

**WOMEN'S RIGHTS IN RECENT INTER-AMERICAN HUMAN RIGHTS JURISPRUDENCE\***

doi:10.1017/amp.2017.38

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While certain aspects of women's rights had been addressed in earlier OAS instruments<sup>1</sup> and more generally in the American Declaration on the Rights and Duties of Man<sup>2</sup> and in the American Convention on Human Rights,<sup>3</sup> many consider that the issue of women's rights was first incorporated in the normative corpus of the Inter-American Human Rights System (IAHRS) with the 1994 adoption of the Belém do Pará Convention on the Prevention, Punishment, and Eradication of Violence Against Women.<sup>4</sup> This treaty obliges states to prevent, punish, and eradicate violence against women, taking special account of vulnerabilities due to race, ethnic background, migrant status, age, pregnancy, socioeconomic situation, etc. It defines the concept of violence against women and forces states to ensure that women live free of violence in the public and private sphere. It also grants the Commission and the Court the ability to process individual complaints regarding alleged violations of the treaty. Since 1994, the Commission has also established a *Rapporteurship on the rights of women*, which assists the IACHR in its thematic or country reports and visits,<sup>5</sup> as well as in the processing of women's rights-related petitions.<sup>6</sup> In recent years, the jurisprudence of the Commission and the Court has addressed several fundamental issues related to women's rights, in particular regarding violence against women, women's right to equality, and reproductive health.<sup>7</sup>

The issue of *violence against women* is probably the sector where IAHRS has developed the most standards. One should indeed recall that the IACHR's 1995 *Raquel Martín de Mejía v. Peru* case<sup>8</sup> was the first international adjudicative decision to qualify rape as torture under international law.<sup>9</sup> This approach was again adopted in the *Ana, Beatriz et Celia Gonzalez Perez v. Mexico* case,<sup>10</sup>

\* The author would like to thank Thomas Antkowiak for organizing the panel on the topic, as well as Elise Hansbury, who contributed to the research for this paper.

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<sup>1</sup> See, e.g., Inter-American Convention on the Granting of Civil Rights to Women, May 2, 1948, 1438 UNTS 51; Inter-American Convention on the Granting of Political Rights of Women, May 2, 1948, 1438 UNTS 63; Inter-American Convention on the Nationality of Women, Dec. 26, 1933, O.A.S. Treaty Series No. 4, 38.

<sup>2</sup> O.A.S. Res. XXX. Final Act, Ninth International Conference of American States (1948), Doc OEA/ Ser.L/V/II.23/ Doc.21, rev 6 (1979) [hereinafter The Declaration], arts. II, VII.

<sup>3</sup> Nov. 22, 1969, 1144 RTNU 123, OASTS n°36 [hereinafter Convention], arts. 1, 4.5, 6.1, 17.

<sup>4</sup> Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 33 ILM 1534 (1994).

<sup>5</sup> The IACHR has adopted seventeen thematic reports and thirty-one chapters of country reports related to women's rights, including the 2015 Report on Legal Standards: Gender Equality and Women's Rights, OEA Ser.L/V/II. Doc.11.

<sup>6</sup> On the Rapporteurship see OEA, *Mujeres*, at <http://www.cidh.org/women/Default.htm>. On the Inter-American Commission of Women, which also has reporting functions, see OAS, *Inter-American Commission of Women*, at <https://www.oas.org/en/cim/>.

<sup>7</sup> Other topics include political participation, education, work, women in armed conflicts, etc.

<sup>8</sup> *Raquel Martín de Mejía v. Peru*, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 (1996).

<sup>9</sup> On this issue, see Christine Strumpfen-Darrie, *Rape: A Survey of Current International Jurisprudence*, 7 HUMAN RIGHTS BRIEF 12 (2000).

<sup>10</sup> *Ana, Beatriz and Celia Gonzalez Perez v. Mexico*, Case 11.565, Inter-Am. Comm'n H.R., Report No. 53/01, OEA/Ser. L/V/II.111 Doc. 20 (2000).

where the IACHR, taking into consideration the Belém do Pará Convention, indicated that rapes committed by state agents as well as the authorities' subsequent inaction to investigate, judge, and sanction these crimes triggered the state's responsibility not only under the Convention, but also under the Inter-American Convention to Prevent and Punish Torture.<sup>11</sup>

This qualification was later reiterated by the Court,<sup>12</sup> which provided definitions of rape and sexual violence,<sup>13</sup> considering it also a violation of the right to human treatment and to private life and dignity.<sup>14</sup> The IACtHR also detailed specific aspects of the state's *duty to investigate*, indicating that it had to act with due diligence to prevent violence and murder against women,<sup>15</sup> taking into consideration the context of impunity prevailing,<sup>16</sup> and had a duty to collect information regarding the situation of women in conditions of vulnerability.<sup>17</sup> In addition, it found that, during investigations, state authorities should adopt a gender perspective and ensure that victims can access justice fully, free from stereotypes.<sup>18</sup> Investigators should follow very strict technical requirements and prevent the revictimization of victims.<sup>19</sup> In addition, the Commission indicated that public authorities have the same due diligence duty to prevent, investigate, and sanction violence against women from private actors, including in contexts of domestic violence.<sup>20</sup>

Indeed, in accordance with the Belém do Pará Convention, states must ensure the right of women to be free from violence,<sup>21</sup> as gender-based violence is a form of *discrimination*.<sup>22</sup> In addition, with regard to *women's right to equality*, the IACHR reiterated that gender is a prohibited motive of discrimination, preventing states from adopting legislation that directly or indirectly discriminates against women.<sup>23</sup> Moreover, both the Commission and Court have highlighted the additional vulnerability faced by women who experience double or intersectional discrimination, based on age, race, ethnic origin, status as a human rights defender, etc.<sup>24</sup> The IACHR has also reaffirmed the

<sup>11</sup> Dec. 9, 1985, O.A.S. Treaty Series No. 67.

<sup>12</sup> Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006); González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009); Fernández Ortega v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 215 (May 7, 2009).

<sup>13</sup> See, e.g., *Castro-Castro*, *supra* note 12, para. 306 and following.

<sup>14</sup> See, e.g., Rosendo Cantú et al. v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 216, para. 118 (Aug. 31, 2010); Fernández Ortega, *supra* note 12, para. 1229.

<sup>15</sup> See, e.g., "*Cotton Field*," *supra* note 12, para. 284.

<sup>16</sup> Velásquez Pais v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 307, para. 133 (Nov. 19, 2015).

<sup>17</sup> Veliz Franco v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 277, paras. 150–51 (May 19, 2014).

<sup>18</sup> See, e.g., "*Cotton Field*," *supra*, note 12, paras. 293, 400; *Velasquez Pais*, *supra* note 16, paras. 180, 197.

<sup>19</sup> See, e.g., *Fernández Ortega*, *supra* note 12, paras. 194, 196.

<sup>20</sup> Jessica Lenahan (Gonzalez) et al. v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011), at paras. 120 and 133.

<sup>21</sup> See, e.g., *Fernández Ortega*, *supra* note 12, paras. 118, 130; see also *Jessica Lenahan (Gonzalez)*, *supra* note 20, para. 110.

<sup>22</sup> See, e.g., *Castro-Castro*, *supra* note 12, para. 303.

<sup>23</sup> María Eugenia Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n. H.R., Report No. 4/01, (2011), at paras. 44, 55.

<sup>24</sup> Yarcé v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 325, para. 193 (Nov. 22, 2016); see also *Jessica Lenahan (Gonzalez)*, *supra* note 20, para. 113; IACHR, Missing and Murdered Indigenous Women in British Columbia, Canada, OEA/Ser.L./V/II doc.30/14 (Dec. 21, 2014).

obligation of states to adopt, in certain circumstances, measures of affirmative action in favor of women, when required to achieve substantive equality of opportunity.<sup>25</sup>

Finally, both the Commission and the Court have adopted significant standards with respect to women's *reproductive and maternal health*. For instance, the IACHR issued a series of detailed recommendations in its thematic reports on Access to Information on Reproductive Health and on Access to Maternal Health Services.<sup>26</sup> The IACtHR also reiterated the states' obligation to adopt special measures of protection regarding pregnant women.<sup>27</sup> In a recent decision on forced sterilization, the Court also highlighted the relationship between maternal health and the rights to privacy and to personal integrity, for which the respect of the previous, free, and informed consent of women to medical interventions is fundamental.<sup>28</sup> Similar principles were recalled in the Court's famous *Decision on in vitro fertilization*, where it indicated that motherhood is an essential part of women's development and that the rights to privacy and personal integrity include the right to reproductive autonomy, to access to reproductive health services, and to relevant information in this regard, in accordance with women's right to enjoy the benefits of scientific progress.<sup>29</sup>

As to the delicate issue of *interruption of pregnancies*, the Commission ruled, in its *Baby Boy* decision,<sup>30</sup> that Article 4 of the Convention does not per se prohibit states from allowing abortion. It analyzed the drafting history of Article I of the Declaration and Article 4 of the Convention and concluded that the drafters had removed language previously proposed and replaced it with its final wording, avoiding requiring several states to derogate from laws that allowed abortions in certain circumstances. The Court seems to have confirmed this interpretation in 2012, indicating that it can be "concluded from the words 'in general' that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible."<sup>31</sup> In addition, some friendly settlements, as well as some provisional measures and precautionary measures decisions, indicate that an abortion should be allowed in certain circumstances, including in cases of pregnant children, in cases of victims of rape, when the health of the mother is in danger, and when the fetus is not viable.<sup>32</sup> This early trend seems to be in line with similar developments at the universal level.<sup>33</sup>

<sup>25</sup> See, e.g., IACHR, Annual Report 1999, Chapter VI, OEA/Ser.L/V/II.106, Doc. 6 rev (Apr. 13, 1999).

<sup>26</sup> IACHR, Access to Maternal Health Services from a Human Rights Perspective, OEA/Ser.L/V/II. Doc. 69 (2010); IACHR, Access to Information on Reproductive Health from a Human Rights Perspective, OEA/Ser.L/V/II.doc 61 (2011).

<sup>27</sup> See, e.g., *Xámok Kásek Indigenous Community v. Paraguay*, Inter-Am Ct. H.R. (ser. C) No. 214, paras. 234, 235 (Aug. 24, 2010).

<sup>28</sup> *IV v. Bolivia*, Inter-Am. Ct. H.R. (ser. C) No. 329, paras. 152–57, 175 (Nov. 30, 2016).

<sup>29</sup> *Artavia Murillo (In vitro fertilization) v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 257, paras. 143–50 (Nov. 28, 2012).

<sup>30</sup> IACHR, Case 1241 (USA), Annual Report of the IACHR 1980–1981.

<sup>31</sup> See *Artavia Murillo (In vitro fertilization)*, *supra* note 29, para. 264.

<sup>32</sup> See, e.g., *Paulina Del Carmen Ramírez Jacinto (Mexico)*, Petition 161–02, Friendly Settlement, Inter-Am. Comm'n H.R., Report No. 21/07, OEA/Ser.L/V/II.130, Doc. 22, rev. 1 (2007); see also *Matters of B Regarding El Salvador, Provisional Measures*, Inter-Am. Ct. H.R. (2013); *Mainumby v. Paraguay, Precautionary Measures*, Inter-Am. Comm'n H.R., PM178/15.

<sup>33</sup> See, e.g., Committee on the Elimination of Discrimination Against Women, Concluding Observations on Peru, CEDAW/C/PER/CO/7-8 (2014), para. 36; Committee on the Elimination of Discrimination Against Women, L.C. v. Peru, CEDAW/C/50/D/22/2009, para. 8.15; Human Rights Committee, K.L. v. Peru, CCPR/C/85/D/1153/2003, para. 6.4; V.D.A. v. Argentina, CCPR/C/101/D/1608/2007, para. 9.3.