

## **The Inter-American System's Recent Contributions to the Development of Women's Human Rights Standards**

Bernard Duhaime et Nancy R. Tapias Torrado

Numéro hors-série, juin 2022

S'ouvrir aux Amériques pour mieux protéger les droits humains et s'engager dans la réconciliation

Opening up to the Americas to better protect human rights and committing to reconciliation

Abriéndose a la Américas para proteger mejor los derechos humanos y comprometerse a la reconciliación

URI : <https://id.erudit.org/iderudit/1091087ar>

DOI : <https://doi.org/10.7202/1091087ar>

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Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)

2561-6994 (numérique)

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Citer cet article

Duhaime, B. & Tapias Torrado, N. R. (2022). The Inter-American System's Recent Contributions to the Development of Women's Human Rights Standards. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 211–246. <https://doi.org/10.7202/1091087ar>

Résumé de l'article

Cet article vise à donner un aperçu de certaines contributions du système interaméricain des droits de l'homme à l'élaboration de normes juridiques régionales sur les droits des filles et des femmes, dans une perspective positiviste. Il aborde d'abord le cadre normatif et institutionnel du système sur ce sujet. Il présente ensuite les principales avancées jurisprudentielles dans trois domaines spécifiques : le droit à l'égalité et à la non-discrimination, le droit de ne pas subir de la violence et les droits sexuels et reproductifs.

# THE INTER-AMERICAN SYSTEM'S RECENT CONTRIBUTIONS TO THE DEVELOPMENT OF WOMEN'S HUMAN RIGHTS STANDARDS

*Bernard Duhaime\* and Nancy R. Tapias Torrado\*\**

This article seeks to provide an overview of some of the Inter-American Human Rights System's contributions to the development of regional legal standards on girls' and women's human rights from a positivist perspective. It first addresses the System's normative and institutional framework on this topic. It then presents key jurisprudential advances in three specific areas: the right to equality and non-discrimination; the right to be free from violence; and sexual and reproductive rights.

Cet article vise à donner un aperçu de certaines contributions du système interaméricain des droits de l'homme à l'élaboration de normes juridiques régionales sur les droits des filles et des femmes, dans une perspective positiviste. Il aborde d'abord le cadre normatif et institutionnel du système sur ce sujet. Il présente ensuite les principales avancées jurisprudentielles dans trois domaines spécifiques : le droit à l'égalité et à la non-discrimination, le droit de ne pas subir de la violence et les droits sexuels et reproductifs.

Este artículo busca brindar un panorama general sobre algunas de las contribuciones del Sistema Interamericano de Derechos Humanos al desarrollo de estándares jurídicos regionales sobre los derechos humanos de las niñas y las mujeres, desde una perspectiva positivista. En primer lugar, aborda el marco normativo e institucional del Sistema sobre este tema. Luego presenta avances jurisprudenciales clave en tres áreas específicas: el derecho a la igualdad y no discriminación; el derecho a estar libre de violencia; y los derechos sexuales y reproductivos.

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On 5 May 2021, hundreds of red dresses were displayed in the many mobilization events across Canada to mark the National Day of Awareness for Missing and Murdered Indigenous Women and Girls in the country. It is a significant day to remember more than a thousand Indigenous women and girls killed or stolen. It is important to remember them, their stories and names, including Francis Brown, from the Wet'suwet'en Nation. She was remembered during a demonstration as a well-known hunter and mushroom picker who knew the woods very well. One day, Francis "disappeared." She has never been found, and her case remains unresolved — her mother never had closure before passing away.<sup>1</sup> Indeed, violence and discrimination against women and girls continue to be endemic all across the Americas and have been particularly acute against certain groups such as Indigenous women and girls, and Canada has not been an exception. The number of cases in the region is overwhelming, as well as the severity of many of them. In the last few years, thousands of women and girls have marched all over the hemisphere to have their voices heard, denouncing abuses and reaffirming their right to a life free of violence and discrimination.<sup>2</sup> March 8<sup>th</sup> — international women's day — and November 25<sup>th</sup> — international day for the elimination of violence against women — have been marked by massive demonstrations, also because the high levels of violence against women and girls have been exacerbated in the context of the pandemic.<sup>3</sup>

Historically, girls and women of the Americas have been subjected to severe human rights abuses. With and for the advancement of a stronger framework for their rights, girls and women, domestic and international organizations, governments and academia, amongst others, have intensified their work addressing these pressing issues in the last few years.<sup>4</sup> In this spirit, the present article seeks to present, from a positivist point of view, some of the Inter-American Human

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<sup>1</sup> Extracted from the speech of Wet'suwet'en leader Marlene Hale during a demonstration in Vancouver on 5 May 2021 (consent to include this extract was granted on 21 May 2021).

<sup>2</sup> In October 2016, for example, tens of thousands of women marched throughout Latin American capitals during the *Niunaménos* demonstrations to protest against the culture of *machismo* and violence against women. See Uki Goñi, "Argentina's women joined across South America in marches against violence", *The Guardian* (20 October 2016), online: <[www.theguardian.com/world/2016/oct/20/argentina-women-south-america-marches-violence-ni-una-menos](http://www.theguardian.com/world/2016/oct/20/argentina-women-south-america-marches-violence-ni-una-menos)>. Similarly, in January 2017, millions of women from all over the United States marched in Washington, denouncing violations of women's rights and asking for policy and social reform: "Our History: January 2017" (last visited 30 May 2022), online: *Women's March* <[www.womensmarch.com/about-us](http://www.womensmarch.com/about-us)>.

<sup>3</sup> For an overview of demonstrations in the last few years, see "Miles de mujeres marchan en A.L. contra violencia machista" (25 November 2019), online: *DW* <[www.dw.com/es/miles-de-mujeres-marchan-en-ala-contra-violencia-machista/a-51411726](http://www.dw.com/es/miles-de-mujeres-marchan-en-ala-contra-violencia-machista/a-51411726)>; Sonia Corona et al., "Miles de mujeres exhiben su fuerza en las calles de América Latina", *El País* (7 March 2020), online: <[elpais.com/sociedad/2020-03-08/america-latina-se-prepara-para-el-8m-mas-multitudinario.html](http://elpais.com/sociedad/2020-03-08/america-latina-se-prepara-para-el-8m-mas-multitudinario.html)>; "8M: las calles de América Latina se llenan de mujeres que luchan por sus derechos", *France 24* (9 March 2021), online: <[www.france24.com/es/am%C3%A9rica-latina/20210308-8m-mujeres-derechos-america-latina](http://www.france24.com/es/am%C3%A9rica-latina/20210308-8m-mujeres-derechos-america-latina)>.

<sup>4</sup> See e.g. Haley Florsheim and Joan Caivano, "Challenges for Women's Rights in Latin America", *The Dialogue* (21 December 2015), online: <[www.thedialogue.org/blogs/2015/12/protect-womens-rights-hold-latin-american-governments-accountable/](http://www.thedialogue.org/blogs/2015/12/protect-womens-rights-hold-latin-american-governments-accountable/)>; "Gender affairs" (last visited 30 May 2022), online: *Economic Commission for Latin America and the Caribbean* <[www.cepal.org/en/work-areas/gender-affairs](http://www.cepal.org/en/work-areas/gender-affairs)>; "Inicio" (last visited 30 May 2022), online: *CLADEM* <[cladem.org/](http://cladem.org/)>.

Rights System's (System or IAHR) contributions to this matter. Thus, the article provides the main regional standards developed by the institutions of the IAHR in this area of human rights law. Accordingly, the authors' objective is not to provide an analytical perspective, but rather to expose what the IAHR has advanced and offers on a very pressing matter across the continent. In this vein, it proposes an updated overview of the IAHR's main jurisprudential advancements for a Canadian readership interested in assessing the usefulness of the regime to promote and defend girls' and women's rights in Canada.<sup>5</sup> Considering their own situation, perspective and potential biases, respectively as Canadian male and Colombian female jurists, both human rights defenders, the authors do not intend to appraise the specific relevance of these developments for Canadian girls and women, but rather provide information and tools which can be useful for the latter's struggles for rights.<sup>6</sup>

The text thus first addresses the Systems' normative and institutional framework on this topic. It then illustrates its important jurisprudential contributions<sup>7</sup> in the specific area of women and girls' rights in the Americas,<sup>8</sup> which mandate States to address core human rights concerns and have paved the way for the adoption of domestic legal standards essential for the better enjoyment of these fundamental rights and freedoms. The text thus focuses on the right to equality and non-discrimination, on the protection of women and girls from violence, and on the important issue of sexual and reproductive rights.<sup>9</sup> It concludes by briefly discussing the importance of these crucial developments and standards for all the States in the hemisphere, including Canada.

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<sup>5</sup> On this issue, see generally Rebecca Cook, "Les droits des femmes et la Convention américaine relative aux droits de l'homme", *Rights and Democracy*, 29 January 2001 at 2 [Cook, "Les droits des femmes"]; Rebecca Cook, "Fostering Compliance with Women's Rights in the Inter-American System" (1998) 11:1 *RQDI* 129.

<sup>6</sup> On the broader debate addressing how authors are positioned in regards to their topic of analysis, see François Dupuis-Déri, "Les hommes profémistes: compagnons de route ou faux amis?" (2008) 21:1 *Recherches Féministes* 149; Anh Hua, "Critical Race Feminism" (Canadian Critical Race Conference 2003 delivered at University of British Columbia, 2-4 May 2003) [unpublished].

<sup>7</sup> To ease the reading of this text, a list of decisions of the Inter-American Commission and Court of Human Rights dealing with women and girls' rights are presented in Annex I and II. While the current paper does not appraise these decisions in the light of the recent literature, it does provide a partial list of doctrinal texts addressing these decisions in Annex III. Annex IV specifically lists doctrinal texts addressing Commission and Court decisions on the issue of the interruption of pregnancies.

<sup>8</sup> These human rights standards are for all women of all ages and backgrounds. Every reference to women is also relevant to girls. In some cases, we have included "women and girls" to emphasize this aspect. When "girls" are not mentioned, it does not exclude them.

<sup>9</sup> It should be noted that the suggested division of topics and distribution of jurisprudential developments in each thematic category is relative in many perspectives. For example, many issues addressed under the heading of violence against women could be similarly discussed under that of equality rights and vice-versa. Such overlapping and interconnection among issues are consistent with the universal, interrelated, interdependent, and indivisible nature of human rights, which clearly include women's rights. On this, see *Vienna Declaration and Programme of Action*, 25 June 1993, A/CONF.157/23 (entered into force 14 February 1994).

## I. INTER-AMERICAN NORMATIVE AND INSTITUTIONAL DEVELOPMENTS REGARDING THE HUMAN RIGHTS OF WOMEN

This section shows how the institutional tools to protect women and girls' rights have evolved in the IAHRS, gaining increasing importance as the system has provided even more attention to this pressing matter. The issue of women's rights has timidly made its way on the Inter-American Human Rights agenda over the years. There were indeed efforts to create a space for women in the Pan American Union (PAU),<sup>10</sup> the predecessor of the Organization of American States (Organization or OAS). It created the Inter-American Commission on Women (CIM) in 1928, giving it the mandate to conduct a study of the legal status of women in the Americas.<sup>11</sup> This resulted in the *Convention on the Nationality of Women*,<sup>12</sup> the first international treaty on women's rights, adopted in 1933.<sup>13</sup>

During the 1948 conference held in Bogota, which saw the adoption of the *OAS Charter*<sup>14</sup> and the creation of the Organization, the Member States also adopted the *Inter-American Convention on the Granting of Civil Rights to Women* and the *Inter-American Convention on the Granting of Political Rights to Women*.<sup>15</sup> In addition, one should recall the *American Declaration*,<sup>16</sup> adopted in 1948, the *American Convention (Pact of San José)*,<sup>17</sup> adopted in 1969, and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*.<sup>18</sup> They all also contain a

<sup>10</sup> On the Pan-American Conference of Women held in 1922, see "Una Conferencia Pan-Americana de Importancia Trascendental" (1922) 55:2 Boletín de la Unión Panamericana. In regard to how women's participation in the PAU was limited during the Sixth International Conference of American States in 1928, see "Brief History of the Commission" (last visited 30 May 2022), online: *Inter-American Commission of Women* <[www.oas.org/en/cim/history.asp](http://www.oas.org/en/cim/history.asp)>.

<sup>11</sup> See "Brief History of the Commission", *ibid*.

<sup>12</sup> OAS, *Convention on the Nationality of Women*, 26 December 1933, 49 US Stat 2957, US Treaty Series 875 (entered into force 29 August 1934).

<sup>13</sup> *Ibid*.

<sup>14</sup> *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951), modified by 721 UNTS 324.

<sup>15</sup> *Inter-American Convention on the Granting of Civil Rights to Women*, 2 May 1948, 1438 UNTS 51 (entered into force 29 December 1954); *Inter-American Convention on the Granting of Political Rights to Women*, 2 May 1948, 1438 UNTS 63 (entered into force 29 December 1954). See also Pan American Union, *Conferencias internacionales americanas, segundo suplemento, 1945-1954* (Washington D.C.: Unión Panamericana, 1956) at 172.

<sup>16</sup> OAS, International Conference of American States, 9th Sess, *American Declaration on the Rights and Duties of Man* (1948), OR OEA/Ser.L/V/II.23/Doc.21, rev. 6 (1979) [*Declaration*]. See for e.g. arts II, VII.

<sup>17</sup> *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978). See for e.g. arts 1, 4.5, 6.1, 17 [*American Convention*].

<sup>18</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 17 November 1988, OAS Treaty Series 69, arts 3, 6 (2), 9 (2), 13 (3) (c), 13 (3) (e), 15 (entered into force 16 November 1999) [*Additional Protocol to the American Convention on Human Rights*]. See also Bernard Duhaime, "Le système interaméricain et la protection des droits économiques, sociaux et culturels des personnes et des groupes vivant dans des conditions particulières de vulnérabilité" (2006) 44 Can YB Intl Law 95.

series of articles addressing women's rights directly or indirectly, in particular through the prism of the right to equality.<sup>19</sup>

But the cornerstone of the Inter-American Human Rights System regarding the rights of girls and women is definitely the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, more commonly known as the *Bélem Do Para Convention*, which was adopted in 1994.<sup>20</sup> This treaty defines violence against women — of all ages and backgrounds — and reiterates the right of women to have a life free of violence, both in the public and private spheres. In accordance with this convention, States must investigate, prosecute and punish perpetrators of violence, and adopt measures to prevent and eliminate all forms of violence against women and girls, taking “special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons,”<sup>21</sup> as provided in Article 9. The Inter-American Commission on Human Rights (IACHR) is competent to receive individual complaints relating to a part of this convention.<sup>22</sup> The Inter-American Commission of Women, in addition to its various statutory functions,<sup>23</sup> is also partly responsible for the observance of the *Bélem Do Para Convention* (Article 19) through a mechanism that reviews periodic reports submitted by States parties describing the measures adopted to implement that convention.<sup>24</sup>

In 1994, the IACHR established a Rapporteurship on the rights of women. It is composed of one of the commissioners, acting as a Rapporteur, and a team of human rights specialists, which assist the IACHR in its thematic and country

<sup>19</sup> *Additional Protocol to the American Convention on Human Rights*, *supra* note 18, arts 3, 6.2, 9.2, 13.3c, 13.3e, 15.

<sup>20</sup> *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (1994) 33:6 ILM 1534 (entered into force 5 March 1995) [*Belém Do Para Convention*].

<sup>21</sup> *Ibid.*, art 9.

<sup>22</sup> *Ibid.*, arts 7, 12.

<sup>23</sup> The Inter-American Commission of Women (CIM), a specialized organization of the Organization of American States, “is the principal forum for debating and formulating policy on women’s rights and gender equality [...] The CIM was the first intergovernmental agency established to ensure recognition of women’s human rights. CIM is made up of 34 Delegates, one for each OAS member state, [...] [who] are designated by their respective governments.”: “Inter-American Commission of Women: CIM Mission and Mandate” (last visited 30 May 2022), online: *Organization of American States* <[www.oas.org/en/cim/about.asp](http://www.oas.org/en/cim/about.asp)>. “Through its influential role within the OAS, [CIM] provides support and recognition to national women’s movements throughout the Americas”—at governmental level, with NGOs, and with grassroots organizations—and helps to foster inter-American cooperation.”: Admin, “Barbadian Senator Elected Vice President of CIM” (13 November 2010), online: *Barbados Government Information Service* <[gisbarbados.gov.bb/blog/barbadian-senator-elected-vice-president-of-cim/](http://gisbarbados.gov.bb/blog/barbadian-senator-elected-vice-president-of-cim/)>.

<sup>24</sup> For the statute of the mechanism to follow up on the implementation of the *Belém Do Para Convention*, see “MESECVI” (last visited 30 May 2022), online: *OAS* <[www.oas.org/es/MESECVI/default.asp](http://www.oas.org/es/MESECVI/default.asp)>. See also OAS, Inter-American Commission on Women, *Report on the Implementation of the follow-up mechanism to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Convention of Belém do Pará in compliance with resolution AG/res. 2138, OR OEA/Ser.G, Cp/Doc. 4104/06* (2006). For the Hemispheric Reports on the Implementation of the *Belém do Para Convention* by the MESECVI, see “Hemispheric Reports on the Implementation of the Belém do Para Convention” (last visited 30 May 2022), online: *OAS* <[www.oas.org/en/mesecvi/hemisphericreports.asp](http://www.oas.org/en/mesecvi/hemisphericreports.asp)>.

reports, as well as during its visits,<sup>25</sup> and in the processing of women's rights related petitions.<sup>26</sup>

Both the IACHR<sup>27</sup> and the Inter-American Court of Human Rights (IACTHR or the Court)<sup>28</sup> have adopted important decisions dealing with girls' and women's rights, in particular regarding the rights to equality and non-discrimination, gender-based violence, as well as sexual and reproductive rights. Many of these precedents have been discussed in the literature.<sup>29</sup>

## II. INTER-AMERICAN JURISPRUDENTIAL STANDARDS ON THE RIGHT TO EQUALITY AND NON-DISCRIMINATION OF WOMEN<sup>30</sup>

From its earlier decisions,<sup>31</sup> the IACHR has stated that discrimination on the basis of gender is prohibited under the *American Convention*. In the *María Eugenia*

<sup>25</sup> The IACHR has adopted over 20 thematic reports and 34 chapters of country reports related to women's rights. Thematic reports include, among others: OAS, IACHR, *Legal Standards related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application Updates from 2011 to 2014*, OR OEA/Ser.L/V/II. Doc. 11 (2015) [*Legal Standards related to Gender Equality and Women's Rights*]; OAS, IACHR, *Indigenous Women and Their Human Rights in the Americas*, OR OEA/Ser.L/V/II. Doc. 44 (2017); OAS, IACHR, *Compendium on Equality and Non-Discrimination. Inter-American Standards*, OR OEA/Ser.L/V/II.171 (2019) [*Compendium on Equality and Non-Discrimination*]; OAS, IACHR, *Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean*, OR OEA/Ser.L/V/II. Doc. 233 (2019) [*Violence and Discrimination against Women and Girls*].

<sup>26</sup> On the Rapporteurship, see "Rapporteurship on the Rights of Women" (last visited 30 May 2022), online: OAS <[www.oas.org/en/iachr/jsForm/?File=/en/iachr/r/dmujeres/default.asp](http://www.oas.org/en/iachr/jsForm/?File=/en/iachr/r/dmujeres/default.asp)>. On the Inter-American Commission of Women, which also has reporting functions, see "Inter-American Commission of Women", *supra* note 23.

<sup>27</sup> See Annex I.

<sup>28</sup> See Annex II.

<sup>29</sup> See Annex III for some selected texts.

<sup>30</sup> On the right to equality and non-discrimination, see OAS, IACTHR, *Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18*, OR OEA/Ser. A No. 18/03 (2003). See also Bernard Duhaime, "Vers une Amérique plus égalitaire ? L'interdiction de la discrimination et le système interaméricain de protection des droits de la personne" in Ludovic Hennebel and Hélène Tigroudja, eds, *Le particularisme interaméricain des droits de l'homme* (Paris: Pedone, 2009) 151.

<sup>31</sup> In addition to the jurisprudential standards presented in this article, see also the following IACHR thematic reports dealing specifically with women's right to equality and non-discrimination: *Legal Standards related to Gender Equality and Women's Rights*, *supra* note 25; OAS, IACHR, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OR OEA/Ser.L/V/II.143 Doc. 59 (2011); OAS, IACHR, *The Road to Substantive Democracy: Women's Political Participation in the Americas*, OR OEA/Ser.L/V/II. Doc. 79 (2011); OAS, IACHR, *Report on the Rights of Women in Chile: Equality in the Family, Labor and Political Spheres*, OR OEA/Ser.L/V/II.134 Doc. 63 (2009); OAS, IACHR, *The Situation of the rights of women in Ciudad Juárez, Mexico: the right to be free from violence and discrimination*, OR OEA/Ser.L/V/II.117 Doc. 44 (2003) [*The Situation of the rights of women in Ciudad Juárez, Mexico*]; *Compendium on Equality and Non-Discrimination*, *supra* note 25; *Violence and Discrimination against Women and Girls*, *supra* note 25.

*Morales de Sierra case*,<sup>32</sup> for example, it ruled that by adopting legislation that expressly treated women differently from men, without legitimate and justified reasons, Guatemala had violated Articles 1 and 24 of the *Convention*.<sup>33</sup> In this case, the *Guatemalan civil code* prevented a woman from exercising certain rights without her husband's authorization, for example, undertaking commercial activities outside her home, entering into contractual agreements or bringing legal actions to court. The Commission considered that the justifications invoked by the State were not imperative and, rather, marginalized women. While doing so, the IACHR interpreted the *American Convention* in light of the United Nations (UN) *Convention on the Elimination of All Forms of Discrimination against Women*. This *Convention* expressly provides that

States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.<sup>34</sup>

The IACHR also addressed briefly the indirect discriminatory effects of legislation on women in the *Elena Téllez Blanco 2007 admissibility decision* dealing with a Costa Rican program regulating the work of "Substitute Aunts" in shelters or residences for children.<sup>35</sup> The Commission admitted the case *inter alia* on the basis that the workload to which the victim was allegedly subjected could, if proven, have a disproportionate impact on women, since only women occupy the 'Aunt' positions, subjected to harsh employment conditions and work hours.<sup>36</sup>

In its 1998 and 1999 annual reports, the IACHR addressed the issue of affirmative action measures in favour of women, which States should adopt in certain circumstances when required to achieve substantive equality of opportunity, particularly for groups that have been historically marginalized.<sup>37</sup> For the Commission,

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<sup>32</sup> *María Eugenia Morales de Sierra v Guatemala* (2001), Inter-Am Comm HR No 4/01 at paras 44, 55, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser.L/V/II.111/doc.20 rev.

<sup>33</sup> Article 1 provides that "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means every human being." Article 24 provides that "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.": *American Convention*, *supra* note 17.

<sup>34</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 34/180, UNGAOR, 1979, Supp No 34 (No. 46), UN Doc A/RES/34/180, art 15 (2). See also *Karina Montenegro et al. v Ecuador* (2007), Inter-Am Comm HR No 48/07 at para 52, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130/doc.22 rev. 1.

<sup>35</sup> *Elena Téllez Blanco v Costa Rica* (2007), Inter-Am Comm HR No 29/07, *Annual Report of the Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130/doc.22 rev. 1.

<sup>36</sup> The merits decision and the Court judgment in this case will be particularly interesting to follow. See also Bernard Duhaime and Ariel E. Dulitzky, "Review of the Case Law of the Inter-American Human Rights System in 2007" (2007) 20:2 RQDI 299 at 312.

<sup>37</sup> See e.g. OAS, IACHR, *Annual Report of the Inter-American Commission on Human Rights 1999*, OR OEA/Ser.L/V/II.106, Doc. 6 rev, chap VI.



these affirmative action programs do not constitute discrimination to the extent that they have an objective and reasonable justification, and have an effect proportional to their aim.

Both the Court and Commission have contributed significantly to developing standards of the rights to equality and non-discrimination regarding lesbian women.<sup>38</sup> In the 2012 *Atala Riffo case*, for instance, the IACTHR concluded that Chile's legislation denying custody rights to a lesbian mother because of her sexual orientation violated her rights to equality and non-discrimination, privacy, and protection of honor.<sup>39</sup> It indicated, more specifically, that

States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. The States are obliged to take affirmative measures to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligations to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.<sup>40</sup>

Similarly, in the 2018 *Merits Report of the Marta Lucía Álvarez Giraldo case*, the Commission found that the State of Colombia violated several of Marta Álvarez Giraldo's rights because she was discriminated against as a lesbian woman in prison.<sup>41</sup> Between 1994 and 2002, she was not allowed an intimate visit. In 2002, her rights were protected by the Constitutional Court of Colombia, but harm and suffering had already been caused during the previous years. Based on the difference between "distinction" and "discrimination," the Commission determined — among others — that negative social stereotypes associated with women's exercise of their sexuality and lesbian women were used to deny Marta's rights.<sup>42</sup>

The heightened vulnerability of women in prison was also recognized by the State of Ecuador in a 2013 *Friendly Settlement* before the Commission regarding *Karina Montenegro and others*.<sup>43</sup> In this case, five women were arbitrarily detained. At the moment of their detention, four were pregnant, and one was over 65 years of age. Still, in contravention of Ecuadorian law, they were detained and taken to jail, when they should have been given house arrest due to their specific conditions. Moreover, the detention extended in time, and the newborns were kept in prison for their first 90

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<sup>38</sup> On the right to equality and non-discrimination of homosexual couples, see also *Duque (Colombia)* (2016), Inter-Am Ct HR (Ser C), No 310; *Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples* (2017), Advisory Opinion OC-24/17, Inter-Am Ct HR (Ser A), No 24. On the specific issue of trans women, see *Vicky Hernández et al. (Honduras)* (2021), Inter-Am Ct HR (Ser C), No 422.

<sup>39</sup> *Atala Riffo and Daughters (Chile)* (2012), Inter-Am Ct HR (Ser C) No 289, *Annual Report of the Inter-American Court of Human Rights: 2012*.

<sup>40</sup> *Ibid.*, para 80. See also Rosa M. Celorio, "The Case of Karen Atala and Daughters: Toward a Better Understanding of Discrimination, Equality, and the Rights of Women" (2012) 15:2 CUNY L Rev 335.

<sup>41</sup> The State violated Articles 5(1), 11(2), 8(1), 24 and 25(1) of the *American Convention* in relation to the State's obligations under Articles 1(1) and 2 thereof.

<sup>42</sup> *Marta Lucía Álvarez Giraldo v Colombia* (2018), Inter-Am Comm HR No 122/18 at paras 160-61, 173, *Annual Report of the Inter-American Commission on Human Rights: 2018*, OEA/Ser.L/V/II/doc.30.

<sup>43</sup> *Karina Montenegro et al v Ecuador*, *supra* note 34.

days of life, without adequate medical attention. This illegal detention generated physical, mental and moral damages to the women, aggravated by their special situation of vulnerability. Their newborns were also negatively affected. In its admissibility report, the Commission had already acknowledged that the alleged violations could contravene the rights of women and children.<sup>44</sup> In the settlement, the State acknowledged its responsibility for not complying with the law and not having granted greater protection to people of vulnerable groups such as children, the elderly and pregnant women.<sup>45</sup>

In this vein, both the Commission and the Court have also adopted clear standards on the issue of double discrimination and intersectional discrimination faced by some women.<sup>46</sup> Both have recognized that some women and girls may be exposed to double or multiple vulnerabilities, based on their age, race, ethnic origin, status as human rights defenders, among others, sometimes even aggravated by certain circumstances or contexts.<sup>47</sup> This is, for example, the *case of the Employees of the Fireworks Factory of Santo Antônio de Jesus in Brazil* adopted by the Court. On 11 December 1998, a fireworks factory exploded in the state of Bahia. As a result, 60 people died, and six survived. The majority of them — the survivors and the dead — were Afro-descendant women in a situation of poverty and low education. The facilities and working conditions were very precarious, and their pay was very low. The majority of the survivors were also women and girls, and none received adequate medical attention. After almost two decades, they were still seeking justice for what happened, as most of the judicial processes were still pending. Consequently, among others, the IACTHR found that the victims of this devastating accident were immersed in patterns of structural and intersectional discrimination, aggravated by a situation of structural poverty and lack of opportunities.<sup>48</sup>

Another example is the *case of Ana Teresa Yarce and four other women human rights defenders* in the “Comuna 13,” Medellín, Colombia. On 6 October 2006, Ana Teresa was murdered. She and the other women human rights defenders had

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Karina Montenegro et al v Ecuador* (2013), Inter-Am Comm HR, No 61/13, *Annual Report of the Inter-American Commission on Human Rights: 2013*, OEA/Ser.L/V/II. Doc. 50 Corr. 1.

<sup>46</sup> On the issue of double and intersectional discrimination faced by women see e.g. Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 *Stan L Rev* 1241; Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics” in Kelley Weisberg, ed, *Feminist Legal Theory* (New York: Routledge, 1991); Johanna E. Bond, “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations” (2003) 52:71 *Emory LJ* 71.

<sup>47</sup> See e.g. *Jessica Lenahan v United States* (2011), Inter-Am Comm HR No 80/11 at para 113, *Annual Report of the Inter-American Commission on Human Rights: 2011*, OEA/Ser.L/V/II/doc.69. See also OAS, IACHR, *Missing and Murdered Indigenous Women in British Columbia, Canada*, OR OEA/Ser.L/V/II Doc.30/14 (2014); *Ana, Beatriz and Celia Gonzalez Perez v Mexico* (2001), Inter-Am Comm HR No 53/01 at para 95, *Annual Report of the Inter-American Commission on Human Rights: 2001*, OEA/Ser.L/V/II.114/doc.5 rev. On the notion of conditions of vulnerability, see more generally Bernard Duhaime, “Le système interaméricain et la protection des droits économiques, sociaux et culturels des personnes et des groupes vivant dans des conditions particulières de vulnérabilité” (2007) 44 *Can YB of Intl Law* 95.

<sup>48</sup> *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus (Brazil)* (2020), Inter-Am Ct HR (Ser C) No 407, *Annual Report of the Inter-American Court of Human Rights: 2020*.

suffered severe violence in reprisal for their actions defending human rights; including, criminalization based on fabricated criminal charges, forced internal displacement, harassment, stigmatization and numerous death threats.<sup>49</sup> In this case, the IACTHR recognized that the vulnerabilities of these victims were heightened because they were women and human rights defenders in a general context of violence against women and violence against women human rights defenders within an armed conflict. Furthermore, the forced displacement affected them in a different and disproportionate manner, exposing them to increased risks and vulnerabilities as women leading the defence of human rights in their communities.<sup>50</sup>

In this regard, as mentioned, it is important to note that Article 9 of the *Bélem Do Para Convention* provides that States must

take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.<sup>51</sup>

In the *Gonzales Lluy case* dealing with the right to life, physical and moral integrity and education of a young girl infected with HIV AIDS in an Ecuadorian facility, the Court took into consideration the victim's gender, age, poor economic situation and health status. It also concluded that these factors added one to another and intersected to constitute a distinct motive of discrimination.<sup>52</sup>

Similarly, in the 2016 decision on the case *I.V. against Bolivia* (addressed further in the last section of this text), the Court discussed how certain women could be placed in situations of greater vulnerability due to an intersection of multiple discriminations. In this specific instance, the victim suffered sterilization without her consent. The Court noted that multiple levels of discrimination based on gender, socio-economic situation, and migratory status also affected this woman's effective access to justice.<sup>53</sup>

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<sup>49</sup> On intersectionality and women human rights defenders, see also Nancy R. Tapias Torrado, "Situación de las lideresas y defensoras de derechos humanos: análisis desde una perspectiva de género e interseccional", Policy Brief, (2019) 4 CAPAZ, online: <[www.instituto-capaz.org/capaz-policy-brief-4-2019-situacion-de-las-lideresas-y-defensoras-de-derechos-humanos-analisis-desde-una-perspectiva-de-genero-e-interseccional](http://www.instituto-capaz.org/capaz-policy-brief-4-2019-situacion-de-las-lideresas-y-defensoras-de-derechos-humanos-analisis-desde-una-perspectiva-de-genero-e-interseccional)>.

<sup>50</sup> *Yarce et al (Colombia)* (2016), Inter-Am Ct HR (Ser C) No 325 at paras 194, 243, *Report of the Inter-American Court of Human Rights: 2016*.

<sup>51</sup> *Bélem Do Para Convention*, *supra* note 20, art 9.

<sup>52</sup> *Gonzales Lluy et al (Ecuador)* (2015), Inter-Am Ct HR (Ser C), No 298 at paras 284-91, *Report of the Inter-American Court of Human Rights: 2015*. See also Bernard Duhaime and Elise Hansbury, "Les développements en droit interaméricain pour l'année 2015" (2016) 53 Can YB Intl Law 328 at 342ff [Duhaime and Hansbury, "2015"]; Bernard Duhaime and Élise Hansbury, "Les droits économiques, sociaux et culturels et le système interaméricain de protection des droits de la personne: *deus ex machina* au dernier acte" (2020) 61:2 C de D 539 at 545ff.

<sup>53</sup> *I.V. (Bolivia)* (2016), Inter-Am Ct HR (Ser C), No 329, *Report of the Inter-American Court of Human Rights: 2016*. See also Bernard Duhaime and Elise Hansbury, "Les développements en droit interaméricain pour l'année 2016" (2017) 54 Can YB Intl Law 384.

Moreover, the IACHR has addressed in greater detail, in some of its thematic reports, the need and importance of adopting an intersectional approach to the processing of cases of human rights violations against women,<sup>54</sup> in particular against Indigenous women.<sup>55</sup>

Before discussing next the worrying issue of violence against women, it is necessary to reiterate that such violence is a human rights violation, and it is discriminatory by its very nature. Indeed, the preamble of the *Bélem Do Para Convention* specifically indicates that “violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men”.<sup>56</sup> Indeed, in the 2006 *Castro Castro Prison case* dealing with security forces repression of an uprising in a Peruvian jail, the IACTHR recalled the observations of the UN Committee for the Elimination of Discrimination against Women as the definition of discrimination against women “includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately,” and that “[v]iolence against women is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”.<sup>57</sup>

In addition, Article 6 of the *Bélem Do Para Convention* expressly indicates that

[t]he right of every woman to be free from violence includes, among others, the right to be free from all forms of discrimination and [...] to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.<sup>58</sup>

The Commission addressed this specific issue in its 2001 ruling on the *Maria da Penha Maia Fernandes v Brazil case*, where the victim had been subjected to domestic violence in a context of rampant and systematic impunity in Brazil. The IACHR considered in particular that the stereotypes associated with women and domestic violence, and the generalized pattern of negligence and tolerance of the phenomenon by the authorities resulted in discriminatory judicial ineffectiveness, which constituted violations of the *American Convention* and the *Bélem Do Para*

<sup>54</sup> OAS, IACHR, *Violence against lesbian, gay, bisexual, trans and intersex persons in the Americas*, OR OAS/Ser.L/V/II.rev.1 Doc. 36 (2015); *Indigenous Women and Their Human Rights in the Americas*, *supra* note 25; OAS, IACHR, *Report on Poverty and Human Rights in the Americas*, OR OEA/Ser.L/V/II.164 Doc. 147 (2017); *Compendium on Equality and Non-Discrimination*, *supra* note 25.

<sup>55</sup> OAS, IACHR, *Legal Standards Related to Gender Equality and Women’s Rights in the Inter-American Human Rights System: Development and Application*, OR OEA/Ser.L/V/II. 143 Doc. 60 (2011).

<sup>56</sup> *Bélem Do Para Convention*, *supra* note 20, preamble.

<sup>57</sup> *Miguel Castro-Castro Prison (Peru)* (2006), Inter-Am Ct HR (Ser C), No 160 at para 303, *Report of the Inter-American Court of Human Rights: 2006*, referring to UNCEDAW, 1994, 11th Mtg, UN Doc. HRI/GEN/1/Rev. 1 at 84, paras 1, 6. See also *González et al. (“Cotton Field”) (Mexico)* (2009), Inter-Am Ct HR (Ser C) No 205 at para 395, *Annual Report of the Inter-American Court of Human Rights: 2009*; *Fernández Ortega (Mexico)* (2010), Inter-Am Ct HR (Ser C) No 215 at paras 130, 118, *Annual Report of the Inter-American Court of Human Rights: 2010*; *Espinoza González (Peru)* (2014), Inter-Am Ct HR (Ser C), No 289 at paras 62ff, 225-29, *Annual Report of the Inter-American Court of Human Rights: 2014*.

<sup>58</sup> *Bélem Do Para Convention*, *supra* note 20, art 6.

*Convention*.<sup>59</sup> This approach was reaffirmed several times by the Commission and the Court, including the 2018 IACTHR decision of the *case of Linda Loaiza López Soto against Venezuela*. In this case, the victim was kidnapped and suffered severe violence — including sexual slavery and torture — in the hands of someone she knew. The Court considered that the violations committed against her were exacerbated by the State authorities' prejudicial gender stereotypes during the investigation and the trial of the accused.<sup>60</sup>

### III. INTER-AMERICAN JURISPRUDENTIAL STANDARDS ON VIOLENCE AGAINST WOMEN

Even before the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* entered into force, the IACHR had already adopted standard-setting precedents on this issue of the utmost importance for the Americas.<sup>61</sup> In its 1996 *Raquel Martín de Mejía decision*,<sup>62</sup> dealing with the case of a woman raped by the Peruvian armed forces, the Commission was the first international adjudicative body to qualify rape as torture under international law — even before the European Court of Human Rights and the UN Ad Hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia.<sup>63</sup> The IACHR confirmed this approach in the 2001 *Ana, Beatriz and Celia Gonzalez Perez case*. There, taking into consideration the *Bélem do Para Convention*, it indicated that

<sup>59</sup> *Maria da Penha Maia Fernandes v Brazil* (2001), Inter-Am Comm HR, No 54/01, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser.L/V/II.111 Doc. 20 rev. One should note that this was the first time the Commission found a violation of the *Bélem Do Para Convention*. As a result of this ruling, Brazil passed Law No 11.340 (the Maria da Penha Law) in 2006. For a broader analysis of the case, see Ariel E. Dulitzky, “El principio de Igualdad y No discriminación. Claroscuros de la jurisprudencia interamericana” (2007) 3 *Anuario de Derechos Humanos* 15 at 225ff. See also *Jessica Lenahan v United States*, *supra* note 47 at para 110.

<sup>60</sup> *López Soto et al (Venezuela)* (2019), Inter-Am Ct HR (Ser C) No 362, *Annual Report of the Inter-American Court of Human Rights: 2018*.

<sup>61</sup> On this issue, see Rosa M. Celorio, “The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting” (2010) 65:3 *U Miami L Rev* 819. In addition to the jurisprudential standards presented *infra*, see also the IACHR thematic reports dealing specifically with women’s right to be free from violence: *Violence and Discrimination against Women and Girls*, *supra* note 25; OAS, IACHR, *Access to Justice for Women Victims of Sexual Violence: Education and Health*, OR OEA/Ser.L/V/II. Doc. 65 (2011); OAS, IACHR, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, OR OEA/Ser.L/V/II. Doc. 63 (2011); OAS, IACHR, *The Right of Women in Haiti to be Free from Violence and Discrimination*, OR OEA/Ser.L/V/II Doc. 64 (2009); OAS, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OR OEA/Ser.L/V/II. Doc. 68 (2007); OAS, IACHR, *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OR OEA/Ser.L/V/II. Doc. 67 (2006); *The Situation of the rights of women in Ciudad Juárez, Mexico*, *supra* note 31.

<sup>62</sup> *Raquel Martín de Mejía v Peru* (1995), Inter-Am Comm HR No 5/96, *Annual Report of the Inter-American Court of Human Rights: 1995*, OEA/Ser.L./V/II.91/doc.7.

<sup>63</sup> On this issue, see Christine Strumpfen-Darrie, “Rape: A Survey of Current International Jurisprudence” (2000) 7:3 *Human Rights Brief* 12, referring to *Aydin v Turkey* (1997), 75 ECHR (Ser A) 23178/94, 25 EHRR 251; *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber I Judgment (2 September 1998) (International Criminal Tribunal for Rwanda); *Prosecutor v Zejnir Delalic*, IT-96-21-T, Trial Chamber Judgment, (16 November 1998) (International Criminal Tribunal for the former Yugoslavia).

rapes committed by Mexican 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 *American Convention* but also under the *Inter-American Convention to Prevent and Punish Torture*.<sup>64</sup>

In the above-mentioned *Castro Prison* judgment<sup>65</sup>, the Court reiterated this qualification of rape as torture and provided detailed legal definitions of rape and sexual violence.<sup>66</sup> Moreover, in two important 2010 judgments dealing with Indigenous women and girls raped and sexually abused by Mexican military personnel, the *Rosendo Cantu* case and the *Fernández Ortega* case, the Court also concluded that such violations infringed upon the victims' rights to private life and dignity.<sup>67</sup> Both the Commission and the Court have described various acts of violence and rape committed by State agents as forms of torture.<sup>68</sup>

Similarly, the Court, in the 2018 case of *Women Victims of Sexual Torture in Atenco v. Mexico*, indicated that for a rape to be classified as torture, the intentionality, the severity of the suffering and the purpose of the act must be analyzed, taking into consideration the circumstances of each case. In this specific situation, protests taking place in Atenco in May 2006 were severely repressed by the police, and 11 women were arbitrarily detained. While the police transported them to the detention center, they were subjected to extreme violence, including rape and other forms of sexual violence. Once in the detention center, many of the women suffered further violations, also by the medical personnel that was supposed to examine them. The Inter-American Court found that the rape, sexual violence and many abuses suffered by these women constituted torture, both physical and

<sup>64</sup> *Ana, Beatriz and Celia Gonzalez Perez v Mexico*, *supra* note 47.

<sup>65</sup> *Miguel Castro-Castro Prison (Peru)* (2006), Inter-Am Ct HR (Ser C) No 160, *Annual Report of the Inter-American Court of Human Rights: 2006*. On this important decision, see Karla Quintana Osuna, "Recognition of Women's Rights Before the Inter-American Court of Human Rights" (2008) 21:2 *Harv Hum Rts J* 301. In *Rosendo Cantu (Mexico)* (2010), Inter-Am Ct HR (Ser C) No 216 at para 118, *Annual Report of the Inter-American Court of Human Rights: 2010*, the Court indicated that "rape may constitute torture even when it consists of a single act or takes place outside State facilities. This is so because the objective and subjective elements that define an act as torture do not refer to the accumulation of acts or to the place where the act is committed, but rather to the intention, the severity of the suffering and the purpose of the act." See also *González et al ("Cotton Field") (Mexico)*, *supra* note 57; *Fernández Ortega (Mexico)*, *supra* note 57; *Espinoza González (Peru)*, *supra* note 57 at paras 62ff and 225-29; *Case of the Plan de Sánchez Massacre (Guatemala)* (2004), Inter-Am Ct HR (Ser C), No 116 at para 49, *Annual Report of the Inter-American Court of Human Rights: 2004*, OEA/Ser.L/V/III.65 Doc 1; *Loayza Tamayo (Peru)* (1996), Inter-Am Ct HR (Ser C), No 33 at para 58, *Annual Report of the Inter-American Court of Human Rights: 1997*, OEA/Ser.L/V/III.39 Doc 5.

<sup>66</sup> *Miguel Castro-Castro Prison (Peru)*, *ibid* at paras 306-310 indicating that "sexual violence consists of actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever. [...] [S]exual rape does not necessarily imply a non-consensual sexual vaginal relationship, as traditionally considered. Sexual rape must also be understood as an act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects, as well as oral penetration with the virile member."

<sup>67</sup> See e.g. *Rosendo Cantu (Mexico)*, *supra* note 65 at para 118; *Fernández Ortega (Mexico)*, *supra* note 57 at para 1229.

<sup>68</sup> *Jineth Bedoya Lima and other v Colombia* (2018), Inter-Am Comm HR, No 150/18 at para 88, OEA/Ser.L/V/II. Doc 172.

psychological.<sup>69</sup> It also considered that these acts of torture were used as a form of social-repressive control and constituted discrimination based on gender.<sup>70</sup>

One should highlight that, in its standard-setting 2010 “*Cotton Field*” decision (*González et al.*), the Court dealt with several aspects of the sadly famous situation of feminicides in Ciudad Juárez in the North of Mexico. In addition to setting other relevant principles, it reiterated the State’s due diligence duty to prevent violence against women and girls, including in the context of “disappearances,” considering the particular circumstances of vulnerability to which women can be exposed.<sup>71</sup> This case was about the responsibility of the State for the “disappearance” and subsequent death of Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez — two of them girls — whose bodies were found in a cotton field in Ciudad Juárez on 6 November 2001. The IACTHR considered that the authorities did not take measures to protect the victims, to prevent these crimes, to investigate them with due diligence, and to respond effectively and adequately, while the State was fully aware of the existence of a pattern of gender violence resulting in the “disappearance” or death of hundreds of women and girls.

This principle of due diligence to prevent violence against women and girls was reiterated in two subsequent decisions about the same crime of feminicide, this time in Guatemala.<sup>72</sup> In 2014, the Court adopted a decision in the *case of Veliz Franco et al.* The case originated on 16 December 2001, when 15-year-old María Isabel Veliz Franco left her home to go to work and never came back. Despite the complaint about her “disappearance,” the authorities did nothing to try to find her. Two days later, her body was found. A series of irregularities occurred during the investigation into her “disappearance” and subsequent death. The Court considered that Guatemala had failed to protect the life and integrity of the victim,<sup>73</sup> as it did again a year later in the 2015 *case of Velásquez Paiz et al.*, dealing with a young woman who had “disappeared” in 2005. More specifically in that case, when the victim’s relatives went to report the “disappearance,” the authorities required them to wait 24 hours before doing so. However, the State agents were well aware of the existing context of violence against women that put the victim in imminent danger. Ultimately, her body was found the following day with signs of sexual and extreme violence. The

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<sup>69</sup> *Case of the Women Victims of Sexual Torture in Atenco (Mexico)* (2018), Inter-Am Ct HR (Ser C) No 371, *Annual Report of the Inter-American Court of Human Rights: 2018*.

<sup>70</sup> *Ibid.*

<sup>71</sup> *González et al. (“Cotton Field”) (Mexico)*, *supra* note 57 at para 284. See also Ruth Rubio-Marín & Clara Sandoval, “Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment” (2011) 33 *Hum Rts Q* 1062; Juana Acosta López, “The Cotton Field case: gender perspective and feminist theories in the Inter-American Court of Human Rights jurisprudence” (2012) 21 *Revista Colombiana de Derecho Internacional* 17.

<sup>72</sup> See *Veliz Franco (Guatemala)* (2014), Inter-Am Ct HR (Ser C), No 277 at paras 142, 151-52. *Annual Report of the Inter-American Court of Human Rights: 2014*; *Velasquez Paiz et al (Guatemala)* (2015), Inter-Am Ct HR (Ser C) No 307 at para 133, *Annual Report of the Inter-American Court of Human Rights: 2015*. See also Duhaime and Hansbury, “2015”, *supra* note 52; Bernard Duhaime and Elise Hansbury, “Les développements en droit interaméricain pour l’année 2014” (2015) 52 *Can YB Intl Law* 301.

<sup>73</sup> *Veliz Franco (Guatemala)*, *supra* note 72.

IACTHR considered that the State did not take immediate and exhaustive measures to find and protect the young woman after learning that she was missing.<sup>74</sup> In both cases, the Court also indicated — among others — that the State had the obligation to compile information and document the circumstances of vulnerability to which the victims were exposed in order to tailor more effective preventive measures.<sup>75</sup>

The Court has addressed in greater detail specific aspects of diligent investigations which should be undertaken by State authorities in cases of violence against women,<sup>76</sup> as required by Articles 8 and 25 of the *American Convention*<sup>77</sup> as well as Section 7(b) of the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*.<sup>78</sup> For instance, in the above-mentioned feminicides cases, the Court indicated that, during such investigative operations, State agents should adopt a gender perspective and ensure that victims can access justice fully, and free from stereotypes. For instance, in the “*Cotton Field*” case, the IACTHR established that the investigative authorities considered the victims to be “flighty” or that “they had run away with their boyfriends,” which added to the State’s inaction at the start of the investigation. The Court concluded that

as a result of its consequences as regards the impunity in the case, this indifference reproduces the violence that it claims to be trying to counter, without prejudice to the fact that it alone constitutes discrimination regarding access to justice. The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.<sup>79</sup>

This was reaffirmed by the Court in *I.V. v. Bolivia*, where it also added that such ineffectiveness or indifference of the judicial system constitutes, in itself, discrimination against women in access to justice.<sup>80</sup>

In both previously mentioned 2010 Mexican cases, *Rosendo Cantu* and *Fernández Ortega*, the Court dictated that investigative authorities had to prevent the revictimization of the women. They had to ensure their effective and willful participation in the investigation, considering linguistic and cultural obstacles as the victims were Indigenous women.<sup>81</sup> The Inter-American Tribunal also provided

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<sup>74</sup> *Velasquez Paiz et al (Guatemala)*, *supra* note 72.

<sup>75</sup> *Veliz Franco (Guatemala)*, *supra* note 72 at paras 150-51.

<sup>76</sup> See e.g. *Espinoza González (Peru)*, *supra* note 57 at paras 242, 252; *Favela Nova Brasilia (Brazil)* (2017), Inter-Am Ct HR (Ser C) No 333 at para 254, *Annual Report of the Inter-American Court of Human Rights: 2017*.

<sup>77</sup> On the duty of due diligence in investigations, see *Velásquez Rodríguez (Honduras)* (1988), Inter-Am Ct HR (Ser C), No 4 at para 172, *Annual Report of the Inter-American Court of Human Rights: 1988*, OAS/Ser.L/V/111.19 Doc 13.

<sup>78</sup> *Rosendo Cantu (Mexico)*, *supra* note 65 at para 177.

<sup>79</sup> *González et al (“Cotton Field”) (Mexico)*, *supra* note 57 at para 400; *Velasquez Paiz et al (Guatemala)*, *supra* note 72 at para 197. See also *Maria da Penha Maia Fernandes v Brazil*, *supra* note 59.

<sup>80</sup> *I.V. (Bolivia)*, *supra* note 53 at para 317.

<sup>81</sup> *Rosendo Cantu (Mexico)*, *supra* note 65 at para 179(iv); *Fernández Ortega (Mexico)*, *supra* note 57 at paras 195-96.



detailed indications of the specific technical requirements for investigating a sexual violence case, particularly regarding the investigators' interactions with the victims.<sup>82</sup> In 2018, in the *Atenco case*, mentioned before, it found that the stereotypical and discriminatory treatment that the women received during the investigative and medical process was revictimizing. Also, the Court recalled that States have the obligation to establish the possible responsibilities of the officials who contribute to such acts of revictimization and institutional violence.<sup>83</sup>

The above-mentioned obligations of States to prevent and investigate with due diligence acts of violence against women apply to acts committed by public authorities and private actors.<sup>84</sup> Thus, it includes acts of violence committed in the context of domestic violence, a situation expressly covered by the *Bélem Do Para Convention*. Article 2 defines the concept of violence against women and includes

physical, sexual and psychological violence: a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, batteries and sexual abuse; b. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.<sup>85</sup>

While violence perpetrated by private actors cannot always trigger State responsibility<sup>86</sup>, it can, however, give rise to a human rights violation attributed to the State when the latter does not act with due diligence, for example, to protect those at risk or to prevent, investigate or sanction these acts of violence.<sup>87</sup>

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<sup>82</sup> *Rosendo Cantu (Mexico)*, *ibid* at para 178; *Fernández Ortega (Mexico)*, *supra* note 57 at para 194: “i) the victim’s statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence; ii) the victim’s statement should be recorded to avoid the need to repeat it, or to limit this to the strictly necessary; iii) the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a protocol for such attention aimed at reducing the consequences of the rape; iv) a complete and detailed medical and psychological examination should be made immediately by appropriate trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes; v) the investigative measures should be coordinated and documented and the evidence handled with care, including taking sufficient samples and performing all possible tests to determine the possible perpetrator of the act, and obtaining other evidence such as the victim’s clothes, immediate examination of the scene of the incident, and the proper chain of custody of the evidence, and vi) access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.”

<sup>83</sup> *Case of the Women Victims of Sexual Torture in Atenco (Mexico)*, *supra* note 69 at paras 316, 339.

<sup>84</sup> *Velásquez Rodríguez (Honduras)*, *supra* note 77 at para 172. See also Dinah Shelton, “Private Violence, Public Wrongs, and the Responsibility of States” (1989) 13:1 *Fordham Intl LJ* 1.

<sup>85</sup> *Bélem Do Para Convention*, *supra* note 20, art 2.

<sup>86</sup> See e.g. *López Soto et al (Venezuela)*, *supra* note 60 at para 138.

<sup>87</sup> See *Violence and Discrimination against Women and Girls*, *supra* note 25 at annex I, paras 56-101.

Similarly, and in addition to the previously mentioned 2001 *Fernandes case*,<sup>88</sup> the Commission found in the 2011 *Jessica Lenahan (Gonzalez) et al* decision that the State agents had failed to undertake reasonable measures to prevent domestic violence even though they knew or should have known of a situation of risk. This was the first complaint brought by a domestic violence victim against the United States of America for alleged international human rights violations. In this case, Jessica Gonzales' estranged husband abducted her three daughters in violation of a domestic violence restraining order. Ms. Gonzales repeatedly called and met with the police to report the abduction and restraining order violation. But the police failed to respond to her urgent calls. Ten hours after her first contact with the police, Ms. Gonzales' estranged husband arrived at the police station and opened fire. The police immediately shot him dead and then discovered the bodies of the three girls in his pickup truck. Public authorities undertook no effective criminal investigation after that. In the course of the civil lawsuit against the police filed by Jessica, the Supreme Court decided in 2005 that she was not entitled to have the restraining order enforced by the police under the *United States Constitution*. In its decision, the Inter-American Commission indicated, among others, that

[t]he obligations established in Article II [of the *Declaration*] extend to the prevention and eradication of violence against women, a crucial component of the State's duty to eliminate both direct and indirect forms of discrimination. In accordance with this duty, State responsibility may be incurred for failures to protect women from domestic violence perpetrated by private actors in certain circumstances.<sup>89</sup>

In certain circumstances, there can also be an enhanced obligation of due diligence, no-revictimization and special protection, such as in instances of violence against girls. This was the case, for example, of the 2018 judgment of *V.P.C. et al v Nicaragua*,<sup>90</sup> dealing with the criminal investigation and subsequent legal processes on the rape of an eight-year-old child by a non-state actor, allegedly the victim's father. The IACTHR indicated that, in such circumstances, the State must at a minimum ensure access to relevant information relating to judicial processes, provide free legal aid to victims so that they can participate in the latter and protect their rights, including the right to be heard within a reasonable time. In addition, the State must ensure that victims are interviewed only when necessary and appropriate, by competent and trained personnel, while respecting the rights of victims to safety and private life. Finally, the authorities must ensure the victims with immediate psychological and medical assistance provided by specialized professionals and in accordance with a gender perspective and the needs of minors. The Court dealt more specifically with the conditions relating to physical examinations carried out by the

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<sup>88</sup> *Maria da Penha Maia Fernandes v Brazil*, *supra* note 59.

<sup>89</sup> *Jessica Lenahan v United States*, *supra* note 47 at paras 120, 133. See also Caroline Bettinger-Lopez, "Human Rights at Home: Domestic Violence as a Human Rights Violation" (2008) 40 Colum HRLR 19; Caroline Bettinger-Lopez, "Jessica Gonzales v. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States" (2011) 21:2 Harv Hum Rts J 183.

<sup>90</sup> *V.R.P., V.P.C. et al (Nicaragua)* (2018), Inter-Am Ct HR (Ser C) No 350, *Annual Report of the Inter-American Court of Human Rights: 2018; Standards and Recommendations regarding Violence and Discrimination against Women and Girls*, *supra* note 87 at paras 120-28.

authorities on such victims of sexual crimes. It indicated that this type of procedure should be carried out after obtaining the consent of the victim's representative, who should be authorized to choose the sex of the professional specializing in child and juvenile gynecology who will carry out the intervention. This should be done in a way that avoids or minimizes additional trauma and revictimization of the child, be performed in an appropriate place, respecting the victim's right to privacy, and in the presence of an accompanying person if requested.<sup>91</sup>

Before addressing women's sexual and reproductive rights in the next section, it is important to note that many decisions dealing with instances of violence against women also address these specific rights. For example, in addition to the *V.P.C. et al v Nicaragua* judgment discussed above, one should also consider the recent case of *Paola Guzmán Albarracín v Ecuador*. In that instance, the victim, a 16-year-old girl who was attending public school, died as a result of medication that she took to kill herself. Prior to her death, the school authorities, who knew of her intoxication, delayed her admission to a hospital, where she was finally taken and later died, leaving a suicide note commenting on sexual abuses that she had been suffering. Since she was 14 years old, the victim had been suffering rape, harassment and sexual abuse by the vice-rector of her school, who had her dominated with the idea of helping her to pass school subjects with which she had difficulty. This abusive situation was known to the school staff, which did not take any action to protect her and rather tried to cover the situation. For almost 18 years, Paola's relatives sought justice, but the accused remains a fugitive. The crime's investigation in many ways blamed the victim and the criminal action was eventually declared prescribed. In the face of such serious violations, the Inter-American Court declared the responsibility of the Ecuadorian State, explaining that the rights to personal integrity and life entail freedoms, among which is sexual freedom and control of one's own body. Such freedoms can be exercised healthily by adolescents to the extent that they develop the capacity and maturity to do so and are provided with adequate sexual education addressing concepts such as prior consent to sexual intercourse, abuse of authority and dominating positions that may hinder such consent. The Court concluded that the girl's right to a life free of sexual violence in the education sphere was violated.<sup>92</sup>

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<sup>91</sup> *Case of V.R.P., V.P.C. et al (Nicaragua)*, *supra* note 90 at paras 172–83, 297. *In concreto*, the Court considered that the examination ordered by the Nicaraguan court was not necessary since the victim and her mother had already carried out two examinations. In addition, it found that the State had not been able to prove that the victim and her mother had been fully informed of the nature and scope of this examination, that they did not have the opportunity to choose the sex of the professional who led the intervention (here a man), and that the latter did not have the necessary qualifications. The victim was forced to undergo the examination following threats from the authorities (the judge and the doctor). The intervention was carried out in the presence of several people in an inappropriate location. Thus, the intervention retraumatized the victim. The Court considered that the State failed in its obligation to adopt special measures to protect the young girl and acted as a second aggressor.

<sup>92</sup> *Case of Guzmán Albarracín et al. (Ecuador)* (2020), Inter-Am Ct HR (Ser C) No 405, *Annual Report of the Inter-American Court of Human Rights: 2020*.

#### IV. INTER-AMERICAN JURISPRUDENTIAL STANDARDS ON WOMEN'S SEXUAL AND REPRODUCTIVE RIGHTS

At the beginning of the 2010s, important milestones were set in the Inter-American System regarding women's sexual and reproductive rights. The Commission published two important thematic reports on the issue: *Access to Maternal Health Services from a Human Rights Perspective* in 2010 and *Access to Information on Reproductive Health from a Human Rights Perspective* in 2011.<sup>93</sup> Similarly, the Court adopted the 2010 *Xámkok Kásek Indigenous Community case*, dealing with the members of an Indigenous community that was reclaiming its traditional lands, where it found Paraguay responsible for the death of certain victims because it had not complied with its obligation to plan and provide adequate health assistance to pregnant women in accordance with the State's international obligation to ensure special measures of protection for pregnant women.<sup>94</sup>

Moreover, in the 2011 *Gelman case* dealing with the enforced "disappearance" of pregnant women by Argentinean and Uruguayan authorities, the Court found violations of the victim's rights to life, personal integrity, liberty, private life and dignity (as well as many other rights). The Court considered her pregnancy as a condition of particular vulnerability. The State agents forced the victim to give birth during her clandestine detention and provided a new identity to the child, who was later given away to another family. The Court considered those violations to "reveal a particular conception of women that threatens freedoms entailed in maternity, which form an essential part of the free development of the female personhood."<sup>95</sup>

There are other important standards regarding women's sexual and reproductive rights adopted to address the context of maternity. In the *I.V. v Bolivia case*, mentioned briefly in both previous sections, the victim was admitted in July 2000 to the Women's Hospital in La Paz, Bolivia. She experienced the spontaneous rupture of the membranes at week 38.5 of her pregnancy and pain at the level of the caesarean section that she had undergone in 1982. The fetus was in a transversal position, and thus a caesarean section was performed. After the newborn was taken for examination, I.V. underwent a bilateral tubal ligation, although she had not consented to the intervention. In its 2016 decision, the IACTHR emphasizes the intrinsic relationship between maternal health and women's rights to privacy and personal integrity. It also analyzed the fundamental importance of fully ensuring the previous, free and informed consent of women to medical interventions. It provided procedural and technical medical requirements in this regard. It recognized that several factors limit the capacity of women to make free and informed decisions

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<sup>93</sup> OAS, IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, OR OEA/Ser.L/V/II. Doc. 61 (2011); OAS, IACHR, *Access to Maternal Health Services from a Human Rights Perspective*, OR OEA/Ser.L/V/II. Doc. 69 (2010). See also *Karina Montenegro et al v Ecuador*, *supra* note 34, dealing with the admissibility petitions alleging violations of the rights of pregnant women detainees.

<sup>94</sup> *Xámkok Kásek Indigenous Community (Paraguay)* (2010), Inter-Am Ct HR (Ser C) No 214 at paras 233-34, *Annual Report of the Inter-American Court of Human Rights: 2010*.

<sup>95</sup> *Gelman (Uruguay)* (2011), Inter-Am Ct HR (Ser C) No 221 at para 97, *Annual Report of the Inter-American Court of Human Rights: 2011*.

related to their reproductive health. For example, the limited access to health services, the power relations existing between a woman and her husband, family, community, or the medical staff, and stereotypes regarding women.<sup>96</sup>

Similarly, in its 2012 standard-setting judgment on *in vitro* fertilization, *Artavia Murillo v Costa Rica*, the Court reiterated that the decision of whether or not to become a mother is an essential part of the rights to private life and free development of women.<sup>97</sup> Also, the rights to privacy and personal integrity include the right to reproductive autonomy, access to reproductive health services, and relevant information in this regard. It also indicated that “[t]he lack of legal safeguards that take reproductive health into consideration can result in a serious impairment of the right to reproductive autonomy and freedom,” and that “there is a connection between personal autonomy, reproductive freedom, and physical and mental integrity.”<sup>98</sup> It also added that women’s right to enjoy the benefits of scientific progress

in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, *de iure* or *de facto*, to exercise the reproductive decisions that correspond to each individual.<sup>99</sup>

The IACHR first addressed the issue of abortion and the right to life, in the *Baby Boy case* adopted in the early eighties, dealing with an abortion that took place in the United States in accordance with US law.<sup>100</sup> It analyzed the drafting history (*travaux préparatoires*) of Article I of the *Declaration*. It concluded that the drafters had preferred to omit language that would oblige States to derogate laws that allowed abortions in certain circumstances and adopted a broader version of the text “Every human being has the right to life, liberty and the security of his person.” Similarly, in light of the *travaux préparatoires* of Article 4.1 of the *Convention*,<sup>101</sup> the IACHR concluded that while the drafters of the *Pact of San José* included a reference to the protection of life “from the moment of conception”, they also inserted the words “in general” to avoid obliging States to derogate laws which allowed abortions.<sup>102</sup> Thus, the IACHR refused to recognize that, in that specific case, by allowing an abortion to take place, the United States had violated the *American Declaration*.

<sup>96</sup> *I.V. (Bolivia)*, *supra* note 53 at paras 152-57, 175, 184ff.

<sup>97</sup> *Artavia Murillo et al. (In Vitro Fertilization) (Costa Rica)* (2012), Inter-Am Ct HR (Ser C) No 257 at para 143, *Annual Report of the Inter-American Court of Human Rights: 2012*.

<sup>98</sup> *Ibid* at para 147.

<sup>99</sup> *Ibid* at paras 143-50.

<sup>100</sup> *Case 1241 v USA* (1981), Inter-Am Comm HR, No 23/81, *Annual Report of the Inter-American Commission on Human Rights: 1980-1981*, OEA/Ser.L/V/II.54 Doc. 9. See also *Roe v Wade*, 410 US 113 (1973). See Rebecca J. Cook & Bernard M. Dickens, “Human rights dynamics of abortion law reform” (2003) 25:1 Hum Rts Q 1 at 25; Rhonda Copelon et al, “Human rights begin at birth: international law and the claim of fetal rights” (2005) 13:26 Reproductive Health Matters 120 at 124-25.

<sup>101</sup> “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

<sup>102</sup> OAS, General Secretariat, *Documents of the 1969 Inter-American Conference on Human Rights*, OR OEA/Ser.K/XVI/1.2 (1969) at 159.

The Court confirmed this interpretation in its above-mentioned 2012 decision on *in vitro* fertilization, when it indicated, that “the object and purpose of Article 4(1) of the *Convention* is that the right to life should not be understood as an absolute right, the alleged protection of which can justify the total negation of other rights.”<sup>103</sup> It also added, after having reviewed decisions of the supreme/constitutional courts of the United States, Germany, Spain, Colombia, Argentina and Mexico on the topic, 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>104</sup>

The Court also specified that “the term ‘in general’ infers exceptions to a rule, but the interpretation in keeping with the ordinary meaning does not allow the scope of those exceptions to be specified.”<sup>105</sup> This being said, these exceptions could certainly include certain types of situations already encountered by both the Commission and the Court in decisions dealing with friendly settlements<sup>106</sup> as well as precautionary<sup>107</sup> and provisional measures<sup>108</sup> where both indicated that abortions must be made available in certain circumstances, including in cases of pregnant girls victims of rape, when the health of the mother is at risk and when the fetus is not viable.<sup>109</sup>

This was the case, for example, of the friendly settlement regarding the *case of Paulina del Carmen Ramírez Jacinto* in Mexico. On 31 July 1999, 14 years old Paulina was raped in her home. The incident was immediately reported to the Public Prosecutor's Office. The rape resulted in a pregnancy, which Paulina and her mother decided to abort. It was a legal option based on Article 136 of the *Baja California Criminal Code*. Thus, on 3 September 1999, the Public Prosecutor's Office authorized the medical intervention to be performed at a public hospital. She received an appointment for October 1<sup>st</sup> and remained at the hospital until October 8<sup>th</sup>, but — while she was forced to fast — the procedure was never performed. Paulina and her mother then went back to the Public Prosecutor's Office, which repeated the order for the

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<sup>103</sup> *Case of Artavia Murillo et al (In Vitro Fertilization) (Costa Rica)*, *supra* note 97 at para 258.

<sup>104</sup> *Ibid* at paras 259-64.

<sup>105</sup> *Ibid* at para 189.

<sup>106</sup> *Paulina Del Carmen Ramírez Jacinto v Mexico* (2007), Inter-Am Comm HR (Ser C), No 21/07, Annual Report of the *Inter-American Commission on Human Rights: 2007*, OEA/Ser.L/V/II.130, Doc. 22, rev. 1. See also Bernard Duhaime & Ariel E. Dulitzky, “Review of the Case Law of the Inter-American Human Rights System in 2007” (2007) 20:2 RQDI 299 at 306; Copelon et al, *supra* note 100 at 122.

<sup>107</sup> *Mainumby v Paraguay* (2015), Inter-Am Comm HR, No PM178/15, *Annual Report of Inter-American Commission on Human Rights: 2015*, OEA/Ser.L/V/II. Doc. 48.

<sup>108</sup> IACTHR, *Matter of B with regard to El Salvador*, Provisional Measures Order, 29 May 2013, *Annual Report of Inter-American Court of Human Rights: 2013*.

<sup>109</sup> On these decisions see Mónica Arango Olaya, “Medidas provisionales adoptadas por la Corte Interamericana de Derechos Humanos en el asunto B. con El Salvador y el fortalecimiento de la protección de los derechos reproductivos en el sistema interamericano” (2014) 10 Anuario de Derechos Humanos 177.

medical procedure. Following that, the State Attorney General took Paulina and her mother to a priest. On 13 October 1999, Paulina was readmitted to the hospital. The next day, two women — invited by the hospital’s director, but who had no connection to the health services — visited Paulina while her mother was not present. They showed her violent videos of abortion and subsequently did the same with her mother, intending to dissuade them. On 15 October 1999, moments before the medical intervention, the hospital’s director met with Paulina’s mother to describe the alleged risks of the procedure and claim that she would be the only person responsible in the case of Paulina’s death. This intense pressure succeeded in deterring Paulina’s mother from carrying out the medical procedure. After a long negotiation with the State, a settlement was reached, and although the Commission did not rule on the merits, it did say that

the *Convention of Belem do Para* states that the victims of sexual violence are entitled to the recognition, enjoyment, exercise, and protection of all their human rights [...] [and] the health of sexual violence victims should be treated as a priority in legislative initiatives and in the health policies and programs of Member States.<sup>110</sup>

Another example is the *case of B* in El Salvador, where one of the strictest anti-abortion laws in the world applies. In fact, many women—mostly from marginalized sectors of the Salvadoran society—have been unjustly sent to prison accused of aggravated homicide because they have had a miscarriage.<sup>111</sup> In the *case of B*, on 29 April 2013, the IACHR granted precautionary measures in her favour. B was suffering from various pathologies, her pregnancy had a high risk of death for her, and the fetus was anencephalic. Yet, the State had not taken any measures to protect her life or integrity. Thus, the IACHR granted precautionary measures to protect her rights and requested the State to implement recommended medical treatment aiming to protect her life, personal integrity and health. A treatment was then practiced, and the Commission lifted the measures on 19 August 2013.<sup>112</sup>

Both the Commission and the Court have yet to rule on such situations in ordinary contentious matters. Yet, both

the universal and inter-American human rights systems have progressively and consistently addressed the impacts of the denial of such services on women’s rights (i.e., health services that women and girls alone need by reason of their gender and reproductive rights), and in particular the impacts of total criminalization of abortion in the countries of Latin America and the Caribbean.<sup>113</sup>

<sup>110</sup> *Paulina Del Carmen Ramírez Jacinto v Mexico*, *supra* note 106 at para 19.

<sup>111</sup> See e.g. Anna-Cat Brigida, “The abortion cases that could force El Salvador to loosen its ban” (14 March 2021), online: *Al Jazeera* <[www.aljazeera.com/news/2021/3/14/the-abortion-cases-that-could-force-el-salvador-to-loosen-its-ban](http://www.aljazeera.com/news/2021/3/14/the-abortion-cases-that-could-force-el-salvador-to-loosen-its-ban)>.

<sup>112</sup> *B v El Salvador* (2013), Inter-Am Comm HR, No 114/13, *Annual Report of Inter-American Commission on Human Rights: 2013*, OEA/Ser.L/V/II. Doc. 50 Corr. 1.

<sup>113</sup> *Violence and Discrimination against Women and Girls*, *supra* note 25 at para 200. See also the section on Impacts of Total Criminalization of Abortion on the Rights of Women and Girls of this report at paras 200-10.

In addition, in its 2012 decision on *in vitro* fertilization, the Inter-American Tribunal also indicated that it had

used different methods of interpretation that have led to similar results according to which the embryo cannot be understood to be a person for the purposes of Article 4(1) of the *American Convention*. In addition, after analyzing the available scientific data, the Court has concluded that “conception” in the sense of Article 4(1) occurs at the moment when the embryo becomes implanted in the uterus, which explains why, before this event, Article 4 of the *Convention* would not be applicable.<sup>114</sup>

These Inter-American decisions dealing directly or indirectly with the interruption of pregnancies and which have been discussed thoroughly in the literature<sup>115</sup> follow the same tendency as similar legislative developments in the region<sup>116</sup> and jurisprudential developments adopted within the United Nations System,<sup>117</sup> for example, by the Committee on the Elimination of Discrimination Against Women,<sup>118</sup> the Human Rights Committee,<sup>119</sup> the Committee of the Rights of

<sup>114</sup> *Case of Artavia Murillo et al (In Vitro Fertilization) (Costa Rica)*, *supra* note 97 at para 264.

<sup>115</sup> See Annex IV.

<sup>116</sup> On 3 August 2017, the Chilean Congress passed a law decriminalizing certain types of abortions. See “Term endings: Michelle Bachelet seeks to relax Chile’s abortion ban”, *The Economist* (12 August 2017), online: <[www.economist.com/the-americas/2017/08/10/michelle-bachelet-seeks-to-relax-chiles-abortion-ban](http://www.economist.com/the-americas/2017/08/10/michelle-bachelet-seeks-to-relax-chiles-abortion-ban)>. More recently, as a result of large women’s mobilizations, on 30 December 2020, the Argentinean Congress regulated and legalized abortion. See *Acceso a la Interrupción Voluntaria del Embarazo*, Decreto No 14/2021 B.O, Ley 27610, online: *Boletín Oficial de la República Argentina* <[www.boletinoficial.gob.ar/detalleAviso/primera/239807/20210115](http://www.boletinoficial.gob.ar/detalleAviso/primera/239807/20210115)>.

<sup>117</sup> Copelon et al, *supra* note 100 at 122-23.

<sup>118</sup> For e.g. *L.C. v Peru*, CEDAW Dec 22/2009, UNCEDAWOR, 2011, UN Doc CEDAW/C/50/D/22/2009 at para 8.15; Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined seventh and eighth periodic reports of Peru*, UNCEDAWOR, 2014, UN Doc CEDAW/C/PER/CO/7-8 at para 36.

<sup>119</sup> See e.g. *K.L. v Peru*, HRC Dec 1153/2003, UNHRCOR, 2005, UN Doc CCPR/C/85/D/1153/2003 at para 6.4; *V.D.A. v Argentina*, HRC Dec 1608/2007, UNHRCOR, 2011, UN Doc CCPR/C/101/D/1608/2007 at para 9.3. See also *Concluding Observations of the Human Rights Committee: Chile*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.104 (1999) at para 15e; *Concluding Observations of the Human Rights Committee: Argentina*, UNHRCOR, 70th Sess, UN Doc CCPR/CO/70/ARG (2000) at para 14; *Concluding Observations of the Human Rights Committee: Costa Rica*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.107 (1999) at para 11; *Concluding Observations of the Human Rights Committee: Peru*, UNHRCOR, 107th Sess, UN Doc CCPR/C/PER/CO/5 (2013); *Concluding Observations of the Human Rights Committee: United Republic of Tanzania*, UNHRCOR, 63rd Sess, UN Doc CCPR/C/79/Add.97 (1998) at para 15; *Concluding Observations of the Human Rights Committee: Venezuela*, UNHRCOR, 71st Sess, UN Doc CCPR/CO/71/VEN (2001) at paras 19, 22; *Concluding Observations of the Human Rights Committee: Poland*, UNHRCOR, 82nd Sess, UN Doc CCPR/CO/82/POL (2004) at para 8; *Concluding Observations of the Human Rights Committee: Bolivia*, UNHRCOR, 59th Sess, UN Doc CCPR/C/79/Add.74 (1997) at para 22; *Concluding Observations of the Human Rights Committee: Colombia*, UNHRCOR, 59th Sess, UN Doc CCPR/C/79/Add.76 (1997) at para 24; *Concluding Observations of the Human Rights Committee: Ecuador*, UNHRCOR, 63rd Sess, UN Doc CCPR/C/79/Add.92 (1998) at para 11; *Concluding Observations of the Human Rights Committee: Mongolia*, UNHRCOR, 68th Sess, UN Doc CCPR/C/79/Add.120 (2000) at para 8b; *Concluding Observations of the Human Rights Committee: Poland*, UNHRCOR, 66th Sess, UN Doc CCPR/C/79/Add.110 (1999) at para 11; *Concluding Observations of the Human Rights Committee: Senegal*, UNHRCOR, 61th Sess, UN Doc CCPR/C/79/Add 82 (1997) at para 12.



the Child,<sup>120</sup> as well as in the European Human Rights System, by the former European Commission on Human Rights<sup>121</sup> and by the European Court,<sup>122</sup> which have considered certain permissive abortion laws compatible with their respective human rights treaty.

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As presented in this article, the Inter-American System has contributed significantly to the progress of important standards related to the protection of human rights of women and girls in the Americas, in particular with respect to the rights to equality and non-discrimination, to be free from violence against women, and to sexual and reproductive rights. These developments have been more prolific in the last few years; thus, some may consider that they come rather late in a long process towards strengthening regional and national normative and institutional frameworks for women and girls in the region. Also, some could argue that the UN System, particularly the avenues offered by the Committee on the Elimination of Discrimination Against Women (CEDAW), is sufficient to address violations of women and girls' rights. This paper, however, demonstrates that the Inter-American Commission and Court of Human Rights' recent decisions and developments have been crucial to address pressing human rights issues for women and girls in the region, particularly in regards to rampant violence and discrimination. Many concerns remain, of course, in particular as to the System's capacity to provoke real social change as to girls and women's rights, in a region where the *status quo* has often been the answer on the matter. Notwithstanding the Court's "conventionality control" powers,<sup>123</sup> many could criticize the limitations to THE implementation of Commission and Court decisions by States,<sup>124</sup> in particular in the area of women's human rights.<sup>125</sup> Yet, the System's contributions to

<sup>120</sup> *General Comment Adopted by the Committee on the Rights of the Child*, UNCRCOR, 33rd Sess (2001) at para 31, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/Rev.7 (2004); *Concluding Observations of the Committee on the Rights of the Child: Guatemala*, UNCRCOR, 27th Sess, UN Doc CRC/C/15/Add.154 (2001) at para 40; *Concluding Observations of the Committee on the Rights of the Child: Chad*, UNCRCOR, 21st Sess, UN Doc CRC/C/15/Add.107 (1999) at para 30; *Concluding Observations of the Committee on the Rights of the Child: Nicaragua*, UNCRCOR, 21st Sess, UN Doc CRC/C/15/Add.108 (1999) at para 35.

<sup>121</sup> *Paton v UK* (1980), 3 EHRR 408; *RH v Norway* (1992), 73 Eur Comm'n on HR DR 155; *Boso v Italy*, No 50490/99, [2002] Eur Ct HR 846.

<sup>122</sup> *Vo v France*, No 53924/00, [2005] 40 EHRR 12. See generally Copelon et al, *supra* note 100 at 123-24; Cook & Dickens, *supra* note 100 at 23.

<sup>123</sup> On the control of conventionality, see Ariel Dulitzky, "An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights" (2015) 50 *Texas Intl LJ* 45. See also Karlos A Castilla Juárez, "Control de convencionalidad: una mera aplicación del derecho internacional" (2014) 33 *Revista Derecho del Estado* 149.

<sup>124</sup> See generally Bernard Duhaime, "Protecting Human Rights in the Americas: recent achievements and challenges" in Gordon Mace, Jean-Philippe Thérien & Paul Haslam, eds, *Governing the Americas: Regional Institutions at the Crossroads* (Boulder: Lynne Rienner Publishers, 2007), 131; Bernard Duhaime, "Commission interaméricaine des Droits de l'Homme en 2005: Enjeux" (2005) 1 *Asymétries* 138.

<sup>125</sup> See e.g. Ciara O'Connell, "Litigating Reproductive Health Rights In The Inter-American System: What Does A Winning Case Look Like?" (2014) 16:2 *Health & Hum Rts* 116.

specific cases and direct and indirect positive impacts on the advancement of normative and institutional frameworks in Latin America and the Caribbean is undeniable.

The struggle for women's human rights in the Americas also has broader implications for other issues, such as the universalization of the System.<sup>126</sup> In fact, progress in the protection of women's human rights is particularly relevant to the debate related to the ratification by the United States of the *American Convention* or the latter's adhesion by Canada.<sup>127</sup> As for the Canadian process,<sup>128</sup> it is certainly central and very rightly so.<sup>129</sup> The present contribution has demonstrated how relevant the IAHRs can be for addressing many of the important human rights concerns faced by Canadian women today, particularly regarding equality and non-discrimination, violence against women and sexual and reproductive rights.

This is certainly the case, for example, of the crucial issue of intersectional discrimination experienced by many women across Canada.<sup>130</sup> The relevance of this approach to Canadian women's equality rights has long been demonstrated, including by the Ontario Human Rights Commission<sup>131</sup> and former Supreme Court Judge Claire L'Heureux Dubé.<sup>132</sup> It is needed more than ever to adequately consider the human rights violations experienced by Indigenous women, as argued earlier by the authors.<sup>133</sup>

Similarly, the issue of violence against women, in particular in the case of Indigenous women, is on top of the country's human rights agenda, including the

<sup>126</sup> On this topic, see generally OAS, IACHR, *Considerations related to the universal ratification of the American Convention and other Inter-American Human Rights Treaties*, OR OAS/Ser.L/V/II.152 Doc. 21 (2014).

<sup>127</sup> See e.g. Paolo Carozza "The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights" (2015) 5:1 *Notre Dame J of Intl & Comp L* 153 at 164.

<sup>128</sup> See e.g. Bernard Duhaime, "Ten reasons why Canada should join the American Convention on Human Rights" (2019) 49 *RGD (hors-série)* 187 or Bernard Duhaime, "Dix raisons pour lesquelles le Canada devrait adhérer à la Convention américaine relative aux Droits de l'Homme" (2018) 31:1 *RQDI* 267. See also Bernard Duhaime, "Canada and the Inter-American Human Rights System: Time to Become a Full Player" (2012) 67:3 *Intl J* 639; Bernard Duhaime, "Strengthening the protection of human rights in the Americas: a role for Canada?" in Monica Serrano & Vesselin Popovski, eds, *Human Rights Regimes in the Americas* (Tokyo: United Nations University Press, 2010) 84.

<sup>129</sup> On previous debates surrounding women's rights and Canada's adhesion to the *American Convention*, see Standing Senate Committee on Human Rights, "Enhancing Canada's Role in the OAS: Canada's adherence to the American Convention on Human Rights", *Journals of the Senate* (May 2003). See also Canadian Lawyers for International Human Rights (CLAIHR), "Canada's Accession to the American Convention on Human Rights", Submission to the Standing Senate Committee on Human Rights (March 2003) at 6; Rights and Democracy, *Brief regarding ratification by Canada of the American Convention on Human Rights*, 19 May 2000 at 4; Cook, "Les droits des femmes" *supra* note 5.

<sup>130</sup> See e.g. *Canada (A.G.) v Mossop*, [1993] 1 SCR 554 at paras 645–46. See also Mary Eaton, "Patently Confused, Complex Inequality and Canada v. Mossop" (1994) 1 *Rev Cons Stud* 203 at 229. See similarly Ontario Policy and Education Branch, *Human Rights Commission, An Intersectional Approach To Discrimination: Addressing Multiple Grounds In Human Rights Claims* (Ontario: Human Rights Commission, 2001); Bernard Duhaime & Josée-Anne Riverin, "Understanding Double Discrimination and Equality Rights of Indigenous Women in Québec" (2011) 65:3 *U Miami L Rev* 903.

<sup>131</sup> Ontario Policy and Education Branch, *supra* note 130, citing C.A. Aylward, "Intersectionality: Crossing the Theoretical and Praxis Divide" (Paper distributed at Transforming Women's Future: Equality Rights in the New Century: A National Forum on Equality Rights presented by West Coast Leaf, 4 November 1999) [unpublished].

<sup>132</sup> *Canada (A.G.) v Mossop*, *supra* note 130.

<sup>133</sup> See Duhaime & Riverin, *supra* note 130 at 909ff.

recommendations of the National Commission of Enquiry into Missing and Murdered Indigenous Women and Girls that are being implemented. On this specific matter, one should recall the substantive findings and methodological recommendations made by the Inter-American Commission in its 2014 *Report on Missing and Murdered Indigenous Women in British Columbia*.<sup>134</sup>

Finally, the IAHRs's recent developments on the issue of women's reproductive health are also extremely pertinent to the Canadian reality, where abortion and women's rights have been central to many social, legal and political debates,<sup>135</sup> and where recent reports of Indigenous women having been forcibly sterilized have shocked the country.<sup>136</sup>

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<sup>134</sup> *Missing and Murdered Indigenous Women in British Columbia, Canada*, *supra* note 47.

<sup>135</sup> See generally *R v Morgentaler*, [1988] 1 SCR 30. See also Cook & Dickens, *supra* note 100 at 20-21.

<sup>136</sup> See e.g. Anna Maria Tremonti, "Aboriginal women say they were sterilized against their will in hospital" (7 January 2016), online (radio segment): *CBC Radio* <[www.cbc.ca/radio/thecurrent/the-current-for-january-7-2016-1.3393099/aboriginal-women-say-they-were-sterilized-against-their-will-in-hospital-1.3393143](http://www.cbc.ca/radio/thecurrent/the-current-for-january-7-2016-1.3393099/aboriginal-women-say-they-were-sterilized-against-their-will-in-hospital-1.3393143)>.

## ANNEXES

### I. Decisions adopted by the Inter-American Commission on Human Rights on women's and girls' rights

On the merits, the Commission adopted:

*Dianna Ortiz v Guatemala* (1996), Inter-Am Comm HR No 31/96, *Annual Report of the Inter-American Commission on Human Rights: 1996*, OEA/Ser.L/V/II.95/doc.7 rev.

*X & Y v Argentina* (1996), Inter-Am Comm HR No 38/96, *Annual Report of the Inter-American Commission on Human Rights: 1996*, OEA/Ser.L/V/II.95/doc.7 rev.

*Raquel Martín de Mejía v Peru* (1995), Inter-Am Comm HR No 5/96, *Annual Report of the Inter-American Court of Human Rights: 1995*, OEA/Ser.L/V/II.91/doc.7.

*María Eugenia Morales de Sierra v Guatemala* (2001), Inter-Am Comm HR No 4/01, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser.L/V/II.111/doc.20 rev.

*Ana, Beatriz and Celia Gonzalez Perez v Mexico* (2001), Inter-Am Comm HR No 53/01, *Annual Report of the Inter-American Commission on Human Rights: 2001*, OEA/Ser.L/V/II.114/doc.5 rev.

*Jessica Lenahan v United States* (2011), Inter-Am Comm HR No 80/11, *Annual Report of the Inter-American Commission on Human Rights: 2011*, OEA/Ser.L/V/II/doc.69

*Marta Lucía Álvarez Giraldo v Colombia* (2018), Inter-Am Comm HR No 122/18, *Annual Report of the Inter-American Commission on Human Rights: 2018*, OEA/Ser.L/V/II/doc.30.

On admissibility, the Commission adopted:

*María Eugenia Morales de Sierra v Guatemala* (1997), Inter-Am Comm HR No 28/98, *Annual Report of the Inter-American Commission on Human Rights: 1997*, OEA/Ser.L/V/II.98/doc.6 rev.

*María Merciadri de Morini v Argentina* (1999), Inter-Am Comm HR No 102/99, *Annual Report of the Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/doc.6 rev.

*Ana, Beatriz and Celia Gonzalez Perez v Mexico* (1999), Inter-Am Comm HR No 129/99, *Annual Report of the Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/doc.6 rev.

*Marta Lucía Álvarez Giraldo v Colombia* (1999), Inter-Am Comm HR No 71/99, *Annual Report of the Inter-American Commission on Human Rights: 1999*, OEA/Ser.L/V/II.106/doc.6 rev.

*María Mamérita Mestanza Chavez v Peru* (2000), Inter-Am Comm HR No 66/00, *Annual Report of the Inter-American Commission on Human Rights: 2000*, OEA/Ser.L/V/II.111/doc.20 rev.

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*M. Z. v Bolivia* (2001), Inter-Am Comm HR No 73/01, *Annual Report of the Inter-American Commission on Human Rights: 2001*, OEA/Ser.L/V/II.114/doc.5 rev.

*Janet Espinoza Feria et al. v Peru* (2002), Inter-Am Comm HR No 51/02, *Annual Report of the Inter-American Commission on Human Rights: 2002*, OEA/Ser.L/V/II.117/doc.1 rev. 1.

*Sonia Arce Esparza v Chile* (2003), Inter-Am Comm HR No 59/03, *Annual Report of the Inter-American Commission on Human Rights: 2003*, OEA/Ser.L/V/II.118/doc.5 rev. 2.

*Ana Victoria Villalobos et al. v Costa Rica* (2004), Inter-Am Comm HR No 25/04, *Annual Report of the Inter-American Commission on Human Rights: 2004*, OEA/Ser.L/V/II.122/doc.5 rev. 1.

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*Valentina Rosendo Cantú et al. v Mexico* (2006), Inter-Am Comm HR No 93/06, *Annual Report of the Inter-American Commission on Human Rights: 2006*, OEA/Ser.L/V/II.127/doc.4 rev. 1.

*Silvia Arce et al. v Mexico* (2006), Inter-Am Comm HR No 31/06, *Annual Report of the Inter-American Commission on Human Rights: 2006*, OEA/Ser.L/V/II.127/doc.4 rev. 1.

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*Karen Atala and daughters v Chile* (2008), Inter-Am Comm HR No 42/08, *Annual Report of the Inter-American Commission on Human Rights: 2008*, OEA/Ser.L/V/II.134/doc.5 rev. 1.

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*Paola del Rosario Guzmán Albarracín et al. v Ecuador* (2008), Inter-Am Comm HR No 76/08, *Annual Report of the Inter-American Commission on Human Rights: 2008*, OEA/Ser.L/V/II.134/doc.5 rev. 1.

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