

**THE PATH TO GENDER JUSTICE IN THE INTER-AMERICAN
COURT OF HUMAN RIGHTS**

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The Path to Gender Justice in the Inter-American Court of Human Rights*

I. Introduction.

In an individual opinion annexed to a December 2006 decision, the President of the Inter-American Court of Human Rights stated that the case in hand was the first one to ever present the Court with women's human rights issues¹. The current paper argues that this is not an accurate representation of Inter-American case law. While acknowledging that the number of gender relevant cases examined by the Inter-American Court of Human Rights (IACtHR or "the Court") is very low in comparison with other international human rights bodies, the paper shows that there have been several cases presented to the Court where the human rights of women have been an issue and where the Court has failed to address those rights adequately (or even at all). Both the numerical lack of gender relevant cases before the Court and the unfortunate handling of most of those cases that it did consider are explained herein through an analysis of the male dominated nature of law in general and international law in particular as well as an analysis of how domestic and international judicial systems respond to women's concerns. The lack of gender sensitive actors in these systems is a key factor in the phenomenon. Recent developments in the case law of the Court that show a newfound sensitivity to women's rights issues can shed light on the factors that have triggered this turnaround. Although these new cases signal a positive shift toward gender justice, there continue to be serious deficiencies in the Court's

* The author would like to thank Professor Ryan Goodman for his guidance in the drafting of this paper. Additionally, she would like to thank Professors William Alford, Reva Siegel, Henry Steiner, Martha Minow, Mindy Roseman and James Cavallaro for their helpful comments. All errors herein remain the exclusive responsibility of the author.

¹ Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, (Nov.25, 2006), (García Ramírez J., individual opinion ¶ 6).

reasoning, particularly in its failure to extend gendered logic to reparations and its reliance on stereotypes of women in order to find violations. Additionally, it appears that the Court has attempted to make up for years of ignoring women's rights by capitalizing on the trend of specialized treaties and taking the controversial decision to render the Belém do Pará Convention justiciable. While the president of the Court vigorously defends this move, there are strong reasons to doubt its appropriateness and it has yet to be seen if the lasting effect will be positive or negative for women. The paper then turns to the future cases that are making their way towards the Court and attempts to gauge how the new precedents will affect them. Finally, the paper suggests strategies to continue to enhance the sensitivity of the Court to gender issues in order to improve the treatment of women in the Inter-American Human Rights System and consequently in the region in general.

II. Background and Context.

The Inter-American system for the protection of human rights is made up of multiple organs that are charged with differing forms of promotion of the fundamental rights contained in several regional human rights documents². For the purposes of this paper, three of these documents are especially worthy of mention: the 1948 American Declaration of the Rights and Duties of Man³ (the “American Declaration”), the 1969 American Convention on Human Rights⁴ (ACHR or the “American Convention”) and the 1994 Inter-American Convention on the

² For more information on the particularities of the Inter-American system for the protection of human rights see CECILIA MEDINA & CLAUDIO NASH, *EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: INTRODUCCIÓN A SUS MECANISMOS DE PROTECCIÓN*, Centro de Derechos Humanos, Facultad de Derecho, Universidad de Chile, 2007 and HÉCTOR FAÚNDEZ LEDESMA, *EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS: ASPECTOS INSTITUCIONALES Y PROCESALES*, 2ND EDITION, Instituto Interamericano de Derechos Humanos, 1999.

³ Organization of American States, American Declaration of the Rights and Duties of Man, May 2, 1948, OAS/Ser.L/V/I.4 rev.12, Jan, 31, 2007.

⁴ Organization of American States, American Convention on Human Rights, Nov.22, 1969, O.A.S.T.S. No, 36, 1144 U.N.T.S. 123.

Prevention, Punishment and Eradication of Violence against Women⁵ (Belém do Pará Convention). The system's largest human rights organ, the Inter-American Commission on Human Rights (IACHR or "the Commission") is charged with administering an individual complaints procedure that applies the American Declaration and certain other human rights instruments to OAS member states according to their signature or ratification by each state. The American Convention created the Inter-American Court of Human Rights (IACtHR or "the Court") a supranational judicial body charged with examining individual complaints after the procedure before the Commission has failed to yield compliance by states party to that Convention. The Court can only rule on cases brought against states that have formally accepted its jurisdiction⁶ and the material scope of its jurisdiction, until 2006, was limited to the rights contained in the American Convention, two articles of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights⁷, the Inter-American Convention to Prevent and Punish Torture⁸ and the Inter-American Convention on Forced Disappearance of Persons⁹. A final point of importance for the purposes of this paper is that the Commission controls the docket of the Court. Before 2001 the Commission sent cases to the Court after a majority vote of its members to that effect; the 2001 amendment to its Rules of Procedure changed this and today all cases where the recommendations of the Commission have not been satisfactorily complied with are sent to the Court unless there is a majority vote to the

⁵ Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Jun. 9, 1994, 33 I.L.M. 1534.

⁶ American Convention on Human Rights, *supra* note 4, art. 62.

⁷ Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," arts. 8a), 13, 19, Nov. 17, 1988, O.A.S.T.S. No. 69.

⁸ Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9 1985, O.A.S.T.S. No. 67. The Court attributed jurisdiction over this Convention to itself in Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Inter-Am. Ct H.R. (ser. C) No. 63, ¶¶ 247-248 (Nov. 19, 1999) and in Case of Cantoral-Benavides v. Peru, 2001, 1988 Inter-Am. Ct H.R. (ser. C) No. 69, ¶¶ 180-191 (Aug. 18, 2000).

⁹ Organization of American States, Inter-American Convention on Forced Disappearance of Persons, art XIII, Jun. 9, 1994, 33 I.L.M. 1429.

contrary¹⁰. Once a case is brought before the Court, the Commission presents the case against the state party in an adversarial fashion and since 2001 the victim is permitted to present independent counsel in addition to the Commission¹¹.

The Court is widely recognized as the highest and most authoritative human rights tribunal in the region. States themselves request that the Court exercise its advisory opinion in matters that are politically sensitive and it is generally accepted that there is a certain political stigma in being brought before the Court. Often it is enough to initiate individual petition proceedings before the Commission to trigger the political will to remedy a human rights violation domestically through that organ's friendly settlement procedure¹². The decisions of the Court are beginning to be invoked before domestic courts as supranational precedents and can also be found in the drafting history of legislative reform bills and in the justification of public policy papers¹³. Most importantly, unlike other international dispute resolution mechanisms in the field of human rights that are open to receiving complaints from the region, the Court offers victims of human rights abuses the possibility of a legally binding decision. For this reason it tends to be favored among Latin American victims.

Against this backdrop it can be said that the case law of the Court is a tremendously useful tool for human rights practitioners, NGOs and academics in the Americas. This being the case, it is certainly a matter of concern that in 18 years of decisions on individual petitions there are only six cases that can be said to refer in a significant way to women's rights and that four of

¹⁰ Inter-American Commission on Human Rights, Rules of Procedure of the Inter-American Commission on Human Rights, art. 44, Oct. 2006, OAS/Ser.L/V/I.4 rev.12, Jan, 31, 2007.

¹¹ Inter-American Court of Human Rights, Rules of Procedure of the Inter-American Court of Human Rights, arts. 23, 33, Nov. 25, 2003, OAS/Ser.L/V/I.4 rev.12, Jan, 31, 2007; IACHR Rules of Procedure, *supra* note 10, arts. 71-74; Inter-American Commission on Human Rights, Statute of the Inter-American Commission on Human Rights, art. 19, Oct. 1979, OAS/Ser.L/V/I.4 rev.12, Jan, 31, 2007; Inter-American Court of Human Rights, Statute of the Inter-American Court of Human Rights, art. 28, Oct. 1979, OAS/Ser.L/V/I.4 rev.12, Jan, 31, 2007.

¹² American Convention on Human Rights, *supra* note 4, art. 48.1.f.

¹³ See, e.g. Cecilia Medina & Claudio Nash, *Introduction* to MANUAL DE DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS PARA DEFENSORES PÚBLICOS, (Centro de Documentación Defensoría Penal Pública, 2003).

those decisions failed to adequately identify and manage the gender sensitive issues that arose from the facts¹⁴.

The majority of victims in cases brought before the Court have been male, however when women have been victims, the allegations against the state do not necessarily disclose gender sensitive violations¹⁵. Others could possibly contain such issues but their facts are described in terms that leave the question open¹⁶. Others still contain allegations that are clearly indicative of gender based violations of human rights; the treatment afforded these cases by the Court will be examined below. The issue that most concerns the author is the fact that before 2004 the Court had not issued a ruling that recognized a gender sensitive human rights violation and therefore had not only deprived women victims of gender based justice but also deprived *women's* rights practitioners, NGOs and academics of tools that would have been helpful to advance the cause of women's rights in a region where such rights are seriously curtailed on a systematic basis.

¹⁴ Charlesworth and Chinkin have stated that “the Inter-American system has also promoted women’s rights in certain contexts” but give as an example the first case received by the Court, In the Matter of Viviana Gallardo, a case regarding the murder of a female prisoner but that was declared inadmissible. It is hard to understand what the authors meant by promoting women’s rights in this case when the Court never examined the merits of the case. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS*, 83, Manchester University Press, 2000.

¹⁵ For example the Myrna Mack case involved the stabbing murder of a human rights activist by unknown assailants. Case of Myrna Mack-Chang v. Guatemala, Inter-Am. Ct H.R. (ser. C) No. 101, (Nov. 25, 2003). Also, the Lori Berenson case involved due process violations and inhumane prison conditions, Case of Lori Berenson-Mejía v. Peru, Inter-Am. Ct H.R. (ser. C) No.119 (Nov. 25, 2004).

¹⁶ For example the disappearance of the young Serrano Cruz sisters could have put them at serious risk of gender based violence or sexual trafficking but this issue was not raised by any of the parties or the Court. Case of the Serrano-Cruz Sisters v. El Salvador, Inter-Am. Ct H.R. (ser. C) No. 120, (Mar. 1, 2005). In the Jean and Bosico Girls case, which dealt with the denial of birth certificates to girls who were descendants of Haitian immigrants, the Court stated that when reasoning it would have regard to the vulnerability of women as a group but then made no further reference to any sex discrimination, Case of the Girls Jean and Bosico v. Dominican Republic, 2005 Inter-Am. Ct H.R. (ser. C) No. 130, ¶ 134 (Sep. 8, 2005).

III. Overview of the Inter-American Court Case Law Regarding Women.

1. Case of Aloeboetoe et al v. Suriname, Reparations, Judgment of September 10, 1993.

The Aloeboetoe judgment, rendered twenty one months earlier than this reparations decision, had recognized that the state of Suriname had accepted its responsibility for human rights violations committed against seven male members of a minority Maroon community, including the deaths of six of them. When the Court reconvened to study the reparations for the survivor and the families of the other victims it was faced with the fact that the victims' community was organized on the basis of matrilineal descent. Additionally the community practiced polygyny and consequently several of the victims had more than one wife¹⁷. The state, probably in an attempt to minimize the amount of compensation it would have to pay, argued that the Court should not determine the beneficiaries according to customary tribal law but rather should apply the American Convention and the applicable principles of international law as well as Surinamese civil law¹⁸. After hearing from the Commission, the Court decided that Surinamese family law did not apply to the victims and their families because it was ineffective insofar as the community was concerned, partly due to their ignorance of it and partly because the state had not endeavored to enforce it in their respect.

In deciding the issue, the Court referred to “rules, generally accepted by the community of nations” to determine that the victims’ children, spouse and ascendants were to be considered their successors in order to determine the compensation to be paid. However, the meaning of each of those categories was to be determined by local law, namely tribal customary law, “to the

¹⁷ Case of Aloeboetoe et al v. Suriname, Inter-Am. Ct H.R. (ser. C) No.15, ¶ 17 (Sep. 10, 1993).

¹⁸ *Id.* ¶ 27, 55.

degree that it does not contradict the American Convention”¹⁹. Despite this firm statement as to the prevalence of international human rights law, the term “spouse” was interpreted to include all of the victim’s wives.

Although the social structure of the community indicated that, since each family group was organized around a woman from whom all others descended, tribal custom would require the compensation be paid to the group as a whole, through its representative, the woman, the Court decided that with regards to the ascendants it would “make no distinction as to sex, even if that may be contrary to Saramaka custom”²⁰. This meant that inasmuch as tribal custom excluded male ascendants from compensation, it would not be applied.

In summary, the Court overruled tribal customary law inasmuch as the exclusion of male ascendants violated the American Convention’s equality clauses but endorsed it inasmuch as it legitimized polygyny.

What is disturbing is that in this judgment the Court makes clear that tribal customs are held as valid only if they do not contravene the American Convention and then does not appear to find that any human rights issues can be compromised by the practice of polygyny. There is no reasoning either in favor or against the practice from a human rights perspective; it appears to be a non-issue for the Court. One could presume that the intention of the Court was to compensate all those who presumably depended on the victims and it is clear that the interests of justice in the present case would not have been served if the Court had awarded compensation to only the chronologically first wives but there were certainly ways of awarding compensation to all without placing a symbolic stamp of approval on a tribal practice that arguably degrades women. For example the judgment could have declared that all those who depended on the

¹⁹ *Id.* ¶ 62.

²⁰ *Id.*

victims, financially or emotionally, would be compensated and therefore included the same people who were included by recognizing the polygynous family structures. It would not have been unorthodox for the Court to have decided to compensate all those involved but make a point of not officially endorsing polygyny, as it did when it refused to endorse the exclusion of male ascendants.

In choosing to recognize all of the women as “wives” instead of as dependants on the deceased, the Court avoided the obvious problem with the dependency method, namely the indeterminacy of what constitutes dependence and therefore of who can be classified as dependents. However, in the Aloeboetoe case the issue only arose with regards to the wives of the massacred men and there is no indeterminacy in their relationship with the deceased: they all depended on the dead men as their partners. The Court has shown itself (albeit after Aloeboetoe) to be willing to compensate the unmarried partners of victims on equal terms with husbands and wives of victims²¹ so, with regards the partners of the deceased in this case, to use dependency criteria would not be unreasonable from a human rights point of view. Whether or not the Court would apply the dependency method for the determination of reparations in future cases not regarding life partners would have to be evaluated, but in the opinion of the author it would not, in principle, detract from the objective of integral compensation of the harm caused by the most egregious human rights violations, namely death and incapacitation.

When the time came to divide up the compensation the court deemed that it would be fair to allocate one third of the total material damages and one quarter of all moral damages awarded for each victim to his wives, divided equally between them. As a result of this concept of fairness, the amount allocated to each woman depended on how many other wives the victim had. While the only woman whose marriage was not polygamous received a third and a quarter

²¹ E.g. Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 421 (Nov.25, 2006).

of the material and moral damages respectively, a woman whose husband had two other wives received a ninth and a twelfth of those damages²². Yet still the Court continued to be oblivious to the equality issues that are patent in this case.

In making this decision it mimicked what would have happened had the men lived, and therefore one could say that, in fact, the Court came to a distribution of reparations according to how each woman relied on her dead husband, according to the dependency method. However, first, this reasoning does not hold fast when one considers that the purpose of moral damages is to repair the suffering experienced by she who is being compensated and second, the only way to arrive at that conclusion is to first have validated the original polygynous marriage system in which women are not considered equally, even with regard to other women. The Court should not have validated such a system and therefore cannot have validly applied the dependency method here. When deciding to distribute the compensation in this way, the Court actually compounded the violation by valuing the suffering of each woman according to her social standing with regards to a man.

2. Case of Caballero Delgado and Santana v. Colombia, Judgment of December 8, 1995.

Isidro Caballero Delgado and María del Carmen Santana, members of the then clandestine M-19 movement, were kidnapped by Colombian armed forces and were subsequently disappeared.

The Court relied on eye witness testimony to conclude that the victims had been detained by members of the armed forces in violation of article 7 of the ACHR (right to liberty). The fact

²² The Court made a similar judgment in the El Amparo case, where it divided reparations for the death of a man between his wife and his extra-marital partner, Case of El Amparo v. Venezuela, Inter-Am. Ct H.R. (ser. C) No. 28, ¶ 40 (Sep. 14, 1996).

that there had been no news of the victims in over six years led the Court to presume that they had been deprived of their right to life in violation of article 4 of the ACHR (right to life). Unlike other cases of forced disappearances, on this occasion the Court did not find a violation of the right to humane treatment (art.5 ACHR) due to a lack of evidence²³. This conclusion is problematic for two reasons; first it detracts from the consolidated jurisprudence on forced disappearances established in the famous Velásquez Rodríguez case and second, three of the same witnesses whose testimonies had served to establish the detention of the victims by the Colombian armed forces also testified as to the mistreatment of Santana.

In effect, one eyewitness testified to having been detained by a group of Colombian soldiers and whilst detained having seeing Santana in the custody of the same soldiers “totally nude with her hands tied behind her back”²⁴. Two other witnesses testified to having heard from locals that they had seen Caballero Delgado’s “companion” dressed only in her underwear in custody of Colombian soldiers²⁵.

Without ever referring to these allegations the Court, when enunciating the facts that it considered to have been proven, dismissed the claim that “Isidro Caballero-Delgado and María del Carmen Santana had been subjected to torture or inhumane treatment during their detention, since that allegation is based solely on [...] vague testimony [...] and was not confirmed by the statements of the other witnesses”²⁶.

In making this statement the Court made no reference to Santana’s nudity and, given that the testimony to that effect was by no means vague, the author is led to suppose that the Court was not even referring to the issue of forced nudity when it decided that article 5 had not been

²³ Case of Caballero-Delgado and Santana v. Colombia, Inter-Am. Ct H.R. (ser. C) No. 22, ¶ 65 (Dec.8, 1995).

²⁴ *Id.* ¶ 36.

²⁵ *Id.* ¶ 38, 39.

²⁶ *Id.* ¶ 53 (f).

violated²⁷. In fact, the Court appears to ignore that part of the testimony altogether. It is particularly troubling that an international human rights court did not consider that the fact that a woman was stripped and bound during an arbitrary detention constituted in and of itself inhumane treatment.

3. Case of Loayza Tamayo v. Peru, Judgment of September 17, 1997.

Perhaps the most egregious affront to women's human rights to ever be committed *by the Court* took place in the judgment in the case of María Elena Loayza Tamayo, a Peruvian woman accused of belonging to the Peruvian Communist Party – Shining Path, who was detained, tried by a faceless military court and convicted of treason. Though her case presents many serious allegations of human rights violations, for the purposes of this paper the most relevant are her allegations of torture and rape whilst detained.

Loayza Tamayo alleged that during her detention by the Peruvian anti-terrorist forces she was raped and sexually abused as well subjected to various other forms of mistreatment including “incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence [and] a restrictive visiting schedule”²⁸. The Court, when analyzing the violations of article 5 of the American Convention (right to humane treatment), found that the arguments and evidence presented, coupled with the failure of the state to refute the claims were enough to merit a finding that the state was responsible for the violation of article 5 with regard to all the instances

²⁷ One judge on the Court dissented as to the ruling on article 5, declaring in his individual opinion that the mistreatment had been proven. However he did not mention which acts in particular constituted mistreatment and referred to testimony that did not mention Santana's nudity. *Id.* (Pacheco J., individual opinion ¶ 2).

²⁸ Case of Loayza-Tamayo v. Peru, Inter-Am. Ct H.R. (ser. C) No. 33, ¶ 45 (e), 58 (Sep.17, 1997).

of alleged mistreatment *except the allegation of rape*. The Court stated that: “Although the Commission contended in its application that the victim was raped during her detention, after examination of the file and, *given the nature of this fact*, the accusation could not be substantiated”²⁹.

It should be pointed out that there was no more hard evidence of the other mistreatment suffered by Loayza Tamayo than there was of her rape, yet the Court did not see that as a problem in finding the state responsible for those, gender neutral, allegations³⁰. It also did not at any time explain what should be understood by the phrase “given the nature of this fact”, i.e. what about the nature of rape requires the Court to apply to it a higher burden of proof than that which is applied to gender neutral violations of the right to humane treatment.

4. Case of Maritza Urrutia v. Guatemala, Judgment of November 27, 2003.

Maritza Urrutia worked for the Guatemalan *Ejército Guerrillero de los Pobres*, an opposition guerilla group that fought the government during the Guatemalan armed conflict. In 1992 Urrutia was abducted by armed men and held for eight days during which time she was interrogated, threatened and forced to appear in a video where she read a prepared statement admitting to participating in the rebel group and withdrawing from it. After recording the statement she was released and told to sign a governmental amnesty agreement. After doing this she managed to flee the country.

Although Urrutia claimed to have been threatened with violence to herself and to her family (particularly her young son), she did not allege that she had been the victim of physical torture or cruel, inhuman and degrading treatment. However, there are parts of her testimony

²⁹ *Id.* ¶ 58, emphasis added.

³⁰ *Id.* ¶ 58.

that raise certain red flags to this respect. She stated that during her abduction “they ‘seized’ her head and placed it between the legs of the man who was next to her and drove off rapidly”³¹. Later, the Court accepted as proven allegations that during her detention Urrutia was “locked in a room, handcuffed to a bed, hooded and with the light on in the room and the radio always on at full volume”³². In its arguments, the Commission picked up on the implications of this situation from a gender perspective and, when making a claim that the right to humane treatment had been violated with regard to Urrutia, it stated that, among other things, “[d]uring her arbitrary detention, Maritza Urrutia was deliberately subjected to psychological torture arising from the threat and continual possibility of being assassinated, physically tortured or raped...”³³. An allegation of this nature is important in that it visibilizes the too often ignored gender specific facets of torture and therefore contributes to overcoming the idea that men and women are interrogated and tortured in the same way³⁴.

The victim’s representative did not make specific gender based allegations and the state did not defend itself at all with regards the allegations of inhumane treatment in general. The Court, when referring to Urrutia’s conditions of detention recognized (with no gender analysis) that she had been subject to cruel and inhuman treatment in violation of article 5(2) of the ACHR³⁵. The Court then went on to find that Urrutia had been subjected to mental torture and in doing so recognized that this type of torture is characterized by “acts that have been prepared and

³¹ Case of Maritza Urrutia v. Guatemala, Inter-Am. Ct H.R. (ser. C) No.103, ¶ 51(a) (Nov.27, 2003).

³² *Id.* ¶ 58.6.

³³ *Id.* ¶ 78(b).

³⁴ See, e.g. in the Latin American context INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA, 251-257, Gobierno de Chile, 2004; COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, INFORME FINAL, vol.VI, ch. 1.5, vol.VIII ch. 2.1, Pontificia Universidad Católica del Perú, Universidad Nacional Mayor de San Marcos, 2003, GUATEMALA: MEMORY OF SILENCE. TZ’INIL NA’TAB’AL. REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION. CONCLUSIONS AND RECOMMENDATIONS, ¶ 91 available at <http://shr.aaas.org/guatemala/ceh/report/english/conc2.html> See in general, AMNESTY INTERNATIONAL, RAPE AND SEXUAL ABUSE: TORTURE AND ILL TREATMENT OF WOMEN IN DETENTION, (1992), *reprinted in* HENRY STEINER & PHILLIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, at 168 (Oxford University Press, 2000).

³⁵ Case of Maritza Urrutia v. Guatemala, Inter-Am. Ct H.R. (ser. C) No.103, ¶ 88 (Nov.27, 2003).

carried out deliberately against the victim to eliminate” their mental resistance³⁶. Although one can infer from this that the anguish suffered by Urrutia may have been rooted in a fear or rape or sexual assault, the Court refused to take one step further and acknowledge this explicitly as the Commission had. This refusal could possibly have been due to an absence of an explicit declaration from the victim claiming to have feared rape. In any case, after the Commission brought up the subject of the threat of gender based violence, the Court’s sentence is all the more striking for having, once again, ignored it³⁷.

5. Case of the Plan de Sánchez Massacre, Reparations, Judgment of November 19, 2004.

The turnaround in matters of gender justice came about in the context of one of the most shocking cases that the Court has ever been called upon to decide. Due to the fact that the state of Guatemala recognized its responsibility in the events in a hearing before the Court (22 years after the events took place), the most important jurisprudence for the purposes of this paper was established in the reparations verdict. Plan de Sánchez is a predominantly Mayan village that was frequently raided by government armed forces during the Guatemalan internal armed conflict. In July of 1982 many of the male inhabitants of the village fled upon observing that the military was making their way to the village again. The women, children and older inhabitants of the village stayed behind because it was widely believed that the military would not take repressive action against them. However upon arriving in the village the soldiers gathered the

³⁶ *Id.* ¶ 93, 94. It is interesting to note that in the English translation of the sentence the Court uses the male prefix repeatedly when it refers to mental torture. The original Spanish version employs a neutral prefix.

³⁷ In similar fashion, family members of the victims in the Goiburú case mentioned threats of sexual violence against them but here no explicit argument was made by the Commission. The Court, while finding violations of article 5 of the ACHR with regards to all of the victim’s relatives, declined to link this finding to the testimony on sexual violence, Case of Goiburú et al v. Paraguay, 2006 Inter-Am. Ct H.R. (ser. C) No.153, ¶ 56i), 100d), (Sep.22, 2006).

remaining inhabitants together and then proceeded to rape, torture and murder the young women. The children were beaten to death and the rest of the people that had remained in the village were forced into a house where hand grenades were subsequently thrown. Those that survived this initial onslaught were gunned down. The soldiers then proceeded to burn the bodies and ransack the village. When the men returned to the village the following day they were confronted with the still burning pyres of the bodies of their loved ones³⁸. It is estimated that 268 people were massacred on that day in Plan de Sánchez village³⁹, most of them women. Despite efforts by the survivors of the massacre, impunity reigned with regards to the events.

The state recognized its responsibility in the events and the court found that the massacre and the ensuing impunity encompassed the violations of eleven articles of the ACHR, among them the right to humane treatment contained in article 5⁴⁰.

The testimony received in the reparations phase of the case, both from survivors and from experts told of the rape and murder of the women, the physical and psychological trauma of the women survivors and the effects that the extermination of women had on the community as a whole, especially with regards the traditional role of women as those charged with the oral transmission of cultural knowledge⁴¹.

When enumerating the facts that it considered as proven, the Court made the following statement:

“The women that were the object of sexual violence by state agents on the day of the massacre and that survived continue to suffer the consequences of that attack. The rape

³⁸ Case of the Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct H.R. (ser. C) No.116, ¶ 32 a)-b), 38, 49.2-49.4 (Nov. 19, 2004).

³⁹ *Id.* ¶ 42.

⁴⁰ *Id.* ¶ 47. It should be noted that no violation of the right to life could be found against the state because the massacre itself occurred before Guatemala had accepted the jurisdiction of the Court. The human rights violations found by the Court either occurred after the acceptance of jurisdiction or constituted continuous violations.

⁴¹ *Id.* ¶ 32 (a)-(b), 38 (a)-(e).

of women was a state practice, carried out in the context of the massacres, intended to destroy the dignity of women on a cultural, social, family and individual level. These women see themselves as stigmatized within their communities and have suffered because of the presence of their attackers in the public areas of the municipality. In addition, the impunity with regards to these events has prevented women from participating in the justice process”⁴².

Accordingly, when establishing the means of reparations that the state was obliged to offer, the Court included the requirement that the Guatemalan state should offer the survivors medical and psychological attention aimed at reducing their suffering⁴³. However, despite its findings on the particular suffering endured by women survivors, when calculating the material and immaterial damages to be awarded to the reparations beneficiaries, the Court decided not to distinguish between different victims and awarded them all the same amount⁴⁴. It can be said that the Court, by falling short of backing up its gendered analysis with concrete compensation, rendered its advancements in the recognition of women’s rights violations empty in practice.

6. Case of the Miguel Castro Castro Prison v. Peru, Judgment of November 25, 2006.

The case that, so far, appears to have examined gender based violations of human rights in most detail referred to events no less shocking than the previous case. In May of 1992 Peruvian government forces attacked the women’s pavilion of the Castro Castro prison, located to the east of Lima. The building housed female detainees, some of whom were awaiting trial, who had been charged with offenses under the state’s anti terrorism laws⁴⁵. Despite initial

⁴² *Id.* ¶ 49.19, unofficial translation.

⁴³ *Id.* ¶ 106.

⁴⁴ The amount came to US\$5,000 for material damages and US\$20,000 for immaterial damages. *Id.* ¶ 75-76, 88-89.

⁴⁵ The pavilion housed women who were members of, or suspected members of, Shining Path.

government declarations to the contrary, the attack was unprovoked and was carried out using wartime weaponry such as explosives, heavy artillery, gases and phosphorous weapons⁴⁶. Women who attempted to surrender were gunned down by snipers. Although the targets were initially women, over the course of the four days that the attack lasted the male inmates accused of belonging to Shining Path, who were housed in a separate building, became involved and thus were also attacked⁴⁷. 41 inmates died in the attack and 185 were injured⁴⁸. The attack was initiated on female visiting day and the women who had gathered outside of the prison were insulted, gassed and shot at⁴⁹. In addition, the Court noted that the timing of the attack had the mothers of the victims searching the morgues on Peruvian Mother's Day⁵⁰.

In the days following the attack the survivors were kept in deplorable conditions where, among other things, forced nudity was the norm⁵¹. In addition, women survivors complained of sexual violence and rape⁵². It should be pointed out that three of the survivors were in advanced stages of pregnancy⁵³.

In its ruling, the Court made several notable advances with regards to its previous women's rights jurisprudence (or general lack thereof). First, it found that forced nudity violated the personal dignity of the victims and then went on to affirm that this was especially serious in the case of female victims⁵⁴. It used the wide definition of sexual violence put forth by the International Criminal Tribunal for Rwanda in the Akayesu case to conclude that the fact that the

⁴⁶ Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 197(21)-(22) (Nov.25, 2006).

⁴⁷ *Id.* ¶ 197(23).

⁴⁸ *Id.* ¶ 243, 283.

⁴⁹ *Id.* ¶ 186.a.3-4, 197.

⁵⁰ *Id.* ¶ 187.a.2.

⁵¹ *Id.* ¶ 187.a.1., 197(49).

⁵² *Id.* ¶ 197(49)-(50).

⁵³ *Id.* ¶ 292.

⁵⁴ *Id.* ¶ 305-306.

naked female victims were observed at all times by armed soldiers constituted sexual violence⁵⁵. In this way the Court took an important step away from its failure to find a violation in the Caballero Delgado and Santana case. Second, when analyzing the allegations of torture and cruel, inhuman and degrading treatment, the Court made clear that when gauging the seriousness of acts committed against the victims, gender was “in some cases” a factor to be taken into consideration⁵⁶. Specifically when dealing with the allegation that one of the victims had been subjected to “a finger vaginal ‘inspection’, carried out by several hooded people at the same time, in a very abrupt manner, with the excuse of examining her”, the Court once again referred to International Criminal Law along with comparative criminal law to classify this conduct as “sexual rape”, the gravity of which was made clear after drawing on several other sources of international human rights law⁵⁷. In the reparations phase of the ruling, the Court awarded higher amounts of compensation to the victims that were subjected to sexual violence and rape⁵⁸ and – without referring to sexual violence in particular - ordered the state to offer all of the victims and their next of kin medical and psychological assistance, free of charge⁵⁹.

Perhaps the most controversial decision that the Court took in this case was the finding that the state, in denying justice to the victims, was responsible for the violation of due process and the right to judicial protection (articles 8 and 25 of the ACHR) in relation to article 7(b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women which deals with state obligations to prosecute and punish acts of violence against women. The groundbreaking and arguably contentious aspect of this finding is that there is no explicit rule that attributes jurisdiction to the Court to examine violations of the Belém do

⁵⁵ *Id.* ¶ 306 citing Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Sep. 2, 1998).

⁵⁶ Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 316 (Nov.25, 2006).

⁵⁷ *Id.* ¶ 309-312.

⁵⁸ *Id.* ¶ 433(c)ix-x.

⁵⁹ *Id.* ¶ 488-450.

Pará Convention. Article 12 of that Convention, which was ratified by Peru in 1996 - well after the events - allocates jurisdiction over individual petitions regarding this Convention to the Commission, not the Court. The Court stated that it was applying the Belém do Pará Convention, along with the Inter-American Convention to Prevent and Punish Torture, to the extent that they specified and complemented the state's obligations under the ACHR⁶⁰. One can reasonably conclude from this therefore that the Court was not establishing that it had jurisdiction to find an autonomous violation of the Belém do Pará Convention. However, this is exactly what the President of the Court clarified in his individual opinion: he reasoned that the Belém do Pará Convention states that disputes should be resolved using the procedure before the IACHR and seeing as that procedure can entail the Commission referring a case to the Court, the Court consequently has jurisdiction to find violations of Belém do Pará. This extensive interpretation of the rules will undoubtedly spark complaints of overlegalization from states parties that ratified the Belém do Pará Convention under the impression that they were signing on to a soft law enforcement system⁶¹.

Another valid question in this respect is what has the women's rights movement gained from the judicialization of Belém do Pará violations? There is, after all, nothing in Belém do Pará that is not already in the ACHR and so, as is always the case with law that refers to specific groups, the risk of marginalizing women's rights from the mainstream protection system is ever present. The Court's ruling is a sign of support for the Belém do Pará Convention and for the political movement that spurred its drafting; it also imposes a significant additional stigma on the state of Peru but the question remains: was the denial of justice for the human rights violations in

⁶⁰ *Id.* ¶ 379.

⁶¹ For an examination of the phenomenon of overlegalization in international human rights law see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *Colum. L. Rev.* 1832 (2002).

this case based on the fact that the victims were women? The male victims that died, were injured or that endured inhumane conditions after the attack were also denied justice as were their male next of kin. Despite the fact that the attack was undoubtedly directed against the female prison population and their female next of kin, it is not clear what about the denial of justice in this case is gender specific, other than a significant number of the victims were women. The Belém do Pará Convention's rules on state obligations to avoid impunity were crafted to respond to an endemic lack of judicial redress for women victims of violence both in the perceived public and the private spheres throughout Latin America. It is not clear how the present case fits into that mold or even if anything is gained by employing Belém do Pará here⁶².

The final interesting aspect of the Castro Castro case is the treatment that the Court assigns to motherhood. The Court responded to several references to the aggravated character of the violations against mothers made by the Commission and the Common Intervener (in representation of some of the victims) by finding not only violations of the pregnant women's right to prenatal and postnatal care whilst detained⁶³ but also by finding that certain other rights violations imposed greater suffering on mothers, be they direct victims or next of kin. For example, the Court found that the solitary confinement that detained mothers were subjected to after the attack and the consequential "impossibility to communicate with their children caused

⁶² This confusion is aided in part by the judicial construction of impunity that the Court has used since the Blake case in 1998 where denial of judicial redress is treated as a separate violation from the original substantive violation that requires redress. If impunity was treated as a procedural violation of a substantive right (in this case the rights to life and humane treatment) as is the practice of the European Court of Human Rights, the denial of justice of a gender based violation would be more easily characterized as a gender based violation. For more on impunity under the Inter-American human rights system see Case of Blake v. Guatemala, Inter-Am Ct. H.R. (ser. C) No. 36, ¶ 96-97 (Jan.24, 1998); Case of Durand and Uguarte v. Peru, Inter-Am. Ct.H.R. (ser. C) No.68, ¶ 129-130 (Aug. 16, 2000); CECILIA MEDINA QUIROGA, LA CONVENCION AMERICANA: TEORIA Y JURISPRUDENCIA: VIDA, INTEGRIDAD PERSONAL, DEBIDO PROCESO Y RECURSO JUDICIAL, 357-383 (Centro de Derechos Humanos, Facultad de Derecho – Universidad de Chile, 2005).

⁶³ Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 332 (Nov.25, 2006).

an additional psychological suffering in the inmates that were mothers”⁶⁴. In addition to this, children of the women in solitary confinement were presumed to be victims for the purpose of reparations⁶⁵. The Court recognized that the timing of the attack so that the fact that the search for the bodies by next of kin coincided with Mother’s Day imposed additional suffering on the mothers of the victims⁶⁶.

The Courts findings regarding enhanced suffering of mothers in solitary confinement and as next of kin of the victims are difficult to reconcile with a jurisprudence that does not compound social stereotypes of women that exist in Latin America. The controversial nature of the claims is best illustrated in the Individual Opinion of one of the Justices that writes:

“[S]omething sacred that has been violated in the present case: the project as well as the experience of *maternity*. Maternity, which must be surrounded by special cares, respect, and acknowledgment, throughout life and in the afterlife, was violated in the present case in a brutal form and on a truly inter-temporal scale. [...] In even another dimension, many of the women who survived the bombing of the Prison of Castro Castro [...] have not been able to be mothers yet, since, as stated in the public hearing in the *cas d’espèce* before this Court, they have since then used all their existential time in searching for truth and justice⁶⁷”.

The Court does not go as far as Justice Cançado Trindade in his sanctification of motherhood but it does fail to argue convincingly that the referring to “mothers” in this case was more appropriate than referring to “parents”. The most pragmatic answer to that question lies

⁶⁴ *Id.* ¶ 330.

⁶⁵ *Id.* ¶ 341.

⁶⁶ *Id.* ¶ 338. This finding was proposed to the Court by expert psychological testimony, *Id.* ¶ 186(b)3.

⁶⁷ *Id.* (Cançado Trindade J., individual opinion ¶ 60, 63 emphasis from original). It is not the first time that this particular judge has expressed such opinions about mothers; see Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala, Inter-Am. Ct H.R. (ser. C) No. 63, (Nov. 19, 1999), (Cançado Trindade J. and Abreu Burelli J., individual opinion ¶ 9-10).

perhaps in the fact that fathers were grossly outnumbered on the list presented to the Court of next of kin that searched the morgues⁶⁸. However it is less probable that no fathers were kept in solitary confinement yet the Court makes no findings as to the damage that experience caused them or their children.

In any case, in the reparations phase of the ruling the Court makes no distinction between mothers and fathers as next of kin, awarding each the same amount of compensation and requiring the state to give medical and psychological assistance to both. In fact, the only mothers that received higher compensation were the three women who were pregnant at the time of the attack and delivered their babies whilst in custody⁶⁹.

While the previous six cases are those where sex is a determinant factor in the ruling, whether recognized or not by the Court, it would be a fallacy to state that women do not come up in any other Court cases. Gender sensitive issues are mentioned tangentially by litigants and the Court itself in several other cases that are less relevant for the purposes of this paper. For example rulings sometimes refer to the grief of mothers; female relatives of victims sometimes claim to be victims of threats of gender based violence when attempting to obtain justice for their loved ones, etc⁷⁰. Where these cases reinforce or detract significantly from the assertions made herein they will be referred to specifically.

⁶⁸ Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, Annex 2 (Nov.25, 2006).

⁶⁹ *Id.* ¶ 433(c)viii.

⁷⁰ E.g. Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala, Inter-Am. Ct H.R. (ser. C) No. 63, ¶ 174 (Nov. 19, 1999); Case of Goiburú et al v. Paraguay, 2006 Inter-Am. Ct H.R. (ser. C) No.153, at ¶56i), 100d), (Sep.22, 2006); Case of the Girls Jean and Bosico v. Dominican Republic, 2005 Inter-Am. Ct H.R. (ser. C) No. 130, at ¶ 134 (Sep. 8, 2005) among others.

The Inter-American Court's case law on women's rights is an anomaly in two senses. First, it is anomalous among human rights judicial and quasi-judicial treaty monitoring bodies in that gender justice is completely absent up into the twenty-first century. The UN Human Rights Committee, the European Court of Human Rights and even the Inter-American Commission on Human Rights already had, at the turn of the millennium, varying degrees of case-law that recognized women's human rights violations and provided redress for those violations⁷¹.

Second, the case law on women's rights is an anomaly in a Court that is well known for its progressive interpretations in other areas of human rights law. For example, with regards to the rights of groups, the Inter-American Court has been somewhat of a pioneer in recognizing and addressing the rights of indigenous communities through case law that gives legal recognition to the concept of communal property⁷² and by acknowledging that the treatment of the dead has different connotations for persons of indigenous descent⁷³. On the other hand, the Court has been quite progressive in the recognition of state obligations towards children⁷⁴. With regards to substantive rights, the Court pioneered the legal argument that brought forced disappearances under the tutelage of the American Convention⁷⁵ and that incorporated certain

⁷¹ E.g. Human Rights Committee: *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (1990); *F. H. Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, U.N. Doc. CCPR/C/OP/2 at 209 (1990); *Graciela Ato del Avellanal v. Peru*, Communication No. 202/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 196 (1988). European Court of Human Rights: *Case of Abdulaziz, Cabales and Balkandali v United Kingdom* 7 EHRR 471 (1985); *Case of Airey v. Ireland* 2 EHRR 305 (1979); *Case of Inze v. Austria* 10 EHRR 394 (1988); *Case of Marckx v. Belgium*, 2 EHRR 330 (1979-80); *Case of Aydin v. Turkey*, 25 EHRR 251 (1988); *Case of Brüggemann and Scheuten v. Federal Republic of Germany*, 3 EHRR 244. Inter-American Commission on Human Rights: *Rosa Marta Cerna Alfaro and Ismael Hernandez Flores*, Case 10.257, Inter-Am. C.H.R. 125, OEA/ser. L/V/II.81, doc. 6 rev. 1 (1992); *Raquel Martín de Mejía v. Perú*, Case 10.970, Inter-Am.C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996); *X and Y v. Argentina*, Case 10.506, Inter-Am.C.H.R., Report No. 38/96, OEA/Ser.L/V/II.95 Doc. 7 rev., at 50 (1997).

⁷² *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct H.R. (ser. C) No. 79, ¶ 149, 151, 155 (Aug. 31, 2001).

⁷³ *Case of Bámaca-Velásquez v. Guatemala*, Inter-Am. Ct H.R. (ser. C) No. 70 (Nov. 25, 2000), (Cançado Trindade J., individual opinion ¶ 4-6).

⁷⁴ *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Inter-Am. Ct H.R. (ser. C) No. 112, ¶ 149, 160-162, 172-176, 209-213 (Sep. 2, 2004); *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct H.R. (ser. A) No. 17 (Aug. 28, 2002).

⁷⁵ *Case of Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct H.R. (ser. C) No. 4, ¶ 159-188 (Jul.29, 1988).

economic, social and cultural rights in the concept of “quality of life”, as opposed to biological life, protected under article 4 of the American Convention⁷⁶. It has also made reference to the loss of a victim’s life project when dealing with reparations, although it did not quantify the damage done⁷⁷.

Two of the Court’s advisory opinions are relevant to women’s rights. The first is OC4 of 1984 that relates to nationalization requirements in Costa Rica. The Court found that the rule allowing for the automatic nationalization of women who are left stateless by reason of their marriage to a Costa Rican man should be opened up to men who find themselves in the same situation. In addition, it found that the voluntary nationalization of foreign women who marry Costa Rican men should also be equally accessible to men in the same situation⁷⁸. Although these conclusions appear to be sound, it is worth noting that the Court found no violation in the fact that Costa Rican nationality was imposed upon the stateless woman, apparently regardless of her will to that effect and that the automatic nationalization of women by marriage was described by the Court in terms of “the *privilege* accorded to women to acquire the nationality of their husbands was an outgrowth of conjugal inequality”⁷⁹.

The second advisory opinion that is relevant to women’s rights is OC18 of 2003 which was motivated by the plight of Mexican immigrants in the United States. The opinion went farther than the original issue (as is often happens with Inter-American Court case-law) and became the Court’s treatise on non-discrimination. In this opinion, that refers only tangentially

⁷⁶ Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala, Inter-Am. Ct H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999), (Cançado Trindade J. and Abreu Burrelli J., individual opinion, ¶ 4).

⁷⁷ Case of Loayza-Tamayo v. Peru, Inter-Am. Ct H.R. (ser. C) No. 42, ¶ 153 (Nov. 27, 1998).

⁷⁸ 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, ¶ 67 (Jan. 19, 1984).

⁷⁹ *Id.* ¶ 42, 64, emphasis added. The English version of the opinion uses the word “right” as a translation of the original “*privilegio*” that the author believes is better translated as “privilege”.

to sex discrimination, the Courts put forward the idea that the principle of non-discrimination has acquired the level of *jus cogens* law⁸⁰.

While these advisory opinions and the case law in other areas referred to do seem to be progressive, only OC4, with its rejection of the “vulnerable woman” stereotype seems to have addressed women’s rights at all.

IV. Theoretical and Practical Explanations for the Lack of Gender-Sensitive Case Law by the Inter-American Court of Human Rights.

After the brief analysis of the Court’s case law regarding women’s human rights violations the questions that beg to be answered are first, why was the Court so negligent with regards to these issues and second, what happened in 2004 to change the situation.

As to the first question, it should be pointed out that most similar human rights adjudicative bodies have gone through a gender sensitization process – none of them have an impeccable track record with regards to women’s rights. Most however, show a progressive sensitization, over time⁸¹. What is particular about the Inter-American Court is that it took so long, compared to the other human rights organs, to catch up and recognize women’s human rights violations. The aforementioned explanation given by the president of the Court that places the blame of the

⁸⁰ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, Inter-Am. Ct H.R. (ser. A) No. 18, ¶ 101 (Sep. 17, 2003).

⁸¹ Regarding the UN Human Rights Committee see PATRICIA PALACIOS ZULOAGA LA NO-DISCRIMINACIÓN: ESTUDIO DE LA JURISPRUDENCIA DEL COMITÉ DE DERECHOS HUMANOS SOBRE LA CLÁUSULA AUTÓNOMA DE NO DISCRIMINACIÓN, 95-123 (Centro de Derechos Humanos, Facultad de Derecho, Universidad de Chile, 2006). Regarding the European Court of Human Rights see Women’s Link Worldwide, Cases from the European Court of Human Rights, http://www.womenslinkworldwide.org/co_reg_echr.html Regarding the IACHR see Patricia Palacios Zuloaga, Selección de Jurisprudencia Universal e Interamericana en Materia de Derechos Humanos y Mujeres, <http://www.publicacionescdh.uchile.cl/Libros/dh-mujeres/index.html> An exception to the general rule could be the International Criminal Tribunal for Rwanda, see Binaifer Nowrojee, “*Your Justice Is Too Slow*”: *How the ICTR Failed Rwanda’s Rape Victims*, United Nations Research Institute for Social Development Occasional Paper (November 2005).

Commission controlled docket is not entirely convincing – as we have seen, the Court *did* have gender relevant cases in its docket long before it recognized that it did.

In this section I will attempt to explain from a theoretical and a practical standpoint why the Court failed to address women’s human rights until 2004, 11 years after the World Conference on Human Rights in Vienna that proclaimed women’s rights as human rights⁸² and 9 years after the Fourth World Conference on Women in Beijing, the two international events that arguably made it impossible to continue to ignore the issues of gendered human rights. The analysis will start with a brief view of the feminist assertion that law is a patriarchal structure that relegates women’s concerns. It will then illustrate how this structure has been carried into international law and in particular to international human rights law. Finally it will examine how the patriarchal structure affects both domestic and international courts.

1. Feminist Theory⁸³.

a. The Status of Women in Law.

Catharine MacKinnon makes the clearest and most categorical evaluation of the status of women in the law, or better put, the role of the law as a factor in the subordination of women. Recognizing the existence of patriarchy in society, she affirms that the law acts as a tool to reinforce the system of subordination of women to men, thus “the state, through law, institutionalizes male power over women through institutionalizing the male point of view in

⁸² Vienna Declaration and Program of Action, U.N. GAOR, World Conf. on Hum. Rts., ¶ 18, U.N.Doc. A/CONF.157/24 (1993).

⁸³ The following section is conceived as an overview that will serve to frame a critique of the Court’s work. The author recognizes that the analysis of the literature has been somewhat oversimplified in order to achieve this goal.

law. Its first state act is to see women from the standpoint of male dominance; its next act is to treat them that way”⁸⁴.

The understanding of the law as a tool that reinforces male domination further allows MacKinnon to explain how the male standpoint becomes a reference for how society in general approaches issues and how that standpoint then determines the content of what is considered objective. The law is considered objective and neutral but actually reflects the male vision that is predominant in society anyway. MacKinnon writes:

“In male supremacist societies, the male standpoint dominates civil society in the form of the objective standard – that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all. [...] The state incorporates these facts of social power in and as law. Two things happen: law becomes legitimate, and social dominance becomes invisible. Liberal legalism is thus a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society⁸⁵.”

The male oriented view that is crystallized in the law also informs the so-called public/private divide whereby issues are classified as being pertinent to or belonging to the public sphere of action, where the protagonists are generally men, or on the other hand being relegated to the private sphere, an area in which the state is reluctant to act. Suffice it to say that many women’s rights issues are relegated to this private sphere⁸⁶.

In Latin America, the territory with the greatest number of states that the Inter-American Court has jurisdiction over, the public/private divide clearly separates issues perceived as

⁸⁴ CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 169 (Harvard University Press, 1989).

⁸⁵ *Id.* at 238.

⁸⁶ *Id.* at 35-36; CATHARINE MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 4 (Belknap Harvard, 2006).

women's issues from the mainstream, public sphere. In addition, MacKinnon's ideas of the law as a tool for male dominance over women can be verified with a quick overview of legislative trends. For example, domestic violence is generally treated as a minor civil (as opposed to criminal) matter and if brought before the courts, procedure is characterized by a conciliation hearing that can bring the proceedings to an end if the woman agrees. Rape is often perceived as a crime against honor and in some countries can still be remedied by marriage to the victim. The law is also reluctant to become involved in labor relations where women generally earn significantly less than their male counterparts but where the law relies on freedom of business. Divorce has varying levels of difficulty from country to country. Abortion is generally illegal with exceptions to this rule varying from state to state and, most importantly levels of enforcement varying from state to state. Similarly access to contraception tends to be limited, with varying exceptions to the rule⁸⁷.

While it can be argued that these trends are not limited to Latin America, they are pervasive in the region. Efforts to revert these trends are notable, though not widespread or effective enough. Abortion restrictions have been loosened in some states, most recently Mexico, but remain ironclad in Chile, El Salvador and most recently Nicaragua. Access to emergency contraception is also being loosened in those states where it was previously illegal⁸⁸. Some states have implemented varying forms of affirmative action and parliamentary quota systems have been implemented in eleven states in Latin America and the Caribbean, with

⁸⁷ For more detailed information on the status of women's rights in the domestic arena in Latin America, see Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), <http://www.cladem.org/espanol/>

⁸⁸ See Center for Reproductive Rights, Latin America and the Caribbean, http://www.reproductiverights.org/ww_lac.html

varying levels of success⁸⁹. Surprising most, Chile, arguably the most socially conservative country in the region, elected its first women president, the only one in the region, in 2005. While these advances are promisingly indicative of a incipient shift in the social validation of sexual equality, there is much to be done and Latin America is far from able to refer to itself as progressive in the area of women's rights.

b. The Status of Women in International Law.

After having identified patriarchal structures throughout the domestic legal structure, feminist writers began to inquire as to the reproduction of these structures in international law and then in international human rights law. Hilary Charlesworth, Christine Chinkin and Shelley Wright reasoned that international law is androcentric due to both its organizational and normative structures⁹⁰. According to the authors, international law is created by state consent and therefore only covers issues that states wish to relinquish to international control⁹¹. Being that this is the case, international law, like patriarchal domestic law, rests on the public/private dichotomy and, seeing as it claims the public sphere as its own, it therefore excludes issues that are important to women⁹². On the other hand, if women are excluded from the public sphere in which international law operates, they are also excluded from the protection, from state action or inaction, which can be provided by international human rights law⁹³. Their analysis concludes with the rather grim assertion that “[i]nternational legal structures and principles masquerade as

⁸⁹ For an analysis of the success of quota systems in Latin America see MARCELA RÍOS, CUOTAS DE GÉNERO, DEMOCRACIA Y REPRESENTACIÓN (IDEA, FLACSO-Chile, 2006). Costa Rica is the Latin American Country with the highest percentage of women in parliament, with 38.6% in 2006, *Id.* at 20.

⁹⁰ Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 621 (Oct., 1991).

⁹¹ *Id.* at 645.

⁹² *Id.* at 625.

⁹³ *Id.* at 629.

“human” – universally applicable sets of standards. They are more accurately described as international men’s law”⁹⁴.

It was Charlesworth who, three years afterwards explained in greater depth why it was that the patriarchal structures that are observed at a national level have been transferred to the international arena. She reasoned that international law is gendered and biased in favor of men because it is constructed upon the idea of sovereignty and state consent⁹⁵. Therefore, if women are subordinated in gender hierarchies within a state, they have little chance of influencing the consent of that state internationally. If women cannot make their concerns heard internally, why would the male-dominated state represent their concerns internationally? If the basis of international law is state sovereignty and the state itself is patriarchal then international law becomes patriarchal too: “Patriarchy is not a temporary imperfection in an otherwise adequate system; it is part of the structure of the system and is constantly reinforced by it”⁹⁶.

International law, constructed by state consent has an architecture that is rife with dichotomies that resemble the male/female, public/private divide where the male is classified as important to international law⁹⁷. Charlesworth and Chinkin point out that there are few women in international organizations that are charged with drafting international law and implementing it. The implication is therefore that it is not surprising that the male quality of the dichotomy is that which is valued⁹⁸.

The dilemma of the bias of international law in favor of men is logically transferred to international human rights law. As Charlesworth recognizes, “[a]lmost all international law is

⁹⁴ *Id.* at 644.

⁹⁵ Hilary Charlesworth, *Feminist Critiques of International Law and Their Critics*, THIRD WORLD LEGAL STUD. 1, 2-3 (1994-1995).

⁹⁶ *Id.* at 9.

⁹⁷ CHARLESWORTH & CHINKIN, *supra* note 14, at 49 and see *id.* at 56-59.

⁹⁸ *Id.* at 49-50, 174-179.

created by men”⁹⁹. The assumption that is implicit in this statement is that law made by men will not be of benefit to women because law made by men takes the male standpoint as the objective norm¹⁰⁰.

MacKinnon, now turning to a critique of international human rights law, points out that the division of human rights into civil and political rights on the one hand, and economic social and cultural rights on the other, with cultural rights as a third, further relegated group, is no coincidence but rather a result of the public/private divide as applied to international human rights law¹⁰¹. She finds that men, as creators of human rights law have been careful to allocate the strongest protection to the rights that are most useful to them in their struggle with other men whereas group rights are allocated the least protection and women, being discriminated as a group, are unprotected as a result¹⁰².

While recognizing Charlesworth’s and MacKinnon’s point, there is no denying the efforts made in international law, particularly international human rights law, to address women’s rights through diverse mechanisms, including treaty law. There have been advancements that have contributed to making the public/private divide more murky, most notably the consolidated view taken by international human rights monitoring bodies that states can be held responsible for the actions of non-state actors whenever the state has failed to diligently prevent or remedy those

⁹⁹ Charlesworth, *supra* note 95, at 13-14. See also CHARLESWORTH & CHINKIN, *supra* note 14, at 48.

¹⁰⁰ I will not in this paper enter into the discussion as to whether a rights discourse is valuable for women, for this see CHARLESWORTH & CHINKIN, *supra* note 14, at 208-212.

¹⁰¹ CATHARINE MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 5 (Belknap Harvard, 2006).

¹⁰² *Id.* at 5-6. This idea goes against the traditional explanation regarding the division of the rights recognized in the Universal Declaration of Human Rights into two groups and consequently two international covenants. The traditional explanation was that the political deadlock of the cold war in the United Nations of the sixties had led to the drafting of a western backed civil and political rights convention, with a stronger treaty monitoring body, and a soviet backed economic, social and cultural rights convention with a lesser enforcement mechanism. See STEINER & ALSTON, *supra* note 34, at 238.

actions¹⁰³. There is still a long way to go to make international law sensitive to women's concerns, but the efforts made in recent years by many international organs have made it an appealing forum in which women can seek redress for domestic violations of their rights.

Both MacKinnon and Charlesworth and Chinkin assert that while women's civil and political rights are often violated without adequate attention by the international community, the rights that are most important to women are economic, social and cultural rights¹⁰⁴. The author, on the other hand, believes that to come to this conclusion is to ascribe to the narrow male-oriented view of civil and political rights. On the one hand, sex-discrimination, femicide, rape, other violence against women (domestic or otherwise) and sexual and reproductive rights can all be addressed by the catalogue of rights set forth in instruments like the International Covenant on Civil and Political Rights (ICCPR)¹⁰⁵. Quiet apart from the interpretation or application of these rights by some, there is nothing in the wording of the instruments that excludes their application to women. On the other hand, rights like nutrition, housing, education, healthcare, social security and equal salary for equal work, when denied to women on a discriminatory basis, are only excluded from the realm of civil and political rights if one adopts the biased view that MacKinnon, Charlesworth and Chinkin themselves complain of. Both the UN Human Rights Committee and the Inter-American Court have made progress in the reunification of economic, social and cultural rights and civil and political rights. The Human Rights Committee, charged with the monitoring of compliance with the ICCPR, began incorporating discrimination of women in the recognition of economic, social and cultural rights in the realm of article 26

¹⁰³ For the purposes of this paper, the most relevant example is the Case of Velásquez-Rodríguez v. Honduras, Inter-Am. Ct H.R. (ser. C) No. 4, ¶ 172 (Jul.29, 1988).

¹⁰⁴ MACKINNON, *supra* note 101, at 5 and Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 Hum. Rts. Q. 63, 69-70 (Feb., 1993).

¹⁰⁵ 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.

(autonomous non-discrimination) in the eighties in a series of observations regarding social security rights for women, principally in the Netherlands¹⁰⁶. The Inter-American Court of Human Rights has reasoned that the concept of “life” under article 4 of the ACHR includes “quality of life”, i.e. minimum standards of living that are achieved by fulfilling economic, social and cultural rights¹⁰⁷.

The author is not sustaining that civil and political rights were not conceived as and are not applied as essentially male; she is just affirming that they do not have to be. General Comment 28 by the Human Rights Committee runs through the rights contained in the ICCPR and illustrates how each of them is generally violated with regards to women¹⁰⁸. Like all the General Comments, it is a guideline for states regarding both how they should comply with the ICCPR and how they should structure their reports to the Committee. This attempt by the Human Rights Committee to bring women’s rights back under their competence recognizes that civil and political rights were being informed by states in a male-oriented way while women’s rights were either not mentioned or mentioned under a minor subheading of their own¹⁰⁹.

The fact that states were not reporting to the Human Rights Committee on the status of women’s rights fits easily into the framework provided by MacKinnon, Charlesworth, Chinkin and Wright. States did not consider women’s rights as relative to the international arena, a clearly public sphere. If little attention was paid to the violations of women’s human rights domestically then states were not likely to find them important enough to report internationally

¹⁰⁶ See PATRICIA PALACIOS ZULOAGA LA NO-DISCRIMINACIÓN: ESTUDIO DE LA JURISPRUDENCIA DEL COMITÉ DE DERECHOS HUMANOS SOBRE LA CLÁUSULA AUTÓNOMA DE NO DISCRIMINACIÓN, 73-75, 201-210 (Centro de Derechos Humanos, Facultad de Derecho, Universidad de Chile, 2006).

¹⁰⁷ Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala, Inter-Am. Ct H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999), (Cañado Trindade J. and Abreu Burelli J., individual opinion, ¶ 4).

¹⁰⁸ Human Rights Committee, General Comment 28, Equality of Rights between Men and Women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

¹⁰⁹ MacKinnon praises the inclusion in General Comment 28 of a reference to the restriction of the publication or dissemination of pornography that portrays women as objects of violence or cruel, inhuman or degrading treatment under article 19 (right to freedom of expression) of the ICCPR. MACKINNON, *supra* note 101, at 257.

to a body such as the Human Rights Committee. On the other hand, the author believes that another reason that states have been reluctant to include reports on women's human rights as civil and political rights is the existence of specialized women's rights instruments.

The UN found the necessary consensus for the Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹¹⁰ in 1965, almost a full year before the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted. At the time, high profile systemic racial discrimination existed in the apartheid system of southern Africa and the racial segregation system in place in the southern United States of America, and CERD was a vehicle through which the international community could express its rejection of these violations while there was as yet no binding international treaty that referred to racial discrimination.

It took 14 years longer for the UN General Assembly to take similar steps with regards to the discrimination against women. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹¹ was modeled on CERD and is generally recognized to have the purpose of visibilizing the endemic violations of women's rights all over the world. The adoption of CEDAW is seen by many as a victory for the women's movement because it entails the recognition by the world's primary international organization and by the large majority of states that form part of it that the detrimental treatment of women because they are women is contrary to international law. In this sense, and only with regards to this political statement, CEDAW did for sex discrimination what CERD did for racial discrimination.

¹¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination, 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.

¹¹¹ 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.

However, one big difference between CERD and CEDAW is vital to understand the importance that racial and sexual discrimination have in international law today. CERD was adopted before the ICCPR and the ICESCR which between them contain no less than 16 substantive equality and non-discrimination clauses; CEDAW was adopted thirteen years afterwards. While its preamble draws attention to the multiple human rights instruments that recognized the illegality of sex discrimination, it declares that despite those instruments, sex discrimination of women was still extensive at the time of adoption of the treaty – so in thirteen years, little progress was made to overcome sex discrimination.

On another note, while CEDAW made sex-discrimination an issue deserving of its own treaty, it also arguably gave states the opportunity to subtract the issue of women's discrimination from the ICCPR and relegate it to a treaty that was less comprehensive and a monitoring body that was less prestigious and wielded less scrutiny power and political enforcement clout¹¹². It also gave states the opportunity to make reservations to obligations that are included in the ICCPR without the same limited consent¹¹³. In short, despite the political gain of visibilization of the issue of sex-discrimination, it appears that CEDAW actually assisted

¹¹² In this sense but with regard to specialized UN human rights bodies, see Elissavet Stamatopoulou, *Women's Rights and the United Nations*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 36, 45 (Julie Peters & Andrea Wolper eds., 1995).

¹¹³ For example Australia's reservation regarding paid maternity leave was not made with regards to any articles in the ICCPR; Bahrein's reservation to article 2 of CEDAW (domestic implementation) subjects it to the requirements of Shariah, no such reservation was made in the later accession to the ICCPR; one of the Democratic Peoples Republic of Korea reservations to CEDAW is with regard to equality in the nationality of children, but no such reservation was made to articles 2, 3, 23.4, 24 or 26 of the ICCPR; Switzerland made reservations to articles of CEDAW regarding the legal capacity of women and equality in marriage whereas no similar reservations exist to the ICCPR. In addition many states made reservations to article 29.1 of CEDAW (arbitration in case of disputes). United Nations Division for the Advancement of Women, Department of Economic and Social Affairs, *Declarations, Reservations and Objections to CEDAW* <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>; Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights New York, 16 December 1966, Declarations and Reservations*, http://www.ohchr.org/english/countries/ratification/4_1.htm

in the expulsion of women's rights from the non-discrimination clauses of the ICCPR, thus motivating the need for General Comment 28¹¹⁴.

Mackinnon draws attention to the further differences in the political rhetoric of the preambles of CERD and CEDAW that establish racial discrimination as a greater evil and greater falsehood than sex discrimination¹¹⁵. She further notes that CEDAW has less dispute resolution mechanisms and is more reserved than other treaties¹¹⁶ but ultimately finds praise for CEDAW's approach to equality as a group right and for the CEDAW Committee's views on prostitution and pornography¹¹⁷.

In the Inter-American system of human rights the equivalent to CEDAW is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women¹¹⁸ (Belém do Pará Convention) a treaty that instead of discrimination focuses around the phenomenon of violence against women in the public and in the private sphere¹¹⁹. The drafting of the Belém do Pará Convention was different from other OAS human rights treaties in that it was carried out by the Inter-American Commission on Women (CIM), a specialized intergovernmental organ of the OAS charged with the promotion and protection of women's rights in the region. Although the CIM is made up of state delegates who are generally not open to formulating extensive obligations in treaties, two important caveats should be made: all of the delegates of CIM are high ranking officials that work in the field of women's rights domestically and all of them are women. This makes the Belém do Pará Convention a treaty about women,

¹¹⁴ For the marginalization of women's rights in general see CHARLESWORTH & CHINKIN, *supra* note 14, at 218-220.

¹¹⁵ MACKINNON, *supra* note 101, at 11.

¹¹⁶ *Id.* at 6. Also As did CHARLESWORTH & CHINKIN, *supra* note 14, at 103-113.

¹¹⁷ MACKINNON, *supra* note 101, at 8, 255-256.

¹¹⁸ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 5.

¹¹⁹ Art 6 of the Belém do Pará Convention affirms that discrimination is a form of violence against women whereas, while CEDAW itself is silent on the issue, the CEDAW Committee has stated that violence against women is an expression of discrimination. Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence Against Women, ¶ 1,7, U.N. Doc. A/47/38 at 1 (1993).

drafted by women experts. This could explain the manifestations of feminist theory that can be found without¹²⁰.

The obvious benefit for women's rights brought about by this treaty is that, like CEDAW, it spells out state obligations that may not have been apparent to states beforehand, when women's rights were protected only by the American Convention. Another important benefit is political; the Belém do Pará Convention has been widely ratified by the states, which contributes to the idea that there is at least a political consensus as to the illegitimacy of violence against women and its causes. Significant advances were made in this treaty with regards to the incorporation of feminist theory to explain why violence against women occurs; the treaty does not limit itself to dealing only with the immediate causes and effects of such violence, but also presses states to deal with cultural traditions and stereotypes of inferiority. It also makes clear that states are responsible for action in the field of gender violence both in the public and the private sphere.

Although Belém do Pará does incorporate many of the ideas that feminist theory has contributed to international law it nonetheless lacks clear state obligations and strong enforcement mechanisms. In addition to this, one can observe that a similar relegation effect can be recognized in the ratification by American and Caribbean states of the Belém do Pará Convention. Therefore, although the major difference between CEDAW and Belém do Pará is that the latter opts for violence as its insignia violation (though it covers much more than violence), it still serves to both attract political attention towards women's rights issues and to remove them from the general protection of the American Convention. The lesser protection offered women by the Belém do Pará Convention is even more pronounced because the Inter-

¹²⁰ For more information see Inter-American Commission on Women, History, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women – 1994 <http://www.oas.org/CIM/English/History8.htm>

American system is a unified one (as opposed to the multiple treaty monitoring bodies that exist in the UN system) and Belém do Pará establishes that controversies that arise as to the application of one article of the Convention (first instance of lesser protection - as opposed to the American Convention) can be resolved through an individual complaints procedure before the Inter-American Commission (second instance of lesser protection – as opposed to the American Convention)¹²¹. Belém do Pará, which is referred to as the “Magna Carta of women’s rights” by the President of the Court¹²², is in fact poorly constructed and poorly enforced. Though this is not the place to carry out a detailed analysis of this treaty, it can be inferred that one of the reasons why since 1994 – the year of its adoption - so few cases of women’s rights have been brought to the Court under the American Convention, is that they have been relegated to the vague domains of Belém do Pará, where they have perished, ignored.

Catharine MacKinnon has nothing but praise for the Belém do Pará Convention’s substantive equality approach to the problem of violence against women. In her view, which the author does not contest, advances made by the convention include the reference to violence against women as a gender based violation both in the public and in the private sphere and the link between violence and “stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination”¹²³. The author’s objection to the Belém do Pará Convention has more to do with the inclusion within it of a catalogue of rights that are that are included in the American Convention already but that does not encompass all of those rights

¹²¹ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 5, art 12. Charlesworth and Chinkin point out that the Inter American Court of Human Rights can emit advisory opinions on Belém do Pará (art. 11 Belém do Pará) but as we have seen, it was not until 2006 that the Court attributed jurisdiction over individual complaints regarding Belém do Pará to itself. CHARLESWORTH & CHINKIN, *supra* note 14, at 76.

¹²² Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, (Nov.25, 2006), (García Ramírez J., individual opinion ¶ 5).

¹²³ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 5, art 6.b.

and so therefore appears to be a list of rights that women are concerned with¹²⁴ and a list of imprecise state obligations, only some of which enable a victim to initiate an individual complaint against the state¹²⁵.

As will be examined below, in 2006 when the Court was faced with the horrors of the Castro Castro prison assault, instead of officially endorsing the relegation of women's rights to a badly built treaty that it apparently had no power to police, and instead of ignoring Belém do Pará completely, it decided to bring Belém do Pará under its jurisdiction and find a violation of its one, lonely, enforceable article. What remains to be seen is whether or not that benefited the struggle for women's rights in Latin America. This question will be answered below.

c. The Status of Women in the Justice System.

When inquiring as to the how the domestic and international courts have dealt with the issue of women's rights one is faced with two questions: first, how do women generally fare before the courts and secondly, whether or not the outcome of adjudicative processes for women is influenced by the presence of women on the bench. This last question is especially relevant for the purposes of this paper because as we will see, there were no women on the Inter-American Court from 1979 to 1989 and again from 1994 to 2004. Three of the four most objectionable cases summarized in this paper were decided with no women on the bench.

¹²⁴ Art 4 of the Belém do Pará Convention indicates that:

“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: a. The right to have her life respected; b. The right to have her physical, mental and moral integrity respected; c. The right to personal liberty and security; d. The right not to be subjected to torture; e. The rights to have the inherent dignity of her person respected and her family protected; f. The right to equal protection before the law and of the law; g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights; h. The right to associate freely; i. The right of freedom to profess her religion and beliefs within the law; and j. The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making”.

¹²⁵ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, supra note 5, arts. 7-8.

Studies have indicated that women go to court as plaintiffs less than men do. Many different reasons for this can be adduced: in some societies access to the courts is restricted for women¹²⁶; where access is equal, women, who make up approximately 70 percent of the world population that lives under the poverty line, often will not have the time and the resources to work with lawyers¹²⁷. Controversial essentialist arguments have been made as to the non-judgmental nature of women who are reluctant to recognize moral rules as absolute¹²⁸, which in turn would presumably predispose them towards other methods of dispute resolution rather than litigation. Finally, one can argue that women do not resort to judicial adjudication because the legal bias against them, compounded by a male oriented court system results in a judicial process that is insensitive to women's interests.

The most evident issues that might justify this assertion are the treatment of sex discrimination and violence against women in claims brought before the courts. National and international adjudicative bodies have tended to adopt the similarity/difference test when examining cases of sex discrimination. This approach compares the situation of women in the area where discrimination is alleged to an individual that is not affected by the adverse action or inaction. Inevitably, in most cases of sex discrimination the unaffected individual is a man and so the judicial test requires comparing women to men. Once a difference in treatment has been established, this approach then allows the court to determine whether or not the distinction is objective and reasonable. Feminist critiques of the similarity/difference test are widespread

¹²⁶ See e.g., *Graciela Ato del Avellanal v. Peru*, Communication No. 202/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 196 (1988).

¹²⁷ United Nations, *Women at a Glance*, <http://www.un.org/ecosocdev/geninfo/women/women96.htm> Amnesty International USA, *Economic, Social and Cultural Rights (ESCR) and Women: A Fact Sheet*, <http://www.amnestyusa.org/women/pdf/economicrights.pdf> For statistics regarding women and poverty in Latin America and The Caribbean, see United Nations, *Economic Commission for Latin America and the Caribbean, Estadísticas de Género, Actualizado en Septiembre de 2005, Indicadores Regionales: Pobreza*, http://www.eclac.org/mujer/proyectos/perfiles/comparados/comp_pobreza.htm

¹²⁸ CAROL GILLIGAN, *IN A DIFFERENT VOICE* 102-103 (Harvard University Press, 1982).

throughout the movement¹²⁹. The principal objection is that the approach does not recognize the systemic subordinated role of women as a group; considering the situation of each woman to men in general attributes individualistic connotations to the problem and gives the impression that sex discrimination occurs in isolated circumstances. What would appear to be at issue is *the treatment of this particular woman in this particular situation* and not the situation of women in general. On the other hand, the approach yields favorable judgments for women in many cases where these comparisons are easily perceived, however, in cases where the issue at hand is perceived to be solely a “woman’s issue”, the similarity/difference test is harder to apply and therefore can lead to discrimination going unchecked. An example is the US *Geduldig* case where disabilities resulting from pregnancy were excluded from insurance coverage for employees. The Supreme Court in this case ruled that the distinction made was not based on sex but rather between pregnant women and non-pregnant people. Because only women can get pregnant the court was unable to compare the treatment of pregnant women to men, and so failed to find sex discrimination¹³⁰. Similarly the Human Rights Committee has consistently applied the similarity/difference test to sex discrimination cases and has created a body of case law that is generally favorable to women. However in the *Vos* case, dealing with a disabled woman whose disability pension was automatically replaced by a lower widow’s pension upon the death of her ex-husband (from whom she had been divorced for 22 years) the Human Rights Committee found no violation of the ICCPR’s autonomous non-discrimination clause because the rule generally favored women and *Vos*, as a working disabled woman was an anomaly that did not vitiate the general rule. In addition to this, the fact that men were not eligible for

¹²⁹ MACKINNON, *supra* note 84, at 216-234; Kathleen E Mahoney, *Canadian Approaches to Equality Rights and Gender Equity in the Courts*, in HUMAN RIGHTS OF WOMEN. NATIONAL AND INTERNATIONAL PERSPECTIVES 437, 442, (Rebecca Cook ed., 1994) originally cited in PALACIOS ZULOAGA, *supra* note 106, at 38.

¹³⁰ *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

widower's pensions meant that there was no imaginary man to compare Vos' case to which eventually made it difficult for the Committee to find a violation¹³¹.

The negative experience of women who report rape and wish to prosecute their rapists has been widely documented¹³². Although steps have been taken in many judicial systems to attend to the particular needs of victims of rape and sexual abuse, who continue to be overwhelmingly women, from specialized police units and evidence gathering forensic units to special sexual violence prosecutors, there continue to be shockingly low statistics of rape cases that are reported and of rapists convicted. Much of this phenomenon can be attributed to the social stigma attached to rape that deters women from seeking prosecution and judges (and juries) from finding that rape has occurred. However once the issue has been raised in court, the crime of rape is constructed in such a way as to make consent a central issue and rape an evidentiary problem¹³³. The focus on consent has led national courts to affirm that wives and prostitutes cannot be raped and that physical resistance is required for rape to occur¹³⁴. The presentation of evidence, widely considered to be an objective task, is rife with gendered presumptions that lead courts and lawyers to bring prior sexual conduct, "provocative" dressing and immediate and mediate reactions of women into the body of evidence that can persuade the decision makers in one direction or another. All of the above contribute to the re-victimization of rape victims by way of the judicial process and contribute to explain the low incidence of judicialization of rape cases domestically. Internationally a good example of this phenomenon is the experience of victims of sexual violence in the proceedings brought before the International

¹³¹ Hendrika S. Vos v. The Netherlands, Communication No. 218/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 232 (1989). Also see Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, as cited by PALACIOS ZULOAGA, *supra* note 106, at 103.

¹³² For an overview of this phenomenon, see NANCY CONNOLLY, *SEXUAL ASSAULT VICTIMS: THE EXPERIENCE OF PARTICIPATING IN THE LEGAL SYSTEM*, Thesis (Ph. D.) (Massachusetts School of Professional Psychology, 1993).

¹³³ See MACKINNON, *supra* note 84, at 180-182.

¹³⁴ *Id.* at 175; ANDREA DWORKIN, *INTERCOURSE 208* (Basic Books, 2007) (1987); M.C. v. Bulgaria, 646 Eur. Ct. H.R. ¶ 63-65 (2003).

Criminal Tribunal for Rwanda (ICTR). The ICTR was certainly a pioneer in the area of sexual violence since its very first conviction set the foundations for a progressive definition of rape and sexual violence¹³⁵. However, subsequent rape and sexual violence trials have been rife with conditions that have only heightened the harm suffered by women victims and witnesses including lack of information for victims, lack of effective witness protection rules and judicial insensitivity towards witnesses¹³⁶.

In most countries domestic violence is not considered a crime of similar gravity as if the acts that constitute it were committed outside of a personal relationship¹³⁷. This can be understood as a state sanctioned endorsement of the idea that women who are sentimentally linked to men become analogous to property. Domestic violence is often subject to a different procedure than assault or battery and such procedure is often characterized by alternative dispute resolution mechanisms that do not take into account the unequal negotiating power of women subjected to violence by their partners, fathers or sons. Additionally, protective measures often go unenforced and sentences are light and at times reflect what is considered by the judge to be best for the family unit instead of what would benefit the battered woman¹³⁸. In the insignia domestic violence case heard in the Inter-American system, the Inter-American Commission on Human Rights found that the state of Brazil had denied due process and an effective remedy to a woman who was shot by her husband who, two weeks after she returned from the hospital then attempted to electrocute her in the bathtub. As a result of these attacks on her life the petitioner

¹³⁵ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶688 (Sep. 2, 1998).

¹³⁶ See in general Binaifer Nowrojee, *supra* note 81.

¹³⁷ See e.g., Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN. NATIONAL AND INTERNATIONAL PERSPECTIVES 116, 135-136 (Rebecca Cook ed., 1994); Radhika Coomaraswamy. Integration of the Human Rights of Women and the Gender Perspective: Violence against Women. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences. Cultural Practices in the Family that are Violent Towards Women, ¶ 123-132, E/CN.4/2002/93, (Jan. 31, 2002).

¹³⁸ With regards to lack of enforcement of restraining orders, see *Town of Castle Rock, Colorado v. Gonzales*, 125 S. Ct. 2796 (2004).

was rendered paraplegic. Fifteen years after these events, the state had still not reached a definitive verdict in the case and the petitioner's ex-husband had still not served a day of prison time. The Commission found that there was a pattern of state tolerance towards domestic violence in Brazil but due to the Inter-American doctrine of treating procedural violations of protected rights as separate violations under due process (article 8 ACHR) and judicial protection (article 25 ACHR) provisions¹³⁹, the state was not found responsible of failing to protect and enforce her right to life and to humane treatment but rather of violations of articles 8 and 25, to which considerably less stigma is attached for the violating state¹⁴⁰.

Having attempted to illustrate why women might not fare well before courts in matters that are gender sensitive, an important caveat to make is that the courts have been vital in matters relating to women's sexual and reproductive rights. Iconic cases such as *Roe v. Wade* have been upheld by the courts, often against legislative and executive assault¹⁴¹. In the European Human Rights system challenges to the right of a woman to terminate her pregnancy has been upheld for 27 years now¹⁴² and while the Human Rights Committee has not required states to provide abortive services in individual cases, it has found the state of Peru responsible for denying an abortion to a seventeen year old woman when that procedure was available in the state¹⁴³. In the Inter-American system sexual and reproductive rights have been dealt with only by the Commission that has endorsed two friendly settlements: the first regarding a Peruvian case of

¹³⁹ Case of *Blake v. Guatemala*, Inter-Am Ct. H.R. (ser. C) No. 36, ¶ 96-97 (Jan.24, 1998).

¹⁴⁰ *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. ¶ 8-23, 60.4 (2000).

¹⁴¹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁴² *Paton v. United Kingdom*, App. No. 8416/78, 3 E.H.R.R. 408 ¶ 7-9 (1980) (Eur. Comm'n H.R.), see also *R.H. v. Norway*, decision on admissibility, App. No.17004/90, Eur. Comm'n H.R. (1992) and *Boso v. Italy*, App. No. 50490/99, Eur. Comm'n H.R. (2002), *Vo v. France*, App. No. 53924/00, Eur. Ct. H.R. (2004).

¹⁴³ *Llantoy Huamán v. Peru* CCPR/C/85/D/1153/2003 ¶ 6.1-6.6 (2005); 13 IHRR 355 (2006).

forced sterilization and consequent death of a woman¹⁴⁴ and most recently in the case of a nine year old rape victim who was denied an abortion by the state of Mexico¹⁴⁵.

One might think that these exceptions contradict the assertions that have been made here with regard the importance given by the domestic and international legal and judicial system to women's rights issues. However, all of the sexual and reproductive rights cases mentioned except those of the Inter-American Commission on Human Rights were decided on the basis of the right to privacy. While the decisions have garnered favorable results for the women who have litigated them, the use of the right to privacy succeeds in covering up the equality issues present in sexual and reproductive rights cases and in relegating them firmly to the private area of the public/private divide. It also focuses on the violation of a right that is exercised individually, thereby negating the discrimination of women as a group¹⁴⁶.

The judicial system, be it domestic or international, is a structure populated overwhelmingly by men that applies man made law to women. The second question put forward in this section was whether or not the outcome of adjudicative processes for women is influenced by the presence of women on the bench. In other words, to what degree did the fact that no women sat on the Inter-American Court for the decision of three of the four badly resolved cases examined at the beginning of this paper influence the decisions reached in those cases.

Charlesworth, Chinkin and Wright call attention to the fact that international law institutions are populated by men¹⁴⁷. The gender imbalance that exists in international law generally is slightly less pronounced in the field of international human rights law but exists

¹⁴⁴ María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am. C.H.R., Report No. 71/03[1] (2003).

¹⁴⁵ Paulina del Carmen Ramírez Jacinto v. Mexico, Case 161-02, Inter-Am. C.H.R., Report No. 21/07 (2007).

¹⁴⁶ Regarding abortion and privacy see MACKINNON, *supra* note 84, at 187-188, 190-194.

¹⁴⁷ Charlesworth, Chinkin & Wright, *supra* note 90, at 623.624; CHARLESWORTH AND CHINKIN, *supra* note 14, at 174-179.

nonetheless; all of the major international human rights courts and treaty monitoring bodies with the exception of the CEDAW Committee are composed of a majority of men¹⁴⁸.

There are symbolic implications to the fact that human rights cases are being decided by panels that do not represent the gender proportions of the world's population¹⁴⁹. The American Convention on Human Rights calls for the Commission to be comprised of seven "persons of high moral character and recognized competence in the field of human rights"¹⁵⁰. Since its creation in 1960 only five women out of a total of fifty-five have ever sat on the Commission and there are currently no women at all on it¹⁵¹. Likewise, the Court is comprised of:

"seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates"¹⁵².

The Court has existed for twenty eight years and for twenty of those years no women sat on its bench; only four out of thirty judges have been women and 2007 is the first year in which more than one woman sits on the Court at once¹⁵³. Needless to say, there are serious political implications in the fact that the member states of the OAS do not consider that enough women comply with the basic requirements to be nominated and elected to the Commission and the Court.

¹⁴⁸ Charlesworth, Chinkin & Wright, *supra* note 90, at 621-625.

¹⁴⁹ CHARLESWORTH AND CHINKIN, *supra* note 14, at 189-190.

¹⁵⁰ American Convention on Human Rights, *supra* note 4, art. 34.

¹⁵¹ The Commission's Rapporteur on Women's Rights is the Argentine man, Victor Abrahamovic.

¹⁵² American Convention on Human Rights, *supra* note 4, art. 52.

¹⁵³ There are currently three women Justices on the Court.

The problem is not exclusive to international law; there is a gender imbalance in domestic courts in most countries also¹⁵⁴. One of the most incisive and comprehensive studies of how gender influences the legal process played out before this essentially male institution that is the court system was undertaken in the United States by the Task Forces on Gender Bias that operated with regards to both state and federal judiciaries in the eighties and nineties¹⁵⁵. They took into account several gender relevant issues and came to conclusions regarding the effects that gender bias in the Court system has. For example, Resnik quotes from the Report of New York Task Force on Women in The Courts:

“gender bias against women... is a pervasive problem with grave consequences.... Cultural stereotypes of women’s role in marriage and in society daily distort court’s application of substantive law. Women uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference and hostility”¹⁵⁶.

These reports had a huge impact on the US judicial system and spurred several measures by the courts to overcome the issue of gender bias.

The question remains then, can the negative experience of women in the Court system in general be directly attributed to the lack of women in decision making positions? After all, as we have seen, much of the feminist literature’s critique of the domestic and the international legal order has to do with the lack of female participation both in the creation of law and in the adjudication of disputes.

¹⁵⁴ Judith Resnik, *Asking about Gender in Courts*, 21 SIGNS 952, 957-958 (1996); Judiciary of England and Wales, Statistics, Women in Post as at 1st April, 2007, <http://www.judiciary.gov.uk/keyfacts/statistics/women.htm> Economic Commission for Europe, UNECE Gender Statistics Database: Statistics on Women and Men in the ECE Region: By Statistical Division, UNECE pg 3, <http://www.unece.org/oes/gender/documents/Symposium%20paper.pdf?OpenAgent&DS=ENERGY/GE.1/2001/1&Lang=E>

¹⁵⁵ For an overview of their work, see, Judith Resnik, *supra* note 154.

¹⁵⁶ New York Task Force on Women in the Courts 1986-87, 17-18, as cited by Resnik, *supra* note 154, at 958.

Charlesworth, Chinkin and Wright in 1991 asked:

“[w]hy is it significant that all major institutions of the international legal order are peopled by men? Long-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while ‘women’s concerns’ are relegated to a special, limited category. Because men are generally not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored. The orthodox face of international law and politics would change dramatically if their compositions were truly human in composition: their horizons would widen to include issues previously regarded as domestic – in the two senses of the word”¹⁵⁷.

Charlesworth later added that “[a] result of this imbalanced participation has been the development of a lop-sided canon of human rights law that rests on, and reinforces, a gendered distinction between public and private worlds”¹⁵⁸. This idea is the first step to understanding why the early case law of the Inter-American Court of Human Rights regarding women was so insensitive to gender based violations of human rights.

A quick jump from there and one can conclude that the solution to the problem is then simply to include women on human rights adjudicative bodies, especially considering the marked improvement that the Inter-American Court case law on women experimented the very same year that a woman was elected to the bench after a ten year absence of female representation. However, feminist authors caution against the “just add women and mix” approach to dealing with the problem “because the international legal system is in itself gendered

¹⁵⁷ Charlesworth, Chinkin & Wright, *supra* note 90, at 625.

¹⁵⁸ Charlesworth, *supra* note 95, at 13-14.

[... i]ts rules have developed as a response to the experiences of a male elite”¹⁵⁹ and therefore adding women will not solve the overarching issue that the law is a patriarchal instrument that must be reformulated as a whole.

On the other hand, if one concludes that the solution to the problem is to merely increase the number of women sitting on a court bench, one is making an impermissible assumption about women in general and that is that women will decide gendered issues in a particular way *because they are women*. In this sense care must be taken to avoid essentialist arguments as to how women think and decide issues. In addition, the assumption that all women will side with women (whatever ‘siding with a woman’ means) can also be very easily disproved empirically. There are innumerable cases of women judges that have not decided cases with a particularly gendered lens, the most accessible example for the purposes of this paper is the first gender sensitive case decided by the Inter-American Court, the Aloeboetoe case, decided with the Court’s first woman justice on the bench.

Notwithstanding this initial assertion, reference must be made to research in the field like that of sociologist Phyllis Coontz who conducted an empirical study of judges and determined that while the gender of the litigant did not significantly influence the outcome of the case before a judge, on more occasions the gender of the judge did. She claimed that the results of her research lent support to psychologist Carol Gilligan’s work on the differences in the way that men and women deal with moral problems¹⁶⁰.

Martha Minow offers an explanation for the results of this study that does not fall into the essentialist trap. In her work on the dilemmas of difference, Minow highlights the influence that one’s own perception of reality has on how we view difference: “Presuming real differences

¹⁵⁹ CHARLESWORTH AND CHINKIN, *supra* note 14, at 50.

¹⁶⁰ Phyllis Coontz, *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?* 18 GENDER ISSUES 59, 60, 71 (2000) (discussing Carol Gilligan’s research).

between people, differences that we all know and recognize, presumes that we all perceive the world in the same way and that we are unaffected by our being situated in it”¹⁶¹. This basic concept has significant consequences for adjudication processes, in particular for what Minow calls the “dilemmas of difference”, namely whether or not exclusion because of perceived difference should be addressed by measures that focus on that difference, therefore running the risk of reinforcing the initial problem¹⁶². For the purposes of the subject at hand, the attempt to explain the gender bias in the Inter-American Court case law and whether or not the solution is to put more women on the Court, the most important part of Minow’s theory on difference are the “Five Unstated Assumptions” that she identifies and that are intrinsic in dilemmas of difference:

“First, we often assume that ‘differences’ are intrinsic, rather than viewing them as expressions of comparisons between people on the basis of particular traits [...] Second, we typically adopt an unstated point of reference when assessing others. It is from the point of reference of this norm that we determine who is different and who is normal [...] Third, we treat the person doing the seeing or judging as without a perspective, rather than inevitably seeing and judging from a particular situated perspective. Although a person’s perspective does not collapse into his or her demographic characteristics, no-one is free from perspective, and no-one can see fully from another’s point of view [...] Fourth, we assume that the perspectives of those being judged are either irrelevant or are already taken into account through the perspective of the judge [...] Finally, there is an

¹⁶¹ MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 4 (Cornell University Press 1990).

¹⁶² *Id.* at 47-48.

assumption that the existing social and economic arrangements are natural and neutral”¹⁶³.

Specifically with regard to judges she holds that “judges are themselves often members of the dominant group and therefore have the luxury of seeing their perspectives mirrored and reinforced in major social and political institutions”¹⁶⁴. In the same sense, Gerards holds that:

“judges, like everybody else, will unavoidably have a bias against particular persons or groups, or will think in stereotypes. Their personal views will consciously or not, always play a role in their interpretation and application of the principle of equality. It is thus extremely difficult for the courts to come to an objective decision”¹⁶⁵.

Finally, Coontz also distances herself from the essentialist approach to the issue and recognizes that:

“[t]he application of legal principles to concrete situations is always interpretative, and while legal education can train judges to focus on the factual matters of cases, the meaning that factual matters have for judges is an interpretative social process and this is precisely where a judge’s experiences could have bearing on the decision making process. We, of course, expect judges to set aside personal viewpoints when deciding cases, yet beneath the robe of justice is an individual whose perceptions of the world have been influenced by their experiences in it”¹⁶⁶.

So the conclusion that can be made is that for gender justice to be achieved in courts, what are needed are not women but rather judges whose experiences and consequent perceptions of the world allow them to appreciate the gender aspects of the cases brought before them. This

¹⁶³ *Id.* at 50-74.

¹⁶⁴ *Id.* at 62.

¹⁶⁵ JH GERARDS, *JUDICIAL REVIEW IN EQUAL TREATMENT CASES 5* (Martinus Nijhoff Publishers 2005).

¹⁶⁶ Coontz, *supra* note 160, at 71.

approach allows us to assert that many more women judges than men judges will have experiences that make them more sensitive to gender issues present in cases, but that not all of them will; it also allows for the possibility that male judges can be more gender sensitive than female judges, depending on the experience and perspective of each. In concrete terms, this explanation is not voided by the fact that there was a woman on the Aloeboetoe Court that did not perceive the gender issues and implications in the way reparations were allocated to polygynous wives, while the Castro Castro Court, on which a woman sat, *was* able to perceive the gendered dimensions of the state violence in that case (although, as we will see, their analysis was not complete). What distinguishes Plan de Sánchez and Castro Castro from the previous case law is not that there was a woman on the court, but rather that there were gender aware judges on the Court. There were no dissents in either of these last two cases so it is also possible to draw the conclusion that those judges that did not decide the previous cases were either able to perceive the gender issues themselves or, like the judges that did decide the previous cases, were persuaded by the arguments of those that were able to examine the case through a gender sensitive lens.

Before the OAS session General Assembly session where new judges were elected in 2003, a large number of women's rights organizations from all over the Americas successfully lobbied their states to elect Justice Cecilia Medina Quiroga, the first woman in ten years to the bench, not because she was a woman, but because of her previous experience in field of women's rights and because of her work on the UN Human Rights Committee where she served during the period in which the Committee drafted General Comment 28. She was present in the deliberations of both the Plan de Sánchez and the Castro Castro case.

2. Practical Constraints.

How does the previous analysis relate to the gendered reality of the Inter-American system for the protection of human rights? Put simply, how much of this theory can be applied to the Inter-American system in order to explain its fallacies in the field of women's rights?

a. The Law.

The American Declaration on the Rights and Duties of Man was the founding human rights instrument in the region and continues to be applied by the Commission to states that have not ratified the ACHR. Its male gendered language is not limited to its title, in its English preamble it states that: "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another"¹⁶⁷. The American Declaration goes on to refer to protected subjects as "human beings" and "persons", while still using the pronoun "his" or "him", except when referring to pregnant women and mothers (together with children) in article VIII. Efforts were made in 1998 to amend the OAS charter and the American Declaration so that all references to "men" be replaced by "human being or person" but the motion has not prospered¹⁶⁸.

¹⁶⁷ American Declaration of the Rights and Duties of Man, *supra* note 3, preamble. This situation is also present in the Spanish version of the American Declaration but to a lesser extent due to different linguistic construction where the word "*persona*" is feminine in Spanish. The OAS Charter, both in English and Spanish uses the words "man" and "*hombre*" respectively to refer to human beings. The Universal Declaration of Human Rights, proclaimed eight months later, makes a very similar statement in its article one but replaces "men" for "human beings" and omits the reference to nature as the source of reason and conscience.

¹⁶⁸ Permanent Council of the Organization of American States, Request to the Inter-American Juridical Committee for an Opinion on the Draft Protocol of Amendment to the OAS Charter and the Draft Resolution on Amendment of the American Declaration of the Rights and Duties of Man, OEA/Ser.GCP/RES. 719 (1151/98), (1998).

The American Convention on Human Rights, the principal treaty that falls within the material competence of the Inter-American Court, follows the same, completely avoidable, pattern of using “person” along with male pronouns but makes a point of clarifying that “‘person’ means every human being”¹⁶⁹.

In contrast, for obvious reasons, the words “him” and “his” do not appear at all the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. As stated beforehand, the Belém do Pará Convention succeeds in bringing attention to the problem of violence against women and in making the bold statement (by international law standards) that violence against women is a “manifestation of the historically unequal power relations between women and men”¹⁷⁰, but fails notably by rendering only vague and diffused state obligations enforceable and assigning them to the soft law, political adjudication of the Commission¹⁷¹. It was with considerable creativity and political bravery that the Inter-American Court reached out in 2006 and decided to pull Belém do Pará under its jurisdictional wing¹⁷².

But what is the result of that attribution of power for women’s rights? So far the Court has only found a violation of Belém do Pará in connection with due process and judicial protection rights under the American Convention, and so adding article 7.b) of Belém do Pará to the mix has not actually addressed any issues that are not covered by the more general ACHR¹⁷³. In fact, none of the state obligations that are justiciable under article 7 of the Belém do Pará Convention are new; they are all included in the obligations to respect and ensure under article 1.1 of the American Convention. The question remains: what is the plus offered by the Belém

¹⁶⁹ American Convention on Human Rights, *supra* note 4, art. 1.2. Once again the problem is present yet less accentuated in the Spanish version of the document.

¹⁷⁰ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 5, preamble.

¹⁷¹ *Id.* art 12.

¹⁷² Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 378-379, 408 (Nov.25, 2006), (García Ramírez J., individual opinion ¶ 2-32).

¹⁷³ *Id.* ¶ 408.

do Pará Convention? What positive aspects are able to counter the apparent subtraction of women's rights from the coverage of the general human rights convention? The risk is evident, while all of Belém do Pará can be included in the American Convention, not all of the American Convention is included in Belém do Pará. If Belém do Pará is, as the President of the Court has stated, the “Magna Carta of women's rights”, the obvious omissions of that convention may give the impression that the few rights recognized therein are women's rights, as opposed to those contained in the American Convention, which would be men's rights. This is a risk that many of us are not willing to take for the sake of political exposure of the very serious problem of gendered violence in the Americas.

In sum, the major Inter-American human rights documents, considered together, support the idea that their drafters had men in mind when they were created. The fact that Belém do Pará exists and is being applied as it is by the system organs, only reaffirms the vision that the original male-pronounced documents were not meant to apply to women in the first place.

b. The Docket.

As we have seen, the president of the Court attributes the lack of gender relative sentences to the male dominated docket of the Court¹⁷⁴. While this statement understates the responsibility of the Court itself in not perceiving and addressing appropriately the gendered cases that it did receive, Justice García Ramírez is absolutely correct in stating that there have been too few cases brought to the Court that have women as victims and that present violations of women's rights. As we have seen, in many countries subject to the jurisdiction of the Court, women have difficulties in accessing formal institutions of justice. Considering that in order to exhaust domestic remedies (as is generally required by the Inter-American system organs) it

¹⁷⁴ *Id.* (García Ramírez J., individual opinion ¶ 6-7).

takes a very patient and persevering complainant, and usually the support of an NGO or other institution, it is not surprising that women, who are marginalized from the internal justice system, do not see the benefits of taking their cases to the international system.

However, once the case is within the system, the question of why the Commission has seen fit to send so few cases to the Court remains. Until the end of 2006, only six cases where a woman's sex was a determinant factor can be identified among a universe of 87 individual cases. Just under 6.9 percent of the Court's cases have referred primarily to women's rights (six cases) and just under 2.3 percent of cases have referred to women's rights and have been resolved by a Court that has recognized the gender relevant issues present in the case (two cases). For a Court of "human" rights, these figures are unacceptable.

One argument offered by a member of the Commission staff is that the women's rights case that were dealt with by the Commission often ended in friendly settlement procedures and therefore could not have been sent to the Court¹⁷⁵. The political sensibilities that the case involves coupled with the strength of the civil society movements that oppose such a solution are often significant. In this sense it is not difficult to understand why the state of Peru would be more willing to settle the case of an impoverished woman who was subjected to an unconsented sterilization that resulted in her death than to settle the case of a military attack on a prison facility that housed female inmates accused of terrorism¹⁷⁶.

¹⁷⁵ Interview with Ariel Dulitsky, Deputy Executive Secretary, Inter-American Commission on Human Rights in Cambridge, MA. (Apr. 19, 2007). E.g. *María Merced de Moroni v. Argentina*, Case 11.307, Inter-Am. C.H.R., Report No. 103/01 (2001); *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01 (2001); *Mónica Carabaotes Galleguillos v. Chile*, Case 12.046, Inter-Am. C.H.R., Report No. 32/02 (2002); *María Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. C.H.R., Report No. 71/03[1] (2003); *Paulina del Carmen Ramírez Jacinto v. Mexico*, Case 161-02, Inter-Am. C.H.R., Report No. 21/07 (2007).

¹⁷⁶ *María Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. C.H.R., Report No. 71/03[1] (2003) and *Case of the Miguel Castro-Castro Prison v. Peru*, Inter-Am Ct. H.R. (ser. C) No. 160, (Nov.25, 2006). The sentiment of the Peruvian general public as to the issue of terrorism is such that the government has announced that it will not comply with the Court's ruling in *Castro Castro*. See Julissa Mantilla Falcón, *La Verdad de las Mentiras: La Sentencia del Penal de Castro Castro*, LA INSIGNIA IBEROAMÉRICA, http://lainsignia.org/2007/enero/ibe_026.htm

The Commission's use of friendly settlements to end individual complaints cases is not exempt of controversy. The term "friendly settlement" seems quite inappropriate when dealing with violations of human rights which are, by definition, egregious, but quite apart from terminology, considerable doubt should be had about with the ability of victims to negotiate on an equal footing with a state that has violated their human rights. This doubt should be heightened when considering the violations of women's rights because women as a group are already in a position of systemic disadvantage within those states. Ending cases in friendly settlement also all but erases political condemnation for the infracting state which is vital in ensuring state compliance in future similar cases. In addition, it keeps women's rights cases from the Court and therefore, as we have seen, prevents the development of jurisprudence by the system's highest organ.

As for the individual cases that, either due to the perseverance of the petitioners or the political inviability of a friendly settlement for the state, manage to make it to the resolution phase, article 61 of the ACHR places the control of the Court's docket firmly in the hands of the Commission. Technically, states parties to the American Convention can also submit a case to the Court but this has happened only once and the Court declared the petition inadmissible¹⁷⁷. In practice, the Commission has been the one to decide whether or not cases where the state has been found responsible for human rights violations are referred to the Court. If we take another look at the six cases examined at the start of this paper, we can see that in none of them the issue of gender is the most prevalent issue argued. Three deal with massacres, one deals with forced disappearances, one with abduction and one with due process rights, torture and cruel, inhuman and degrading treatment and prison conditions. This lends weight to the assumption that in three

¹⁷⁷ In the first issue that the Court was called upon to resolve, Costa Rica presented a case against itself, bypassing the Commission completely. In the matter of Viviana Gallardo et al. Inter-Am. Ct H.R. (ser. A) No. 10181 (Nov. 13, 1981).

of the first four cases the Court addressed only the issues that it considered the most egregious, leaving gendered issues at one side. On the other hand, in Loayza Tamayo it appears to have considered the alleged rape of the victim as *more* serious than her other allegations, so much so that it found insufficient evidence as to its occurrence.

In the Commission's defense, although it ignored the gender implications of the first two cases, it does appear that it caught on to gender based violations long before the court did. For many years before the Court's turnaround it was agreed that, amidst the general lack of political will to significantly improve the situation of women's rights within the OAS states, particularly the Latin American states, any progress made in the field in the Inter-American system was attributable to the Commission. This is possibly due to the fact that the Commission, being an essentially political body, has a mandate that is far wider than that of individual complaint dispute settlement and is therefore open to learning of human rights violations and taking action in diverse fora. The Commission, which has greater contact with civil society and is more pervious to political influence both from within and from without the OAS¹⁷⁸, began to argue violations based on the sex of the victim in Loayza Tamayo and did so once again in Maritza Urrutia but was denied by the Court in both instances.

However, this information must be considered together with the fact that up until the reform of the Commission's Rules of Procedure in 2001 the only cases that were taken to the

¹⁷⁸ The Commission's track record in the field of women's rights is better than the Court's, particularly with regards to the issue of violence against women; in addition to having established a Rapporteurship on the Rights of Women, the Commission has referred to the situation of women in country reports since 1995 (Haiti) and there are several cases that were resolved favorably for victims before the Commission. The element that is clearly lacking in its history is a will to refer women's rights complaints to the Court. For an analysis of the role of the Commission with respect to women see Cecilia Medina Quiroga, *The Inter-American Commission on Human Rights and Women, with Particular Reference to Women*, in *THE ROLE OF THE NATION-STATE IN THE 21ST CENTURY. HUMAN RIGHTS, INTERNATIONAL ORGANIZATIONS AND FOREIGN POLICY. ESSAYS IN HONOUR OF PETER BAER* 117 (Monique Castermans-Holleman, Fried van Hoof & Jaqueline Smith eds., 1998) and Cecilia Medina Quiroga, *Human Rights of Women: Where are we Now in the Americas?* in *ESSAYS IN HONOUR OF ALICE YOTOPOULOS-MARANGOPOULOS* 907 (A Manganas ed., 2003).

Court were those where a majority of the Commissioners voted in favor of doing so. This would entail at least four of the seven members of the Commission considering that the case was worthwhile, that the incompliance of the state with the Commissions recommendations was serious and presumably (considering the prosecutorial role that the Commission adopts in cases that it brings before the Court) that there was enough evidence to secure a finding of state responsibility before the Court. It is unclear which of these requirements the Commission felt were lacking when it decided to not pursue the various women's cases that it had ruled on, before the Court. In sum, in order to carry out a balanced analysis, the positive role that has been attributed to the Commission in the area of women's rights must not be considered separately from its obvious reticence to forward women's rights cases to the Court.

Since the reform of 2001 there now has to be a majority of votes against sending a case to the Court to stop the default referral, but even today, the Commission is mandated by its rules of procedure to consider the best way to obtain justice in each particular case when deciding whether or not to block its referral to the Court. This eminently political decision is influenced, among other things by the position of the petitioner, the nature and seriousness of the violation, the need to develop or clarify the case-law of the system, the future effect of the decision within the legal systems of the Member States and the quality of the evidence available¹⁷⁹. Considering the practical applications of the theory studied regarding the importance of women's issues in a patriarchal legal system, all of the aspects to be considered except the position of the petitioner are troubling from the point of view of women's rights cases, especially the appreciation that the Commission may have as to the "nature and seriousness of the violation" and the "quality of the evidence available". Notwithstanding however, considering that since the 2001 reform as many primarily gender relevant cases have been resolved by the Court as were sent to it in the twenty

¹⁷⁹ IACHR, Rules of Procedure, *supra* note 10, art. 44.2.

two previous years, it can be concluded that the advancement of women's rights cases is benefited by the lessening of the Commission's discretion over the referral of cases to the Court.

The Maritza Urrutia, Plan de Sánchez and Castro Castro cases were referred under these new rules, the other three cases were referred by majority vote, which makes Loayza Tamayo the only case where the Commission has voted affirmatively, against the default archiving, to refer to the Court a case where the Commission itself recognizes there has been a gender based violation – the rape of María Elena Loayza Tamayo¹⁸⁰. This data would support the assertion that women's cases get further in the system if they do not depend on the political will of the Commission members to do so.

It has been suggested that the 6 year gap between Loayza Tamayo and Urrutia can be explained by the reticence that the Commission may have felt given the very real risk that other gender relevant cases would suffer the same crushing fate as Loayza Tamayo¹⁸¹. With the Commission attributing blame to the Court and the Court likewise attributing blame to the Commission we are faced with a situation in which each organ found a way not to be responsible for the problem and the only losers were women.

c. The Actors.

The Gender Task Forces noted the enormous disparities between men and women judges in the US judicial system. One of the conclusions of these task forces cited previously indicates that gender bias against women is a “pervasive problem with grave consequences”¹⁸². Can the lack of persons with relevant gender experiences, to use Minow's terms, be tagged as a cause of

¹⁸⁰ It is worth noting that almost 7 years passed between the voted referral of the Loayza Tamayo case and the default referral of the Maritza Urrutia case.

¹⁸¹ Interview with Ariel Dulitsky, Deputy Executive Secretary, Inter-American Commission on Human Rights in Cambridge, MA. (Apr. 19, 2007).

¹⁸² New York Task Force on Women in the Courts 1986-87, 17-18, as cited by Resnik, *supra* note 154, at 958.

the Commission's reluctance to refer gender cases to the court and the Court's reluctance to find gender sensitive violations? The members of the Commission and the Court are nominated by OAS states and are elected by the General Assembly, with no applicable gender quota. There is no specific professional requirement for Commissioners while Inter-American Court justices are lawyers by profession but not necessarily judges in the domestic arena. Academics are common members of both organs. The gender imbalance in both organs has been shocking.

As stated beforehand, there are currently no women on the Commission and since 1960 there have been only five women Commissioners out of a total of fifty five. A review of the staff that currently works with the all-male commission indicates that the Executive Secretary and the Assistant Executive Secretary of the Commission are both men whereas twenty two out of twenty eight professionals are women (78.6%) while all of the Commission's administrative staff are women. The correlation between the sex of the staff member and the responsibility ascribed to their position is patently obvious in the Commission.

On the other hand, the Court has functioned with no women on the bench for twenty years out of its twenty-eight year existence. There was one woman justice (out of a total of seven) between 1989 and 1994, and between 2004 and 2006. As a result of elections last year, there are currently three women justices on the Court (42.9%) though the effect of this new composition has yet to be seen. In the first half of 2007 there were eight women lawyers out of a total of thirteen (61.5%), five female paralegals out of a total of six (83.3%) and all of the Court's secretaries were women¹⁸³.

¹⁸³ Although the historical gender imbalance in both organs is patent, a more in depth analysis would require a comparison of these figures with the pool of potential applicants in each of the average age ranges for each position, particularly those of the Court Justices and the Commissioners, in order to gauge the extent of the inaccessibility of those positions for women.

The author wishes to reiterate here that she is mentioning gender imbalance not as an easy diagnosis of the problem, but rather she refers to the sex of the justices and the staff of these organs to illustrate how they are failing to represent their constituents properly (in the political sense that a human rights body should reflect a composition of “humans”, rather than “men”) and to call attention to the fact that the absence of women could quite probably be a factor in the poor performance of both organs in gender sensitive cases because women are *more likely* to have had experiences that make them more aware of the gendered implications of the cases before them.

Examples of the effect that gender sensitive judges have on the outcome of gender sensitive cases can be found in other organs. For example, it is well known that the International Criminal Tribunal for Rwanda’s (ICTR) Akayesu ruling which is famous for its progressive application of law in the realm of rape and sexual violence addressed these issues at the insistence of Justice Navanethem Pillay, whose previous experience included the representation of women victims of domestic violence and participation in women’s advocacy groups¹⁸⁴. The Akayesu ruling is a very important precedent in international criminal law and can be seen in the case law of the International Criminal Tribunal for the former Yugoslavia. It is likewise reflected in the importance given to sexual violence by the ICC¹⁸⁵. In addition to this, it was invoked by the Inter-American Court of Human Rights in the Castro Castro case in support of the contention that forced nudity constituted sexual violence¹⁸⁶. Likewise, the Supreme Court Justices Sandra Day O’Connor and Ruth Bader Ginsburg are seen by feminist authors as vital to

¹⁸⁴ Emily Newberger, *The Bus Driver’s Daughter*, Harvard Law Bulletin, Spring, 2006, available at http://www.law.harvard.edu/alumni/bulletin/2006/spring/feature_3.php

¹⁸⁵ Goldstone and Dehon: *Engendering Accountability: Gender Crimes Under International Criminal Law*, New England Journal of Public Policy, 121, 134-137, (Fall/Winter 2003-2004). Also see Rome Statute of the International Criminal Court, arts. 6-9, 36.8, UN Doc. A/CONF.183/9 (Jul. 17, 1998).

¹⁸⁶ Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 306 (Nov.25, 2006).

the success of women's rights cases in the U.S.¹⁸⁷. The European Court of Human Rights has a much more women friendly case law than its Inter-American counterpart and several of its most important women's rights cases have been decided with women on the bench¹⁸⁸.

V. The Question of Change: The Plan de Sánchez Massacre and the Castro Castro Prison Rulings.

This paper has claimed that the case law of the Inter-American Court with regards to women's rights changed for the better in 2004, coincidentally the same year that a gender aware woman was elected to the bench. While I affirm that this circumstance is undeniable, there is understandable debate as to why the case law changed so violently and as to the extent of the change.

If there was ever a case to provoke a turnaround in the women's rights situation in the Court it was the Plan de Sánchez Massacre case. The sheer numbers of the victims and the sheer brutality of the acts committed made the case scream for gendered attention. The Court is certainly no stranger to massacres but the circumstances of this case suggested not only a methodical planning of the acts, but also, quite possibly genocidal intent against the indigenous population of the area, although the Court did not go as far as to recognize that.

Several factors converged in this case to bring the issue of gender to the surface. The first were the brutal circumstances of the case, the second was the arrival on the Court of a woman Justice with extensive experience in the field of women's rights. Third, the delegation of the Inter-American Commission that argued the case in the oral proceedings was all-female, led by the Commission's Rapporteur on the Rights of Women who was accompanied by two female

¹⁸⁷ E.g. *Planned Parenthood v. Casey* 505 U.S. 833 (1992), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Jackson v. Birmingham*, 544 U.S. 167 (2005).

¹⁸⁸ E.g. *Aydin v. Turkey*, App. No. 23178/94, 25 E.H.R.R. (1997); *M.C. v. Bulgaria*, 646 Eur. Ct. H.R. (2003).

staff professionals. The experience of the Rapporteur and her staff was undoubtedly vital in the framing of the case in gender sensitive terms. Fourth, the case was heard and decided in 2004, several years after the issue of mass rape as a reprehensible act under international law had been firmly established. As we have seen, after the landmark decision in the Akayesu case and subsequent rulings in the International Criminal Tribunals for Rwanda and the ex-Yugoslavia, the Rome Statute of the ICC reflected in several articles the concern of the international community for the practice of sexual violence. Although the Akayesu case was not discussed in the deliberations of the Court in the Plan de Sánchez case¹⁸⁹ (as it was in Castro Castro), it is not unreasonable to presume that the aforementioned manifested international concern formed part of the background that each judge was able to draw on when deliberating. Fifth, the Commission, led by the Women's Rapporteur, presented key expert witness testimony by an indigenous law specialist and, more importantly for the purposes of this paper, by a psychologist who was able to explain to the Court the effects of these acts on the mental health of the victims taking particular note of their sex and their indigenous ethnicity¹⁹⁰. Finally, the author believes that reference must be made to the gender stereotypes of both men and women in Latin America that form part of the experience of all those involved in the judging of this case. The issue becomes relevant if one understands that the men left the village that day because they believed that the soldiers would not harm the women that they left behind. It is abundantly clear from the testimony of the victims that if they had conceived that the women were at risk of violence, other measures would have been taken. In fact, the rape and murder of women and children by the armed forces was a measure destined to harm the men that had fled into hiding; the rape was directed at them as much as to the women that Latin American culture indicates that men must

¹⁸⁹ Telephone interview with Cecilia Medina Quiroga, Vice-President, Inter-American Court of Human Rights, in Cambridge MA., (May 1, 2007).

¹⁹⁰ Case of the Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct H.R. (ser. C) No.116, ¶ 38 (Nov. 19, 2004).

protect. The rape and murder of women that are intimately connected to men in armed conflict is well documented as the weapon of choice of certain armed groups because it attacks the masculinity of the men that are charged with the protection of those women. In short, the case presents the facts in a way that makes it particularly easy for male interveners to empathize with the male survivors of the massacre. According to the expert witness testimony, the rape of women plunged the whole village into a state of collective shame and family relations became disarticulated as a result¹⁹¹. Given the pervasive nature of the rape stigma throughout Latin America, it is not hard to see how those involved in the case were able to appreciate the immense harm done by the state in this case.

Castro Castro had the benefit of the two years that separated it from Plan de Sánchez during which time the issue decanted and women's rights advocates were made aware that the Court was more open to finding women's rights violations. As we have seen, in the interim there were several cases that presented women's issues only tangentially with little formal recognition from the system organs and so it took another shockingly egregious case to once again force the Court to take measures.

Once again the egregiousness worked in favor of the success of the case before the Court. Castro Castro, like Plan de Sánchez was a massacre and was directed at women because they were women. This was undeniable; the state of Peru's attack on the women's wing of the prison was aimed at demoralizing the Shining Path movement in its entirety, much for the same reasons as the Guatemalan armed forces had targeted the women in Plan de Sánchez. The same gender aware judge sat on the Court along with six others that, after Plan de Sánchez reparations ruling, were certainly *more* gender aware if in fact they had not been before that case; it was the President of the Court, a man, who took it upon himself to explain in his individual opinion the

¹⁹¹ *Id.* ¶ 38.

reasoning behind the Court's seizure of jurisdiction over Belém do Pará. In this case the delegation that presented the case for the Commission in the oral hearings before the Court was different from the one in the Plan de Sánchez case in that it was mostly male, but similar in that it made gendered considerations a central part of the argument made before the Court¹⁹². Perhaps one of the most determinative aspects of this case inasmuch gendered analysis is concerned was the participation of the Common Intervener who represented part of the victims. This representative was a lawyer who had been detained in the women's wing of the Castro Castro prison at the time of the attack and so was also a victim. From the beginning her arguments centered on the fact that this was a case of violence against women, often taking gender arguments further than the Commission did; her arguments regarding the applicability of the Belém do Pará Convention pushed the idea of applicability of the instrument whereas the Commission argued only for the interpretation of articles 8 and 25 of the ACHR in light of that text¹⁹³.

The influence that international criminal law had on the Court was more explicit than in Plan de Sánchez; this time the Court made specific reference to the Akayesu ruling when applying its extended definition of sexual violence to the case at hand¹⁹⁴. Similarly, other sources of international human rights law are seen to be borrowed as the Court made its first in depth analysis of the nature of rape and sexual violence as a violation of human rights under the ACHR. Thus, reference was made to the UN Minimum Rules for the Treatment of Prisoners, the European Court of Human Rights' case law (specifically the Aydin case), the CEDAW

¹⁹² E.g. Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 259 g)-i) (Nov.25, 2006).

¹⁹³ *Id.* ¶ 369 f), 370 j).

¹⁹⁴ *Id.* ¶ 306.

Committee's General Recommendation 19 on Violence against Women and the reports of the UN Special Rapporteurs on Torture and Violence against Women¹⁹⁵.

Once again, expert testimony was important in order to establish the gendered intent of the attack and the gendered effects of it on women. In this case that testimony came from a criminologist, proposed by the Commission, and from two psychologists specialized in the treatment of torture victims, proposed by the common intervener¹⁹⁶.

The final element in *Castro Castro* that may have influenced the ruling of the Court is, as in the *Plan de Sánchez* case, the stereotype of women that is prevalent in Latin American culture. If the operative cultural standard in the *Plan de Sánchez* ruling was the role of men in the “protection” of women from other men, in the *Castro Castro* case it was the vulnerability of women and the role of motherhood that stuck out in the arguments of the Commission, the common intervener and the Court itself. The condemnation of violence against pregnant women and mothers (which in Latin American culture are indistinguishable) is perhaps the most salient part of the ruling. If we go back to Minow's writings on the experience of judges as fundamental in influencing their decisions, it becomes easier to understand why motherhood is a simple way to visualize women's issues for those who do not have direct, first hand experience of those issues. Not all of the judges on the Court were mothers, but presumably all had had mothers and mothers, as we will see further on, fall only slightly short of sacred in Latin American culture. To see the women in the *Castro Castro* case as mothers rather than as women and rather than simply as human beings apparently heightened the sensibility of the judges to gender violence issues present in the case. In short, many of the violations described were presented through the

¹⁹⁵ *Id.* ¶ 303-313.

¹⁹⁶ *Id.* ¶ 186 a) 1, b) 2-3.

lens of motherhood: the three pregnant women who suffered through the attack on the prison¹⁹⁷; the horror of the murders of the inmates was portrayed through their mother's search of the morgues on Mother's Day¹⁹⁸; the particular tale of the mother who discovered her son alive under a pile of bodies in the morgue and then had to face a soldier that was going to kill him¹⁹⁹; the suffering imposed by solitary confinement illustrated through the experience of mothers who were not allowed to see their children²⁰⁰. One judge went as far as to say that the human rights of women who were not mothers had been violated because they had not been able to become mothers²⁰¹.

The author sustains that all of the above - the particularly egregious nature of the violations, the composition of the Court, the expertise of the intervening parties, the influence of international law, the expert testimonies and the gender stereotypes prevalent in Latin American culture - drove the Court to issue its two most gender sensitive rulings to date. The Court set its jurisprudence on gender based sexual violence following the more progressive rulings of the European Court and the ICTR and succeeded in both bringing attention to the particular violations of women's rights during conflict and shaming the state. The rulings however were not perfect.

First, although the rulings recognized sexual violence and established the new Inter-American case law to that effect, the gendered concern did not go as far as the reparations phase of the case. In this sense, despite recognizing that the purpose of the mass rape in Plan de Sánchez was the destruction of the dignity of women in many different aspects of their lives, the Court did not distinguish between women and men when allocating reparations. The tables of

¹⁹⁷ *Id.* ¶ 292.

¹⁹⁸ *Id.* ¶ 338.

¹⁹⁹ *Id.* ¶ 187.a.2.

²⁰⁰ *Id.* ¶ 330.

²⁰¹ *Id.* (Cançado Trindade J., individual opinion ¶ 63).

monetary compensation awarded by the Court show that the “suffering” of women and men was considered equivalent²⁰². Likewise, in the Castro Castro case the Court awarded the same reparations to men and women with three important exceptions: the three pregnant women who were housed in the attacked wing of the prison received five thousand dollars more compensation than the others, the victim of rape was awarded thirty thousand dollars more and the six victims of sexual violence (forced nudity while hospitalized) were awarded ten thousand dollars more than the standard amount awarded²⁰³.

While these caveats show that the Court is now willing to look at each individual’s suffering as informative in the allocation of immaterial damages, the Court in its analysis of the reparations for this case failed to take into account and properly repair the gendered violations of men’s rights that were argued and proven in this case. For example, while the six women in the hospital were kept naked during their stay, the men who were left in the Castro Castro prison were forced to remain naked on the ground in a crouched position for prolonged amounts of time. They were also subjected to beatings and electric shocks on their genitals²⁰⁴. The motivation behind this treatment was the same as that behind the sexual violence committed against the women inmates, namely the degradation and psychological torture of the prisoners. Although one can convincingly argue that the forced nudity of detained women puts them at a heightened risk of rape and sexual abuse, and therefore deserves heightened condemnation and reparation, it does not follow that the use of sexually charged methods of mistreatment towards men should receive no extra reparation at all.

²⁰² Case of the Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct H.R. (ser. C) No.116, ¶ 49.19, 75-76, 88-89 (Nov. 19, 2004).

²⁰³ Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 433 c) viii-x (Nov.25, 2006).

²⁰⁴ *Id.* ¶ 197 (46), 186 a) 8, 260 l).

While it has been argued throughout this paper that gender relevant violations of human rights deserve special attention from the Court, that attention should be based on the actual violations and the actual harm done and not on stereotyped notions of what constitutes suffering for men and for women. It is important to explain to the readers of the rulings *why* the system organ has arrived at the conclusions that it has with regard to gender violations. For example, the ruling states that the Commission “in its brief of final arguments [...] indicated that almost a hundred of the victims of the present case are women, for who the consequences of the breaches to human rights analyzed resulted especially gross”²⁰⁵. To ask why, when confronted with this statement is not a trivial question, especially given the Inter-American system’s patchy history in this field, yet the Commission does not elaborate.

The lack of reparations for male victims of sexual violence was not the only instance of the Court’s differentiated treatment of men and women as victims. Solitary confinement was deemed a more egregious violation of human rights when those confined were mothers because they were prevented from seeing their children for prolonged amounts of time²⁰⁶. Nothing was said about the effects that solitary confinement had on fathers of children who were unable to see them.

This brings us back to the issue of mothers. The overarching question here is what was the effect of the Court’s focus on mothers in the Castro Castro ruling for the women’s rights movement in Latin America? A critique of the Court’s position is exceptionally hard due primarily to the intent of the violating state. The mother stereotype is strong in Latin America, a region where the Catholic majority is overwhelming and where the Virgin Mary, the quintessential mother, is widely venerated. There is little doubt in the author’s mind that the

²⁰⁵ *Id.* ¶ 228 p). See also *Id.* ¶ 369 f).

²⁰⁶ *Id.* ¶ 330.

attack was designed to use the stereotype of women as subject to the protection of their men and more specifically the mother stereotype to demoralize the armed opposition movement in Fujimori's Peru. The fact that such a devastating attack was launched against the women's wing of the prison while men were only attacked when attempting to assist the women, the timing of the attack so that it occurred on women's visiting day and so that the search for the bodies coincided with Mother's Day all indicate that the assault was meticulously planned to have an effect that spanned the movement. It also seems that the assault achieved the desired effect; one of the victims claimed to have felt anguish at the knowledge that his mother was outside watching all that was going on and worrying about him²⁰⁷.

The abuse of the gender stereotypes was widespread in the various dictatorial regimes that have governed Latin America in the recent past due to its usefulness in the psychological breakdown of detainees in interrogations. Examples are abundant in truth commission reports and related literature: rape of women detainees was extremely common as were other forms of sexual violence against them. There are also reports of women relatives of male detainees being raped in their presence to force the men to talk or to punish them²⁰⁸.

While knowledge of this practice was not widespread until after the publication of the various truth commission reports in Latin America, in the field of human rights advocacy the image of the mother as a relentless, almost iconic, figure in the struggle against the dictatorships was at the forefront of the general public's view of the repression. The prevalent, media friendly

²⁰⁷ *Id.* ¶ 186, Expert Reports b) 3.

²⁰⁸ INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA, *supra* note 34, at 244; see also INFORME DE LA COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, *supra* note 34; GUATEMALA: MEMORY OF SILENCE. TZ'INIL NA'TAB'AL. REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION. CONCLUSIONS AND RECOMMENDATIONS, ¶ 91 available at <http://shr.aaas.org/guatemala/ceh/report/english/conc2.html>; Lynn Stephen, *Women's Rights Are Human Rights: The Merging of Feminine and Feminist Interests among El Salvador's Mothers of the Disappeared (CO-MADRES)*, 22 AMERICAN ETHNOLOGIST 807 (1995); Jennifer G. Schirmer *Those Who Die for Life Cannot Be Called Dead: Women and Human Rights Protest in Latin America*, 32 FEMINIST REVIEW 3 (1989).

image is that of the Mother's of the Plaza de Mayo who gathered every week in Buenos Aires' central square with white scarves over their hair and pictures of their disappeared sons and daughters pinned to their clothing to demand information about their whereabouts. They were soon enough joined by the Grandmothers of the Plaza de Mayo who have spent decades searching for their grandchildren, stolen from their disappeared children and given in adoption to families connected with the military.

It is reasonable to presume that all of these circumstances - the catholic culture's vision of women, the targeting of women for their stereotyped sexual role and requirements and the iconic image of mothers as those that struggle for human rights justice in the Americas - form part of the common culture in Latin America, a culture that is shared by the perpetrators, the victims, the advocates and the judges in this case. And so the question remains: what should have been the response of the Court to these circumstances as presented by the parties in the case? How should a human rights court respond to such egregious exploitation of gender stereotypes to inflict harm? If the Court finds, as it did, that the violations of these women's rights were more reprehensible because they were mothers, does that reinforce the stereotypes in detriment of women in general? On the other hand, if both the perpetrators and the victims are participants in the culture in which these ideas are prevalent, the victims did in fact suffer more because they were mothers and so if the Court fails to recognize this circumstance it can fail in its most important task, the administration of justice for the victims of human rights violations that are presented to it²⁰⁹. What if the victims request that the Court find the violations of the rights of mothers particularly severe, as they did in this case? Finally, what are the effects of this

²⁰⁹ In the Castro Castro case, where the mother issue hit its highest point, out of twenty parents listed as next of kin that had made trek to the morgues in search of their children eighteen were mothers and just two were fathers. Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, Annex 2 (Nov.25, 2006).

type of reasoning on other cases in the future and should the Court be considering this when ruling in a case such as the Castro Castro massacre?

If we agree that the stereotypes of women as mothers and/or as subject to the protection of men are a product of the patriarchy that women are held under and that as such they restrict women's access to a position of equality in our societies then an answer to this question is that the Court should take no part in reinforcing such ideas and should rule in a way that takes into account the particular gendered aspects of a case without reinforcing the ideas that made the violation so egregious in the first place. Therefore, the Court should have awarded equal reparations to the women in Aloeboetoe instead of dividing them into groups of wives defined by their dead husbands. Consider, on the other hand the Case of Vargas Areco where a child was conscripted by government military forces and then killed by them. After hearing of the emotional breakdown suffered by the child's mother, the Court decided to award her five thousand dollars more for immaterial damages than what was awarded to the father²¹⁰. What is reparative justice in a case such as this where the mother did suffer great emotional stress to a further extent than that suffered by the father?²¹¹

All of this is without regard to the future of Inter-American case law. As we will see, there are currently several cases making their way through the system that challenge cultural conceptions of how women should behave, particularly with regards to motherhood. Any endorsement of a particular vision of motherhood, in particular that akin to Justice Cançado

²¹⁰ Case of Vargas-Areco v. Paraguay, 2006 Inter-Am. Ct H.R. (ser. C) No. 155, ¶ 151a)-b) (Sep, 26, 2006).

²¹¹ Historically, in the Inter-American Court case law, parents in general and mothers in particular have not had to prove close ties to their children in order to receive reparations. E.g. Case of Loayza-Tamayo v. Peru, Inter-Am. Ct H.R. (ser. C) No. 42, ¶ 101-105 (Nov. 27, 1998); Case of Trujillo-Oroza v. Bolivia, Inter-Am. Ct H.R. (ser. C) No. 92, ¶ 55 (Feb. 27, 2002); Case of Bulacio v. Argentina, Inter-Am. Ct H.R. (ser. C) No. 100, ¶ 85 (Sep. 18, 2003). In the Street Children Case the Court stated that the remains of the victims [...] were sacred to their families, and particularly their mothers" Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Inter-Am. Ct H.R. (ser. C) No. 63, ¶ 174 (Nov. 19, 1999).

Trindade's "sanctity of motherhood" discourse, will undoubtedly affect cases where what is at issue is a woman's sexuality or her decision to become, or not become, a mother at all.

It is the author's view that the Court made enormous strides when it took on the issue of gendered violence in Plan de Sánchez and in Castro Castro, but that it erred when it endorsed the same stereotype used to victimize women and men in this case. There are enough objective facts in this case to conclude that there was enhanced suffering of certain victims in the Castro Castro case because of their undeniably close relationship to other victims, especially those who were parents of the victims. It is not only reasonable but also necessary for a human rights court to recognize that the victims of the Castro Castro massacre, men and women, were maliciously targeted with a social stereotype that heightened their suffering based on their sex. This approach entails necessarily finding that the state also violated the right to equality of the victims. To rule that sex discrimination was the basis of the treatment that the victims received is very different from an essentialist ruling that a mother's pain or a woman's pain is worse because they are mothers and women. This finding was entirely possible in Castro Castro without jeopardizing the examination of the case with a gendered lens; to see women and men as such, recognizing their particular circumstances without reducing them to their societal stereotypes would have made this case the remarkable, positive precedent that it deserves to be²¹².

Finally, there is the issue of the sudden and unexpected promotion of the Belém do Pará Convention to the prestigious group of justiciable treaties in the Inter-American Court's

²¹² The author recognizes that there exists a rich debate in feminist literature as to the status and appreciation of motherhood; however such a debate will not be analyzed in this paper. Suffice it to say that those authors that recognize a heightened importance of the experience of motherhood in women's lives do not necessarily endorse the Court's particular expression of this experience, or the political implications that stem from it.

forum²¹³. The Court in the Castro Castro ruling found a violation of articles 8 (due process) and 25 (judicial protection) *in connection with* article 7(b) of the Belém do Pará Convention, falling short, but only slightly, of finding an autonomous violation of this treaty. As we have seen, the Court had much to make up for politically; the individual opinion drafted by its President recognizes that the Court was lagging behind its contemporaries inasmuch as the recognition of women's rights is concerned. The President's reasoning as to why the Court could find a violation of Belém do Pará was not at all far-fetched and, in fact, less controversial than other extensive moves that the Court has made in the past. His reasoning was grammatical: the Belém do Pará Convention submits individual petitions of violations of its article 7 to the procedure for complaints brought to the Inter-American Commission. The Rules of Procedure that the Commission uses to deal with individual petitions indicate that if the state has not complied with the recommendations made by the Commission in its final report, it can refer the case to the Court unless a majority votes otherwise²¹⁴. The President concluded that this provision is that which implies that the Court has jurisdiction to hear cases based on Belém do Pará; i.e., the treaty empowers the Commission to resolve individual complaints and one function attributed to the Commission within that broad delegation is the ability to refer cases to the Court. This grammatical reasoning is credible and does not distort the ordinary meaning of the terms of the treaty but it does disregard what was presumably the initial intent of the parties²¹⁵. The President makes light of the fact that the treaty drafters did not specifically include the Court as a dispute settlement organ in the Belém do Pará treaty by saying that there is no fixed formula for

²¹³ The Commission argued in the Castro Castro case that the Belém do Pará Convention, which was not in force in Peru at the time of the events should be referred to in order to interpret the state's obligations under articles 4 (life), 5 (humane treatment), 8 (due process) and 25 (effective remedy). Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, ¶ 369 f) (Nov.25, 2006).

²¹⁴ IACHR, Rules of Procedure, *supra* note 10, art. 44.1. Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160 (Nov.25, 2006), (García Ramírez J., individual opinion ¶ 31).

²¹⁵ Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

assigning jurisdiction to the Court²¹⁶ and so there is presumably no reason to refute his reasoning on the basis of prior practice. The President's construction of jurisdiction does not appear to be *per se* illegitimate but it is certainly boldly extensive and the author wonders whether the benefits of such a move in terms of credibility of the Court among states parties and analysts of the system were worth such a stretch, especially given that it was not a legally *necessary* move. The Court was and continues to be under considerable pressure to catch up to its contemporaries in the field of gender justice, and this type of situation generally creates a risk of overcompensation that could, in fact, be detrimental to the initial purpose.

A robust argument against the extension of jurisdiction is that it arguably goes against the intention of the treaty drafters, which is hugely important politically because, as Helfer points out, extensive interpretations such as this can trigger denunciations by states parties and bring about certain reluctance of states to ratify future human rights treaties in the region²¹⁷.

It is as yet to be seen if the extensive interpretation in *Castro Castro* has the same effect as the Human Rights Committee death row syndrome rulings had on the Caribbean states²¹⁸ but, given the political climate in Latin America, it seems unlikely that states will denunciate a treaty that deals with violence against women. In this sense, the denunciation of the First Optional Protocol to the ICCPR by Trinidad and Tobago was motivated in part by the popularity of the death penalty on the islands. There is presumably no significant “violence against women” lobby in Latin American and Caribbean states.

²¹⁶ Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am Ct. H.R. (ser. C) No. 160, (Nov.25, 2006), (García Ramírez J., individual opinion ¶ 18).

²¹⁷ See Helfer, *supra* note 61.

²¹⁸ Helfer points out that the inclusion of “death row syndrome” under the prohibition of torture and cruel, inhuman and degrading treatment led to the withdrawal of Trinidad and Tobago from the First Optional Protocol to the ICCPR.

Of much more concern to the author is the danger that the full justiciability of the Belém do Pará Convention will lead to the gradual exclusion of gender based violence issues from the American Convention in order to have them assigned to Belém do Pará. It is politically vital to be completely clear that women's rights are mainstream human rights and that although Belém do Pará adds much politically, it adds nothing legally that was not there already in the American Convention.

VI. The Future of Women's Rights Case Law in the Inter-American Commission and Court.

As can be seen from the analysis of the cases resolved by the Court, the issues presented for its consideration were not legally complex. The violations of women's rights that were present in those cases tended to be egregious and undeniable. Given this fact it is imperative that the turnaround experienced by the Court continue to mature because there are a series of cases making their way through the Commission procedure that could quite possibly be considered by the Court and that present issues more complex than the ones that the Court has either dealt with or ignored to date. For example two very prominent cases involve stereotypes of women as applied to lesbians: the Álvarez Giraldo case refers to the denial of conjugal visitation rights to an incarcerated lesbian woman²¹⁹ and the Atala Riffo case refers to the removal by the state of female children from the home of a gay mother²²⁰. On another front, a very media friendly sexual and reproductive rights case involves the Costa Rican ban on *in vitro* fertilization, according to the state in order to comply with the right to life "in general, from the moment of

²¹⁹ Marta Lucía Álvarez Giraldo v. Colombia, Case 11.656, Inter-Am. C.H.R., Report No. 71/99 (1999). The Commission declared the case admissible in May of 1999, but it has yet to find on the merits.

²²⁰ Case of Karen Atala Riffo v. Chile, currently before the IACHR, as yet unpublished.

conception” provision of article 4 of the American Convention²²¹. Finally, perhaps the most interesting case for the purposes of this paper is *M.Z. v. Bolivia* which deals with the rape of a Dutch woman by a Bolivian man and the subsequent acquittal of the rapist. Among other arguments, the alleged victim asserts that she was denied a fair trial because the Bolivian court system is biased against women. The bias therefore is not specific to her person but rather is against all women; in short, she affirms that no woman can receive a fair trial in Bolivia. This case has incredibly interesting political ramifications, whatever the ruling of the Commission and eventually the Court may be, however as of the date of this writing its resolution is still pending. What makes it even more interesting for this paper is that it has been pending before the Commission for over six years, over five years having passed since it was declared admissible²²². *M.Z.* languishes, lost (or even buried) perhaps because there are truths that the Inter-American system is not yet willing to recognize.

VII. The Way Forward: Strategies for Continuing Improvement.

The purpose of this paper is to identify and attempt to explain the problem of gender insensitivity in the case law of the Inter-American Court with a view to proposing ways to improve the situation. While the Court itself has recently taken great strides in this direction, the situation remains far from satisfactory. Now that the position of the Court has been firmly established with regard to gross and systematic violations of women’s human rights, it must now turn its attention to the everyday, pervasive and culturally rooted violations that women all over Latin America and the Caribbean endure on a daily basis.

²²¹ Ana Victoria Sánchez Villalobos et al v. Costa Rica, Case 12.361, Inter-Am. C.H.R., Report No. 25/04 (2004).

²²² *M. Z. v. Bolivia*, Case 12.350, Inter-Am. C.H.R., Report No. 73/01, OEA/Ser./L/V/II.114 Doc. 5 rev. at 121 (2001).

By drawing on the analysis carried out above, and having identified the Court's successes and failures in this field, six strategic areas can be identified as means that concerned actors can focus on to assist the process of change toward a more gender friendly Court jurisprudence.

1. Law Making: General Human Rights Instruments versus Specialized Women's Rights Instruments.

The specialized law making trend is a tempting one, especially given the languishing application of general human rights law to women in general. Specialized rights treaties serve political and hermeneutical purposes: on the one hand they are effective means to raise awareness and to use international pressure to extract commitments from states parties; on the other hand they serve to clarify and to expand on the commitments already undertaken in general human rights treaties.

However, the drafting of specialized treaties also gives states the option of not ratifying them or of ratifying them with reservations that have not been made when ratifying the general treaties that already bind them²²³. In addition, as we have seen, they also facilitate the relegation of women's rights to these specialized treaties that more often than not contain diffuse state obligations and weak enforcement mechanisms.

It will be rare that a specialized treaty innovate on the state obligations contained in the American Convention on Human Rights so pressure groups must carefully weigh the political advantages of a specialized treaty against the legal risks of pushing for such a treaty. A good example is the current campaign for an Inter-American sexual and reproductive rights treaty²²⁴. While recognizing that there is a widespread and pervasive denial of sexual and reproductive

²²³ MACKINNON, *supra* note 101, at 6. Also see note 113.

²²⁴ See Campaña por una Convención Interamericana de los Derechos Sexuales y Reproductivos, <http://www.convencion.org.uy/>

rights throughout the region, given the pressure that states receive from conservative groups, in particular the Catholic Church, states should not be given the opportunity to *not ratify* the new treaty or to ratify it with reservations. The refusal to ratify this treaty will not have legal effects on the state's obligations under the American Convention, but the political effects could be disastrous for the domestic invocation of these general rights.

An alternate strategy that avoids these problems and would force the general monitoring bodies to keep focusing on women's rights is one where advocates use these bodies, such as the Inter-American Court, to specify and expand the content of general human rights provisions through individual case law and advisory opinions. Sexual and reproductive rights can be brought before the Court based on article 4 (right to life), 5 (right to humane treatment), 11 (right to privacy) and 24 (right to equal treatment) of the American Convention.

2. The Reform of Legal Education in Latin America.

One of the recommendations made by the Gender Task Force Reports was the need to reform legal education²²⁵. This conclusion stands to reason because many domestic and international law makers, state representatives, Inter-American Commissioners and all litigants before and judges on the Inter-American Court have gone to law school. Given that the presence of women in law schools in Latin America and the Caribbean, both as students and as professors, is a relatively recent phenomenon, it is safe to say that most of the Inter-American Commissioners and Inter-American Court justices attended law school at a time when law school was a predominantly male experience²²⁶. Given that, as Schneider holds “[l]aw schools transmit

²²⁵ Elizabeth M Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 38 J. LEGAL EDUC. 87, 88 (1988).

²²⁶ An analogy is made here to Schneider's comments on law school faculty members. *Id.*

our first messages about what is permissible in the law”²²⁷, the reform of law school curricula and the heightened presence of women on law school faculties become urgent measures if sex bias against women in the Inter-American human rights complaints system is to be avoided in the future.

Law school is an excellent opportunity to begin to construct the gendered experiences that will help make the system’s actors gender aware in the future. In the area of law school curricula, much the same dynamic occurs as with general and specific human rights documents. While courses that focus on feminist legal theory or women in the law are politically very relevant, they may assist in the idea that it is not necessary to incorporate women’s experiences into other more general courses. If women’s experiences are going to be reflected in law school curricula in a meaningful way then they should be present in the core courses that all students must pass in order to graduate. Optional “gender courses”, that leave exposure to those who seek and choose it, are not a good enough solution.

3. The Composition of the Inter-American System Organs.

There are currently no requirements for quotas of women Commissioners and Court Justices in the Inter-American system. As we have seen, the requirements imposed on candidates for those positions have to do with their moral standing and their professional achievements²²⁸. The nomination of candidates for these positions is up to states and the positions have been overwhelmingly filled by men, with both the Commission and the Court passing through periods with no female members at all. As we have seen, this has consequences both in the political sense and in the outcome of cases brought before the Court. Politically it is

²²⁷ *Id.*

²²⁸ American Convention on Human Rights, *supra* note 4, arts. 34, 52.

telling of the inferior situation of women in the region that no women are considered for the highest positions in international human rights law. Judicially, the lack of Commissioners and Judges with gendered experiences has led to gender issues being overlooked.

The problem of incentivizing women's participation in international human rights organs is not exclusive to the Inter-American system. Examples of how international Courts have dealt with the problem can be found in the European and African systems and in the International Criminal Court.

The Council of Europe has attempted to deal with the problem by requesting that states, which are entitled to a judge on the European Court of Human Rights, include at least one woman on their list of three candidates. In addition, the European Court makes a point of assigning at least one woman to each chamber. This approach has not been completely successful but there are currently 14 women out of 45 judges on that Court (31%)²²⁹. The Protocol to the African Charter On Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights requires states to give "due consideration to adequate gender representation" when preparing the lists of nominees that will be presented to the Assembly of Heads of State and Government of the OAU for voting. It further requires the Assembly to ensure that there is "adequate gender representation" in the election of judges²³⁰. The first election of judges held early in 2007 yielded a court comprised of nine men and two women (18%).

²²⁹ For a list of European Court Judges see European Court of Human Rights, The Court, Composition of the Court, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Plenary+Court/> See also, JUTTA LIMBACH, PEDRO CRUZ VILLALÓN, ROGER ERRERA, THE RT. HON. LORD LESTER OF HERNE HILL QC, TAMARA MORSCCHAKOVA, THE RT. HON. LORD JUSTICE SEDLEY & ANDRZEJ ZOLL, JUDICIAL INDEPENDENCE: LAW AND PRACTICE OF THE APPOINTMENTS TO THE EUROPEAN COURT OF HUMAN RIGHTS (INTERIGHTS, May 2003).

²³⁰ Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, arts. 12, 14, Jun. 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

The Rome Statute of the ICC requires that states parties consider when selecting judges the need for “a fair representation of female and male judges” and “the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children”²³¹. As a result of these rules, there are currently nine men and seven women judges (43.75%) on the ICC, including Judge Navanethem Pillay, renowned for her work on the ICTR’s Akayesu case.

The Inter-American system stands out among these contemporary organs in that it has no rule at all regarding the gender balance of its organs’ membership. While the current all-male composition of the Commission is clearly indicative of the problem, the current composition of the Court, with 42.85% of women on the bench is an oddity given the history of the organ and should not be invoked to deem action by the OAS unnecessary. Technically there is no reason why the Court could not revert to an all male composition in the future. Given the political and jurisdictional consequences of female under-representation, it is imperative that the OAS take measures to ensure that the Commission and the Court reflect not only the gender distribution of the region’s population, but also its racial and ethnic distribution at the very least. To not do so puts the legitimacy of the work of the Commission and the Court at serious risk.

This process can be influenced by NGO and human rights activists by lobbying OAS member states and states parties to the American Convention to nominate and elect gender aware judges²³². However, the process can be more complicated than it seems at first sight because states are electing Commissioners and Judges that will ultimately determine their international

²³¹ Rome Statute of the International Criminal Court, *supra* note 185, arts. 36.8.a.iii, 36.8.b.

²³² E.g. the election of a female judge to the Inter-American Court in 2003 came after a coordinated effort of women’s rights organizations throughout the Americas.

responsibility and therefore may well be reluctant to elect candidates perceived to be NGO-friendly²³³.

With regards to other system actors, the Court members themselves recognize the value of having specialized Court staff to assist in research of gender based issues. In this sense, the Court has recently begun to support specialized capacity-building study by its lawyers²³⁴.

4. Litigation Strategies.

- a. ***Presentation of Cases:*** The Commission and the Court must be presented with cases in order for them to be made aware of the women's rights problems that prevail in the region and in order for them to rule on these issues. Advocates can assist this process by bringing more cases to the system and by selecting emblematic cases that represent a widespread violation of women's rights in a state party to the OAS, the resolution of which could spark a domino effect domestically²³⁵.
- b. ***Gender Sensitive Issue Framing:*** In order for the Court to be able to properly grasp the gendered dimensions of a given case, it is essential that the litigants properly frame the issues in that light. As we have seen, the Commission made no arguments with respect to equality rights in Aloeboetoe or with respect to sexual violence in Caballero Delgado and Santana and thereby did not alert the Court to these issues. On the other hand, gendered arguments were key in the Plan de Sánchez Massacre

²³³ Interview with Jessica Neuwirth, Executive Director, Equality Now, in Cambridge MA., (Apr. 19, 2007).

²³⁴ Telephone interview with Cecilia Medina Quiroga, Vice-President, Inter-American Court of Human Rights, in Cambridge MA., (May 1, 2007).

²³⁵ E.g. the Dutch women's social security cases brought before the Human Rights Committee that sparked an overhaul of the domestic social security program: S. W. M. Broeks v. The Netherlands, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (1990) and F. H. Zwaan-de Vries v. The Netherlands, Communication No. 182/1984, U.N. Doc. CCPR/C/OP/2 at 209 (1990).

and Castro Castro cases²³⁶. If the issues are not argued, the litigants share the responsibility of bad judgments with the Court; if on the other hand arguments are made and then rejected by the Court, as was the case in Loayza Tamayo and Urrutia, the responsibility lies with the gender biased Court alone.

- c. ***Presentation of Expert Witness Testimony:*** Plan de Sánchez and Castro Castro were also good examples of the strategic use of expert testimony to illustrate gendered effects that are not immediately apparent to the judges. Expert testimony, while presented by the parties, maintains a certain air of impartiality that lends credibility to the arguments of the litigants: issues presented by expert witnesses tend to be perceived as facts rather than opinions.
- d. ***Extension of Useful Precedents:*** Although the Court has certainly lacked women's rights precedents in the strict sense, fortunately for litigants it has several important precedents issued in cases regarding men but that can be extremely useful in women's rights cases.
 - i. ***State Responsibility for Non-State Action:*** In the first case that the Court decided it found the state of Honduras responsible for the forced disappearance of a university student. The Velásquez Rodríguez case was remarkable for several reasons but for the purposes of this paper the most important is that it found that a state party could be held responsible for violations of human rights committed by non-state actors "because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention"²³⁷. This precedent can be invoked in cases of state tolerance of sex discrimination in general and sexual harassment,

²³⁶ Telephone interview with Cecilia Medina Quiroga, Vice-President, Inter-American Court of Human Rights, in Cambridge MA., (May 1, 2007).

²³⁷ Case of Velásquez-Rodríguez v. Honduras, Inter-Am. Ct H.R. (ser. C) No. 4, ¶ 172 (Jul.29, 1988).

rape and other forms of sexual violence, particularly domestic violence. The Velásquez Rodríguez precedent has the ability, therefore, of mitigating the public/private divide with regards to violence and to workplace discrimination among other issues.

- ii. **Economic, Social and Cultural Rights:** The Villagrán Morales et al. case (also known as the “Street Children” case) dealt with the abduction, torture and murder of five homeless youths from Guatemala City. In ruling on the violation of the victim’s right to life, the Court found that “[i]n essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence”²³⁸. This precedent opens the door for the justiciability of the economic, social and cultural rights that MacKinnon, Charlesworth and Chinkin consider are more important than civil and political rights for women in general through the Inter-American Court procedure. It is also an important precedent for cases regarding the sexual exploitation of women, for example through trafficking.
- iii. **Procedural *Onus Probandi* Rules:** Velásquez Rodríguez also introduced burden shifting as a tool that the system employed against states that either conducted deficient investigations or were generally in compliance with the requirements of the system organs²³⁹. Curiously enough, this was the tool that the Court used in

²³⁸ Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala, Inter-Am. Ct H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999), In their individual opinion, Justices Cançado Trindade and Abreu Burelli state that “[t]his outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights”, *id.* (Cançado Trindade J. and Abreu Burelli J., individual opinion, ¶ 4).

²³⁹ Case of Velásquez-Rodríguez v. Honduras, Inter-Am. Ct H.R. (ser. C) No. 4, ¶ 134-138 (Jul.29, 1988).

the Loayza Tamayo case to find that all allegations of inhumane treatment except the rape of the victim had in fact occurred. Regardless of its misuse by the Court in that particular case, burden shifting remains a very useful means of bypassing evidentiary rules that are informed by the public/private dichotomy, particularly traditional consent based evidentiary requirements in rape cases.

- iv. **Non-Discrimination as *Jus Cogens*:** Advisory Opinion OC18, which dealt with the rights of migrants, recognized that the principle of non-discrimination had acquired the status of *jus cogens*²⁴⁰. This is an incredibly useful precedent for cases where sex discrimination is alleged against states that argue some sort of justification for discriminatory practices. Furthermore, the precedent is vital where states have not taken on international treaty obligations in the field of sex based discrimination.

5. Presentation of *Amici Curiae* Briefs.

Amici Curiae briefs can be very important in assisting the Court by framing issues in gender aware terms that are either overlooked by the litigants or excluded purposefully for political or strategic reasons. For example, in the MZ case, the NGO Equality Now presented the Commission with a brief that detailed various aspects of the case, *inter alia*, gender bias, stereotypes of women and rape myths²⁴¹. These briefs are welcomed by the Court²⁴² and, when

²⁴⁰ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, Inter-Am. Ct H.R. (ser. A) No. 18, ¶ 101 (Sep. 17, 2003).

²⁴¹ Equality Now, Amicus Curiae Brief to the Inter-American Commission on Human Rights in Case 12.350, M.Z. v. Bolivia, available at http://www.equalitynow.org/reports/mz_en.pdf

²⁴² Telephone interview with Cecilia Medina Quiroga, Vice-President, Inter-American Court of Human Rights, in Cambridge MA., (May 1, 2007).

drafted by specialists, can provide the Court with the arguments and precedents that it needs to find gender relevant violations.

6. Awareness Raising and Lobby.

Despite norm creation by international organizations such as the Commission and the Court as organs of the OAS, international human rights law continues to be made and influenced primarily by states. A concerted effort by domestic and international human rights and women's rights advocates can influence state consent in areas such as norm formulation, signature and ratification of human rights instruments, elections of Commission and Court members, submission to friendly dispute settlements and compliance with Commission reports and Court rulings. In this sense, strategic approaches to executive, legislative and judicial organs domestically and employment of media resources can drastically improve enforcement of international standards internally²⁴³.

VIII. Conclusions²⁴⁴.

The Inter-American Court's past shortcomings in the field of women's rights are undeniable. While the most immediately evident cause of this problem is the male-dominated composition of the Inter-American Commission and the Court itself, in fact the problem reveals itself to be a multifactorial one that cannot be remedied by merely adding women to the system's organs and waiting for change to occur. The problems faced by the system in this area are more complex than just the numerical representation of women; what is needed to tackle this

²⁴³ For an account of the domestic women's movement efforts to achieve equal rights protection in the United States of America, see Reva Segal, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*; 2005-06 Brennan Center Symposium Lecture, 94 Calif. L. Rev. 1323, (2006).

²⁴⁴ The research herein and the corresponding conclusions that can be drawn from this paper can be useful for future discussions on institutional design of new human rights bodies and for reform of existing bodies.

multifactorial problem is a multifactorial approach that includes gender aware lawmakers, Commissioners, Judges and litigants - of both sexes.

The Court itself has made huge strides in a very short time towards a more appropriate gender appreciation of the issues that are submitted to its jurisdiction but problems remain, particularly in the stereotypes that inform the Court's vision of women victims. While these stereotypes are also prevalent in Latin American and Caribbean culture, and have been used by states to violate women's human rights, the Court's endorsement of them contributes to perpetuating the problem and raises red flags for future cases of sex-discrimination involving women who have challenged the cultural assertions of what is appropriate behavior for women.

Given that the Court has responded in a positive way to victims' demands of gender justice in cases of gross and systematic violations of human rights, one of the remaining challenges is to achieve the same with regards to subtler, more pervasive violations of women's rights that are subject to widespread impunity domestically in states in the region and that as yet have not been submitted to the Court's consideration. If this challenge and the remaining deficiencies of the Inter-American Court's case law on women's rights are addressed adequately by all the actors that work in and with the system, the author is confident that the international recognition and adjudication of women's rights issues in Latin America and the Caribbean will improve considerably.