



PETITION BEFORE
THE INTER-AMERICAN COMMISSION
ON HUMAN RIGHTS

Dr. Santiago Canton
Executive Secretary
Inter-American Commission on Human Rights
1889 F Street NW
Washington, D.C. 20006

Petitioners: Center for Reproductive Rights (CRR)
Vivo Positivo

Victim: F.S.

State Party Concerned: Chile

TABLE OF CONTENTS

I. INFORMATION CONCERNING THE AUTHORS OF THE PETITION	4
II. INTRODUCTION	5
III. FACTS	7
IV. DOMESTIC PROCEDURES	10
V. CHILE IS A STATE PARTY	14
VI. THE PETITIONER EXHAUSTED DOMESTIC REMEDIES	15
VII. THE PETITION IS PRESENTED WITHIN THE STATUTE OF LIMITATIONS	17
VIII. THERE ARE NO PARALLEL PROCEEDINGS PENDING	17
IX. THE ACTORS ARE STATE AGENTS	18
X. THE ACTIONS AND OMISSIONS OF THE STATE VIOLATED THE RIGHTS OF F.S.	19
10. THE CHILEAN STATE HAS AN OBLIGATION TO RESPECT AND ENSURE THE RIGHTS ENshrined IN THE AMERICAN CONVENTION AND IN THE CONVENTION OF BELÉM DO PARÁ.	19
10.1. THE STERILIZATION OF F.S. WITHOUT HER CONSENT VIOLATED HER RIGHTS TO PHYSICAL AND MENTAL INTEGRITY AND HUMANE TREATMENT (ARTICLE 5 OF THE AMERICAN CONVENTION).....	21
10.1.1. Informed consent is essential to protecting physical and mental integrity.....	24
10.1.2. The coercive sterilization of F.S. violated her rights to physical and mental integrity and humane treatment.....	25
10.2. THE STERILIZATION OF F.S. WITHOUT HER CONSENT VIOLATED HER RIGHT TO BE FREE FROM GENDER-BASED VIOLENCE (ARTICLES 3 AND 7 OF THE CONVENTION OF BELÉM DO PARÁ).	27
10.2.1. Coercive sterilization is a form of gender-based violence.....	28
10.2.2. The forced sterilization of F.S. violated her right to be free from gender-based violence.....	29
10.3. THE STERILIZATION OF F.S. WITHOUT HER CONSENT VIOLATED HER RIGHTS TO PERSONAL LIBERTY AND SECURITY (ARTICLE 7 OF THE AMERICAN CONVENTION), PRIVACY (ARTICLE 11 OF THE AMERICAN CONVENTION), AND FAMILY LIFE (ARTICLE 17 OF THE AMERICAN CONVENTION).	29
10.3.1. Reproductive health decisions fall within the zone of privacy.....	31
10.3.2. By arbitrarily robbing F.S. of her reproductive capabilities without her consent, the Chilean State violated her rights to personal liberty and security, privacy, and family life.	31

10.4. THE STERILIZATION OF F.S. WITHOUT HER CONSENT VIOLATED HER RIGHT TO HEALTH (ART. 26 OF THE AMERICAN CONVENTION AND ART. XI OF THE AMERICAN DECLARATION).....	32
10.4.1. The coercive sterilization of F.S. violated her right to health.....	34
10.5 THE FAILURE OF THE CHILEAN JUDICIAL SYSTEM TO EXERCISE DUE DILIGENCE IN INVESTIGATING F.S.'S STERILIZATION VIOLATED HER RIGHTS TO EFFECTIVE JUDICIAL REMEDY (ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION) AND THE STATE'S OBLIGATION TO PREVENT, PUNISH AND ERADICATE VIOLENCE AGAINST WOMEN (ARTICLE 7 OF THE CONVENTION OF BELÉM DO PARÁ).	34
10.5.1. The Chilean State failed to exercise due diligence to prevent violations of human rights violations protected under the American Convention and Convention of Belém do Pará.	38
10.6. THE CHILEAN STATE FAILED TO PROVIDE SPECIAL PROTECTIONS TO F.S. AS A SOCIO-ECONOMICALLY DISADVANTAGED, HIV POSITIVE, PREGNANT WOMAN (ARTICLE 9 OF THE CONVENTION OF BELÉM DO PARÁ).	43
10.7. THE STATE'S ACTIONS AND OMISSIONS CONSTITUTE GENDER-BASED DISCRIMINATION AND DISCRIMINATION ON THE BASIS OF F.S.'S HIV STATUS, THEREBY VIOLATING F.S.'S RIGHTS TO BE FREE FROM DISCRIMINATION (ARTICLE 1 OF THE AMERICAN CONVENTION) AND HER RIGHT TO EQUAL PROTECTION OF THE LAW (ARTICLE 24 OF THE AMERICAN CONVENTION).	44
10.7.1. The State's actions and omissions discriminated against F.S. on the basis of her gender.....	46
10.7.2 The State's actions and omissions discriminated against F.S. on the basis of her HIV status.....	47
XI. PETITION	50
XII. ANNEXES	50

I. INFORMATION CONCERNING THE AUTHORS OF THE PETITION

Center for Reproductive Rights
120 Wall Street
New York, NY 10005
United States of America
Telephone: (917) 637-3600
Fax: (917) 637-3666

Vivo Positivo
San Isidro 367
Santiago Centro, Santiago
Chile
Telephone: (56-2) 635-3951
Fax: (56-2) 635-5074

This petition is presented jointly by the Center for Reproductive Rights and Vivo Positivo, as representatives of the victim, F.S.

REQUEST FOR CONFIDENTIALITY

With respect to the right to privacy of the victim, we respectfully request that the Commission maintain her name in strict confidentiality and that the Commission refer to her only as F.S. in any communications that might be published or made available to the public. In addition, the petition makes reference to, and includes excerpts from, the medical history of the petitioner, given that details of the petitioner's medical history are central to the allegations alleged in the current petition. However, the petitioner's medical history is strictly confidential and we ask that the Commission protect and maintain the petitioner's need for confidentiality in this area.

II. INTRODUCTION

The right to reproductive autonomy—the ability to make fully informed decisions about the number and spacing of children and family planning methods without coercion—is fundamental to the preservation and protection of myriad other human rights, including the rights to physical and mental integrity, humane treatment, personal liberty, privacy, family life, health, and the right to be free from physical, sexual or psychological violence, rights enshrined in the American Convention on Human Rights (American Convention) and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará). It is essential that States protect and preserve this right on an equal basis for everyone, without discrimination on the basis of gender or HIV status.

Chile's Decree N° 2326, governing surgical sterilization, mandates that such procedures be performed only after the individual undergoing the operation has received comprehensive information on the risks and benefits of sterilization, its intended permanency, and alternative, non-permanent family planning methods, and has signed an authorization form attesting that he or she has received such information and voluntarily consents to the surgery. In practice, however, this obligation to obtain informed, written consent for surgical sterilization is not always met. Indeed, Chilean women living with HIV/AIDS are often denied the opportunity to come to an informed and voluntary decisions about their reproductive health, as doctors abuse their position of power to either pressure such women to be sterilized or perform tubal ligations at the same time as performing a cesarean or other operation, without the women's knowledge or consent. A study of women living with HIV/AIDS in Chile found that 50 percent of the women interviewed who underwent surgical sterilizations after learning they were HIV-positive were either pressured by health care providers to do so or the sterilization was performed without their knowledge.¹ These coercive interventions stem primarily from deep-seeded discrimination against women living with HIV, rather than justifiable public health concerns, given that appropriate antiretroviral therapy, safe delivery practices, and adequate information about breastfeeding alternatives can reduce the risk of mother-to-child transmission to less than two percent.²

The case related in this petition is that of F.S., a rural Chilean woman living with HIV, who was sterilized without her knowledge or consent when she was only 20 years old. F.S. always wanted to be a mother, and she was overjoyed when she learned that she was pregnant, as she and her husband had been trying for a child for the two years that they had been married. Her joy, however, was slightly marred when, as part of routine pre-natal screenings, she learned that she was HIV-positive, having contracted the disease from her husband. Notwithstanding the shock she felt on learning that she was HIV-positive, F.S. sought the necessary treatment to minimize the risk of transmitting the virus to her child, determined to give birth to a healthy, HIV-negative child.

The evening before she was scheduled to undergo a cesarean section, F.S.'s water broke, pushing up the time of her operation to shortly after midnight. F.S. learned that she would

¹ FRANCISCO VIDAL, MARINA CARRASCO, AND RODRIGO PASCAL, *MUJERES CHILENAS VIVIENDO CON VIH/SIDA: ¿DERECHOS SEXUALES Y REPRODUCTIVOS?* 106 (2004) (hereinafter *MUJERES CHILENAS VIVIENDO CON VIH/SIDA*).

² See, e.g., WORLD HEALTH ORGANIZATION, HIV TECHNICAL BRIEFS: PREVENTION OF MOTHER-TO-CHILD TRANSMISSION OF HIV 1 (Mar. 12, 2007), available at http://www.who.int/reproductive-health/hiv/hiv_tecbrief_pmtct.pdf.

have to be operated on by the surgical team that was on duty that night, rather than the programmed doctor who had experience operating on women living with HIV. Because the time of the operation had been moved up, F.S.'s husband was not present with her at the hospital, and she was ushered into the operating room alone, in pain from the contractions and concerned that she give birth to a healthy child. Her pain and nerves were further exacerbated by the attitudes of the medical practitioners, who made it clear that they wanted nothing to do with F.S. given her HIV status. Without ever speaking to F.S. about sterilization or family planning methods, the surgical team administered anesthesia, and F.S. slept while they operated on her. She awoke only briefly to learn that she had given birth to a son.

The next morning, F.S. was resting in a recovery room when a nurse informed her that she had been sterilized during the operation. F.S. was shocked to learn that she would never be able to have children again, but at that moment was more concerned about her newborn son, who she learned had been born healthy and HIV-negative.

As the news of her sterilization began to sink in, however, and as she shared the disturbing news with her husband, F.S. became depressed. She and her husband had always dreamed of having a big family, and the surgeon had robbed her of her fertility. At the time, F.S. did not know that the surgeon's actions had violated Chilean law or that she could challenge his action in court, she only knew that her dream of having a big family could no longer come to fruition.

Slowly, F.S. began to learn of her rights and began to realize that the surgeon should be held accountable for what he did to her. She also began to hope that, through legal action, she might be able to obtain financial reparations that would enable her to pay for in vitro fertilization to have children again. With the help of Vivo Positivo, she found lawyers in Curicó, the city where the sterilization had occurred, who were willing to take her case, and filed a criminal complaint against the doctor who had sterilized her without her consent.

However, in a small city like Curicó, the surgeon carried significant influence where the poor, rural HIV-positive agricultural worker did not. The Public Prosecutor carried out a substandard investigation that was marked by irregularities and bias. Based on contradictory testimony, the Prosecutor concluded that F.S. had consented to the procedure—ignoring the fact that she had not given informed, written consent as required under Chilean law—and recommended that the Juzgado de Garantía dismiss the case. The Juzgado de Garantía, without considering F.S.'s testimony or the glaring discrepancies in the testimonies on which the Prosecutor relied, accepted the Prosecutor's account of the facts and dismissed the case. The Corte de Apelaciones de Talca, similarly ignoring evidentiary discrepancies and the legal requirement for written consent, upheld the Juzgado de Garantía's decision and dismissed the case, leaving F.S. without further recourse to vindicate her rights.

The actions of the Chilean State through both its public health practitioners and its judicial system violated the State's obligation to respect, protect, and ensure the rights of the American Convention and the Convention of Belém do Pará on an equal basis. The State, through its agents, should have been able to protect F.S.'s reproductive autonomy on an equal basis with men and HIV-negative women. By coercively sterilizing F.S., and then denying her the opportunity to vindicate her rights through the judicial system, the Chilean State discriminated against her on the basis of her gender and HIV-status.

The coercive sterilization of F.S., as well as the failure of the judicial system to adequately investigate and prosecute the harm she suffered, violated her rights to physical and mental integrity, humane treatment, personal liberty, privacy, family life, health, judicial protections, and the right to be free from gender-based violence. These violations compromised Chile's international legal obligations arising under articles 1, 5, 7, 8, 11, 17, 24, 25, and 26 of the American Convention and articles 7 and 9 of the Convention of Belém do Pará.

III. FACTS

1. F.S. was born on January 26, 1982, and was raised in the countryside outside of the small town of Hualañé, Region VII (Región de Maule), Chile. She lived in the country until she was 12-years-old, when her family moved to Hualañé. She left school without finishing high school, and found work as a seasonal farm worker, picking fruit during the harvest. F.S. continues to live in Hualañé and her only employment is as a seasonal agricultural worker, a job that employs her for roughly three months each year.

2. At the beginning of March 2002, at age 20, F.S. learned that she was pregnant through a home pregnancy test.³ She was very excited to learn that she was pregnant, as she and her husband had been trying for a baby for two years.

3. Shortly thereafter, F.S. went to the Consultorio Familiar de Hualañé, a department of the Hospital of Hualañé, the local public hospital in Hualañé. At this time, F.S. underwent several tests confirming her pregnancy. The nurse attending F.S. also suggested that she undergo an HIV test, as a routine precaution. However, F.S. did not receive any counseling on HIV/AIDS at this time. The test results came roughly one month later, and to her surprise, F.S. learned that she was HIV positive.⁴

4. In April 2002, on learning of her HIV status, F.S. was referred to the Curicó Hospital, another public hospital located roughly an hour from Hualañé, in Curicó, Region VII, Chile. F.S. was referred to the Curicó Hospital for specialized treatment during her pregnancy, so that she could receive the necessary antiretroviral treatment to reduce the risk of transmitting the virus to the fetus. At the Curicó Hospital, a Doctor Ramírez treated F.S. throughout her pregnancy.⁵

5. During her pregnancy, F.S. was never counseled on sterilization or other forms of birth control, or on the risk of mother-to-child transmission. The only information she ever received was that she needed to take antiretroviral medication to help prevent transmission.⁶

6. F.S. scheduled a caesarian section operation to take place the morning of November 5, 2002, and was told that a doctor who had experience operating on women who were HIV positive would perform the operation. She checked into the Curicó Hospital the evening of November 3, 2002, in preparation for the surgery. During her stay at the hospital, F.S. was placed in a gynecological room, rather than a standard maternity room, apparently because the staff wanted to keep her isolated due to her HIV status.

³ Declaración Jurada de F.S., Curicó, Chile (Jan. 19, 2009), Annex I, p. 2-3 [hereinafter Affidavit of F.S.].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

7. F.S.'s water broke sometime between 7:00 p.m. and 7:30 p.m. on November 4, 2002, and the time of the surgery was moved up accordingly.⁷ She was told that she would have to be operated on by the surgical team on duty, under the supervision of Dr. Manuel Gatica Berríos, rather than by the medical team that had been slated to perform the surgery the following morning.

8. At 7:35 p.m. on November 4, 2002, the attending nurses started F.S. on anti-retroviral treatment to reduce the risk of HIV transmission during childbirth, and she was given another dose at 8:35 p.m.⁸ While treating her, the attending nurse criticized and belittled F.S., asking how she could be so irresponsible as to bear children when she was HIV positive.

9. At no time during her pregnancy or following her admittance to the hospital did F.S. request to be sterilized, nor did she consent verbally or in writing to a tubal ligation procedure. Furthermore, she received no counseling regarding surgical sterilization and the risks and benefits of, and alternatives to, such a procedure.⁹ An unsigned page from F.S.'s medical file includes a note that the tubal ligation was "requested by patient."¹⁰ Despite this note, F.S. never requested the procedure nor did she ever discuss sterilization with any hospital staff.¹¹

10. Chilean law requires that both female and male sterilizations be authorized in writing, with the patient's fully informed consent, stating:

Si el o la solicitante persisten en su decisión [de esterilizarse], previo a la ejecución del procedimiento respectivo se dejará constancia en un documento elaborado al efecto, de su decisión de ser sujetos del procedimiento, de la circunstancia de haberlo decidido libremente y de haber recibido toda la información sobre el mismo, sobre su carácter irreversible y sobre los métodos anticonceptivos alternativos existentes, el que será firmado por éste, el médico tratante y el director del centro asistencial.¹²

The preamble to this law indicates that the purpose of these guidelines is to ensure respect for women's reproductive rights, in accordance with Chile's international obligations.¹³

11. F.S. never signed a form authorizing the procedure,¹⁴ despite this legal requirement, nor did she receive any of the information necessary to come to an informed decision to end her

⁷ *Id.*

⁸ Medical Record of F.S., Annex I, pp. 175-176.

⁹ Affidavit of F.S., *supra* note 3.

¹⁰ Medical Record of F.S., *supra* note 8, Annex I, p. 177.

¹¹ Affidavit of F.S., *supra* note 3.

¹² República de Chile, Fija Directrices para los Servicios de Salud sobre Esterilización Femenina y Masculina, Resolución Exenta N° 2326, art. 4 (*published* Dec. 9, 2000), Annex I, p. 182 [hereinafter "Sterilization Law"].

¹³ *Id.* at preamble, Annex I, p. 181 (citing "[l]a necesidad de dar cumplimiento a la Convención sobre Eliminación de Todas las Formas de Discriminación contra la Mujer ... en lo que se refiere a los derechos de salud y reproductivos de las mujeres, normados en sus artículos 3 y 16 letra e) y a los acuerdos de las Conferencias de Población y Desarrollo de El Cairo 1994 y la Cuarta Conferencia Mundial sobre la mujer, Beijing 1995" as the justification for this new law).

¹⁴ The Policía de Investigaciones de Chile, when investigating the case, affirmed the absence of any written authorization to undergo the procedure. Policía de Investigaciones de Chile, Informe Policial No. 1459/00709, *Section III: Resultados de la Investigación Criminalística* (May 4, 2007), Annex I, p. 47 [hereinafter Informe Policial].

reproductive capabilities. F.S. was never informed about the effects and risks of, and alternatives to, sterilization prior to undergoing the procedure.¹⁵

12. The surgical team has not contested the fact that F.S. did not provide written authorization for the tubal ligation. Furthermore, written authorization was not sought, despite the fact that Dr. Gatica was aware of the aforementioned law.¹⁶ Rather, Dr. Gatica, the operating doctor, has alleged that F.S. requested the procedure orally after she was brought into the operating room, and that such consent was sufficient.¹⁷ No member of the surgical team alleges that F.S. was instructed on the risks of sterilization and other forms of birth control as alternatives to the procedure. Rather, the most information that the medical team has alleged she was provided is that she would not have more children.

13. In particular, Dr. Gatica has stated that F.S. requested the procedure verbally after being transferred to the operating room, and that he informed her that she would not be able to have any more children.¹⁸ In contrast, neither attending nurse testified that the patient asked for the procedure in the operating room. One nurse, Nancy Calderón Duarte, attested that Dr. Gatica asked F.S. if she would undergo a tubal ligation after she was brought into the operating room, and that F.S. assented orally.¹⁹ The other attending nurse, Juana Maldonado Cabello testified, “Doctor Gatica already knew that the patient wanted to be sterilized, but I tell you that I asked her again if she wanted to be sterilized and if she were sure or not.”²⁰ However, according to this nurse’s testimony, this conversation with F.S. took place after F.S. had been administered anesthesia for the surgery, and the nurse only testifies that she informed the patient that the procedure meant she would not have any more children.²¹ Not a single member of the medical team has testified that F.S. received information about the risks of the tubal ligation procedure or non-permanent alternatives to sterilization, information that is critical to making an informed decision about surgical sterilization.²²

14. F.S. was transferred to the operating room at around 12:20 a.m. on November 5, 2002.²³

15. Between the time when F.S. was transferred to the operating room and the time her son was delivered, the medical personnel had roughly fifteen minutes in which to prepare F.S. for

¹⁵ Affidavit of F.S., *supra* note 3.

¹⁶ Declaración Jurada de Doctor Manuel Gatica Berríos, Curicó, Chile (Mar. 28, 2007), Annex I, p. 29-30 [hereinafter March 2007 Affidavit of Dr. Gatica].

¹⁷ Declaración Jurada de Doctor Manuel Gatica Berríos, Curicó, Chile (May 18, 2007), Annex I, p. 52 [hereinafter May 2007 Affidavit of Dr. Gatica]. (“En el momento de ingresar al pabellón esta paciente solicita ser ligada en el procedimiento de la cesárea.”). *See also*, March 2007 Affidavit of Dr. Gatica, *supra* note 16.

¹⁸ May 2007 Affidavit of Dr. Gatica, *supra* note 17 (“Yo le manifesté si estaba conciente de lo que significaba la ligadura tubaria, haciéndole ver la imposibilidad de lograr un nuevo embarazo.”).

¹⁹ Declaración Jurada de Nancy Calderón Duarte, Curicó, Chile (Nov. 6, 2007), Annex I, p. 76 [hereinafter Affidavit of Nancy Calderón] (“Cuando la paciente ingresa el Doctor le pregunta si se realizará la ligadura tubaria y ella responde que sí.”).

²⁰ Declaración Jurada de Juana América Maldonado Cabello, Curicó, Chile (Sept. 13, 2007), Annex I, p. 68 [hereinafter September 2007 Affidavit of Juana Maldonado] (translation of affidavit in Spanish, which states: “El doctor Gatica ya sabía que la paciente se quería ligar, sin embargo, me señaló que le volviera a preguntar si se quería ligar y si estaba segura o no.”).

²¹ September 2007 Affidavit of Juana Maldonado, *supra* note 20.

²² *See, e.g.*, INTERNATIONAL FEDERATION OF GYNECOLOGY AND OBSTETRICS (FIGO), *Ethical Considerations in Sterilization in ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY*, 74-75 (2006) [hereinafter FIGO, *Ethical Considerations in Sterilization*] available at <http://www.figo.org/files/figo-corp/docs/Ethics%20Guidelines%20-%20English%20version%202006%20-2009.pdf>.

²³ Affidavit of F.S., *supra* note 3.

surgery, administer anesthesia, and operate to deliver her son, during which time F.S. was in early labor and experiencing contractions. F.S.'s son was delivered at 12:35 a.m. on November 5, 2002.²⁴ He was born healthy and HIV negative.

16. On November 5, 2002, F.S. woke up from the anesthesia in a hospital recovery room. It was then that she learned for the first time from a nurse at the Curicó Hospital, María Angélica Olivares, that the doctors sterilized her during the surgery and that she would no longer be able to have any children. Both F.S. and her husband were shocked and dismayed to learn that she would not be able to have any more children, as she and her husband had always planned to have a big family.²⁵

17. To this day, F.S. continues to suffer depression knowing that she can no longer bear children. As F.S. has attested, she sees fertility as a “vital part of being a woman” and has “felt like less of a woman” since Dr. Gatica sterilized her without her consent.²⁶ F.S. feels the loss of her reproductive capabilities acutely whenever she sees other pregnant women or when family members—with whom she has not been able to share her HIV status or the fact that she was sterilized for fear of the stigma and discrimination she would encounter—pressure her and her husband to have more children. Big families and female fertility are highly valued in Chile, and are of particular importance in agrarian communities. F.S. has felt severe shame, depression and low self-esteem as a result of her infertility.

18. The sterilization has also placed a significant strain on F.S.'s relationship with her husband, as they had always planned to have a large family together. They have periodically separated from one another as a result of this stress, and recently, in December 2008 and January 2009, the stress of F.S.'s infertility has provoked F.S.'s husband to lash out at her in acts of physical and psychological abuse.

19. Furthermore, F.S. has encountered significant problems in accessing medical care since denouncing the actions of the medical team. Doctors at the Curicó Hospital have treated her with contempt and discrimination, making it uncomfortable for her to seek necessary antiretroviral treatment.²⁷ In addition, neither F.S. nor her husband have been able to access psychological treatment to help them process the loss of her fertility, as they do not have the money to pay for such care and counseling services are not covered by the basic, free health care services under which F.S. is treated.

IV. DOMESTIC PROCEDURES

20. On March 17, 2007, F.S. filed a criminal complaint before the Juzgado de Garantía de Curicó, alleging that the operating surgeon, Dr. Manuel Gatica Berríos, who sterilized her without her consent committed lesiones graves gravísimas, under Article 397, N° 1 of the Chilean Penal Code, which criminalizes physical harm resulting in impotence.²⁸ Article 397 provides:

²⁴ Medical Record of F.S., *supra* note 8.

²⁵ Affidavit of F.S., *supra* note 3. *See also*, Declaración Jurada del Marido de F.S., Curicó, Chile (Sept. 25, 2007), Annex I, p. 71.

²⁶ Affidavit of F.S., *supra* note 3.

²⁷ *Id.*

²⁸ República de Chile, Código Penal, art. 397, n° 1 (*published* Nov. 12, 1874) [hereinafter Penal Code], *available at*: <http://www.bcn.cl/leyes/pdf/actualizado/1984.pdf>.

“El que hiriere, golpear o maltratare de obra a otro, será castigado como responsable de lesiones graves:

1° Con la pena de presidio mayor en su grado mínimo, si de resultas de las lesiones queda el ofendido demente, inútil para el trabajo, *impotente*, impedido de algún miembro importante o notablemente deforme. (...)”²⁹

21. The complaint further alleged that several aggravating circumstances, as defined in Article 12 of the Chilean Penal Code, were present in the instant case, including Article 12, N° 5 (“En los delitos contra las personas, ... emplear astucia, fraude o disfraz”) Article 12, N° 7 (“Cometer el delito con abuso de confianza”), and Article 12, N° 8 (“Prevaler del carácter público que tenga el culpable”). The complaint alleged that the surgical team abused the trust that F.S. had placed in them as medical specialists and public officers, thereby aggravating the underlying crime of lesiones graves gravísimas.³⁰

22. In addition, the complaint alleges that the surgeon discriminated against F.S., in contravention of the Chilean Constitution and article 1 of the American Convention on Human Rights. Article 1 of the Constitution provides: “People are born free and equal in dignity and rights.”³¹ By discriminating against F.S. on the basis of her gender and HIV status, the surgical team violated this fundamental principle of equality.

23. Finally, the complaint alleged that Dr. Gatica’s decision to sterilize F.S. without consent violated rights enshrined in the Chilean Constitution, including the rights “to life and physical and mental integrity” (19.1), “to equal protection of the law” (19.3), and “to the protection of health” (19.9).³²

24. The Policía de Investigaciones de Chile carried out an investigation into the allegations put forth in F.S.’s criminal complaint. On May 4, 2007, the Policía de Investigaciones de Chile reported the findings of this investigation to the Office of the Public Prosecutor of Curicó, affirming that there was a basis for the criminal complaint. In particular, the report concluded:

Conforme a los antecedentes recopilados y señalados en el presente Informe Policial, tales como Declaración Voluntaria de Afectada, entrevista a médicos del equipo que practicaron la operación, quienes se negaron a prestar declaración, haciendo uso de su derecho legal a guardar silencio, se estableció la efectividad de la presente Querella por el delito de Lesiones Graves.

Además, cabe señalar, que tal como lo indica la denunciante, no se encontró ningún documento o evidencia, donde se autorice la práctica de una ligación tubaria, a la que fue sometida la afectada.³³

25. On August 10, 2007, F.S., through her lawyer, requested that the Office of the Public Prosecutor formalize the investigation against Dr. Manuel Gatica Berríos, who performed the

²⁹ Penal Code, *supra* note 28, at art. 397, n° 1 (emphasis added).

³⁰ Querella Criminal (Mar. 17, 2007), Annex I, pp. 21-22.

³¹ República de Chile, Constitución de la República, art. 1 (1980) [hereinafter CHILE CONST.], available at: <http://www.bcn.cl/leyes/pdf/actualizado/242302.pdf>.

³² Querella Criminal, *supra* note 30, at 21.

³³ Informe Policial, *supra* note 14.

tubal ligation surgery, and Dr. Rodrigo Jara Doussoulin, the anesthesiologist.³⁴ On September 10, 2007, F.S. and her lawyer reiterated their request that the Prosecutor formalize the investigation against Dr. Gatica.³⁵

26. On September 24, 2007, the Public Prosecutor formalized the investigation against Dr. Gatica.³⁶ However, the Prosecutor's investigation was marked by irregularities. In particular, the Prosecutor repeatedly failed to request declarations from the members of the surgical team until prodded by F.S. and her lawyer,³⁷ and declined to question witnesses about glaring discrepancies in their testimonies, despite such requests by F.S. and her lawyer.³⁸

27. The Public Prosecutor closed his investigation on April 2, 2008,³⁹ recommending that the case be dismissed, having determined that F.S. requested the tubal ligation procedure verbally after she had been transferred to the operating room for her caesarian section. The Public Prosecutor based this finding on testimony of some members of the medical team and on the fact that the patient's medical chart stated that the tubal ligation was "requested by patient."⁴⁰ The Public Prosecutor's report omitted the absence of written authorization, as required by Chilean law, did not address the question of whether the alleged consent of the patient constituted informed consent, and omitted both the testimony of F.S. and of another member of the medical team. In particular, the Prosecutor relied on the following testimony:

a) An attending nurse, Juana Maldonado Cabello, who testified on September 13, 2007 that she had confirmed with F.S. her desire to be sterilized;

b) An attending nurse, Nancy Calderón Duarte, who testified on November 6, 2007 that, when the patient was transferred into the operating room, Dr. Gatica asked the patient whether she wanted to be sterilized and the patient responded yes;

c) A nurse from the hospital in Hualañé, Denisse Micheas Martínez, who testified on March 18, 2008 that F.S. informed her that she had requested the sterilization because she did not want to risk the possibility of having sick babies in the future;⁴¹ and

d) Dr. Gatica, the surgeon who performed the surgery, who testified on May 18, 2007 that F.S. requested the procedure orally after she was brought into the operating room, and that oral consent was sufficient to authorize the procedure.

28. On April 7, 2008, the Juzgado de Garantía de Curicó scheduled a hearing for June 2, 2008, to make a determination on the recommended dismissal of the case.⁴² At the hearing before the Juzgado de Garantía de Curicó on June 2, 2008, the Court remitted the facts of the case to the Regional Office of the Public Prosecutor, as requested by F.S. and her lawyer, in accordance with Article 258 of the Criminal Procedure Code.⁴³

³⁴ Request to Formalize the Investigation (Aug. 10, 2007), Annex I, p. 57.

³⁵ Second Request to Formalize the Investigation (Sept. 10, 2007), Annex I, p. 63.

³⁶ Record of the Hearing on Formalization of the Investigation (Sept. 24, 2007), Annex I, p. 69.

³⁷ *See, e.g.*, Request to take Affidavits (May 2, 2007), Annex I, p. 43; Request to Compel Testimony (June 7, 2007) Annex I, p. 54 a; Second Request to Formalize Investigation, *supra* note 35.

³⁸ *See, e.g.*, Request to Refer to Prior Testimony (Aug. 25, 2007), Annex I, p. 62; Request to Investigate Discrepancies in Testimony (Oct. 1, 2007), Annex I, p. 72.

³⁹ Cierre de la Investigación (Apr. 2, 2008), Annex I, p. 78.

⁴⁰ Recommendation of the Public Prosecutor to the Juzgado de Garantía (April 2, 2008), Annex I, p. 80.

⁴¹ Declaración Jurada de Denisse Micheas Martínez, Curicó, Chile (Mar. 18, 2008), Annex I, p. 77 [hereinafter March 2008 Affidavit of Denisse Micheas].

⁴² Announcement of Hearing (Apr. 7, 2008), Annex I, p. 83.

⁴³ Record of Oral Hearing (June 2, 2008), Annex I, p. 86. *See also*, Poder Judicial Juzgado de Garantía, Informe de la Audiencia Oral (June 2, 2008), Annex I, p. 87.

29. On June 4, 2008, F.S. and her lawyer filed a request with the Regional Public Prosecutor's Office (Fiscalía Regional, Región de Maule) disputing the findings of the Curicó Prosecutor,⁴⁴ under Article 258 of the Criminal Procedure Code.⁴⁵ The request challenged the local Public Prosecutor's report by pointing to blatant discrepancies in the testimonies on which the Public Prosecutor relied, noting in particular:

a) With respect to the testimony of attending nurse, Juana Maldonado Cabello, that the nurse had previously given testimony on March 28, 2007 that she had no memory of this particular patient or surgery.⁴⁶

b) With respect to the testimony of attending nurse, Juana Maldonado Cabello, that in her September testimony, she recounted a conversation with F.S. in which F.S. indicated her desire to be sterilized because "no one would want to marry and have children with someone with AIDS,"⁴⁷ ignoring the fact that F.S., at the time of the surgery, had already been married for two years.⁴⁸

c) With respect to the testimony of attending nurse, Nancy Calderón Duarte, that her testimony conflicts with that of the rest of the medical team, and would tend to support the fact that any consent that was obtained was not informed consent. Specifically, whereas Ms. Maldonado and Dr. Gatica attest that the patient requested the sterilization, Ms. Calderón attests that Dr. Gatica asked the patient once when she entered the operating room and again in the middle of the operation if she would be sterilized, and that the patient assented.⁴⁹ Nothing in Ms. Calderón's testimony suggests that F.S. received any counseling about the risks or benefits of, or alternatives to, sterilization, or that F.S. was informed about the procedure to which she was assenting.

d) With respect to the testimony of the nurse from Hualañé, Denisse Micheas Martínez, that the nurse had previously given testimony on March 28, 2007 stating only that F.S. knew she had been sterilized and had not complained to the nurse of the sterilization. At that time, she did not recall any conversations in which F.S. informed her that she had chosen to be sterilized.⁵⁰

e) With respect to the testimony of Dr. Gatica, that his testimony supports the allegation that he did not obtain written authorization for the procedure.

f) With respect to the question of consent, that the Public Prosecutor's report ignored the laws that require sterilizations to be authorized in writing, voluntarily and with fully informed consent.

g) The request also highlighted the fact that the Public Prosecutor's findings ignored the testimony of another attending nurse, Ingrid Alburquenque Baraona, who testified that "yo completé la ficha pero no recuerdo haberle dicho nada de la ligadura porque habitualmente cuando uno lo hace, lo anota."⁵¹

30. In response to this request, the Regional Public Prosecutor could have reopened the investigation to clarify these discrepancies, assigning a new prosecutor, or could have

⁴⁴ Request to Fiscal Regional del Ministerio Público, Región de Maule, Annex I, p. 84.

⁴⁵ República de Chile, Código Procesal Penal. art. 258 (*published* Oct. 12, 2000) ("Si el querellante particular se opusiere a la solicitud de sobreseimiento formulada por el fiscal, el juez dispondrá que los antecedentes sean remitidos al fiscal regional, a objeto que éste revise la decisión del fiscal a cargo de la causa.") [hereinafter Criminal Procedure Code], *available at*: <http://www.bcn.cl/leyes/pdf/actualizado/176595.pdf>.

⁴⁶ Declaración Jurada de Juana América Maldonado Cabello, Curicó, Chile (Mar. 28, 2007), Annex I, p. 39 [hereinafter March 2007 Affidavit of Juana Maldonado].

⁴⁷ September 2007 Affidavit of Juana Maldonado, *supra* note 20.

⁴⁸ Marriage Certificate (May 19, 2000), Annex I, p. 70.

⁴⁹ Affidavit of Nancy Calderón, *supra* note 19.

⁵⁰ Declaración Jurada de Denisse Micheas Martínez, Hualañé, Chile (Mar. 28, 2007), Annex I, pp. 36-37.

⁵¹ Declaración Jurada de Ingrid Alburquenque Baraona, Curicó, Chile (Mar. 28, 2007), Annex I, p. 33.

indicted Dr. Gatica based on existing evidence. Instead, on June 16, 2008, the Regional Office of the Public Prosecutor supported the recommendations of the local Public Prosecutor to dismiss the case.⁵² On June 20, 2008, the Juzgado de Garantía de Curicó scheduled a hearing for July 18, 2008, to rule on the dismissal.⁵³

31. At the hearing on July 18, 2008, the Juzgado de Garantía de Curicó decided to formally dismiss the case.⁵⁴ The Juzgado de Garantía de Curicó dismissed the case under article 250, subsection a, which provides that “El juez de garantía decretará el sobreseimiento definitivo: a) Cuando el hecho investigado no fuere constitutivo de delito.”⁵⁵ The trial court’s decision mentioned neither the disputed facts nor the absence of written, informed consent for the procedure.

32. At this same hearing, the Juzgado de Garantía denied F.S. and her lawyer their request to try the case on their own, as permitted under article 261(a) of the Criminal Procedure Code.⁵⁶

33. On July 22, 2008, F.S. and her lawyer appealed the decision of the Juzgado de Garantía to the Corte de Apelaciones de Talca.⁵⁷ The appeal reiterated the claims presented to the Juzgado de Garantía and the Regional Office of the Public Prosecutor, highlighting the discrepancies in the testimony relied upon and the fact that neither the Public Prosecutor’s report nor the Juzgado de Garantía’s decision acknowledged the absence of written authorization for the sterilization, as required by Chilean law.

34. On July 29, 2008, the Corte de Apelaciones de Talca held a hearing on the case, and on August 4, 2008, the appellate court upheld the lower court’s decision to dismiss the case.⁵⁸ Of the three judges presiding over the case, one judge, Hernán González García, dissented, acknowledging that the disputed testimonies and the facts of the case tended to show a possible crime and argued that F.S. and her lawyer should be permitted to continue to investigate the allegations and try the case on their own. However, the two judges for the majority decided to dismiss the case under article 250(a), holding that the facts did not constitute a crime.

V. CHILE IS A STATE PARTY

35. Chile is a State Party to the following regional and international conventions that are referred to herein:

A. American Convention on Human Rights, ratified by Chile on August 10, 1990.⁵⁹

⁵² Report of the Regional Office of the Public Prosecutor, Maule Region (June 16, 2008), Annex I, p. 88.

⁵³ Announcement of Hearing (June 20, 2008), Annex I, p. 90.

⁵⁴ Poder Judicial Juzgado de Garantía, Informe de la Audiencia Oral (July 23, 2008), Annex I, p. 91. *See also*, Record of Oral Hearing (June 18, 2008), Annex I, p. 89.

⁵⁵ Criminal Procedure Code, *supra* note 45, at art. 250(a).

⁵⁶ *Id.* at art. 261(a) (“[E]l querrelante, por escrito, podrá: a) Adherir a la acusación del ministerio público o acusar particularmente. En este segundo caso, podrá plantear una distinta calificación de los hechos, otras formas de participación del acusado, solicitar otra pena o ampliar la acusación del fiscal, extendiéndola a hechos o a imputados distintos, siempre que hubieren sido objeto de la formalización de la investigación.”)

⁵⁷ Appellate Brief (July 22, 2008), Annex I, p. 92.

⁵⁸ Corte de Apelaciones de Talca, Resolución 23127 de Recurso 365/2008 (Aug. 4, 2008), Annex I, p. 97.

⁵⁹ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (entered into force July 18, 1978) (ratified by Chile Aug. 10, 1990) [hereinafter American Convention], available at <http://www.oas.org/juridico/english/treaties/b-32.html>.

B. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”), ratified by Chile on October 24, 1996.⁶⁰

C. Convention on the Elimination of All Forms of Discrimination against Women, ratified by Chile on January 6, 1990.⁶¹

D. International Covenant on Civil and Political Rights, ratified by Chile on March 23, 1976.⁶²

E. International Covenant on Economic, Social and Cultural Rights, ratified by Chile on January 3, 1976.⁶³

VI. THE PETITIONER EXHAUSTED DOMESTIC REMEDIES

36. Article 46 of the American Convention on Human Rights and Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights sets forth as a prerequisite for admissibility that the “remedies under domestic law have been pursued and exhausted in accordance with the generally recognized principles of international law.”⁶⁴ The purpose of this requirement is to provide State Parties an opportunity to remedy the harm within their own legal system before appearing before an international tribunal.

37. The Commission has further explained that a petitioner is not obligated to exhaust all adequate remedies in order to satisfy the purpose of the exhaustion requirement. The Commission has stated “if the alleged victim lodged her case with *one* of the valid and adequate alternatives in the domestic jurisdiction, and the State had the opportunity of remedying the matter by internal means, the aim of the international norm would have been observed.”⁶⁵

⁶⁰ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), 33 I.L.M. 1534 (1994) (*entered into force* Mar. 5, 1995) (*ratified by Chile* Oct. 24, 1996) [hereinafter Convention of Belém do Pará], *available at* <http://www.oas.org/juridico/english/treaties/a-61.html>.

⁶¹ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (*entered into force* Sept. 3, 1981) (*ratified by Chile* Jan. 6, 1990) [hereinafter CEDAW], *available at* <http://www2.ohchr.org/english/law/cedaw.htm>.

⁶² International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) (*ratified by Chile* Mar. 23, 1976) [hereinafter ICCPR], *available at* <http://www2.ohchr.org/english/law/ccpr.htm>.

⁶³ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) (*ratified by Chile* Jan 3, 1976) [hereinafter ICESCR], *available at* <http://www2.ohchr.org/english/law/cescr.htm>.

⁶⁴ INTER-AM. C.H.R., RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, art. 31, *approved* 119th Special Session of the Commission (Dec. 4-8, 2000), *amended* 116th, 118th, and 132nd Regular Sessions of the Commission (Oct. 7-25, 2002, Oct. 7-24, 2003, and July 17-25, 2008, *respectively*) [hereinafter RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION], *available at*:

<http://www.cidh.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm>.

⁶⁵ *I.V. v. Bolivia*, Petition 270-07, Inter-Am. C.H.R., Report N° 40/08, para. 70 (2008) (*emphasis added*), *available at* <http://www.cidh.org/annualrep/2008eng/Bolivia270.07eng.htm>. *See also*, *Marcela Andrea Valdés Díaz v. Chile*, Petition 12.337, Inter-Am. C.H.R., Report N° 57/30, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 191, para. 40 (2003) (“[I]f the alleged victim raised the issue by any lawful and appropriate alternative under the domestic juridical system and the State had the opportunity to remedy the matter within its jurisdiction, then the

38. In the instant case, F.S. pursued and fully exhausted the only adequate domestic remedy available to her: a criminal complaint against Dr. Manuel Gatica, the surgeon who sterilized her without her consent or knowledge. F.S.'s primary concern in challenging the sterilization was to ensure that there was no impunity for Dr. Gatica and to prevent him from sterilizing other women living with HIV without their consent. By filing a criminal complaint, F.S. could hope to seek both criminal sanctions against Dr. Gatica, as well as financial indemnification for the harm that she suffered.⁶⁶

39. F.S. filed a criminal complaint against Dr. Gatica in a timely fashion, and the Public Prosecutor's office opened an investigation into the allegations. However, as discussed above, the Public Prosecutor's investigation was plagued by irregularities that undermined the legitimacy and effectiveness of the investigation.⁶⁷

40. At the conclusion of the investigation, the Public Prosecutor recommended that the case be dismissed, determining that there was no crime. In determining that F.S. had consented to the procedure, the Public Prosecutor's recommendations omitted any reference to the Chilean law mandating written, informed consent for surgical sterilization. Instead, the Public Prosecutor relied on a note in the file indicating that the patient had requested the sterilization and on flawed testimony from the medical team, as discussed in detail above.⁶⁸

41. F.S. and her lawyer challenged the Public Prosecutor's findings, requesting that the Juzgado de Garantía de Curicó remit the case to the Regional Public Prosecutor. The request challenged the decision of the local Public Prosecutor by highlighting the glaring discrepancies between the testimonies on which the Public Prosecutor had relied and prior testimonies of those same witnesses, as discussed above.⁶⁹

42. The Regional Public Prosecutor could have reopened the investigation, but instead ignored these discrepancies and upheld the local Public Prosecutor's recommendation to dismiss the case. At the oral hearing, F.S. and her lawyer requested permission to continue to try the case on their own, which, if granted, would have given them the opportunity to continue to investigate the discrepancies, as well as attach a civil claim seeking financial indemnification to the charges. The trial court, in apparent reliance on the facts as presented by the local Public Prosecutor and without acknowledging the above-mentioned discrepancies, dismissed the case and denied F.S. and her lawyers the opportunity to proceed on their own.

43. Once a case has been permanently dismissed at the trial level, the Criminal Procedure Code permits only an appeal to the respective Court of Appeals, and no appeals beyond

purpose of the international rule has thus been served.”), *available at* <http://www.cidh.org/annualrep/2003eng/Chile.12337.htm>.

⁶⁶ Criminal Procedure Code, *supra* note 45, at art. 261 (“[E]l querellante, por escrito, podrá: (d) Deducir demanda civil, cuando procediere.”).

⁶⁷ See, *supra*, Section IV, para. 26.

⁶⁸ See, *supra*, Section IV, para. 27.

⁶⁹ See, *supra*, Section IV, para. 29.

this.⁷⁰ Accordingly, F.S. appealed the Juzgado de Garantía's decision to the Corte de Apelaciones de Talca.⁷¹

44. On August 4, 2008, the Corte de Apelaciones de Talca, in a two-to-one split decision upheld the lower court's decision both to dismiss the claim and to deny F.S. the opportunity to proceed on her own.⁷² With this decision, F.S. fully exhausted domestic remedies in accordance with the Inter-American Commission's admissibility requirements.

45. F.S. considered filing a civil complaint against the Curicó Hospital, but rejected this approach because a civil claim did not provide the remedies that she sought. By pursuing a civil, rather than a criminal, claim, Dr. Gatica would have faced no repercussions for his actions. A civil action could only have provided F.S. with financial indemnification, which alone would not have been sufficient to redress the harm she suffered. The Commission has explained that "only those remedies adequate for making reparations for the violations allegedly committed" must be exhausted, defining adequate remedies are those "which are suitable to address an infringement of a legal right."⁷³ The suitability of the domestic remedies available depends on the nature of the alleged violation. Where a victim has suffered violations of physical integrity, remedies that grant only financial compensation while ensuring impunity for those responsible do not sufficiently redress the rights violation. In contrast, the criminal remedy that F.S. pursued could have resulted in both accountability for the criminal act and financial indemnification, providing more holistic redress for the harm that F.S. suffered. Accordingly, a criminal complaint was the only suitable remedy available to F.S. under Chilean law.

46. By pursuing and fully exhausting the only appropriate remedy available under Chilean law, F.S. exhausted domestic remedies in accordance with Article 46.1.a of the Convention and Article 31 of the Rules of Procedure of the Inter-American Commission. The State was given an opportunity to remedy the harm that F.S. suffered, and failed to redress the violation of F.S.'s basic human rights. To the contrary, the failure of the Chilean State to fully and fairly investigate and prosecute the alleged violations exacerbated the harm, further violating F.S.'s rights protected under the American Convention and the Convention of Belém do Pará.

VII. THE PETITION IS PRESENTED WITHIN THE STATUTE OF LIMITATIONS

47. Article 46.1.b of the American Convention and Article 32 of the Rules of Procedure of the Inter-American Commission requires that petitions be presented within six months of the date on which the victim was notified of the judgment that exhausted domestic remedies. The statute of limitations in this case is February 4, 2009, six months after the Corte de Apelaciones de Talca published its decision to dismiss the petitioner's claim and notified her of its decision. Accordingly, this petition complies with the six-month statute of limitations.

VIII. THERE ARE NO PARALLEL PROCEEDINGS PENDING

⁷⁰ Criminal Procedure Code, *supra* note 45, at art. 253 ("El sobreseimiento sólo será impugnado por la vía del recurso de apelación ante la Corte de Apelaciones respectiva.").

⁷¹ Appellate Brief, *supra* note 57.

⁷² Corte de Apelaciones de Talca, Resolución 23127 de Recurso 365/2008, *supra* note 58.

⁷³ *Jesús María Valle Jaramillo v. Colombia*, Petition 0519/01, Inter-Am. C.H.R., Report N° 05/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 242, para. 28 (2003), *available at* <http://www.cidh.org/annualrep/2003eng/Colombia.519.01.htm>.

48. The subject of this petition is not pending before any other international tribunal, and, accordingly, complies with the admissibility requirements established in Article 46 of the American Convention and Article 33 of the Rules of Procedure of the Inter-American Commission.⁷⁴

IX. THE ACTORS ARE STATE AGENTS

49. Article 9 of the Chilean Constitution establishes that the State “protege el libre e igualitario acceso a las acciones de promoción, protección y recuperación de la salud,” stating additionally that “[e]s deber preferente del Estado garantizar la ejecución de las acciones de salud, sea que se presten a través de instituciones públicas o privadas.” Article 5 of the Reglamento Orgánico del Ministerio de Salud establishes that the role of the Ministry of Health is “proponer políticas, formular planes y programas de salud y velar por el cumplimiento de las normas dictadas, asignar recursos y controlar y evaluar las actividades del sector.”⁷⁵ Finally, the Chilean Public Health Code provides that “Toda mujer, durante el embarazo y hasta el sexto mes del nacimiento del hijo, y el niño, tendrán derecho a la protección y vigilancia del Estado por intermedio de las instituciones que correspondan.”⁷⁶

50. The above norms establish that: i) access to health care is a right guaranteed by the State; ii) the Ministry of Health of Chile controls and coordinates all health-related policies, programs, and institutions, regardless of whether they are public or private, and iii) the State is obligated, through public and private health institutions, to protect the health and physical integrity of women during pregnancy and labor.

51. Dr. Manuel Gatica Berríos’ classifies as a State agent based on his work as a medical practitioner providing essential health services at the Hospital Base de Curicó, a public hospital administered under the control of the Ministry of Health. Health care is a basic right under the Chilean constitution, and both public and private institutions provide health care services under the direction and control of the Ministry of Health, a government agency. Accordingly, Dr. Gatica, in his provision of necessary health care at a public hospital, qualifies as a State agent. F.S., a poor woman from a rural area of Chile, went to the Curicó Hospital seeking essential treatment during labor to reduce the risk of transmission of HIV to her son. As a State agent, Dr. Gatica was obligated to protect the health and physical integrity of F.S. during labor; instead he abused his position of power and sterilized F.S. without obtaining her written, informed consent, causing serious and lasting physical and mental harm, and giving rise to the human rights claims alleged in this petition.

52. Additionally, it is clearly established that the actions of public institutions, including the Office of the Public Prosecutor and other judicial organs, such as the Juzgado de Garantía and

⁷⁴ RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION, *supra* note 64, at art. 33.1.

(“The Commission shall not consider a petition if its subject matter: a. is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member; or, b. essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member.”)

⁷⁵ República de Chile, Reglamento Orgánico del Ministerio de Salud, Decreto 136/04, art 5 (*published* Apr. 21, 2005), *available at*: <http://www.bcn.cl/leyes/pdf/original/237230.pdf>. Article 1 of this same law defines the health sector as being comprised of “todas las personas naturales y jurídicas, de derecho público o privado, que realizan o contribuyen a la ejecución de las acciones de protección, fomento, diagnóstico, recuperación de la salud, cuidados paliativos y rehabilitación de las personas enfermas.”

⁷⁶ República de Chile, Código Sanitario, Decreto No. 725, art. 16 (*published* Jan. 31, 1968) [hereinafter Public Health Code], *available at*: <http://www.bcn.cl/leyes/pdf/actualizado/5595.pdf>.

the Corte de Apelaciones de Talca, have a direct impact on the protection and adjudication of rights. Accordingly the actions of these institutions directly implicate State responsibility, and the institutions and their employees are State agents.

X. THE ACTIONS AND OMISSIONS OF THE STATE VIOLATED THE RIGHTS OF F.S.

53. The Chilean State violated articles 1, 5, 7, 8, 11, 17, 24, 25, and 26 of the American Convention, as well as articles 7 and 9 of the Convention of Belém do Pará. The State violated F.S.'s rights on two separate occasions: first when public health officials cruelly decided to rob F.S. of her reproductive capacity, sterilizing her without her consent or knowledge, and again when the Chilean judicial system turned a blind eye to the trauma that she experienced and determined that the doctor who coercively sterilized her had committed no crime.

10. The Chilean State has an obligation to respect and ensure the rights enshrined in the American Convention and in the Convention of Belém do Pará.

54. Article 1(1) of the American Convention establishes the obligations of States to “respect” and “ensure” the rights and freedoms enshrined in the American Convention.⁷⁷ In concordance with the obligations of article 1(1), article 2 requires States to enact legislative or other measures to give effect to the rights or freedoms set forth in the Convention.⁷⁸ States are further obligated to ensure that the rights, freedoms, and protections enshrined in the American Convention are protected on an equal basis without distinction based on, *inter alia*, sex or health status.

55. A combined reading of articles 1 and 2 obligates States to ensure both *de facto* and *de jure* enjoyment of all Convention rights. In other words, a State has a duty to establish a legislative and policy framework that protects the rights of individuals from arbitrary and abusive interference, to ensure that such laws and/or policies are implemented, and to provide effective judicial remedies when individual rights are violated.⁷⁹ As the Inter-American Court has established, the State must “organize the governmental apparatus and, in general, all the structures through which public power is exercised” in order to comply with its article 1 obligations to respect, protect, and ensure.⁸⁰

56. The obligation to respect the rights of the Convention imposes certain limitations on the actions of State agents. Recognizing “that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State,”⁸¹ State agents and institutions are restricted from acting in a way that would infringe the fundamental rights and freedoms of the Convention. In contrast, the obligations to protect and ensure impose a duty on States

⁷⁷ American Convention, *supra* note 59, at art. 1(1). (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”)

⁷⁸ *See id.* at art. 2.

⁷⁹ *See, e.g.,* Inter-Am. C.H.R., *The Situation of the Rights of Women in Ciudad Juárez: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, Doc. 44, para. 155 (Mar. 7, 2003), available at <http://www.cidh.org/annualrep/2002eng/chap.vi.juarez.htm>.

⁸⁰ Case of *Velásquez Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 166 (July 29, 1988), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

⁸¹ *Id.* at para. 165.

to take affirmative steps to secure these rights, including measures to prevent, investigate, and punish rights violations.⁸² In this manner, States have both positive and negative obligations to guarantee, without discrimination, the enjoyment of the Convention's rights and freedoms, and, accordingly, are responsible for both the actions and omissions of State agents and institutions that infringe on these rights.

57. Other international human rights treaties to which Chile is a State Party establish similar duties on the basis of a State's membership. The International Covenant on Civil and Political Rights (ICCPR) establishes the obligations of States "to respect and to ensure [the Covenant's rights] to all individuals" and, accordingly, instructs States "to adopt such laws or other measures as may be necessary to give effect to the rights recognized" therein.⁸³ In this respect, the Human Rights Committee (HRC) has highlighted the importance for individuals to know their rights and for State agents to understand the international legal obligations of the State.⁸⁴ The Committee on Economic, Social and Cultural Rights, in light of the affirmative and negative obligations that these international treaties impose, has indicated that interpretation of domestic legislation should respect the State's international legal obligations, noting that "when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter."⁸⁵

58. Based on these authoritative and persuasive interpretations, article 1 of the American Convention establishes a State's general obligation to respect, protect and ensure the rights and freedoms enshrined in the Convention. This obligation implies that the State must: i) abstain from imposing measures that violate the rights and freedoms enshrined in the Covenant; ii) recognize within the State's domestic legal system these rights; and iii) promote and facilitate the conditions necessary to achieving the full realization of such rights.

59. In a similar manner, article 7 of the Convention of Belém do Pará outlines specific obligations of the States Parties vis-à-vis violence against women. Article 7 provides: "The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence."⁸⁶ Article 7 goes on to enumerate the concrete measures—both preventative and punitive—that States must take to fulfill these obligations. As with the American Convention, these duties include establishing a legislative and policy framework that protects the rights of women from private and public acts of gender-based violence, ensuring that such laws and/or policies are implemented, investigating acts of violence with due diligence, and providing effective judicial remedies when acts of gender-based violence are committed.⁸⁷

60. The rights to physical and mental integrity, humane treatment, including the right to be free from cruel, inhuman or degrading treatment, personal liberty, privacy, family life, health,

⁸² *Id.* at paras. 166-167.

⁸³ ICCPR, *supra* note 62, at art. 2.

⁸⁴ Human Rights Committee, *General Comment 3: Article 2 – Implementation at the National Level* (13th Sess., 1981), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 125 (2003).

⁸⁵ Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant*, para. 15, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998).

⁸⁶ Convention of Belém do Pará, *supra* note 60, at art. 7.

⁸⁷ *Id.*

and effective judicial remedies are all enshrined in the American Convention, and the Chilean State, as a State Party to these conventions, is obligated to respect, protect, and ensure full and free enjoyment of these rights without discrimination on the basis of, *inter alia*, sex or health status. A violation of any “one of those rights ... necessarily implies that Article 1 (1) of the Convention has also been violated.”⁸⁸ The rights to freedom from gender-based violence, physical and mental integrity, personal liberty and security, dignity, family life, equal protection of the law, and judicial remedies are protected in the Convention of Belém do Pará. As the Commission held in *Maria da Penha Fernandes v. Brazil*, violations of these rights implicates a State’s article 7 duties to prevent, punish and eradicate violence against women.⁸⁹

61. The right to be free from coercive sterilization is protected under both international law, falling within the ambit of the above-mentioned rights, and Chile’s domestic law. In contravention of these domestic and international legal obligations, Dr. Gatica made the decision to sterilize F.S. without seeking her informed consent, thereby permanently ending her reproductive capabilities and provoking significant mental anguish. In the same manner, the Public Prosecutor who investigated F.S.’s allegations and the judges who heard the case ignored the facts of the case, as well as these domestic and international legal obligations, and determined that Dr. Gatica had committed no crime, thereby denying F.S. an opportunity to seek reparations for the harm she suffered.

62. In this manner, State agents demonstrated blatant disregard for the rights and freedoms enshrined in the American Convention and the Convention of Belém do Pará—rights and freedoms that F.S. is entitled to enjoy on an equal basis regardless of her gender or her status as a woman living with HIV. By violating F.S.’s rights to physical and mental integrity, humane treatment, including the right to be free from cruel, inhuman or degrading treatment, freedom from gender-based violence, personal liberty, privacy, family life, health, and effective judicial remedies, the Chilean State, through these State agents, also violated its obligations to respect, protect, and ensure these rights.

63. The following sections discuss the substance of the above-mentioned rights, as established within the relevant international legal framework, and demonstrate how the facts of the present case sustain an allegation that the Chilean State has violated these rights, in relation to its obligation to respect, protect and ensure these rights.

10.1. The sterilization of F.S. without her consent violated her rights to physical and mental integrity and humane treatment (article 5 of the American Convention).

64. Article 5 of the American Convention provides that “Every person has the right to have his physical, mental, and moral integrity respected,” and that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” The right to personal integrity and humane treatment is a fundamental right protected in numerous international

⁸⁸ *Velásquez Rodríguez* Case, Inter-Am. Ct. H.R., *supra* note 80, at para. 162.

⁸⁹ *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report N° 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704, para. 58 (2000) (holding that a State can be held “liable for failing to perform its duties set forth in Article[] 7 ... in relation to rights protected therein, among them, the right to a life free of violence (Article 3), the right of a woman to have her life, her physical, mental, and moral integrity, her personal safety, and personal dignity respected, to equal protection before and of the law, and to simple and prompt recourse to a competent court for protection against acts that violate her rights (Articles 4(a), (b), (c), (d), (e), (f), and (g))”, available at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm>).

and regional human rights instruments.⁹⁰ Indeed, the right to be free from cruel, inhuman or degrading treatment is so fundamental as to be regarded as non-derogable, even in times of national emergency.⁹¹ The Inter-American Commission has highlighted the fundamental nature of this right, stating: “The conduct proscribed by Article 5(2) is universally and without exception prohibited under both customary and conventional international law.”⁹²

65. The rights protected in article 5 of the American Convention are well established in Chile’s other international and domestic legal obligations, as well. The Convention of Belém do Pará reiterates the right of physical and mental integrity, providing:

Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others: ... [t]he right to have her physical, mental and moral integrity respected [and t]he rights to have the inherent dignity of her person respected.⁹³

The right to be free from cruel, inhuman or degrading treatment is protected in article 7 of the International Covenant on Civil and Political Rights (ICCPR), article 6 of the Inter-American Convention on the Prevention and Punishment of Torture, article 16 of the Convention against Torture, article 5 of the Universal Declaration on Human Rights. Additionally, article 19.1 of Chile’s Constitution states that all people have the “derecho a la vida y a la integridad física y psíquica de la persona.”⁹⁴

66. Although the substance of “physical, mental, and moral integrity” and “cruel, inhuman, or degrading” treatment is not defined in these treaties, the jurisprudence of the Inter-American Court and the Inter-American Commission provides guiding principles as to what constitutes inhuman treatment, thereby violating the right to physical and mental integrity. Notably, both the Commission and Court have held that Article 5 not only prohibits acts that result in physical pain, but those which may have lasting physical or psychological effects,⁹⁵ or which cause mental or psychological suffering.⁹⁶

⁹⁰ See, e.g., ICCPR, *supra* note 62, at art. 7; Universal Declaration on Human Rights, art. 5, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [hereinafter Universal Declaration], available at <http://www.unhcr.ch/udhr/lang/eng.htm>; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51), annex at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987) (ratified by Chile Sept. 30, 1988), available at: <http://www2.ohchr.org/english/law/cat.htm>; Inter-American Convention to Prevent and Punish Torture, art. 6, O.A.S. Treaty Series No. 67, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (entered into force Feb. 28, 1987) (ratified by Chile Sept. 15, 1988), available at <http://www.oas.org/juridico/english/treaties/a-51.html>; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), as amended by Protocol 11 (entered into force Nov. 1, 1998) [hereinafter European Convention], available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>; African [Banjul] Charter on Human and Peoples’ Rights, arts. 4, 5, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter Banjul Charter], available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf>.

⁹¹ See, e.g., ICCPR, *supra* note 62, at art. 4.2 (“No derogation from Article[] ... 7 ... may be made.”)

⁹² *Michael Gayle v. Jamaica*, Case 12.418, Inter-Am. C.H.R., Report N° 95/05, OEA/Ser.L/V/II.124 Doc. 5, para. 61 (2005), available at <http://www.cidh.org/annualrep/2005eng/Jamaica.12418eng.htm>.

⁹³ Convention of Belém do Pará, *supra* note 60, at art. 4.

⁹⁴ CHILE CONST., *supra* note 31, at art. 19.1.

⁹⁵ See, e.g., *Case of Loayza-Tamayo v. Peru*, 1997 Inter-Am. Ct. H.R. (Ser. C) No. 33, para. 57 (Sept. 17, 1997) (“The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or

67. Furthermore, the Commission and Court have drawn on the other international instruments and their interpretations to define the scope of these provisions. The Human Rights Committee has interpreted article 7 of the ICCPR, the article that is analogous to the American Convention's article 5, to prohibit "acts that cause mental suffering to the victim," stating further "that article 7 protects, in particular, ... patients in ... medical institutions."⁹⁷

68. Coercive sterilization has lasting physical and psychological effects, permanently robbing patients of their reproductive capabilities and inflicting mental distress on them, thus interfering with the victim's physical and mental integrity and violating his or her right to be free from cruel and inhuman treatment. The physical and psychological effects of coercive sterilization are well documented, and are thus foreseeable consequences of the procedure. Surgical sterilization is intended to be a permanent contraceptive method, as the World Health Organization,⁹⁸ FIGO,⁹⁹ and even Chile's law governing sterilization¹⁰⁰ have noted. While surgery to reverse the procedure is available, such procedures are costly, not widely available, and not always successful.¹⁰¹ Furthermore, reversal surgeries carry their own health consequences. In addition to the risks inherent in any surgical procedure, where tubal ligation reversals are successful, there is a heightened risk of ectopic pregnancy.¹⁰² Coercive sterilizations typically result in psychological trauma, including depression and grief.¹⁰³ In addition, many women who have been coercively sterilized may suffer alienation from their partners or their families due to the loss of their fertility, particularly in cultures that closely associate womanhood with motherhood.

69. Accordingly, the practice of sterilizing patients without their consent violates the rights enshrined in article 5 of the American Convention and those same rights as they are affirmed in article 4 of the Convention of Belém do Pará. Indeed, the Commission has agreed that forced sterilization implicates the rights protected in article 5 of the Convention, admitting two cases involving coercive sterilization as having alleged violations of article 5 rights.¹⁰⁴ In particular, in its admissibility decision in *I.V. v. Bolivia*, the Commission stated, "if it were

degrading treatment with varying degrees of physical and psychological effects." (emphasis added), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_33_ing.pdf.

⁹⁶ See, e.g., *Michael Gayle v. Jamaica*, Inter-Am. C.H.R., *supra* note 92, at para. 61 ("[T]he Commission has indicated that inhumane treatment includes unjustifiable conduct that causes severe physical, mental or psychological pain or suffering.").

⁹⁷ Human Rights Committee, *General Comment 20: Article 7* (44th Sess. 1992), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, para. 5, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003). See also, *K.L. v. Peru*, CCPR Comm. No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003, para. 6.3 (2005) (affirming that psychological suffering is sufficient to constitute cruel and inhuman treatment in contravention of article 7 of the ICCPR).

⁹⁸ WORLD HEALTH ORGANIZATION, *MEDICAL ELIGIBILITY CRITERIA FOR CONTRACEPTIVE USE 8* (2004), available at <http://www.who.int/reproductive-health/publications/mec/mec.pdf>.

⁹⁹ FIGO, *Ethical Considerations in Sterilization*, *supra* note 22, at 75.

¹⁰⁰ Sterilization Law, *supra* note 12, at arts. 3, 4, Annex I, p. 182.

¹⁰¹ JOHNS HOPKINS POPULATION INFORMATION PROGRAM, *THE ESSENTIALS OF CONTRACEPTIVE TECHNOLOGY A HANDBOOK FOR CLINICAL STAFF* at sec. 9-12 (July 1997) [hereinafter *JOHNS HOPKINS, HANDBOOK FOR CLINICAL STAFF*].

¹⁰² *Id.* at secs. 9-5, 9-22.

¹⁰³ STEVEN G. GABBE, ET AL. EDS., *OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES* 704, (1996).

¹⁰⁴ *María Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. C.H.R., Report N° 66/00, OEA/Ser.L/V/II.111 Doc. 20 rev. at 350, para. 1 (2000), available at <http://www.cidh.org/annualrep/2000eng/ChapterIII/Admissible/Peru12.191.htm>; *I.V. v. Bolivia*, Inter-Am. C.H.R., *supra* note 65, at para. 4.

proven that a sterilization procedure were carried out in a public hospital without consent, ... this could amount to a possible violation” of the victim’s article 5 rights.¹⁰⁵

70. Other international treaty monitoring bodies have similarly found that involuntary sterilization violates the rights to physical and mental integrity and humane treatment. Treaty monitoring bodies have frequently linked coercive sterilization to a violation of the right to be free from cruel or inhuman treatment,¹⁰⁶ and the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has stated that “States parties should not permit forms of coercion, such as non-consensual sterilization, ... that violate women's rights to informed consent and dignity,” affirming that coercive sterilization infringes on the rights to human dignity and physical and mental integrity.¹⁰⁷

10.1.1. Informed consent is essential to protecting physical and mental integrity.

71. Informed consent for surgical sterilization is essential to preserving a patient’s fundamental rights to humane treatment and physical and mental integrity. International human rights monitoring bodies have repeatedly emphasized the need to obtain informed consent for sterilization procedures.¹⁰⁸ Indeed, Chile’s law governing surgical sterilization mandates informed, written consent for the procedure, and notes that the promulgation of the law is to ensure compliance with Chile’s international legal obligations.¹⁰⁹

72. In order for consent to be considered informed, patients must consent freely and voluntarily, “without threats or improper inducements, after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient.”¹¹⁰ The International Federation of Gynecologists and Obstetricians (FIGO) has stressed the need for informed consent for surgical sterilization. Accordingly, FIGO has

¹⁰⁵ *I.V. v. Bolivia*, Inter-Am. C.H.R., *supra* note 65, at para. 80.

¹⁰⁶ *See, e.g.*, Human Rights Committee, *Concluding Observations: Slovakia*, para. 12, U.N. Doc. CCPR/CO/78/SVK (Aug. 22, 2003); Human Rights Committee, *Concluding Observations: Czech Republic*, para. 10, U.N. Doc. CCPR/C/CZE/CO/2 (Sept. 8, 2007).

¹⁰⁷ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Women and Health (Article 12)* (20th Sess, 1999), para. 22, U.N. Doc. A/54/38/REV. 1 (SUPP) [hereinafter CEDAW, *General Recommendation 24*], available at:

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>.

¹⁰⁸ *See, e.g.*, Human Rights Committee, *General Comment 28: Art. 3* (68th Sess., 2000), in *Compilation of General Comments And General Recommendations By Human Rights Treaty Bodies*, para. 11, U.N. Doc. HRI/GEN/1/Rev.7, at 179 (2004); Human Rights Committee, *Concluding Observations: Peru*, para. 21, U.N. Doc. CCPR/CO/70/PER (Nov. 15, 2007); Human Rights Committee, *Concluding Observations: Slovakia*, *supra* note 106, at para. 12.; Human Rights Committee, *Concluding Observations: Czech Republic*, *supra* note 106, at para.10; Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Peru*, paras. 484 - 485, U.N. Doc. A/57/38, Supp. No. 38, 2002, pp. 212-219 (2002); Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Czech Republic*, para. 24, U.N. Doc. CEDAW C/CZE/CO/3 (2006); Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Hungary*, paras. 8 - 9, U.N. Doc. CEDAW//C/HUN/CO/6 (2007); Committee against Torture, *Concluding Observations: Peru*, para. 23, U.N. Doc. CAT/C/PER/CO/4 (2004); Committee against Torture, *Concluding Observations: Czech Republic*, paras. 5-6, U.N. Doc. CAT/C/CR/32/2 (2005); Committee on the Elimination of Racial Discrimination, *Concluding Observations: Slovakia*, para. 12, U.N. Doc. CERD/C/65/CO/7 (2004); Committee on the Elimination of Racial Discrimination, *Concluding Observations: Czech Republic*, para. 14, U.N. Doc. CERD/C/CZE/CO/7 (2007).

¹⁰⁹ Sterilization Law, *supra* note 12, at preamble, arts. 3, 4, Annex I, p. 182.

¹¹⁰ INTERNATIONAL FEDERATION OF GYNECOLOGY AND OBSTETRICS (FIGO), *Guidelines Regarding Informed Consent in ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY* 12, 12 (2006) [hereinafter FIGO, *Informed Consent Guidelines*] available at <http://www.figo.org/files/figo-corp/docs/Ethics%20Guidelines%20-%20English%20version%202006%20-2009.pdf>

established objective criteria that medical providers must follow in order to ensure that consent is fully informed and voluntary. The FIGO guidelines state that “[t]he physician performing sterilisation has the responsibility of ensuring that the person has been properly counselled concerning the risks and benefits of the procedure and of its alternatives.”¹¹¹ In particular, noting that “[t]he process of informed choice must precede informed consent,” the guidelines mandate that physicians ensure that patients have been informed of “[r]ecognised available alternatives, especially reversible forms of family planning which may be equally effective.”¹¹² Finally, FIGO stresses that “informed consent is not a signature but a process of communication and interaction,” noting that while implementation of informed consent guidelines “may be difficult and time consuming.... these difficulties do not absolve physicians caring for women from pursuing fulfilment of these criteria for informed consent.”¹¹³

73. The CEDAW Committee has similarly emphasized the importance of access to such family planning information, noting, “in order to make an informed decision..., women must have information about contraceptive measures and their use ... as provided in article 10(h) of the Convention.”¹¹⁴ In its decision in *A.S. v. Hungary*, the CEDAW Committee stated that a primary purpose of a woman’s article 10(h) right to information on family planning methods is “to guard against [a surgical sterilization] being carried out without her having made a fully informed choice.”¹¹⁵

74. Chile’s law governing sterilization codifies these informed consent requirements, mandating that patients requesting sterilization receive “consejería en salud sexual y reproductiva a la persona, con información completa sobre métodos anticonceptivos alternativos y ... de alta improbabilidad de reversión en el caso de la esterilización femenina, incluyendo las posibles complicaciones y porcentaje de fracaso.”¹¹⁶ The law further requires that the patient, together with the treating doctor and the director of the department, sign a form documenting the patient’s decision to undergo the procedure, that includes information “de la circunstancia de haberlo decidido libremente y de haber recibido toda la información sobre el mismo, sobre su carácter irreversible y sobre los métodos anticonceptivos alternativos existentes.”¹¹⁷

75. Given the permanent nature of sterilizations, and the irrevocable physical harm and psychological suffering that results when a patient is subjected to such interventions without her fully informed consent, sterilization without informed consent violates a patient’s rights to physical and mental integrity and humane treatment.

10.1.2. The coercive sterilization of F.S. violated her rights to physical and mental integrity and humane treatment.

¹¹¹ FIGO, *Ethical Considerations in Sterilization*, *supra* note 22, at 74.

¹¹² *Id.*

¹¹³ FIGO, *Informed Consent Guidelines*, *supra* note 110, at 13.

¹¹⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations* (13th Sess., 1994), para. 22, U.N. Doc. A/49/38 (SUPP) [hereinafter CEDAW, *General Recommendation 21*], available at:

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

¹¹⁵ *A.S. v. Hungary*, CEDAW Comm. No. 4/2004, U.N. Doc. A/61/38, pp. 366-379, para. 11.2 (2006).

¹¹⁶ Sterilization Law, *supra* note 12, at art. 3.

¹¹⁷ *Id.*

76. In the present case, F.S. never requested to be sterilized, nor did she consent to the procedure. Instead, Dr. Gatica substituted his own decision for the decision of his patient, determining that because she was a woman living with HIV she should not be allowed to have any more children. F.S. trusted Dr. Gatica to perform a cesarean section operation to bring her son into the world, and Dr. Gatica abused that trust, taking advantage of the situation to simultaneously cut F.S.'s fallopian tubes. By substituting his decision for hers, Dr. Gatica sterilized F.S. against her will, thus violating her rights to physical and mental integrity and humane treatment.

77. As discussed above, in order for a patient to give informed consent, the patient must have been fully informed of the risks and benefits of the surgical intervention to which she is consenting, as well as alternatives to the procedure. The FIGO guidelines stress that information on alternative family planning methods is particularly essential for younger patients—like F.S., who was only 20 years old at the time of the surgery—facing the “lifelong” consequences of surgical sterilization.¹¹⁸

78. However, as both F.S.'s and the surgical team's testimony indicates, F.S. was never given any information regarding the risks and benefits of the procedure and its intended permanency, nor was she counseled on alternative forms of family planning methods, as required under Chilean law. The most information that the medical team alleges they provided to F.S. about the procedure is that it she would not be able to have children again.¹¹⁹ Furthermore, the testimony of one attending nurse indicates that this information, if provided at all, was imparted to F.S. after she had been placed under anesthesia.¹²⁰

79. Equally telling is the absence of written consent. Chilean law requires that a patient consent in writing, documenting that she has received all the required information and that she has reached her decision to be sterilized voluntarily. In violation of this law, F.S. never signed such a form, a fact confirmed both in the report of the Policía de Investigaciones de Chile and by the testimony of the medical team, which demonstrates that F.S.'s written consent for the procedure was never even sought.

80. The coercive sterilization has had lasting physical and psychological effects for F.S. She feels like the doctors treated her as “less of a person” by deciding to rob her of her fertility without consulting her,¹²¹ and, as discussed in section III, F.S. continues to suffer depression as a result of her infertility. She sees fertility as a “vital part of being a woman” and has “felt like less of a woman” since she was sterilized without her consent.¹²² The sterilization has also placed a significant strain on F.S.'s relationship with her husband, alienating her from her husband and provoking physical and psychological violence against F.S. By sterilizing her without her informed consent, the State violated F.S.'s right to physical, mental, and moral integrity, as well as her right to be free from cruel and inhuman treatment.

81. Finally, the Commission has held that allegations of cruel and inhuman treatment must be examined on a case-by-case basis, taking into consideration, among other factors, the sex and

¹¹⁸ FIGO, *Ethical Considerations in Sterilization*, *supra* note 22, at 75.

¹¹⁹ May 2007 Affidavit of Dr. Gatica, *supra* note 17 (“Yo le manifesté si estaba conciente de lo que significaba la ligadura tubaria, haciéndole ver la imposibilidad de lograr un nuevo embarazo.”); September 2007 Affidavit of Juana Maldonado, *supra* note 20 (“Yo le expliqué que era una ligadura, le dije que nunca más iba a ser mamá.”)

¹²⁰ September 2007 Affidavit of Juana Maldonado, *supra* note 20.

¹²¹ Affidavit of F.S., *supra* note 3.

¹²² Affidavit of F.S., *supra* note 3.

health status of the victim.¹²³ Accordingly, F.S.'s status as a pregnant woman and as a woman living with HIV should be taken into consideration in the Commission's assessment of her allegations of inhuman treatment.

10.2. The sterilization of F.S. without her consent violated her right to be free from gender-based violence (articles 3 and 7 of the Convention of Belém do Pará).

82. International human rights law protects the right of women to live their lives free of violence, with the strongest articulation of this right found in the Convention of Belém do Pará. The preamble of the Convention of Belém do Pará affirms that “violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms.” Article 3 of the Convention of Belém do Pará articulates the right of “[e]very woman ... to be free from violence in both the public and private spheres.” Article 4 reaffirms the rights of women “to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments,” acknowledging that violence against women implicates a host of other rights violations. The CEDAW Committee, the monitoring body for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has similarly acknowledged this, stating that “[g]ender based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”¹²⁴ As a result, violence against women “may breach specific provisions of the [CEDAW] Convention, regardless of whether those provisions expressly mention violence.”¹²⁵ Chile has promulgated the Convention of Belém do Pará into law in its entirety,¹²⁶ such that the right to be free from gender-based violence is guaranteed under both international and domestic legal obligations.

83. The Convention of Belém do Pará defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere,”¹²⁷ and includes violence “that is perpetrated or condoned by the state or its agents.”¹²⁸ The CEDAW Committee has further elaborated on this notion of an act “based on gender,” stating that gender-based violence is “violence that is directed against a woman because she is a woman or that affects women disproportionately.”¹²⁹ Acts of coercion “that inflict physical, mental or sexual harm or suffering” fall under the definition of violence against women.¹³⁰

¹²³ *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. C.H.R., Report N° 35/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 821, paras. 78, 83 (1997), available at <http://www.cidh.org/annualrep/97eng/Dom.Rep.10832.htm>.

¹²⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against Women* (11th Sess., 1992), para. 1, U.N. Doc. A/47/38 (SUPP) [hereinafter CEDAW, *General Recommendation 19*], available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.

¹²⁵ *Id.* at para. 6.

¹²⁶ República de Chile, Promulga la Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer, Decreto No. 1640 (*published* Nov. 11, 1998), available at: http://www.bcn.cl/lc/tinterna/tratados_pdf/tratado_uli154.pdf.

¹²⁷ Convention of Belém do Pará, *supra* note 60, at art. 1.

¹²⁸ Convention of Belém do Pará, *supra* note 60, at art. 2.

¹²⁹ CEDAW, *General Recommendation 19*, *supra* note 124, at para. 6.

¹³⁰ *Id.* See also, UN Declaration on Elimination of Violence against Women, U.N. Doc. A/RES/48/104 (1994), article 1 (“[T]he term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”); Beijing Declaration

84. The Inter-American Commission has held that the Convention of Belém do Pará “protects, *inter alia*, ... the right to a life free of violence.”¹³¹ Article 7 of the Convention of Belém do Pará obligates States to take concrete measures to protect this right.¹³² In particular, article 7 provides that States must “refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation.”¹³³ Accordingly, when State agents commit acts of gender-based violence or a State fails to take the appropriate steps to investigate and punish both public and private acts of violence against women, in accordance with its article 7 obligations, the State can be held liable for its failure to protect this article 3 right to be free from gender-based violence.¹³⁴

85. By failing to adequately prevent, investigate and prosecute acts of gender-based violence, States foster a culture of impunity with respect to such violence. This impunity carries significant consequences. For example, as the Beijing Platform for Action states, “Violence against women is an obstacle to the achievement of the objectives of equality, development and peace.”¹³⁵

86. Such consequences are further compounded when violence is directed at vulnerable populations, such as pregnant women or women living with HIV/AIDS. For example, the UN Secretary General’s report on violence against women observes “that HIV-infected women are more likely to have experienced violence, and that women who have experienced violence are at higher risk for HIV.”¹³⁶ The report further demonstrates that institutional acts of violence directed at women living with HIV/AIDS raise broader public health concerns, noting that “women [are prevented] from accessing HIV/AIDS information, being tested, disclosing their HIV status, accessing services for the prevention of HIV transmission to infants and receiving treatment and counseling” when they fear of discrimination or violence on account of their perceived or actual HIV status.¹³⁷

10.2.1. Coercive sterilization is a form of gender-based violence.

87. Coercive sterilization is consistently deemed to be a form of gender-based violence by international treaty monitoring bodies, international consensus documents, and other international actors, as it is an act that disproportionately affects women and causes physical, sexual and psychological harm and suffering.

88. In its general recommendation on violence against women, the CEDAW Committee explicitly mentions coercive sterilization, highlighting the fact that such an intervention carries adverse mental and physical effects for women.¹³⁸ The UN Special Rapporteur on

and Platform for Action, Fourth World Conference on Women, para. 112, UN Doc. A/Conf.177/20 (Oct. 17, 1995), available at <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>.

¹³¹ *Maria da Penha Fernandes v. Brazil*, Inter-Am. C.H.R., *supra* note 89, at para. 54.

¹³² See, *supra*, Section X, paras. 59-60.

¹³³ Convention of Belém do Pará, *supra* note 60, at art. 7(a).

¹³⁴ *Maria da Penha Fernandes v. Brazil*, Inter-Am. C.H.R., *supra* note 89, at para. 58.

¹³⁵ Beijing Declaration and Platform for Action, *supra* note 130, at para.112.

¹³⁶ U.N. Secretary-General, *In-depth Study on All Forms of Violence against Women: Report of the Secretary-General*, para.160, UN Doc. A/61/122/Add.1 (July 6, 2006) [hereinafter U.N. Secretary-General Report on VAW].

¹³⁷ *Id.*

¹³⁸ CEDAW, *General Recommendation 19*, *supra* note 124, at para. 22.

Violence against Women has called forced sterilization “a severe violation of women’s reproductive rights,” stating that it involves “the battery of a woman” and is thus a form of “violence against women.”¹³⁹ The Beijing Platform for Action states, “Acts of violence against women also include forced sterilization and forced abortion.”¹⁴⁰ In a report on violence against women, the UN Secretary General writes that “[t]he use of sterilization to control the reproductive behaviour of the female population or a particular subgroup, constitutes violence against women.”¹⁴¹

89. Coercive sterilizations rob women of their reproductive capabilities, causing permanent physical harm and lasting psychological trauma, as discussed above. Accordingly, forcible sterilizations meet the definition of gender-based violence, and violate women’s rights to live a life free of violence.

10.2.2. The forced sterilization of F.S. violated her right to be free from gender-based violence.

90. As discussed above, F.S. did not consent to surgical sterilization, nor was her informed consent sought. By performing a tubal ligation when F.S. had only consented to a cesarean section. State agents perpetrated an act of gender-based violence against F.S. This act inflicted severe physical, sexual and psychological harm on F.S., as discussed above,¹⁴² violating her right to be free from violence as protected in article 3 of the Convention of Belém do Pará. Accordingly the State violated its article 7 obligation to refrain, and prevent its agents and institutions, from committing acts of gender-based violence.

10.3. The sterilization of F.S. without her consent violated her rights to personal liberty and security (article 7 of the American Convention), privacy (article 11 of the American Convention), and family life (article 17 of the American Convention).

91. Article 7 of the American Convention provides that “[e]very person has the right to personal liberty and security.” This right is similarly protected in article 4 of the Convention of Belém do Pará,¹⁴³ article 9 of the International Covenant on Civil and Political Rights,¹⁴⁴ article I of the American Declaration on the Rights and Duties of Man,¹⁴⁵ and article 3 of the Universal Declaration on Human Rights.¹⁴⁶

92. The right to personal liberty is an essential component of human dignity, protecting a sphere of individual autonomy from State interference. In order to guarantee this right, State Parties are required to respect personal autonomy and refrain from interfering in this

¹³⁹ Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences* (55th Sess.), para. 51, U.N. Doc.E/CN.4/1999/68/Add.4 (1999).

¹⁴⁰ Beijing Declaration and Platform for Action, *supra* note 130, at para. 115.

¹⁴¹ U.N. Secretary-General Report on VAW, *supra* note 136, at para. 142.

¹⁴² See, *supra*, Section 10.1.2.

¹⁴³ Convention of Belém do Pará, *supra* note 60, at art 4 (“Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others: ... c) The right to personal liberty and security; ... e) The rights to have the inherent dignity of her person respected and her family protected.”).

¹⁴⁴ ICCPR, *supra* note 62, at art. 9.1 (“Everyone has the right to liberty and security of the person.”).

¹⁴⁵ American Declaration on the Rights and Duties of Man, art. I, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1948) [hereinafter American Declaration], available at: <http://www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm>.

¹⁴⁶ Universal Declaration, *supra* note 90, at art. 3 (“Everyone has the right to life, liberty and security of person.”).

protected sphere. Accordingly, the right to personal liberty is inextricably linked to article 11 of the American Convention.

93. Article 11 provides that “[e]veryone has the right to have his honor respected and his dignity recognized,” and “[n]o one may be the object of arbitrary or abusive interference with his private life, his family, [and] his home.” The Chilean Constitution similarly links privacy and individual autonomy with human dignity, guaranteeing “[e]l respeto y protección a la vida privada y a la honra de la persona y su familia.”¹⁴⁷ These rights are also protected in article 4 of the Convention of Belém do Pará,¹⁴⁸ article 17 of the ICCPR,¹⁴⁹ article V of the American Declaration,¹⁵⁰ and article 12 of the Universal Declaration.¹⁵¹ Similarly, article 17 creates a State duty to protect the rights of the family as “the natural and fundamental group unit of society,” including the right to found a family. Read in conjunction with article 11, the Commission has recognized “the central role of the family and family-life in the individual’s existence.”¹⁵²

94. The Commission has stated that “[t]he object of Article 11, as well as of the entire Convention, is essentially to protect the individual against arbitrary interference by public officials,” noting in particular that “[t]he right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one’s own.”¹⁵³

95. Family life and decisions about when and whether to found a family fall within this zone of activity, as discussed below. While the Commission has recognized that rights to privacy and family life may be subject to certain restrictions in domestic law, in accordance with article 32.2 of the American Convention,¹⁵⁴ these limitations must meet certain standards. As the Commission lays out in *X & Y v. Argentina*, acts or conduct of the State that interferes with a right enshrined in the American Convention must “be prescribed by law” and must “be necessary for the security of all.”¹⁵⁵ The Commission has further emphasized that “the state has a special obligation to prevent ‘arbitrary or abusive’ interference,” which is characterized by “elements of injustice, unpredictability and unreasonableness.”¹⁵⁶

96. Thus, acts or conduct by State agents that unlawfully or unreasonably interferes with an individual’s ability to make autonomous decisions regarding personal and family life violates the rights to personal liberty (article 7), dignity and privacy (article 11) and family life (article 17).

¹⁴⁷ CHILE CONST., *supra* note 31, at art.19.4.

¹⁴⁸ Convention of Belém do Pará, *supra* note 60, at art. 4.

¹⁴⁹ ICCPR, *supra* note 62, at art 17 (“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”).

¹⁵⁰ American Declaration, *supra* note 145, at art. V (“Every person has the right to protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.”).

¹⁵¹ Universal Declaration, *supra* note 90, at art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”).

¹⁵² *X & Y v. Argentina*, Case 10.506, Inter-Am. C.H.R., Report N° 38/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 50, para. 96 (1996), available at: <http://www.cidh.org/annualrep/96eng/Argentina11506.htm>.

¹⁵³ *Id.* at para. 91.

¹⁵⁴ American Convention, *supra* note 59, at art. 32.2 (“The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”).

¹⁵⁵ *X & Y v. Argentina*, Inter-Am. C.H.R., *supra* note 152, at para. 60.

¹⁵⁶ *Id.* at para. 92.

10.3.1. Reproductive health decisions fall within the zone of privacy.

97. Decisions on when and whether to establish a family, family planning methods, and the number and spacing of ones children fall within the zone of personal autonomy that is protected by the rights to personal liberty, privacy, and family life. Such decisions cannot be forced on an individual by the government or a State agent, such as a medical provider.

98. International treaty monitoring bodies and international consensus documents have expressed that a woman's right to personal autonomy, privacy and family life is inextricably linked with her reproductive autonomy. Article 16(e) of CEDAW provides that women have "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." In interpreting the substance of this right, the CEDAW Committee has expressed concern over coercive sterilization, noting that "[d]ecisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government."¹⁵⁷ Both the Human Rights Committee and the European Court on Human Rights have held that the arbitrary denial of access to legal therapeutic abortions violates a woman's right to privacy.¹⁵⁸ The Beijing Platform for Action declares that "[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence."¹⁵⁹

99. The Inter-American Commission has articulated this connection between reproductive autonomy and the rights to privacy and family life in the context of forced sterilization. In its admissibility decision in *I.V. v. Bolivia*, the Commission found that coercive sterilization "could amount to a possible violation of Article 11(2) of the American Convention," given "the arbitrary interference by state employees in the private life of I.V. regarding whether or not to maintain her reproductive function, invading her private life."¹⁶⁰ The Commission went on to state that "the facts could [also] amount to a possible violation of Article 17 ... regarding the arbitrary interference of state employees in the right of I.V. to decide freely and responsibly on the number of her children, and consequently the size of her family."¹⁶¹

100. Finally, it is worth noting that Chile's Decree No. 2326 stipulates that decisions regarding sterilization are to be made freely and independent, stating that the "decisión de someterse a esterilización es personal y emanará de la voluntad libre manifestada por quien la solicita."¹⁶²

10.3.2. By arbitrarily robbing F.S. of her reproductive capabilities without her consent, the Chilean State violated her rights to personal liberty and security, privacy, and family life.

¹⁵⁷ CEDAW, *General Recommendation 21*, *supra* note 114, at para. 22.

¹⁵⁸ *K.L. v. Peru*, CCPR, *supra* note 97, at para. 6.4; *Tysiac v. Poland*, Application No. 5410/03, Eur. Ct. H.R., paras. 106-108 (Mar. 20, 2007). *See also*, HRC, *General Comment 28*, *supra* note 108, at para. 20 ("Another area where States may fail to respect women's privacy relates to their reproductive functions, for example, where there is a requirement for the husband's authorization to make a decision in regard to sterilization.")

¹⁵⁹ Beijing Platform for Action, *supra* note 130, at para. 96 (para. 96 available at <http://www.un.org/womenwatch/daw/beijing/platform/health.htm>).

¹⁶⁰ *I.V. v. Bolivia*, *supra* note 65, at para. 80.

¹⁶¹ *Id.* at para. 82.

¹⁶² Sterilization Law, *supra* note 12, at art. 2, Annex I, p. 181.

101. In the present case, the State agents decided to sterilize F.S. without her consent, infringing on her rights to maintain her fertility and to freely decide on the number and spacing of her children, and thus violating her rights to personal liberty, privacy and family life, as protected under the American Convention.

102. As discussed above, in order to comply with obligations under the American Convention, any State measure restricting protected rights must be established by law and necessary for preserving the general welfare, requirements that are not met in the instant case. In this case, State agents arbitrarily decided to sterilize F.S. in contravention of Chilean law requiring voluntary, informed, written consent, thus violating the first test for determining whether State action is permissible within the bounds of article 32.2 of the American Convention.

103. Accordingly, the decision to rob F.S. of her reproductive capabilities constituted an unlawful and abusive interference with her rights to personal liberty, privacy and family life, violating articles 7, 11, and 17 of the American Convention.

10.4. The sterilization of F.S. without her consent violated her right to health (art. 26 of the American Convention and art. XI of the American Declaration)

104. The right to health is a fundamental human right “indispensable for the exercise of other human rights.”¹⁶³ Article 26 of the American Convention provides: “The States Parties undertake to adopt measures ... with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States.” While the scope of article 26 is not explicitly articulated in the Convention, auxiliary documents—such as the Charter of the Organization of American States, the American Declaration, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)—provide guidance as to the intended scope and content,¹⁶⁴ demonstrating that the right to health is among those economic, social and cultural rights protected under article 26. The Inter-American Commission has affirmed that the American Convention “directly protect[s] economic, social, and cultural rights, and give[s] rise to obligations,” noting that “Article 26 of the American Convention requires that the states parties to the Convention adopt ‘measures, both internally and through international cooperation ... with a view to achieving progressively, by legislation or other appropriate means, the full realization’ of

¹⁶³ Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, para. 1, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR, *General Comment 14*].

¹⁶⁴ See, e.g., The Charter of the Organization of American States, 119 U.N.T.S. 3 (*entered into force* Dec. 13, 1951); amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A (*entered into force* Feb. 27, 1970); amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527 (*entered into force* Nov. 16, 1988); amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005 (*entered into force* Sept. 25, 1997); amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009 (*entered into force* Jan. 29, 1996), available at <http://www.oas.org/juridico/english/charter.html>; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), preamble, O.A.S. Treaty Series No. 69 (1988), OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (*entered into force* Nov. 16, 1999) (stating that the purpose of the Protocol is to reaffirm and develop “fundamental economic, social and cultural rights [that] have been recognized in earlier international instruments”), available at <http://www.oas.org/juridico/english/treaties/a-52.html>. Chile has signed, but not ratified, the Protocol of San Salvador.

these rights.”¹⁶⁵ The Commission has further stated that the economic, social and cultural rights enshrined in the American Declaration on the Rights and Duties of Man¹⁶⁶ are likewise binding on States Parties.¹⁶⁷

105. The right to health is also protected in other international human rights instruments to which Chile is a State party, including article 12 of the International Covenant on Economic, Social and Cultural Rights,¹⁶⁸ article 12 of the Convention on the Elimination of All Forms of Discrimination against Women,¹⁶⁹ and article 25 of the Universal Declaration of Human Rights.¹⁷⁰ The interpretation of these provisions by the corresponding treaty monitoring bodies provide guidance in defining the right to health as protected under article 26 of the American Convention.

106. The Committee on Economic Social and Cultural Rights (CESCR) has declared:

The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non consensual medical treatment and experimentation.

107. Similarly, the Programme of Action of the UN International Conference on Population and Development (ICPD) defines reproductive health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes,”¹⁷¹ and provides that “[r]eproductive health-care programmes should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.”¹⁷²

108. In defining the duty of States with respect to the right to health, the CESCR has stated:

¹⁶⁵ Inter-Am. C.H.R., *Third Report on the Human Rights Situation in Columbia*, chap. 3, para. 4, OEA/Ser.L/V/II.102 (Feb. 26, 1999) [hereinafter *Third Report on Colombia*], available at <http://www.cidh.org/countryrep/colom99en/table%20of%20contents.htm>.

¹⁶⁶ American Declaration, *supra* note 145, at art. XI (“Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care.”).

¹⁶⁷ *Third Report on Columbia*, *supra* note 165, at chap. 3, para. 4.

¹⁶⁸ ICESCR, *supra* note 63, at art. 12 (“The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”).

¹⁶⁹ CEDAW, *supra* note 61, at art. 12 (“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”).

¹⁷⁰ Universal Declaration, *supra* note 90, at art. 25(1) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”).

¹⁷¹ *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, Sept. 5 – 13, para. 7.2, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), [hereinafter *ICPD Programme of Action*] available at <http://www.iisd.ca/Cairo/program/p07002.html>.

¹⁷² *Id.* at Principle 8, available at <http://www.iisd.ca/Cairo/program/p02009.html>.

The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. ... The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate ... measures towards the full realization of the right to health.¹⁷³

109. Given that reproductive autonomy is fundamental to the right to health, information regarding family planning methods is a vital component of the State's obligation to fulfilling the right to health. The CEDAW Committee has stressed the importance of information in ensuring a woman's right to health. In particular, in its decision in *A.S. v. Hungary*, the CEDAW Committee determined that, by failing to obtain the petitioner's fully informed consent for a surgical sterilization, the State had violated her right to health under article 12 of CEDAW.

110. The CEDAW Committee has stated that health care services must be "delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives" in order to comply with its article 12 obligations, emphasizing further that "States parties should not permit forms of coercion, such as non-consensual sterilization ... that violate women's rights to informed consent and dignity."¹⁷⁴

111. Accordingly, in order to respect, protect and fulfill the right to health as protected under article 26 of the American Convention, State must "refrain from interfering directly or indirectly with the enjoyment of the right to health"¹⁷⁵ and must provide adequate health care services including information on family planning methods that allow a woman to make autonomous reproductive health decisions.

10.4.1. The coercive sterilization of F.S. violated her right to health.

112. The Chilean State did not meet its article 26 obligations in the instant case. State agents directly interfered with F.S.'s right to health by sterilizing her without her consent. The unauthorized intervention by State agents disrupted F.S.'s reproductive capabilities, causing irreparable physical and mental harm. Furthermore, by denying F.S. information both about the surgical sterilization and alternative forms of family planning methods, the State violated her right to make autonomous reproductive health decisions, a core component of her right to health. Accordingly, the Chilean State violated its obligations under article 26 of the American Convention.

10.5 The failure of the Chilean judicial system to exercise due diligence in investigating F.S.'s sterilization violated her rights to effective judicial remedy (articles 8 and 25 of the American Convention) and the State's obligation to prevent, punish and eradicate violence against women (article 7 of the Convention of Belém do Pará).

¹⁷³ CESCR, *General Comment 14*, *supra* note 163, at para. 33.

¹⁷⁴ CEDAW, *General Recommendation 24*, *supra* note 107, at para. 22.

¹⁷⁵ CESCR, *General Comment 14*, *supra* note 163, at para. 33.

113. Judicial protection is essential to combating a culture of impunity and eradicating the tragic phenomena of violence against women, and the protection of this right to an effective remedy is well established in international human rights law. Specifically, article 25(1) of the American Convention states: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention.”¹⁷⁶ Along similar lines, article 8(1) of the American Convention establishes the right of every person to a fair trial, which includes “the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, ... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”¹⁷⁷

114. Article 4 of the Convention of Belém do Pará affirms this right to judicial remedy,¹⁷⁸ and article 7 establishes specific State obligations in responding to gender-based violence, providing:

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to [*inter alia*]:

...

b) apply due diligence to prevent, investigate and impose penalties for violence against women; ...

f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;

g) establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies.¹⁷⁹

These rights and protections are reiterated in numerous international and regional human rights treaties.¹⁸⁰

¹⁷⁶ American Convention, *supra* note 59, at art. 25(1).

¹⁷⁷ *Id.* at art. 8(1).

¹⁷⁸ Convention of Belém do Pará, *supra* note 60, at art. 4 (“Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments, [including] (g) The right to equal protection before the law and of the law; [and] (h) The right to simple and prompt recourse to a competent court for protection against acts that violate her rights.”).

¹⁷⁹ Convention of Belém do Pará, *supra* note 60, at art. 7.

¹⁸⁰ See Universal Declaration, *supra* note 90, at art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him.”), and art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights.”); ICCPR, *supra* note 62, at art. 2(3) (“Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy..., (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities.”), and art. 14 (“In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”); European Convention, *supra* note 90, at art. 6 (“In the determination of his civil rights and obligations ... everyone is entitled to a fair trial and public hearing.”), and art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority.”); Banjul Charter, *supra* note 90, at art. 7 (“Every

115. Both the Inter-American Court and the Inter-American Commission have established that the obligation to exercise due diligence in investigating allegations of rights violations and providing prompt and effective judicial recourses is closely associated with the State's general obligation, under article 1(1), to respect, protect, and ensure the rights enshrined in the Convention. The Inter-American Court has stated: "As a consequence of this [article 1] obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."¹⁸¹

116. In its report, *Access to Justice for Women Victims of Violence in the Americas*, the Inter-American Commission affirmed this connection between judicial protection and the State's obligations to respect, protect and ensure, in this case with respect to violence against women, stating:

The case law of the inter-American system holds that *de jure* and *de facto* access to judicial guarantees and protections is essential to eradicating the problem of violence against women and is a necessary precondition if States are to be in full compliance with the international obligation they have freely undertaken to practice due diligence in responding to this very serious human rights problem.¹⁸²

117. The Commission made a similar determination in the case *Maria da Penha Fernandes v. Brazil*, finding that the lack of an effective judicial remedy, such as where the State fails to investigate or condemn acts of violence against women, creates a climate of impunity. The Commission found that such a failure to exercise due diligence violates the State's obligations under articles 8 and 25 in the American Convention, in relation to the State's article 1 obligations, and article 7 of the Convention of Belém do Pará.¹⁸³

118. Accordingly, these duties to provide an effective remedy, including the obligation to exercise due diligence, are inextricably linked to the full realization of the rights enshrined in the American Convention and the Convention of Belém do Pará, in addition to constituting a substantive rights violation on their own accord.

119. In its decision in *Velásquez Rodríguez v. Honduras*, the Inter-American Court of Human Rights established that in order to comply with its due diligence obligations, a State must: i) take necessary steps to prevent human rights violations; ii) where such violations are alleged, conduct a serious investigation into the allegations; iii) prosecute and punish those that are responsible for the violations; and iv) provide adequate compensation to the victim for the harm suffered.¹⁸⁴ Notably, satisfying one of these obligations does not relieve the State of its duty to fulfill its other obligations. The Court has further stated that "[t]he absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation

individual shall have the right to have his cause heard[, including] the right to an appeal to competent national organs against acts violating his fundamental rights.").

¹⁸¹ *Velásquez Rodríguez* Case, Inter-Am. Ct. H.R., *supra* note 80, at para. 167.

¹⁸² Inter-Am. C.H.R., *Access to Justice for Women Victims of Violence in the Americas*, para. 2, p. 13, OEA/Ser.L/V/II. (Jan. 20, 2007) [hereinafter *Access to Justice for Women Victims of Violence*], available at <http://www.cidh.org/women/Access07/tocaccess.htm>.

¹⁸³ See *Maria da Penha Fernandes v. Brazil*, Inter-Am. C.H.R., *supra* note 89, at para. 56.

¹⁸⁴ *Velásquez Rodríguez* Case, Inter-Am. Ct. H.R., *supra* note 80, at para. 174.

of the Convention.”¹⁸⁵ Thus, whenever a violation of human rights occurs and the State fails to take reasonable measures remedy the situation and punish those responsible, it incurs additional international responsibility.¹⁸⁶

120. The Inter-American Commission has affirmed the due diligence obligations laid out in *Velásquez Rodríguez*. In its report *Access to Justice*, the Commission reiterated that States are obligated to exercise due diligence, which consists of four elements: “prevention, investigation, punishment and redress of the human rights violation.”¹⁸⁷ The Commission’s report and jurisprudence help define the contours of each of these elements in the context of gender-based violence.

121. The Commission has described measures that States should undertake in order to comply with the obligation to prevent gender-based violence, including educating the judiciary and police regarding the importance of not condoning violence against women,¹⁸⁸ establishing educational programs for the general public,¹⁸⁹ and creating “appropriate specialized services, including shelters, counseling services for all family members, care and custody of the affected minors.”¹⁹⁰

122. The obligation to investigate requires that investigations be carried out “by competent and impartial authorities.”¹⁹¹ The Commission has noted that “[w]hen investigations are not carried out by appropriate authorities, duly trained in gender-related issues, ... the investigations are needlessly delayed and important clues or evidence overlooked.”¹⁹² The U.N. Secretary General’s report on violence against women also provides insight into how investigations should be carried out in order to effectively respond to gender-based violence, providing that investigations should “not degrade women subjected to violence and [should] minimize intrusion, while maintaining standards for the collection of the best evidence.”¹⁹³

123. The obligation to punish goes hand-in-hand with the obligation to conduct a thorough and impartial investigation. The Commission has reiterated the need for competence and impartiality on the part of the judicial system, noting that the judicial officers and prosecutors should “perform their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.” Both the Commission and the U.N. Secretary General have stated that criminal proceedings must be conducted in a “gender-sensitive” manner to prevent re-victimization.¹⁹⁴ Noting that “gender-based violence is a critical health issue for women” the CEDAW Committee has emphasized the need for “[f]air and protective procedures for hearing complaints and imposing appropriate sanctions on health care professionals” who have committed acts of gender-based violence.¹⁹⁵

¹⁸⁵ Case of the “*Street Children*” (*Villagrán Morales et al.*) v. *Guatemala*, 1999 Inter-Am. Ct. H.R. (Ser. C) No. 63, para. 235 (Nov. 19, 1999), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf.

¹⁸⁶ *Velásquez Rodríguez* Case, Inter-Am. Ct. H.R., *supra* note 80, at para.173.

¹⁸⁷ *Access to Justice for Women Victims of Violence*, *supra* note 182, at para. 27, p. 12.

¹⁸⁸ See, e.g., *Maria da Penha Fernandes v. Brazil*, Inter-Am. C.H.R., *supra* note 89, at para. 61.

¹⁸⁹ See, e.g., *id.*

¹⁹⁰ See, e.g., *Access to Justice for Women Victims of Violence*, *supra* note 182, at para. 56. p. 24.

¹⁹¹ *Id.* at para. 46.

¹⁹² *Id.* at para. 46; see also *id.* at para. 54.

¹⁹³ U.N. Secretary-General Report on VAW, *supra* note 136, at para. 266.

¹⁹⁴ *Id.* at para. 268.

¹⁹⁵ CEDAW, *General Recommendation 24*, *supra* note 107, at para. 15.

124. Finally, the State is obligated to provide adequate redress for the harm suffered. The U.N. General Assembly states that such reparation must be proportionate to the physical and mental harm undergone and to the gravity of the human rights violations, and might include restitution; compensation; satisfaction; rehabilitation; and guarantees of non-repetition and prevention.¹⁹⁶

10.5.1. The Chilean State failed to exercise due diligence to prevent violations of human rights violations protected under the American Convention and Convention of Belém do Pará.

125. In failing to take the necessary steps to prevent, investigate, punish and redress the harm that F.S. suffered, the Chilean State failed to meet the necessary elements of its due diligence obligation, violating its duty to provide effective judicial remedies as mandated under articles 8 and 25 of the American Convention and article 7 of the Convention of Belém do Pará.

126. The Chilean State failed to take the necessary steps to prevent the violence against F.S.

127. States must take affirmative steps to prevent acts of gender-based violence. Articles 7¹⁹⁷ and 8¹⁹⁸ of the Convention of Belém do Pará, as well as reports¹⁹⁹ and jurisprudence²⁰⁰ of the Inter-American Commission, provide guidance as to what these measures might look like, including establishing legislative and policy protections to guard against such abuses,

¹⁹⁶ U.N. General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (2006) available at <http://www2.ohchr.org/english/law/remedy.htm>.

¹⁹⁷ Convention of Belém do Pará, *supra* note 60, at art. 7 (providing that States undertake to: “c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary; [and] e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women.”).

¹⁹⁸ *Id.* at art. 8 (“The States Parties agree to undertake progressively specific measures, including programs: a. to promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected; b. to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women; c. to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women; d. to provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, counseling services for all family members where appropriate, and care and custody of the affected children; e. to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women; f. to provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life; g. to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women; h. to ensure research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes; and i. to foster international cooperation for the exchange of ideas and experiences and the execution of programs aimed at protecting women who are subjected to violence.”).

¹⁹⁹ *Access to Justice for Women Victims of Violence*, *supra* note 182.

²⁰⁰ *See, e.g., Maria da Penha Fernandes v. Brazil*, Inter-Am. C.H.R., *supra* note 89, at para. 61.

educating both the general public and State officials with the aim of modifying discriminatory practices that tolerate and/or condone violence against women, and providing specific training to State agents on how to prevent and respond to acts of violence.

128. Chile has failed to establish a comprehensive legislative and policy framework to protect women's reproductive rights, and has failed to adequately educate and train medical practitioners to implement those legislative policies that do exist, exposing women, and particularly women living with HIV/AIDS to acts of violence like the one that F.S. suffered. Although Chile's law on sterilization specifically mandates informed, written consent for surgical sterilization,²⁰¹ Chile has not promulgated any comprehensive legislation on women's sexual and reproductive rights, nor are there any legislative protections for the reproductive rights of women living with HIV/AIDS.

129. Furthermore, a study on the sexual and reproductive rights of Chilean women living with HIV revealed high incidents of pressure and coercion from health care providers, highlighting the need for stronger legislative and policy protections and for full implementation of existing protections. For example, of the women interviewed, 56 percent indicated that they were pressured to use contraceptives to prevent pregnancy, and 34 percent were pressured into sterilization.²⁰² Indeed, of the women who underwent surgical sterilizations after they learned of their HIV status, 50 percent reported that they were pressured by health care providers to do so.²⁰³ This high incidence of sterilizations of women living with HIV without their informed, voluntary consent exposes the failure of the Chilean State to adequately implement the domestic legislative protections that do exist, and thus the State's failure to take the necessary steps to prevent this type of gender-based violence.

130. The Chilean State failed to adequately investigate the rights violations that F.S. suffered.

131. The Inter-American Court has established that investigations "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective."²⁰⁴ In order to meet such standards, investigations must be immediate, exhaustive, serious and impartial to effectively prevent human rights violations. While a State's due diligence obligation does not require investigations to lead to successful prosecutions in every case, the obligation requires that the process must be conducted in a manner that enables the investigator to identify whether a rights violation has been committed and, when appropriate, to lead to the identification and punishment of those responsible. The simple act of opening an investigatory process that does not conform to these standards is insufficient to shield the State from liability.

132. While the Chilean State opened an official investigation into the sterilization of F.S., the investigation was flawed and incomplete on many fronts, and thus, failed to satisfy the Chilean State's due diligence obligations. As noted in section IV, the Office of the Public Prosecutor in Curicó did not interview several key members of the medical team until prodded by F.S. and her lawyer, he had to be asked on several occasions to formalize the investigation,²⁰⁵ and he failed to address, let alone resolve, blatant discrepancies in testimony

²⁰¹ Sterilization Law, *supra* note 12, at arts. 3, 4.

²⁰² MUJERES CHILENAS VIVIENDO CON VIH/SIDA, *supra* note 1, at 68.

²⁰³ *Id.* at 106.

²⁰⁴ *Velásquez Rodríguez* Case, Inter-Am. Ct. H.R., *supra* note 80, at para. 177.

²⁰⁵ *See, e.g.*, Request to take Affidavits, *supra* note 37; Request to Compel Testimony, *supra* note 37; Second Request to Formalize Investigation, *supra* note 35.

regarding whether F.S. provided informed, written consent for her sterilization. F.S. and her lawyer pointed out these discrepancies to the Public Prosecutor, requesting that follow up declarations be taken to clarify the facts of the case,²⁰⁶ but the Public Prosecutor failed to do so.

133. In identifying gaps and irregularities in investigations into acts of gender-based violence, the Inter-American Commission “has verified that the majority of evidence-collection efforts related to acts of violence against women focus on physical and testimonial evidence, neglecting other types of evidence that can be crucial to establishing the facts, such as that of a scientific and psychological nature.”²⁰⁷ The Public Prosecutor’s investigation into the violence against F.S. neglected such essential evidence that tends to prove that F.S. did not provide informed consent for the surgical sterilization.

134. In addition to evidentiary inconsistencies that call into question whether F.S. requested or consented to sterilization orally, the investigatory process was flawed because the Public Prosecutor wholly disregarded the requirements set forth under Chilean law mandating informed consent in writing. While a notation in F.S.’s medical file might be considered *prima facie* evidence that F.S. requested the procedure orally, there is no evidence that F.S.’s informed, written consent was sought, let alone obtained, as discussed above in Section III. Even if we put aside the glaring discrepancies in the testimony from the medical staff and take these statements to be true, the hospital staff failed to provide F.S. with the counseling and information on the risks and benefits of the sterilization procedure and on alternative forms of contraception that is necessary to come to an informed decision as to whether to end one’s reproductive capabilities, as required under Chile’s domestic and international legal obligations.

136. As such, the Public Prosecutor conducted an incomplete, cursory and biased investigation that was not necessarily intended to confirm the truth. While the Office of the Regional Prosecutor reviewed the local Public Prosecutor’s findings, in response to an appeal made by F.S. through her attorney, its decision to support the local Public Prosecutor’s recommendation to dismiss the case compounded the flawed nature of the Chilean State’s investigatory process. By failing to further investigate and resolve blatant evidentiary discrepancies, as submitted by the petitioner, the Regional Office similarly failed to engage in a thorough, impartial and effective investigation process. It is worth highlighting further that the Inter-American Commission’s report on access to justice for victims of gender-based violence pointed specifically to failures of the Chilean judicial system to adequately investigate allegations of gender-based violence, indicating that the inadequacy of the investigation into F.S.’s allegations is not an isolated incident.²⁰⁸

137. The Chilean State failed to fully prosecute the violations of F.S.’s rights, and punish the responsible party.

138. The Inter-American Court has confirmed that States not only bear a responsibility to employ an appropriate legal framework to deter rights violations, but to also take all

²⁰⁶ See, e.g., Request to Refer to Prior Testimony, *supra* note 38; Request to Clarify Discrepancies in Prior Testimony, *supra* note 38.

²⁰⁷ *Access to Justice for Women Victims of Violence*, *supra* note 182, at para. 136, p. 53.

²⁰⁸ *Id.* at paras. 145-146, pp. 56 - 57.

necessary measures to punish serious deprivations of rights due to criminal acts by others.²⁰⁹ In other words, States have the obligation to create and utilize a functioning prosecutorial system capable of bringing justice for rights violations.

139. Despite this obligation, however, the Inter-American Commission has found that in the context of gender-based violence, “certain discriminatory socio-cultural patterns influence the conduct of officials at all levels of the judicial branch, with the result that ... very few cases ... actually go to trial and end in convictions.”²¹⁰ As discussed below, discrimination against women living with HIV is particularly invidious, as HIV-positive women “are often believed to have deserved what has happened” given that HIV is inextricably linked to notions of sexual misconduct and promiscuity.²¹¹ The Commission has noted that:

These discriminatory socio-cultural patterns influence the behavior of attorneys, prosecutors, judges and other officials in the administration of justice system in general, and the police. They have a negative effect on the judicialization of these cases and ... are also one of the reasons why so few convictions are won in cases involving violence against women.²¹²

140. In order to be effective, prosecutions must be conducted in a gender-sensitive manner that combats these biases, taking into account the victim’s testimony and recognizing the reasons that a victim of gender-based violence might delay or decline to file complaints, including “social stigmatization, her economic dependence, and her fear of reprisals.”²¹³ In addition to the failures of the investigation described above, the Chilean State failed to prosecute this case in a gender-sensitive manner, thus violating its due diligence obligations.

141. By accepting the Public Prosecutor’s evidentiary findings and recommendations to formally dismiss the case without addressing the contradictory testimony, disputed facts, and the absence of legally-mandated informed, written consent, both the Juzgado de Garantía de Curicó and the Corte de Apelaciones de Talca failed to adequately consider the legitimacy of F.S.’s legal claims and fully prosecute the case. In their decisions, the Juzgado de Garantía and the Corte de Apelaciones did not give any credence to F.S.’s testimony that she never consented to the procedure. Furthermore, the Public Prosecutor’s report, on which both the trial and appellate courts based their decisions, stressed the fact that F.S. had not filed a complaint about the sterilization sooner, ignoring the very real concerns that F.S. faced

²⁰⁹ See Case of *The Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (Ser. C) No. 140, para.120 (Jan. 31, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf; Case of *Ximenes-Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (Ser. C) No. 149, paras. 124-125 (July 4, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf; Case of *Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (Ser. C) No. 146, para. 153 (Mar. 29, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf; Case of *The Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (Ser. C), No. 134, para. 232 (Sept. 15, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf; Case of *Juan Humberto Sánchez v. Honduras*, 2003 Inter-Am. Ct. H.R. (Ser. C) No. 99, para.110 (June 7, 2003), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_99_ing.pdf; *Street Children Case*, Inter-Am. Ct. H.R., *supra* note 185, at para.144.

²¹⁰ *Access to Justice for Women Victims of Violence*, *supra* note 182, at para. 147, p. 58.

²¹¹ PAN AMERICAN HEALTH ORGANIZATION, UNDERSTANDING AND RESPONDING TO HIV/AIDS-RELATED STIGMA AND STIGMA AND DISCRIMINATION IN THE HEALTH CARE SECTOR 13 (2003) [hereinafter PAHO, HIV/AIDS-RELATED STIGMA], available at: http://www.paho.org/English/AD/FCH/AI/Stigma_report_english.pdf.

²¹² *Access to Justice for Women Victims of Violence*, *supra* note 182, at para.151.

²¹³ *Id.* at para.158.

regarding stigma and discrimination on the basis of her HIV status and concerns that such a denunciation could interfere with the necessary antiretroviral treatment that she sought, and continues to seek, from the Curicó Hospital. The manner in which the prosecution was carried demonstrates the illusory prosecutorial protections for victims of gender-based violence in Chile.

142. The sub-standard investigation and prosecution that took place in F.S.'s case not only demonstrates the Chilean State's failure to take F.S.'s claims seriously, but also highlights again the State's failure to educate State agents such as investigators, prosecutors and judges regarding the importance of not condoning violence against women, an essential component of both preventing and prosecuting gender-based violence.²¹⁴ Had the State agents been properly sensitized to the nature of, and rights violations resulting from, gender-based violence, they could have taken greater measures to ensure that F.S.'s claims were adequately investigated and prosecuted.

143. Furthermore, both the Juzgado de Garantía and the Corte de Apelaciones denied F.S. and her lawyer the opportunity to continue investigating and prosecuting the case on their own, as permitted under article 261(a) of the Criminal Procedure Code.²¹⁵ If the courts had not denied this opportunity, F.S. and her lawyer would have been able to investigate and possibly resolve the evidentiary discrepancies that the Public Prosecutor's flawed investigation failed to address, and could have provided them with an opportunity to fully prosecute the case.

144. The Chilean State, through this breakdown of its judicial system, denied F.S.'s right to a hearing before an impartial and competent court. The incomplete and biased manner in which the Courts managed this case is emblematic of the larger failure of the Chilean judicial system to fully and competently prosecute allegations of gender-based violence. By failing to ensure a competent judicial system in the case at hand, the State violated its due diligence obligations and F.S.'s rights to judicial guarantees and judicial protection.

145. The Chilean State failed to redress the harm F.S. suffered.

146. In addition to access to fair and effective legal procedures that hold perpetrators accountable, States must provide restitution, reparations or other just and effective remedies for women who have been subjected to violence.²¹⁶ Such redress may take the form of rehabilitation, financial indemnification, or guarantees of non-repetition.

147. In contrast to these requirements, F.S. experienced various barriers to accessing justice when seeking relief for her human rights violations, and continues to suffer the effects of the violation of her rights without reparation. F.S. struggled to secure legal representation due to the sensitive and charged nature of her case and discrimination against HIV-positive women and women victims of violence. She was unable to obtain a fair and thorough hearing of her claims, and her own testimony was ignored in the investigation and prosecution of the case.

²¹⁴ See *Maria da Penha Fernandes v. Brazil*, Inter-Am. C.H.R., *supra* note 89, at para. 61.

²¹⁵ Criminal Procedure Code, *supra* note 45, at art. 261(a) (“[E]l querellante, por escrito, podrá:
a) Adherir a la acusación del ministerio público o acusar particularmente. En este segundo caso, podrá plantear una distinta calificación de los hechos, otras formas de participación del acusado, solicitar otra pena o ampliar la acusación del fiscal, extendiéndola a hechos o a imputados distintos, siempre que hubieren sido objeto de la formalización de la investigación.”).

²¹⁶ See Convention of Belém do Pará, *supra* note 60, at art. 7(f) and (g).

By dismissing her case the Chilean judicial system wholly denied F.S. the ability to obtain any redress and fostered a climate of impunity for perpetrators of gender-based violence and violence against women living with HIV.

148. The Chilean State's failure to take the necessary steps to prevent the type of violence that F.S. suffered, to conduct an impartial and competent investigation into, and prosecution of, the rights violations alleged, and to redress the harm that F.S. suffered amounts to a violation of F.S.'s right to an effective judicial remedy and the State's due diligence obligations under articles 8 and 25 of the American Convention and article 7 of the Convention of Belém do Pará.

10.6. The Chilean State failed to provide special protections to F.S. as a socio-economically disadvantaged, HIV positive, pregnant woman (article 9 of the Convention of Belém do Pará).

149. States have a heightened responsibility to ensure protection of the rights of vulnerable groups. Article 9 of the Convention of Belém do Pará requires that States take special account of women who might be particularly vulnerable to violence.²¹⁷ Article 9 specifically highlights the vulnerability and special consideration that should be paid to “women subjected to violence while pregnant or who are disabled, of minor age, [or] socio-economically disadvantaged.”²¹⁸ More broadly, the Inter-American Commission has found that “every person in a situation of vulnerability is entitled to special protection, as a result of the special duties that the State must fulfill in order to satisfy its general obligations to respect and guarantee human rights.”²¹⁹

150. Similarly, the International Covenant on Economic, Social and Cultural Rights²²⁰ CEDAW,²²¹ and the American Declaration²²² emphasize that States have particular obligations to mothers during and immediately following pregnancy. Chilean law affirms this need for special protections for women during pregnancy and after childbirth, stipulating that: “Toda mujer, durante embarazo y hasta el sexto mes del nacimiento del hijo, y el niño, tendrán derecho a la protección y vigilancia del Estado por intermedio de las instituciones que correspondan.”²²³

151. As a socio-economically disadvantaged, HIV-positive, pregnant woman, F.S. was entitled to special protections from the Chilean State. In addition to ensuring that her human

²¹⁷ *Id.* at art. 9.

²¹⁸ *Id.*

²¹⁹ *Ximenes Lopes Case*, Inter-Am. Ct. H.R., *supra* note 209, at para. 103 (unofficial English translation of “toda persona que se encuentre en una situación de vulnerabilidad es titular de una protección especial, en razón de los deberes especiales cuyo cumplimiento por parte del Estado es necesario para satisfacer las obligaciones generales de respeto y garantía de los derechos humanos. ... es imperativa la adopción de medidas positivas, determinables en función de las particulares necesidades de protección del sujeto de derecho, ya sea por su condición personal o por la situación específica en que se encuentre, como la discapacidad.”). *See also, Pueblo Bello Massacre Case*, Inter-Am. Ct. H.R., *supra* note 209, at para.123; *Sawhoyamaya Indigenous Community Case*, Inter-Am. Ct. H.R., *supra* note 209, at para.154; *Mapiripán Massacre Case*, Inter-Am. Ct. H.R., *supra* note 209, at para.117.

²²⁰ ICESCR, *supra* note 63, at art. 10 (“Special protection should be accorded to mothers during a reasonable period before and after childbirth.”).

²²¹ CEDAW, *supra* note 61, at art. 12(2) (“State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period.”).

²²² American Declaration, *supra* note 145, at art. VII (“All women, during pregnancy and the nursing period, and all children have the right to special protection, care, and aid.”).

²²³ Public Health Code, *supra* note 76, at art. 16.

rights were not violated, the State bore the additional obligation to implement safeguards to protect F.S. from gender-based violence and violations of her rights to physical and mental integrity, humane treatment, personal liberty, privacy, family life and judicial protection. Such safeguards should have been implemented within both the healthcare and judicial systems. F.S. suffered multiple rights violations, first while seeking urgent health care during the birth of her child and subsequently when she sought justice and redress for the permanent loss of her reproductive capacity. Yet, rather than provide F.S. with the special protections that her status as an socio-economically disadvantaged, HIV-positive woman mandated, the State actions that led to these rights violations were grounded in discrimination based on those same vulnerabilities, as discussed below.

10.7. The State’s actions and omissions constitute gender-based discrimination and discrimination on the basis of F.S.’s HIV status, thereby violating F.S.’s rights to be free from discrimination (article 1 of the American Convention) and her right to equal protection of the law (article 24 of the American Convention).

152. The Inter-American Court has recognized the principle of non-discrimination and equal protection as “fundamental for the safeguard of human rights in both international and domestic law.”²²⁴ Indeed, essentially every international and regional human rights document emphasizes this right to be free from discrimination.²²⁵ In fact, the Court has stated that the principle of equal protection and nondiscrimination is one of *jus cogens*, the most fundamental and preemptory of rights.²²⁶ In particular, article 1 of the American Convention calls on States to respect and ensure the rights enshrined in the Covenant “without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

153. There are two types of discrimination: direct and indirect discrimination. Direct discrimination consists of measures adopted by a State that intentionally disadvantage an individual or group on the basis of a prohibited ground, such as sex. In contrast, indirect discrimination occurs when a seemingly neutral provision or practice disproportionately impacts a particular group without reasonable justification, such as singling out poor, HIV-

²²⁴ *Juridical Conditions and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, para. 88 (Sept. 17, 2003), available at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

²²⁵ See, e.g., Universal Declaration, *supra* note 90, at arts. 2, 7; ICESCR, *supra* note 63, at arts. 2(2), 3; ICCPR, *supra* note 62, at arts. 2, 26; International Convention on the Elimination of Racial Discrimination, art. 2 G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969); Convention on the Rights of the Child, art. 2, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2 1990); American Declaration, *supra* note 145, at art. II. See also, Advisory Opinion OC-18/03, *supra* note 224, at para. 86 (noting that “[t]he fact that the principles of equality and non-discrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle”).

²²⁶ Advisory Opinion OC-18/03, *supra* note 224, at paras. 101, 106. See also, Human Rights Committee, *General Comment 18: Non-Discrimination* (37th Sess. 1989), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, para.1, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003) [hereinafter Human Rights Committee, *General Comment 18*] (“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”); ICCPR, *supra* note 62, at art. 4(1) (forbidding discrimination even in times of national emergency).

positive women for non-consensual surgical interventions.²²⁷ Both types of discrimination are forbidden, not only in the inter-American system,²²⁸ but also by the Human Rights Committee,²²⁹ the Committee on the Elimination of Discrimination against Women,²³⁰ the European Court of Human Rights,²³¹ and the African Commission on Human Rights.²³²

²²⁷ See, e.g., *D.H. and Others v. the Czech Republic*, Application No. 57325/00, Eur. Ct. H.R., para.184 (Nov. 13, 2007) (“The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.”).

²²⁸ See *Case of The Girls Yean and Bosico v. Dominican Republic*, 2005 Inter-Am Ct. H.R. (Ser. C) No. 130, para.141 (Sept. 8, 2005) (holding that “the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that . . . States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights”), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf; Advisory Opinion OC-18/03, *supra* note 224, at para.103 (interpreting Articles 1 and 24 of the American Convention as prohibiting “any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination”). See also, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4, para.54 (Jan. 19, 1984) (stating that “Article 24 restates to a certain degree the principle established in Article 1(1)”), available at http://www.corteidh.or.cr/docs/opiniones/seriea_04_ing.pdf; *William Andrews v. United States*, Case 11.139, Inter-Am. C.H.R., Report N° 57/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 570, para.173 (1997) (interpreting Article II of the American Declaration as requiring that “*application* of the law should be equal for all without discrimination”) (emphasis added), available at <http://www.cidh.org/annualrep/97eng/USA11139.htm>.

²²⁹ See Human Rights Committee, *General Comment 18*, *supra* note 226, at para.7 (defining discrimination under Articles 2 and 26 of the ICCPR as “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the *purpose* or *effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”). Article 2 of the ICCPR states that: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 further establishes that: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²³⁰ See Committee on the Elimination of Discrimination against Women, *General Recommendation 25: On Temporary Special Measures* (30th Sess., 2004), para.7, U.N. Doc. CEDAW/C/2004/I/WP.1/Rev.1 (2004) (“Firstly, States parties’ obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies.”), available at [http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf).

²³¹ See *D.H. and Others v. the Czech Republic*, Eur. Ct. H.R., *supra* note 227, at para.175 (holding that “a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.”). Article 14 of the European Convention states that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” The principle of equal protection and nondiscrimination is also embodied in Protocol 12 of the Convention, Article 1 of which affirms that: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

²³² See *Legal Resources Foundation v. Zambia*, Comm. No. 211/98, Afr. C.H.R., para.70 (2001) (interpreting Articles 2 and 3 of the African [Banjul] Charter on Human Rights as requiring “the *purpose* or *effect* of any limitation. . . be examined”) (emphasis added). Article 2 guarantees that: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or

154. The right of equal protection, as protected in article 24 of the American Convention²³³ and article 4 of the Convention of Belém do Pará,²³⁴ is bound up with the prohibition on discrimination. The Commission has explained that “the right to equality before the law means not that the substantive protections of the law will be the same for everyone, but that the application of the law should be equal for all persons without prejudice or discrimination.”²³⁵ The Inter-American Court has further acknowledged the “inseparable connection” between the guarantees of non-discrimination and of equal protection under the law, “recognizing [that] equality before the law . . . prohibits all discriminatory treatment.”²³⁶ Therefore, the guarantees of nondiscrimination and equal protection are usually analyzed together.

155. While not all distinctions among individuals or groups violate the principle of equal protection and nondiscrimination, a distinction is discriminatory if it “lacks objective and reasonable justification.” Thus, States are prohibited from “enact[ing] laws, in the broadest sense, formulat[ing] civil, administrative or any other measures, or encourag[ing] acts or practices of their officials, in implementation or interpretation of the law that discriminates against a specific group of persons” on one of the prohibited grounds. The Inter-American Court has further found that States have a positive obligation to “combat practices of [a discriminatory] nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual.”²³⁷ This obligation even extends to the actions of third parties who, “with [the State’s] tolerance or acquiescence, create, maintain, or promote discriminatory situations.”²³⁸

156. The principles of non-discrimination and equal protection of the law are cross-cutting principles. Accordingly, article 1 obligations require States to respect and ensure every right protected in the American Convention—including the rights to physical and mental integrity, humane treatment, personal liberty, privacy, family life, health, and judicial protection—on an equal basis, without distinction as to sex, health status or any other prohibited category.

157. Accordingly, State action that disproportionately violates the rights of a protected group or sub-group of the population, such as women or HIV-positive people, simultaneously violates the principle of non-discrimination and equality before the law.

10.7.1. The State’s actions and omissions discriminated against F.S. on the basis of her gender.

158. Discrimination on the basis of sex is expressly prohibited under article 1 of the American Convention. In addition, article 6 of the Convention of Belém do Pará affirms that “[t]he right of women to be free from all forms of discrimination.” The Convention on the

social origin, fortune, birth or other status.” Article 3 establishes that “[e]very individual shall be equal before the law” and that “[e]very individual shall be entitled to equal protection of the law.”

²³³ American Convention, *supra* note 59, at art. 24 (“All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”).

²³⁴ Convention of Belém do Pará, *supra* note 60, at art. 4(f) (recognizing “[t]he right [of every woman] to equal protection before the law and of the law.”).

²³⁵ *William Andrews v. United States*, Inter-Am. C.H.R., *supra* note 228, at para.173.

²³⁶ Advisory Opinion OC-18/03, *supra* note 224, at para. 83.

²³⁷ Case of *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (Ser. C) No. 127, paras. 185-186 (June 23, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf.

²³⁸ Advisory Opinion OC-18/03, *supra* note 224, at para.104.

Elimination of All forms of Discrimination against Women (CEDAW Convention) more fully develops the concept of discrimination against women, defining it as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ... on a basis of equality of men and women, of human rights and fundamental freedoms.”²³⁹ Article 2 of CEDAW obliges States “to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, ... [t]o refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.”

159. The CEDAW Committee has stated that “[t]he definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”²⁴⁰

160. As discussed above, coercive sterilization is a form of gender-based violence that disproportionately affects women and “seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.”²⁴¹ Accordingly, such practices violate a woman’s right to be free from gender-based discrimination. Furthermore, the Inter-American Commission has acknowledged that the denial of justice in cases alleging gender-based violence is rooted in discrimination against women, which deprioritizes such claims.²⁴²

161. In the present case, Dr. Gatica coercively sterilized F.S., targeting her for her status as a woman living with HIV/AIDS. Subsequently, the Public Prosecutor, the Juzgado de Garantía de Curicó, and the Corte de Apelaciones de Talca conducted a biased and incompetent investigation into her allegations of coercive sterilization. The arbitrary and abusive conduct of all of these State agents discriminated against F.S. on the basis of her gender, thus failing to respect and ensure the above-enumerated rights on an equal basis with men and denying F.S. the equal protection of the law.

10.7.2 The State’s actions and omissions discriminated against F.S. on the basis of her HIV status.

162. The human rights of people living with HIV/AIDS are at constant risk of infringement due to the high level of stigma around the disease. As the Pan American Health Organization has noted, “being HIV-positive can lead to a non-exercise or non-enjoyment of human rights, as when those who are living with the virus suffer ... acts of discrimination.”²⁴³

163. Although not explicitly enumerated among article 1’s protected categories, discrimination on the basis of one’s health status, including HIV status, is prohibited under international human rights law. Article 1 of the American Convention prohibits discrimination on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or *any other social condition*.”²⁴⁴ While the

²³⁹ CEDAW, *supra* note 61, at art. 1.

²⁴⁰ CEDAW, *General Recommendation 19*, *supra* note 124, at para. 6.

²⁴¹ *Id.* at para.1.

²⁴² *Access to Justice for Women Victims of Violence*, *supra* note 182, at para.151, p. 60.

²⁴³ PAHO, HIV/AIDS-RELATED STIGMA, *supra* note 211, at 17-18.

²⁴⁴ American Convention, *supra* note 59, at art. 1 (emphasis added).

Commission has not fully elaborated what constitutes “any other social condition,” the Committee on Economic, Social and Cultural Rights has interpreted the corresponding provision of the International Covenant on Economic, Social and Cultural Rights to encompass health status, including HIV/AIDS.²⁴⁵ Other international bodies have reaffirmed this interpretation of health status, and particularly HIV status, as a prohibited category on which to discriminate.²⁴⁶

164. The United Nations Declaration of Commitment on HIV/AIDS requires U.N. Member States to “eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS.”²⁴⁷ U.N. members further agreed to “ensure the development and implementation of ... national strategies ... that address the epidemic in forthright terms; confront stigma, silence denial; address gender and age-based dimensions of the epidemic; eliminate discrimination and marginalization.”²⁴⁸

165. The International Guidelines on HIV and Human Rights similarly highlight the importance of eliminating discrimination against people living with HIV/AIDS, providing that “States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors ... and provide for speedy and effective ... remedies.”²⁴⁹ The Guidelines further provide that “States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights.”²⁵⁰

166. Nowhere is this principle of non-discrimination more salient than in the provision of health care services, which are central to the protection of, *inter alia*, the rights to health, life, and physical integrity of people living with HIV/AIDS. The Committee on Economic, Social and Cultural Rights has stated that “health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds,” and includes people living with HIV/AIDS among those vulnerable and marginalized populations.²⁵¹ The International Guidelines on HIV/AIDS provides that “States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV prevention, treatment, and care and support.”²⁵² Chile’s domestic legal framework on HIV similarly calls for non-discrimination in the area of health care, providing that “ningún establecimiento de salud, público o privado, cuando sea

²⁴⁵ See, e.g., CESCR, *General Comment 14*, *supra* note 163, at para.18 (“[T]he Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, ... health status (including HIV/AIDS), which has the intention or effect of nullifying or impairing equal enjoyment or exercise of the right to health.”).

²⁴⁶ See, e.g., UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (47th Sess.), Resolution 1995/21, U.N. Docs. E/CN.4/Sub.2/1995/51 (1995) (stating “that discrimination on the basis of HIV or AIDS status, actual or presumed, is prohibited by existing international human rights standards, and that the term “or other status” in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS”).

²⁴⁷ *Declaration of Commitment on HIV/AIDS*, General Resolution of the U.N. General Assembly, para. 58, UN Doc. A/RES/S-26/2 (Aug. 2 2001).

²⁴⁸ *Declaration of Commitment on HIV/AIDS*, *supra* note 247, para. 37.

²⁴⁹ Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, INTERNATIONAL GUIDELINES ON HIV AND HUMAN RIGHTS, Guideline 5 (2006).

²⁵⁰ INTERNATIONAL GUIDELINES ON HIV AND HUMAN RIGHTS, *supra* note 249, at Guideline 11.

²⁵¹ CESCR, *General Comment 14*, *supra* note 163, at para 12.b.

²⁵² INTERNATIONAL GUIDELINES ON HIV AND HUMAN RIGHTS, *supra* note 249, at Guideline 6.

requerida su intervención de acuerdo con la ley, podrá negar el ingreso o atención a personas portadoras o enfermas con el virus de inmunodeficiencia humana o condicionar lo anterior a la realización o presentación de resultados del referido examen.”²⁵³

167. Despite these numerous provisions prohibiting discrimination on the basis of HIV status, discrimination against people living with HIV/AIDS is deep-seeded and widespread. Discrimination against women living with HIV/AIDS is particularly invidious, as “HIV/AIDS is also linked to longstanding stigmas of sexual misconduct.... ‘People with HIV/AIDS are often believed to have deserved what has happened’” because they are perceived to be promiscuous.²⁵⁴ Indeed, as the Pan American Health Organization has noted, “HIV infection is so strongly associated with promiscuity that women with the virus are frequently assumed to be promiscuous, irrespective of their sexual history. When HIV is diagnosed, ‘men are more likely to be accepted by family and community. Women ... are more likely to be blamed.’”²⁵⁵

168. Vulnerable populations, such as HIV-positive women, are often more susceptible to violence and other acts of gender-based discrimination.²⁵⁶ Coercion in the area of reproductive health care, such as forced sterilization of women living with HIV/AIDS, is a common manifestation of such discriminatory violence, with reports of such practices emerging all over the globe.²⁵⁷ The experience of Chilean women living with HIV is no exception. As discussed above,²⁵⁸ a study on women living with HIV revealed high incidences of discrimination and coercion when HIV-positive women attempted to access reproductive health services. In particular, of the women interviewed, 56 percent indicated that they were pressured to use contraceptives to prevent pregnancy, and 34 percent were pressured into sterilization.²⁵⁹ Indeed, of the women who underwent surgical sterilizations after they learned of their HIV status, 50 percent reported that they were pressured by health care providers to do so.²⁶⁰ Personal anecdotes indicate that this discriminatory practice is still common throughout Chile.

169. In the present case, State agents repeatedly discriminated against F.S. on the basis of her HIV status. As F.S. attests, throughout her stay in the hospital, medical personnel criticized her for being pregnant, isolated her, and made clear their distaste at having to treat her—all because of her HIV status. Dr. Gatica determined that, because she was a woman living with HIV, she should not be allowed to have any more children. Furthermore, the biased and incompetent manner in which the investigation and prosecution was carried out demonstrates that this discrimination carried over into the judicial system.

²⁵³ República de Chile, Establece Normas Relativas al Virus de Inmuno Deficiencia Humana y Crea Bonificación Fiscal para Enfermedades Catastróficas, Ley No. 19.779, art. 7 (*published* Dec. 14, 2001).

²⁵⁴ PAHO, HIV/AIDS-RELATED STIGMA, *supra* note 211, at 14.

²⁵⁵ PAHO, HIV/AIDS-RELATED STIGMA, *supra* note 211, at 14.

²⁵⁶ U.N. Secretary-General Report on VAW, *supra* note 136, at para. 160.

²⁵⁷ *See, e.g.*, CENTER FOR REPRODUCTIVE RIGHTS, AT RISK: RIGHTS VIOLATIONS OF HIV-POSITIVE WOMEN IN KENYAN HEALTH FACILITIES (2008); HUMAN RIGHTS WATCH, A TEST OF INEQUALITY: DISCRIMINATION AGAINST WOMEN LIVING WITH HIV IN THE DOMINICAN REPUBLIC (2004); AMNESTY INTERNATIONAL, “I AM AT THE LOWEST END OF ALL”: RURAL WOMEN LIVING WITH HIV FACE HUMAN RIGHTS ABUSES IN SOUTH AFRICA (2008); AMNESTY INTERNATIONAL, “I AM NOT ASHAMED”: HIV/AIDS AND HUMAN RIGHTS IN THE DOMINICAN REPUBLIC AND GUYANA (2006).

²⁵⁸ *See, supra*, Section 10.5.1, para. 129.

²⁵⁹ MUJERES CHILENAS VIVIENDO CON VIH/SIDA, *supra* note 1, at 68.

²⁶⁰ *Id.* at 106.

170. As discussed above, the Chilean State's actions violated F.S.'s rights to physical and mental integrity, humane treatment, personal liberty, privacy, family-life, health, effective judicial remedy and the right to be free from gender-based violence. The State denied F.S. the equal protection of these rights because she was a woman living with HIV, in contravention of articles 1 and 24 of the American Convention. Accordingly, the Commission should find that the Chilean State failed to respect and ensure the above-enumerated rights without discrimination on the prohibited grounds of sex and HIV status.

XI. PETITION

171. Based on the above-presented petition, we respectfully request that the Honorable Inter-American Commission on Human Rights:

1. Declare the present petition admissible,
2. Analyze the merits of this petition, resolving that the Chilean State has violated the rights of F.S. as alleged above,
3. When appropriate, establish methods of reparation for the harms suffered, as well as guarantees of non-repetition,
4. When appropriate, exhort the State to adopt necessary legislative and policy measures to guarantee to women and people living with HIV/AIDS the full and equal enjoyment of the rights enshrined in the American Convention and the Convention of Belém do Pará,
5. When appropriate, compel the State to hold its agents accountable for the rights violations alleged, and
6. When appropriate, present the case before the Inter-American Court on Human Rights.

XII. ANNEXES

ANNEX I

For the co-petitioning organizations Center for Reproductive Rights and Vivo Positivo,

Sincerely,



Luisa Cabal
Director
International Legal Program
Center for Reproductive Rights

DATE: FEBRUARY 3, 2009