition was filed on May 14, 2010, the facts denounced in in allegedly took place starting on March, 2008, and their effects allegedly extend to the present. In view that the Commission to concluded that in this petition the exceptions to the exhaustion of domestic remedies is applicable do un unjustified delay in the criminal investigation, the IACHR considers that the petition was filed timely and that the admissibility requirements must be considered to have been met.

VII. ANALYSIS OF COLORABLE CLAIM

11. In light of the elements of fact and law submitted by the parties and the nature of the matter before it, the Commission considers that this petition is not manifestly groundless and that it requires a study on the merits as the facts alleged about the disappearance and later extrajudicial execution of the alleged victim by agents of the National Police, the persistent impunity and the law of effective judicial protection in the judicial proceedings undertaken as a result from the facts could, if corroborated as true, characterize possible violations of articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (due process), 11 (privacy) and 25 (judicial protection) of the American Convention on Human Rights in relation to its article 1.1 to the detriment of the alleged victim and his family members.

12. With regards to the alleged violations of articles of the American Declaration, this Commission has previously established that, once the Convention enters into force in relation to a State, it is it and not the Declaration that becomes the primary source of law applicable by the Commission, as long as the petition refers to the violation of rights which are identical in both instruments and does not constitute a situation of continuous violation. In these cases, the alleged violations to the Declaration fit within the realm of protection of articles 4, 5, 8 and 25 of the Convention. Therefore, the Commission will examine these allegations in light of the Convention.

13. With regards to the arguments of the State concerning the fourth instance formula, the Commission reiterates that, within the framework of its mandate, it is competent to declare a petition admissible and to rule of the merits of it when it refers to domestic proceedings that could constitute violations of rights guaranteed by 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 and its article 1.1; 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 22nd day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Stuardo Ralón Orellana, Commissioners.