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REPORT No. 134/20
PETITION 390-08
REPORT ON ADMISSIBILITY

YADIRA EMILSE PENAGOS VEGA AND FAMILY
COLOMBIA

Approved electronically by the Commission on June 9, 2020.

Cite as: IACHR, Report No. 134/20, Petition 390-08. Admissibility. Yadira Emilse Penagos Vega and family. Colombia. June 9, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Luz Mery Guerrero Sierra
Alleged victim:	Yadira Emilse Penagos Vega and family
Respondent State:	Colombia
Rights invoked:	Article 8 (Judicial Guarantees) of the American Convention on Human Rights ¹

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	April 3, 2008
Additional information received at the stage of initial review:	April 7, 2008; September 19, 2012
Notification of the petition to the State:	June 26, 2014
State's first response:	December 4, 2014
Additional observations from the petitioner:³	February 21, 2015
Additional observations from the State:	July 18, 2008

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of instrument made 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	8 (Judicial Guarantees) and 25 (Judicial Protections), 2 and 1.1 of American Convention on Human Rights
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, Article 46.2.a of the American Convention applies.
Timeliness of the petition:	Yes, within the terms of Section IV.

¹ Hereinafter "the Convention" or "the American Convention.

² The observations of each party were duly translated to the opposing party.

³ Since their last substantive communication, the petitioners have sent several communications to the IACHR requesting information on the status of the petition and requesting a decision on admissibility. The last of these communications is dated December 12, 2017.

V. FACTS ALLEGED

1. The purpose for the petition refers to the lack of judicial protection for the death of Yadira Emilse Penagos Vega (hereinafter “the alleged victim”), as well as the impossibility of appealing a sentence due to the minimum amount. The petitioner indicates that the alleged victim was a seventh semester student at the Faculty of Sports Science and Physical Education at the University of Cundinamarca. On June 12, 2000, the alleged victim lost his life during a rescue swimming practice in unknown waters, carried out in the Hidroprado dam, located in the Municipality of Purificación, Department of Tolima. It is detailed that while the alleged victim was swimming, a professor, without considering that the boat had an outboard motor, attempted to make waves with the boat to raise the level of difficulty for the students who were in the water. It is alleged that due to this movement the alleged victim was hit thereby causing him to drown and die minutes later.

2. The petitioner indicates that the family of the alleged victim filed a criminal complaint for wrongful death against the teachers in charge of the swimming practice. On June 28, 2002, the Criminal Court of the Purification Municipality Circuit acquitted those involved by rationalizing that there was no certainty in light of the professor’s culpability since they had acted with the necessary care. Additionally, the Court held that the victim was of legal age, thereby making it easy for him to detect the dangers of the place; that he had shown indiscipline; and that he was not in good health, all which could have played a factor in the accident.

3. The petitioner alleges that on June 11, 2002, the next of kin of the alleged victim filed a claim for direct reparation before the Administrative Court of Tolima against the Ministry of Education, the Department of Cundinamarca and the University of Cundinamarca for the death of the alleged victim. This claim was rejected on June 23, 2005, on the grounds that it had not been possible to prove the irregular activity of the State and that there were elements to consider the inexcusable guilt of the victim. Petitioner indicates that this ruling was contrary to the evidence gathered in the process and that there were irregularities in the assessment of the evidence. In this sense, it stands out that one of the judges of the aforementioned court cast her dissenting vote in which she expressed that the case should not have been analyzed in light of the subjective failure of the service, but on the objective responsibility of the State for the exercise of dangerous activities. Thus, Petitioner explained that in the activity in which the alleged victim lost his life, a risk-generating element intervened, that is, the boat with the outboard motor that was driven by one of the university professors. In this regard, he highlights that the necropsy protocol revealed open wounds and fractures in the head, chest and right arm, findings that could correspond to trauma with a punctured short element, that is, the propeller of the outboard motor. In addition, Petitioner points to the added value of the testimony of a student who was on the boat and who asserted that the alleged victim was hit by the boat.

4. Therefore, the decision was appealed before the Third Section of the Administrative Litigation Chamber of the State Council; the latter rejected the appeal on December 2, 2005, based on Law 954 of 2005, considering that it was a single instance process by virtue of the minimum amount. The petitioner states that on December 16, 2005, an appeal was filed, which was resolved on May 11, 2006, which confirmed the rejection of the appeal. On September 20, 2007, a tutela action was filed before the Council of State alleging a violation of the right to due process. Said appeal was rejected *in limine* on September 24, 2007 by the Fourth Administrative Litigation Section of the State Council; which was sent for notification by telegram on October 2, 2007; and actually received by the mother of the alleged victim on October 3, 2007, since she lived in a town in the municipality of Cundinamarca. It indicates that in order to collect the evidence to file the petition with the IACHR, on November 19, 2007, authentic copies of all the actions related to the tutela action were requested before the Administrative Court, which were obtained days later.

5. The State alleges that the petition was presented one year and four months after the decision of the appeal was resolved on May 11, 2006. It affirms that the tutela action filed by the alleged victims in this case was inappropriate according to the nature of the appeal and indicates that the term must be counted from the date of execution of the decision issued by the Council of State, that is, May 26, 2006.

6. Finally, the State indicates that Law 954 of 2005 conforms to international standards regarding access to justice. It maintains that in this case, its application did not ignore the fundamental rights of the alleged victims. Additionally, it refers that the criminal process before the Colombian judicial system was

developed in observance of the guarantees of due process; processed by a competent authority; and that a careful analysis of all the evidentiary elements was carried out. It alleges that the Commission does not have the capacity to review this case in the fourth instance and points out that any review of this process would constitute an application of this formula.

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

7. The State argues that the petition is untimely, since it should have been filed within six months after the appeal was rejected. The Petitioner points out that an appeal was filed against the decision issued on December 2, 2005 by the Council of State, which established that the action presented was the only instance due to the amount, which was dismissed on May 11, 2006; and that a petition for a tutela action was subsequently filed, which was rejected on September 29, 2007 and effectively notified on October 3, 2007.

8. The Commission observes that a criminal investigation was initiated due to the death of the alleged victim, which ended on June 28, 2002 with the acquittal of the professors who had been accused of wrongful death. In this sense, the IACHR takes into account that the purpose of the petition is the lack of reparation and the impossibility for review of a judicial sentence in the framework of the demand presented by the next of kin. The Commission observes that by way judgment of December 2, 2005, the Third Section of the Administrative Litigation Chamber of the State Council expressly established the impossibility of challenging the sentence, by application of Law 954. Faced with this impossibility, the petitioner raised a tutela action to resolve the alleged violations of due process in the development of the contentious administrative process. The IACHR takes into account that the petitioners tried unsuccessfully to question the decision of the Council of State through an appeal to the same Council of State, which was resolved on May 11, 2006. Before this resolution, Petitioner filed an action for protection on September 20, 2007, considering that Petitioners right to due process was violated due to the impossibility of appealing the decision of the Council of State, which was rejected on September 24, 2007. The tutela action was notified and received by the next of kin of the alleged victim on October 3, 2007, therefore, this petition meets the requirement established in Article 46.1.a of the American Convention.

9. Regarding the filing deadline, the Commission notes that the ruling in the tutela action was notified on October 3, 2007 and that the petition was received at the IACHR on April 3, 2008. In light of the foregoing, the petition complies with the requirement of timeliness.

VII. ANALYSIS OF COLORABLE CLAIM

10. In view of the factual and legal elements presented by the parties and the nature of the matter brought to their attention, the Commission considers that the petitioner's allegations are not manifestly unfounded and require a substantive study, since the alleged facts on lack of judicial protection and access to an effective remedy for the death of Yadira Emilse Penagos Vega in a university sponsored practice, as well as the impossibility of appealing a sentence based on the minimum amount⁴, if corroborated as certain, could characterize violations of the articles 8 (judicial guarantees) and 25 (judicial protection) of the American Convention, in relation to Articles 1.1 and 2.

⁴ In previous cases, the Inter-American Commission has admitted requests related to the alleged lack of a review body for administrative actions in Colombia based on the amount in question. IACHR, Report No. 86/18, Petitions 550-07 and 1357-08, Luz Dary Roncancio Torres y Otros, Colombia, July 16, 2018, para. 28; IACHR, Report No. 107/17, Petition 535-07, Vitelio Capera Cruz, Colombia, September 7, 2017, para. eleven; IACHR, Report No. 106/17, Petition 272-07, Admissibility, Luis Horacio Patiño and Family, Colombia, September 7, 2017, para. 9; IACHR, Report No. 71/09, Petition 858-06, Massacre of Belén - Altavista, Colombia, August 5, 2009, para. 44; and IACHR, Report No. 69/09, Petition 1385-06, Rubén Darío Arroyave Gallego, August 5, 2009, para. 37; IACHR, Report No. 96/18 Petition 1293-07, Benedesmo Palacios Mosquera, Colombia, September 5, 2018, para. 14; IACHR, Report No. 45/19, Petition 289.09, Admissibility, (Gabriel Ángel Gómez Martínez and family, Colombia, April 24, 2019, para. 11)

VIII. DECISION

1. To declare this petition admissible in relation to Articles 8 and 25, in accordance with Articles 1.1 and 2 of the American Convention, to the detriment of the alleged victim and his next of kin;

2. Notify the parties of this decision; continue with the analysis of the merits of the matter; and 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 9th day of the month of June, 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 Julissa Mantilla Falcón, Commissioners.