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**REPORT No. 18/20**  
**PETITION 449-16**  
ADMISSIBILITY REPORT

MARIA AND FAMILY  
PERU

Approved electronically by the Commission on March 22, 2020

**Cite as:** IACHR, Report No. 18/20, Petition 449-16. Admissibility. Maria and family. Peru.  
March 22, 2020.

**I. INFORMATION ABOUT THE PETITION**

Petitioner:	Center for Reproductive Rights (CRR) and others <sup>1</sup>
Alleged victim:	Maria <sup>2</sup> and family
Respondent State:	Peru <sup>3</sup>
Rights invoked:	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy), 25 (judicial protection), 26 (economic, social and cultural rights) of the American Convention of Human Rights <sup>4</sup> in relation to art 1.1 (obligation to respect rights); and Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. <sup>5</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>6</sup>**

Filing of the petition:	March 17, 2016
Notification of the petition to the State:	July 17, 2018
State's first response:	October 18, 2018
Additional observations from the petitioner:	November 2, 2016, May 26, 2017, February 27, 2018, February 1, 2019, April 25, 2019
Additional observations from the State:	October 2, 2019

**III. COMPETENCE**

Competence <i>Ratione personae</i> :	Yes
Competence <i>Ratione loci</i> :	Yes
Competence <i>Ratione temporis</i> :	Yes
Competence <i>Ratione materiae</i> :	Yes, American Convention (deposit of instrument of ratification on July 28, 1978) and Belém do Pará Convention (deposit of instrument of ratification on June 4, 1996)

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

Duplication of procedures and International <i>res judicata</i> :	No
Rights declared admissible	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy), 24 (equal protection), 25 (judicial protection), 26 (economic, social and cultural rights) of the American Convention of Human Rights in relation to art 1.1 (obligation to respect rights) and art 2 (domestic legal effects) and Article 7 of the Belém do Pará Convention
Exhaustion of domestic remedies or applicability of an exception to the rule:	Exceptions from Articles 46.2.a and 46.2.c apply, under the terms of section VI
Timeliness of the petition:	Yes, under the terms of section VI

**V. ALLEGED FACTS**

1. The petitioner submits that the alleged victim was sexually abused on two occasions and denounces the responsibility of the State for lack of diligent investigation, perpetuating impunity with respect to the facts allegedly committed by three of those responsible. It also denounces the denial of free access to

<sup>1</sup> Asociación Paz y Esperanza, Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX) and Estudio para la Defensa de los Derechos de la Mujer (DEMUS).

<sup>2</sup> The petitioners requested that the alleged victim be assigned the name of "Maria" to preserve her identity as she was victim of sexual violence.

<sup>3</sup> Based on art. 12.2.a of the Rules of Procedure of the Commission, Commissioner Francisco José Eguiguren, a Peruvian national, did not participate in the debate or decision of the current matter.

<sup>4</sup> Hereinafter "American Convention" or "the Convention".

<sup>5</sup> Hereinafter "Belem do Pará Convention".

<sup>6</sup> The observations of each party were duly notified to the other party.

emergency oral contraception (AOE) while she was in the hospital and the right to autonomous and free reproductive choices.<sup>7</sup> The petitioner argues that as part of the right to be treated equally, and as part of the health services provided to victims of sexual violence, this denial constituted a violation of these rights.

2. The petitioner indicates that by means of a ministerial resolution, on July 13, 2001, family planning standards were extended to incorporate the AOE as a contraceptive method.<sup>8</sup> On June 21, 2004, the Ministry of Health approved the National Guidelines for Comprehensive Attention for Sexual and Reproductive Health, including the Protocol on violence against women, which states that in cases of patients coming for consultation after being raped, AOE should be offered and administered. Finally, on July 18, 2005, the Ministry of Health approved the "Family Planning Technical Standard" which recognizes the AOE as a contraceptive method. However, in a ruling dated October 16, 2009, the Constitutional Court ordered the Ministry of Health to refrain from developing as a public policy the free national distribution of the so-called "Next Day Pill", Levornorgestrel.<sup>9</sup> The petitioner informs that, as a result of said decision, the State does not provide AOE for free or sell it in public hospital pharmacies, although its distribution and sale in private pharmacies and hospitals is still allowed, generating a situation of discrimination, as not all women, let alone girls and adolescents, have the necessary financial resources to access it.

3. The petitioner argues that under the previously described scenario, the alleged victim, after being sexually assaulted twice, was denied effective and free from discrimination access to the AOE. The petitioner argues that the alleged victim was raped a first time, on February 25, 2014, by a schoolmate, and a second time, on March 23, 2014, by four men, including the former aggressor, who then left her abandoned in a park. They contend that on the same day, the relatives of the alleged victim took her to the Hermilio Valdizan Medrano Public Hospital, where she remained until March 26. The staff informed the parents that in order to examine her, they had to file a criminal complaint, thus delaying the health care provided to the victim, when it was an emergency situation. Therefore, on that same day, the mother of the alleged victim filed a criminal complaint with the Deputy Prosecutor of the First Corporate Criminal Provincial Prosecutor's Office in Huánuco.<sup>10</sup> The mother took the copy of the complaint to the Hospital, where at 23:00 hours of the same day she arrived with the legist doctor Flemin Maylle Adriano, who performed the exams in the hospital's surgery service. The petitioners submit that once the exams completed, and 48 hours after the rape, the so-called "Next Day Pill", AOE, was prescribed to the victim, without however providing her with the information on the proper way to use it or other possible alternatives, and without the alleged victim being able to ask questions about the prescription and its nature and effects. Since neither the hospital nor the public pharmacies had the AOE, the alleged victim had to obtain it in a private pharmacy, despite her limited financial resources. Finally, the petitioner indicated that during the four days he was in the hospital, the medical visits were carried out by different people every single day, each one of them asking about the rape again and again, revictimizing her every time.<sup>11</sup>

4. Regarding equal access to emergency oral contraception, the petitioners allege that there is no remedy available in Peru that could repair the human rights violations caused by denying access to the pill. Petitioners indicate that the only remedy available would be filling an amparo, but that it would be ineffective, since it would be unreasonable for the alleged victim to have to exhaust this recourse considering the highest judicial instance in constitutional matters has affirmed the prohibition of the public distribution of the AOE.<sup>12</sup> Petitioner also indicates that the control of constitutionality in Peru is concentrated, hence this

<sup>7</sup> The petitioner refers to the concept of personal freedom developed by the Inter-American Court in the case *Artavia Murillo (In vitro fertilization) vs. Costa Rica* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257.

<sup>8</sup> It included two sets of combined pills known as Yuzpe method and the pills of Progéstágeno, Levornorgestrel (Postinor) and Norgestrel (Ovrette).

<sup>9</sup> The petitioners alleged that the Tribunal did not include in its decision any reference on the Yuzpe method, which has been included in the national policies, but which level of efficacy is lower and which causes collateral effects.

<sup>10</sup> In relation to the first episode, she alleges that the aggressor threatened her with killing her parents and nephew if she denounced the facts reason why the petitioner didn't present a claim before the police.

<sup>11</sup> The petitioners highlight that since the sexual abuse, Maria presented sleep problems and lack of appetite among other manifestations of the sexual violence trauma. Moreover, the psychologic evaluation concluded that the alleged victim presented indications of emotional stress and depression compatible with a traumatic sexual experience negatively impinging in her life project.

<sup>12</sup> Decision from the Constitutional Tribunal 2005-2009-PA/TC October 26, 2009.

Court is the only Court in the country to entertain amparos.<sup>13</sup> Finally, they allege that the appeal lacks the necessary speed to consider it suitable and effective. Experience shows that it is not possible to obtain a ruling in the form of an amparo by a judicial authority within a period of less than 72 hours, the period prescribed to take the AOE for it to be effective. In this regard, they refer to the *Violeta Cristina Gómez v. Ministry of Health* case, in which it took 38 days to obtain a decision on a precautionary measure ordering the State to distribute the AOE, and for which there is still no definitive ruling even after five years.<sup>14</sup> Additionally, they indicate that although a precautionary measure was decreed in this case, compliance with said measure has been deficient.<sup>15</sup> Therefore, the appeal for amparo is not suitable to protect the infringed rights and, consequently, should not be considered as an internal remedy that needs to be exhausted.

5. Regarding the criminal process, the petitioner indicates that on April 24, 2014, Prosecutor Yanet Marlenen Corfero Dias ordered to initiate the preliminary investigation for the alleged commission of the rape against the alleged victim. On May 9, 2014, the alleged victim gave her statement in the investigation that was carried out against Willinton Albornoz Ramos, and on May 16, she underwent a psychological expertise. On June 21, 2014, the protocol of psychological expertise of the accused and the alleged victim was taken. Subsequently, on September 4, 2014, the Prosecutor's Office of the First Civil and Family Provincial of Huánuco was requested to formalize the complaint against the accused for the commission of rape. On December 23, 2014, the Court decided to open a judicial investigation against the accused, providing for his preventive detention as a procedural condition, emitting location and capture orders. The accused was captured on July 20, 2015, having been considered a fugitive from justice to that date, period during which the alleged victim continued to receive threats from the aggressor by telephone and through Facebook and other social networks. On July 22, 2015, the Second Specialized Family Court of Huánuco issued a sentence in which it declared the criminal responsibility of the accused for the rape of the alleged victim. Since at the time of the events the perpetrator was 17 years old, the court ordered a socio-educational internment measure for a period of one year, as well as civil reparation of 900 sol, to be paid to the alleged victim. After an appeal filed by the accused, on October 29, 2015, the Civil Chamber of the Superior Court of Justice of Huánuco confirmed the judgment of first instance, ratifying the conviction and the socio-educational measure ordered in the first instance.<sup>16</sup> The petitioner indicates that since the prosecution did not exercise its ex officio power to appeal the sentence, the decision is final, so domestic remedies were exhausted. On July 18, 2016, the Family Court declared the accused rehabilitated and restored all his suspended or restricted rights, a resolution which was confirmed on August 2, 2016.

6. Regarding the other perpetrators, the petitioners argue that up to the date of filing the petition, and more than 2 years after the facts took place, none have been located, prosecuted or convicted for their participation in the facts. They argue that, despite the allegations and testimonies granted by the victim and her relatives, the State failed on its duty to diligently investigate and take procedural action in this regard. Therefore, they argue that the exception provided in Article 46.2.c of the American Convention applies.

7. For its part, the State requests that the petition be declared inadmissible. Regarding the criminal process, the State alleges that it has carried out a serious, impartial and effective investigation, aimed at the determination of the truth, the persecution, capture, prosecution and eventual punishment of the perpetrators of the criminal acts. It argues that, particularly in the absence of witnesses, the scientific tests that could be done were exhausted, but that a result that would give evidence of the participation of the alleged aggressors could not be obtained from them. This situation does not imply a breach of the State's obligation regarding the investigation of the facts, since this obligation is one of means and not of results. Also, the appeal of a conviction is not an ex officio duty as argued, but is a discretionary power exercised by the prosecutor, taking into account several factors. The Public Ministry chose not to appeal the judgment against the accused, on the basis that it was harmoniously complying with the obligations of the State and the various interests at stake. Thus, it is clear that the questioning of the judicial decisions issued by the

<sup>13</sup> The petitioner makes reference to the Inter-American Court case *Artavia Murillo and others* ("in vitro fertilization") vs. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257.

<sup>14</sup> The petitioner makes reference to said case in response to the observations presented by the State.

<sup>15</sup> The petitioners indicate that based on studies AOE has only been distributed in 15 out of the 25 departments of Peru and in less than 20% of healthcare facilities.

<sup>16</sup> On April 1, 2016 the request for liberty with conditions presented by the person convicted of the crime was declared inadmissible.

competent jurisdictional bodies is not duly substantiated, but is rather only supported by mere disagreement with the result obtained; the petitioner intends that the IACHR acts as a fourth instance court.

8. Likewise, the State argues that the petition does not comply with the requirement regarding the exhaustion of domestic remedies. It alleges that the petitioner should have filed an amparo, a process aimed at the rapid and effective protection of fundamental rights, such as health and equality. Likewise, in order to prevent certain acts that violate fundamental rights from becoming irreparable, due to their urgency, the possibility of issuing precautionary measures has been incorporated in order to suspend the violation. Hence, the alleged victim has an ideal remedy available, which is not an extraordinary remedy, but a formal constitutional process. In this regard, the State refers to a resolution issued by the First Constitutional Court of the Superior Court of Lima on June 19, 2016, whereby a precautionary measure was issued, ordering the Ministry of Health to distribute the AOE free of charge in all health centers nationwide, within 30 days. The State alleges that the Ministry of Health has complied with said resolution. It also indicates that on July 2, 2019, the First Constitutional Court of Lima issued a resolution ordering the Ministry of Health to give information about and distribute the emergency oral contraceptive free of charge, noting that the decision of the Constitutional Court 2005-2009-PA / TC of October 26, 2009 contravened the criteria established by the Inter-American Court in the case of *Artavia Murillo et al. vs. Costa Rica*.

9. Finally, the State indicates that although the American Declaration of the Rights and Duties of Man can be used by the IACHR to interpret the Convention, it cannot serve as a source to claim direct effects of any of its provisions. In this regard, it indicates that, unlike the Convention, the Declaration does not contain among its recognized rights the right to health and social security. Likewise, only the rights recognized in Articles 8 and 13 of the Protocol of San Salvador can be argued through the individual communications system before the IACHR.

## **VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

10. Regarding the criminal process, the petitioner contends that the investigations have not been completed and all those responsible for the facts have not been punished, since only one of those responsible was identified and convicted. For its part, the State argues that the criminal proceedings have been carried out within a reasonable period of time, in accordance with the complexity of the matter and due diligence on behalf of the State. The Commission notes that on July 22, 2015, the Second Specialized Family Court of Huánuco sentenced one of those responsible for the rape of the alleged victim to prison. However, the Commission observes that the petitioners allege that the State's inaction is the reason why the responsibility of three of the four alleged responsible parties would remain in impunity. In view of the foregoing, the Commission considers the exception provided for in Article 46.2.c of the American Convention applies.

11. Regarding equal access to the AOE, the Commission observes that it is an uncontroversial fact that there was a final and binding decision at the time issued by the highest judicial instance of Peru in constitutional matters, which declared the unconstitutionality of its distribution by the Ministry of Health. The Commission notes that the State argues that there was no exhaustion of domestic remedies, since the petitioner did not exhaust the amparo, which was available and suitable, as demonstrated by an action filed regarding similar facts, in which a precautionary measure was issued on June 19, 2016, ordering the distribution of the AOE within 30 days. The Commission also takes note of the subsequent decision of July 2, 2019, resolving the merits of the appeal. Regarding this, the petitioners indicate that the usual timeframe to resolve such appeal does not protect the rights of the alleged victim, since it is not possible to obtain a ruling by a judicial authority within a period of time allowing the administration of AOE to be effective. Therefore, the Commission observes that in the specific circumstances of the present case, there was no remedy in the domestic legislation of the State that could be effective for the protection of the rights allegedly violated. Thus, the Commission concludes that the exception provided for in Article 46.2.a of the Convention applies.

12. On the other hand, the IACHR observes that the events occurred in 2014 and that there is a conviction dated July 22, 2015, confirmed on October 29, 2015, so it is considered that the petition was presented within a reasonable period of time and the admissibility requirement regarding the submission period is satisfied.

## **VII. COLORABLE CLAIM**

13. The Commission notes that this petition includes allegations regarding the lack of diligent investigation by the State as part of the criminal process, which would have impeded the clarification of the facts and the punishment of all those responsible, as well as also contributing to the lack of effective access to justice of the alleged victim within this process, including the denial of access to the AOE on an equal basis and the lack of relevant and complete information in this regard. In view of these considerations and after examining the factual and legal elements presented by the parties, the Commission considers that the claims of the petitioner are not manifestly unfounded and require a substantive study since the alleged facts, if corroborated as true, could characterize violations of Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy), 24 (equal protection), 25 (judicial protection), 26 (economic, social and cultural rights) of the American Convention, in relation with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of said treaty; as well as Article 7 of the Convention of Belém do Pará. Likewise, the Commission will analyze at the merits stage whether the penalty imposed to the perpetrator and the reparation granted to the alleged victim as a result of the criminal proceeding follow the standards set by of the American Convention.

## **VIII. DECISION**

1. To find the instant petition admissible in relation to Articles 5, 7, 8, 11, 24, 25 and 26 of the American Convention, in relation with its Articles 1.1 and 2, and Article 7 of the Belem do Para Convention; and

2. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 25<sup>th</sup> day of the month of February, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Margarete May Macaulay, and Stuardo Ralón Orellana (dissenting opinion), Commissioners.

**DISSENTING OPINION, COMMISSIONER STUARDO RALÓN ORELLANA**  
**Report on Admissibility No. 18/20, Petition No. 449-16, “María and Family against Peru”**

I must respectfully lodge my dissenting opinion in relation to the present admissibility report. After examining the arguments of the majority, I believe the case before us must be ruled inadmissible. That determination is based on two reasons:

ONE: The State has examined and judicially punished the actions.

Despite the enormous human drama that the facts of the case reveal, it can also be observed that they have been effectively examined and punished by the respondent state’s courts. Hence, in accordance with the provisions of Article 47.c of the American Convention, it can be concluded that the complaint is obviously out of order.

TWO: The complaint seeks to condemn the State for actions that are not a right recognized in the American Convention on Human Rights.

The complaint seeks the censure of the State for actions that, according to the petitioner, constitute a violation of a right protected by the Convention. Abortion is not, however, a Convention right, and States are therefore not obliged to furnish the means for the procedure to be carried out. Again in connection with this aspect, the complaint is also inadmissible in that, in keeping with Article 47.c of the American Convention, it does not tend to establish a violation of “rights guaranteed by this Convention.”

**REASONING AND GROUNDS FOR THE DISSENTING OPINION**

As already noted, the facts of the case are extremely dramatic. It involves a situation in which a 17-year-old adolescent raped the complainant. Once the agencies responsible for criminal prosecutions in Peru were informed of that fact, they began the proper investigations. Thus, the competent agencies fulfilled their duty of investigating and identified the adolescent in question as the perpetrator of the crime. The courts then heard the charges and, in 2015, decided to sentence the perpetrator to a one-year prison term and the payment of damages as compensation. The State explains that this punishment was imposed because at the time of the crime, the perpetrator was not yet of adult age. The courts then enforced the adolescent criminal statute with respect to the perpetrator. The accused lodged an appeal against the ruling of the first-instance court; however, the appeals court upheld the lower court’s judgment. Finally, in 2016, after completing his year in detention, the perpetrator of the crime was released and was fully restored in the exercise of his rights in accordance with Peruvian law.

As can be seen, in response to a crime committed by a private citizen, the State reacted by investigating the situation, identifying the guilty party, and punishing him in accordance with its criminal legislation. From that

point of view, the State of Peru has met its international human rights duties as set out in the American Convention.

Clearly, each of us may maintain his or her own opinion regarding whether the punishment imposed was appropriate, or whether the public prosecutor should have challenged the appellate court's judgment in order to secure a stiffer sentence. However, were the Commission to embark on an examination of those circumstances, it would necessarily be setting itself up as a court of the fourth instance. Indeed, assessing the proportionality of the imposed sentence or analyzing whether domestic law was correctly interpreted and enforced by the agencies involved in the proceedings are matters beyond the Commission's competence, as it has established in its own precedents on repeated occasions. Ruling this case admissible would therefore open a door whereby, hypothetically, the Commission would ultimately be able to judge matters over which the States have not granted jurisdiction.

Furthermore, the petitioner claims that the State failed to provide her with the emergency contraception known as the "morning-after pill" after she reported the rape. According to the petitioner's contentions, that situation represented an infringement of her human rights, on the grounds that furnishing the pill in question was an obligation of the State under the human rights enshrined in the American Convention. That reasoning would be correct if the text of the American Convention recognized abortion as a right. Indeed, were abortion a right under the Convention, States would then be obliged to furnish all women making such requests with the means necessary to abort. That, however, is not the case.

As a member of the Commission, I understand how traumatic and inhuman the situation the petitioner experienced was. Clearly, few actions constitute as serious attacks on an individual's dignity as rape. In spite of sharing and understanding the petitioner's pain, however, I must note that the Peruvian State's failure to provide the pill at that time did not represent, in accordance with Article 47.b of the American Convention, a situation of facts that "tend to establish a violation of the rights guaranteed by this Convention." That is because, quite simply, no specific provision of the American Convention on Human Rights recognizes a "right to abortion" that would, in turn, require States to provide the means necessary to carry out that procedure. On the contrary, the American Convention offers broad protection of the right to life—including the lives of the unborn—in Article 4.1, which states that "this right shall be protected by law and, in general, from the moment of conception."

In conclusion, since no provision of the American Convention on Human Rights recognizes a "right to abortion," the State's failure to provide the so-called morning-after pill, which has a clear abortifacient effect, cannot tend to establish a situation that, under Article 47.b of the Convention, represents a violation of any of rights guaranteed therein. Therefore, and also from that point of view, the petition is inadmissible.

For the reasons set out above in this opinion, I respectfully dissent.