



BOFAXE

Forcing Women to Deprioritize Their Health? (Part 1)

An Analysis of the IACtHR's Ambiguous Stance on Abortion Rights

— Six of the sixteen countries in the world, which prohibit abortions under all circumstances, are located in Middle America. Yet it remains unclear whether absolute bans on abortions are compatible with the American Convention on Human Rights (ACHR, Convention) (Castro, p. 171). So far, the relevant jurisprudence of the Inter-American Court of Human Rights (IACtHR, Court) has been rather inconsistent creating the impression that the Court is afraid of adopting a clear position on the abortion controversy. In the case of *Beatriz* the IACtHR needs to decide whether it is proportional to risk the life of a 22-year-old mother to save the life of her fetus, which will die after its birth anyway.

The blogpost will not discuss this case as an opportunity for the Court to advance a more liberal jurisprudence towards abortion but will analyze the IACtHR's rather ambiguous stance on the issue. It remains extremely difficult to predict whether the Court will grant a limited right to abortion to prevent states like El Salvador from deprioritizing a pregnant person's health for the sake of her unborn. The IACtHR's former jurisprudence suggests that this depends ultimately on the courage of the Court since abortion seems to be treated as a political than a legal question.

Background of the Case *Beatriz and Others vs. El Salvador*

El Salvador is one of the six Middle American countries outlawing abortion under all circumstances. According to Article 133 of the El Salvadorian Código Penal, a consented abortion is sanctioned with two to eight years in prison. In practice, this legislation was challenged in spring 2013 when the National Maternity Hospital of El Salvador considered medical treatment, including an abortion, of the 22-year-old lupus patient Beatriz necessary to save her life (see here and here). At that point, she was in the 13th week of pregnancy with an anencephalic fetus which was classified as not capable of extra-uterine life (para. 2.ii). Although the Constitutional Chamber of the Supreme Court of Justice adopted preventive measures, the pregnancy was not terminated. Subsequently, the Inter-American Commission on Human Rights (IACHR, Commission) was called in and required El Salvador "to adopt preventive measures to protect the life, personal integrity, and health of B" (para. 3). The IACHR based its reasoning *inter alia* on the incapability of the fetus to survive (para. 4. ii). Since El Salvador did not follow the demand, the IACHR submitted a request for provisional measures for the 24th week-pregnant Beatriz to the IACtHR (para. 3). It is noteworthy that the Commission explicitly stated that the protected good, the life of the fetus, will not last long while the mother's life can be protected by the medical termination of the pregnancy (para. 4). The Commission further stressed that it did not expect the IACtHR to rule on the legality of the El Salvadorian abortion ban (para. 4.ii). Consequently, the Court, indeed, demanded El Salvador "to adopt and guarantee, urgently, all the necessary and effective measures so that the medical team who are treating B. can take, without any interference, the medical measures they consider opportune and desirable to ensure due protection of the rights [to life and humane treatment]" (para. 1). In June, Beatriz had a C-section which has led to the death of the fetus within 5 hours.

In January 2022, nine years later, the Commission transferred the case again to the IACtHR claiming that several rights of Beatriz under the ACHR as well as under the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) were violated. The former willingness of the IACtHR to request preventive measures, the special characteristics of the mother's lupus disease, and the fetus' inability to survive after birth give the Court a good opportunity to question the absolute prohibition of abortion in El Salvador. However, it is difficult to forecast the IACtHR's ruling in this case because its former case law on abortion is rather ambiguous (cf. Castro, pp. 171, 180).



BOFAXE

Forcing Women to Deprioritize Their Health? (Part 2)

An Analysis of the IACtHR's Ambiguous Stance on Abortion Rights

Contradictory Signals

On the one hand, a peculiarity of the Convention is the explicit wording of [Article 4 \(1\) ACHR](#), which states that the right to life is “in general, [protected] from the moment of conception” ([Sedacca](#), p. 129). In addition, the [travaux préparatoires](#) can be read as trying to close the door to a right to abortion under the ACHR (cf. [Paúl](#), pp. 239f.). Until now, the IACtHR used to [avoid](#) interpreting this provision.

For example, the IACtHR found in the [Case of the Sawhoyamaya Indigenous Community v. Paraguay](#) (2006) a violation of the property rights and the right to life of members of an indigenous community (paras. 144, 178). It is [criticized](#) for not discussing if the rights of unborns of this community were affected as well ([Castro](#), pp. 174f). Moreover, in 2021, the IACtHR analyzed in [Manuela et al. v. El Salvador](#) the case of an obstetric emergency classified as aggravated homicide (para. 91f.). While several human rights violations were determined by the IACtHR (para. 173), the El Salvadorian prohibition of abortion, even in cases of emergency, [was not discussed](#) in greater detail. This leads to the impression that the IACtHR is rather cautious in interpreting Article 4 (1) ACHR or in deriving a ‘human right to abortion’ from the Convention. The ‘[reluctance](#)’ in questioning the Convention’s compatibility with abortion detracts from the human rights protection of women (and unborns) within the member states.

On the other hand, the Convention was interpreted rather progressively in the [Case of Artavia Murillo et al. \(“In Vitro Fertilization”\) v. Costa Rica](#) (2012) ([Teles Pires](#), p. 1024). In this case, the IACtHR declared the Costa Rican total prohibition of in vitro fertilization (IVF) as incompatible with the Convention since it violates the rights to humane treatment, the right to privacy, the rights of the family as well as the right to non-discrimination (para. 317). While this gives rise to the rights to (reproductive) health and to reproductive autonomy (paras. 147 ff), it is even more significant in the context of abortion ([Castro](#), p. 176), that the right to life of unborns is found to be “gradual and incremental” not “absolute” (para. 264). The restrictive interpretation of Article 4 (1) ACHR in [Artavia](#) is welcomed among progressive scholars ([Lemaitre and Sieder](#), p. 150) and criticized heavily as contradicting the wording, telos, and the historic state will by pro-life scholars (e.g., [Paúl](#), pp. 221-22, 246).

In addition, the IACtHR found in [Artavia](#) that the IVF ban of Costa Rica violates the prohibition of discrimination by acknowledging the existence of gender stereotypes leading to a greater impact of the ban on women (paras. 294ff). The [Case of I.V. v. Bolivia](#) (2016) illustrates an even further “progression in [the IACtHR’s] gender analysis” ([Palacios Zuloaga](#), p. 916) since it interpreted forced sterilization as discriminating inhumane treatment (para. 270).

Moreover, the Court found in the [Case of Brítez Arce y Otros vs. Argentina](#) (2022) that Cristina Brítez Arce, who died after giving birth to a dead child, suffered from obstetric violence, and accordingly her rights to life, integrity, health, and non-discrimination were violated (paras. 85f). This ruling is welcomed as “[historic](#)” and as [introducing](#) the concept of obstetric violence and setting “[new standards](#)” in the protection of pregnant women. It forms a further development of reproductive rights under the Convention.

Why Does the IACtHR Avoid Ruling on Abortion?

As the above analysis illustrates, the IACtHR has created a rather confusing picture of its stance towards abortion under the Convention in its previous jurisprudence. On the one hand, it has developed a rather progressive and gender-sensitive stance on reproductive rights, on the other hand it is quite cautious in even addressing the question of abortion and its compatibility with the Convention. This inconsequence of establishing a liberal jurisprudence on reproductive rights and having a rather cautious stance on abortion could be explained by [political considerations](#). Being responsible for the protection of human rights of women and unborn life in Latin America is connected with a moral area of tension between strong interests groups on both sides: The enormous influence of the catholic church for the belief what is right and wrong within the society and legislation ([Sedacca](#), pp. 131f) opposes the growing influence of women right’s group, which demand having the choice about their own body as a matter of autonomy (ibid, pp. 123f). Besides, the IACtHR is facing a compliance challenge ([Palacios Zuloaga](#), p. 932): If states disagree with the Court’s decisions, the judgements could cause a backlash ([Lemaitre and Sieder](#), pp. 157f) or be ignored ([Paúl](#), p. 130). Recalling the political pressure, the Court’s ambiguous case law could indicate that it favors a more liberal jurisprudence – but does not [dare](#) to formulate it.

What to Expect

The outcome of the IACtHR [Beatriz](#)-case is completely uncertain. Considering the strong national and social opposition against abortion rights and the Court’s judgement in [Manuela](#), it would be consequent to avoid a direct ruling on the (in)compatibility of abortion with the Convention again. However, it would also be important to finally affirm the conviction that abortion is in principle compatible with the ACHR – following the quite liberal development of reproductive rights and the interpretation of Article 4 (1) ACHR in [Artavia](#), [I.V.](#) and [Brítez](#). This could mean to balance the rights of pregnant people and unborns explicitly and grant at least a limited right to abortion whenever it is necessary for the protection of the mother’s health. This would be in line with the European jurisdiction on abortion on health grounds ([X v. the United Kingdom](#), para. 19) and with the [practice in many states worldwide](#). But it seems that it is not a purely legal question whether to explicitly prioritize a pregnant woman’s life over the one of her unborn, non-viable child.