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REPORT No. 289/22

PETITION 445-14

REPORT ON THE ADMISSIBILITY

DORIS ADRIANA LOAIZA PATIÑO ET AL.
COLOMBIA

Approved electronically by the Commission on September 28, 2022.

Cite as: IACHR, Report No. 289/22. Petition 445-14. Admissibility.
Doris Adriana Loaiza Patiño et al. Colombia. September 28, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Carolina Romero Burbano ¹
Alleged victim:	Doris Adriana Loaiza Patiño et al ²
Respondent State:	Colombia ³
Rights invoked:	Articles 4 (life), 8 (judicial guarantees), 17 (rights of the family), 24 (equal protection), and 25 (judicial protection) of the American Convention on Human Rights ⁴ , in relation to its article 1.1 (obligation to respect rights)

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	March 18, 2014
Additional information received during the stage of initial review:	July 24 and 28, 2015 and October 15 and 31, 2019
Notification of the petition:	November 18, 2019
State's first response:	November 19, 2020
Additional observations of the petitioner:	December 30, 2020
Additional observations of the State:	April 30, 2021

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 (instrument of ratification deposited on July 31, 1973) and Interamerican Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para") (deposit of instrument of ratification of November 15, 1996)

IV. 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 5 (right to human treatment), 8 (judicial guarantees), 24 (equal protection), and 25 (judicial protection) of the American Convention; and the article 7 of Convention of Belem do Para.
Exhaustion or exception to the exhaustion of domestic remedies:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

¹ This petition was initially filed by Mr. Faberth Romero Garcia as petitioner. However, by means of a note sent on June 27, 2019, the petitioner communicated that Mrs. Carolina Romero Burbano would be the petitioner.

² The petitioner individually identified the next of kin of the alleged victim: (1) Fabio Rodrigo Zemanate Daza, husband; (2) Inés Patiño de Loaiza, mother; (3) Mario German Loaiza Patiño, brother; (4) Line Maria Loaiza Patiño, sister; and (5) Carlos Hernán Loaiza Patiño, brother.

³ Pursuant to the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Carlos Bernal Pulido, a Colombian national, did not participate in the debate or in the decision on this matter.

⁴ Hereinafter "the Convention" or "the American Convention".

⁵ The observations of each party were duly notified to the other party.

V. ALLEGED FACTS

1. The petitioner claims that Mrs. Loaiza Patiño suffered acts of negligence and medical malpractice in a cesarean section, which resulted in her death and that of her baby. She alleges that the State is responsible for the violation of judicial guarantees and judicial protection since it did not diligently investigate such event or adequately provide reparations to her next of kin.

2. The petitioners reports that in February 2006 the alleged victim became pregnant at the age of 39, for which she was included by the health promotion entity COMFENAL (hereinafter, the "EPS") in the high-risk obstetric program. After that, the petitioner explains that on December 8, 2006, Mrs. Loaiza Patiño presented pain in the lower part of her abdomen, for which she called the EPS gynecologist, who prescribed Buscopan for the pain and told her to wait until December 12, 2006, the day she had been scheduled for her cesarean section.

3. Given that the pain continued, Mr. Fabio Zemanata, husband of the alleged victim, took her to the "Del Prado" Clinic, the institution assigned for her cesarean section. The petitioner reports that at this medical center she was not treated by an obstetrician-gynecologist and only examined by a general practitioner, who explained to her that she did not have any condition and gave her a drug to calm her down, leaving her for approximately two hours under observation in the emergency room. The petitioner alleges that the doctors did not feel the baby's movements, so they decided to do laboratory tests; and then perform a caesarean section in which they identified the presence of a uterine rupture, so the baby was born "extra-uterus". Despite resuscitation by doctors, the newborn died. In addition, because her condition was serious, the doctors subjected Mrs. Doris Loaiza to an "emergency hysterectomy", and she died on December 9, 2006.

4. Considering this, the petitioner alleges that on October 8, 2008, and faced with this situation, Mr. Fabio Zemanate presented the EPS with a petition to access public information, requesting his wife's medical records. However, on October 15, 2008, the company denied such a request, basing its response on article 14 of Resolution 1995 July 8, 1999, which provides that: "*Access to the information contained in medical records may be granted in the terms provided by law to: (1) the user; (2) the medical professionals, technicians and support staff that provide direct clinical care to the user ("the health team"); (3) the judicial and health authorities in the cases provided by law; and (4) other persons determined by law.*"

5. In view of what happened, on February 17, 2009, Mr. Fabio Zemanate and the alleged victim's next of kin filed a civil tort liability claim⁶ against the EPS for deficiencies in the provision of the service. However, on September 13, 2012, the Second Civil Circuit Court dismissed the claim and ordered the relatives of the alleged victim to pay costs and procedural expenses; arguing that according to the evidentiary material it was impossible to prove civil tort liability; and that, on the contrary, Mrs. Doris Loaiza received timely treatment, and that her death was not due to medical negligence.

6. The next of kin of the alleged victim appealed to the Superior Court of the Judicial District of Medellín, Civil Decision Chamber, which on March 14, 2013, confirmed the first instance judgment, arguing that the cause of death was a risk inherent to pregnancy, and that the evidence showed that the alleged victim died due to an abrupt and unpredictable situation.

7. As a result of this decision, the next of kin of the alleged victim filed a direct action for the protection of constitutional rights, alleging the violation of their rights to due process and defense in the ordinary civil liability proceeding. However, on July 5, 2013, the Civil Cassation Chamber of the Supreme Court of Justice declared the action inadmissible, considering that there were other procedural tools before the natural judge that could have been filed, such as the extraordinary appeal for cassation.

⁶ The petitioner party indicates that medical civil liability is regulated in article 2341 of the Civil Code, which "provides that the person who has wrongfully committed damage to another is obliged to compensate the damages that derive from it, thus establishing the tort liability regime. For its part, civil liability can be considered contractual or non-contractual depending on: i) the legal relationship between the parties from which the damage derives - whether or not it pre-exists the damage; ii) the action brought by the plaintiff/victim or the injured family, to claim compensation for damages." Ibid.

8. On March 14, 2013, Mr. Fabio Zemanate appealed this decision, but on August 28, 2013, the Labor Cassation Chamber of the Supreme Court of Justice confirmed the first instance ruling, reiterating that the extraordinary appeal was not used. The petitioner indicates that said decision was notified to the next of kin of the alleged victim, by means of a telegram, on September 26, 2013.

9. Based on the foregoing considerations, the petitioner alleges that the State violated the rights to due process and judicial guarantees, since after more than fifteen years those involved have not been held responsible for the negligence in the provision of services and medical malpractice that caused the death of Mrs. Loaiza Patiño and her baby. Likewise, the petitioner claims that the failure in medical care was since the signs and symptoms presented by the alleged victim were not detected in time and that no timely and immediate action was taken in the face of an imminent uterine rupture. The petitioner adds that the medical records and the medical certificate that were attached to the judicial proceedings show that the alleged victim was "taken to cesarean section forty-five minutes after the signs of uterine rupture appeared, without transfusion."

10. In this regard, the petitioner explains that the jurisprudence of the Third Section Administrative Litigation Chamber of the Council of State established, in a ruling of October 1, 2008, that a patient who did not receive timely treatment due to the lack of blood reserves of the Regional Hospital of Nueva Vista, deserves compensation for non-pecuniary damage, since the hospital should have had available the necessary elements for the proper provision of the service, as well as special care, and comprehensive and timely attention.

11. It argues that, within the framework of the civil proceeding, the judicial authorities incurred in a judicial decision that was contrary to law and the Constitution (*vía de hecho*) by not taking into account fundamental evidence, since they did not adequately assess the interrogation of Mr. Fabio Rodrigo Zemanate Daza, husband and companion of the alleged victim the day She entered to the "Del Prado" Clinic; and that they also failed to examine the evidentiary material, violating the right to defense and the guarantees of due process. In the opinion of the petitioner, the authorities gave full credibility to the statements of the doctors who participated in the events without considering the current employment relationship between said doctors and the "Del Prado" Clinic.

12. Likewise, the petitioner alleges that, having filed the appeal before the Superior Court of the Judicial District of Medellín and the action for the protection of constitutional rights before the Supreme Court of Justice, they exhausted domestic remedies. They argue that the extraordinary cassation appeal was inadmissible due to the amount claimed under the civil procedural legislation in force at the time of the facts, according to article 4867 of the Code of Civil Procedure⁸. In this regard, the petitioner informs that the economic situation of Mr. Zemanate Daza did not allow him to sue for at least 425 legal minimum wages in Colombia, the minimum required to use the appeal for cassation procedure under domestic law.

13. Finally, the petitioner explains that the relatives of the alleged victim did not file a criminal complaint for the facts, since domestic legislation –without the petitioner specifying which legal norm– considers the failure in the provision of service as a situation subjective responsibility, which involves an inadequate provision of services by the administration, which must be analyzed by civil or administrative means. The petitioner adds that it is unaware if there was any disciplinary investigation at the "Del Prado" Clinic for the facts denounced, since it is impossible for private persons to be notified in this regard.

14. The State, for its part, alleges that the petition is inadmissible for failure to establish the alleged violations of the American Convention. In this regard, it indicates that it complied with the obligations derived from the rights to judicial guarantees and judicial protection in favor of the next of kin of the alleged victim, since at the domestic level they obtained answers in the ordinary civil tort liability proceeding in two

⁷ The petitioner reports that the amount that would have corresponded to the alleged victim's husband was 65,227,546 Colombian pesos, less than the total of four hundred twenty-five thousand national minimum wages required to file the appeal.

⁸ "Article 366. Modified. L. 592/2000, Article 1. Origin. The appeal for cassation proceeds against the following judgments issued in the second instance by the superior courts, when the current value of the resolution unfavorable to the appellant is or exceeds four hundred and twenty-five (425) current monthly legal minimum wages as follows: 1. Those issued in the ordinary proceedings or that assume that character..."

instances. In a similar sense, it argues that they could also file an action for the protection of constitutional rights in the same way, respecting the constitutional and conventional standards.

15. Regarding the ordinary civil tort liability proceeding, the State argues that the Second Civil Court of the Medellín Decongestion Circuit, in a judgment dated September 13, 2012, dismissed the claim, arguing that the duly weighed evidentiary material revealed that the alleged victim received timely treatment timely and there was no responsibility of the EPS or the doctors. Subsequently, on March 14, 2013, the Civil Decision Chamber of the Superior Court of the Judicial District of Medellín confirmed the first instance ruling, arguing that the alleged negligence in medical care was not proven and that, on the contrary, the material evidence showed that the alleged victim died due to an abrupt and unpredictable situation. In this sense, the State argues that the proceedings were carried out with full observance of due process and within a reasonable time.

16. On the other hand, the State informs that according to the criterion of medical responsibility in Colombia, not in all cases which result in harm for the patient give rise to compensation for damages, since for this to be the case there must be a conduct, action, or omission, involved. It adds that for the exercise of the medical profession there are criteria and theoretical knowledge, so when the doctor who through the contractual or non-contractual relationship treats a patient, is not committing to cure him, but to act in accordance with the rules of his science.

17. Regarding the action for the protection of constitutional rights, it maintains that the Supreme Court of Justice analyzed such an appeal in two instances through duly substantiated rulings. In this sense, it explains that, in the first instance, on July 5, 2013, the Civil Cassation Chamber of said Court denied the action, arguing that the plaintiffs did not use other legal means, such as the extraordinary appeal of cassation, in accordance with article 6, numeral 1 of Decree 2491 of 1991⁹. Then, on August 28, 2013, the Labor Cassation Chamber confirmed the ruling, considering that the relatives of Mrs. Loaiza Patiño did not make use of the legal resources available to them, such as the extraordinary appeal. It reiterates that the action for the protection of constitutional rights had two instances of analysis before the Supreme Court, but that the petitioner did not resort to the appeal for cassation.

18. For these reasons, it requests that the petition be declared inadmissible based on Article 47(b) of the American Convention, since the claim of the petitioner is that the Commission act as a court of appeal, in a manner contrary to its complementary nature.

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

19. In the present case, the petitioner alleges that the alleged victim's next of kin exhausted domestic remedies with the decision of the Labor Cassation Chamber of the Supreme Court of Justice on August 28, 2013, notified on September 26, 2013. For its part, the State does not raise any exceptions on this point. In view of this and taking into consideration the allegation of the alleged victim that the extraordinary appeal was not adequate to address her legal situation, this petition complies with the provisions of Article 46.1.a) of the American Convention. Likewise, considering that on September 26, 2013, the decision confirmed the rejection of the action for the protection of constitutional rights and that the IACHR received this petition on March 18, 2014, the deadline for submission of the petition established in article 46.1.b) of the American Convention is also met.

VII. COLORABLE CLAIM

20. The Commission observes that the object of the petition refers specifically to the ordinary civil liability proceeding, which, it is alleged, violated the rights of the alleged victims, since it would not have been

⁹“Article 6. Grounds of inadmissibility of the action for the protection of constitutional rights. The action for the protection of constitutional rights will not proceed: 1. When there are other remedies or means of judicial defense, unless it is used as a transitory mechanism to avoid irreparable damage. The existence of said means will be assessed specifically, in terms of their effectiveness, taking into account the circumstances in which the applicant finds himself”.

effective in repairing the damages derived from an alleged medical malpractice in a cesarean section, which would have resulted in the death of Mrs. Loaiza Patiño and her newborn baby. In this sense, this petition is not focused on the lack of punishment of those allegedly responsible for such an event due to the impact on the right to life of the persons, but only on the absence of compensation.

21. To support its petition, the petitioner argues that, according to the medical records, the medical personnel did not adopt adequate measures to safeguard the health of the alleged victim. It affirms that even though Mrs. Loaiza Patiño was in a situation of high obstetric risk, she was not treated as a priority as soon as she presented symptoms of pain and that the medical staff performed a caesarean section forty-five minutes after the signs of uterine rupture manifested, without transfusion of blood. Likewise, it affirms that the judicial authorities failed to adequately evaluate the statements and interrogations made in the civil liability proceeding, and that they carried out a biased analysis of the evidentiary material.

22. In view of these considerations and after examining the elements of fact and law set forth by the parties, the Commission considers that the allegations of the petitioners are not manifestly unfounded and need to be studied on the merits since the alleged facts, if corroborated, could constitute violations of Articles 5 (right to human treatment), 8 (judicial guarantees), 24 (equal protection), and 25 (judicial protection) of the American Convention, in relation to Articles 1.1; and the article 7 of Convention of Belem do Para to the detriment of Mrs. Loaiza Patiño y her family.

23. With regard to the claim for the alleged violation of Articles 4 (right to life) and 17 (protection to the family) of the American Convention, the Commission notes that the petitioners have not provided sufficient arguments or grounds to consider *prima facie* their possible violation.

24. Finally, regarding the State's arguments regarding the fourth instance formula, the Commission reiterates that, according to its mandate, if it is competent to declare a petition admissible and rule on the merits when it refers to internal proceedings that could be in violation of the rights guaranteed by the American Convention as in the present case.

VIII. DECISION

1. To declare the present petition admissible in relation to articles 5, 8, 24 y 25 of the American Convention; and article 7 of the Convention Belem do Para;

2. To declare this petition inadmissible in relation to article 4 and 17; and

3. To notify the parties of this decision; 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 28th day of the month of September, 2022. (Signed:) Julissa Mantilla Falcón, President; Stuardo Ralón Orellana, Vice President; Margarete May Macaulay (dissident vote), Second Vice President; Esmerald Arosemena de Troitiño, Joel Hernández (dissident vote) and Roberta Clarke, Commissioners.