

# Violence against Women as a Translocal Category in the Jurisprudence of the Inter-American Court of Human Rights

Violência contra a Mulher como uma Categoria Translocal na Jurisprudência da Corte Interamericana de Direitos Humanos

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**Abstract** 

Understanding that legal categories are created and shaped through a process

that is not only juridical, but also social and political, this paper offers an

overview of the category 'violence against women' in the jurisprudence of the

Inter-American Court of Human Rights. By doing a critical in-depth analysis of

the most relevant cases for the category's development, besides relying on

information gathered through interviews conducted with the Courts' lawyers,

the paper suggests that the category is a translocal one, in the sense that its

content has been determined through a complex interaction between

transnational formulations and local variables.

Keywords: Inter-American Court of Human Rights; violence against women;

jurisprudential development.

Resumo

Entendendo que as categorias jurídicas são criadas e moldadas por um

processo que é não apenas jurídico, mas também social e político, este artigo

oferece uma visão global da categoria 'violência contra as mulheres' na

jurisprudência da Corte Interamericana de Direitos Humanos. Valendo-se de

uma análise crítica aprofundada dos casos mais relevantes para o

desenvolvimento da categoria, além de informação obtida por meio de

entrevistas conduzidas com advogados e advogadas da Corte, o artigo sugere

que a categoria é translocal, no sentido de que o seu conteúdo é determinado

por meio uma complexa interação entre formulações transnacionais e

variáveis locais.

Palavras-chave: Corte Interamericana de Direitos Humanos; violência contra a

mulher; desenvolvimento jurisprudencial.

Direito & Práxis

#### 1. Introduction

In January 1995, the Inter-American Commission of Human Rights brought to the attention of the Inter-American Court of Human Rights (IACtHR) a case against Peru. The case dealt with several human rights violations inflicted upon María Elena Loayza Tamayo, a professor at the University San Martín de Porres, whom the National Division against Terrorism (DICONTE) had incarcerated under the accusation of being part of the Communist Party of Peru – Shining Path. Throughout the procedure before both the Commission and the Court, María Elena remained imprisoned, subjected to various forms of cruel and unhuman treatment reported to the Inter-American System by activists and lawyers, her sister, Carolina Loayza Tamayo, amongst them. First the Commission, in its recommendation (1994), and later the Court, through a provisional measure (1996) followed by a judgment on merits (1997), attempted to exert some influence upon the authoritarian regime led by Alberto Fujimori, aiming at guaranteeing María Elena's fundamental rights. A case such as this highlights that, along with the integration of markets and increasing migration flows, the rearrangement of borders and power structures in the contemporary world-system have led to the emergence of a "transnational legal sphere". That this is not an isolated case, but instead part of increasing trend worldwide, raises relevant theoretical and empirical questions regarding critical approaches to human rights and the use of law to promote justice in a global landscape.

One of these questions, which I pursue in this paper, concerns the long and complex process of development and circulation of legal categories. Such

<sup>1</sup> The Shining Path (Sendero Luminoso) was a Maoist faction of the Communist Party in Peru, which initiated an armed insurgency against the Peruvian state in 1980.

<sup>&</sup>lt;sup>2</sup> Following an already existent literature (Benhabib 2012; Santos 2007, among others), I am using "transnational legal sphere" to indicate the space provided by international courts and quasi-judicial systems of human rights which enable the production of discourses on human rights that are not constrained within the vocabulary of the national state or borders. For scholars like Santos (2007), this transnational legal sphere has enabled the emergence of a new form of activism, which she calls "transnational legal activism". Different from the transnational feminist networks of Keck and Sikkink (1998), this activism is characterized by its focus "on legal action engaged with international courts or quasi-judicial institutions to strengthen the demands of social movements; to make domestic legal and political changes; to reframe or redefine rights; and/or to pressure States to enforce domestic and international human rights norms." (Santos 2007, p. 1)



process, through which novel categories are produced, mobilized, and spread throughout the globe, reaching a specialized judicial space as the IACtHR, is full of different modes of translation (Merry 2006; Santos 2014), in which multiple actors participate, including activists, victims, lawyers, judges, and policy experts. These translations also happen "in multiple directions, from social into legal (trans)national institutional spaces, as well as from above [...], below [...], and the sides [...]" (Santos 2014, 2)<sup>3</sup>. Such multidirectional interpretations make them categories embedded in worldviews that are neither local nor global, but rather constituted in the enmeshment of discursive practices that break away with that very distinction. This is what I am describing as translocal.<sup>4</sup>

The legal category 'violence against women' is a good example of what I just outlined. Even though it is now a central one in the jurisprudence of the IACtHR on women's human rights, the Court was not its developer. Rather, the framing of 'violence against women' as a human rights violation is the product of a large and transnational feminist mobilization to use legal language and sanctions aiming to hinder different forms of violence suffered by women in distinct spaces. As Sally Engle Merry has shown, "the movement to define violence against women as a crime started in Western Europe, North America, Australia, and New Zealand in the 1970s and became global during the 1980s." (Merry 1996, 51). Outside of Europe and the United States, the movement "has adopted human rights language and UN conventions on human rights to condemn violence against women perpetrated by state action, such as in custody or in times of war." (Merry 1996, 51) The same approach has been increasingly used to frame violence against women in others spaces as well, such as the family, the street, and the workplace, targeting offenders other than state actors.

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<sup>&</sup>lt;sup>3</sup> By proposing this innovative framework, Santos is arguing against a tendency in the literature to depict the work of translation carried out by 'transnational activists' "as unidirectional, either from the global into the local, or from the local into the global or regional NGO networks or into the international and regional systems of human rights norms" (Santos 2014, 5). Here, she is siding with Zwingel (2012) to demonstrate that "the processes of norm diffusion and translation are multidirectional processes of appropriation and contestation of norms" (Santos 2014, 5).

<sup>&</sup>lt;sup>4</sup> I use translocal in the way that my colleagues at the Translocal Law Research Collective and myself have been theorizing it, that is, to indicate the ways in which transnational forces, power and regulation shape and interact with the local setting, which then become a privileged site to examine transnational social-politico processes. For more information about the Collective, please see: < http://www.kcl.ac.uk/law/tli/about/translocal-law-research-group.aspx>.

Researches conducted by transnational NGOs, such as Human Rights

Watch (HRW), also attests the global character of the issue. In 1990, HRW

established a Women's Rights Project "to monitor violence against women and

gender discrimination around the world." (Merry 1996, 70) The result of this

Project, carried out in alliance with HRW organizations around the world,

consisted in various expert reports. These included issues such as "police

abuse of women in police custody and prison in Pakistan (1992), rape and

murder of women in Peru's armed conflict (1992), rape of Asian maids in

Kuwait (1992), trafficking of Burmese women and girls into brothels in

Thailand (1993), rape of Somali women refugees in Kenya (1993), rape in Haiti

(1994), and state surveillance of women's virginity in Turkey (1994)." (Merry

1994), and state surveinance of women's virginity in rurkey (1994). (Wen

1996, 70)

In this paper, I examine the global problem of 'violence against

women' and how the Inter-American Court of Human Rights, an institution

that is part of the 'transnational legal sphere', tackled it. While the IACtHR

provides a space for women to confront and challenge local forms of

patriarchy, the process through which the Court gives content to global

categories, such as 'violence against women', is marked by several variables.

These include, to mention but a few, elements specific to the history of the

region, the composition of the Court, the pressure from local movements, and

the framing pursued by lawyers.

Let me provide one example. The case with which I opened this paper

had its merits appreciated by the IACtHR in 1997. By that time, feminist legal

scholar Catherine MacKinnon had already developed the notion of rape as

torture. More specifically, she first introduced the idea in 1993, in the face of

the realities of mass rape in the former Yugoslavia's conflict (McGlynn 2008).

For MacKinnon and many others, the international legal system should

forcefully address and redress all forms of violence against women. In the case

of María Elena Loayza Tamayo not only the Inter-American Commission and

her representatives pursued the claim that she had been raped by state

authorities while under their custody but also the victim herself testified to it.

However, the IACtHR dismissed this specific charge under the argument of lack

of evidence. During the trial, the Court already had access to the latest

developments in the field, including how to deal with questions of evidence in

similar cases, but it decided not to go into them and treat María Elena Loayza

Tamayo's grievance as 'general state violence'. This instance shows that the

incorporation and development of a legal category into an institutional

repertoire takes more than simply being part of a 'transnational sphere',

where ideas are generated and circulated. In the case of the IACtHR, besides

the pressure from local feminist movements, NGOs, and victims themselves, it

took a dramatic change in the bench's composition, with the inclusion of three

female judges, besides the engagement of the Court's lawyers.<sup>5</sup>

Along these lines, this paper provides a bird's eye view of the

development of the category 'violence against women' in the jurisprudence of

the IACtHR, claiming that while this is certainly a global category, the process

of translation in the Inter-American System, which is still ongoing, cannot be

understood as a mere transposition of ideas circulating globally. In what

follows, I first present a brief overview of Latin American feminisms' struggle

to counter violence against women, highlighting not only some of their

strategies but, and perhaps most important, the connections with what has

been described as the 'global movement' (Merry 1996). Next, I delve into the

Inter-American Court's jurisprudence to provide an analysis of the most

important cases in which the category was explicitly addressed and advanced,

paying attention to the content it was given throughout time. In this analysis, I

also use elements and references from interviews that I conducted with some

the Courts' lawyers during fieldwork in 2014. Finally, and in conclusion, I tease

out the lessons we can learn from this case study for the understanding of how

legal categories are developed in the 'transnational legal sphere'.

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<sup>5</sup> Not only female judges were relevant for this jurisprudential shift. It is also important to acknowledge the work of many other women during the judicial proceedings, as representatives, lawyers, experts, witnesses, and victims.

<sup>6</sup> To preserve the anonymity of my informants, I will refer to them as lawyers of the IACtHR.

## 2. Latin American Feminisms and the issue of violence against women: A tale of multiple scales, diverse strategies and transnational connections

While feminist activists and organizations have always been an important political voice throughout Latin American history, which has also been marked by different forms of violence – for instance, colonial violence, dictatorships or violence of dependent capitalism - it was only recently that the two met. This is not to say that women and feminists in the region had not encountered the problem of violence before, but it was less than half a century ago that it became part of their working agenda. As Soledad Larraín (1999, 8) has historicized, the end of the 1970s and the beginning of the 1980s were marked by the establishment of new women's and feminist groups specifically focused on the issue of violence against women. In addition, many already established organizations included the problem in their programs and activities as of primary concern. While many of these actors were initially concerned with state violence, which is understandable given the authoritarian regimes ruling most of Latin America, it was not long until activists and scholars started recognizing that acts of rape, torture, and sexual enslavement suffered by women in prisons were not "aberrant behaviors but part of broader 'societal archetypes and stereotypes' that were manipulated by torturers" (Keck and Sikkink 1998, 177). From this point on, feminist activism entered also the private sphere. If the women's movement in the United States and Western Europe played an important role in politicizing the issue of violence against women, particularly rape and domestic violence, in the mid-1970s, women's groups in Latin America were also key actors in laying the foundations for what later became known as a prominent transnational network (Keck and Sikkink 1998).

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<sup>&</sup>lt;sup>7</sup> Larraín (1999, 8) provides the following list of organization, which gives an idea of the breadth of involvement with the issue throughout the continent. "Women's House in Colombia; the Ecuadorian Center for Women's Promotion and Action (CEPAM); the María Guare Foundation in Guayaquil; the Manuela Ramos Movement and he Flora Tristán Center for Peruvian Women in Peru; AVESA in Venezuela; Women's House in Chile; Women's Place in Argentina; CEPIA in Rio de Janeiro; and the National Front for Women's Rights (FENALIDM) and the Group to Combat Violence against Women (COVAC) in Mexico". Granted, this is not meant to be an exhaustive list, as there were many other groups also dedicated to the issue during that period.

One of the initial important steps in this regional articulation was the

First Meeting of Latin American Feminists, held in Bogotá, in 1981. During that

event, not only the activists condemned sexual violence against women, but

also declared November 25 International Day for Ending Violence against

Women, "in commemoration of the torture and assassination of the Mirabal

sisters by the Trujillo dictatorship in the Dominican Republic" in 1960 (Lemaitre

2013, 179). The date became an important one in the feminist activist calendar

in the Americas, and in part led to the global campaign "16 Days of Activism

against Gender Violence".8 Additionally, these activists also brought their

struggle and condemnation back home, where they organized public events

and led marches that continue to this day. Feminist efforts held still and at the

Second Meeting of Latin American Feminists, which took place in Peru in 1983,

participants agreed upon the necessity of establishing shelters to host and

protect the victims as well as of conducting research to better understand the

problem. Thus, at the Third Meeting, held in Brazil in 1985, a first network,

with Isis-Salud, an NGO based in Chile, was established. Some years later, in

1989, the Southern Cone Network to combat violence was created in Buenos

Aires, and in 1990, during the Fifth Meeting of Latin American Feminists,

another regional network was also formed. (Larraín 1999)

However, it was not until becoming acquainted with the notion of

violence against women as a human rights violation that the movement

boomed in Latin America, as also happened worldwide. This conceptualization

began to circulate amongst activists in the early 1990s, particularly through an

article written by Charlotte Bunch, titled Women's Rights as Human Rights:

Towards a Revision of Human Rights, which appeared in the journal Human

Rights Quarterly. Margaret E. Keck and Kathryn Sikkink reproduce in their book

the testimony of Susana Chiarotti, one of the founding coordinators of Indeso-

Mujer in Argentina, in which she describes the encounter with the above

formulation:

We began to make the connection between violence and human rights when a "compañera" from Buenos Aires brought is the

rights when a "compañera" from Buenos Aires brought is the article by Charlotte Bunch on "Women's rights as human rights,"

<sup>8</sup> For more information about the campaign, see this website: <http://16dayscwgl.rutgers.edu/>.

[...]. I said to myself, "Hmmm... a new approach to human rights. This we have not seen before. And a new approach to violence as

well." So I told the other women in my group, "It seems to me that this would be the key to end our isolation." Women's groups

are not isolated from each other, but society's reception of us is

"there are the women again with their stuff." "This new approach," I said, "would be very interesting, because we could

recruit a lot of people who are not going to be able to say no." So I translated the article for them during our meetings. (Keck and

Sikkink 1998, 165)

Latin American activists became thus part of a global conversation, and

indeed, they were amongst the most active participants, playing a key role in

the development of the transnational network (Keck and Sikkink 1998, 179).

Such conversation centered primarily on producing a new category of human

rights violation, that is, violence against women (VAW). As Keck and Sikkink

(1998, 171-172) explain,

What existed first was not the general category "violence against women" but separate activist campaigns on specific practices –

against rape and domestic battery in the United States and Europe, female genital mutilation in Africa, female sexual slavery

in Europe and Asia, dowry death in India, and torture and rape of political prisoners in Latin America. It was neither obvious nor natural that one should think of female genital mutilation and

domestic abuse as part of the same category. The category "violence against women" had to be constructed and popularized before people could think of these practices as the "same" in

some basic way.

Categories are relevant in different specialized fields: they play a

central role in social science, public policy and, as the case examined here

highlights, in transnational activism. For academics observing and explaining

the world, categories enable them to make sense and organize a messy reality,

identifying groups of people and things that share specific features and can

then be aggregated for data analysis (Oliver 2011, 24). In the field of public

policy, categorization also serves to organize reality, but here they have a

much more concrete impact. It is through categorization that policy makers

grant specific entitlements to certain groups while excluding others (Oliver

2011, 24). For example, in Brazil, the elderly enjoy a free pass to use local

public transport, benefit that the unemployed (another category) do not have

access to. As the case of violence against women shows, categorization is also an important tool for activists. It was through the development of a category that the transnational network against violence could name a problem and give a face to it. The category 'violence against women' "made sense", and "captured the imagination" (Keck and Sikkink 1998, 172) of many across the world. In addition, it "served some key strategic purposes for activists trying to build a transnational campaign because it allowed them to attract allies and bridge cultural differences" (Keck and Sikkink 1998, 172). In other words, the category spoke to women across class, race, nationality, and sexual orientation divides, and at the same time, captured a range of experiences. For this reason, it thrived, and entered the legal arena, becoming thus a legal category.

In many situations, legal categorization proves to be of critical importance. The case of violence against women is one of them, and Latin American feminists were successful in pushing this agenda. The 1990s were a decade of extensive legal reforms throughout the region. Many countries not only signed the only existing regional agreement on the subject – and the very first international document to officially define violence against women, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women —, but also reformed their criminal codes and adopted new legislation handling violence within the family. The reforms established new government institutions to specifically deal with the problem,

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<sup>&</sup>lt;sup>11</sup> This convention is also known as the Belém do Pará Convention, and was adopted by the Organization of American States in 1994.



<sup>&</sup>lt;sup>9</sup> Take, for example, the case of refugees via-à-vis undocumented migrants. If someone can have the formal recognition of her condition as a refugee, this guarantees her access to a few rights, including the right to stay, protection under international law, access to services such as health and education. If, on the other hand, she is unable to get that formal recognition, she becomes an undocumented, aka "illegal migrant", subjected then to deportation. (Oliver 2011, 24)

<sup>&</sup>lt;sup>10</sup> The Inter-American System was also a pioneer in creating the first organ dedicated specifically to deal with women's issues on the regional level. The Inter-American Commission of Women was established in 1928, in La Habana, Cuba, during the Sixth International Conference of the American States, as the accomplishment of a steady women's movement that had been fighting for an equal rights treaty. While this Commission was first established with the sole purpose of conducting a study on the legal status of women in the Americas for the following conference, it remained as a permanent institution. Today, it is a specialized structure within the OAS with the mandate to promote and protect the rights of women and to support the member states in similar efforts.

while also invalidating any still existing norms that legitimated inequality between the sexes<sup>12</sup> (Lemaitre 2013, 177).

Mala Htun and S. Laurel Weldon (2012) have shown the great impact that autonomous feminist movements have on the development of the so-called VAW (Violence Against Women) policy worldwide. Through a statistical analysis, they demonstrated that "the autonomous mobilization of feminists in domestic and transnational contexts – not leftist parties, women in government, or national wealth – is the critical factor accounting for policy change" globally (Htun and Weldon 2012, 548), primarily for three reasons. First, these movements "articulate social group perspectives, [second, they] disseminate new ideas and frames to the broader public, and, [finally, they] demand institutional changes that recognize these meanings" (Htun and Weldon 2012, 552).

These autonomous and strong feminist movements have exerted their effects, influencing policy on VAW worldwide through a variety of means. These include demanding institutional reforms; influencing public and government agendas; protesting and creating public disruption; organizing networking and other activities that connect activists, officials, and organizations; adopting lifestyles that model new forms of social arrangement ("everyday politics"); producing and distributing informational material; and so forth (Htun and Weldon 2012, 554). Amidst these various initiatives and strategies, there is also space for transnational legal activism, defined as "a type of activism that focuses on legal action engaged with international courts or quasi-judicial institutions to strengthen the demands of social movements; to make domestic legal and political changes; to reframe or redefine rights;

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<sup>&</sup>lt;sup>12</sup> According to Lemaitre (2013, 177), several statutes on violence against women were passed in Latin America during the 1990s and 2000s: "Argentina, Ley 24.417, 1994; Bolivia, Ley 1.674, 1995; Colombia, Ley 294, 1996 reformed by ley 575, 2000; Costa Rica, Ley 7.586, 1996; Chile, Ley 20.066, 2005; Ecuador, Ley 103, 1995; El Salvador, Decreto Ley 902 de 1996; Guatemala, Ley 97-96; Honduras, Decreto 132-97; México, Ley de Asistencia y Prevensión de la Violencia Intrafamiliar 1996 and Ley General de Acceso de las Mujeres a una Vida Libre de Violencia de 2007; Nicaragua, Ley 230, 1996; Panamá, Ley 27, 1995; Puerto Rico, Ley 54, 1989 (the first one in Latin America); Peru, Ley 27.306, 2000 amending Ley 26.260, 1993 (the first one in South America); Dominican Republic, Ley 24-97; Uruguay, Ley 16.707, 1995; and Ley 17.514, 2002; Venezuela, Ley sobre la violencia contra la mujer y la familia, 1998." Brazil, contrastingly, only reformed its legislation, introducing Lei Maria da Penha (Lei 11.340), in 2006, after the Inter-American Commission of Human Rights found that the country had violated the rights of Maria da Penha Maia Fernandes for failure in protecting her from domestic violence as well as prosecuting and sanctioning her aggressor (IACHR, REPORT № 54/01, CASE 12.051).

and/or to pressure States to enforce domestic and international human rights norms" (Santos 2007, 30).

The finding that transnational legal activism is growing throughout the world, <sup>13</sup> as social movements and NGOs resort more frequently to strategic litigation in international judicial and quasi-judicial bodies, leads to a set of inferences. First, it points to a growing legitimacy of the transnational legal sphere among human rights activists, advocates and victims of rights violations themselves. Here it is worth noting that an interesting transformation is taking place in what I call "the human rights chain". If at first activists would wage their campaigns in the international arena aiming at developing legal instruments, such as treaties and conventions, that would be taken back to the national level<sup>14</sup> to be translated into local legislation and policy, now this flow happens in a full circle. In cases that the state, including the national judiciary, does not address alleged human rights violations as campaigners and victims had sought, the latter are increasingly resorting to Humans Rights Courts and Commissions as another strategy to pressure, shame and compel national governments to act.

Moreover, while the decisions and recommendations emanating from these institutions are not easily enforceable, as happens with most of international public law, they are still relevant in a twofold manner. 15 First, these decisions and recommendations, due to their increasing public global recognition, exert strong impact and influence over national governments,

can alter the expectations of domestic actors and strengthen and even spark domestic

<sup>&</sup>lt;sup>15</sup> Addressing the specific case of women's international human rights, scholars have argued that its "effective application [...] depends on both vertical and horizontal interactions. Vertical interaction involves both working down and working up. Working down refers to the process that Byrnes called 'bringing the international back home', meaning increasing the use of women's international human rights at the domestic level in legal and political contexts. Working up means introducing legal developments favorable to women, [...], and the diversity of women's experiences within different cultures, into international human rights law. Horizontal interaction refers to the exchange of experiences among regional human rights systems and among national courts or systems of the same region." (Cook 1992, 30).



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 $<sup>^{13}</sup>$  As I see it, this type of activism is an outgrowth of the multiple uses activists had already found for international norms, such as human rights treaties and conventions. They offer "normative leverage to national civil society organizations. At the same time, local activist organizations bring home the value of international and regional treaties. They raise awareness of the rights recognized by the treaties; they use them to train judges, police, and other officials; and treaties help activists lobby legislatures to change discriminatory laws. International treaties

mobilization (Simmons 2009)." (Htun and Weldon 2012, 558-559) <sup>14</sup> For an interesting account of how this so-called "translation" unfolded in the case of the struggle to stop violence against women, see Merry (2006).

particularly those aiming to participate in the so-called club of consolidated

democracies where observing human rights is equated to progress, civilization

and rule-of-law. Second, it is now a common strategy for activists working in

the local political and judicial arenas to invoke precedents delivered from the

aforementioned institutions in order to promote change in the domestic

system.16

For all these reasons, it is relevant to examine spaces such as the Inter-

American Court of Human Rights and question how they apply, give content

and transform legal categories, such as violence against women, developed

through broad activist networks. In addition to the impact that these

institutions' rulings have on individual cases, which in themselves also have a

structural dimension as will become clear in the next session, it is also

important to consider the role they play in terms of regional diffusion. Htun

and Weldon (2012) have highlighted the importance of regional diffusion for

spreading international norms. According to them, such "diffusion occurs both

through processes of elite learning and emulation of other nations and through

connections in civil society. Through these connections, elites learn lessons

from other countries and activists, and NGOs take ideas from proximate

jurisdictions and press for government action" (Htun and Weldon 2012, 558). I

want to suggest here that the work done by the ICtHR - examining cases

submitted by the Commission, providing advisory opinions requested by

countries and other legitimated institutions and conceding provisional

measures in urgent cases – is another important strand of regional diffusion.

This is so not only because the Court itself has increasingly engaged in an effort

to publicize and enforce, throughout the region, the human rights standards it

establishes, but also because NGOs, social movements and activists take these

standards to their local struggles, making the necessary connections and

translations, and furthering their dissemination.

In the next session, I examine the development of the uses of the

category 'violence against women' by the IACtHR, through an in-depth analysis

 $^{16}$  Human rights acquired a double discursive role in the Latin American context: while they remain a protest discourse against the governments, the latter rarely oppose them in a publicdiscursive manner, but quite on the contrary, often present their platforms applying the language of rights (Vázquez and Delaplace 2011).

of the most important cases, including some in which the category was not

applied. In addition, I also make use of the insights and information gathered

through the interviews I conducted with some of the Courts' lawyers, during

fieldwork conducted in 2014. As I hope will become clear, the Court made a

progressive incorporation of the global category 'violence against women' in a

process largely marked by the influence of local factors, such as the bench

composition, the legal training of the Courts' lawyers, the influence of feminist

legal scholars and the regional context.

3. The development of the category 'violence against women' in the

jurisprudence of the Inter-American Court of Human Rights

While the Inter-American Court of Human Rights had its first period of sessions

in 1979 and despite the widespread and vigorous feminist activism on the

issue of violence against women since the 1980s, as shown in the previous

section, it was not until 2006 that the Court applied the category to one of its

rulings. Nonetheless, there were a few cases ruled by the ICtHR previously that

could have been examined through a gender perspective, therefore

considering the applicability of the category 'violence against women' to the

grievances described by the victims and/or their lawyers.

The first of these cases is the one with which I opened this paper,

Loayza Tamayo vs. Perú, sentenced in 1997. María Elena Loayza Tamayo, a

Peruvian university professor, was arrested without a warrant by the National

Division against Terrorism accused of belonging to the Peruvian Communist

Party – Shining Path, tried by a faceless military court and convicted of treason.

The Inter-American Commission, while submitting the case to the Court,

explicitly referred to the sexual violence, among other forms of torture and

inhumane treatment, suffered by María Elena during her time in prison:

At DICONTE, she remained 10 days uncommunicable and was subject to torture, cruel and degrading treatment, and

intimidations, for example, "tortures... threats of being drown by

seashore for hours at night and the rape she was victim of by

military men of the DICONTE".17

María Elena not only confirmed the above accusations but also provided more details about the sexual violence she had been a victim of while detained. She testified,

... that she was touched, that they touched her whole body, that the police physically assaulted and hit her; that they took her to the beach with other detainees; that she was blindfolded and tied, that they hit her, they undressed her, they raped her through her vagina and her rectum, that they suffocated her in the ocean, that she believes she fainted; that the police kept beating her on the way to DINCOTE; that every day she was assaulted and touched; [...] that she was antagonized, tortured, threatened with the life of her sister and her daughter, reason why she signed the evidentiary statement, so her family would be safe; [...]. <sup>18</sup>

When analyzing the alleged violation of article 5 of the American Convention – the right to humane treatment –, the ICtHR found that the arguments and evidence presented, coupled with the state's inability to invalidate the latter, were sufficient to prove the cruel, inhumane and degrading treatment María Elena had suffered while detained, except for the rape. In the Court's account, "given the nature of this fact, the accusation could not be substantiated". The interesting, and surprising, fact here is that there was no more strong evidence of the other violations experienced by María Elena than there was of her rape, and yet, the Court not only dismissed this latter allegation but also left unexplained what should be understood by the expression "given the nature of the fact" (Palacios Zuloaga, 2008). <sup>20</sup>

<sup>19</sup> Idem, p. 28-29. Translation by the author.

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Rev. Direito e Práx., Rio de Janeiro, Vol. 08, N. 2, 2017, p. 1507-1544.

<sup>&</sup>lt;sup>17</sup> Corte Interamericana de Derechos Humanos, *Caso Loayza Tamayo Vs. Perú*, Sentencia de 17 de septiembre de 1997 (Fondo), p. 2. Translation by the author.

<sup>&</sup>lt;sup>18</sup> Idem, p. 20. Translation by the author.

<sup>&</sup>lt;sup>20</sup> In the case *La "Panel Blanca"* (*Paniagua Morales y otros*) *Vs. Guatemala*, decided by the Court in 1998, Blanca Lidia Zamora de Paniagua, in her testimony, pointed to various signs of sexual torture that she had seen when recognizing the body of her sister-in-law, Ana Elizabeth Paniagua Morales (one of the victims), at the morgue. In addition, another victim in this case, Doris Torres Gil, testified that during her time in prison, the guards made insinuations with sexual content towards her. However, none of these claims was further considered by the Court. Similarly, in 2003, the Court examined the case *Maritza Urrutia Vs. Guatemala*, in which the Commission, adopting a gender perspective, pointed out that, while arbitrarily detained, Maritza had been psychologically tortured, given the threats and continual possibility of being assassinated, physically tortured or raped. While the Court recognized the psychological torture, it did not go as far as the Commission to state that such violation carried a gender-specific content, rooted in

It was in 2004 that the Court first deployed, though not in its entire

extension, the category 'violence against women'. The case Masacre Plan de

Sánchez Vs. Guatemala<sup>21</sup> dealt with the violations perpetrated against a Mayan

village, during the Guatemalan internal armed conflict. This indigenous

community was frequently raided by government armed forces and, in July

1982, as the men saw the military approaching the village, they escaped,

leaving women and children behind because they believed government forces

would not take any actions against the latter. Nonetheless, what happened in

Plan de Sánchez that day was a carnage. The military raped, tortured and

murdered the young women. Children were beaten to death and everyone

else was assassinated inside a house bombarded with hand grenades. The

bodies were burned and the village ransacked.

While the Guatemalan state recognized its responsibility in the events,

and the Court found that eleven articles of the American Convention had been

violated, it was only in the reparations verdict that the Court examined the

issue of violence against women. Relying on survivors' and expert witnesses'

testimonies, the ICtHR recognized the physical and psychological trauma

experienced by the women who survived and the extent of the consequences

of the massacre for the entire community, particularly in face of the central

role played by women as transmitters of cultural knowledge. For the first time,

the Court was embracing at least part of the claims made by the transnational

feminist movement against violence, as it is clear in this part of the judgment:

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

state practice, carried out in the context of the massacres, intended to destroy the dignity of women on a cultural, social, family and individual level. These women see themselves as stigmatized within their communities and have suffered because

stigmatized within their communities and have suffered because of the presence of their attackers in the public areas of the municipality. In addition, the impunity with regards to these

events has prevented women from participating in the justice

process.<sup>22</sup>

the fear of being raped or sexually assaulted.

<sup>21</sup> Corte IDH. Caso Masacre Plan de Sánchez Vs. Guatemala. Reparaciones. Sentencia de 19 de noviembre 2004. Serie C No. 116.

<sup>22</sup> Idem, p. 61. Translation by the author.

The statements above echo some of the feminist contentions that

sexual violence is a very specific form of harm, connected to a deeper structure

of gender subordination, which leaves in its victims both physical and

psychological traumas. Acknowledging this, the ICtHR determined as part of

the reparations to be fulfilled by the Guatemalan state, that it should offer the

survivors medical and psychological attention. Such service should be designed

with the participation of the women leaders of the village, aimed at alleviating

the survivors' suffering while also helping them to reconnect with the

community.23

Nonetheless, it was only in the case of *Penal Miguel Castro-Castro Vs.* 

Perú, decided in November 2006, that the Court applied, for the first time, the

Belém do Pará Convention in its analysis of the right to humane treatment and

the state's duty to investigate human rights violations. The facts reported in

the case took place in Peru, in 1992. Fujimori, with the support of the military,

had just carried out a presidential coup, shutting down Congress, suspending

the Constitution and removing judicial power. The Castro Castro prison,

located to the East of Lima, housed many political prisoners, both men and

women who awaited trial under charges of terrorism. Between May 6 and 9,

the female pavilion of the prison, which housed women who were members or

suspected members of the Communist Party - Shining Path, was brutally

attacked by government forces. Wartime weaponry was deployed. Explosives

were launched from the roof and from helicopters, while the women ran away

to the next pavilion to save their lives. Snipers gunned down those who tried

to leave the building and surrender. Although the attack initially targeted the

women, the male inmates also became victims of the onslaught during the

events.

According to the government's version of the facts, the operation had

the aim of simply moving the female inmates to another maximum-security

penitentiary in Chorrillos. However, neither inmates nor the prison's director

were informed about the alleged moving. It was in fact a planned attack that

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<sup>23</sup> The gender sensitivity acquired by the Court from the *Masacre Plan de Sánchez* case can be also identified in the ruling of the case *Ia Masacre de Mapiripán Vs. Colombia*, passed in September 15, 2005. Dealing with the issue of displaced communities, the IACtHR acknowledged the serious psychological consequences for the people affected, particularly the women, the

youth and the children.

aimed at targeting specifically the inmates located in the pavilions 1A and 4B

of the prison. Many of these women were pregnant, some of them were

elderly, and had been victims of different forms of torture and mistreatment,

which continued even after they had been transferred to other prisons.

Various kinds of abuse were perpetrated by state agents during and after the

massacre, including forced nudity, beating, psychological and physical torture,

and sexual violence. The Court asserted that,

... the women were affected by acts of violence differently from

men, some acts of violence were directed specifically against them and they were affected in greater proportion than men by some acts. It has been recognized by many Peruvian and

international institutions that during the armed conflict, women faced specific violations of their human rights, such as sexual violence, which in many occasions was deployed as "a symbolic

means to humiliate the opposing party". 24

The Court went on in its analysis to incorporate the dominant frame of

violence against women in armed conflict:

It is recognized that during internal and international armed

conflicts, the parties resort to sexual violence against women as a means of punishment and repression. The use of state power to violate the rights of women in an internal conflict, besides

affecting them directly, may have the objective of having an impact on society through these violations and send a message or

teach a lesson.<sup>25</sup>

The Inter-American Court thus explicitly adopted the definition of

sexual violence mobilized by the International Criminal Tribunal for Rwanda in

the Akayesu case to conclude that this category encompassed the fact that the

naked female victims had been observed during the whole time by armed

soldiers. When examining the allegation that one of the victims had been

subjected to "a finger vaginal 'inspection', carried out by several hooded

people at the same time, in a very abrupt manner, with the excuse of

examining her", 26 the Court again referred to International Criminal Law along

<sup>24</sup> Corte IDH. Caso del Penal Miguel Castro Castro Vs. Perú. Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2006. Serie C No. 16. p.79. Translation by the author.

<sup>25</sup> Idem, p. 80. Translation by the author.

<sup>26</sup> Idem, p. 81.

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with comparative criminal law to classify this conduct as "sexual rape", <sup>27</sup> the gravity of which was made clear after drawing on several other sources of international human rights law. In the reparations section of the ruling, the Court awarded higher amounts of compensation to the victims who had been subjected to sexual violence and rape.

In my conversations with some of the lawyers at the IACtHR.<sup>28</sup> thev were unanimous in pointing to the importance of the bench composition for the change the Court's jurisprudence underwent regarding women's rights. Cecília Medina Quiroga, a Chilean jurist who not only had previous extensive work on human rights but was also known for her activism for women's human rights was the first woman to become a judge at the IACtHR in 2004, year when the verdict on the case Masacre Plan de Sánchez Vs. Guatemala came out. Her participation is deemed by some of the lawyers as decisive for the judgment passed two years later in the Penal Miguel Castro-Castro Vs. Perú case, which was the first to fully apply the category "violence against women". In 2007, two other women were elected judges to the IACtHR, Margarette May Macaulay, a Jamaican who is also known for her advocacy for women's human rights, and is now the Rapporteur on the Rights of Women at the Inter-American Commission, and Rhadys Abreu Blondet, from Dominican Republic. Cecília's mandate lasted from 2004 to 2009, Margarette and Rhadys's mandates lasted from 2007 till 2012. From 2013 to 2015, the bench was all male. In 2016, Judge Elizabeth Odio Benito, from Costa Rica, known for her active role in highlighting the violations of women's rights as a judge of the International Criminal Tribunal for the former Yugoslavia, was elected and is the only woman in the current composition of the IACtHR. The presence of women as judges in the Court was stressed by all the lawyers I interviewed as a key factor for unleashing the incorporation of a gender perspective in the rulings. However, it is important to underline that these are not any women judges, but all of them except Judge Blondet, have a history of commitment

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<sup>&</sup>lt;sup>27</sup> Idem, p. 82.

<sup>&</sup>lt;sup>28</sup> I conducted fieldwork at the Inter-American Court of Human Rights for about a month and a half in June, 2014. During this period, I talked to five lawyers of the Court who had been involved in the cases concerning women's rights/gender issues. While I had a number of questions that I would ask to all of them, the interviews were not structured as I was mostly interested in hearing how each of them made sense of the 'gender shift' that had taken place in the Court's jurisprudence.

and advocacy for women's rights.

The full appropriation and development of the category 'violence against women' happened though three years after the *Castro Castro* case, in 2009, in a paradigmatic decision on femicide. Widely known as the *Campo Algodonero* case, *González y otras Vs. México* was decided by a majoritarian female bench, with Judge Cecilia Medina Quiroga, as President, Margarette May Macaulay and Rhadys Abreu Blondet, Judges of the IACtHR, and Rosa María Álvarez González, as an *ad hoc* Judge. In this case, the IACtHR verified the responsibility of the Mexican state for the disappearance and murder of three young women, whose bodies were found in a cotton field in Ciudad Juárez, on November 6, 2001. Despite the Mexican state's partial recognition of its international responsibility, the Court understood that there were crucial elements still to be addressed under the framing of "violence and discrimination against women", particularly because the state had denied the charge of violation of any right, be it right to life, personal integrity or freedom.

To examine the issues raised by the Inter-American Commission and the victims' representatives, the Court engaged in a detailed analysis of the legal and social issues surrounding the case. It started out by contextualizing Ciudad Juárez, an industrial city in the north of Mexico, characterized by intense traffic of migrants, deep social inequalities and high rates of criminal activities. Since 1993, the city has witnessed an increase in the rate of disappearances and homicides of women and girls. Not only the numbers were alarming, but violence against women was a fact largely accepted by the state, indicating an intricate phenomenon was to be confronted. First, the victims were all young women, ranging from 15 to 25 years old, students or workers in shops, factories or other local business. Second, the crimes had common features: the women were kidnapped and maintained in captivity, their relatives pressed charges without receiving proper response from state authorities and, after days or even months, their corpses were found in a wasteland with signs of violence, including rape and other forms of sexual assault, torture and mutilation. Third, the violence was explicitly gendered: the transformation of gender roles within the family was one of the major factors unleashing it. Women had become the preferred workers in the local assembly

plants, becoming the breadwinners of their families. This transformation in

women's social position outside and within the family was not followed by a

change in the patriarchal values dominating local culture, leading to deep

conflicts whose worst form of manifestation is female assassination.

Moreover, the absence of public services in marginalized areas; human

trafficking; money laundering; drug consumption; high rates of school dropout;

and the intense presence of the military in the area are also factors generating

violence and marginalization in Ciudad Juárez. After examining reports and

evidence from a variety of sources, the Court concluded that most of the cases

of female murders in the city constitute cases of gender violence occurring in a

context of systematic discrimination against women.

The 'gender' (as the Court put it) of the victims was a relevant factor of

the crime, influencing both its motivation and the kind of violence inflicted.

Establishing for the first time a judicial dialogue with UN instruments in this

matter, as one of the IACtHR lawyers pointed out to me, the Court asserted

that the case should be understood within the context of entrenched gender

inequality. The improvement of women's social position, such as their

incorporation into the labor force, is connected to the amplification in forms of

violence against them that work as a protective mechanism of traditional

values and gender roles viewed by the aggressors as undergoing a process of

disruption. Noteworthy is how the Court conceives violence against women as

linked to broader issues of social inequality and patriarchal values, therefore

rejecting an individualistic approach that scrutinizes the victims' personal life

history and social background. Such move echoes feminist legal scholars'

critiques (Bumiller 2008, among others), which have long demonstrated how

problematic it is to discuss the victim's personal life, particularly her sexual life,

habits, tastes, and modes of dressing in trials of violence against women. The

IACtHR understood that rather than a personal issue, violence against women

is a structural problem, rooted in gender hierarchies.

The Court also examined problems in the investigation and processing

of the cases of violence against women in Ciudad Juárez as a form of structural

violence. There was delay in starting the investigations, negligence and

irregularities in the collection of evidence and identification of the victims, loss

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of information, mislaying of remains and no characterization of the aggression

against women as part of a global phenomenon of gender violence. A culture

of impunity prevailed in the cases of violence against women and state agents

sought legitimation for their lack of action by admonishing the victims and

reproducing existent gender stereotypes.

The Court concluded that since 1993 there has been a constant

increase in the number of female homicides in the city. The inexistence of a

serious response from the state was representative of a culture of

discrimination against women within the state apparatus, which contributed to

its reinforcement within society, therefore allowing for the perpetuation of

violence against women in Ciudad Juárez. The Court went further to establish

the connections between impunity in individual cases and a structural problem

of violence against women, in the following terms:

This judicial inefficacy in individual cases of violence against women is conducive to an environment of impunity which

facilitates and promotes the repetition of acts of violence in

general and sends a message according to which violence against women can be tolerated and accepted as part of everyday life. <sup>29</sup>

In sum, the Court framed the case as part of a broader context in

which the norm is the absence of investigation and punishment of the

aggressions against women within a generalized phenomenon of gender

violence. The necessity of tackling the problem as a larger and structural one

rather than the individualized approach taken by the Mexican state was

reaffirmed by the IACtHR, following the opinion of experts and human rights

organizations heard in the case.

Another relevant issue examined by the Court regarded the

relationship between violence against women and discrimination, more

specifically if the former could be framed as the latter. In order to solve the

point in question, the Court adopted the concept of discrimination against

women as established by CEDAW, meaning "every distinction, exclusion or

<sup>29</sup> Corte IDH. Caso González y otras ("Campo Algodonero") Vs. México. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 16 de noviembre de 2009. Serie C No. 205. p. 100. The structural approach adopted in this case as well as the transformative remedies imposed on

the state were furthured in Velásquez Paiz y otros Vs. Guatemala (2015).

restriction based in sex which has as its object or result to diminish or annul the recognition, enjoyment or exercise by the woman, independently of her civil status, on the basis of the equality between men and women, of the human rights and fundamental freedoms in the political, economic, social, cultural and civil or any other spheres". 30 Moreover, the Convention of Belém do Pará establishes that violence against women is a manifestation of the relations of power historically unequal between women and men, and it also recognizes that the right of every woman to live a life free of violence includes the right of being free from any and all forms of discrimination.<sup>31</sup> For the Court. in the case of Ciudad Juárez, "the impunity of the crime committed sends the message that violence against women is tolerated, which favors the perpetuation and social acceptance of the phenomenon, the sentiment and sensation of insecurity among the women, as well as a persistent lack of trust on their part in the system of justice."<sup>32</sup> The IACtHR went further to claim that women's subordination is associated with practices based on socially dominant and persistent gender stereotypes, which is aggravated when these stereotypes are embedded, implicitly or explicitly, in public policies and practices, particularly in the reasoning and language of the judicial police and state authorities. Under such conditions, the creation and the use of stereotypes becomes both one of the causes and a consequence of violence against women.

The case *González y otras Vs. México* was thus groundbreaking in the sense that it was the first time in which the IACtHR engaged in an extended translation of the category 'violence against women' to the Latin American context, fully embracing its main elements: the structural character of the violence, the connections between gender roles and stereotypes and violence, the necessity of adopting different evidentiary standards given the nature of the harm, the institutional violence that allows for a culture of impunity to prevail, and so on. The relevance the Belém do Pará Convention had then acquired in the jurisprudence of the Court would not be taken back, as another case also examined in 2009 demonstrated.

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<sup>&</sup>lt;sup>32</sup> Idem, p. 102.



<sup>&</sup>lt;sup>30</sup> Idem, p. 101.

<sup>&</sup>lt;sup>31</sup> Idem, p. 101.

In the case La Massacre of Las Dos Erres Vs. Guatemala, the IACtHR

could not examine the specific actions undertaken by the state security agents,

a special group of the Guatemalan army called Kaibiles, because by the time

the events happened, the Guatemalan state had not yet recognized the Court's

jurisdiction. Nonetheless, the IACtHR moved on to frame the case as state

negligence in investigating, prosecuting and punishing the men responsible for

the massacre of 251 inhabitants of the community Parcelamiento de Las Dos

Erres. Among the victims there were children, men and women. The latter

suffered violations that included rape and extreme physical violence to the

point that some of them aborted their babies because of the assaults inflicted

upon them.

Guatemala lived under an intense armed conflict from 1962 to 1996, a

period during which the state applied the so-called "National Security

Doctrine", which comprehended, among other actions, military intervention to

fight alleged "subversion", a category under which every individual or

organization that represented any form of opposition to the state, then

described as an "internal enemy" was targeted.33 In 1982, a coupe d'état

installed a military government in Guatemala. During this period, military

actions, known and supported by the highest governmental authorities,

consisted mostly in massacring the population. Around 626 people were

executed with extreme cruelty as a form of state terror and with the aim of

eliminating the "internal enemy". Among such actions is the massacre trialed

in this judicial case, which happened between 6 and 8 of December, 1982.

As I clarified earlier, the Court could not directly assess the actions of

the military men, but it addressed the violence against women within the

frame of access to justice, judicial protection and fair trial. The IACtHR

understood that the Guatemalan state had an obligation to investigate those

acts, in accordance with the American Convention which was already in force

when the massacre happened. Moreover, such obligation was again accepted

by the state when it ratified the Belém do Pará Convention, in 1995:

<sup>33</sup> Corte IDH. Caso de la Masacre de Las Dos Erres Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2009. Serie C No. 211. p. 22

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... the state has the duty of guaranteeing the right of access to justice ...according to the specific obligations imposed by specialized Conventions ...on the issue of prevention and punishment of torture and violence against women. <sup>34</sup>

Despite being aware of the cruel forms of violence against women, including torture, rape and induced abortion, which took place during those three days in the community La Dos Erres, the Guatemalan state remained inert and did nothing to uncover what had happened, let alone prosecute or punish those responsible for it. The Court went on to expand its previous examination of violence against women during armed conflicts, and to assert that women were particularly selected as victims of sexual violence, a state practice in the context of massacres, aimed at destroying women's dignity on cultural, social, family and individual domains. Within this context, the Court understood that the absence of investigation of serious actions against personal integrity, such as torture and sexual violence in armed conflicts and/or in systematic patterns, constitute the violation of the state's duty in relation to protection of human rights. Under this argument, the state was convicted to immediately start the investigation of these cases. 35 As one of the IACtHR lawyers pointed out to me during an interview, this is a very important case, particularly when compared to the Masacre Plan de Sánchez case. In it, while the Court could not address the fact themselves, in examining the issue of access to justice and due process, it acknowledges that even in the investigation of facts a gender perspective needs to be considered.<sup>36</sup> The IACtHR thus, even timidly, embraces the transnational idea that sexual violence in armed conflicts may be a weapon war, constituting thus war crime and even attempted genocide against the indigenous people. Such approach was furthered in the case Masacres de Río Negro Vs. Guatemala, when the Court explicitly addressed the specific use of violence against women as a weapon to destroy Mayan communities:

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<sup>&</sup>lt;sup>34</sup> Idem, p. 41

The obligation to effectively and impartially investigate charges of violence against women was reasserted in several cases afterwards, such as *Gudiel Álvarez y otros (Diario Militar) Vs. Guatemala* (2012).

<sup>&</sup>lt;sup>36</sup> A few years later, in the case Defensor de Derechos Humanos y otros vs. Guatemala (2014), the Court asserted that a gender perspective is of outmost relevance in the procedure of evaluating the risks to which human rights' defenders are subjected and in the establishment of the corresponding protective measures.

... this Court has established that during the armed conflict, the women were particularly selected as victims of sexual violence. Thus, during and before the mentioned massacres o 'scorched earth operations', members of the state security forces perpetrated massive or indiscriminate and public sexual violations, followed by the murder of pregnant women and the induction of abortions. This practice was aimed at destroying women's dignity at cultural, social, family and individual levels. Moreover, ...when perpetrated against maya communities, 'the massive violations had a symbolic effect, since the maya women have as their responsibility the social reproduction of the social

group [...and] personify the values that should be reproduced in

In 2010, the Court examined the case *Fernández Ortega y otros Vs. Mexico*, which again examined the alleged international responsibility of the Mexican state for the sexual violation and torture of Inés Fernández Ortega on March 22, 2002, as well as for the absence of proper investigation and punishment of the perpetrators, the lack of reparation for the victim and her family, the use of military jurisdiction to investigate and prosecute the violation of human rights, and the difficulties that indigenous people face, in particularly women, when seeking access to justice. While the Mexican state recognized its responsibility for the violation of the rights to judicial guarantees and protection established on articles 8.1 and 25 of the American Convention as well as the right to personal integrity protected by article 5 of the same legal document, it denied the violation of the rights safeguarded by the Convention of Belém do Pará, more specifically its article 7, that is, the right to live a life free of all forms of violence.

the community. 37

Important in this case is the intersectional approach adopted by the Court when examining the violence against women, more specifically indigenous women. While in previous instances the IACtHR had already acknowledged the way in which indigenous women were affected by the problem, this time it went further to link the difficulties faced by the indigenous peoples to access justice, to the historical process of

<sup>&</sup>lt;sup>37</sup> Corte IDH. Caso Masacres de Río Negro Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 4 de septiembre de 2012. Serie C No. 250. Par. 59. Along similar lines, see: Corte IDH. Caso Masacres de El Mozote y lugares aledaños Vs. El Salvador. Fondo, Reparaciones y Costas. Sentencia de 25 de octubre de 2012. Serie C No. 252.



marginalization, deprivation and non-recognition within the Mexican nation

state:

An important percentage of the states of Guerrero's population belong to indigenous communities, who maintain their traditions and cultural identities while living in cities characterized by great marginalization and poverty. In general, the indigenous

population finds itself under conditions of vulnerability, reflected in different domains, such as administration of justice and health

services.38

Remarkably, the Court's discourse is also open to the recognition of

the violence perpetrated by the patriarchal state and its agents through the

remembrance of six other cases of rape that happened between 1997 and

2004, of which soldiers serving in the region were accused. The IACHR explicitly

recognized that "among the forms of violence that affect the women in the

state of Guerrero is the 'institutional military violence' [which] has placed the

population in a condition of vulnerability, affecting the women in a particular

way."39

Besides this contextualization of the violent encounter between the

authoritarian patriarchal state and the indigenous communities, the Court

examined the specificities of the case. The victim was described as a 25-year-

old indigenous woman from the community Me'phaa, living in Barranca

Tecoani, state of Guerrero, an isolated mountainous area of difficult access.

Married to Prisciliano Sierra and mother of four children at the date of the

assault, Ms. Fernández dedicated herself to domestic work, breeding the

animals owned by the family and cultivating various crops in the family's land.

On March 22, 2002, around 3 pm, Ms. Fernández Ortega was at home with her

four children, when a group of approximately 11 soldiers, in their uniforms and

carrying weapons, surrounded her house. Three of them entered the house

and started questioning the victim about where had her husband gone to steal

meat. She did not answer due to fear and lacking knowledge of Spanish. One of

the soldiers, pointing the gun at her, ordered that she lay down on the floor.

Another soldier lifted her skirt, took off her underwear and raped her while the

<sup>38</sup> Corte IDH. Caso Fernández Ortega y otros Vs. México. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 30 de agosto de 2010. Serie C No. 215. p. 27.

<sup>39</sup> Idem, p. 28.

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other soldiers watched. Afterward, they left the house, along with those who

were waiting outside.

The case was brought by the victim's husband to the knowledge of the

indigenous organization, who then persuaded the state Commissioner of

Human Rights to meet the victim and collect her first declarations. She was

also taken to a doctor, who provided her with nothing more than painkillers as

supposedly there was no other remedy for the case. The victim went through

all kinds of difficulties and barriers – from the public prosecutor who did not

want to hear the case since it involved soldiers to the absence of a female

gynecologist in the public hospital to examine her – to press charge against her

offenders. And when the case finally arrived at the military prosecutor, the

Coordinator of Forensic Chemistry declared that there was no biological

evidence in the case's archive because the samples obtained from the

gynecological examination had been lost during the analysis.

The IACtHR valued positively that the victim narrated the facts several

times, and on different occasions. Though there was an inconsistency in Ms.

Fernández's various narrations in regards to how many of the soldiers had

raped her, the Court understood it to be not unusual that some aspects of the

history might lack precision when retelling the experience of rape. The Court

also accounted for the fact that the victim spoke me'paa and to press charges

in the first place, she did not have the assistance of a professional interpreter.

Moreover, her second account of the facts was a written document presented

and translated to her by someone else. Furthermore, the facts relate to a

traumatic moment lived by the victim and its impact might cause difficulties in

remembering. Finally, eight years went by between the first testimony given

by her in 2002, and her audience with the IACtHR in 2010.

In addition, the Court was very attentive to the way in which the victim

used the word "violation" to refer to the actions which she was a victim of, so

as to demonstrate that there was no inconsistency in her account. 40 Finally, the

victim's personal condition was taken into consideration in the dismissal of the

state's allegation. According to the Court,

<sup>40</sup> Idem, p. 37.

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... the alleged victim is a indigenous woman, who lived in an isolated mountainous area, who had to walk many hours for

denouncing her rape to health and legal authorities who did not speak her language. These charges would probably have negative repercussions in her social and cultural environment, among

others, a possible disapproval from her community. Despite all of that, she denounced and persevered in her accusation, knowing

that the area where she lives continued to be policed by the army, some of whom she was imputing a serious crime.

What we see here is that the Court positively valued the courageous

act of the victim, highlighting its personal implications and burdens. This is the

kind of human sensibility that feminist legal scholars ask for, to compensate for

the male standard implicitly incorporated by the legal system. The Court

concluded that the victim's version of the facts was accurate and should be

accepted.

In addressing the issue of nonexistence of physical signs of violence,

the Court asserted that the use of force cannot be considered an essential

element to characterize sexual conduct without consent. Along the same lines,

it affirmed that the victim was not required to prove physical resistance; it was

sufficient that the coercive elements of the conduct was demonstrated. In this

case, the Court understood that there was a situation of extreme coercion,

with the aggravating circumstance of the relationship of authority between the

soldiers and the victim. Again, the IACHR takes a firm stand against the usual

way in which rape cases are addressed – the victim is the one who has to prove

that there was no consent – by taking the victim's testimony as a valuable

proof. Moreover, it also amplifies the protection for women as it rejects the

idea that aggression and violence necessarily leaves physical traces.

Another important case in the gradual development of 'violence

against women' as a translocal category in the IACtHR is Gelman Vs. Uruguay.

Even though the Commission itself did not invoke any argument connected to

María's identity as a woman, the victims' representatives requested the Court

to declare that the state had failed in acting with the necessary diligence in

order to prevent, investigate and sanction violence against women. They

argued, among other things, that in face of the definition of violence against

women embraced by articles 1 and 2 of the Convention of Belém do Pará, the

conditions of illegal detention, impossibility of communicating and the

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suffering imposed upon María Claudia García become particularly severe

because of her vulnerable condition of an advanced state of pregnancy.

Though I am also interested in the way in which women are constructed as a

victim of state terror as well as the different gender categories deployed in

such construction, my focus here is on how structural state violence/state

terror, which happens outside the private sphere, is framed as violence against

women by the IACtHR.

The Court started out by offering a detailed historical account of

Operation Condor and some of the human rights violations conducted during

its development. Amongst them there was the treatment dispensed to

pregnant women, who would be maintained alive until they gave birth and

then have their children taken from them to be given to someone in the

military or in the police force. Afterward, the mother would be killed or

"disappeared". This is what happened to María Claudia García Iruretagoyena

Casinelli, born in Buenos Aires, Argentina, in 1957. She worked in a shoe

factory and was studying Philosophy and Letters at the University of Buenos

Aires. When she was deprived of her freedom, she was only 19 and 7 months

pregnant of her first daughter with Marcelo Arieal Gelman Schubaroff. María

and her husband were detained together in August 1976 by the Argentine and

Uruguayan military commands and taken to a clandestine detention center,

known as "Automotores Orletti". Her husband was tortured and many years

later, more precisely in 1989, his body remains were found, from which it

could be determined that he was killed in 1976. María was taken to

Montevideo, in Uruguay, and remained in the headquarters of the Uruguayan

Information Service until she was taken to the Military Hospital to give birth, in

November of the same year. María had her daughter taken from her in the end

of the following month. What happened to María afterward is not yet clarified.

With a powerful description of the ways in which state violence acted

upon women's bodies during the military regimes and, in particular, María's

body, the Court recognized the actions performed against her as violence

against women:

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María Claudia García's state of pregnancy when she was detained constituted the particular condition of vulnerability for which it

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was given a differentiated affectation in her case. In Argentina, she had already been separated from her husband and soon transferred to Uruguay without knowing his fate, what in itself constituted a cruel and inhuman act. Subsequently, she was detained in a clandestine center of detention and torture, namely the SID, where her differential treatment - as she was isolated from the other detainees - was not a means to comply with an special obligation of protection in her favor, but rather to achieve a particular goal, which was the instrumentalization of her body for the birth and breastfeeding of her daughter, who was then taken from her, deprived of her identity and given to another family. [...] The facts of the case reveal a particular conception of the woman's body that violates her free maternity, which is an essential part of the unconstrained development of women's personality. This is even more serious if one considers, according to what has been highlighted, that her case happened within a context of disappearance of pregnant women and illegal appropriation of children in the framework of Operation Cóndor. The underlined acts committed against María Claudia Garcia may be classified as one of the most serious and blameworthy forms of violence against women, which have been perpetrated by Argentine and Uruguayan state agents, that affected her personal integrity and were clearly based upon her gender. The actions caused her physical and psychological damages and sufferings that, for the feelings of deep anxiety, desperation and fear she felt for being with her daughter in a clandestine detention center, where usually one could hear the torture inflicted upon other detainees in the SID. Not knowing what would be the destiny of her daughter when they were separated, as well as being able to foresee her own tragic fate, constitute an impact of so great magnitude that it has to be qualified as the most serious form of damage to her psychical integrity.<sup>41</sup>

Since the Rosendo Cantú and Fernandez Ortega cases, both against Mexico, the Court has been developing new standards for evaluating evidence in the cases of violence against women and, particularly, sexual violence. According to one of the IACtHR lawyers I interviewed, this shift in the Court's understanding, evident when one compares the new standards to the one applied to the Loayza Tamayo case, for example, might be, among other factors, explained as a rejection of the victim's blaming strategy commonly pursued by national courts. Such shift becomes even more apparent in the case J. Vs. Perú, which dealt with similar violations to that alleged in the case Penal Miquel Castro Castro, but to which much more sophisticated and

<sup>&</sup>lt;sup>41</sup> Corte IDH. Caso Gelman Vs. Uruguay. Fondo y Reparaciones. Sentencia de 24 de febrero de 2011. Serie C No. 221. p. 30-31.

transnational standards were applied. The Court was explicit in giving full

credit to the victims' testimony:

of aggression that, in general, is characterized by happening in the absence of other people besides the victim and the aggressor or aggressors. Given the nature of this form of violence, one cannot expect the existence of graphic or textual evidence and, for this,

... this Court has established that sexual violence is a special type

expect the existence of graphic or textual evidence and, for this, the declaration of the victim constitutes a fundamental evidence of the fact. ...the Court considers that such standard is applicable to sexual aggressions in general. In addition, while examining the

mentioned declarations, it is important to take into account that the sexual aggressions are a kind of violation that usually the

victim does not place charges because of the stigma it entails... 42

The Court reaffirmed its new approach to evidence<sup>43</sup> in cases of

violence against women, very much in tune with the claims made by transnational feminist mobilizers, in the case *Veliz Franco Vs. Guatemala*. Here,

the Court asserted that the way the body of the girl María Isabel was found

was in itself enough evidence to prove she had been murdered simply because

she was a woman. In this case, and quite differently from the Loyaza Tamayo

case, the Court asserted that:

It is important to clarify that the lack of absolute certainty about what has been expressed [that it was a case of violence against women and female homicide] is a consequence of the lack of conclusión in the internal investigation of the facts, as well as the way such investigations have been conducted thus far. Thus, for example, very important elements such as evidences of sexual

violence have not been determined in a accurate way...<sup>44</sup>

In addition, it is also evident in the Veliz Franco y otros case that the

IACtHR is now part of a transnational conversation on violence against women.

<sup>42</sup> Corte IDH. Caso J. Vs. Perú. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 27 de noviembre de 2013. Serie C No. 275. Par. 323. Similarly, see: Corte IDH. Caso Espinoza Gonzáles Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 20 de

noviembre de 2014. Serie C No. 289.

<sup>43</sup> The issue of evidence in cases that contain claims of violence against women is quite an interesting one in the jurisprudence of the IACtHR, deserving an analysis of its own. In the case *Ríos y Otros vs. Venenzuela* (2009), for example, the Court understood that neither the Commission nor the representatives could prove that the women journalists, victims of violence by state agents, had suffered any different or specific form of aggression because of their 'female condition'.

<sup>44</sup> Corte IDH. Caso Veliz Franco y otros Vs. Guatemala. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 19 de mayo de 2014. Serie C No. 277. par. 178.

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The Court explicitly mentions the standards adopted not only by the Inter-

American Human Rights System, but also the Council of Europe, the European

Court of Human Rights and the Universal System:

... the violence directed against a woman because she is a woman or the violence that affects a woman in a disproportionated

manner, is a form of discrimination against women, as have signaled international human rights protection bodies, such as the

European Human Rights Court and the CEDAW...45 Along the same lines, the Council of Europe Convention on preventing and

combating violence against women and domestic violence

(Estambul, 2011) ...

It is interesting to see how the jurisprudence of the Court evolves from

requiring that the specific ways in which women are affected by acts of

violence be very well argued and proved to the Court itself taking a more

active role in framing some actions as 'violence against women'. This can be

apprehended in the case Rodriguez Vera y otros Vs. Colombia. Here, the Court

considered that some of the aggressions suffered by one of the detained

victims, Yolanda Santodomingo Albericci, constituted forms of violence against

women as defined by the CEDAW, though none of them were actual sexual

violence. Such framing reinforces another important shift in the Court's

jurisprudence as violence against women is not anymore linked to bodily harm

but encompasses a large spectrum of actions that are an expression of unequal

gender power relationships. This approach was further developed in the most

recent decision on women's human rights passed the ICtHR.

In I.V. Vs. Bolivia, a case dealing with the forced sterilization of a

Peruvian woman by a doctor in a Bolivian public hospital, the Court

understood, among many others, that such act constituted a form of violence

against women. Citing the Committee for the Elimination of Violence against

Women, as well as the Beijing Declaration and Platform of Action, the IACtHR

concluded that the non-consented or involuntary sterilization, which results in

permanent loss of reproductive capacity, "constitutes an act of violence and

discrimination"46 against women.

<sup>45</sup> Idem, par. 207.

<sup>46</sup> Corte IDH. Caso I.V. Vs. Bolivia. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 30 de noviembre de 2016. Serie C No. 329.

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4. Conclusion: Violence against women as a translocal category in the Latin

American landscape

As I attempted to demonstrate throughout this paper, legal categories are not

given but are rather the result of a process of socio-legal development, which

may also entail the work of activists. In the case of 'violence against women',

before a strong and well-organized feminist transnational mobilization took as

its own the task of developing such legal category and pressing for its

acknowledgment and embracement by both national and international courts,

the social problem of violence suffered by women remained unseen and

unaddressed.

However, the way in which each legal institution incorporates and puts

to use transnationally developed legal categories is somewhat unique. In the

case of the IACtHR, the framing of certain violations of women's rights as

'violence against women' was the result of a number of different and

interconnected developments that continue up to this day. First, it was

necessary to have a majoritarian female bench in order for the issue to be

given enough and adequate attention. The lawyers of the Court also played a

significant role - as one of them asserted to me during our interview. Many of

them had been trained in the Academy on Human Rights and Humanitarian

Law, at American University Washington College, being thus influenced by

feminist legal scholars teaching there, such as Rebecca Cook, Suzana Sacuto,

Dianne Diliker, Elizabeth Marshall, among others. They would read their

articles – as another lawyer assured to me – along with influential (feminist)

NGOs statements, even though none of these documents would be cited in the

decisions. The work done by transnational feminist academics in developing a

gender perspective was thus crucial and determinant to make the issue of

'violence against women' widely visible, including to the Court. In addition, the

local social conflicts also influence the frames that the Court applies. As

another lawyer told me during our conversation, the Court needs to abide

itself to the facts, and build its interpretation upon them.

For all these elements and circumstances, I claim that 'violence against

women' is a translocal category. While the concept itself was developed

elsewhere, in the space of transnational feminist networking aptly described

by Keck and Sikkink (1998), its reception by institutions that make up the

transnational legal sphere, such as IACtHR, is marked by a number of local

factors that a top down description of a translation that happens from the

global to the local cannot account for. The case discussed here might thus

illuminates the various processes of translations that take place in

transnational legal mobilization.

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