

OEA/Ser.L/V/II.

Doc. 217

6 December 2019

Original: English

## **REPORT No. 195/19**

### **PETITION 26-09**

#### REPORT ON ADMISSIBILITY

NEVARDO DE JESÚS MORALES MARÍN & FAMILY  
COLOMBIA

Electronically approved by the Commission on December 6, 2019.

**Cite as:** IACHR, Report No. 195/19, Petition26-09. Admissibility.Nevardo de Jesús Morales Marín and Family. Colombia. December 6, 2019..

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Javier Leonidas Villegas Posada
<b>Alleged victim:</b>	Nevarado de Jesús Morales Marín and family <sup>1</sup>
<b>Respondent State:</b>	Colombia <sup>2</sup>
<b>Rights invoked:</b>	Articles 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 25 (Right to Judicial Protection) of the American Convention on Human Rights <sup>3</sup> ; Articles I (Right to life, liberty and personal security), XI (Right to the preservation of health and to well-being), XVIII, and (Right to a fair trial) of the American Declaration of the Rights and Duties of Man <sup>4</sup> .

**II. PROCEEDINGS BEFORE THE IACHR<sup>5</sup>**

<b>Filing of the petition:</b>	January 12, 2009
<b>Additional information received at the stage of initial review:</b>	September 18, 2009, August 7 and September 12, 2012
<b>Notification of the petition to the State:</b>	November 12, 2014
<b>State's first response:</b>	June 5, 2015
<b>Additional observations from the petitioner:</b>	August 12 and 14, 2015, October 29, 2018
<b>Additional observations from the State:</b>	December 14, 2018

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	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**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 4 (life), 5 (humane treatment), 8 (fair trial), and 25 (judicial protection) of the American Convention, in conjunction with Articles 1.1 thereof (obligation to respect rights) and 2 (obligation to adopt provisions of domestic law) thereof.
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes; exception established in Article 46.2 (c) of the ACHR applies.

<sup>1</sup> Martha Lucia Restrepo Garcia (common-law in fact spouse), Andres Felipe Morales Restrepo (son), Maria Margarita Morales Marín (mother), Maria Celina Marín Ceballos (foster mother), Fabian de Jesus Morales Marín (brother), Jorge William Morales Marín (brother) Luis Albeiro Morales Marín (brother).

<sup>2</sup> Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not participate in the discussion or the decision on this matter.

<sup>3</sup> Hereinafter "American Convention" or "Convention".

<sup>4</sup> Hereinafter "American Declaration."

<sup>5</sup> The observations submitted by each party were duly transmitted to the opposing party.

**Timeliness of the petition:**

Yes, under the terms of Section VI.

**V. ALLEGED FACTS**

1. According to the petition, Mr. Nevarado de Jesús Morales Marín (hereinafter “Mr. Morales” or “the alleged victim”) was assassinated on January 1, 1999. The petition states that, at the time of his assassination, Mr. Morales was the Mayor of San Carlos (located in the Department of Antioquia). According to the petition, since 1989, Mr. Morales had been the subject of constant, threats, multiple attacks (including kidnapping) and harassment by paramilitary and other illegal groups including the National Liberation Army (*Ejército de Liberación Nacional*). In this regard, the petition claims that mayors of other cities in eastern Antioquia had also been subjected to a similar pattern of harassment and attacks.

2. The petition claims that the State was aware of the dangers faced by Mr. Morales, but failed to take adequate steps to protect him. According to the petition, the State only assigned an armed bodyguard to Mr. Morales, but this bodyguard was also killed during the attack that also led to the death of Mr. Morales. The petition alleges that the State was negligent in not taking adequate measures to protect the life of Mr. Morales.

3. According to the petition, circumstances of Mr. Morales’ death not only violated his right to life, but the due process rights of his family. The petition contends that in December 2000, the family of Mr. Morales initiated a claim for damages before the *Tribunal Administrativo de Antioquia* (Administrative Court of Antioquia) against the Ministry of Defence of Colombia. The petition states that on October 26, 2006 the family’s claim was dismissed by the court. In 2007, the petitioner states that an appeal was filed with the *Consejo de Estado Sala de lo Contencioso Administrativo Seccion Tercera* (Council of State Chamber for Contentious Administrative Matters - Third Section). At the time of filing of the petition (2009), a decision from this judicial body was still pending. The petitioner contends that there has been unreasonable delay in resolving the judicial proceedings initiated by the family of Mr. Morales.

4. The petitioner also claims that the family filed a criminal complaint which led to the opening of an investigation by the Prosecutor General (*Fiscalia de la Nacion -FGN*). Petitioner claims, however, that the investigation was ultimately archived, and that accordingly, there has been no effective investigation into the circumstances surrounding the death of Mr. Morales; and that despite the lapse of time since the murder, that there has been no identification or arrests of the persons who were responsible.

5. According to the file, the Council of State Chamber for Contentious Administrative Matters - Third Section finally issued a decision in 2015 in which it reversed the decision of the Administrative Court of Antioquia. The Council of State ruled that the State was liable to pay damages to the family of Mr. Morales. However, it also held that Mr. Morales was partly responsible for the circumstances that led to his death on the ground that Mr. Morales, as mayor, he had some measure of control over the extent of police protection he could summon given his position. Accordingly, the Council of State reduced the damages payable by 30%. Dissatisfied with the amount of damages awarded (and the manner in which they were calculated), the family of Mr. Morales appealed to the Council of State Chamber for Contentious Administrative Matters – Fourth Section (*Consejo de Estado Sala de lo Contencioso Administrativo Seccion Cuarta*). On April 27, 2017, the Council of State Chamber for Contentious Administrative Matters – Fourth Section upheld the decision of the Council of State Chamber for Contentious Administrative Matters - Third Section. Finally, the family appealed to the Council of State Chamber for Contentious Administrative Matters – Fifth Section (*Consejo de Estado Sala de lo Contencioso Administrativo Seccion Quinta*) – which also dismissed the appeal on June 29, 2017.

6. The State contends that the petition is inadmissible – ultimately on the ground that (a) the petition fails to disclose any facts that could characterize a violation of the American Convention; and (b) the adjudication of the petition by the Commission would be a violation of the fourth instance formula. In the State’s initial observations, it contended that the petition was also inadmissible for failure to exhaust domestic remedies. However, in light of the decision of the subsequent judicial decisions that granted/affirmed the award of damages to the family of Mr. Morales, the State thereafter took the position

that the petition's claims had been adequately and effectively resolved by the judiciary in accordance with the international obligations of the State. The State argues that there was no unreasonable delay in completing the judicial proceedings, having regard to the complexity of the matter. In this respect, the State mentions that the alleged facts of the petition took place within the context of an armed conflict where it was difficult to identify the perpetrators as well as to establish the responsibility of the State. Accordingly, the State submits that (a) there are no facts that might prima facie constitute violations of the American Convention and (b) the domestic resolution of the petition's claims deprives the Commission of jurisdiction based on the fourth instance formula. The State further submits that the petitioner's disagreement with the judicial decisions does not confer any competence on the Commission to adjudicate the petition.

7. The State claims that a criminal investigation was initiated following the murder of Mr. Morales. However, the State indicates that in keeping with prevailing regulation, that on March 17, 2004 a decision was taken to archive the investigation – given that more than 180 days had elapsed since the circumstances surrounding the death of Mr. Morales. The State contends that in keeping with its international obligations, it took all available measures to comply with its obligation to investigate the homicide of Mr. Morales. Given the foregoing, the State concludes that (a) any complaints by the petitioner regarding the criminal investigation process are unfounded and/or inadmissible; and (b) in keeping with the fourth instance formula, the Commission lacks the competence to review decisions taken within the context of the criminal investigation process.

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

8. The petitioner argue that there the State has failed to comply with its investigative obligations, which justifies an exception to the requirement of exhaustion of domestic remedies contained in Article 46.2.c of the Convention. The petitioner also contends that judicial delays in resolving the claim for reparation also warrant an exception to the requirement of exhaustion of domestic remedies under the same provision. For its part, the State argues that the criminal investigation and the judicial proceedings were both carried out diligently and that, accordingly, that any review by the Commission would be tantamount to exercising fourth instance jurisdiction.

9. The Commission considers that in situations such as the one proposed, the domestic remedies that must be taken into account for purposes of admissibility of the petition are those related to the criminal investigation. In this regard, the Commission notes that the criminal investigation was suspended in 2004 by the State without any tangible measures taken to identify, prosecute, and punish those responsible for the death of Mr. Morales. In this regard, the Commission notes that more than 20 years has elapsed since Mr. Morales' death, with no conclusive criminal investigation conducted by the State.

10. Regarding the claims for direct reparations, the Commission reiterates that in order to determine the admissibility of a claim such as the one at hand, an action for direct redress is not a suitable mechanism and need not be exhausted, in that it is not appropriate for securing comprehensive redress and justice for the next-of-kin. However the Commission notes that compensation was awarded to family of Mr. Morales in 2015 (by the Council of State Chamber for Contentious Administrative Matters - Third Section) approximately 15 years after the family had initiated judicial proceedings.

11. Given the absence of a conclusive criminal investigation and the delay in judicial proceedings, the Commission considers that in the present case the exception to the exhaustion of domestic remedies provided for in Article 46.2.c of the American Convention applies.

12. Regarding the deadline for presenting the petition, the Commission observes that the facts alleged took place starting in 1999; that the petitioners took legal action in 2000; and that the consequences of the facts, including the alleged failure to investigate and punish those responsible continues to the present day. Thus, taking into account that this petition was filed on January 12, 2009, the Inter-American Commission finds that the petition was filed within a reasonable period of time, in the terms of Article 32(2)

of the Rules of Procedure of the IACHR (based on the foregoing application of Article 46.2.c of the American Convention).

## VII. ANALYSIS OF COLORABLE CLAIM

13. Taking into account the factual and legal arguments presented by the parties and the nature of the matter before it, the Commission finds that, if proven, the alleged facts relating to violations of due process, unwarranted delay, and failure to investigate and punish those allegedly responsible for the murder of Mr. Morales could characterize possible violations of the rights protected in Articles 4 (life), 5 (physical integrity) of the Convention (in conjunction with Articles 1.1 and 2), to the detriment of the alleged victim; and of the rights contained in Articles 8 (judicial guarantees) and 25 (judicial protection) of the American Convention (in conjunction with Articles 1.1 and 2), to the detriment of the family of the alleged victim.

14. The Commission notes that the petitioner has invoked provisions not only of the American Convention but also of the American Declaration. As it relates to the American Declaration, the Commission has previously established that, once the American Convention enters into force in relation to a State, this and not the Declaration becomes the primary source of law applicable by the Commission, provided that the petition refer to an alleged violation of rights that are identical in both instruments and do not deal with a situation of continuous violation.<sup>6</sup> In the instant case, there is similarity in the subject matter as between the provisions of the Declaration and the Convention invoked by the petitioner. Therefore as regards those alleged violations of the American Declaration, the Commission shall refer only to the provisions of the Convention.

15. As to the State's contentions regarding the exercise of fourth instance jurisdiction, the Commission recognizes that it is not entitled to review judgments issued by domestic courts acting within their jurisdiction and in accordance with due process of law and the judicial safeguards. However, the Commission reiterates that, under its mandate, it is competent to declare a petition admissible and rule on the merits when it concerns domestic proceedings that may have violated any of the rights protected by the American Convention.

## VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, and 25 of the American Convention in relation to its Articles 1.1 and 2; 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 6<sup>th</sup> day of the month of December, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren, and Flávia Piovesan, Commissioners.

---

<sup>6</sup> See IACHR Report N<sup>o</sup> 125/01, Case 12.388, YATAMA, Nicaragua, December 3, 2001, para. 15.