

# Recent Developments

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## RECOGNITION OF WOMEN'S RIGHTS BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

### INTRODUCTION<sup>1</sup>

In 2003, former President of the UN Human Rights Committee and current President of the Inter-American Court of Human Rights, Cecilia Medina Quiroga, analyzed the development of women's human rights in the Inter-American System of Human Rights.<sup>2</sup> The balance was in sum positive: the Inter-American Commission of Human Rights ("the Commission") had addressed several cases regarding women. However, the role of the Inter-American Court of Human Rights ("the Court", "the Inter-American Court" or "the Tribunal") had been "*prima facie*, extremely modest."<sup>3</sup>

In November 2006, the Court directly addressed violations of human rights against women for the first time in its 28-year history in *Miguel Castro-Castro Prison* ("Castro-Castro Prison case").<sup>4</sup> The Court's incorporation of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"),<sup>5</sup> into its analysis (for example, in its analysis of the right to humane treatment and the duty to investigate) gives full recognition to the human rights of women in the Inter-American context.<sup>6</sup>

This paper begins by providing a brief history of the cases brought before the Tribunal that concerned gender and summarizes the Court's holding. The paper then analyzes the bold and far-reaching Castro-Castro Prison case in detail.

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1. The following note outlines the recent developments of women's rights in the case law of the Inter-American Court of Human Rights. For a more in-depth view of the issues the note contemplates see Patricia Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, LL.M. Long Paper, Harvard Law School, May 2007.

2. CECILIA MEDINA QUIROGA, *Derechos Humanos de la Mujer, ¿Dónde estamos ahora en las Américas?* [*Human Rights of Women: Where are we now in the Americas?*], in *ESSAYS IN HONOUR OF ALICE YOTOPOULOS-MARANGOPOULOS 907* (Centro de Derechos Humanos, Facultad de Derecho, Universidad de Chile trans. 2003), available at [http://www.publicacionescdh.uchile.cl/Libros/18ensayos/Medina\\_DondeEstamos.pdf](http://www.publicacionescdh.uchile.cl/Libros/18ensayos/Medina_DondeEstamos.pdf).

3. *Id.* at 2.

4. Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs), Inter-Am. Ct. H.R. (ser. C.) No. 160 (Nov. 25, 2006).

5. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women art. 12, June 9, 1994. 27 U.S.T. 3301, 1438 U.N.T.S. 63.

6. See *Id.* ¶¶ 344-50, § XV.

I. BACKGROUND: *LOAYZA-TAMAYO CASE* AND *PLAN DE SÁNCHEZ MASSACRE CASE*

A. *Loayza-Tamayo Case*

The Inter-American Court did not hear a case regarding sexual violence against women until 1997, when it heard the *Loayza-Tamayo* case against Peru.<sup>7</sup> There, the Commission alleged that Peruvian state agents illegally detained, tortured, and raped the victim.<sup>8</sup>

The Tribunal held that the Commission proved torture by other means,<sup>9</sup> but not rape, to wit, “[a]lthough the Commission contended in its application that the victim was raped during her detention, after examination of the file and, given the nature of [the] fact, the accusation could not be substantiated.”<sup>10</sup> Was there a substantial difference in the evidence proffered by the Commission for the torture as opposed to the rape? No, as Patricia Palacios Zuloaga states, “there was no more hard evidence of the other mistreatment suffered by *Loayza Tamayo* than there was of her rape. . . .”<sup>11</sup>

The Court, by choosing this course, made a powerful and controversial statement about women in human rights. First, rape—which does constitute cruel, inhuman, or degrading treatment, and, in some cases, torture—would require more evidence than other forms of mistreatment and torture. The Court, however, failed to mention what this different evidentiary standard is. Second, when given the choice between a gender-neutral violation (torture) and a violation related to sex (rape in this case), the Court would decide on the gender-neutral grounds.

B. *Plan de Sánchez Massacre Case*

In 1982, the military in Guatemala tortured and killed women, children, and the elderly in what became known as the *Plan de Sánchez Massacre*.<sup>12</sup> The Inter-American Court issued a judgment on the Merits and a judgment

7. *Case of Loayza-Tamayo v. Peru (Merits)*, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997). Previously, the Court had issued an Advisory Opinion regarding gender discrimination in a Costa-Rican law project regarding naturalization. See Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. Advisory Opinion OC-4/84 (ser. A) No. 4, ¶¶ 64-67 (Jan. 19, 1984).

8. *Case of Loayza-Tamayo v. Peru (Merits)*, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997).

9. E.g., incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, and a restrictive visiting schedule. *Case of Loayza-Tamayo v. Peru (Merits)*, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 58 (Sept. 17, 1997).

10. *Id.*

11. Palacios Zuloaga *supra* note 1, at 13.

12. *Case of the Plan de Sánchez Massacre v. Guatemala (Merits)*, Inter-Am. Ct. H.R. (ser. C) No. 105 (April 29, 2004).

on Reparations concerning the 1982 massacre that implicated human rights abuses to women.<sup>13</sup>

### 1. *The Judgment on the Merits*

The Court found that the representative of the victims, CALDH, proved that before being murdered, twenty *patojas*, indigenous “girls between the ages of 12 and 20 were taken to a house where they were mistreated [and] raped” by the military.<sup>14</sup> What evidentiary standard did the Court use when making this determination?

The State, Guatemala, accepted the facts and violations alleged by the Commission and the representatives of the victims.<sup>15</sup> Thus it is impossible to know what the Tribunal’s position would have been, should it have had to prove the sexual violations without the State’s recognition, as in the Loayza Tamayo case. After this case, it was still unclear what proof the Court required to find a gender-related violation.

### 2. *The Judgment on Reparations*

While the Court took no big steps forward in the evidentiary phase of the judgment, it did mandate progressive remedies for victims of gender-based violence in the instant case. The Court found that those women who survived the massacre,

“still suffer from that attack. The rape of women was a State practice, executed in the context of massacres, designed to destroy the dignity of women at the cultural, social, family and individual levels. These women consider themselves stigmatized in their communities and have suffered from the presence of the perpetrators in the town’s common areas. Also, the continuing impunity of the events has prevented the women from taking part in the legal proceedings.”<sup>16</sup>

When determining the reparations in the case, the Court decided to order the State, *inter alia*, to provide all the victims with free medical and psychological treatment. The Tribunal stated that “[w]hen providing the psychological and psychiatric treatment, the special circumstances and

13. *Id.* See also Case of the Plan de Sánchez Massacre v. Guatemala (Reparations and Costs), Inter-Amer. Ct. H.R. (ser. C.) No. 116 (Nov. 19, 2004).

14. Case of the Plan de Sánchez Massacre v. Guatemala (Merits), Inter-Amer. Ct. H.R. (ser. C.) No. 105, ¶ 42(18) (April 29, 2004). See also Case of the Plan de Sánchez Massacre v. Guatemala (Reparations and Costs), Inter-Amer. Ct. H.R. (ser. C.) No. 116, ¶ 49(2) (Nov. 19, 2004).

15. Case of the Plan de Sánchez Massacre v. Guatemala (Merits), Inter-Amer. Ct. H.R. (ser. C.) No. 105, at 36 (April 29, 2004). The State also “d[id] not address the issue of genocide raised in the application by the . . . Commission and the petitioners, because it is not the subject matter of the American Convention [on] Human Rights.” *Id.* ¶ 36(5).

16. Case of the Plan de Sánchez Massacre v. Guatemala (Reparations and Costs), Inter-Amer. Ct. H.R. (ser. C.) No. 116, ¶ 49(19) (Nov. 19, 2004).

needs of each person must be taken into account, in order to provide collective, family and individual treatment".<sup>17</sup> Even though it was not the first time that the Tribunal ordered this kind of reparation, nevertheless this statement demonstrates the Court's conclusion that women who had been raped should have access to professional assistance.

## II. THE CASTRO-CASTRO PRISON CASE

In 2006, the Court heard a new case where there were allegations of sexual violence, and it held that there had been abuses that were directly related to gender.<sup>18</sup> In the Castro-Castro prison case, the Court directly addressed the issue of violence against women and for the first time took into consideration the Convention of Belém do Pará.<sup>19</sup>

### A. *The Facts*

For almost twenty years, various groups<sup>20</sup> within Peru were in armed conflict. From May 6 to May 9, 1992, around 135 women and 450 men who were prisoners at the maximum-security prison Miguel Castro-Castro in Lima, Peru<sup>21</sup> were the object of a violent attack from State agents.<sup>22</sup> The inmates were persons either accused or convicted for terrorism crimes or for treason.<sup>23</sup>

The state agents exploded a wall in the women's prison ward and then "used war weapons, explosives, tear gas, vomiting, and paralyzing bombs against the inmates. . ." <sup>24</sup> producing asphyxia and burned skin.<sup>25</sup> Men and women died during the attack. Further, female inmates, including pregnant women, were forced to flee to avoid gunfire.<sup>26</sup> All prisoners were forced to

17. *Id.* ¶ 107.

18. Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs), Inter-Am. Ct. H.R. (ser. C.) No. 160 (Nov. 25, 2006).

19. While the Court had interpreted on several occasions the Inter-American Convention to Prevent and Punish Torture, *opened for signature* Dec. 9, 1985, O.A.S.T.S. No. 67, it had never applied—until November 2006—the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women. On the other hand, the Commission had already addressed that Convention. See *María da Penha v. Brasil*, Case 12.051, Inter-Am. C.H.R. Report No. 54/01, OEA/Ser.L/V/II.111. doc. 20 (2000).

20. These groups were: 1) Sendero Luminoso, or the "Shining Path," 2) the Túpac Amaru Revolutionary Movement, and 3) agents of the police force and the military.

21. Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs), Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 197(13) (Nov. 25, 2006).

22. *Id.* ¶ 197(20-7).

23. *Id.* ¶ 197(10).

24. *Id.* ¶ 197(21).

25. *Id.* ¶ 197(22).

26. Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs), Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 290 (Nov. 25, 2006).

lie face down regardless of their condition,<sup>27</sup> and then were transferred either to the hospital or to other prisons.<sup>28</sup>

At the Police Sanity Hospital, the State surrounded the prisoners with security forces, stripped inmates and required them to remain naked for extended periods of time, forbade female inmates from showering, and, in some cases, required armed male guards to accompany female prisoners when they went to the bathroom.<sup>29</sup> Further, one female was required to undergo abrupt digital penetration by "several hooded persons," under the guise of an "inspection."<sup>30</sup>

Inmates transferred to other prisons did not fare any better.<sup>31</sup> Female prisoners "were [the] object of constant physical and psychological mistreatments . . . [Moreover], they did not have access to products of personal hygiene, such as soap, toilet paper, feminine pads, or additional underwear, as well as warm clothes . . . and they were threatened with being killed."<sup>32</sup> In addition, two pregnant inmates "did not receive medical attention until they were taken to the hospital for their labor" and one of them "did not receive post-partum medical attention."<sup>33</sup>

Once the transfer concluded, prisoners "were not allowed to communicate with their next of kin and attorneys for several days, and in some cases during weeks or months."<sup>34</sup> It was only after the solitary confinement ceased, that prisoners were allowed to see their next of kin through a fence.<sup>35</sup>

The State did not conduct an adequate investigation related to the previous facts.<sup>36</sup>

### B. *The Court's Assessment*

The Court made reference to how gender plays an important role in the numerous contraventions of human rights. First, the Court held that these gender-related abuses violated Article 5 of the American Convention on Human Rights<sup>37</sup> ("the American Convention"), the right to humane treatment.<sup>38</sup> Second, the Court held that the State violated Articles 8 and 25 of the American Convention, the right to fair trial and due process, respec-

27. *Id.* ¶ 294, 298.

28. *Id.* ¶ 197(48).

29. *Id.* ¶ 197(49).

30. *Id.* ¶ 197(50).

31. *Id.* ¶ 197(52)-197(57).

32. *Id.* ¶ 197(51).

33. *Id.* ¶ 197(57).

34. *Id.* ¶ 197(54).

35. *Id.* ¶ 197(56).

36. *Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs)*, Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 385 (Nov. 25, 2006).

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

38. *Id.* ¶ 300.

tively, when it failed to investigate violations of Article 5.<sup>39</sup> Finally, the Court decided to grant reparations that acknowledged the gender-based nature of the violations.<sup>40</sup> Throughout the Castro-Castro Prison case, the Court incorporated the Convention of Belém do Pará as a judicial source.<sup>41</sup>

### 1. *Right to Humane Treatment (Article 5)*

Analysis of Article 5 of the American Convention infringements in the present case began by making reference to the Convention of Belém do Pará. The Court stated that “besides the protection granted by Article 5 of the American Convention, it is necessary to point out that Article 7 of the Convention of Belém do Pará expressly states that the States must ensure that the State authorities and agents abstain from any action or practice of violence against women.”<sup>42</sup>

When analyzing the case, the Tribunal considered five specific events related to women: a) the suffering of pregnant women during the attack; b) the fact that women were forced to be nude in front of armed men in the Hospital; c) the fact that some women were not provided any hygienic supplements; d) the vaginal “inspection”; e) the confinement; and f) the lack of pre- and post-partum attention to the pregnant women.

#### *a. The Suffering of Pregnant Women During the Attack*

The Court focused on the plight of pregnant women in the massacre, who “experienced an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings on anguish, despair, and fear for the lives of their children”.<sup>43</sup> The Tribunal went on to say that although “the treatment [received by all male and female inmates] constituted an inhuman treatment in violation of Article 5 of the American Convention, [t]his breach was worse regarding those inmates who were injured and the women who were pregnant.”<sup>44</sup>

#### *b. Forced Nudity in front of Male State Agents*

The Court held that all inmates who were submitted to nudity for prolonged periods of time were victims of a treatment that violated their personal dignity. However, the forced nudity imposed a heavier burden for the six female inmates.<sup>45</sup> Specifically, these acts “directly endangered the dignity of those women . . . [and] caused them serious psychological and moral

39. *Id.* ¶ 408.

40. See, e.g., the varying compensation allotted to pregnant and non-pregnant victims. *Id.* ¶ 433(c) viii, ix and x.

41. See *Id.* ¶¶ 344-50, § XV.

42. Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs), Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 292 (Nov. 25, 2006).

43. *Id.* ¶ 292.

44. *Id.* ¶ 300.

45. *Id.* ¶ 306.

suffering, which is added to the physical suffering they were already undergoing due to their injuries.”<sup>46</sup> Consequently, the Tribunal decided that the State was responsible for the breach of the right to humane treatment of those six women.

*c. Lack of Hygienic Supplements*

The women inmates transferred to other prisons “were object[s] of constant physical and psychological mistreatments. They were kept without contact with the outside world . . . [and] they did not have access to products of personal hygiene, such as soap, toilet paper, feminine pads, or additional underwear, as well as warm clothes.”<sup>47</sup> Consequently, based on standards of the International Committee of the Red Cross, the Tribunal considered that such conditions and excesses caused “special and additional suffering to [the] imprisoned women.”<sup>48</sup>

*d. Digital Penetration*

The Inter-American Court concluded—based on international and comparative jurisprudence and doctrine—that the vaginal “inspection” constituted sexual rape.<sup>49</sup> The Court further stated that when rape is committed by a State agent, it “is an especially gross and reprehensible act, taking into account the victim’s vulnerability and the abuse of power displayed by the agent.”<sup>50</sup> Consequently, the Court found that the State was responsible not only for the breach of the right of humane treatment (Article 5 of the American Convention), but also for the contraventions of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

*e. Confinement*

The Tribunal held that the confinement imposed on all the inmates violated the rights to humane treatment under Article 5.<sup>51</sup> However, the Court considered that the mothers went through an additional suffering. Indeed, the imposition of solitary confinement on mothers made it “impossib[le] to communicate with their children [and] caused an additional psychological suffering . . . .”<sup>52</sup>

46. *Id.* ¶ 308.

47. *Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs)*, Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 197(51) (Nov. 25, 2006).

48. *Id.* ¶ 331.

49. *Id.* ¶¶ 309-312. It added that sexual rape “must also be understood as 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.”

50. *Id.* ¶ 311.

51. *Id.* ¶ 333.

52. *Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs)*, Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 330 (Nov. 25, 2006).

*f. Lack of Pre and Post Partum Care*

The Court held the deprivation of prenatal care for two pregnant inmates imposed “an additional violation to their right to humane treatment.”<sup>53</sup> Inexorably, the Tribunal’s analysis of gender-related violations and its inclusion of the Convention of Belém do Pará underlines the particular importance the Court gave to the situation of women in the Castro-Castro Prison. Specifically, the Court found five separate instances where the State imposed an undue burden on women because of their gender, which in turn violated Article 5 of the American Convention’s guarantee of humane treatment. The importance of the Convention of Belém do Pará was further illuminated when the Court assessed whether the State, Peru, had conducted the investigations mandated by international human rights law.

*2. The Right to a Fair Trial and Due Process (Articles 8 and 25) and The Duty to Investigate*

The Inter-American Court has consistently stated in its jurisprudence that the State has the duty “to investigate possible acts of torture or other cruel, inhuman, or degrading treatments.”<sup>54</sup> In the instant case, the obligation to investigate derives from several norms: Articles 1(1) (Obligation to Respect Rights) and 5 (Right to Humane Treatment) of the American Convention, as well as the provisions of the Inter-American Convention to Prevent and Punish Torture and the Convention of Belém do Pará.<sup>55</sup> The two last Conventions were “applicable to the case since they specify and complement the State’s obligation with regard to the compliance of the rights enshrined in the American Convention.”<sup>56</sup>

Specifically, the Court took into consideration Article 7(b) of the Convention of Belém do Pará, the obligation to apply due diligence to investigate and punish violence against women, and articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, the obligation of taking “effective measures to prevent and punish” cruel, inhumane and degrading treatments and torture and consequently, to conduct “an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process”.<sup>57</sup>

The Court considered that in order to comply with the obligation to investigate, “once the state authorities become aware of the fact, they must start, *ex officio* and without delay, a serious, impartial, and effective investigation.”<sup>58</sup> Further, the Tribunal obliged the State to take into account “the

53. *Id.* ¶ 332.

54. *Id.* ¶ 344.

55. According to the Tribunal, the Convention of Belém do Pará was applicable to the State as of the date of its ratification on June, 1996. *Id.* ¶ 344.

56. *Id.* ¶ 379.

57. Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs), Inter-Amer. Ct. H.R. (ser. C.) No. 160, ¶ 378 (Nov. 25, 2006).

58. *Id.* ¶¶ 256, 378.

seriousness of the facts that constitute violence against women, taking into consideration the obligations imposed on it by the treaties it has ratified in this subject.”<sup>59</sup>

The Court found that “the domestic proceedings initiated in the present case have not constituted effective recourses to guarantee a true access to justice by the victims, within a reasonable period of time.”<sup>60</sup> Consequently, the Tribunal concluded that the State was responsible for breaching “Articles 8(1) and 25 of the American Convention, in relation with the obligation included in Article 1(1) of the same, in connection to Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.”<sup>61</sup>

### 3. *Reparations*

“Reparation generally refers to the various means by which a state may repair the consequences of a breach of international law for which it is responsible.”<sup>62</sup> Indeed, there has to be correlative reparation to every human right violation. International law has classified several types of reparations: compensation, restitution, satisfaction and guarantees of non-repetition.<sup>63</sup> In the Castro-Castro Prison case—as it does in all its jurisprudence—the Inter-American Court made three different conceptual divisions in the Reparations portion of the judgment, which include all of the above classifications: pecuniary damages, non-pecuniary damages, and other forms of reparations.<sup>64</sup>

The Court made specific legal considerations regarding the victims that were women. When addressing reparations in the chapter on non-pecuniary damages, the Tribunal ordered the State to compensate with different amounts the victims that were pregnant, the woman that was sexually raped, and the six women who were subjected to sexual violence.<sup>65</sup>

Finally, in the chapter entitled “Other Forms of Reparation (Measures of Satisfaction and Non-Repetition Guarantees),” the Court ordered the State, *inter alia*, to make certain reparations that, while being gender neutral, may have an impact on women: 1) to conduct an investigation of the facts, and to “identify, prosecute and punish those responsible”;<sup>66</sup> 2) to offer physical and psychological treatment to the victims and their next of kin, as the

59. *Id.* ¶ 394.

60. *Id.* ¶ 408.

61. *Id.*

62. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 7 (2d. ed. 2006).

63. *Id.* at 8.

64. See *Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs)*, Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 410 (Nov. 25, 2006).

65. The compensation amounts were US \$5,000.00, US \$30,000.00 and US \$10,000.00, respectively. *Id.* ¶ 433(c) viii, ix and x.

66. *Id.* ¶¶ 436-42.

Court had ordered in the Plan de Sánchez Massacre Case,<sup>67</sup> “without cost and through its specialized health institutions . . . [and] taking into consideration the sufferings of each of them after an individual evaluation;”<sup>68</sup> and 3) to “implement . . . human rights education programs, addressed to agents of the Peruvian police force, on the international standards applicable to matters regarding treatment of inmates in situations of alterations of public order in penitentiary centers.”<sup>69</sup>

### III. THE INCORPORATION OF INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN (CONVENTION OF BELÉM DO PARÁ)

The Inter-American Court is tasked with applying and interpreting the American Convention on Human Rights. However, it is not limited to this Convention. While analyzing a case, the Court may apply other treaties that give it power. Consequently, the Court has applied the Inter-American Convention on Forced Disappearance of Persons, and the Inter-American Convention to Prevent and Punish Torture. However, the Tribunal had not applied the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women until 2006.

It is difficult to categorically attribute this to one specific factor. However, it is possible to posit both legal and meta-judicial possibilities.

#### A. Legal Possibilities

##### 1. *Can the Court apply the Convention of Belém do Pará?*

Article 12 of the Convention of Belém do Pará states that the Inter-American Commission of Human Rights can receive “petitions . . . containing denunciations or complaints of violations of Article 7 of th[e] Convention [of Belém do Pará] by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention . . . and the Statutes and Regulations of the Inter-American Commission . . . for lodging and considering petitions.”<sup>70</sup>

67. *Id.* ¶¶ 448-50. Case of the Plan de Sánchez Massacre v. Guatemala (Reparations and Costs), Inter-Am. Ct. H.R. (ser. C.) No. 116, ¶ 49(19) (Nov. 19, 2004). The Court has ordered this kind of reparation in many cases, not necessarily directed to women. *See, e.g.*, Case of Pueblo Bello Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No.140 (Jan. 31, 2006); Case of Mapiripan Massacre v. Colombia Inter-Am. Ct. H.R. (ser. C) No. 134. (Sept. 15, 2005).

68. Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs), Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 449 (Nov. 25, 2006).

69. *Id.* ¶ 452.

70. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women art. 12, June 9, 1994. 27 U.S.T. 3301, 1438 U.N.T.S. 63.

The language of Article 12 led some to believe that only the Inter-American Commission, and not the Court, could apply the Convention of Belém do Pará. In her article, *Human Rights of Women: Where Are We Now in the Americas?*, Cecilia Medina Quiroga states that regardless of the fact that Article 12 does not expressly mention the Court, it seems obvious that the Court could apply that article because the article points out that the American Convention will dictate norms related to the petitions, and the Court is not excluded from the process.<sup>71</sup>

The Inter-American Court sides with Medina Quiroga in the Castro-Castro Prison Case, when it applies and interprets the Convention of Belém do Pará.<sup>72</sup>

2. *Does the fact that no petitioner had alleged a breach of the Convention of Belém do Pará before explain the discrepancies in judgments?*

The Inter-American Court has within its power the ability to use the principle of *iura novit curia*. Indeed, this principle reasons that judges know the law, thus they have the discretionary faculty for applying certain points of law even if these points of law are not alleged by the parties. The Tribunal has used this principle in other cases in other contexts. Why not in the context of the human rights of women?

### B. *Meta-Judicial Possibilities*

#### 1. *Court Composition*

It can also be argued that the composition of the Court effectuated the change in the judgments.<sup>73</sup> In 1997, the Court was composed entirely of men, and in 2004 and 2006 it had a female justice, Cecilia Medina Quiroga.<sup>74</sup> The Honorable Medina Quiroga was not just any female justice: she was an ardent supporter of women's rights, and she believed that the Court could apply the Convention of Belém do Pará. Another fundamental factor was that the representative of the victims was herself a victim in the case and focused her allegations on violence against women.

Perhaps also, the gender-focused Castro-Castro Judgment might not have been possible without the Plan de Sánchez Massacre Case,<sup>75</sup> which decanted issues about women's rights violations.<sup>76</sup> In other words, the victims' repre-

71. MEDINA QUIROGA, *supra* note 2, at 4.

72. A controversial question that remains is whether the denial of justice in this case was imposed on women as a gender violation or was also applied to men, in which case the American Convention already protects such rights. See Palacios Zuloaga, *supra* note 1, at 20–22.

73. *Id.* at 64.

74. As of January 2007 the Court has three women judges, one of whom is the Vice-President.

75. Case of the Plan de Sánchez Massacre v. Guatemala (Reparations and Costs), Inter-Am. Ct. H.R. (ser. C.) No. 116 (Nov. 19, 2004).

76. Palacios Zuloaga, *supra* note 1, at 66–7.

sentative's focus on the sexualized nature of the abuses may have forced the Court to confront the issue of human rights of women.

### CONCLUSIONS

Karen Knop stated that when "international law aspires to regulate . . . women's lives, it does so at a level of abstraction that is difficult to relate to women's experiences."<sup>77</sup> Hopefully, the knowledge and promotion of the Court's judgment will make the Court accessible to women as a tool, and eliminate the abstraction. This can be done either by applying the Convention of Belém do Pará or by simply applying the American Convention of Human Rights, which by itself is a protective instrument directly concerning women.

As Catherine MacKinnon says: "For the glorious dream of the Universal Declaration to come true, for human rights to be universal, both the reality it challenges and the standard it sets need to change."<sup>78</sup> Indeed, introducing substantial changes to make women visible and include them in the priorities of international law must be everyone's task. First, tribunals must make an effort to include female jurists among their ranks. Second, women and their representatives should be sure to bring actions that deal solely with the issue of abuses against women. This two-pronged approach can help ensure that women's rights are a priority and not just a theoretical afterthought. In 2007, with three female justices on the bench and one of them as the President for the first time in the Court's history, and with women and representatives being aware of the aforementioned developments, the future looks promising.

—Karla I. Quintana Osuna\*

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77. Karen Knop, *RelStatements: Feminism and State Sovereignty in International Law*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 293, 294 (1993).

78. CATHERINE A. MACKINNON, *Are Women Human in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 43, 43 (2006).

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