

OEA/Ser.L/V/II.  
Doc. 219  
6 December 2019  
Original: Spanish

**REPORT No. 197/19**  
**PETITION 696-09**  
REPORT ON ADMISSIBILITY

DANY ALBERTO HENAO GALLEGO AND FAMILY  
COLOMBIA

Approved by the Commission on December 5, 2019 in San Salvador, El Salvador.

**Cite as:** IACHR, Report No. 197/19, Petition 696-09. Admissibility. Dany Alberto Henao Gallego and family. Colombia. December 6, 2019.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Oscar Dario Villegas Posada
<b>Alleged victim:</b>	Dany Alberto Henao Gallego and family <sup>1</sup>
<b>Respondent State:</b>	Colombia <sup>2</sup>
<b>Rights invoked:</b>	Articles 4 (life), 5 (humane treatment), 8 (fair trial), 11 (privacy), 19 (rights of the child), 25 (judicial protection) and 26 (progressive development) of the American Convention on Human Rights <sup>3</sup> and Articles I (life, liberty and personal security), VII (protection for mothers and children), XI (preservation of health and to well-being), and XVIII (fair trial) of the American Declaration of the Rights and Duties of Man <sup>4</sup> and other international treaties <sup>5</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>6</sup>**

<b>Filing of the petition:</b>	June 9, 2009
<b>Additional information received at the stage of initial review:</b>	March 30, 2015; April 10, 2015
<b>Notification of the petition to the State:</b>	May 6, 2016
<b>State's first response:</b>	November 29, 2017
<b>Additional observations from the petitioner:</b>	June 18, 2018
<b>Additional observations from the State:</b>	November 9, 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 8 (right to a fair trial), 19 (rights of the child) and 25 (right to judicial protection) of the American Convention in connection with Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) thereof

<sup>1</sup> Elkin Dario Henao Arenas, father of the alleged victim; Gladys Yeny Gallego Marin, mother of the alleged victim; Cristhian Alejandro Henao Gallego, brother of the alleged victim.

<sup>2</sup> Pursuant to the provisions of Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in the discussion or the decision on this case.

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

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

<sup>5</sup> Articles 1, 2, 3, and 30 of the Universal Declaration of Human Rights; Articles 2, 6, 24, 25, 26, and 27 of the Convention on the Rights of the Child; Articles 6, 7, and 24 of the International Covenant on Civil and Political Rights.

<sup>6</sup> The observations submitted by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, on January 13, 2009
Timeliness of the petition:	Yes, on June 9, 2009

## V. FACTS ALLEGED

1. The petitioner indicates that on January 21, 1997, Dany Alberto Henao Gallego, who was 7 years old, suffered an accident while he was riding a bicycle and collided with a vehicle belonging to the National Police of Colombia, an accident that reportedly led to his death on the 23rd of that month. The petitioner claims that the acts occurred due to the negligence and recklessness of the police officer, who failed to stop despite noticing the presence of the cyclist. The petitioner also claims that the State violated the alleged victim's right to life and to physical integrity, as well as his and his family members' access to justice and due process, as a result of a decision not to pursue criminal charges and a contentious-administrative proceeding that did not allow for an appeal.

2. The petitioner indicates that the Section Unit of the Public Prosecutor's Office declined to open a criminal investigation for manslaughter and that therefore the case was not examined on the merits and the driver's criminal responsibility was not recognized. The petitioner also indicates that there was no formal disciplinary process to determine whether the police officers were liable to disciplinary action. The petitioner also alleges that on January 21, 1999, the family of the alleged victim filed a claim for direct compensation with the Administrative Court of Antioquia. The petitioner indicates that on March 23, 2007, the court issued a ruling denying the compensation sought in the lawsuit, concluding that one of the factors constituting grounds for exoneration of liability was present, namely that the victim's exclusive fault, and that the considerations laid out in the lawsuit about the causes of the accident were value judgments, conjectures, or suppositions without supporting evidence. The petitioner appealed that decision on April 20, 2007, an appeal that was denied on May 18, 2007, based on Law No. 446 of 1998<sup>7</sup>, then in force, on grounds that the largest claim being sought in the lawsuit did not exceed the amount established in that law for a case to be subject to appeal. The court therefore denied the appeal, ruling it inadmissible. The petitioners then filed an appeal for reversal (*reposición*), maintaining that the law in force when they sued for direct compensation established that the process included the potential to appeal<sup>8</sup>. They argued that the jurisdictional modification as the case was proceeding, which rendered their appeal inadmissible, violated due process. However, on September 9, 2008, the appeal for review was denied and the ruling of May 18, 2007, upheld. The petitioner filed a complaint appeal, which was rejected on December 3 by the Contentious-Administrative Chamber in a decision notified on January 13, 2009. The petitioner argues that the alleged victims were therefore denied access to justice. He claims that the remedies provided have not been effective in granting them access to truth and reparation, and that those responsible were not punished. The petitioner alleges that beyond the issue of agreement or disagreement with the decision adopted in that jurisdiction, what is important are the limitations on the proper exercise of rights, which form the basis for the claim that rights under the Convention have been violated.

3. For its part, the State contends that, based on the grounds laid out by the petitioner, it is not possible to deduce that there has been a serious violation of due process. The State alleges that the Rionegro Section Prosecutor's Office opened a preliminary investigation, No. 2341, to look into the death of the alleged victim. Delegate Prosecutor 58 declined to press charges after finding that the police officer's conduct did not constitute a recognized criminal offense, based on testimony gathered as the investigation unfolded. During

<sup>7</sup> Law 446 of 1998 provided that until the Administrative Courts became fully operational, the existing laws governing jurisdiction would remain in effect. The Administrative Courts became operational on June 1, 2006, which is when Law 446 took effect in terms of the jurisdiction-related provisions that had been suspended. The court indicates that pursuant to this law, matters of direct compensation may not be appealed when the amount does not exceed 118,413,000 pesos. By court order dated March 30, 2006, the Council of State ruled that the amount to be taken into account shall be the amount in effect at the time the lawsuit was filed, not at the time of appeal. The petitioner filed a claim for direct compensation on January 21, 1999. The appeal was filed on April 20, 2007.

<sup>8</sup> The largest claim sought by the petitioners was for the sum of 100,583,340.00 pesos, while the law requires a minimum sum of 118,143,000.00 pesos.

the course of the investigation, and based on the body of evidence gathered, it was determined that the child's death was due to the victim's carelessness. The State claims that it acted diligently in taking the relevant investigative steps to determine the truth about what happened. It indicates that investigators took various eyewitness statements and weighed the traffic infraction proceedings of the Rionegro Secretariat of Traffic and Transportation, which decided not to charge the police officer with a traffic offense, as the child was the one who was careless for driving against traffic. The State indicates that it sees no sign that the plaintiff took action with respect to this decision, even though it was subject to appeal under the Code of Criminal Procedure.

4. In terms of the administrative process, the State indicates that with the entry into operation of the Administrative Courts, Law 446 of 1998 began to take effect in terms of the jurisdiction-related provisions that were suspended, which meant that the relevant provisions of the Contentious-Administrative Code applied. The administrative court thus properly determined that the remedy of appeal was inadmissible, pursuant to the law in force. The State argues that the fact that the judicial proceedings ended with a judgment against the plaintiff does not in itself mean that there was a violation of the individual's human rights. In addition, the State claims that the immediate application of procedural laws<sup>9</sup> — such as reasonable and proportional restrictions to the ability to lodge an appeal, in non-criminal proceedings<sup>10</sup> that do not involve the punitive power of the State — does not violate due process and the right to a defense, nor does it violate the Constitution<sup>11</sup>. Finally, the State indicates that if the petitioners believed that the judgment handed down by the Contentious-Administrative Court contained errors that could affect their fundamental rights, they could have sought a remedy for the protection of constitutional rights, the proper means to challenge decisions of sole instance — something they did not do.

5. Finally, the State argues that the Commission is not competent *ratione materiae* to rule on alleged violations of the Universal Declaration on Human Rights, the American Declaration, and the International Covenant on Civil and Political Rights, pursuant to Articles 44 and 47 of the American Convention. The State also contends that the content of the petition demonstrates that the petitioner is turning to the inter-American system to dispute decisions adopted in domestic jurisdictions by the Office of the Attorney General of Colombia and the Contentious-Administrative Courts, with the aim of making the inter-American system a court of fourth instance. However, the petition under examination lays out facts already heard by various judicial entities at the domestic level without any type of violation of due process or of the obligations established in the instruments of the inter-American human rights system.

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

6. The petitioner argues that the Section Unit of the Public Prosecutor's Office declined to open an investigation into the crime of manslaughter and that therefore the case was not examined on the merits. In terms of the administrative process, the petitioner indicates that he filed a claim for direct compensation with the Administrative Court of Antioquia, which was denied on March 23, 2007. The petitioner appealed that decision, and the appeal was rejected on May 18, 2007, based on Law 446 of 1998. The petitioner then filed an appeal for review, which was rejected on September 9, 2008; in response, he filed a complaint appeal, and that was also rejected, on December 3, 2008. For its part, the State contends that it in the criminal proceedings, Delegate Prosecutor 58 issued a decision on August 25, 1998, in which he declined to press charges after finding that the police officer's conduct did not constitute a recognized criminal offense. The State contends that the plaintiff did not appeal that decision. In terms of the administrative process, the State maintains that if the petitioners believed that the judgment handed down by the Contentious-Administrative

<sup>9</sup> On this point, the State makes reference to the following ruling: I/A Court H.R. Case of Liakat Ali Alibux v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 30, 2014, para. 69.

<sup>10</sup> On this point, the State makes reference to the following ruling: I/A Court H.R. Case of Maldonado Ordoñez v. Guatemala, Preliminary Objections, Merits, Reparations and Costs. Judgment of May 3, 2016. Concurring Vote of Judge Humberto Antonio Sierra Porto, para. 8 and following.

<sup>11</sup> Article 31 establishes, "Every court judgment may be appealed or consulted, save for the exceptions established by law."

Court contained errors that could affect their fundamental rights, they should have sought a remedy for the protection of constitutional rights, the proper means to challenge decisions of sole instance.

7. In terms of criminal proceedings, the Commission notes that in a decision dated August 25, 1998, following the preliminary investigation, the prosecutor declined to press charges, after finding that the police officer's conduct did not constitute a recognized criminal offense. The State contends that the petitioner did not appeal that decision, which he could have done under the Code of Criminal Procedure. The Commission therefore concludes that the alleged victims did not exhaust all domestic remedies with respect to criminal proceedings.

8. With regard to the contentious-administrative case, the Commission finds that the alleged victims exhausted domestic remedies with the complaint appeal, which was rejected on December 3, 2008, in a decision notified on January 13, 2009. Moreover, the Commission notes that the process followed in the administrative jurisdiction was non-appealable by law, and therefore it cannot be demanded of the petitioner that he pursue additional judicial remedies<sup>12</sup>. Given that the petition was received by the IACHR on June 9, 2009, it meets the requirements for admissibility established in Articles 46(1)(a) and 46(1)(b) of the American Convention.

## VII. ANALYSIS OF COLORABLE CLAIM

9. In view of the factual and legal elements alleged by the parties and the nature of the matter brought to its attention, the Commission considers that the allegations regarding violations of the alleged victim's right to life and to physical integrity, were resolved by the State in the domestic jurisdiction, with no apparent contradiction with the American Convention. However, the Commission considers that the allegations related to the application of Law 446 of 1998, which establishes that the decision cannot be appealed based on the sum applicable to cases such as that of the alleged victim's, and in this particular case a child, describe possible violations of Articles 8 (right to a fair trial), 19 (rights of the child) and 25 (judicial protection) of the American Convention in connection with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof.

10. In terms of the alleged violations of articles of the American Declaration, the IACHR has established previously that once the American Convention enters into force in relation to a State, the Convention and not the Declaration becomes the primary source of law applicable by the Commission, as long as the petition refers to the alleged violation of rights that are identical in both instruments and as long as it is not a matter of an ongoing violation. Meanwhile, in relation to the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights, the Commission lacks jurisdiction to establish violations of these treaties' norms; nevertheless, it can take these treaties into account as part of its exercise of interpreting the norms of the American Convention in the merits stage of the case at hand, under the terms of Article 29 of the Convention.

## VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 19 and 25 of the American Convention in connection with Articles 1.1 and 2 thereof;

2. To find the instant petition inadmissible in relation to Articles 4, 5, 11 and 26 of the American Convention; and

3. 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.

---

<sup>12</sup> See IACHR, Report No. 54/17. Petition 1327-07. Admissibility. Luz Angelica Porrras Camacho and others. Colombia. May 25, 2017, par. 8.

Approved by the Inter-American Commission on Human Rights on the 6th day of the month of December, 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.