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REPORT No. 353/21
PETITION 1846-14
ADMISSIBILITY REPORT

ANDREA DAYNA MEDINA STEIN AND HER DAUGHTER
PERU

Approved electronically by the Commission on November 24, 2021.

Cite as: IACHR, Report No. 353/21. Petition 1846-14. Admissibility. Andrea Dayna Medina Stein and her daughter. Peru. November 24, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Dayna Gabriela Stein Arroze and Andrea Dayna Medina Stein
Alleged victim:	Andrea Dayna Medina Stein and her daughter
Respondent State:	Peru ¹
Rights invoked:	Articles 4 (life), 5 (personal integrity), 8 (right to a fair trial), 12 (freedom of conscience and religion), 13 (freedom of thought and expression), 15 (right of assembly), 16 (freedom of association) and 25 (judicial protection) of the American Convention on Human Rights ² and other international treaties ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	November 6, 2014
Additional information received at the stage of initial review:	March 29, April 3 and November 2 and 11, 2016
Notification of the petition to the State:	September 4, 2019
State's first response:	January 24, 2020
Additional observations from the petitioner:	July 11, 2020
Additional observations from the State:	December 22, 2020

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 the instrument of ratification developed 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 <i>res judicata</i>:	No
Rights declared admissible:	Articles 4 (life), 5 (personal integrity), 8 (right to a fair trial), 19 (rights of the child), 25 (judicial protection), and 26 (economic, social and cultural rights) of the American Convention, in relation to Article 1.1 thereof (obligation to respect rights); and Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

¹ In accordance with Article 17.2.a of the Rules of Procedure of the Commission, Commissioner Julissa Mantilla Falcón, a Peruvian national, did not participate in the discussion or decision of the present case.

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

³ Article 19 (freedom of opinion and expression) of the Universal Declaration of Human Rights.

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. The petitioners allege that the State violated the rights of Ms. Medina and her daughter by letting them become victims of medical malpractice and obstetric violence, which resulted in the death of the latter. They argue that, to date, such facts have not been thoroughly investigated and those responsible have not been punished.

2. The petitioners state that as of April 2012, Ms. Medina, who was pregnant, attended the San Pablo Private Clinic in Lima to be seen by an obstetrician-gynecologist. On December 3, 2012, after two initial tests confirming that there were no issues, an ultrasound showed dilation in the fetus's heart chambers. Despite this, the petitioners note that the medical staff verbally told the alleged victim that everything was fine.

3. On December 11, 2012, Ms. Medina, who was nine-months pregnant, visited the above mentioned clinic for a routine checkup. That day, the medical staff placed a device on the alleged victim and left her waiting for over an hour, without giving her any information about what was happening. Then, the head of Obstetrics informed Ms. Medina that the baby's heartbeat was dropping and that she had to be operated on. The petitioners allege that despite this situation, the medical staff did not perform a new ultrasound to the alleged victim because she did not have credit cards or money at that time, contradicting the instructions provided by the gynecologist and breaching medical protocols.

4. The petitioners add that at the time of delivery, the gynecologist and other doctors performed acts of obstetric violence to the detriment of the alleged victim. In this regard, they state that the gynecologist denied Ms. Medina's husband access to the room, without providing any reasonable justification, except that "he had so decided." In addition, when the anesthesiologist said that it was not possible to insert the catheter on the alleged victim, the gynecologist decided to perform the entire caesarean section without anesthesia.

5. The petitioners allege that after a highly tortuous cesarean procedure, the nurses did not place the baby on Ms. Medina's chest or capture her footprints, merely taking her to another room, without letting the mother see her. They claim that on December 12, 2012, the doctors brought the baby to the alleged victim, who spent the entire day with her in her room at the medical center. However, Ms. Medina realized that the baby had no umbilical cord and that she already had two teeth, so she began to suspect that the baby was not her newborn daughter.

6. According to the birth report, the baby was born at 22:43 on December 11, 2012, in perfect health. Nevertheless, on December 13, 2012, the nurses, without providing any information, took the alleged victim's daughter with them. Several hours later, a doctor informed the alleged victim that her baby had been transferred to the neonatal intensive care unit due to heart problems. The petitioners argue that after insisting that she be allowed to see her daughter, Ms. Medina managed to access the intensive care unit, but she allegedly found a different baby from the one she had had in her room. While the doctors reiterated to the alleged victim that the baby she had seen was indeed her daughter, she contests said statement, since the baby "looked different," and none of the babies in the unit had identification tags.

7. The petitioners point out that Ms. Medina and her family later saw the baby that was presumably theirs from afar and noticed that she had a 3-to-5-cm cut in her chest. After asking the medical staff about it, they were informed that a general practitioner had tried to perform a catheterization procedure without success. The petitioners allege that said procedure was performed without seeking the consent of the family and was not carried out by a specialist in the matter.

8. They point out that, due to the above mentioned ill-treatment by the staff of the medical center, Ms. Medina's family had to arrange for the use of an ambulance through the State's Ambulance Transport System. On December 14, 2012, they managed to have the alleged victim's daughter transferred to the Guillermo Almenara Public Hospital. However, they argue that they did not receive an adequate response from said public hospital either, and on the contrary, since December 15, 2012, the medical staff constantly harassed the alleged victim to persuade her that the baby should undergo surgery, without providing any details as to what the baby's condition was and even though the success rate of said procedure was only 1%.

9. Within this scenario, Ms. Medina requested that her baby be examined by the staff of the National Cardiovascular Institute (hereinafter "INCOR"). Consequently, on December 19, 2012, an ambulance transferred the baby to the INCOR, where medical staff concluded that she needed to either undergo surgery or receive a heart transplant. Since there was only a 1% chance that the baby would survive the operation, the alleged victim preferred to wait, so the ambulance transferred her daughter back to the Guillermo Almenara Public Hospital. On this point, the petitioners question that the medical staff transferred the baby, both to the INCOR and then back to the Guillermo Almenara Public Hospital, without the presence of her parents in the vehicle, which contravened medical protocols.

10. The petitioners point out that on December 25, 2012, a doctor contacted the alleged victim by telephone, indicating that she should go to the medical center to authorize a blood transfusion for her daughter. Upon the medical staff's insistence, the alleged victim's husband signed the authorization for this procedure to be performed. The petitioners argue that despite the alleged urgency, the blood transfusion was carried out on December 27, 2012. In this regard, they maintain that Ms. Medina noticed that the device used for said procedure was strange. She later consulted with other doctors and other mothers affected by the actions of the San Pablo Clinic,⁵ who indicated that, based on the characteristics of the device, it was not meant to perform transfusions, but plasmapheresis.⁶

11. The petitioners indicate that half an hour after the transfusion had been performed, a doctor informed Ms. Medina that her daughter had died due to cardiac arrest and indicated that an autopsy should be conducted. They claim that the alleged victim decided against the autopsy being carried out and that, as a result, the medical staff threatened her with calling the police and were very rude towards her. However, the petitioners indicate that finally, the doctors allowed Ms. Medina to sign a document refusing to carry out said procedure.

12. They add that, on the death certificate, clinic staff misstated the time of death and indicated that the baby was male. They also indicate that after overcoming the depression caused by her daughter's death, Ms. Medina requested her baby's medical record and only then did she learn that, according to the doctors' observations, her baby suffered from heart failure, pneumonia and sepsis, conditions that had not been communicated to her in a timely manner.

13. Given this situation, on July 5, 2013, the alleged victim filed a criminal complaint against the staff of the San Pablo Clinic and the Guillermo Almenara Public Hospital for abandonment of a patient, serious injuries, wrongful death, coercion, kidnapping, and malicious and involuntary injuries to the detriment of the alleged victim's daughter. They also note that on several occasions, Ms. Medina has requested that the exhumation of her daughter's body be carried out, so as to confirm whether the body was indeed her daughter's and to determine her age.

14. However, on March 10, 2015, the 24th Provincial Prosecutor's Office in Criminal Matters of Lima declared a large part of the complaint inadmissible, and based on the proceedings that were carried out, it filed a complaint against three persons for the forgery of private documents and misrepresentation against the Guillermo Almenara Public Hospital and the National Bureau of Vital Statistics (hereinafter "RENIEC"), for the issuance and use of a false death certificate. In the face of this situation, Ms. Medina filed a formal complaint, but on June 5, 2015, the Eighth Superior Prosecutor's Office in Criminal Matters declared said complaint unfounded.

15. The alleged victim then filed a complaint against the representative of the Office of the Public Prosecutor of the 24th Provincial Prosecutor's Office in Criminal Matters of Lima. However, on December 10, 2015, said complaint was declared inadmissible. The petitioners add that, in the face of this decision, Ms. Medina appealed, but the authorities rejected this remedy on the grounds that it was filed in an extemporaneous manner. Finally, they contend that on July 30, 2016, the Provincial Prosecutor's Office in

⁵ The petitioners note that 15 babies died under unclear circumstances from December 2012 to December 2013. As a result, their mothers met with different authorities to inform them about their experiences.

⁶ The petitioners state that plasmapheresis is a procedure by which blood is completely removed from the body and processed so that white blood cells, red blood cells and platelets are separated from the plasma.

Criminal Matters of Lima also declared the nullity appeal they brought against the notification and closing of the case unfounded.

16. In parallel with the criminal complaint, on November 27, 2014, Ms. Medina filed a claim with the National Institute for the Defense of Competition and the Protection of Intellectual Property (hereinafter "INDECOPI") against the San Pablo Clinic and Social Health Insurance, claiming that the actions of such institutions violated her rights and those of her daughter as users of the health service. The petitioners argue that on December 29, 2017, the INDECOPI's Consumer Protection Commission, by resolution 3711-2015/CC1, declared most of the above claims inadmissible and only sanctioned the San Pablo Clinic for the lack of medical specialists in its intensive care unit.

17. The alleged victim appealed this decision, and on September 5, 2018, the Consumer Protection Chamber of the Court of the INDECOPI, by resolution 2293-2018/SPC, confirmed the sanction against the San Pablo Clinic for the lack of medical specialists and added a sanction for (i) failure to perform an echocardiogram before delivery; (ii) inadequate application of epidural anesthesia; (iii) failure to keep the child in an incubator for over four hours; and (iv) absence of information on the sepsis symptoms that the baby allegedly had and on her health status. However, it rejected that: (i) the website of said medical center disclosed undue information; (ii) a catheterization procedure was performed on the baby without an informed consent; (iii) the discharge of the newborn was refused; and (iv) there was no ambulance available to transfer the baby. It also ordered the Consumer Protection Commission to re-examine (i) whether the San Pablo Clinic advertised its services as having a "Heart Institute" in a misleading way; (ii) whether the newborn had sepsis; and (iii) if a suitable protocol was in place to identify newborn babies.

18. Based on this resolution, the INDECOPI's Consumer Protection Commission, by resolution 0703-2019-CC, analyzed the points mentioned above and declared them unfounded. The petitioners maintain that on May 6, 2019, Ms. Medina filed an appeal against said decision and on November 18, 2019, the Consumer Protection Chamber of the Court of the INDECOPI, by resolution 3213-2019/SPC, confirmed the rejection of such claims.

19. Due to the above considerations, the petitioners allege that the daughter of the alleged victim died sixteen days after birth because of medical malpractice by the medical staff of the San Pablo Clinic and the Guillermo Almenara Public Hospital; and that there are indications that her baby was kidnapped and replaced with other by members of such medical staff. They also claim that Ms. Medina suffered obstetric violence by the staff of said medical center.

20. They add that, to date, such facts have not been adequately investigated. In this regard, they question the fact that the staff of the Homicide Division of the National Police did not go to such medical facilities to close and seal dated copies of medical records, death certificates and other medical reports to ensure that no tampering existed. They point out that, to date, it is evident that the medical record has been tampered with, since there are plenty of cross outs and smears, and no chronological order is followed. In addition, the petitioners argue that the Office of the Public Prosecutor relied on a DNA test that was fatally defective to corroborate the blood relation between the deceased baby and Ms. Medina. They add that they requested copies of the initial ultrasounds, but to date they have not received such documents from the medical centers, despite having requested them by certified letter and having reported said situation to the INDECOPI.

21. Finally, according to the petitioners, at the time Ms. Medina gave birth, several reports were filed against the San Pablo Clinic on television and other media for medical malpractice. They indicate that, because of the news coverage, a medical audit was carried out, which established the existence of hospital viruses in that medical center, especially in its intensive care unit.

22. For its part, the State replies that the petition is inadmissible since the petitioners did not exhaust all domestic remedies before submitting their petition. It claims that on November 6, 2014, the date the petition was submitted, the Office of the Public Prosecutor was still investigating the facts and that only on January 9, 2018, did the Second Criminal Court for Prosecutions of Persons in Prison adopt a final decision in the criminal proceedings. Accordingly, it considers that the petitioners speculated on the outcome of the

domestic proceedings, thereby breaching Article 46.1 a) and b) of the American Convention by submitting its petitions before the domestic proceedings were completed.

23. In addition, the State contends that the facts denounced do not constitute violations of human rights for which it could be held accountable. It argues that the Office of the Public Prosecutor initiated an investigation against the medical and auxiliary staff of the San Pablo Clinic and Guillermo Almenara Public Hospital, based on the criminal complaint filed by the alleged victim for the alleged medical malpractice. The State indicates that on March 10, 2015, the representatives of the Office of the Public Prosecutor, after analyzing the evidence gathered, decided not to file a criminal complaint for the offenses of abandonment and/or exposure of persons to danger, serious injuries and wrongful death, among other crimes.⁷ It indicates that these representatives considered that there was no evidence of any negligence with regard to the medical care given to Ms. Medina and her daughter.

24. Similarly, the State indicates that the audit report prepared by the Second Directorate of Health of Lima Sur on September 30, 2014, as well as the medical record itself, clearly shows that the medical staff applied epidural anesthesia to the alleged victim without complications, and therefore they did not violate her right to integrity. It also argues that the death of the newborn baby was due to her congenital heart conditions, and not to medical malpractice.

25. However, it states that the Office of the Public Prosecutor considered that, unlike the charges previously mentioned, it was appropriate to file a criminal complaint for the offenses of forgery of private documents and misrepresentation against the Guillermo Almenara Yrigoyen Hospital and the RENIEC. As a result, on January 9, 2018, the Second Criminal Court for Prosecutions of Persons held in Prison confirmed the criminal conviction against such persons in the second instance for the crimes cited.

26. Based on this, the State claims that the authorities decided on the complaint filed by the alleged victim and on the many remedies subsequently brought by Ms. Medina's family members in accordance with due process. In view of these considerations, the State requests for the petition to be declared inadmissible based on Article 47 b) of the American Convention, since it considers that the petitioner's claim is aimed at the Commission acting as a court of appeals, which is against its supplementary nature.

27. Finally, it alleges that the Commission lacks subject-matter competence to decide, through its system of petitions and cases, on possible breaches of the Universal Declaration of Human Rights.

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

28. With regard to the State's argument that domestic remedies were exhausted after the petition had been filed, the IACHR reaffirms that what should be taken into account in determining whether domestic remedies have been exhausted is the situation at the time of the ruling on admissibility.⁸ On this basis, it considers that on June 5, 2015, the Eighth Superior Prosecutor's Office in Criminal Matters, in a final ruling, confirmed that the complaint for the offenses of abandonment of a patient, serious injuries, wrongful death, coercion, kidnapping and malicious and involuntary injuries against the alleged victims was inadmissible. Therefore, based on such information, the Commission finds that the petition meets the requirements established in Articles 46.1.a) and 46.1.b) of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

29. In the light of the information provided by the parties, the Commission notes that the purpose of the present case is to denounce an alleged medical malpractice, attributable to a number of medical centers,

⁷ In particular: fraud, omission of statements in documents and deletion, destruction or concealment of documents, misrepresentation of marital status, coercion, kidnapping, and injury.

⁸ IACHR, Report No. 4/15. Petition 582-01. Admissibility. Raúl Rolando Romero Feris. Argentina. January 29, 2015, para. 40.

both public and private, which resulted in the death of Ms. Medina's daughter. The Commission also notes that the facts have not been diligently investigated to this date.

30. Due to the complexity of the facts, the Commission considers that the arguments of the petitioners are founded and need to be studied on the merits. In this line, if such arguments prove to be certain, they could constitute violations of the rights protected in Articles 4 (life), 5 (personal integrity), 8 (right to a fair trial), 19 (rights of the child), 25 (judicial protection), and 26 (economic, social and cultural rights) of the American Convention in relation to Article 1.1 (obligation to respect such rights) thereof to the detriment of the alleged victim and her daughter, according to the terms of this report.

31. Additionally, since the petitioners also allege that Ms. Medina suffered obstetric violence, following its recent decision on the merits of *Balbina Francisca Rodríguez Pacheco and relatives v. Venezuela*,⁹ the IACHR will consider the possible application of the Convention of Belém do Pará.

32. Regarding the alleged violation of Articles 12 (freedom of conscience and religion), 13 (freedom of thought and expression), 15 (right of assembly) and 16 (freedom of association) of the American Convention, the Commission considers that the petitioners have not provided sufficient arguments or grounds to consider *prima facie* their possible violation.

33. As for the alleged violation of Article 19 of the Universal Declaration of Human Rights, the Commission is not competent to declare that the provisions of the Declaration have been violated. However, the Commission may take them into consideration as part of its interpretation of the provisions of the American Convention during the merits stage of this case, pursuant to Article 29 of the American Convention.

34. With regard to the State's allegations about the Commission acting as a fourth instance, the Commission reiterates that, according to its mandate, it is competent to declare a petition admissible and to rule on its merits when said petition refers to domestic proceedings that could be in violation of the rights guaranteed by the American Convention, as in the present case.

VIII. DECISION

1. To declare this petition admissible in relation to Articles 4, 5, 8, 19, 25, and 26 of the American Convention in accordance with Article 1.1 thereof, and Article 7 of the Convention of Belém do Pará.

2. To declare this petition inadmissible in relation to Articles 12, 13, 15, and 16 of the American Convention.

3. To notify the parties of this decision; to proceed with the merits of the case; 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 24th day of the month of November, 2021. (Signed:) Antonia Urrejola, President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández, and Stuardo Ralón Orellana, Commissioners.

⁹ IACHR, *Balbina Francisca Rodríguez Pacheco and relatives*. Bolivarian Republic of Venezuela. Report on the Merits No. 332-20. Case 12,868. November 19, 2020.