
From the CEDAW to the American Convention:
elucidation of women's right to a life's project
and protection of maternal identity within
Inter-American human rights jurisprudence

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1 Introduction

One of the most challenging dilemmas within the field of women's rights is how to balance equality and difference approaches. Within the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the expression of recognition of maternity as a social function within the Preamble and Article 5(b) was intended to combat prejudice or inferior conceptions of women, lifting the social perception of the mother's role to one of active worth. Thus far within its jurisprudence, the CEDAW Committee has approached maternal rights from the perspective of non-discrimination and equality. Cases addressing maternity leave and workplace protection during pregnancy have been analyzed pursuant to Article 11 (non-discrimination in the field of employment), maternity care according to Article 12 (non-discrimination in healthcare), and cases involving family planning and child rearing within the context of marriage have been pursued according to Article 16 (non-discrimination in the family), instead of Article 5(b).¹ In contrast, at the regional level the Inter-American

¹ See *Alymeda da Silva Pimentel Teixeira v. Brazil*, CEDAW/C/49/D/17/2008, 10 August 2011, establishing violations of Articles 12 and 2(c) and (e) due to discriminatory denial of access to maternity care resulting in the death of the infant; *Dung Thi Thy Nguyen v. The Netherlands*, CEDAW/C/361/D/3/2004, 29 August 2006, addressing maternity leave benefits, Article 11 (2, 2(b)) no violation established; *A.T. v. Hungary*, Comm. No. 2/2003, CEDAW, 26 January 2005, involving domestic violence, finding violations of Articles 2(a)(b)(e), 5(a) and 16; and *Szjijharto v. Hungary*, CEDAW Comm. No. 4/2004 A/61/38 (2006), 14 August 2006, addressing enforced sterilization of a Roma woman, finding violations of Articles 10(h), 12 and 16(1e). See also UN Declaration on the Elimination of

Court of Human Rights adopted a difference-oriented perspective when addressing the claims related to violation of maternal identity in the case of *Miguel Castro-Castro Prison v. Peru* (2006).² This chapter suggests that the approach of the regional court reflects a higher level of legitimacy as it offers an interpretation of human rights that is more inclusive of the women actually concerned.

Exploration of the continuing relevance of difference valuation over formal equality as an important vehicle for achieving a holistic protection of women's rights is pursued. Maternal identity is examined as an important manifestation of human dignity.³ Martha Fineman specifically called for attention to be placed on the family (defined as the Mother/Child paradigm):

I assert that the family is typically considered as an afterthought (if at all) by feminist legal theories whose attention remains focused on equality in the workplace and on issues surrounding sexuality and violence against women. When it is addressed, the family is considered more of an anomaly to be corrected than an institution so pivotal to the maintenance of societal structure and operation that it seems impervious to reform ... much of feminist legal theory fails to place the family and the role of mother as central institutions for the development of theory ... legal theory must recognize the reality of existing systemic and persistent inequality and move beyond the simplistic equality paradigm, establishing an affirmative feminist theory of difference.⁴

She highlighted the connection between mother and child as an important value when discussing equality between the sexes – describing a vertical, inter-generational, biological tie of intimacy between people.⁵ As described by Robin West:

Indeed, perhaps the central insight of feminist theory of the last decade has been that women are 'essentially connected', not 'essentially separate', from the rest of human life, both materially, through pregnancy,

Discrimination against Women (1967), Article 10(2) addressing maternity leave, and the International Covenant on Economic, Social and Cultural Rights (1966), Article 10(2) on protection of mothers and maternity leave. The ILO has also been active in promoting maternity leave.

² IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs), Judgment, Ser. C No. 160, 25 November 2006.

³ N. Levit and R. R. M. Verchick, *Feminist Legal Theory: A Primer* (New York University Press, 2006) at 18.

⁴ M. A. Fineman, *The Neutered Mother, the Sexual Family and other Twentieth-Century Tragedies* (New York: Routledge, 1995) at 12.

⁵ *Ibid.* at 5 and 41.

intercourse, and breast-feeding, and existentially, through the moral and practical life.⁶

The second section of this chapter reviews the debate regarding the concept of maternity within the *Travaux Préparatoires* of the CEDAW, culminating in normative recognition of its social significance. This is followed by a presentation of the Inter-American Court of Human Rights' use of narratives within its jurisprudence to elucidate the scope of women's right to a life's project, including maternity rights, as a means to guarantee human dignity. This chapter argues that motherhood should be viewed as a type of agency to be protected by the state. I juxtapose the approach of the regional court towards acknowledgment of violations affecting maternal identity with academic criticism that seeks to underscore the duty to avoid wrongful gender stereotypes according to Article 5(a) of the CEDAW. My main argument is that the academic criticism is precarious as it ignores the reclamation by women of recognition of their rights from the perspective of difference. In my opinion, there is a tension between Article 5(a) and (b) that merits exploration.⁷ Hence, this chapter complements Cusack's chapter in this volume by addressing dilemmas presented by mischaracterization of wrongful gender stereotyping. The conclusion suggests that the Inter-American human rights system contextualizes the CEDAW's value within the region through its support for holistic recognition of maternity rights.

⁶ R. West, 'Jurisprudence and gender', *U. Chi. L. Rev.* 55:1 (1998) 1–72 at 3.

⁷ M. McCarthy, "Something not to be grasped": notes on equality on the occasion of the twentieth anniversary of *mulieris dignitatem*', *Ave Maria L. Rev.* 8:1 (2009) 121–52 at 123: '(W)hen it comes to the equality of women and men, the unique differences that can be found at the most basic level of the "division of labor" between them, such as the fact that only men can "beget" and only women can ovulate, carry, give birth to, and nurse a child, must be played down. For to possess "more of something" (unequally in the case of commonly held traits, such as physical strength or empathy, for example, or exclusively in the case of certain anatomical features and processes) necessarily suggests diminishment of the other or that something has been "taken away from" the other, thus putting into question his or her equal dignity and worth and unleashing the various envies and fears. Freud's envious female comes to mind, but also the more recently discovered male, driven as he is by "womb envy" and fear. It was not for nothing that the Grand Dame of postmodern "difference feminism," Luce Irigaray, dumped the language of equality altogether when she asked insubordinately, "Equal to whom?"'

2 Recognition of the social significance of maternity within the CEDAW

According to the *Travaux Préparatoires*, the USSR supported the creation of a preamble to underscore the relation between development and women's participation in all areas, from employment to maternity.⁸ With respect to the preamble, Sweden had proposed using the word 'parenthood' instead of 'maternity'. Denmark, Finland, the Netherlands and Norway proposed replacing the 'social significance of maternity' with the 'social significance of child-bearing'.⁹ The final text included both aspects (emphasis added):

Preamble, para. 13:

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, *the social significance of maternity* and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.

As pertaining to Article 5(b), the USSR provided a draft that contained the principles adopted in the final treaty text:

States parties shall adopt all necessary measures with a view to preparing public opinion for the complete eradication of prejudices, customs and all other practices based on the concept of inferiority of women and for recognition of motherhood as a social function.¹⁰

⁸ The UN Declaration on Social Progress and Development (1969), Article 11(b) links protection of mothers to social evolution: 'Social progress and development shall aim at the continuous raising of the material and spiritual standards of living of all members of society, with respect for and in compliance with human rights and fundamental freedoms, through the attainment of the following main goals: the protection of the rights of the mother and the child.' This perspective is upheld by scholars who link the nurture of children to the development of civic participants. L. C. McClain, 'Care as a public value: linking responsibility, resources, and republicanism', *Chi.-Kent L. Rev.* 76 (2000–2001) 1673–732; M. A. Fineman, 'Contract and care', *Chi.-Kent L. Rev.* 76 (2001) 1403–40 at 1408, cited by L. T. Kessler, 'Transgressive caregiving', *Fla. St. U. L. Rev.* 33 (2005) 1–88 at 61.

⁹ L. A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Dordrecht: Martinus Nijhoff, 1993) at 40. See also T. S. Dahl, 'Equal status and birth law' in A. Hellum (ed.), *Birth Law* (Oslo: Scandinavian University Press, 1993) 1–29 at 11, discussing the purpose of birth law as a separate legal field and distinct area of women's law.

¹⁰ Rehof, *supra* note 9 at 79.

It then joined the Philippines with another draft that stated:

The States parties shall adopt all necessary measures with a view to educating public opinion for the complete eradication of prejudices, customs and all other practices based on the concept of women and for the recognition that the protection of motherhood is a common interest of the entire society which should bear responsibility for it.¹¹

There were diverging opinions, as the Federal Republic of Germany and Portugal supported the mention of society's interest in protecting motherhood, while Norway was concerned that this wording would bind women to that role too closely. The UK found this language to be vague and that it might relate to social policy beyond the Convention. The World Health Organization (WHO) preferred wording that expressed motherhood to be of common interest to the entire society (rather than referring to protection). Denmark found the language to be outmoded, while Mexico was of the view that governments should recognize that protection of motherhood was a common obligation of society. The USA objected to the term 'motherhood' as it was discriminatory against men and contrary to US law. Finally, the Working Group replaced it by consensus with the term 'maternity'.¹² The final language of Article 5(b) in the CEDAW is reflective of cultural feminism that seeks positive valuation of feminine roles:¹³

The States parties shall take all appropriate measures:

- (b) To ensure that family education includes a proper understanding of *maternity as a social function* and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases [emphasis added].

R. C. Preston and R. Z. Ahrens highlight the key components of cultural feminism on normative development:

While the male conception of self is that of an autonomous individual, female self-conception is largely connected to the world and others.

¹¹ *Ibid.*

¹² However, Morocco did not consider maternity to have a social function.

¹³ For an example of cultural feminism, see C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982). 'Women's concept of value revolves not around the axis of autonomy, individuality, justice and rights, as does men's, but instead around the axis of intimacy, nurturance, community, responsibility and care'. West, *supra* note 6 at 2.

Cultural Feminism's goal does not lie in merely identifying the unique traits of women – traditional patriarchy has already done that – but in celebrating them and recognizing them as strengths. Cultural Feminists argue that these traits and characteristics are not only important but must be taken into account in order for women to enjoy full equality. Further, they recognize that true equality may entail the recognition of human rights that are directed solely at women. They are concerned with protecting and fostering the female experience.¹⁴

In spite of the incorporation of specific language affirming the value of maternity within the CEDAW, it may be argued that the concept of maternity as a fulfilling experience for women has received insufficient attention within parts of feminist literature. In contrast, within Africa, Asia and Latin America perceptions of motherhood as a guarantor of status within society prompt feminist voices from these regions to value recognition of difference over notions of equality:

The importance of motherhood and the valuation of the childbearing capacity by African women is probably the most fundamental difference between the African woman and her Western counterpart in their struggle to end discrimination against women. For African women, the role of mother is often central and has intrinsic value.¹⁵

Unlike feminist movements in the US and Europe, women's activism in Latin America never fully and enthusiastically embraced 'equality feminism'. This may be the result of identification of women with their family responsibilities and motherhood as a still essential female role.¹⁶

In this chapter 'maternity' is used interchangeably with 'motherhood' and 'maternal identity', as these terms all focus on the state of being a mother, as well as the characteristics, feelings and qualities associated with this connective experience. One of the most promising vehicles for recognizing difference is the use of narratives, which is discussed in the next section.

¹⁴ R. C. Preston and Ronald Z. Ahrens, 'United Nations Convention documents in light of feminist theory', *Mich. J. Gender and L.* 8 (2001) 1–44 at 9.

¹⁵ F. Chioma Steady, 'The Black Woman cross-culturally: an overview' in F. Chioma Steady (ed.), *The Black Woman Cross-Culturally* (Rochester, VT: Schenkman Books, 1981) 7–41 at 34–5.

¹⁶ See J. P. Bruno, 'Third-world critiques of Western feminist theory in the post development era', paper posted 2006.

3 The use of narrative in human rights

As noted by J. S. Peters, narrative can serve as a form of redress and has an independent legal–political function.¹⁷ As ‘narrative truth’ it gives voice to individual subjective experience as a legitimate source of truth with claims to rights and justice, restoring dignity and providing closure to the victim and community. L. Goodmark also states:

Proponents of narrative legal scholarship also stress how narratives bring the voices of those traditionally deprived of power within the legal system to the forefront. Arguing that while it may appear neutral, the law itself is a story, structured around narratives developed by the powerful, proponents of narrative theory offer alternative narratives to illustrate the ways that the law excludes these voices and advocate for the need to reform the law to address ‘outsider’ voices. Narratives help to create common ground, allowing individuals to understand and empathize with the experiences of individuals and groups who are, or seem to be, different. Narratives can bridge the gap between the abstractions of the law and the individual experiences of the humans involved in legal proceedings.¹⁸

Narratives evolved within the customary traditions of all peoples, and have been recognized in Africa and the Americas as forms of conflict resolution and peace building. In the modern period they have been used in the context of claims rooted in oppression based on race and/or gender.¹⁹ They appear in reports addressing domestic violence, detention, war crimes and so on, in order to promote law reform and as *amici curiae* in national and international forums. In particular, they have been instrumental in international criminal tribunals and formed part of national healing processes conducted via truth commissions. Additionally, they form a central part of refugee status determination. Feminist legal critics have used narrative to highlight institutionalized injustice, and intersectional feminists and third-wave feminist legal theorists use narrative as a form of discourse.²⁰ The narrative seeks to dismantle exclusionary,

¹⁷ J. S. Peters “‘Literature’, the “rights of man” and narratives of atrocity: historical backgrounds to the culture of testimony’, *Yale J.L. and Human.* 17 (2005) 253–84 at 253–4.

¹⁸ L. Goodmark, ‘Telling stories, saving lives: the Battered Mothers’ Testimony Project, women’s narratives, and court reform’, *Bepress Legal Series*, paper nr. 517 (2005), available at: <http://law.bepress.com/cgi/viewcontent.cgi?article=2578&context=expresso> (last accessed 5 February 2013).

¹⁹ See J. C. Murphy, ‘Lawyering for social change: the power of the narrative in domestic violence law reform’, *Hofstra L. Rev.* 21:4 (1993) 1243–93.

²⁰ See D. L. Rhode, ‘Feminist critical theories’, *Stan. L. Rev.* 42 (1989–1990) 617–38 at 621. On intersectional feminist theory, see P. J. Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991); E. V. Spelman, *Inessential Woman:*

hierarchical tendencies within law and promote holistic recognition of protection rights of persons subject to discrimination by relating personal experiences. Its use in forums addressing human rights serves to develop our understanding of norms within contextual situations, thereby constituting an important component in the emancipative aspiration of identifying new protection dimensions. In short, it is a mechanism to provide restorative justice through recognition. Berta Hernández-Truyol advocates participation of women's voices in inquiry processes in order to ensure that their rights are respected:

The common thread of each inquiry, of course, is to make women visible and raise their voices so that their needs are met and their rights are respected and fulfilled worldwide. In this regard, there has to be an acceptance that in order to raise women's voices a discursive process of communication that includes women is necessary. Regardless of who the ultimate decision-maker is, the process must include and integrate the views of those who are the subjects and the objects of the process, from whom expectations are being generated by the process.²¹

Foster, Haupt and de Beer describe narrative as providing 'inter-subjective understanding' as opposed to prediction and control provided by delineating facts.²²

The victims in the cases I will discuss include women held within detention centres in Peru and identified by the state as being linked to the Shining Path, who have been silenced by their isolation from general society. It may be argued that the state's classification of them as linked to terrorism renders them particularly vulnerable, indicating an increased need for empathy from those determining their claims of reparation in the event of violations.²³

The Inter-American Court of Human Rights utilizes quasi-narrative or third-person narrative, along with narrative to enable holistic analysis of the protection interest of human rights victims. The Court has sought to

Problems of Exclusion in Feminist Thought (Boston, MA: Beacon Press, 1988) at 133–59. On third-wave feminist theory see R. Dicker and A. Piepmeier (eds.), *Catching A Wave: Reclaiming Feminism for the 21st Century* (Boston, MA: Northeastern University Press, 2003), which calls for recognition of feminine roles such as motherhood.

²¹ B. E. Hernández-Truyol, 'Out of the shadows: traversing the imaginary of sameness, difference, and relationalism – a human rights proposal', *Wis. Women's L.J.* 17 (2002) 111–62.

²² D. Foster, P. Haupt and M. de Beer, *Theatre of Violence: Narratives of Protagonists in the South African Conflict* (Cape Town: HSRC Press, 2005).

²³ K. Schaffer and S. Smith, *Human Rights and Narrated Lives: The Ethics of Recognition* (New York: Palgrave MacMillan, 2004) at 1.

develop normatively the scope of non-discrimination, which it declared to be a *jus cogens* norm in its *Advisory Opinion on Undocumented Migrants*.²⁴ It uses narratives to flesh out our understanding of non-discrimination and the scope of harm to marginalized groups, such as indigenous people and women.²⁵ In the case of victims asserting violations against maternal identity, this methodology may be considered to enable a progressive discussion of how to approach this issue from the perspective of human rights recognition and reparation. As we shall explore, by using the narrative the Inter-American Court of Human Rights is able to expand our understanding of human dignity and maternity.

4 Recognition of violation of a woman's life plan

Cook and Cusack define harm as 'denial of recognition of individual dignity and worth ("recognition effects")'.²⁶ They cite the Inter-American Commission on Human Rights' view in the *Morales de Sierra* case.²⁷ The Commission notes that the right to honour and dignity (as guaranteed in the American Convention on Human Rights (ACHR)) embodies a number of elements related to the dignity of the individual, 'including for example, the ability to pursue the development of one's personality and aspirations, determine one's identity, and define one's personal relationships'.²⁸ The Inter-American Court is at the forefront in enunciating recognition of a violation of one's 'life plan' as regards human rights victims, in particular women.

The case of *Loayza Tamayo v. Peru* involved a female university professor who was detained, raped and tortured by state agents. Her life was radically changed after the abuse: she gave up her studies, moved abroad, suffered deep depression and chronic post-traumatic stress disorder. Her ability to fulfil her ambitions was devastated and her options in life were severely limited. From a transcendental perspective, her personal aspirations were destroyed and in this manner her very sense of self was

²⁴ IACtHR, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, 17 September 2003.

²⁵ IACtHR, *Awas Tingi v. Nicaragua*, Judgment 31 August 2001, Series C No. 79.

²⁶ Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, (Philadelphia: University of Pennsylvania, 2010) at 59.

²⁷ IACommHR, *Maria Eugenia Morales de Sierra*, Case 11.625, Report no. 4/01, Guatemala (19 January 2001).

²⁸ *Ibid.* at 66.

permanently altered. The Court summarized the narrative she provided in testimony, noting:

In this sense, the victim's testimony has unique import, as she is the one who can provide the most information concerning the consequences of the wrongful acts of which she was the victim.²⁹

The victim petitioned the Court for compensation on account of damage to the life plan. Judges Cançado Trindade and Abreu-Burelli highlighted the concept of providing reparation from the *perspective of the victim*, in light of his or her needs, aspirations and claims. The Court determined that these actions had long-term effects in that they inhibited the fulfilment of the woman's potential and goals (personal and professional), which could be considered an important manifestation of freedom. The Court held the state responsible for failing to prevent the violations, and in that manner highlighted a breach of the social contract of which the natural consequence is the 'self-imposed' exile of the victim. The narrative is thus a third-person narrative, in which the Court expresses recognition of the violation (adopting the language offered by the victim's lawyer in terms of elucidating the components of the life's plan):

152. It is obvious that the violations committed against the victim in the instant Case prevented her from achieving her goals for personal and professional growth, goals that would have been feasible under normal circumstances. Those violations caused irreparable damage to her life, forcing her to interrupt her studies and to take up life in a foreign country far from the context in which her life had been evolving, in a state of solitude, poverty, and severe physical and psychological distress. Obviously this combination of circumstances, directly attributable to the violations that this Court examined, has seriously and probably irreparably altered the life of Ms. Loayza-Tamayo, and has prevented her from achieving the personal, family and professional goals that she had reasonably set for herself.

What is important to recognize is that the Court is very clear in highlighting the individual harm suffered and personal experience, hence avoiding essentialist argumentation. The next section reviews the relationship between maternal identity and one's life plan.

²⁹ IACtHR, *Loayza Tamayo*, Reparations, Judgment 27 November 1998, Series C. No. 42, para. 73.

5 Recognition of maternity rights and life plan

The Inter-American Court of Human Rights developed its recognition of an individual's life plan as intrinsic to maintenance of human dignity within the context of maternal identity in the case of *Miguel Castro-Castro Prison v. Peru*.³⁰ This case involved a military attack on a prison, resulting in injury of 175 inmates, the death of 42 persons, and cruel, inhuman treatment of 322 inmates. The Court found violations of the American Convention concerning rights to life (Article 4), humane treatment (Article 5), fair trial (Article 8), judicial protection (Article 25 ACHR, and Article 7b of the Belém Convention), and of the Inter-American Convention to Prevent and Punish Torture (Articles 1, 6 and 8). The decision contains a rich collection of narratives of victims, witnesses, and experts on torture and psychology, all highlighting maternal dimensions related to harm experienced.

One may suggest that although the concept of maternity appears intertwined with human rights, our understanding of its protection dimensions have been limited. Consider the following definition:

Maternity or motherhood is the social and legal acknowledgment of the parental relationship between a mother and her child. It is specially related with the protection of the baby and the mother within and after childbirth.³¹

Although this definition appears to focus on the bond between a woman and her infant, the Inter-American human rights system has developed a more expansive view of maternity, one in which the bond extends throughout the child's maturation and death.

The Court cited the CEDAW Committee's General Recommendation No. 19 on 'violence against women' in order to ground its analysis of the violation of sexual rape (in the form of vaginal examinations) amounting to torture, and forced nudity amounting to sexual violence in violation of the right to humane treatment.³² In addition, the Court highlighted violations against mothers, specifically:

³⁰ IACtHR, Merits, Reparations and Costs, Judgment 25 November 2006, Ser. C. No. 160.

³¹ See: www.absoluteastronomy.com/topics/Maternity (last accessed 22 October 2010) (emphasis in original).

³² Paras. 303–313.

1. Denial of prenatal and postnatal care for pregnant women in the detention centre,
2. Violations against next of kin and solitary confinement of inmates that rendered communication with their children impossible and caused psychological suffering.³³

Judge Cancado Trindade highlighted particular harm imposed related to maternal identity:

1. Timing of the attack so that the search for the bodies in the morgue by the next of kin coincided with Mother's Day imposed additional suffering,
2. Denial of life plans as some women were unable to become mothers due to the lengthy pursuit of justice.

This decision received criticism in the form of an academic article authored by P. P. Zuloga. Her core argument was that the Inter-American Court of Human Rights reinforced Latin American social stereotypes of women by recognizing violations of maternal identity.³⁴ She approved of the Court's recognition of sexual violence and rape as violations meriting compensation.³⁵ Indeed, recognition of sexual violence and rape as violations of international law meriting prosecution has been a primary focus of the Northern/Western feminist movement, culminating in case law within the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as adoption of UN Security Council Resolutions 1325 and 1820.³⁶ In some respects it may be suggested that the focus on attaining prosecution of rape may have resulted in less attention being paid to other protection aspects relevant to women, including those linked to maternal identity. Zuloga recognized that the attack deliberately intended to demoralize the Shining Path by targeting the women's wing of the

³³ Paras. 330, 333 and 342.

³⁴ P. P. Zuloga, 'The path to gender justice in the Inter-American Court of Human Rights', 17 *Tex. J. Women and L.* 17 (2007–2008) 227–96.

³⁵ The Inter-American Court issued three decisions afterwards addressing sexual violence: *Case of González et al. ('Cotton Field') v. Mexico*, Judgment, Series C No. 205 (16 November 2009) (addressing gender stereotyping as well); *Case of Fernández Ortega and Others v. Mexico* (Preliminary Objections, Merits, Reparations and Costs), Judgment, Series C No. 215 (20 August 2010); *Case of Rosendo Cantú and Others* (Preliminary Objections, Merits, Reparations and Costs), Judgment, Series C No. 216 (31 August 2010).

³⁶ See: www.un.org/Docs/sc/unscl_resolutions08.htm (last accessed 5 February 2013). See C. MacKinnon, 'Defining rape internationally: a comment on Akayasu', *Colum. J. Transnat'l L.* 44:3 (2006) at 940.

prison on women's visiting day, with the search for bodies occurring on Mother's Day. Moreover, she admitted that the victims specifically requested the Court to find the violations against mothers to be particularly severe. Nevertheless, she was suspect of Judge Cançado Trindade's characterization of maternity as being sacred and requiring special care, respect and acknowledgement. Zuloga's scepticism is in keeping with the classic equality feminist criticism against typology of the mother as one who 'needs "protection" during times of both war and peace and is more an object than a subject of international law'.³⁷ This depiction prompted many feminists to reject maternity as a value, given the consequences of marginalization.³⁸

It is of concern that the perception of the protection accorded to women is deemed to be related to a lack of agency, or passivity, instead of considering that protection may be accorded in reward of agency, a duty owed by the state or society towards individuals who have imparted a benefit via care and formation of future generations. Otto cites with concern the protective representation of mothers in Article 25 of the Universal Declaration of Human Rights: 'Motherhood and childhood are entitled to special care and assistance.'³⁹ She further calls for replacing the 'injured subjectivities produced by human rights law with subjects who have agency to struggle for rights. Such a reinvention also requires fully accepting the constructed and fluid nature of gender differences.'⁴⁰

I argue that there is a need to revise this rhetorical description and its underlying assumptions. Motherhood must be recharacterized as a form of agency, and the provision of protection is a duty by the state owed to mothers, not on account of their passivity/helplessness, but rather precisely on account of their actions as mothers. As pointed out by Martha Fineman:

³⁷ D. Otto, 'Disconcerting "masculinities": reinventing the gendered subject(s) of international human rights law' in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford and Portland, OR: Hart, 2005) 105–30 at 106.

³⁸ See M. Chamallas, *Introduction to Feminist Legal Theory* (New York: Aspen, 2003) at 16: 'Equality theorists argued that protection through the law was harmful to women because it served to restrict women's lives to the home and family.'

³⁹ *Ibid.* at 113. The UN Declaration on Human Rights (1948), Article 25(2) on care and assistance to mothers (this was proposed by India's delegate and met with no opposition). See A. Eide, 'Article 25' in A. Eide, G. Alfredsson, G. Melander, L. Adam Rehof and A. Rosas (eds.), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992). See also the International Covenant on Economic, Social and Cultural Rights, Article 10(2): special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

⁴⁰ Otto, *supra* note 37 at 128.

most mothers do not experience motherhood as 'oppressive' ... Mother has been neutered in several senses. She is taken out of contexts. In policy discussions, just as she is de-gendered, Mother is also de-raced and de-classed. Mother is treated as though she has no ethnic or cultural community that helps to define her. Equality makes Mother an empty legal category, robbing real-life mothers of the protection of their specificity. This neutering happens in the context of a racist and misogynist culture that paradoxically fills the neutered Mother with idealized and demonized contents.⁴¹

Indeed, human rights have been defined as protections of minimal aspects of agency or autonomy, and it is in this light that the concept of maternity, which implies human action, responsibility and intimacy, needs to be interpreted.⁴²

Judge Cançado Trindade invoked the narrative of one of the victims in order to ground the finding of a violation, thereby confirming Schaffer and Smith's observation that this methodology is 'one of the most potent vehicles for advancing human rights claims'.⁴³ This process creates an international space for personal testimony that highlights the maternal dimensions of the violation. It is important to note that the victim herself chooses to present this perception of violation; it was not imposed upon her by the Court. Because narratives may be used to identify 'disjunction between the values espoused by the community and the actual practices that occur',⁴⁴ the testimony of violations related to maternal rights is particularly significant within a Latin American culture that traditionally sanctifies the role of the mother.

Zuloga criticized the cultural dimensions of the maternal role as being linked to gender stereotypes that should not be promoted within the international human rights regime. In contrast, I argue that this perspective inappropriately negates protection rights linked to biological/social difference. Social norms oriented towards protection and honour of mothers need not only be viewed as a negative, but rather may also

⁴¹ Fineman, *supra* note 4 at 53 and 67. She adds: 'There is a need for the development of theoretical language to express women's experiences so as not to alienate women who live some aspects of traditional lives.'

⁴² In comparison, within the field of international humanitarian law, medical and religious personnel are granted special protection on account of their agency, as are soldiers placed *hors de combat* or taken as prisoners of war. The crucial consideration is that the identification of a duty of care towards them is not considered to objectify the soldiers.

⁴³ Schaffer and Smith, *Human Rights and Narrated Lives* at 1.

⁴⁴ Fineman, *supra* note 4 at 72.

indicate positive protection elements that seek to uphold human dignity, instead of repressing it.

Judge Cançado Trindade argued that his approach pursues precisely a gender analysis and includes the narrative of a mother to highlight the importance of recognition of violation related to maternal identity. In his view, non-discrimination requires recognition of difference in order to provide protection:

58. The present case cannot be adequately examined without a gender analysis. Remember that, as a first step, the United Nations Convention of the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) advanced on a holistic vision of the matter, tackling women's rights in all areas of life and in all situations (in fact, I would even add in the light of the *cas d'espèce*, in the deprivation of freedom); the Convention cries out for the modification of socio-cultural patterns of behavior (Article 5) and highlights the principle of equality and non-discrimination.
62. There was then the extreme violence in the experience itself of maternity, when facing the brutality perpetrated against their children. In the aforementioned public hearing before this Court in the present case of the Castro Castro Prison, a mother (Mrs. Julia Peña Castillo), a witness in the case, described it with eloquence:

(...) On June 06, 1992, who speaks is the mother of many children (...), (...) my mother's instinct was more than for the house, for more than just cooking, I left everything behind (...). When I arrived there [at Castro Castro] there was more than just the press, (...) there were many soldiers, there were trucks going in and others coming out, (...) there I started screaming, (...) screaming and saying: – 'what are you doing, my children my children'! It was the first thing reflected in my words, my children. (...)

(...) There many of us mothers hugged, we hugged strongly because the roars of the cannon reached out hearts. Each roar represented a very strong pain because you could see the splinters flying from the pavilions. (...) There was a mother next to me, I hugged her and she told me 'my daughter is alive, my daughter is alive' (...). Hearing her got me very excited. Later that day the situation was worse, you could no longer hear voices, just shots fired from what sounded like a machine gun or a long weapon (...), you could hear it and then it would stop, and then on the other side again. (...) The gunshots continued. We stayed there all night, we did not know anything, who was dead, who was injured, how many had died, nothing because they did not give us any information. Even the police officers that came out (...). They did not give us any type of information (...). (...) They were not interested.

63. In even another dimension, many of the women who survived the bombing of the Prison of Castro Castro – as has been stated in this Concurring Opinion (para. 13, *supra*) – have not been able to be mothers yet, since, as stated in the public hearing in the cas d'espèce before this Court, they have since then used all their existential time in searching for truth and justice. Thus, we are facing here a maternity that has been denied or postponed (a damage to a life project), forced upon them by the cruel circumstances, as claimed with all pertinence by the common intervener of the representatives of the victims and their next of kin (*supra*) [internal citations omitted].

It is essential to note that the claim of denial of the possibility to become mothers is raised by the applicants in the hearing, not imposed upon them by the Court. The Court recognized their claim, in keeping with prior case law addressing the life project as an element of reparation. The applicants' request for recognition of violation of fulfilment of an aspect of their personal life's project (motherhood) should not be invalidated because the concept of motherhood as a woman's natural role and destiny may be considered a stereotype.⁴⁵ Whereas the *Loayza Tamayo* case addressed the combined violation of personal and professional goals of a female university professor, in this case the applicants specifically identify the personal goal of motherhood as the goal interfered with. It is a reflexive recognition that provides equal protection through its recognition of difference.

6 Misdiagnosis of wrongful gender stereotypes

Cook and Cusack provide us with a definition of wrongful gender stereotypes and explain their scope, with arguments that mirror the Inter-American Court's identification of the right to a life plan:

A gender stereotype can harm women when it diminishes their dignity as human beings ... A gender stereotype infringes women's dignity when it fails to recognize their intrinsic and equal worth as human beings or when, for example, it treats them in ways that do not take into account their actual situations ... When a gender stereotype fails to respect the basic choices women have made (or would like to make) about their own lives, when it interferes with their ability to shape, or carve out, their own identities, when it lowers expectations of them, or, for example, negatively impacts their sense of self, goals, and/or life plans, it degrades them. The

⁴⁵ On the notion of motherhood as a stereotype, see Cook and Cusack *supra* note 26 at 11.

gender stereotype constricts women's identities, meaning that it prevents women from defining and presenting themselves as they would like. Instead, women have been publicly defined or presented in the manner of another's choosing, and their ability to shape their own identities and direct their lives according to their own values, priorities, and aspirations has been denied.⁴⁶

Cook and Cusack call for treating women according to their diverse individual needs, abilities, priorities and circumstances.⁴⁷ Nevertheless, they caution against the assignation of difference for 'benign purposes/benevolent paternalism' and the prescription of roles. This confirms a bias towards traditional equality values over difference perspectives. The Inter-American Court sought to provide reparation for violation of life plans and addressed gender-related violations by the state. It sought to restore human dignity and thus justified its recognition of maternal identity as meriting protection and reparation. The Court's identification of harms related to maternal identity appears legitimate, proportionate and reasonable as it seeks to redress targeting of mothers/women. It appears that the Court sought to pursue recognition of the victims according to individual circumstances. In *Miguel Castro-Castro Prison v. Peru* the recognition of motherhood as an aspiration (life plan/personal goal/life choice/shaping of identity one would like to make) meriting recognition grants the benefit of compensation, and does not impose a burden on women. It seeks to uphold dignity, not to degrade or marginalize them or prescribe an identity that is contrary to their life plans. It should be noted that this case appears to build upon the Court's prior jurisprudence setting forth the state's duty to guarantee human dignity in life involving indigenous people and minors.⁴⁸

Judge Cançado Trindade explicitly noted that the victims and their families made normative reference to the Convention of Belém do Pará, rather than the Commission, thereby enabling the Court to make a gender analysis of the violations:

68. In the legal proceedings (in both the written and oral stages) before this Court, it was the representation of the victims and their next of kin, and not the Commission, who insisted on relating the protection norms of the Convention of Belém do Pará (specifically its Articles 4

⁴⁶ Cook and Cusack, *supra* note 26 at 64–5. See also Cusack's chapter in this volume, describing wrongful gender stereotyping as resulting in discrimination or leading to violations of other rights and freedoms.

⁴⁷ Cook and Cusack *supra* note 26 at 173.

⁴⁸ IACtHR, *Sawhoyamaya Case v. Paraguay* (2006), *Villagran Morales/the Street Children Case v. Guatemala* (1999), and the *Juvenile Reeducation Case v. Paraguay* (2004).

and 7) with the violations to the American Convention on Human Rights. This exercise comes to attend the necessary gender analysis in the present case. Article 4 of the Convention of Belém do Pará states that 'every woman' has the right to 'recognition, enjoyment, exercise, and protection' of all the human rights enshrined in international instruments on the matter, among which it expressly mentioned the rights to life, humane treatment, to not be submitted to tortures, to respect to 'the inherent dignity of her person'.

69. And, through Article 7 of the Convention of 1994, the States Parties agree to pursue a series of measures to 'prevent, investigate, punish, and eradicate' the different forms of violence against women. In the present case of the Castro Castro Prison, where, for the first time in the history of this Court, the gender analysis is set forth – to my satisfaction as a Judge – by the representatives of the victims themselves and their next of kin (and not by the Commission) as the true plaintiff before the Court and as subjects of International Law, the human rights of women have been violated with special cruelty, constituting the aggravated international responsibility of the Respondent government [internal citations omitted].

It is hard to reconcile Zuloga's demand that the Court explicitly recognize gender-specific forms of violations in the form of rape and sexual violence but negate its explicit recognition of gender-related violations that relate to maternal identity. It may be contended that Zuloga has a 'carnal bias' within her interpretation of human rights, one which prioritizes sexual autonomy over maternal identity. Article 1 of the UN Declaration on the Elimination of Violence against Women (1993) defines violence against women as going beyond physical elements: 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'. In like manner, the definition contained in Article 1 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women also recognizes mental harm:

For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

The danger of accepting Zuloga's argument is that it pursues a singular approach to protection, the consequence of which is contempt or denial of recognition of a particular experience of harm, which in this case was claimed by a distinct group of women. In effect, this position calls upon

us to silence, ignore or render invisible the voices of mothers because their perceptions of harm are misconceived as falling outside of the accepted paradigm of gender protection. There is a need to reconceive the gendered identity of mother in a positive manner. Zuloga concludes by advocating the espousal of a sex discrimination approach as opposed to a particular, gender-based approach:

the Court made enormous strides when it took on the issue of gendered violence in *Plan de Sanchez* and in *Castro Castro*, but [that] it erred when it endorsed the same stereotype used to victimize women and men in this cases. There are enough objective facts in this case to conclude that there was enhanced suffering of certain victims in the *Castro Castro* case because of their undeniably close relationship to other victims, especially those who were parents of the victims. It is not only reasonable but also necessary for a human rights court to recognize that the victims of the *Castro Castro* massacre, men and women, were maliciously targeted with a social stereotype that heightened their suffering based on their sex. This approach entails necessarily finding that the state also violated the right to equality of the victims. To rule that sex discrimination was the basis of the treatment that the victims received is very different from an essentialist ruling that a mother's pain or a woman's pain is worse because they are mothers and women. This finding was entirely possible in *Castro Castro* without jeopardizing the examination of the case with a gendered lens; to see women and men as such, recognizing their particular circumstances without reducing them to their social stereotypes would have made this case the remarkable, positive precedent that it deserves to be.⁴⁹

This rhetoric establishes distinct constructs of categories for protection, under the guise of pursuing a 'universal' theory, which in effect neglects difference in variation within the experience of harm.⁵⁰

In my opinion, maternal identity can be as important as sexual autonomy in the definition of a woman's life. To emphasize one aspect of female experience as legitimate for human rights protection but not the other appears unsound, biased and fallacious. One may turn to Refugee Law for relevant elucidation of this point. Consider this case from the Immigration and Refugee Board of Canada addressing whether asylum should be granted to the mother of an illegitimate child in China:

The panel referred to a decision of the German Federal Administrative Court where that Court found that '[i]n general, a threat to life, limb

⁴⁹ Zuloga, *supra* note 34.

⁵⁰ See M. Malik, 'Feminism and its "other": female autonomy in an age of "difference"', *Cardozo L. Rev.* 30 (2008–2009) 2613–28 at 2616.

or freedom of one spouse also poses a threat to the marriage and thus ... a hardship for the other spouse'. The Canadian Refugee Board panel member concluded: In my opinion, the principle which the German administrative court enunciated in respect to spouses, is more persuasive in respect to a relationship between a mother and a child, particularly a child of tender years. The hardship for the parent of a child being persecuted may be even more poignantly felt by a mother than would the hardship which is felt by one spouse when the other spouse is persecuted ... The panel found the claimant to be a Convention refugee.⁵¹

In fact, infliction of severe pain or suffering upon a family member as means of extracting information, intimidating or punishing a person is also specifically recognized as a form of torture. Returning to the Inter-American Court case, although one may argue that a father's pain over the loss of a child may be equivalent to that of a mother, it is undeniable that the strategic decision to launch an attack so that the parents would have to search for the bodies on Mother's Day would have a particular impact on mothers. This concept is derived directly from the victims' testimonies:

64. And, in the dimension of the after-life, the experience of maternity has also been seriously affected. It has been well illustrated in the desperate search, in the morgues, by the victims' next of kin, of the remains of the inmates who died in the armed attack against the Prison of Castro Castro, and the indifference of the state authorities. As stated by the Court in the present Judgment,

(...) The testimonies included in the body of evidence coincide when they state that an additional element of suffering was the fact of being [the mothers and next of kin] in that situation of uncertainty and despair on 'Mother's Day' (Sunday May 10, 1992) (para. 338).

Judge Cançado Trindade seeks to expand the range of apperception of harm into the transcendental realm of human experience. Relationships between family members are recognized as composing a fundamental aspect of human identity. They have a distinct value and merit reparation when violation is pursued with the intention of exploiting the relationship to magnify the scope of harm. Maternal identity is formed *within* the intimate connection between mother and child, and when that attachment is brutally violated, mothers may demand recognition of this particular form of harm.⁵² Indeed, Robin West suggests:

⁵¹ CRDD V91-00998, Groos, Robles, 15 November 1991.

⁵² Gilligan, *supra* note 13 at 159, cited by West, *supra* note 6 at 18. West characterizes separation as the official harm of cultural feminism (at 19, 28, 60-6, 65): 'Women's concept of harm revolves not around a fear of annihilation by the other but around a fear of

Put phenomenologically, instead of narratively, feminist legal theorists need to show through stories the value of intimacy – not just to women, but to the community – and the damage done – again, not just to women, but to the community – by the law’s refusal to reflect that value.⁵³

Within its jurisprudence, the Court has developed various dimensions of what may be considered to fall within a scope of harm to maternal identity akin to West’s ‘connection thesis’. For example, one may consider the *Case of Cantoral Huamani and García Santa Cruz v. Peru* (2007), in which the Inter-American Court cites the psychologist’s report noting the impact of the loss of the father of the family, which meant that the mother had to work on Christmas Day and Mother’s Day, leaving the children alone. One may also consider the *Case of González et al. (‘Cotton Field’) v. Mexico* (2009) in which the Court cites the narratives of mothers reflecting on their need for the truth after the disappearance of their daughters in Ciudad Juárez, Mexico, and the psychological damage experienced as a result of the lack of response by the authorities.⁵⁴ Similarly, the UN Human Rights Committee recognized the liability of the state for violation of Article 7’s prohibition of torture and cruel, inhuman or degrading treatment or punishment with respect to the anguish and stress caused to the mother of a woman who was disappeared and the uncertainty concerning her fate and whereabouts.⁵⁵ It found violation of the same Article in two other cases in which mothers were denied information regarding the date of execution of their sons, access to the body for burial and location of the burial site, thereby subjecting them to a state of uncertainty and mental distress amounting to inhuman treatment.⁵⁶ The identification of maternal identity as a central element of a particular woman’s life project is intended to uphold her human dignity rather than diminish it,

separation and isolation from the human community on which she depends, and which is dependent upon her ... Women have, from law’s inception, lacked the power to make law protect, value, or seriously regard our experience ... a legal system which fails to value intimacy, fails to protect against separation ... feminist legal theorists need to show through stories the value of intimacy – not just to women, but to the community – and the damage done – again, not just to women, but to the community – by the law’s refusal to reflect that value.’

⁵³ West, *supra* note 6 at 65.

⁵⁴ Paras. 413–24. See also IACtHR, *La Cantuta v. Peru*, Judgment, Series C No. 162, 29 November 2006, para. 125.

⁵⁵ UN Human Rights Committee, *Quinteros v. Uruguay*, Communication No. 107/1981 (21 July 1983) para. 14.

⁵⁶ UN Human Rights Committee, *Banderenko v. Belarus*, Comm. No. 886/1999 para. 10, CCPR/C/77/D/886/1999 (3 April 2003) and *Lyashkevich v. Belarus*, Comm. No. 887/1999 para. 9.2 CCPR/C/77/D/887/1999 (3 April 2003). See also *Sarma v. Sri Lanka*, Comm.

and hence should not be considered a harmful gender stereotype. By recognizing narratives elucidating the scope of maternal identity and harm, the Inter-American Court supports the phenomenological evolution of human rights protection towards holistic protection of women. Failure to place sufficient emphasis on narrative evidence may result in denial of protection.⁵⁷

7 Conclusion: in pursuit of international and regional harmonization

In this chapter it is suggested that the Inter-American Court's use of narratives expands upon the foundation established by the CEDAW's recognition of maternity, as a form of agency according to Article 5b, in order to provide more holistic, reflexive protection of related rights meriting recognition and reparation. It may be argued that a finding of violation, accompanied by a narrative in which the victim is permitted to voice in his/her own words his/her personal experience of the scope of harm may be more in keeping with the notion of having a judgment serve as part of reparation. The narrative serves to avoid generalizations or gender stereotypes, as the story is about an individual. This permits recognition that not all persons belonging to a particular category may identify with a scope of harm that is defined by the expression of personal experience. The benefits of recognition of maternal identity are made evident by consideration of consequences related to non-recognition of maternal violations, for example the risk of radicalization and further oppression, such as the prosecution of the mothers of the victims of the massacre at Beslan.⁵⁸ They were prosecuted as extremists in Russia due to their attempt to pursue assignation of state responsibility within the court system. It

No. 950/2000, CCPR/C/78/D/950/2000 (16 July 2003) in which the state is found to have violated Article 7 in relation to both the father and the mother of a man who was disappeared. One may consider that it is recognized that torture or inhuman or degrading treatment may be the consequence of psychological harm (not only physical harm).

⁵⁷ One may consider the dissent in the case of *Zhen Zhen Zheng v. The Netherlands*, Communication No. 15/2007, CEDAW/C/42/D/15/2007 (26 October 2009). CEDAW Committee members Mary Shanti Dairiam, Violeta Neubauer and Silvia Pimental highlighted interviews and reports in which the woman described being subjected to forced sex, rape, detention, as well as previous hardship endured as an illiterate, poor orphan. They utilized this material to contradict the majority's dismissal of the claim. Their conclusion indicated that the narratives revealed that she had been a victim of trafficking, thereby meriting protection from the state.

⁵⁸ See <http://siberianlight.net/mothers-of-beslan-victims-charged-with-extremism/> (last accessed 5 February 2013).

is important to recognize that the enunciation of maternal demands for the right to truth and justice with respect to the disappearance of their children by the Mothers of the Plaza de Mayo in Argentina was considered to form part of the foundation of the modern human rights era, as it launched transnational response networks. It would be ironic if recognition of harm related to motherhood was later described as inappropriate within the context of human rights and mischaracterized as a wrongful gender stereotype.

Because the CEDAW Committee has yet to address a case involving Article 5(b), there is imbalance within the jurisprudence, which places emphasis on equality rather than difference. The relevance of the use of narratives by the Inter-American Court is that it highlights the way in which the CEDAW may be further interpreted in order to achieve its aspiration of attaining respect for the dignity of all women, including mothers. This chapter highlights the potential for using narratives as a vehicle by which to achieve harmony between the language in Articles 5(a) and (b) of the CEDAW. The Inter-American Court of Human Rights supports recognition of difference as a central element of protection of women's rights. It may be argued that the Court seeks to expand interpretation of the CEDAW in order to apply its standards directly in the regional context.

The majority of Latin American states have ratified the CEDAW and its Protocol. The CEDAW Committee's review of country reports within the Americas primarily focuses on the following issues: harmonization of national legislation with the Convention, monitoring functions, education of the judiciary, implementation of the Convention in federal systems and enforcement in provinces, employment legislation and maternity leave, the situation of indigenous women, discriminatory culture, gender stereotyping within the judiciary, media, educational systems and society, and the importance of reducing maternal mortality, as well as provision of prenatal and postnatal care in urban and rural areas.

Within the Inter-American human rights system, both the Inter-American Court and Commission of Human Rights have produced case law in which women's rights are addressed via reference to substantive and procedural guarantees relating to a state's due diligence duty to prevent, investigate, punish and redress cases in which women have been subjected to violations within the American Convention (or in the alternative, the American Declaration), *inter alia*: the right to humane treatment (Article 5, ACHR), the right to

fair trial (Article 8, ACHR) and the right to due process (Article 25, ACHR).⁵⁹

Moreover, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) serves as an additional source for holding states accountable for failing to investigate cases in which women have been subjected to harm (Article 7b).⁶⁰ This Convention has been ratified by more states than any other convention in the Inter-American system. Nonetheless, the Inter-American Commission has noted that ‘Most cases of violence against women are never formally investigated, prosecuted and punished by the administration of justice systems in the hemisphere.’⁶¹

The CEDAW Committee follows up implementation of regional norms: for example during discussion of Nicaragua’s report, it queried the implementation of the Convention of Belém do Pará; and with respect to Brazil the Committee inquired as to enforcement of an Inter-American

⁵⁹ The Inter-American Court’s cases addressing the protection of women include: *Case of Fernández Ortega and Others v. Mexico* (Preliminary Objections, Merits, Reparations and Costs), Judgment, Series C No. 215 (20 August 2010); *Case of Rosendo Cantú and Others* (Preliminary Objections, Merits, Reparations and Costs), Judgment, Series C No. 216 (31 August 2010); *Case of González et al. (‘Cotton Field’) v. Mexico*, Judgment, Series C No. 205 (2009); *Cantoral-Humani and García-Santa Cruz v. Peru*, Judgment, Series C No. 167 (10 July 2007); *Miguel Castro-Castro Prison v. Peru*, Judgment, Series C No. 160 (25 November 2006); *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, Series C No. 146 (29 March 2006); *Girls Yean and Bosico v. Dominican Republic*, Judgment, Series C No. 130 (8 September 2005); *Molina-Theissen v. Guatemala*, Judgment, Series C No. 106 (4 May 2004); *Plan de Sanchez Massacre v. Guatemala*, Judgment, Series C No. 105 (29 April 2004); *De La Cruz-Flores v. Peru*, Judgment, Series C No. 115 (18 November 2004); *Lori Berenson-Mejia v. Peru*, Judgment, Series C. No. 119 (25 November 2004); and *Maria Elena Loayza-Tamayo v. Peru*, Judgment, Series C No. 33 (17 September 1997). Further the *Yakye Axa Indigenous Community Case v. Paraguay*, Judgment, Series C No. 125 (17 June 2005) highlighted the state’s duty of care to pregnant women. The Inter-American Commission has had several important cases, including: *Maria Merciadri de Morini*, Case 11.307 Report No. 103/01, Argentina (11 October 2001); *Maria Eugenia Morales de Sierra*, Case 11.625, Report No. 4/01, Guatemala (19 January 2001); *Ana, Beatriz, and Celia Gonzalez Perez*, Case 11.565, Report No. 129/99, Mexico (19 November 1999); *Maria Da Penha Maia Fernandes*, Case 12.051 Report No. 54/01, Brazil (16 April 2001); *Jessica Lenahan et al.*, Case 12.626, Report No. 80/11, United States (21 July 2011).

⁶⁰ IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs), Judgment, Ser. C No. 160 (25 November 2006); *Case of Fernández Ortega and Others v. Mexico* (Preliminary Objections, Merits, Reparations and Costs), Judgment, Series C No. 215 (20 August 2010); *Case of Rosendo Cantú and Others* (Preliminary Objections, Merits, Reparations and Costs), Judgment, Series C No. 216 (31 August 2010).

⁶¹ Inter-American Commission of Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II p. viii (20 January 2007).

Commission of Human Rights view, in the case of Maria da Penha Maia Fernandes, calling for prosecution of a perpetrator of domestic violence.⁶² Finally, the Committee conducted an inquiry on gender violence in Ciudad Juárez, Mexico. This produced specific recommendations addressing the state's duty to investigate and punish the perpetrators, complementing recommendations by the Special Rapporteur of the Inter-American Commission on Human Rights.⁶³ The CEDAW Committee supports the Inter-American Human Rights System as a partner in the protection of women's rights. We may be witnessing symbiosis of the systems in providing protection for women's rights.

⁶² UN Committee on the Elimination of Discrimination against Women, *Summary Record: Consideration of Combined Reports Submitted by Brazil*, CEDAW/C/SR.611 (11 July 2003); UN Committee on the Elimination of Discrimination against Women, *Summary Record: Consideration of Sixth Periodic Report of Nicaragua*, CEDAW/C/SR.761 (13 February 2007).

⁶³ UN Committee on the Elimination of Discrimination against Women, *Report on Mexico under Article 8 of the Optional Protocol*, CEDAW/C/2005/OP.8/Mexico (27 January 2005); Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117 (7 March 2003).