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REPORT No. 384/22
PETITION 1573-14

REPORT ON ADMISSIBILITY

P.E.M.M.
PERU

Approved electronically by the Commission on December 17, 2022.

Cite as: IACHR, Report No. 384/22. Petition 1573-14. Admissibility P.E.M.M. Peru. December 17, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Aldo Enrique Araujo Neyra, Rafael Alonso Ynga Zevallos, and Asociación Civil LTGB
Alleged victim:	P.E.M.M.
Respondent State:	Peru[1]
Rights invoked:	Articles 4 (right to life), 8 (right to a fair trial), 11 (right to privacy), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention on Human Rights[2]

II. PROCEEDINGS BEFORE THE IACHR[3]

Filing of the petition:	November 3, 2014
Additional information received at the stage of initial review:	May 11, 2015, and October 20, 2016
Notification of the petition to the State:	October 22, 2021
State's first response:	February 17, 2022
Petitioners additional information :	August 4, 2022
States additional information :	April 20, 2022
Warning about possible archiving:	September 24, 2020
Petitioner's response to the warning of possible archiving:	September 28, 2020

III. COMPETENCE

Competence *Ratione personae*:	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes
Competence *Ratione materiae*:	Yes, American Convention (instrument of ratification deposited on July 28, 1978)

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 3 (right to juridical personality), 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), 24 (right to equal protection), 25 (right to judicial protection), and 26 (economic, social, and cultural rights) of the American Convention.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, as indicated in section VI
Timeliness of the petition:	Yes, as indicated in section VI

[1] In keeping with Article 17.2.a of the Commission's Rules of Procedure, Commissioner Julissa Mantilla Falcón, a Peruvian national, did not participate in the debate or decision on this case.

[2] Hereinafter "the Convention" or "the American Convention."

[3] The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. The petitioners allege that the State discriminated against the alleged victim as a trans woman when the administrative and judicial authorities rejected her request for gender recognition, because of which she does not to date have a national identity document (DNI) that reflects her gender identity.

2. The petitioners explain that P.E.M.M., a dual Peruvian and Spanish national, succeeded in having her female name and gender recognized in Spain, after which she filed suit in Peru to have her name recognized in her country of origin as well. Accordingly, on October 20, 2009, the Specialized Civil Court of San Martín declared the action to be adequately grounded, finding that the plaintiff had reliably demonstrated that she identified as female. Since neither the Public Prosecution Service (MP) nor any other authority filed an appeal, on January 27, 2010, that decision became final.

3. Based on that decision, the petitioners indicate that on August 23, 2010, the alleged victim filed a writ of *amparo* against the National Identification and Civil Status Registry (hereinafter, RENIEC), requesting the recognition of her female gender on her DNI, and that on May 3, 2012, the Civil Court of the Province of San Martín ruled the claim to be adequately grounded. However, they report that the RENIEC lodged an appeal against that decision, alleging that a constitutional remedy was not the correct channel to address P.E.M.M.'s claim, since the matter should have been heard by the regular civil courts. As a result, on September 10, 2012, the Decentralized Mixed Chamber of Tarapoto overturned the judgment against which the appeal was brought, declaring it inadmissible on the grounds that the matter should not be resolved through *amparo* proceedings.

4. In view of this, they state that the alleged victim filed a constitutional grievance; however, on March 18, 2014, the Constitutional Court, through a ruling in Case No. 00139-2013-PA/TC, declared that suit groundless. Among its findings, the Constitutional Court stated that:

> *For the law (...) sex means biological sex (...). The difference between the sexes thus responds to an extra-legal and biological reality that must be constitutionally respected because it is based on 'the nature of things' (...). In the case at hand, at no time does the appellant argue that P.E.M.M. is chromosomically, hormonally, gonadically, or morphologically of the female sex. The appellant supports P.E.M.M.'s sex change claim on purely psychological grounds (...). It is clear that not identifying with the male biological sex or identifying with the female sex involves a psychological 'pathology' (as she herself calls it), as is also proven by her claim to have undergone a 'thorough evaluation' of a psychological nature to diagnose her with 'transsexualism'.*

5. Furthermore, the Constitutional Court found that accepting P.E.M.M.'s request would cause a great impact and complications in the field of civil law and that, in particular, the following consequences would arise: *"(1) a person would be able to change his or her sex in the civil registry at will; (2) the marriage of persons of the same sex would be allowed, since an operated transsexual, despite the external change, continues to have the same chromosomal sex.*" Accordingly, it stated that its decision constituted binding and obligatory constitutional doctrine for all the country's courts.

6. By virtue of the aforesaid considerations, the petitioners contend that the State primarily violated the alleged victim's right to identity and equality, and that the refusal to recognize her gender identity has also implied other violations, since P.E.M.M. has had problems in the personal formalities she must carry out—with banks, commercial businesses, and state entities—preventing her from living a full life without fear of any kind of risk. Finally, they claim that Peru has no specific process for the recognition of gender identity and that the current procedures do not allow for a prompt decision to be adopted, since they involve evidentiary stages that are discriminatory for trans persons. They contend that this situation was aggravated by the Constitutional Court's decision, which enshrined a discriminatory finding in constitutional doctrine.

7. For its part, the State argues that the petition is inadmissible. First, it raises the objection of a lack of material competence for the purported violation of the alleged victim's right to identity, since that right is not expressly enshrined in any article of the American Convention, nor in any other instrument of the inter-

American system. Consequently, it contends that the alleged violation of that right cannot be discussed within the IACHR's petition and case system.

8. Peru further states that the petitioners did not adequately exhaust domestic remedies. It indicates that under Article 5 of the Code of Constitutional Procedure then in force,[4] *amparo* was the appropriate remedy for the protection of fundamental rights, provided that there was no other equally satisfactory channel. It notes that in the case at hand, both the Decentralized Mixed Chamber of Tarapoto and the Constitutional Court rejected the alleged victim's claim, finding, among other arguments, that the matter should be resolved through regular civil proceedings. Likewise, it indicates that there are various national precedents like the present case that, since they were processed through the appropriate channels, obtained the expected results. Specifically, the State cites three resolutions handed down by civil courts and chambers that ordered that the plaintiffs' names and sexes be changed; and, based thereon, it concludes that since it has been established that there was an adequate and effective remedy that the alleged victim did not use, the petition at hand does not meet the requirement set out in Article 46.1.a of the American Convention.

9. The State also contends that the alleged victim did not exhaust the remedy for challenging a possible violation of Article 24 of the American Convention. Thus, it notes that although Peruvian law provides for the possibility of challenging the constitutionality of a self-executing provision by means of *amparo*, P.E.M.M. neither challenged nor requested the non-application of the order on the grounds that it was discriminatory. For that reason, the State holds that it did not have the opportunity to rule on this matter within domestic jurisdiction, so neither does this aspect of the petition meet the requirement set forth in Article 46.1.a of the Convention.

10. Finally, it argues that the alleged facts do not tend to establish a violation of human rights. It indicates that the first advances made by the agencies of the inter-American system with respect to differences in treatment, equality, and non-discrimination on the grounds of sexual orientation were made in 2012, through the judgment in the case of Atala Riffo and Daughters v. Chile. Consequently, it contends that when P.E.M.M. began her proceedings before the domestic courts, no international standard for the protection of the right to gender identity was yet in force, and that it was not until 2017, through Advisory Opinion No. 24, that the Inter-American Court developed such a legal parameter. On that basis, the State requests that the IACHR consider that, given the lack of international consensus on the matter in dispute, the margin of appreciation doctrine is applicable.

11. As for the alleged infringement of the right to a fair trial and judicial protection, Peru argues that the fact that the outcome of the proceedings has not been satisfactory for P.E.M.M. does not mean that the remedies available under domestic law were illusory or that there were procedural irregularities. In addition, it reiterates that the alleged victim had another equally satisfactory avenue to assert the right she considers having been violated.

12. Finally, the State notes that the petitioners detail to what extent there was a violation of P.E.M.M.'s rights to life, human treatment, and honor; and that there was no violation of the right to equality before the law, since internal rules exist regarding the protection of the rights of trans persons in the electoral and health fields. For the reasons given, Peru requests that the petition be declared inadmissible in accordance with Article 47.b of the American Convention, in that it believes that the petitioners' aim is for the Commission to act as an appellate court, in contradiction to its complementary nature.

[4] Code of Constitutional Procedure. "Article 5. Grounds for inadmissibility. Constitutional proceedings shall be inadmissible when: […] 2. There are specific, equally satisfactory procedural avenues for the protection of the threatened or violated constitutional right, except in the case of habeas corpus proceedings."

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

13. In the present matter, the Inter-American Commission observes that the alleged victim filed a writ of amparo and, in the face of its denial, presented a constitutional tort, which it´s final decision was issued on March 18, 2014, by the Constitutional Court, through a judgment handed down in the File No. 00139-2013-PA/TC. This judgement was notified on May 12 of that same year. In this regard, the IACHR considers that the alleged victim used a recursive procedure that, in principle, could have had a result that protected the rights that he considered violated, exhausting it until his last instance.

14. Likewise, although the State alleges that the alleged victim had civil remedies available to him, the Commission reiterates that the requirement of exhaustion of domestic remedies does not imply that the alleged victims have the obligation to exhaust all possible remedies available to them. In this sense, the IACHR has maintained that if the alleged victim raised the issue through any of the valid and adequate alternatives according to the domestic legal system and the State had the opportunity to remedy the matter in its jurisdiction, the purpose of the international standard is accomplished[5].

15. Based on this parameter, the Commission considers that the State's argument regarding the suitability and effectiveness of the ordinary civil remedy is inadmissible; given that even when the judgments forwarded as annexes by the State show the existence of decisions favorable to claims similar to those of the present case, at the domestic level –except in the second instance of the appeal for amparo– there was no warning of the existence of another proper way to resolve the dispute. In the first decision, it was concluded that, despite the exceptional nature of the amparo appeal, the action proceeded due to the legislative vacuum on the matter under debate. Later, the Constitutional Court directly analyzes the merits of the matter without identifying the existence of another resource and without directing it; correspondingly, the alleged victim to such mechanism. For this reason and given that the alleged victim had already exhausted the amparo and constitutional tort remedies, it would be disproportionate to require him to exhaust other mechanisms provided for at the domestic level.

16. Thus, the IACHR considers that for purposes of admissibility of this report, the petition formally complies with the requirement of exhaustion of domestic remedies provided in Article 46.1.a) of the American Convention. Likewise, regarding the requirement of the filing deadline, established in Article 46.1.b) of that treaty, the Commission observes that the aforementioned decision was notified on May 12, 2014 and the petition presented to the IACHR on November 3 that year, therefore within the period of six months established in said regulation. The State, for its part, has not disputed the exhaustion of domestic remedies.

VII. ANALYSIS OF COLORABLE CLAIM

17. In the first place, the Commission reiterates that the evaluation criterion of the admissibility phase differs from that used to rule on the merits of a petition. at this stage, the IACHR must carry out a prima facie evaluation to determine whether the petition establishes grounds for the violation, possible or potential, of a right guaranteed by the Convention, but not to establish the existence of its violation. This determination on the characterization of violations of the American Convention constitutes a primary analysis, which does not imply prejudging the merits of the matter. For purposes of admissibility, the Commission must decide whether the alleged facts may characterize a violation of rights, as stipulated in Article 47.b) of the American Convention or whether the petition is "manifestly unfounded" or is "obviously unfounded". total inadmissibility", according to 47.c) of the American Convention[6].

18. The Commission considers it pertinent to recall that neither the American Convention nor the IACHR Rules of Procedure require the petitioner to identify the specific rights allegedly violated by the State in the matter submitted to the Commission, although the petitioners may do so. It is up to the Commission, based

[5] IACHR. Report 70/04, Petition 667-01, Admissibility, Jesús Manuel Naranjo Cárdenas y otros, Jubilados de la empresa venezolana de aviación VIASA. Venezuela, October 15, 2004, para 52.

[6] IACHR, Report No. 69/08, Petition 681-00. Admissibility. Guillermo Patricio Lynn. Argentina. October 16, 2008, para. 48

on the case law of the system, to determine in its admissibility reports, which provision of the relevant inter-American instruments is applicable, or its violation could be established, if the alleged facts are proven by means of sufficient elements[7].

19. Based on the facts raised by the petitioning party, and the determination already made in a similar precedent[8], the Commission observes that the petitioning party's allegations are not manifestly unfounded and require an in-depth study, considering the obligations established for the Peruvian State by the American Convention. In this sense, the Commission considers proceeding with the examination of the articles indicated at the end of this decision.

20. Finally, and with respect to the argument of the "formula of the fourth instance", the Commission underlines the complementary nature of the inter-American system and emphasizes that, as the Inter-American Court has indicated, in order for a "fourth instance" exception to proceed it would be necessary to "seek to review the ruling of a domestic court due to its incorrect assessment of the evidence, the facts or the domestic law, without, at the same time, alleging that such ruling incurred in a violation of international treaties [...]" [9]. In the present case, the Commission considers that, as the Inter-American Court has indicated, "[it] is responsible for verifying whether or not the steps actually taken at the domestic level violated international obligations of the State derived from the inter-American instruments that grant it competition"[10]. Likewise, it is responsible for examining "whether or not the actions of judicial bodies constitute a violation of the international obligations of the State, [which] may lead to [...] examining the respective domestic processes to establish their compatibility with the Convention American"[11]. In this sense, the analysis of whether the State incurred in violations of the American Convention is an issue that must be decided on the merits of this matter.

VIII. DECISION

1. To declare this petition admissible in relation to Articles 3, 5, 8, 11, 24, 25, and 26 of the American Convention; 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 17th day of the month of December, 2022. (Signed:) Stuardo Ralón Orellana (dissident vote), Vice President; Margarette May Macaulay, Second Vice President; Esmerald Arosemena de Troitiño, Joel Hernández, Roberta Clarke and Carlos Bernal, Commissioners.

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[7] This is a criterion widely reiterated by the Commission, see, among others: IACHR, Report 7/12, Petition 609-98, Admissibility. Guillermo Armando Capo. Argentina. March 19, 2012, para. 26.

[8] IACHR, Report 57/18, Petition 969-07, Admissibility. Karen Manuca Quiroz Cabanillas. Peru. May 5, 2018, para. fifteen. Inter-American Court. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 18.

[9] Inter-American Court. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 18.

[10] Inter-American Court. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 19.

[11] Inter-American Court. Case of Palma Mendoza et al. v. Ecuador. Preliminary Objection and Background. Judgment of September 3, 2012. Series C No. 247, para. 18; Inter-American Court. Case of Rosadio Villavicencio v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2019. Series C No. 388., para. 24; Inter-American Court. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 19.