

OEA/Ser.L/V/II.164
Doc. 141
7 September 2017
Original: Spanish

REPORT No. 120/17
PETITION 2003-13
REPORT ON ADMISSIBILITY

BEATRIZ
EL SALVADOR

Approved by the Commission at its session No. 2098 held on September 7, 2017
164th Extraordinary Period of Sessions

Cite as: IACHR, Report No. 120/17. Petition 2003-13. Admissibility. Beatriz. El Salvador.
September 7, 2017.



REPORT No. 120/17
PETITION 2003-13
 REPORT ON ADMISSIBILITY
 BEATRIZ
 EL SALVADOR
 SEPTEMBER 7, 2017

I. INFORMATION ABOUT THE PETITION

Petitioners:	Colectiva Feminista para el Desarrollo Local de El Salvador; Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico de El Salvador; Ipas Centro América; and Centro por la Justicia y el Derecho Internacional
Alleged victim:	Beatriz and Family ¹
State denounced:	El Salvador
Rights invoked:	Articles 1.1, 2, 4, 5, 8, 9, 11, 24, 25, and 26 of the American Convention on Human Rights (hereinafter "American Convention"); Article 6 of the Inter-American Convention to Prevent and Punish Torture (hereinafter : "IACPPT"); and Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter "Convention of Belém do Pará")

II. PROCEDURE BEFORE THE IACHR²

Date on which the petition was received:	November 29, 2013
Date on which the petition was transmitted to the State:	March 19, 2015
Date of the State's first response:	March 2, 2016
Additional observations from the petitioning party:	September 6, 2016
Additional observations from the State:	To date, the State has not presented additional observations
Precautionary measure granted:	PM 114-13. Precautionary measure granted on April 29, 2013
Provisional measure granted:³	Matter "B". Provisional Measure granted on May 29, 2013 and lifted on August 19, 2013.

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes

¹ The petitioning organizations asked that the name of the alleged victim be kept confidential and requested that she be referred to as "Beatriz." They also asked that her family members' data be kept confidential.

² Each Party's observations were duly transmitted to the opposing Party.

³ On July 11 and September 5, 2017, the IACHR notified the State and the petitioners, respectively, that, given the connections between the subject matter of the present petition with the precautionary measure and, later on, with the provisional measure, it had decided to take the documents presented by the Parties in connection with those proceedings into account in the processing of the present petition.

Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument deposited on August 21, 1990); Convention of Belém do Pará (instrument deposited on January 26, 1996); and IACPPT (instrument deposited on December 5, 1994)

IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of proceedings and international <i>res judicata</i>:	No
Rights declared admissible:	Articles 1 (obligation to respect rights), 2 (domestic legal effects), 4 (life), 5 (humane treatment), 8 (right to a fair trial/ due guarantees), 9 (freedom from ex post facto laws), 11 (right to privacy/ to have honor respected and dignity recognized), 24 (equal protection), 25 (judicial protection), and 26 (progressive development of economic, social, and cultural rights) of the American Convention on Human Rights; Articles 1, 6, and 8 of the IACPPT; and Article 7 of the Convention of Belém do Pará
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes. Article 46.2.a of the American Convention applies
Timeliness of the petition:	Yes, as per Section VI

V. ALLEGED FACTS

1. The petitioners describe the alleged victim as a woman who was born on October 30, 1990 in circumstances of extreme poverty, who was diagnosed in 2009 with systemic lupus erythematosus exacerbated by lupus nephritis and rheumatoid arthritis, which they refer to collectively as the "underlying illness." They state that in July 2011 she had a high-risk pregnancy and was referred to the National Maternity Hospital (hereinafter "the Hospital"), where, after a series of medical treatments for anemia, severe lupus condition together with pneumonia, hypertension and pre-eclampsia, she underwent a caesarian section and gave birth to a baby boy on March 4, 2012 who was regarded as premature and diagnosed with respiratory distress and necrotizing enterocolitis and only released from hospital 38 days after he was born. The petitioners say that Beatriz was offered sterilization but she declined it because she feared her child might die and that she would then not be able to try and have another one.

2. They state that in November 2012, Beatriz suspected that she was pregnant and on February 18, 2013 went to the emergency room at the Rosales National Hospital, where she was diagnosed with a high-risk pregnancy in its 11th week. They say that in March she was again referred to that hospital on account of lupus-related injuries. There Beatriz was told that an ultrasound exam showed "no skullcap, with an image typical of an anencephalic fetus. A check-up was recommended in the 20th week". They report that the defect was confirmed at the Hospital on March 12, 2013 and that the doctors decided to take the case before the Medical Committee "to reach a consensus (sic) on when the pregnancy should be interrupted because anencephaly is incompatible with life". They state that on March 14, 2013, the Head of the Perinatology Unit at the Hospital explained to Beatriz that the fetus had no chances of surviving and that there could be complications with her pregnancy due to her underlying illnesses and the sequels of her previous pregnancy. For that reason, Beatriz asked for her pregnancy to be interrupted, at which point the physician explained to her that her request was not legally permitted.

3. They state that the Medical Committee of the Hospital agreed to file a petition with the Office of the Attorney General of the Republic (hereinafter "PGR") and to request the opinion of the Minister of Health. They say that two days later, the Head of the Legal Unit at the Hospital communicated with the Coordinator of the Board for the Protection of Children and Adolescents to request the opinion of the "competent authority or institution" to carry out the medical procedure recommended in order to "safeguard the life of the mother." They add that on April 9, 2013, the Board for the Protection of Children and Adolescents of San Salvador ruled on the request saying that it lacked authority in that area. It maintained, however, that there was a "possible risk and threat to the rights of the unborn child" so that it was obliged to uphold those rights and to notify the PGR so that the latter could appoint a state attorney to represent and defend the interests of the unborn child. The petitioners point out that, on that same day, Beatriz went to an appointment with the Director of the Hospital, who told her they could not act until one of the entities consulted pronounced on the matter. They say that the next day the Ancillary Prosecuting Attorney of San Salvador of the PGR sent a communication to the Minister of Health telling her that there would be no opposition to carrying out the procedure that health professionals considered pertinent and best in terms of safeguarding Beatriz's life.

4. They assert that on April 12, 2013, the Medical Committee at the Hospital agreed to terminate the pregnancy on the grounds that in the short and medium term there was no possibility of the fetus surviving, that Beatriz's underlying illnesses would grow worse as pregnancy progressed, and that the duration of the pregnancy at that time (less than 20 weeks) meant that there was less risk of maternal health complications, given Beatriz's medical history and circumstances. They add that, despite the above, the Committee said it was subject to the law and as professionals of the Hospital they could not break the law. They say that on April 18, 2013, upon returning to the Hospital, the alleged victim was threatened and harassed by hospital personnel, due to the presentation of an action for enforcement of rights (*recurso de amparo*). A complaint was therefore filed with the Minister of Health. The petitioners also state that Beatriz told the Hospital psychologist that she had had suicidal thoughts and that the psychologist's only response had been to talk about God and give her religious books to read. They maintain that, on May 22, 2013, doctors at the hospital and the Head of the hospital's Perinatology Unit met and considered proposing to the Medical Committee that they would not perform surgery for the time being and that they planned to end the pregnancy at 28 weeks when the surgical risks would be lower.

5. As regards the judicial actions brought on account of the facts reported, the petitioners say that Beatriz's representative filed an action for enforcement of rights on April 11, 2013 with the Constitutional Chamber of the Supreme Court of Justice (hereinafter "SC-CSJ") against the Director, the Head of the Legal Unit and the Head of the Perinatology Unit of the Hospital requesting that an order be given to operate on Beatriz immediately and save her life, given the Hospital's refusal to interrupt the pregnancy due to the criminal consequences they might suffer because of the absolute ban on abortions in El Salvador. They state that on April 17, 2013, the SC-CSJ admitted the action for processing and issued a precautionary measure to ensure that the respondent authorities guaranteed Beatriz's life and health, by providing the necessary and best treatment for the preservation of those rights, while the matter was being processed.

6. Given the time that had elapsed without Beatriz's pregnancy being interrupted, on April 18, 2013, the petitioning organizations requested that the IACHR grant precautionary measures, which it did on April 29, 2013. Since the precautionary measure granted had no effect on the situation, on May 20, 2013 they asked the IACHR to apply for provisional measures with the Inter-American Court of Human Rights (hereinafter "I/A Court H.R."). They add that the SC-CSJ issued a judgment on May 28, 2013 and gave notice of it the following day (May 29), rejecting the action because it considered that the medical personnel had guaranteed Beatriz's rights to health and life by admitting her, monitoring her state of health, and providing the medicines needed to stabilize her condition and therefore concluded that the respondent authorities had not committed the omission they had been accused of. The SC-CSJ maintained that in El Salvador there is an absolute ban on practicing abortion because it contravenes the constitutional protection of the human being from the moment of conception, and it argue that the rights of the mother cannot be given precedence over those of the child to be born (*nasciturus*) nor vice-versa, and that it was exclusively up to the medical professionals to determine the circumstances and timing for medical intervention as it was they who had to

take on the risks associated with the exercise of the medical profession and decide what was clinically best for guaranteeing both the life of the mother and of the *nasciturus*.

7. The petitioners state that on June 3, and after the granting of provisional measures by the I/A Court H.R. on May 29, 2013, the pregnancy was terminated and Beatriz sterilized at her request. They assert that the new born weighed 518 grams and was 29 cm long, with no skullcap or brain tissue, and was showed to Beatriz by the doctors, dying five hours later. They say that on June 10, at her request, Beatriz was released from hospital.

8. They state that further judicial actions were brought on account of the facts denounced, including a complaint filed on July 3, 2013 with the Office of the Attorney for the Defense of Human Rights (Ombudsperson), for violation of the right to life due to failure to interrupt the pregnancy. That complaint was admitted on the grounds that, if true, the facts of the case would constitute impairment of the rights to health, personal integrity/humane treatment, and to special medical treatment, with consequent danger to life due to lack of medical care, as well as to the right of access to justice. At the same time, the authorities involved were asked to provide information. The petitioners state that, as of the date of presentation of the complaint to the IACHR, they had no knowledge of any further actions. They also went to the Office of the Prosecutor General (*Fiscalía General de la República*), which body said that it had already issued its opinion in connection with the action for enforcement of rights proceedings (*amparo*), clarified the norms currently in effect, and stated that, if the alleged facts were true, the medical staff could be liable for failure to do their duty. On May 23, 2013, a complaint was filed with the Government Ethics Tribunal against the Director of the Institute of Forensic Medicine (a body that was asked for an expert opinion during the *amparo* proceedings) for violating his moral duties when he publicly queried the Hospital's diagnosis and failed to recuse himself due to conflict of interest, since his spouse pertains to the "Fundación Sí a la Vida" [Pro-Life Foundation], an organization that attempted to act as a third party in the *amparo* proceedings. The petitioners say that on October 23, 2013, the Tribunal refused to admit the proceeding on the grounds that the Director had not been a party to the *amparo* proceedings; nor had "Fundación Sí a la Vida" intervened as a third party benefited by them.

9. The petitioners argue that criminal legislation in El Salvador against abortion is ambiguous, incomplete, and opposed to the legislature's obligation to amend or abolish laws and practices that favor the persistence or tolerance of violence against women, since Article 133 of the Criminal Code contains no legal characterization of the conduct constituting an offense. It simply provides for its punishment. They argue that such ambiguity allows one conduct to be characterized as one or more offenses, so that a person accused of the crime of abortion may later be accused of aggravated homicide, with consequent adjustment of the sentences handed down. They argue that the norms in force and State practice with respect to abortion impose gender stereotypes and roles that materialize as a form of discrimination against girls and women.

10. They further argue that there is no appropriate domestic remedy to safeguard Beatriz's rights in a timely manner. They maintain that, in connection with unconstitutionality proceeding 18-98, the SC-CSJ considered that in cases of therapeutic, ethical, and eugenic abortion the conflict can only be regulated via a single penalization system (*sistema común de penalización*) and that the regulation of said norm is incomplete inasmuch as it operates only once acts have already been consummated, "so that it is not possible for a judge or other State entity to analyze and rule on a possible controversy preventively, with a view to authorizing or not authorizing an abortion." They state that a similar pronouncement was made by the Office of the Prosecutor-General (FGR) in response to a query by Beatriz's representative regarding application of the state of necessity contemplated in Article 27.3 of the Criminal Code, in the sense that the FGR considered that application of that notion can only be discussed within the framework of a criminal proceeding. For that reason, the petitioners argue that no appropriate domestic remedy exists. They also report that the SC-CSJ denied Beatriz access to a prompt and effective remedy for protecting her rights, because Beatriz had requested that her pregnancy be interrupted on March 14, 2013 (in the 14th week of pregnancy) and on April 11, 2013 an *amparo* action had been filed with the SC-CSJ (19th week of pregnancy), despite which the court had issued a final resolution after 48 days (26th week of pregnancy), which was not a reasonable period of time given the characteristics and urgency of the case, but rather an illusory and ineffective period of time, meaning that the Court had not acted with due diligence. The petitioners argue, at the same time, that in

rejecting the *amparo* action, referred responsibility for a decision back to the physicians treating Beatriz, without resolving the obstacles Beatriz had had in accessing the treatment recommended. The petitioners likewise state that, through the SC-CSJ and the other authorities involved, the State engaged in institutional violence against Beatriz, by not considering her special need for a prompt resolution of her situation, given the specific circumstances of the case.

11. They add that, given the non-existence of a preventive domestic remedy that would allow prompt resolution of the controversy between the rights of the woman and those accorded to the fetus, the only remedy available to argue the right to life pursuant to Article 2 of the Constitution was an *amparo* action. The petitioners state that the judgment handed down was based on Articles 32 and 35 of the Law of Constitutional Procedures, which refer inter alia to the inadmissibility of a civil suit for compensation of damages in cases in which the *amparo* is not granted, and on the final nature of the judgment, which is reaffirmed in Articles 81 and 86 of the aforementioned law. This last-mentioned norm states that there is no appeal against the judgment. For that reason, the petitioners maintain that the only available remedy was duly exhausted. They likewise state that Beatriz is not entitled to receive reparation for the violations of her rights inasmuch as her *amparo* action was denied and they add the exception provided for in Article 46.2.a of the American Convention and Article 31.2.a of the Rules of Procedure of the IACHR applies in this case.

12. They assert that the facts reported have not been examined or resolved by the Commission in terms of merits nor is the case being heard by any other international agency empowered to rule on the merits. Without prejudice thereto, on November 13, 2013, they had heard that four special United Nations mechanisms had asked the State for information regarding the case in question.⁴ Nevertheless, they maintain that those mechanisms do not constitute an "international governmental organization" in the sense of Article 33 of the Rules of Procedure of the IACHR. They add that the special mechanisms are not obliged to transmit replies provided by States to those who provided the information, so that no adversarial proceedings result that might result in an "effective settlement" of the matters addressed in the present petition. They also state that, according to information in the public domain, there is no indication that the special mechanisms have followed up on the State's response with a view to issuing any opinion on the merits of the case.

13. Given the facts of the case as described above, the petitioners argue that the State failed to meet its obligation to respect the rights to life and personal integrity/human treatment of Beatriz and to fulfill its duty to prevent violations of those rights, a situation that, in addition, amounted to violence against women, due to the passive conduct of the health authorities who failed to proceed to interrupt the pregnancy, thereby allowing the pregnancy to continue past the 20th week and to require more extensive surgery, placing Beatriz's life at extreme risk and causing her and her family profound uncertainty and suffering. For that reason, the petitioners also allege violations of her family members' right to integrity. They further argue that these impairments to Beatriz's life, personal integrity and comprehensive health constituted cruel, inhuman, and degrading treatment and give rise to aggravated liability, due to noncompliance with the precautionary measures issued by the Commission. They also state that the authorities violated Beatriz's right to privacy and personal integrity. Finally, they argue that the criminal laws in force on abortion violate the principle of legality given the situation of legal uncertainty generated for Beatriz, who was left not knowing whether she would in fact be prosecuted for consenting and proceeding with the interruption of the gestation of the anencephalic fetus, and that said legislation constitutes a regression vis-à-vis the State's international obligations to progressively achieve full materialization of the right to health. They argue that the restrictive constitutional and criminal law that bans all forms of abortion in practice discriminates disproportionately against girls and women.

⁴ The Chair of the Working Group on the issue of discrimination against women in law and in practice; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on violence against women, including its causes and consequences requested information from the State on April 18, 2013. The State replied on May 21, 2013.

14. The State maintains that it acknowledges its obligation to guarantee the human rights of women in its territory and points to the implementation of a number of public policies and the adoption of laws and carrying out of programs that seek to make gender equality a reality, together with women's right to a life free from violence and discrimination. The State also provides ample details of the medical care provided to Beatriz and of the judicial proceedings conducted on her behalf before the CS-CSJ, as well as in the proceedings before the Commission and the I/A Court of H.R. In particular, the State asserts that Beatriz had access to justice system mechanisms in the form of the *amparo* action, in the course of which an effort was made to expedite the proceedings by bunching together the different steps involved, given the biological changes being undergone by the plaintiff. The State adds that the IACHR's recommendations to the State in case 12.249, Jorge Odir Miranda Cortez et al. against El Salvador were taken into consideration during processing of the *amparo* action, because, even though *amparo* proceedings comprise a series of procedures and forwarding of data to the parties by legal deadlines, in the instant case, given its nature and urgency, the Constitutional Chamber decided to join procedural steps together and omit data-forwarding contemplated in the law, without thereby contravening the adversarial principle, while observing the rights of the parties to be heard and to defend their case.

15. The State mentions that during the process a precautionary measure was issued that sought to safeguard Beatriz's right to life and health, while weighing the right to life of the *nasciturus*, and ordering that suitable medical procedures be followed. For that reason, according to the State, the Constitutional Chamber's analysis of compliance with the measure was based on the standard of obligations to safeguard, which principally refer to means, not end results. It was on that understanding that, after ascertaining satisfactory compliance with the obligation to safeguard the right to life and health, the SC-CSJ had decided to acquit the authorities accused and to reiterate their obligation going forward.

16. The State asserts that at all times medical personnel acted with technical and scientific autonomy in deciding the best treatment for Beatriz's condition and that they provided her with conditions conducive to her mental and emotional health, such as a private space near the nurses so as to facilitate monitoring of her condition, arrangements that took her sensitivity to light into consideration, and permission to be accompanied and receive visits from family members. Thus, the State claims that it indeed took the necessary steps from a medical science perspective to ensure due protection of Beatriz's rights. It further points out that given the provision of the Constitution that recognizes a biological fact when it provides that life and the consequent right to life begin at the moment of conception, the State took steps to preserve the life of the fetus, the outcome of which was unsatisfactory due to its anencephalic condition.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

17. The petitioners argue that despite the nonexistence of an appropriate remedy, they exhausted the *amparo* option, which would be the only one available by law, with all the limitations they describe. For its part, the State made no comments in this regard. On this, the Commission considers that given the argument of the lack of a specific remedy for promptly resolving a situation such as the one described above; that, according to the Law of Constitutional Procedures, there is no appeal against an *amparo* judgment; and that a judgment denying *amparo* precludes the filing of civil suits for reparation, the conditions for an exception contemplated in Article 46.2.a of the American Convention are given in this case, namely that there is no due legal process in the domestic law of the State in question to protect the allegedly violated right or rights. The IACHR received the petition on November 29, 2013, while the facts with which the petition is concerned are said to have begun to occur on March 14, 2013, and certain of their effects continue to this day. Therefore, in light of the context and characteristics of this case, the Commission considers that the petition was lodged within a reasonable time and that the admissibility requirement regarding the timeliness of its presentation must be deemed met.

VII. COLORABLE CLAIM

18. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the IACHR considers that, if proven, the alleged facts relating to access to health, grave threats to life and personal integrity, violations of due process, the lack of legal characterization of the

conduct constituting a crime of abortion, interferences into private life, lack of access to justice and judicial protection, and discrimination, the events reported could constitute possible violations of Articles 4, 5, 8, 9, 11, 24, 25, and 26 of the American Convention, in conjunction with Articles 1.1 and 2 of that treaty, and of Article 7 of the Convention of Belém do Pará, to the detriment of Beatriz. The Commission further considers that the arguments in respect of the IACPPT require analysis during the merits phase of possible violations of Articles 1, 6, and 8 of that instrument. In addition, as regards Beatriz's family members, if proven, the allegations concerning to personal integrity could constitute possible violations of Article 5 of the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 9, 11, 24, 25, and 26 of the American Convention, in conjunction with Articles 1(1) and 2 thereof;

2. To find the instant petition admissible in relation to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

3. To find the instant petition in relation to the alleged violations of Article 7 of the Convention of Belém do Pará.

4. To notify the parties of this decision;

5. To continue with the analysis on the merits; and

6. 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 in the city of México, on the 7 day of the month of September, 2017. (Signed): Francisco José Eguiguren, President; Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners