

PARADIGMATIC CHANGES IN GENDER JUSTICE: THE ADVANCEMENT OF REPRODUCTIVE RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

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I. Introduction

Reproductive rights are an emergent topic in international human rights law. This essay will explore how reproductive justice has been addressed by the Inter-American Human Rights System (IAS) through case law, hearings and thematic reports. Its objective is to analyze trends within the Inter-American doctrine and case law regarding reproductive health and freedom and present strategies to improve strategic litigation and increase access to justice for women and girls who suffer violations in these spheres.

The article will begin by describing the historical context in which reproductive rights have been framed as human rights in the international sphere and the importance of the democratic consolidation in Latin America in this process. The next section will present a series of landmark cases admitted and resolved in the Inter-American System, both in the Inter-American Commission and the Inter-American Court, relating to violations in the field of reproductive choices and gender-based violence illustrating common arguments and international human rights standards advanced in the case law. Here, I will argue that the new developments of the IAS jurisprudence on the elimination of gender-based violence in human rights law are relevant and can inform strategic litigation undertaken as an advocacy tool for the recognition and justiciability of reproductive rights.

Finally, in the concluding section, current opportunities and challenges will be identified, taking into account the human rights framework and paradigms of international litigation outlined in the

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quest for reproductive justice and transformative equality faced by advocates.

II. A Brief History of Reproductive Rights' Recognition in the International Sphere

With the rising of democratic governments in Latin America has come an increased attention to sexual and reproductive health services as human rights and social justice issue.² The struggle for democracy in the continent and the recognition of women's rights (including reproductive rights) as human rights was catalyzed by the United Nations (UN) Decade for Women (1975-85) and the development of specific international human rights instruments to recognize women's equality and eliminate all forms of gender-based violence.³

Although international human rights law was not initially developed to address violations of women's human rights and women were generally excluded from participating in the creation of international human rights law, the UN General Assembly's adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 and of the Declaration on the Elimination of Violence against Women in 1993, marked the placement of women's rights on the human rights agenda and international legal discourse.⁴ At the regional level, the Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará") in 1994. These international human rights instruments have been key in the recognition of women's rights as human rights, being broad-based, comprehensive documents that highlight the obligations of the States to promote gender equality and guarantee a life free of violence for women both in the public and private spheres.

However, these instruments only vaguely address sexual and reproductive rights. Only the CEDAW Convention commands States to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis for equality of men and women, access to health care services, including

² REBECCA J. COOK ET AL., *REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS, AND LAW* 155 (2003).

³ JANE S. JAQUETTE ED., *FEMINIST AGENDAS AND DEMOCRACY IN LATIN AMERICA* 5 (2009).

⁴ Elissavet Stamatopoulou, *Women's Rights and the United Nations*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 36 (Julie Peters & Andrea Wolper, eds. 1995).

those related to family planning.”⁵ Nevertheless, the CEDAW Committee, an international body created to supervise the proper implementation of the Convention, has understood this obligation broadly, considering that States have a duty to ensure access to reproductive health services free from discrimination.⁶

Historically, the human right to health described in other general human rights instruments, such as the International Covenant on Social and Economic Rights (1966), has excluded women’s reproductive health and their needs in obtaining health-related services.⁷ As L. Cabal notes: “In this context, reproductive health was relegated to the fields of population and development, and notions of reproductive rights as human rights were non-existent. The blatant exclusion of the pillars of reproductive rights – the rights to reproductive health care and to reproductive self-determination – from the human rights framework was revealing in that it exposed the biased lens with which human rights have traditionally been interpreted.”⁸ As a result, violations of women’s human rights in the reproductive sphere, such as obstructions to accessing legal abortion, contraception, HIV and uterine cancer treatments, forced sterilizations and female genital mutilation were not considered as human rights violations.

The 90’s brought a new shift to this vision with the UN International Conference on Population and Development (El Cairo, 1994) and the Fifth World Conference on Women (Beijing, 1995). Thanks to women’s rights groups’ timely advocacy, sexual and reproductive health was recognized from a human rights-based perspective at both Cairo and Beijing. Cairo’s Program of Action described the international consensus that emerged from the Conferences: reproductive rights embrace certain human rights that are already recognized in national laws and international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the

⁵ See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art. 12, U.N. General Assembly Resolution 34/180, Dec. 18th, 1979.

⁶ See Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 24 “Women and Health”, (1999), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/77bae3190a903f8d80256785005599ff](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/77bae3190a903f8d80256785005599ff).

⁷ Luisa Cabal and Jaime M. Todd-Gher, *Reframing the Right to Health: Legal Advocacy to Advance Women’s Reproductive Rights*, in *REALIZING THE RIGHT TO HEALTH* 120 (Andrew Clapham & Mary Robinson eds., 2009).

⁸ *Id.*

right to attain the highest standard of sexual and reproductive health.⁹

Since then, women's rights movements have strongly advocated to enforce Cairo and hold States accountable for their international commitments towards the improvement of reproductive health services within their countries, as well as for the enforcement of human rights law to protect women's reproductive choices.

Conceptualizing reproductive rights as human rights – related to equality, freedom and autonomy— rather than framing them as social or “second generation rights” is relevant to understanding the scope of the States' obligations regarding the achievement of reproductive self-determination. Women's rights groups have promoted the international interpretation of human rights instruments to underscore not only the importance of States' legal duty to respect reproductive rights by eliminating obstacles women face in exercising those rights, but also their positive obligations to guarantee their fulfillment through appropriate legislative, judicial, administrative and budgetary measures.¹⁰

In addition, feminist scholars have insisted on framing the issues of sexual and reproductive rights within the umbrella of citizenship.¹¹ The claim is that the sexual division of labor within the private sphere (family) restrains women's development as citizens in the public sphere (work and government), since the majority of their time is invested in family and domestic tasks. Thus, the exercise of reproductive rights cannot be separated from the democratization of the family and the State.¹²

III. From Treaties to Practice: International Litigation of Reproductive Rights

Positive advances in the recognition of reproductive rights within the human rights framework have not been sufficient to effectively redress the inequalities and disadvantages to which women are subjected in their daily lives. As noted by R. Cook, this “failure” of human rights law to fulfill its promise of universality in the case of women is complex and is due to several factors, including

⁹ Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5–13 September 1994, U.N. Doc. A/CONF.171/13/Rev.1, at para. 7.3.

¹⁰ Rebecca Cook et. al, *supra* note 2, at 156.

¹¹ SILVIA LEVÍN, DERECHOS AL REVÉS ¿SALUD SEXUAL Y REPRODUCTIVA SIN LIBERTAD? 78 (2010).

¹² See *generally* MALA HTUN, SEX AND THE STATE: Abortion, Divorce, and the Family Under Latin American Dictatorships and Democracies (2003).

a “lack of understanding of the systemic nature of the subordination of women, failure to recognize the need to characterize the subordination of women as a human rights violation, and lack of state practice to condemn discrimination against women.”¹³ Consequently, a new paradigm emerged in the last decade of the 20th century: strategic litigation of reproductive cases before international human rights bodies.

Struggling for the international recognition of reproductive rights, women’s groups became aware of the potential of international human rights law to defend women’s rights. Thus, in addition to the capacity building, legislative and public policy advocacy strategies, efforts have been made to litigate cases both nationally and before international human rights bodies.¹⁴ There has also been an increasing interest within human rights organizations with regard to reproductive rights topics.¹⁵

Although feminist advocates and scholars recognize the limitations of a rights-based strategy and are aware that its effectiveness varies depending on the cultural context, the importance of integrating women’s experiences of injustice and subordination when developing international human rights law has also been a major concern.¹⁶ The international litigation of cases continues to be a paradigmatic strategy for women’s rights organizations in the 21st Century.

Consequently, several landmark cases regarding reproductive rights have been presented before international human rights bodies, both within the UN System and at the regional level, for example, the Inter-American System (composed of the Inter-American Commission and Court). The following analysis will concentrate on the Inter-American System.

¹³ REBECCA J. COOK ED., HUMAN RIGHTS OF WOMEN 3 (1994).

¹⁴ See, e.g., the Center for Reproductive Rights (CRR), a women’s rights NGO integrated by human rights lawyers whose mission is to use “the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to protect, respect and fulfill.” <http://reproductiverights.org/en/about-us/mission>; The Information Group on Reproductive Choice (GIRE), a Mexican NGO whose aim is “to promote and defend women’s reproductive rights, within the context of human rights.” http://www.gire.org.mx/index.php?option=com_content&view=article&id=392&Itemid=1115&lang=en.

¹⁵ See, e.g., Human Rights Watch, “Sexual and Reproductive Health” in their website: <http://www.hrw.org/topic/health/sexual-and-reproductive-health>; Amnesty International, “Women’s Lives, Women’s Rights” addressing maternal mortality as a global reproductive health issue: <http://www.amnesty.org/en/campaigns/demand-dignity/issues/maternal-mortality>

¹⁶ See Rebecca J. Cook, *supra* note 13, at 4-5.

Historically, the majority of cases resolved in the IAS have focused on gross-violations of human rights, such as arbitrary executions, massacres and forced disappearances due to the prevalence of authoritarian regimes and dictatorships in Latin America in the first half of the 20th Century. The rising of democratic governments and relative political stability in the region has promoted analysis by the Inter-American Commission and Court of discriminatory practices suffered mainly by disadvantaged groups due to their race, ethnicity or gender.¹⁷

In this context, the Inter-American Human Rights Commission (“IAHRC or the Commission”) has recently issued two thematic reports on reproductive rights issues: *Access to Maternal Health Services from a Human Rights Perspective* (2010) and *Access to Information on Reproductive Health from a Human Rights Perspective* (2011).¹⁸

Also, the IAHRC has analyzed several petitions regarding reproductive rights in the last two decades. Three landmark cases regarding access to legal abortion, forced sterilization of women and adolescent pregnancy in schools are: Paulina Ramírez Jacinto (Mexico), María Mamérita Mestanza (Peru) and Mónica Carabantes Galleguillos (Chile).¹⁹ It is worth noting that all three cases were resolved as *friendly settlements*, meaning the Commission didn’t issue a merits report on the case but served as a mediator between the victims and the State to reach an agreement.²⁰

In the case of Mónica Carabantes, a petition was filed against the State of Chile arguing the decision of that country’s courts not to punish abusive interference in the private life of Mónica Carabantes Galleguillos. Carabantes Galleguillos had filed a suit against the

¹⁷ Victor Abramovich, *From massive violations to structural patterns: new approaches and classic tensions in the inter-american human rights system*, SUR INTERNATIONAL JOURNAL ON HUMAN RIGHTS, 11 (2009), http://www.surjournal.org/eng/conteudos/getArtigo11.php?artigo=11,artigo_01.htm

¹⁸ Inter-Am.C.H.R., *Access to Maternal Health Services from a Human Rights Perspective*, OEA/Ser.L/V/II. Doc. 69 (2010); Inter-Am.C.H.R., *Access to Information on Reproductive Health from a Human Rights Perspective* OEA/Ser.L/V/II. Doc. 61 (2011).

¹⁹ *Paulina Ramírez v. Mexico*, Inter-Am.C.H.R, Friendly Settlement, Report 21/07, (2007); *María Mamérita Mestanza Chávez v. Peru*, Inter-Am.C.H.R, Friendly Settlement, Report 71/03, (2003); *Mónica Carabantes Galleguillos v. Chile*, Inter-Am.C.H.R, Friendly Settlement, Report 33/02, (2002).

²⁰ After a petition is admitted by IACHR and observations are made by the State presumed responsible of the human rights violations, the Commission issues a merits report on the case or requests the State and the petitioners to sign a friendly settlement. See Inter-American Convention on Human Rights, Article 48(1) (f).

private school that expelled her for becoming pregnant, arguing that this violated her honor and dignity as recognized in Article 11 of the American Convention on Human Rights (hereinafter “the American Convention”), and the right to equal protection of the law (Article 24). A friendly agreement was signed in 2001, where the State committed to cover higher education costs for Mrs. Carabantes, secondary and higher education costs for her daughter and carry out a public act of redress.²¹

In the case of María Mamérita Mestanza, a Peruvian 33 year old woman who suffered forced sterilization by public health authorities under Fujimori’s regime, the petitioners alleged that the Peruvian State had violated Mrs. Mestanza’s rights to life, personal integrity, and equality based on Articles 4, 5, 1, and 24 of the American Convention, as well as violations of Articles 3, 4, 7, 8, and 9 of the Convention of Belém do Pará), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter “the Protocol of San Salvador”) and Articles 12 and 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²²

The Peruvian State recognized its international responsibility in a friendly agreement and offered economic compensation to Mrs. Mestanza’s family as reparation. It also promised to make a thorough investigation of the facts and apply legal sanctions to any person determined to have participated, and modify national legislation and public policies on reproductive health and family planning to eliminate discrimination and respect women’s autonomy.²³

In the case of Paulina Ramírez, a petition was filed against the State of Mexico for violating the human rights of Paulina, a young girl from Baja California who became pregnant as a result of a rape and was prevented, by the state authorities, from exercising her right to terminate that pregnancy as provided for in Mexican law. According to the complaint, the Mexican State was internationally responsible for violating rights protected in Articles 1, 5, 7, 8, 11, 12, 19, and 25 of the American Convention, Articles 1, 2, 4, 7, and 9 of the Convention of Belém do Pará, as well as Article 10 of the Protocol Protocol of San Salvador, the right to health protected in Article 12 of the CEDAW, and the rights protected in Articles 19, 37, and 39 of the Convention on the Rights of the Child.²⁴

²¹ See IACHR, *Monica Carabantes v. Chile*, *supra* note 19.

²² See IACHR, *María Mamérita v. Peru*, *supra* note 19.

²³ *Id.*

²⁴ See IACHR, *Paulina Ramírez v. Mexico*, *supra* note 19.

The parties signed a friendly agreement where the State of Mexico committed to publicly recognize its international responsibility for the violation of Paulina's human rights and carry out reparation of damages. These included payment of judicial expenses, economic compensation, psychological and health care services for Paulina and her son, as well as an education scholarship, clarification of local laws to promote access to legal abortion services and enforcement of national public policies to provide medical assistance for women victims of sexual abuse.²⁵

The only reproductive rights cases in which the Commission has issued merits reports are the *Baby Boy case (US)* and the *X and Y case v. Argentina*. In the first case, the Commission analyzed the rulings of the United States Supreme Court and the Court of Massachussets (upholding women's right to abortion) that presumably violated article 4 of the American Convention which protects right to life, in general, from the moment of conception. The Commission considered the U.S. had not breached its international obligations since the *traveaux preparatoires* reflected the intention of the States parties to respect abortion laws in the region, as finally established in the provision to protect life *in general* from the moment of conception in Article 4 of the Convention.²⁶ In the second case, regarding vaginal inspections conducted by prison authorities on the women visitors of the Federal Penitentiary Service in Argentina, the Commission found the Argentinian State responsible for imposing an unlawful condition to female visitors for prison visits lacking appropriate legal and medical guarantees.²⁷ The Commission concluded the State of Argentina had thus violated the rights to personal integrity, privacy and family life of Ms. X and her daughter Y, as guaranteed in Articles 5, 11, 17 of the American Convention, in relation to the general obligation established in Article 1.1 which requires the Argentinian State to respect and guarantee the full and free exercise of all provisions recognized in the Convention, as well as the rights of children protected in article 19 of the same instrument.²⁸

The Commission has also admitted cases regarding illegal conditions in the detention of pregnant women in Ecuador, discrimination of adoptive mothers in their right of maternity leave in Brazil and sterilization without informed consent in Bolivia.²⁹ The

²⁵ *Id.*

²⁶ *Baby Boy Case*, Resolution 23/81(United States), Case 2141, Inter-Am. Com. H.R., OEA/Ser.L/V/II.54, Doc. 9 rev. 1 (1981).

²⁷ *Ms. X v. Argentina*, Case10.506, Inter-Am. C.H.R., Report 38/96, (1996) at para. 116.

²⁸ *Id.*

²⁹ *Karina Montenegro and Others v. Ecuador*, Inter-Am.Com.H.R., Report No. 48/07 (2007); *Fátima Regina Nascimento de Oliveira and Maura*

common alleged violations in these cases have been the rights to personal integrity and humane treatment (Article 5.1), judicial protection and effective resources (Articles 8.1 and 25) protected in the American Convention, and the obligation of the State to act with due diligence to prevent, investigate and sanction violence, as established in Article 7 of the Convention of Belem do Pará.

As for pending cases in the Inter-American Court of Human Rights (Inter-American Court or “the Court”), a paradigmatic resolution is expected this year on *in vitro* fertilization in Costa Rica. The Court is currently analyzing whether the prohibition on the assisted reproductive technique known as *in vitro* fertilization, in place since 2000 following a ruling by the Constitutional Chamber of the Costa Rican Supreme Court, respects International human rights standards.

In its merits report of the case, the Commission found that this absolute prohibition violated the human rights of infertile couples protected in articles 11(2), 17(2) and 24 of the American Convention, considering it constituted an arbitrary interference in the right to private and family life and the right to found a family.³⁰ The Commission also found that the prohibition violated the victims’ right to equality since the State had denied them access to a treatment that would have enabled them to overcome their disadvantage with respect to fertile couples in their ability to have biological children, and that it had a disproportionate impact on women.³¹

Without diminishing the relevance of reproductive rights violations being discussed in the IAS, it is worth noting that the majority of these cases lack a broad analysis of the claims of structural and gender-based discrimination embedded in the lack of reproductive health services and obstructions to women’s autonomy. Since three of the landmark cases have been resolved through friendly settlements (*María Mamérita*, *Paulina Ramirez* and *Monica Carabantes*), the opportunity has been lost to address the context and patterns of gender-based discrimination represented by these three cases (victims of sexual violence denied abortion services, marginalized women sterilized against their will and adolescent girls expelled from schools for becoming pregnant). For example, in the

Tatiana Ferreira Alves v. Brasil, Inter-Am.Com.H.R., Report No. 7/10, (2010); *I.V. v. Bolivia*, Inter-Am.Com.H.R., Report No. 40/08, (2008).

³⁰ *Gretel Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Case No. 12.361, Inter-Am. C. H.R.; Inter-American Commission on Human Rights, July 29, 2011. <http://www.cidh.oas.org/demandas/12.361Eng.pdf>.

³¹ *Id.*

case of Mrs. Mestanza, the petitioners argued that it was “one more among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indian, and rural women.”³² Similarly, Paulina’s case was claimed to be “indicative of those of a countless number of girls and women forced into motherhood after being raped and after being prevented by state authorities from exercising a legitimate right enshrined in Mexican law.”³³

Even in the merits report of the *X and Y case*, the Commission dedicated the report to analyzing whether the vaginal inspections were preventive measures adopted by the State authorities for an objective purpose (the maintenance of public order and security), and concluded that they were not acceptable restrictions to the Convention's provisions and not reasonable under the circumstances of the case.³⁴ The petitioners’ argument that these searches constituted a discriminatory practice against women was not discussed.

Nevertheless, the Commission has argued before the Inter-American Court in the *in vitro fertilization* case that the absolute ban of this assisted reproductive technique is discriminatory and disproportionately affects women.³⁵ It is now up to the Court to determine whether or not the prohibition of *in vitro* fertilization constitutes gender-based discrimination.

Also, in recent cases, the Commission seems to be identifying a close nexus between violence and reproductive rights violations, or at least considering this aspect of the petitioners’ claims when further analyzing the merits of the case. For example, in the case of *I.V. v. Bolivia*, the Commission considered that forced sterilization committed by public officers, the consequences of the intervention (both physical and psychological), as well as the delay in due process against the perpetrators can be considered violations of Art. 7 of Convention Belem do Pará.³⁶ And in its admissibility report of the *Karina Montenegro and Others* case, the Commission considered that the illegal detention of pregnant women and elders and the conditions in which the pregnancy occurred, can be considered violence against women (articles 7 and 4 of Belem do Pará).³⁷

³² See *María Mamérita v. Peru*, *supra* note 19, at para. 9.

³³ See *Paulina Ramírez v. México*, *supra* note 19, at para. 14.

³⁴ See *Ms. X v. Argentina*, *supra* note 27, at paras. 72, 116.

³⁵ See “*In Vitro Fertilization*”, *supra* note 30.

³⁶ See *I.V. v. Bolivia*, *supra* note 29.

³⁷ *Karina Montenegro and Others v. Ecuador*, *supra* note 29.

In contrast to the emergent doctrine on discrimination and violence in reproductive rights cases, the Inter-American Commission and Court's decisions on ground-breaking cases regarding pervasive manifestations of violence against women, such as feminicides, domestic and sexual violence, have underscored the close nexus between discrimination and gender-based violence. In this respect, the Inter-American Court has issued noteworthy resolutions addressing structural discrimination caused by cultural stereotypes and social inequalities that prevent women from full realization of their human rights.³⁸

For example, in the *Cotton Field Case*, regarding the murders and disappearances in Ciudad Juárez, Mexico, the Court analyzed the particular context of the city in which the violence occurred and expressed concerns regarding the culture of discrimination ("machismo") affecting women.³⁹ One significant finding of the Court in this case was the prevalence of discriminatory stereotypes, particularly in the justice system, relating to the context of widespread violence against women. In this landmark decision, the Court delivered a comprehensive interpretation of the Belem do Pará Convention, examining its applicability and conducting a thorough review of the due diligence obligation of States to prevent, investigate and punish violence against women.⁴⁰

In light of the discriminatory context in which feminicides occurred, the Court went beyond the concept of integral reparations and ordered the Mexican State to implement *transformative reparations* to modify discriminatory practices and pervasive cultural stereotypes against women in Ciudad Juárez. Reparations should be crafted aspiring not only for restitution and redress of damages, but for the transformation of the situation of violence, designed to identify and eliminate the factors that cause discrimination; and adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women.⁴¹

³⁸ *The "Las Dos Erres" Massacre v Guatemala*, Inter-Am.Ct.H.R. Series C., No. 211 (2009); *González et al. ("Cotton Field") v Mexico*, Inter-Am. Ct.H.R. Judgment, Series C No. 205 (2009), *Rosendo Cantú and Others v México*, Inter-Am.Ct.H.R. Judgment Series C. No. 216 (2010); *Fernandez Ortega and Others v. Mexico*, Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

³⁹ The Court concluded that violence against women in Ciudad Juarez follows a systemic pattern of discrimination and in this situation "an obligation of strict due diligence arises in regard to reports of missing women, with respect to search operations during the first hours and days." *See Cotton Field*, *supra* note 38, at para. 283.

⁴⁰ *See generally Cotton Field*.

⁴¹ *Cotton Field*, *supra* note 38, para. 451.

In the *Rosendo Cantú* and *Fernandez Ortega* cases, the Inter-American Court also expressed its concern about the “institutional violence” that women face when there is a large military presence.⁴² In both rulings, the Court considered that sexual violence is a paradigmatic form of violence against women with consequences that transcend the victim,⁴³ characterizing it as a form of torture when committed by State agents and aggravated in cases of indigenous women.⁴⁴ Sexual violence and violations of women’s personal integrity had been analysed by the Court in the context of systemic patterns of violence in previous rulings.⁴⁵

The Inter-American Commission has considered domestic violence to be a form of gender-based discrimination, finding States responsible for violating women’s rights to personal integrity and effective judicial protection due to discriminatory judicial passivity (overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors) and insufficient commitment to take appropriate action to address domestic violence.⁴⁶

IV. What Can We Learn From these Cases?

Considering the positive developments made in the Inter-American System to advance women’s rights, there have been significant advances in framing violence as gender-based discrimination and international human rights standards regarding access to justice for victims of violence that are useful in defending reproductive rights cases.

In cases involving gender-based killings, including feminicides, crimes of sexual violence and intimate partner violence,⁴⁷ the Inter-

⁴² *Fernandez Ortega and Others v. Mexico*, at para. 109.

⁴³ *Id.* at para. 118. Judge Cecilia Medina dissented on this argument in *Cotton Field*, arguing that also private actors can commit torture. *See Cotton Field supra* note 38, at para.132, Dissenting Vote of Judge Medina Quiroga at para. 2-3.

⁴⁴ *Rosendo Cantú and Others v México* Inter-Am. Ct. H.R. Series C. No. 216 (2010) at para. 71. *Fernandez Ortega and Others v. Mexico*, Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

⁴⁵ *See The “Las Dos Erres” Massacre v Guatemala*, Inter-Am.Ct.H.R. Series C. No. 211 (2009), at para. 141.

⁴⁶ *See Maria Da Penha Fernandes v Brazil*, Inter-Am. Com. H.R., Report No. 54/01 (2001); *Jessica Lenahan (González) and Others v United States*, Inter-Am. Com. H.R., Report No. 80/11, Case 12.626 (2011).

⁴⁷ *See Raquel Martín de Mejía v. Peru*, Case. 10.970, Inter-Am. Com. H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 rev. (1996); *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, OEA/Ser./L/V/II.111, doc. 20 rev. (2001); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Com.H.R., Report No. 54/01, OEA/Ser./L/V/II.111, doc. 20 rev. (2001); *The “Las Dos Erres” Massacre v Guatemala*, Inter-Am.Ct.H.R. Series C., No. 211 (2009); *González et al. (“Cotton Field”) v Mexico*, Inter-Am. Ct.H.R. Judgment, Series C No. 205 (2009), *Rosendo Cantú and other v México*, Inter-Am.Ct.H.R. Judgment

American jurisprudence as well as the Special Rapporteur on Violence Against Women, its Causes and Consequences have outlined the following standards regarding access to justice and due diligence obligations of States:⁴⁸

- a) Conduct effective investigations of the crime, prosecute and sanction acts of violence perpetrated by the State or private actors, especially when these acts are tolerated by the State and demonstrate a pattern of systemic violence towards women;
- b) There is an obligation of judicial impartiality which includes the requirement to treat women victims and their relatives with respect and dignity throughout the legal process;
- c) Guarantee *de jure* and *de facto* access to adequate and effective judicial remedies;
- d) Ensure comprehensive and integral reparations for women victims of violence and their relatives, including measures designed to address institutional and social violence;
- e) Adopt public measures to modify cultural patterns based on discriminatory stereotypes that promote unequal treatment of women in societies; and
- f) Identify certain groups of women as being at particular risk for acts of violence, including women belonging to ethnic, racial and minority groups.

As noted by R. Celorio, the international human rights standards elucidated upon in recent case law addressing gender-based violence were “geared toward shedding light on the content of the States’ obligation to organize their structure - including the work of all sectors such as justice, health, and education - to prevent, investigate, sanction, and offer reparations for acts of violence and discrimination against women in different settings and sociopolitical contexts.”⁴⁹

V. The Way Forward: Opportunities and Challenges in Advancing Reproductive Rights

Taking into account that some reproductive rights violations are perpetuated in the context of structural discrimination and/or

Series C. No. 216 (2010); *Fernandez Ortega and Others v. Mexico*, Inter-Am. Ct. H.R. Judgment (Ser. C) No. 215. (2010).

⁴⁸ *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Human Rights Council, 23th Sess., at 116.U.N. Doc. A/HRC/20/16, (May 23, 2002).

⁴⁹ Rosa Celorio, “The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting”, 65 U. MIAMI L. REV. 819, 821 (2011).

gender-based violence, women's rights advocates should take advantage of the developments of the Inter-American System to address gender-based violence when framing reproductive rights cases. Although the jurisprudence on reproductive rights is still emerging from the shadows of international human rights law, reproductive health and self-determination are rights protected in human rights instruments.

States have positive obligations to protect, respect and guarantee reproductive rights and are obligated to carry out comprehensive reparation if public officials deny access to reproductive health services, treatments and scientific advances. Moreover, according to international human rights law, States have the duty to ensure informed choices in this field by: acting with due diligence to eliminate discriminatory practices and gender-based violence that undermines reproductive freedom; guarantee access to justice to victims denied of these rights; adopt appropriate legislative, judicial and administrative measures to *transform* discriminatory practices and cultural stereotypes restricting women's reproductive choices.

In this sense, the concept of *transformative equality* is embodied in international human rights law. As scholars have noted, the formulation of this concept "sees full and genuine equality as likely to be achieved only when the social structures of hierarchy and dominance based on sex and gender are transformed."⁵⁰ When litigating cases for women's rights advocacy, it is crucial to take into account the context of structural discrimination and violence in order to identify patterns in the human rights violations analyzed and seek transformative justice.

Aside from increasing national and international litigation of reproductive rights cases, women's rights groups should use other international human rights mechanisms to make visible the common patterns and contexts of subordination in which reproductive rights violations take place. Therefore, the constant monitoring of the situation of discrimination and violence against women in the Americas, including sexual and reproductive health issues, conducted by the Inter-American Commission's Rapporteurship on the Rights of Women is an open window to request regional hearings, country visits, and collaborate with thematic reports on these issues.

⁵⁰ Marsha A. Freeman et al eds., COMMENTARY, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN*, 55 (2012).

The justiciability of reproductive rights at the international level is necessary for the determination of international human rights standards in this sphere and the enforcement of States' obligations to ensure reproductive rights. Nevertheless, access to the international "theater" of justice is very expensive and a long journey to vindicate rights violations. Considering the limited economic and human resources that women's rights organizations generally have in Latin America, international litigation represents a costly and technical endeavor that not everyone can undertake.

On the other hand, a significant current challenge in combating reproductive injustice, as well as gender-based violence, is the implementation of existing human rights standards to ensure that the root causes and consequences of violence and discrimination against women are tackled at all levels, from the home to the transnational arena.⁵¹ Thus, the implementation of human rights rulings and recommendations of International bodies continues to be the "elephant" in the room.

The Inter-American System has mechanisms to monitor the compliance of reports and rulings issued in human rights cases such as: requesting information and submission of reports by the State, as well as expert opinions and observations to those reports by the victims or their legal representatives; holding hearings and adopting other measures that deems appropriate.⁵² Nevertheless, the IAS has not been effective in ensuring States' fulfillment of their obligations as outlined in human rights instruments and promises of integral reparations to victims of gender-based violence and reproductive violations. Impunity to investigate crimes and sanction perpetrators continues to be rampant in the region. Despite the significance of international jurisprudence addressing violence against women and reproductive rights issues for their recognition in the human rights framework and discourse, the language issued in international rulings has become very sophisticated (structural discrimination, institutional violence, gender stereotypes) and is difficult for local judges to understand and integrate domestically.

VI. Conclusion

⁵¹ See Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Conclusions and Recommendations, *supra* note 48, at paras. 103-104.

⁵² See Article 48.1 of the Rules of Procedure of the Inter-American Commission establishing follow-up measures and Article 69 of the Rules of Procedure of the Inter-American Court establishing the Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court.

Reproductive rights have been significantly integrated, at least in a formal sense, in the human rights framework and in the interpretation of international human rights bodies. The cases regarding abortion, forced sterilization, intimate searches in prison, and reproductive techniques reviewed and pending in the IAS are proof of this. The emergent case-law on reproductive rights needs to be informed by recent international human rights standards on gender-based violence, particularly in the resolution of pending cases and the framing of new petitions before the IAS. A broad interpretation of the Inter-American human rights instruments to include controversial issues, such as access to legal abortion, emergency contraception and reproductive techniques will be a key factor in the realization of gender equality.