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REPORT No. 52/14
PETITION 112-09
REPORT ON ADMISSIBILITY

F.S.
CHILE

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REPORT No. 52/14¹**PETITION 112-09****ADMISSIBILITY**F.S.²

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July 21, 2014

I. SUMMARY

1. On February 3, 2009, the Inter-American Commission on Human Rights (hereinafter also referred to as "the Inter-American Commission" or "the Commission") received a petition presented by the Center for Reproductive Rights and *Vivo Positivo* (hereinafter also referred to as "the petitioners") in representation of F.S., alleging the international responsibility of Chile for the sterilization without consent of a woman who is HIV positive in a public hospital. The petitioning organizations contend at the same time that the State did not adopt the necessary measures to prevent the above-mentioned sterilization without consent, which is a form of violence against women, and failed to investigate these facts with due diligence.

2. In this regard the petitioners contend that these facts constitute a violation of the alleged victim's rights enshrined in Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 11 (right to privacy), 17 (rights of the family), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention, all in relation to Article 1 of this instrument. They also allege violation of Articles 7 and 9 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter "Convention of Belém do Pará").

3. As of the date of this report's approval, the State had not submitted observations regarding the facts alleged by the petitioners.

4. After reviewing the petitioner's position in light of the requirements for admissibility set forth in Articles 46 and 47 of the American Convention, and given the State's lack of response in the instant case, the Inter-American Commission decides to declare this petition admissible with respect to the alleged violation of Articles 5, 8, 11, 13, 17, 24, and 25 of the American Convention, in accordance with Article 1(1) thereof, as well as with respect to the alleged violation of Article 7 of the Convention of Belem do Pará.

II. PROCESSING BY THE INTER-AMERICAN COMMISSION

5. The Commission received the petition, written in English, on February 3, 2009, and assigned it number 112-09. Through a note dated February 13, 2009, the Commission acknowledged receipt to the petitioners and informed them that the petition should be sent in Spanish, which is the official language of the State involved. The petitioners responded in a note dated March 18, 2009, informing the Commission that they were in the process of translating the petition. On July 7, 2009, the Commission received the petition translated into Spanish, sent by the petitioners by means of a note dated June 29, 2009.

6. The Commission forwarded copies of the petition to the State of Chile in a note dated May 9, 2011 and set a deadline of two months for it to submit observations. Pursuant to a note dated August 4, 2011, the State requested a two-month extension to submit a response to the petition, which was granted by the IACtHR on August 18, 2011. On December 11, 2013, the Commission reiterated to the State its request for observations.

¹ Commissioner Felipe González, of Chilean nationality, did not participate in the deliberations or the decision on this case, in keeping with the provisions of Article 17(2)(a) of the Commission's Rules of Procedure.

² At the express request of the petitioners in a communication dated June 29, 2009, the alleged victim's name has not been revealed (hereinafter "F.S.") in this report.

7. On September 25, 2012, the petitioners forwarded to the Commission a technical report prepared by the *Joint United Nations Programme on HIV/AIDS* (UNAIDS) at the request of the Center for Reproductive Rights. On July 17, 2013, the Commission confirmed receipt of the document and informed the petitioners that in order to forward this report to the parties it had to be submitted in Spanish, as this is the official language of the State accused.

8. On January 15, 2013, the petitioners sent a letter to the Commission requesting an admissibility hearing for this case during the 147th regular session of the Commission. On March 4, 2013, the Commission responded to the petitioners that due to the large number of hearings requested, it would not be possible to comply with this request.

9. On August 18, 2013, the petitioners sent the Commission a second letter requesting that it grant [them] an admissibility hearing for this case during the 149th regular session of the Commission. In a note dated November 6, 2013, the Commission informed the petitioners that due to the large number of hearings requested, it would not be possible to comply with this request.

10. On May 1, 2014, the Commission received an *amicus curiae* brief prepared by *The International Women's Human Rights Clinic (IWHR) at the City University of New York (CUNY) School of Law*. As the brief was submitted in English, the Commission sent a letter to the petitioners on July 7, 2014, indicating that in order to forward this brief to the State, it had to be translated into Spanish.

III. THE POSITIONS OF THE PARTIES

A. The Position of the Petitioners

11. The petitioners submitted a series of claims related to F.S., a Chilean woman residing in Hualañé, a rural town in the Maule Region, located in the south of the country. At the beginning of March 2002, at the age of 20, F.S. discovered that she was pregnant. She welcomed this news joyfully as she and her husband had wanted to have a child for two years. Shortly thereafter, F.S. went to the Family Clinic in Hualañé, where routine exams and an HIV test were performed. Approximately one month later, F.S. received the results of these analyses and discovered that she was HIV positive. The petitioners indicate that afterwards, F.S. was referred to the Curicó Hospital, a public facility located an hour from Hualañé, in order to receive the antiretroviral therapy necessary to reduce the risk of transmission of the virus to the fetus. During her entire pregnancy she was treated at the aforementioned Hospital by Dr. Ramírez.

12. The petitioners assert that F.S. did not receive guidance on sterilization or other kinds of contraception during her pregnancy, nor was she provided guidance on the risk of HIV transmission from mother to child. According to the petitioners, F.S. was only informed that she should take the antiretroviral drugs to help prevent transmission. The petitioners contend that during the administration of the antiretroviral therapy, which reduces the risk of HIV transmission during labor, one of the nurses rebuked F.S. and accused her of being irresponsible for having children if she was HIV positive.

13. The petitioners indicate that a cesarean section was scheduled for F.S. on the morning of November 5, 2002, and she was told that a doctor with experience in surgery on HIV-positive women would operate on her. The petitioners recount that F.S. entered the Curicó Hospital in preparation for the surgery on the night of November 3. Her water broke around 7 the next morning, and the surgery therefore had to be moved up. As a result of moving up the date of surgery, the cesarean was performed by the surgeon on call, Dr. Gatica, instead of the doctor that had been scheduled to do it.

14. F.S.'s cesarean section was performed around midnight according to the petitioners. Her son was born healthy and HIV-negative at 12.35 a.m. on November 5. The petitioners state that when F.S. awakened from the anesthesia in the recovery room, a nurse informed her that she had been sterilized during the procedure and would not be able to have more children. The petitioners assert that F.S. and her husband were very upset at this news, as both had always wanted to have a large family.

15. The petitioners state that Chilean law stipulates that sterilization procedures must be authorized in writing and with the patient's informed consent. They affirm, however, that F.S. did not consent or sign any document authorizing the procedure, nor did she receive the information that she would have needed to make an informed decision in this regard. Furthermore, the petitioners contend that prior to the procedure F.S. did not receive any information about the effects and risks of sterilization or about other alternative methods of contraception.

16. The petitioners point out that the doctor who performed F.S.'s sterilization declared that she had requested the procedure verbally after being taken into the operating room. The petitioners contend, however, that F.S. never requested to be sterilized nor did she agree to the procedure, and in this regard they assert that none of the nurses testified that F.S. had requested the procedure after being taken into the operating room.

17. The petitioners also cite a study on Chilean women living with HIV/AIDS that indicates that "50% of the surgical sterilizations performed after discovering patients' HIV-positive status were done under pressure by health personnel or without their knowledge."³ In this respect, the petitioners contend that this kind of coercion reflects a deeply-rooted discrimination against women living with HIV.

18. Additionally, the petitioners state that on March 17, 2007, F.S. filed a criminal complaint with the Court of Guarantees of Curicó against Dr. Gatica on charges of serious bodily injury. The petitioners indicate that after filing the complaint, F.S.'s attorney had to twice request, on August 10 and September 10, 2007, that the Office of the Prosecutor formally undertake an investigation of the doctor allegedly responsible for the sterilization, after which the Office of the Prosecutor did so on September 24, 2007.

19. The petitioners indicate that the prosecutor charged with the case declared the investigation closed on April 2, 2008, and requested that the Court of Guarantees of Curicó definitively dismiss that case, as he deemed it had been demonstrated that F.S.'s sterilization had been performed with her express verbal consent.

20. The petitioners indicate that on June 2, 2008 a hearing was held at the Court of Guarantees of Curicó in order to issue a ruling on the prosecutor's recommendation that the case be dismissed. In this hearing F.S.'s attorney requested the case records be forwarded to the Office of the Regional Prosecutor, in keeping with Article 258 of the Criminal Code of Procedure. The request was granted, and on June 4, 2008 F.S.'s attorney filed an appeal of the Prosecutor of Curicó's decision with the Office of the Regional Prosecutor, questioning the Office of the Prosecutor's report and underlining the discrepancies in the testimony on which the prosecutor's decision was based.

21. The petitioners state that the Office of the Regional Prosecutor had the opportunity to reopen the investigation to clarify the discrepancies, as well as to issue an indictment of Dr. Gatica. However, the petitioners indicate, on June 16, 2008, the Office of the Regional Prosecutor upheld the case's dismissal.

22. The petitioners indicate that as a result of this a new hearing was held on July 18, 2008 at the Court of Guarantees of Curicó to rule on the recommendation that the case be dismissed. At this hearing the Court definitively dismissed the case, based on Article 250(a) of the Code of Criminal Procedure, which provides that dismissal is appropriate when the facts investigated do not constitute a crime. The petitioners contend that this court decision did not mention the facts in dispute, nor did it refer to the lack of written informed consent required under national law. At the same hearing the petitioners add that the court denied the request for private prosecution presented by F.S. and her attorney. Upon appeal of this decision by F.S.'s attorney, the Court of Appeals of Talca upheld the decision to dismiss the case on August 4, 2008.

³ The petitioners cited: VIDAL, F. and CARRASCO, M. Chilean Women Living with HIV/AIDS: Sexual and Reproductive Rights? [Mujeres chilenas viviendo con VIH/SIDA: ¿Derechos sexuales y reproductivos?]. Santiago, Vivo Positivo, Universidad Arcis, Flacso Chile, 2004, p. 106.

23. With regard to the aforementioned criminal proceedings, the petitioners submitted a series of allegations which focus on the lack of due access to justice and F.S.'s unequal protection under the law. They contend that the State did not employ the necessary means to diligently and thoroughly investigate the alleged violations inflicted on F.S. They also deem that during these proceedings no due consideration was given to F.S.'s sex, economic situation, and the fact that she lives with HIV—factors which heighten the risk of social prejudices, violations of human rights, and [different] kinds of discrimination during the unfolding of legal proceedings.

24. In relation to the foregoing, the petitioners indicate that when dismissing the case, the statements made by the alleged victim and her husband to the Office of the Prosecutor were completely ignored, as the prosecutor's decision to definitively dismiss the case was exclusively based on five pieces of evidence: the statements given to the Office of the Prosecutor by the anesthetist's assistant, the surgeon's assistant, the midwife, and the doctor that participated in the operation, as well as F.S.'s labor protocol record, which states "tubal ligation requested by patient." The decision to dismiss the matter solely on consideration of the statements by the surgical team, without considering F.S.'s and her husband's statements, was confirmed by the Court of Guarantees of Curicó and the Court of Appeals of Talca. Furthermore, the petitioners underline that the report by the Office of the Prosecutor upon which the decision to dismiss the case was based emphasizes the fact that F.S. did not report the facts earlier. For the petitioners this shows that the alleged victim's fear of being stigmatized and discriminated against due to her HIV-positive status was ignored, as well as her fear that a complaint could interfere with the antiretroviral therapy that she receives at the Curicó Hospital.

25. The petitioners also assert that F.S.'s alleged sterilization without consent constitutes a form of violence against women, and in this regard, contend that all the alleged facts supposedly took place in a context in which the Chilean judicial system was ineffective in investigating reports of gender-based violence, which negatively impacted the outcome of this case.

26. In relation to the rights impaired as a result of the facts alleged, the petitioners contend that F.S.'s alleged sterilization without consent violated her rights to humane treatment, personal liberty and safety, respect for her privacy, family life, health, effective legal remedies, judicial protection, and equal protection under the law, pursuant to Articles 1, 5, 7, 8, 11, 17, 24, 25, and 26 of the American Convention and Articles 7 and 9 of the Convention of Belem do Pará. The petitioners contend that these violations first occurred when public health employees sterilized F.S. without her consent, and then [again] when the Chilean judicial system did not provide an investigation and legal proceedings in keeping with the required legal guarantees.

27. In relation to the requirements for competence and admissibility of the petition, the petitioners indicate that the facts reported were committed by agents of the State, as F.S.'s sterilization was performed in a public hospital and that the actions of the Office of the Prosecutor, the Court of Guarantees of Curicó and the Court of Appeals of Talca—all public institutions—had direct effects on the protection and defense of F.S.'s rights. The petitioners further indicate that the last decision in the criminal proceedings against the doctor that performed the sterilization of the alleged victim was issued on August 4, 2008, and the petition was presented to the Inter-American Commission on February 3, 2009, thus fulfilling the 6-month deadline for submitting a petition.

28. In relation to the requirement to exhaust domestic remedies, the petitioners underline that the only valid and appropriate remedy to penalize the alleged perpetrators of the sterilization and obtain redress for the victim was the criminal complaint against the doctor responsible for the sterilization performed without consent, which was exhausted and came to an unsuccessful close. They further underline that F.S. considered the possibility of filing a civil suit against the Curicó Hospital, but this idea was rejected because this remedy could only result in economic compensation, which, in and of itself, is not appropriate to obtain the comprehensive redress the alleged victim seeks.

B. The Position of the State

29. In keeping with the section above on processing, the petition was forwarded to the State on May 9, 2011, so it could make observations within a 2-month deadline. On August 4, 2011, the State requested a 2-month extension to submit its observations, which was granted by the Commission on August 18, 2011. On the date this report was approved, the State of Chile had not submitted its observations on the petition.

IV. ANALYSIS

A. Competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae* of the Inter-American Commission

30. The petitioners are entitled under Article 44 of the American Convention to submit complaints to the Commission. The petition indicates that the alleged victim is an individual, with respect to whom the State of Chile committed to respecting and ensuring the rights enshrined in the American Convention and other international instruments. Chile has been a party to the American Convention since August 21, 1990, the date on which it deposited its instrument of ratification, and therefore the Commission is competent *ratione personae* to review the petition.

31. The commission is competent *ratione loci* to take cognizance of the petition inasmuch as it alleges violations of rights protected under the American Convention that took place in the territory of a State party thereto. Furthermore, the Commission is competent *ratione temporis* under the American Convention and the Convention of Belém do Pará, ratified by the State of Chile on August 21, 1990 and November 15, 1996, respectively, as the obligation to respect and ensure the rights protected under both instruments was already in force for the State on the date when the facts alleged in the petition occurred. Finally, the Commission is competent *ratione materiae* because the petition reports potential violations of human rights protected under the American Convention and the Convention of Belém do Pará.

B. Other Admissibility Requirements for the Petition

1. Exhaustion of Domestic Remedies

32. Article 46(1)(a) of the American Convention and Article 31(1) the Commission's Rules of Procedure provide that to make a decision on the admissibility of a matter, the Commission must confirm whether domestic legal remedies have been invoked and exhausted, in keeping with generally recognized principles of international law. This requirement's purpose is to allow domestic authorities to be informed of an alleged violation of a protected right, and where appropriate, to remedy it before it is heard by an international body.

33. In this case, the petitioners contend that F.S. filed and exhausted criminal proceedings in domestic courts in order to obtain redress for her alleged sterilization without consent. The State has not disputed that domestic remedies were exhausted.

34. The Commission notes that this case allegedly involves crimes that must be investigated and prosecuted at the initiative of the authorities, and that in such cases "the State has the obligation to promote and give impetus to the criminal process, and that in such cases, this is the suitable way to clarify the facts, prosecute those responsible, and establish the appropriate criminal sanctions, as well as to pave the way for other forms of reparation of a financial nature"⁴. Furthermore, in cases where the alleged facts may constitute a form of violence against women, the appropriate remedy to be exhausted in order to identify and punish the perpetrators of said violence are the criminal proceedings, which the State should pursue with due

⁴ IACtHR, Report No. 21/14, Petition 525-01, Admissibility, *Baptiste Willer and Frédo Guirant*, Haiti, April 4, 2014, paragraph 20; IACtHR, Report No. 19/12, Petition 1127-05, Admissibility, *Family of Sergio Arturo Canales Galvez*, Honduras, March 20, 2012, paragraph 29.

diligence.⁵ The petition shows that the alleged victim submitted a criminal complaint against the doctor supposedly responsible for the events of March 17, 2007, and that these proceedings ended with the definitive dismissal of the case, upheld by a decision of the Court of Appeals of Talca on August 4, 2008. This dismissal was due to the fact that the Court considered that at the close of the investigation it had been demonstrated that F.S.'s sterilization was performed with her express verbal authorization.

35. As a result, the Commission confirms that the petitioners exhausted criminal proceedings and that in this case no additional information has been provided regarding other remedies available in domestic courts. The Commission notes that the State has the burden of proving that other suitable domestic remedies are available and that the State has remained silent on this point.

36. Based on the above, the Commission concludes that the petitioners have exhausted the ordinary remedies of the criminal justice system in order to obtain redress for F.S.'s alleged sterilization without consent. Therefore, her claims meet the requirement for prior exhaustion of domestic remedies under Article 46(1)(a) of the American Convention.

2. Deadline for Submission

37. Article 46(1)(b) of the American Convention stipulates that for a petition to be admissible, it must be presented within six months of the date on which the interested party was notified of the final decision that exhausted domestic remedies.

38. The Commission notes that on August 4, 2008 the Court of Appeals of Talca issued a decision upholding the definitive dismissal of the criminal case against the doctor supposedly responsible for the alleged victim's sterilization. The victim was notified of this decision on the same date. The petition was submitted to the Commission on February 3, 2009, thereby complying with the 6-month deadline stipulated in Article 46(1)(b) of the American Convention.

3. Duplication of Proceedings and International Res Judicata

39. The case file does not reveal that the matter addressed in the petition is pending in any other international settlement proceedings, nor that it reproduces a petition that has already been reviewed by this or any other international body. Therefore, the requirements provided for under Articles 46(1)(c) y 47(d) of the Convention are considered to have been met.

4. Characterization of the Alleged Facts

40. The petitioners have presented a series of arguments related to two main aspects of the matter in question. First of all, they have reported that F.S. was allegedly sterilized without her consent. Second of all, they have presented claims related to irregularities that occurred during the criminal proceedings that the alleged victim filed in domestic courts.

41. With regard to the first of the facts alleged, the Commission considers that if the surgical sterilization performed without consent in a public hospital and the physical and psychological effects resulting from this procedure were proven to be true, these facts may characterize a violation of the rights protected under Articles 5, 11, and 17 of the American Convention in relation to Article 1(1) thereof, as well as a violation of Article 7 of the Convention of Belem do Pará, in the understanding that a sterilization performed without consent would be a form of violence against women. Regarding Article 5 of the American Convention, the Commission notes that in the international arena it has been recognized that the practice of sterilization without an individual's consent may constitute a violation of the right to humane treatment and cause serious emotional distress.

⁵ IACHR, Report No. 154/10, Petition 1462-07, Admissibility, *Linda Loaiza López Soto and Family*, Venezuela, November 1, 2010, paragraph 49.

42. Furthermore, the Commission takes into consideration the petitioners' allegations that the alleged victim is a woman that lives with HIV and this condition had an impact on the decision to sterilize her. According to the petitioners, other factors came into play in this decision, such as the fact that the alleged victim is a poor woman who resides in a rural area. These allegations, if proven, may constitute a violation of Article 24 of the Convention. The Commission also considers that the State's alleged lack of due diligence in investigating and punishing those potentially responsible for performing a sterilization on F.S., allegedly without her consent, may constitute a kind of discrimination in the guarantee of access to justice, the details of which the Commission will review in light of Article 24 of the Convention during the merits stage.

43. The Commission also understands that the alleged lack of informed consent prior to performing the sterilization may characterize a violation of the right of access to information protected under Article 13 of the Convention.

44. Furthermore, the Commission considers that the alleged irregularities and discrimination that occurred during the criminal proceedings may characterize a violation of Articles 8 and 25 of the American Convention, in relation to Article 1(1) thereof. The Commission further considers that the aforementioned allegations may constitute a violation of Article 7 of the Convention of Belém do Pará. In its interpretation of Article 7 of this Convention during the merits stage, the Commission will, in keeping with its usual practice, take into account Article 9 thereof.⁶

45. Finally, the Commission notes that, to the extent appropriate, it may analyze during the merits stage the potential impairments of F.S.'s family member's rights under Articles 5, 8, 11, 17, 24 and 25.

V. CONCLUSIÓN

46. The Inter-American Commission concludes that is competent to hear the merits of this case and that the petition is admissible in keeping with Article 46 and 47 of the American Convention. Based on the factual and legal arguments presented above and without prejudging the merits of this matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES TO:

1. Declare this case admissible as regards alleged violation of rights protected under Articles 5, 8, 11, 13, 17, 24, and 25 of the American Convention in connection to Article 1(1) thereof, and Article 7 of the Convention of Belém do Pará.
2. Notify the parties of this decision.
3. Continue with the analysis of the merits of the matter; and
4. Publish this decision and include it in its Annual Report to the OAS General Assembly.

⁶ IACtHR, Report No. 93/09, Admissibility, Petition 337-03, *Samanta Nunes da Silva*, Brazil, September 7, 2009, paragraph 52.