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REPORT No. 47/17
PETITION 42-07

REPORT ON ADMISSIBILITY

JENNER ALFONSO MORA MONCOLEANO AND OTHERS
COLOMBIA

Approved by the Commission at its session No. 2085 held on May 25, 2017
162nd Extraordinary Period of Sessions

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I. INFORMATION ABOUT THE PETITION

Petitioner	Permanent Committee for the Defense of Human Rights
Alleged victim:	Jenner Alfonso Mora Moncaleano and others[2]
State denounced:	Colombia
Rights invoked:	Articles 4 (Right to Life), 5 (Right to personal integrity), 7 (Right to personal liberty), 8 (judicial guarantees), 24 (Right to equal protection) and 25 (Right to judicial protection) of the American Convention on Human Rights [3] and other international treaties[4]

II. PROCEDURE BEFORE THE IACHR

Date on which the petition was received:	January 11th 2007
Date on which the petition was transmitted to the State :	July 23rd 2010
Date of the State's first response:	November 4th 2010
Additional observations from the petitioner:	December 10th 2010, October 15th 2012
Additional observations from the State:	March 8th 2011

III. COMPETENCE

Competence *Ratione personae:*	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes
Competence *Ratione materiae*:	Yes, ACHR (ratification instrument deposited on July 31st 1973); and Inter-American Convention to Prevent and Punish Torture [6] (ratification instrument deposited on January 19th 1999)

[1] In accordance with article 17.2.a) of IACHR Regulations, commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in the discussion or decision of the present case.

[2] The other alleged victims are Vladimir Zambrano Pinzón, Juan Carlos Palacio Gómez, Arquímedes Moreno Moreno, Federico Quesada and Martín Alonso Valdivieso.

[3] Hereinafter "American Convention" or "Convention."

[4] In addition, there are allegations of violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Geneva Conventions and Additional Protocol II; The Declaration of the Rights of Man and of the Citizen; and the International Covenant on Civil and Political Rights.

[5] All the observations received were duly transmitted to the opposing party. On October 7th and 17th 2014, on January 6th 2015, on January 20th 2016 and on March 29th 2017, communications containing no substantive observations were received from the petitioners.

[6] Hereinafter "IACPPT."

IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL RES JUDICATA, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and international res judicata:	No
Rights declared admissible:	Articles 1 (Obligation to respect rights), 2 (Obligation to adopt domestic legislative measures), 4 (Right to Life), 5 (Right to personal integrity), 7 (Right to personal liberty), 8 (Judicial guarantees), 16 (Freedom of association), 22 (Freedom of movement and residence), 23 (Political rights), 25 (Right to judicial protection) of the ACHR, and articles 1, 6 and 8 of the IACPPT
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, exception of article 46.2.c of the ACHR applies
Timeliness of the petition:	Yes, under the terms of Section VI

V. ALLEGED FACTS

1. The petitioners report that on September 6th 1996, Jenner Alfonso Mora Moncaleano, Vladimir Zambrano Pinzón, Juan Carlos Palacio Gómez and Arquímedes Moreno Moreno, militants of the political party *Unión Patriótica*, left their homes in Bogotá with a view to meeting up in order to discuss protection measures regarding their safety, given that they were being followed. They indicate that, as a result of having being identified by police informants as members of FARC's Urban Network in Bogotá, they formed the subject of an intelligence operation by the "Illegal Armed Group" Unit of the Directorate of Criminal Investigation and Interpol ("DIJIN"), which was searching for guerrilla cells in the capital. They allege that, that day, a group of police officers detained them without a written arrest warrant and transferred them to an unknown place where they were tortured in order to obtain information about the whereabouts of Federico Quesada and Martin Alonso Valdivieso. They add that, in the early morning of the following day, they were moved to a garbage dump called *Mondoñedo de Funza-Cundinamarca*, located various kilometers away from Bogotá, where they were executed. They state that their bodies were mutilated, incinerated and abandoned there. They add that using the information obtained under torture, the police officers split into two groups, one of which went to the residence of Federico Quesada, killing him by shooting him several times with a firearm a few blocks from his home, and the second group went to the residence of Martin Alonso Valdivieso, whom they killed in the same manner. They assert that, as a result of these events and the search for justice, the integrity of the family members of the alleged victims has been put at risk. In particular, they indicate that the parents of Jenner Mora suffered harassment, and that they benefitted from the plan for the protection of victims and witnesses for a period of six months, after which this support was taken away with no explanation, and that they were subsequently obliged to seek asylum in Spain.

2. They allege that only three police officers were convicted for the actions described above, in a ruling pronounced on January 31st 2003 which, following an appeal by those convicted, was confirmed on December 19th 2005 by the Supreme Decongestion Court of San Gil. They assert that, despite a police officer having clearly identified those responsible, the Public Prosecutor of the National Unit for the Protection of Human Rights terminated the investigation in favor of a number of people and dismissed the case on October 13th 2005 in favor of seven other officers from various different ranks, a ruling against which the complainant lodged an appeal. They indicate that, to date, this appeal remains pending, which they argue favors impunity and affects the reasonable duration of the investigation. They state that on March 18th 2009 the Supreme Court, through a judicial review, quashed the rulings of June 7th and September 6th 2001 that terminated the investigation against one Captain, ordering the remittal of the proceedings to the National Unit of Human Rights and International Humanitarian Law of the Public Prosecutor's Office. They allege, however, that the action for review did not succeed because fresh evidence was uncovered, as asserted by the State, but rather

because of evidence already contained in the file since 2001 which the Court ordered be assessed in a comprehensive manner, and on the basis of this it ordered the reopening of the investigation, which is still pending. Furthermore, they assert that those convicted are not serving their sentence and that two witnesses were assassinated due to lack of protection. They argue that the top ranks of the chain of command of the National Police Department and of the DIJIN have remained untouched by the courts, representing a situation of impunity. Due to all of the above, they allege that the State did not fulfill its obligation to guarantee the victims' access to justice, and that the delay in the investigations and in uncovering those responsible has led to the reasonable duration of the investigation being exceeded.

3. With respect to the disciplinary proceedings, they indicate that proceedings were initiated before the Office of the Inspector General (PGN - *Procuraduría General de la Nación*) against 8 officers, who were initially dismissed, but in a second instance the Inspector General revoked the punishment and absolved them, despite the fact that three of them had criminal convictions. They further state that the PGN, in response to a petition, announced that a disciplinary action would not be opened as the case was closed due to *res judicata* on September 8th 2005, and that an action was lodged against the PGN for the protection of fundamental rights, which was rejected.

4. Regarding the administrative jurisdiction, they assert that the courts have permitted a series of dilatory courses of action by the Ministry of Defense – National Police Department which have rendered direct reparation worthless. They point out that all the families filed the action for direct reparation, lodging their claims at different times, but the administrative courts have not delivered a fair solution. With respect to the family of Jenner Mora, they state that the damages awarded represented only a small part of the damage suffered, as it did not take account of the emotional distress caused to that family by the persecution and harassment of a number of its members which forced them into exile. The ruling of March 4th 2004 awarded 100 minimum monthly salaries for each of Jenner Mora's parents, and 50 minimum monthly salaries for two brothers. With respect to the family of Vladimir Zambrano, they indicate that the ruling of the administrative court limited itself to stating, in its verdict of first instance of August 6th 2001, that the evidence does not prove that the State officers accused did actually torture and assassinate Zambrano, and that when the family of the alleged victim filed the appeal, it was in such a vulnerable situation that the appeal was not lodged in time. With respect to the families of the other alleged victims, they state that the action was lodged in time, and that they appealed against the verdict of first instance, but that the proceedings are still pending, which they assert constitutes a double violation of their rights. They allege that at no point did the families renounce their right to comprehensive reparation, and that this did not occur in the criminal justice system, as is affirmed by the State.

5. For its part, the State maintains that the alleged victims were members of the urban network of the "Antonio Nariño" front, of the FARC subversive group, and for this reason were being watched by members of the "Illegal Armed Group" Unit, and describes the circumstances of their deaths. On the subject of the criminal proceedings, it indicates that criminal charges constitute the right channel to deal with the kidnappings and murders of the alleged victims, and that while final judgments have been pronounced, the criminal proceedings are still ongoing. In this respect, it indicates that there is a second-instance conviction of December 19th 2005, pronounced by the Supreme Tribunal of the Judicial District, which confirmed the judgment of the Sixth Criminal Circuit Court, for kidnapping and aggravated homicide against three individuals, and which acquitted three more defendants. It also indicates that on March 18th 2009, on the basis of fresh evidence, the Criminal Cassation Division of the Supreme Court partially quashed the decisions of June 7th and September 6th 2001 which terminated the investigation with respect to one officer, remitting the proceedings to the National Human Rights Unit of the National Public Prosecutor's Office, which on April 9th 2010 charged the individual for the crimes of aggravated kidnapping for ransom and aggravated homicide. It indicates that on June 11th 2010 the Public Prosecutor did not confirm the decision of May 9th 2010 and granted the appeal with suspensive effect, so the investigation remains ongoing.

6. The State asserts that the judicial authorities have enabled the family members of the alleged victims to participate actively in the proceedings, recognizing them as complainants, giving them the opportunity to present claims in litigation, enabling them to file actions, and responding to them in good time, and therefore believes that the exception of article 46.2.b of the IACHR does not apply. Furthermore, it states

that the criminal proceedings have been conducted within a reasonable period of time, rendering the exception of article 46.2.c of the IACHR inapplicable, taking into account the complexity of the case given that the circumstances in which the kidnappings and deaths took place have made the conduction of investigations difficult, particularly the concealment and destruction of evidence, as well as the high number of individuals who played a part in the events, combined with the intense investigative and judicial activities which led to the conviction of three individuals in 2003, and to charges being brought against a fourth person, who was a high-ranking officer, which refutes the assertions that only low-ranking officers were investigated. Furthermore, the State alleges that there was no delay in enforcing the sentences of the three men convicted, as the judges responsible for the enforcement of sentences and security measures are indeed enforcing those sentences. The State also alleges that a distinction must be drawn between the monitoring activities performed by members of the DIJIN and the behavior of Police officers acting in a personal capacity, well exceeding their functions.

7. The State indicates that an action for direct reparation is an appropriate remedy to obtain comprehensive reparation in matters of State responsibility, and that in this case the family members expressed their wish to abstain from claiming the payment of damages in criminal courts but instead to do so through courts of administrative jurisdiction; despite this, however, they either did not resort to this channel or filed the action or claims in an untimely manner, favoring the non-payment of damages. With respect to the family members of Jenner Mora, it asserts that they filed an action for direct reparation against the State – National Police Department (DIJIN), and on March 4th 2004 the State was held liable, and this ruling was confirmed by the Council of State which rejected the appeal of the defendant, and declared the first instance judgment final and enforceable. It adds that on September 1st 2006, an action for annulment lodged by the defendant was rejected, rendering the judgment final, with the sentence having been served. It alleges that the family members had the opportunity to appeal but did not do, thereby rendering the ruling of September 1st 2006 final and enforceable. It asserts that the petitioner does not explain why the administrative court did not award the family members of Mora compensation for material damage, mentioning that the judgment established that it had not been demonstrated that the alleged victim was living with his parents, nor that the latter were financially dependent on him, nor had the expenses incurred as consequential damage been proved, which illustrates the negligence of his lawyers. As for the family members of Vladimir Zambrano, with respect to the ruling which dismissed their claims, the State considers the family's lawyers to be responsible for lack of reasonable care, as it affirms that no link with the victim was proved because the lawyers did not include the relevant documents and exceeded the deadline for the filing of the appeal, amongst other acts of negligence. With respect to the family members of Juan Carlos Palacio Gómez, Arquímedes Moreno Moreno, Federico Quesada and Martin Alonso Valdiviesoit, the State alleges that they did not receive reparation because they did not file an action for direct reparation. In this regard, the State maintains that this not only constitutes grounds for inadmissibility but also a tacit renouncement of the right to claim financial reparation before the Inter-American System.

8. Regarding the disciplinary proceedings, the State asserts that although no liability was found, this has no bearing on the criminal responsibility of the officers involved in the events, and in addition, with respect to the guarantee of non-recurrence, it indicates that the three people responsible were sentenced to not only forty years in jail, but also to the secondary sentence of being banned from exercising public office duties and rights.

9. Moreover, the State affirms that the petition includes several assertions that suggest that the petitioner intended to use the Inter-American System as an appeals court in criminal matters, while it has been shown that the investigations and proceedings have been conducted diligently and have produced concrete results, with those convicted serving their sentences, and the investigation is ongoing. Furthermore, the State requests that the IACHR refrain from exceeding its jurisdiction, and that it does not pronounce judgment with respect to other international agreements or regulations cited by the petitioner other than the American Convention on Human Rights, as it lacks jurisdiction in the matter.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

10. The petitioners allege that they were denied access to justice and that there was an unwarranted delay in the investigations for the reasons expounded above. The State, for its part, alleges that not all domestic remedies were exhausted with respect to the criminal proceedings, and that the petition is inadmissible with respect to reparations; it also maintains that the exceptions to the exhaustion of domestic remedies are not applicable as has been stated above.

11. The Commission understands that whenever an alleged offence prosecutable *ex officio* has been committed, the State has the obligation to instigate and take part in criminal proceedings and that, in those cases, the criminal justice system constitutes the appropriate channel to elucidate the facts, try those responsible and establish the corresponding criminal sanctions[7]. In addition, with respect to the claims by the State regarding the conduction of actions within the framework of the administrative jurisdiction justice system, constant case law has established that this channel is not an effective recourse for analyzing the admissibility of a claim such as this one, insofar as it does not contribute towards putting an end to impunity, to ensuring the non-recurrence of the injurious acts or to ensuring the free and full exercise of the rights protected by the Convention[8], and therefore does not constitute the right recourse that must be exhausted by the petitioners for the purposes of presenting their petition to the Inter-American System.

12. In this case, the facts are alleged to have taken place in September 1996 and, over 20 years later, although there have been three convictions, the justice system is said to be continuing the investigation in the criminal courts. By virtue of the above, the Commission concludes that the exception to the exhaustion of domestic remedies established in article 46.2.c of the Convention is applicable in this case, as is article 31.2.c of IACHR Regulations. Furthermore, the petition before the IACHR was received on January 11th 2007, and the alleged facts at the center of the claim took place from September 6th 1996, with certain effects being said to extend to the present day. Therefore, in view of the context and characteristics of the present case, the Commission believes that the petition was presented within a reasonable time and that the requirement of admissibility based on the timeliness of the petition must be considered to have been fulfilled.

VII. COLORABLE CLAIM

13. In view of the elements of fact and law expounded by the parties and the nature of the issues brought to its knowledge, the IACHR believes that, if proven, the facts alleged regarding arbitrary imprisonment, torture and assassination of the alleged victims by virtue of their militancy in the *Unión Patriótica* political party, as well as the alleged infringements of due process and judicial protection, could constitute potential violations of articles 4, 5, 7, 16 and 23[9] of the ACHR with respect to the alleged victims, and of articles 1, 6 and 8 of the IACPPT. Furthermore, and if proven, the facts alleged in the claims regarding the infringements of integrity, lack of access to justice and judicial protection, as well as the situation of displacement that the family members of the alleged victims are said to have been subjected to, could constitute potential violations of articles 5, 8, 22 and 25 of the ACHR.

14. As for the alleged violation of article 24 of the ACHR, the Commission considers that the file does not include sufficient evidence to enable the identification of potential violations of that article.

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[7] IACHR, Report No. 17/16, Petition1132-06. Admissibility. Hortencia Neyid Tunja Cuchumbe and others. Colombia. April 15th 2016. par. 27.

[8] IACHR. Case of Manuel Cepeda Vargas Vs. Colombia. Preliminary exceptions, Merits, Reparations and Costs. Ruling of May 26th 2010. Paragraph 139; Case of the " Mapiripán Massacre". Merits, Reparations and Costs. Ruling of September 15th 2005. Par. 210.

[9] See, in general, IACHR, Report No. 5/97, Case 11.227. Admissibility. José Bernardo Díaz and others. Colombia, March 12th 1997, paragraphs. 27-38.

VIII. DECISION

1. To find the present petition admissible in relation to articles 4, 5, 7, 8, 16, 22, 23 and 25 of the American Convention on Human Rights;

2. To notify the parties of this decision;

3. To continue with the analysis on the merits; and

4. 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 in the city of Buenos Aires, Argentina, on the 25 day of the month of May, 2017. (Signed): Francisco José Eguiguren, President; Margarette May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and James L. Cavallaro, Commissioners.