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## Bringing it home: the inter-American system and state obligations - using a gender approach regionally to address women's rights violations domestically

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## Bringing it home: the inter-American system and state obligations - using a gender approach regionally to address women's rights violations domestically

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# Bringing it Home: The Inter-American System and State Obligations

*Using a gender approach regionally  
to address women's rights violations domestically<sup>1</sup>*

*"No written law has ever been more binding than unwritten  
custom supported by popular opinion."*

Carrie Chapman Catt, Women's Rights Activist  
[in a speech at the US Senate]

## 1. Introduction

Women's rights violations have the ability to reveal a society's structural inequalities as well as notions of subordination, citizenship and patriarchal customs and traditions. Women's rights are human rights, and it is for this reason that understanding the 'why' behind gender-based human rights violations not only illuminates rights specific to women, but also opens the door for a discussion about the State's role in the protection and promotion of all human rights.

The purpose of this essay is two-fold: first the increasing trend toward dealing with gender issues will be highlighted in the Inter-American system. A brief discussion of four gender-related cases will illustrate a progression on such issues within the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court on Human Rights (Inter-American Court). These cases not only serve to demonstrate a progressive development in women's rights in the regional law, but will also elucidate underlying social issues that have been and remain in place in Latin American countries. The objective of the first part of this research is to examine the connections between the Inter-American system and women's rights and the societal inequalities that have allowed, and continue to cause, the subordination of women.

The thrust of the essay focuses specifically on the relationship between the Inter-American system and the state of Peru with regard to the María Mamérita Mestanza Chávez<sup>2</sup> case. This case is

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unique for several reasons: firstly, it is the only forced sterilization case to have been heard at the Inter-American Commission; secondly, the case not only acknowledges the State's violations of women's rights, but also calls for an end to domestic impunity; thirdly, as of 2009 the State has failed to fully comply with the Commission's recommendations and finally, it raises questions about ideas of progress and modernity in Latin America. This case allows for a critical analysis of not only the connection between the regional system and the obligations of the State, but also State practices and policies that violate women's rights.

For purposes of this essay it is important to understand the motivating factors behind forced sterilization in Peru. In order to provide context for this case a section is dedicated to the examination of Peru's family planning program in the 1990s, as a means of eugenics-influenced population control. Although population control may seem fairly removed from a discussion about gender and regional and state relationships, it is in fact a crucial component in underscoring women's rights in Peruvian society. The analysis of this case will not only illustrate how the Inter-American system and the member State function, but also show how the State's failure to address women's rights can be understood as a conflict between concepts of modernity and progress and deep-seated Latin American traditional and patriarchal customs.

Finally, in an effort to 'bring it home,' domestic implementation of women's rights, or rather a lack thereof, reveals how the state and the Inter-American systems often fail to eliminate impunity for gender-based crimes. It is the goal of this research to clearly establish a connection between traditional viewpoints on women's rights and gender justice at both the State and regional levels.

## 2. The Practice of Gender Justice in the Inter-American System

The Inter-American system's Organization of American States (OAS), which was established in May of 1948, currently has thirty-five<sup>3</sup> member states. It is the regional system which applies the

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<sup>2</sup> María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am. Comm'n H.R., Report N° 66/00, <http://www.cidh.org/women/Peru12.191eng.htm> (2000). María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am, Comm'n H.R., Report 71/03, [www.cidh.org/annualrep/2003eng/peru.12191.htm](http://www.cidh.org/annualrep/2003eng/peru.12191.htm) (2003).

<sup>3</sup> Ratifications of the OAS Charter, ORGANIZATION OF AMERICAN STATES, (12 April 2010). [www.oas.org/en/member\\_states/default.asp](http://www.oas.org/en/member_states/default.asp). Both Cuba and Honduras' participation in the OAS is limited. Cuba has not participated as a member since 1962 because it is not a democracy, and Honduras' coup in June of 2009 has left the State in a questionable democratic position. Canada and the United States have not ratified the American Convention on Human Rights.

American Declaration on the Rights and Duties of Man as the first international human rights instrument in April 1948 and preceded the Universal Declaration of Human Rights, on which the European Convention on Human Rights is based, by seven months. The American Convention on Human Rights was adopted on 22 November 1969. The Convention of Belém do Pará (1994), or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, is the only human rights document whose sole purpose it is to address violence against women. The Inter-American regional system is similar in many ways to the European system, but differs in the types of issues and cases brought before it. Latin American States have historically been plagued with coups d'états, military dictatorships and human rights abuses such as disappearances, extrajudicial killings, torture and sexual violence against women.<sup>4</sup> It was with this background that the Organization of American States created a human rights system with the goal of being effective within all the member States. The Inter-American system has two enforcement bodies: the Inter-American Commission on Human Rights, which was created in 1959, and the Inter-American Court of Human Rights, which was established by the American Convention on Human Rights.<sup>5</sup> The Inter-American Commission is a quasi-judicial body that has the ability to propose recommendations to the Member State, refer cases to the Court and is responsible for applying the American Declaration and the American Convention to both individual and interstate complaints. The Inter-American Commission, in its work to conduct accurate reporting mechanisms, has been criticized for its failure to demand State accountability before the Inter-American Court.<sup>6</sup>

It is important to highlight one of the Inter-American Court's notable advancements in establishing State accountability by referring to the 1988 Velasquez Rodriguez case<sup>7</sup> where the Court ruled that Honduras had a negative obligation not to disappear its citizens, and a positive obligation to protect its citizens from violence. This case was of special importance to the Court's future proceedings because it related individual events with a widespread problem, and called for

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<sup>4</sup> RHONA KM SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS, 115, 2<sup>nd</sup> ed., 2005. For a more complete view, see Tom Farer, *The Rise of the Inter-American Human Rights Regime: No longer a Unicorn, Not yet an Ox*, 19 HUM. RTS. Q. 510-546 (1997).

<sup>5</sup> HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, 1019-1021, 3<sup>rd</sup> ed., 2008.

<sup>6</sup> *Id.*, 1023-1025

<sup>7</sup> Velasquez Rodriguez v Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 165, 166 (July 29, 1988).

the State's cooperation in addressing the underlying issues that caused the violations.<sup>8</sup> The Velasquez Rodriguez case expanded the Inter-American Court's authority by allowing it not only to rule on individual cases but also to address the State's role in collective human rights violations.

The Inter-American Court and the Inter-American Commission have increasingly adopted a gender perspective in their work over the past two decades as a result of the both the Commission and the Court's approach to interpreting the American Declaration on the Rights and Duties of Man, the American Convention, and the Convention of Belém do Pará on violence against women in the region. The section which follows will illustrate progress of gender justice by looking at four cases where gender is fundamental to the Commission or Court's findings.

In January 2007 the Inter-American Commission released a document titled *Access to Justice for Women Victims of Violence in the Americas*. In its work, along with the research completed by the Inter-American Commission's Rapporteur on the Rights of Women, the Commission found that

all too often prompt and effective recourse to judicial remedies eludes women victims of violence, even after they report the crimes committed against them... The vast majority of these offenses are never punished and neither the victimized women nor their rights are protected.<sup>9</sup>

The intention of this report was to make recommendations to States based on the lack of compliance witnessed by the Inter-American Commission over the previous decade. The Inter-American system has increasingly used a gender approach in its rulings, and found that Member States were complicit in human rights violations by failing to domestically enforce women's rights protections. The cases that illustrate this include: *X and Y v Argentina* (1996),<sup>10</sup> *María da Penha v Brazil* (1998),<sup>11</sup> *Miguel Castro-Castro Prison v Peru* (2006)<sup>12</sup> and *Gonzalez y otras v Mexico* (2009).<sup>13</sup> These cases highlight developments in women's rights and display the Inter-

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<sup>8</sup> HENRY J. STEINER ET AL, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 1042 (2008).

<sup>9</sup> *Access to Justice for Women Victims of Violence in the Americas*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.Doc 68, vii, 20 January 2007.

<sup>10</sup> *X and Y v Argentina*, Case 10.506, Inter-Am. Comm'n H.R., Report N° 38/96, [www.cidh.oas.org/annualrep/96eng/Argentina11506.htm](http://www.cidh.oas.org/annualrep/96eng/Argentina11506.htm) (1996).

<sup>11</sup> *María da Penha Fernandes v Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report N° 54/01, OEA/Ser.L/V/II.111 (1998).

<sup>12</sup> *Miguel Castro-Castro Prison v Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.160 (November 25, 2006).

<sup>13</sup> *Case of González et al. ("Cotton Field") v. Mexico*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 205 (November 16, 2009).

American system's perspective on the States' obligation to protect and promote women's rights at the domestic level.

The *X and Y v Argentina* case addressed the issue of women and children who were forced to undergo vaginal inspections in order to visit inmates in Argentine prisons.<sup>14</sup> The Inter-American Commission ruled that the inspections were a violation of several articles of the American Convention. The State had allowed for a violation of the right to privacy (Article 11), the right to family (Article 17) and the rights of the child (Article 19). Because the visiting women were forced to forego their right to privacy when entering the prison, the State failed to fulfill its obligation to "facilitate and regulate contact between detainees and their families."<sup>15</sup> This case was of particular importance as the victims were women, and their gender was directly related to a violation of their rights. It also established a link between the right to privacy and the right to physical and psychological integrity.<sup>16</sup> The Inter-American Commission recommended that the State adopt legislation to abolish this practice and to update them on the progress of said legislation, as well as to provide monetary compensation to the victims.<sup>17</sup>

In *María da Penha Maia Fernandes v Brazil* the Inter-American Commission found that the State had been complicit in allowing for patterns of domestic abuse to go unrecognized and unpunished. The victim, Mrs. Fernandes, suffered domestic abuse at the hand of her husband for fifteen years, was paralyzed as a result of his attempt to murder her and was denied justice for over 17 years.<sup>18</sup> The Inter-American Commission stated that

this case involves not only a failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices...General and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative

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<sup>14</sup> *Briefing Paper: Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights*, CENTER FOR REPRODUCTIVE RIGHTS, 10 (October 2002) [www.reproductiverights.org](http://www.reproductiverights.org).

<sup>15</sup> *X and Y v Argentina*, Case 10.506, Inter-Am. Comm'n H.R., Report N° 38/96, [www.cidh.oas.org/annualrep/96eng/Argentina11506.htm](http://www.cidh.oas.org/annualrep/96eng/Argentina11506.htm), ¶ 97 (1996).

<sup>16</sup> *Briefing Paper: Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights*, CENTER FOR REPRODUCTIVE RIGHTS, 10 (October 2002).

<sup>17</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, Section 2, Article 62,

'A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.'

<sup>18</sup> Update on the Work of the Rapporteurship on the Rights of Women, Inter-Am. Comm'n H.R., Chapter VI(c) 7, [www.cidh.oas.org/annualrep/2001eng/chap.6c.htm](http://www.cidh.oas.org/annualrep/2001eng/chap.6c.htm) (February 13, 2002).

of the society, to take effective action to sanction such acts.<sup>19</sup>

The State's acquiescence in ignoring domestic abuse allowed for the following violations of the Convention of Belém do Pará: the right to be free from violence in public and private spheres (Article 3), the right to exercise to the protection of a woman's human rights (Article 4) and the duty upon the State to condemn all forms of violence against women and pursue policies to prevent and punish such violence (Article 7).<sup>20</sup> The State's failure to provide due diligence in this trial was a violation of Article 8(1) of the American Convention. In its recommendations the Inter-American Commission ordered that the State complete domestic criminal proceedings, conduct investigations about the delay of such proceedings and, *inter alia*, train public officials about domestic abuse.<sup>21</sup> It was with this case that the Inter-American Commission applied the Convention of Belém do Pará for the first time, and, as a result, it was also the first time that the State was held accountable for violations of a Convention whose sole purpose is to protect women from crimes that are gender-based in nature.<sup>22</sup>

In 2006, the Inter-American Court heard the Miguel Castro-Castro Prison v Peru<sup>23</sup> case, which involved an attack in 1992 by government forces on the woman's ward of the prison. This attack took place on women's visiting day, which was also Mother's Day. In the days following the attack the survivors were stripped of their clothing and many were submitted to sexual violence and rape.<sup>24</sup> This case was notable in gender justice advancements for several reasons. First, the Court found that by denying justice to the victims the State violated both the due process (Article 8) and judicial protection (Article 25) provisions of the American Convention. Second, the Court linked the Convention violations to the Convention of Belém do Pará's Article 7(b) which calls on the State to "apply due diligence to prevent, investigate and impose penalties for violence against women." The Court concluded that because the Inter-American Commission has jurisdic-

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<sup>19</sup> Giulia Paglione, *Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing*, 28, HUM. RTS. Q. 143 (2006).

<sup>20</sup> Organization of American States, Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará," June 9, 1994, 24<sup>th</sup> Session.

<sup>21</sup> Briefing Paper: Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights, CENTER FOR REPRODUCTIVE RIGHTS, 9 (October 2002).

<sup>22</sup> Briefing Paper: Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights, CENTER FOR REPRODUCTIVE RIGHTS, 10 (October 2002).

<sup>23</sup> Miguel Castro-Castro Prison v Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160 (November 25, 2006).

<sup>24</sup> Patricia Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17, TEX. J. WOMEN & L. 240-241 (2007-2008).



tion over the Convention of Belém do Pará, and the Commission refers cases to the Court, the Court has the ability to rule using the Convention of Belém do Pará in its resolution process.<sup>25</sup> Finally, the Inter-American Court responded to the grievances of women when it found violations of both prenatal and postnatal care of mothers during detainment. In this finding the Court determined that both women and their children were victims for reparations purposes. This case expanded the Court's jurisdiction to include the Convention of Belém do Pará, defined victim's family members as reparation beneficiaries and ruled that the State has a duty to ensure domestic due diligence.

In *y otras* (also known as “Campo Algodonero” or Cotton Fields case) v Mexico<sup>26</sup> the Inter-American Court found that the failure of the Mexican government to effectively investigate, prosecute and prevent the murders of Claudia Ivette Gonzalez, Esmeralda Herrera Monreal and Laura Berenice Ramos Monarrez violated the American Convention of Human Rights and the Convention of Belém do Pará as their inaction constituted gender-based violence against women and girls in Ciudad Juárez. Mexico in effect had failed to respect the rights set out in the American Convention on Human Rights<sup>27</sup> and did not fulfill its obligation to adopt legislative and other measures to give effect to the rights and freedoms recognized in the Convention.<sup>28</sup> These included violations of the right to life (Article 4), right to personal integrity (Article 5), right to personal liberty (Article 7), right to a fair trial (Article 8), rights of the child (Article 19) and the right to judicial protection (Article 25).

Mexico argued that the Inter-American Court had no jurisdiction to make a finding under the Convention of Belém do Pará. The Court's reply was clear: international law was composed of both a set of rules and a set of values and that in this case the Inter-American Court interpreted the jurisdictional rule of the Convention of Belém do Pará through taking into account the values the Inter-American system sought to safeguard and protect.<sup>29</sup> Article 62 permitted the Court un-

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<sup>25</sup> *Id.*, 242.

<sup>26</sup> Case of González et al. (“Cotton Field”) v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 205, ¶602 (November 16, 2009).

<sup>27</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, Article 1.

<sup>28</sup> *Id.*, Article 2.

<sup>29</sup> Daniela X. Cornejo, *IACtHR Finds Mexico Violated Convention on Eradication of Violence Against Women*, Human Rights Brief Blog (March 23 2010), <http://hrbrief.org/2010/03/23/iacthr-finds-mexico-violated-convention-on-eradication-of-violence-against-women>.

der the American Convention to evaluate violations in terms of that Convention and in relation to other Inter-American instruments such as the Convention of Belém do Pará.<sup>30</sup> The Court recognized that the killings of the women constituted femicide and held Mexico accountable for the failure to protect its citizens from such gender violence. In reaching its decision the Court examined a number of sources of fact and law including the 2009 European case of *Opuz v. Turkey*<sup>31</sup> where the European Court of Human Rights found Turkey in violation of its obligations to protect women from gender-based violence as a form of discrimination under the European Convention of Human Rights.<sup>32</sup>

The progression illustrated above serves to illuminate the Inter-American system's increasing prioritization of women's rights violations as it calls for the State to fill the "significant gap between the formal availability of certain remedies and their effective application."<sup>33</sup> Although the Inter-American system recognizes this "gap" in gender justice, it has failed to consider the context in which it was created. Gender justice has been completely absent in the Inter-American Court up until recently when women's rights have become "justiciable."<sup>34</sup> The State continues to neglect women's rights because of the underlying traditional and social issues that have placed women in marginalized positions within society.

The structural inequalities that exist in Latin America differ in composition, origin and societal implications based on each particular country, and that country's experience with colonization and modernization. Gender inequality is in many ways reflective of each country's experience.

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<sup>30</sup> Article 12 of the Convention of Belem do Para permits petitions before the Inter-American Commission of Human Rights:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

<sup>31</sup> *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R., Judgment (2009).

<sup>32</sup> Article 14 of the Convention states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>33</sup> Access to Justice for Women Victims of Violence in the Americas, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.Doc 68, viii, 20 January 2007.

<sup>34</sup> Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17, TEX. J. WOMEN & L. 245 (2007-2008).

Catharine MacKinnon refers to “gender as a social system that divides power.”<sup>35</sup> She elaborated this concept by referring to the State, in the feminist perspective, as male, where the “law sees and treats women the way men see and treat women.”<sup>36</sup> Her explanation raises concerns about addressing States’ responsibilities to protect women in a system that inherently fails to protect women. It is outside the scope of this essay to discuss the societal and gender inequalities in each country of the Organization of American States, but for purposes of this research the underlying issues that continue to plague Peruvian women will serve as an indicator of the situation in Latin America.

Structural inequalities in Peru have roots that date back to the colonial process when the Spanish introduced the Catholic religion, destroyed rural communities in the Andean region, and imposed different moral values as well as a different language on the people.<sup>37</sup> Colonization created deep stratifications in society where the rural peoples became increasingly insignificant as Peru experienced modernization. In 1993, approximately 30 percent of the 11 million women living in Peru lived in rural areas.<sup>38</sup> Currently, the Quechua-speaking Peruvian indigenous represent 30 to 50 percent of the population. It is estimated that about 67 percent of the entire Peruvian population live in urban areas, and 33 percent live in rural areas.<sup>39</sup> Roughly 36 percent of those below the poverty level live in rural areas, whereas only 4.6 percent of urban populations experience that level of poverty.<sup>40</sup> The rural population may be referred to as indigenous, *campesinos* or *mestizos*, the categorization of which is determined by social interactions. A man may be *mestizo* in a rural community but then becomes *campesino* or indigenous in an urban setting. These relationships are further complicated when gender is included in the equation.

A rural woman is more likely to dress in traditional clothing, to speak Quechua and to remain in her rural community. A rural man, on the other hand, may wear western clothing, have a greater

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<sup>35</sup> CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, 161, 1989.

<sup>36</sup> *Id.* 161-162.

<sup>37</sup> Ernesto Vasquez del Aguila, *Invisible Women: forced sterilization, reproductive rights, and structural inequalities in Peru of Fujimori and Toledo*, 6, ESTUDOS E PESQUISAS EM PSICOLOGIA, 111, (2002).

<sup>38</sup> Julie Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, 144, (Ruth Rubio Marín, ed., 2006).

<sup>39</sup> *Women’s Sexual and Reproductive Rights in Peru: A Shadow Report*, CENTER FOR REPRODUCTIVE RIGHTS, 5 (1998) [www.reproductiverights.org](http://www.reproductiverights.org).

<sup>40</sup> Vasquez del Aguila, *Invisible Women: forced sterilization, reproductive rights, and structural inequalities in Peru of Fujimori and Toledo*, 6, ESTUDOS E PESQUISAS EM PSICOLOGIA, 111, (2002).

opportunity to learn Spanish and travel to urban areas as well as other rural regions.<sup>41</sup> The clear division between rural and urban essentially makes women invisible members of Peruvian society. Rural women's status as that of an undocumented person causes them to face restrictions on their voting rights, access to health, education and social programs, marriage, the opportunity to legally record their births, acquire property and find employment.<sup>42</sup> This system of inequality is clearly seen when looking at literacy in Peru. Three out of four illiterate Peruvians are women; in urban areas one out of every ten women is illiterate, and in rural areas the number jumps to more than four women in every ten is illiterate.<sup>43</sup> Rural women are the most marginalized group in Peru.

As was discovered in the Peruvian Truth and Reconciliation Commission<sup>44</sup>, women often do not recognize themselves as victims of human rights abuses. Most often women seek justice not for themselves, but for their male family members. Women who have been victims of sexual violence are most concerned with *returning* to what they know as their status quo, not with *reinventing* it (our emphasis).<sup>45</sup> The norm for a rural Peruvian woman is that of subordinate to men and invisible to the State. Carolyn Deere and Magdalena León de Leal summarize this concept clearly by stating:

since women's subordination seems natural within patriarchal ideologies, it is difficult for change to erupt spontaneously from the condition of subordination. Empowerment must be introduced by first creating consciousness of gender discrimination.<sup>46</sup>

Instead of working to eradicate inequality and discrimination, the State has been reluctant to first, recognize the woman's role as subordinate to men as a violation of human rights, and second, to implement a judicial system that protects women from customs or values that violate her rights.

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<sup>41</sup> *Id.*

<sup>42</sup> Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, 144, (2006).

<sup>43</sup> Center for Repro Rights. Shadow Report, 5.

<sup>44</sup> The Peruvian Truth and Reconciliation Commission was created with the purpose of "...clarifying the process, facts and responsibilities of the terrorist violence and human rights violations produced from May 1980 to November 2000...." Eduardo Gonzalez Cueva, *The Peruvian Truth and Reconciliation Commission*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, 70, (Naomi Roht-Arriaza, Javier Mariezcurrena, eds.), 2006)

<sup>45</sup> Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, 144-145, (2006).

<sup>46</sup> CAROLYN DEERE AND MAGDALENA LEON DE LEAL, EMPOWERING WOMEN: LAND AND PROPERTY RIGHTS IN LATIN AMERICA, 19, 2001.

### 3. The Inter-American System and a Peruvian Case Study

The Inter-American Commission appointed a Rapporteur on the Rights of Women in 1994, with a mandate to “analyze the extent to which member state law and practices which affect the rights of women comply with the broad obligations of equality and nondiscrimination contained in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.”<sup>47</sup> Over the past few decades on-site visits have played an integral role in the assessment of a member State’s advancements, as well as member State failures to incorporate women’s rights in law and policies. The State of Peru has had six on-site visits, and has been included in numerous annual reports, as well as two country specific reports on the situation of women’s rights in Peru.<sup>48</sup> The most recent of these country specific reports was released in 2000; a specific focus was placed on discriminatory practices against women and reproductive health.<sup>49</sup> Reports issued by the Inter-American Commission are distributed to the government of the member State, and include recommendations that will be investigated upon future on-site visits. The member State is fully aware that the reporting mechanism of the Inter-American Commission is limited in that it is unable to do more than “name and shame” a member State which has violated provisions of the American Convention or American Declaration. Although a member State often fails to respond to either the reporting mechanism or the judicial proceedings of the Inter-American Commission it may choose to implement legislature domestically as a response.

Peru’s history with the Inter-American system can be described as tumultuous. In 1999 Peru withdrew its acceptance of the Inter-American Court’s jurisdiction,<sup>50</sup> and did not renew acknowledgement of the Court’s jurisdiction until 2003.<sup>51</sup> Although Peru ratified the Convention of Belém do Pará in 1996, its failure to enforce regional and domestic law has allowed for the continuance of violence and discrimination against women, and most especially indigenous women.<sup>52</sup>

Women have historically been victims of violence in Peru. Domestic violence is embedded in the

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<sup>47</sup> Update on the Work of the Rapporteurship on the Rights of Women, Inter-Am. Comm’n H.R., Chapter VI(c) 1, [www.cidh.oas.org/annualrep/2001eng/chap.6c.htm](http://www.cidh.oas.org/annualrep/2001eng/chap.6c.htm) (February 13, 2002).

<sup>48</sup> Peru’s on-site visits took place in May of 1989, Oct.-Nov. of 1991, April and May of 1992, May of 1993 and November of 1998. This information is available at [www.cidh.oas.org/visitas.eng.htm](http://www.cidh.oas.org/visitas.eng.htm).

<sup>49</sup> Second Report on the Situation of Human Rights in Peru, Inter-Am. Comm’n H.R., Chapter VII, 6-8, [www.cidh.oas.org/women/chapter7.htm](http://www.cidh.oas.org/women/chapter7.htm), (2000).

<sup>50</sup> Remarks by the Chairman of the Inter-American Commission on Human Rights, Robert Kogod Goldman, at the Opening of the 147<sup>th</sup> Regular Session, Inter-Am. Comm’n H.R., [www.cidh.org/discursos/09.21.99.english.htm](http://www.cidh.org/discursos/09.21.99.english.htm). (September 21, 1999).

<sup>51</sup> Annual Report of the Inter-American Court of Human Rights, 2003, Inter-Am. Ct. H.R., 18, OEA/Ser.L/V/III.61 (February 9, 2004)

<sup>52</sup> Second Report on the Situation of Human Rights in Peru, Inter-Am. Comm’n H.R., Chapter VII, 2-3, [www.cidh.oas.org/women/chapter7.htm](http://www.cidh.oas.org/women/chapter7.htm), (2000).

historical and cultural traditions of Peruvian society, and also in familial traditions that are characterized by male dominance.<sup>53</sup> Women have continuously faced violence not only as a result of conflict, but also as a result of State-mandated policies. In 1980, an insurgent group, Sendero Luminoso (Shining Path), began what would become over a decade of violence in the rural regions of Peru.<sup>54</sup> This violence was a result of the State's failure in its rapid economic, political and social expansion to reach marginalized groups, mainly in the Andean region of Peru.<sup>55</sup> The State's response to insurgent violence was state-sponsored violence, and rural men and women who shared similar socio-demographic backgrounds were most affected by the conflict.<sup>56</sup> In fact, 80 percent lived in rural areas, 34 per cent were illiterate and 48 per cent were between the ages of 10 and 30 years old.<sup>57</sup> Women were most affected by the following crimes under the following percentages: extrajudicial executions (50%), detentions (27%), torture (23%), kidnappings (17%), disappearances (16%) and rape (10%).<sup>58</sup> Women suffered from both indirect and direct violence, and as a result their experience was intrinsically intertwined with the man's experience, the child's experience and the community's experience. The State was responsible for a significant proportion of the sexual violence committed between 1980 and 2000. State sexual violence was not limited to the time period in which the direct threat of insurgent group violence loomed in Peru's countryside, but also occurred in State-sponsored government programs, such as its family planning program.

Following the violence that occurred between the years of 1980 through 2000 the Peruvian government established the Peruvian Truth and Reconciliation Commission (2001-2003).<sup>59</sup> The Commission included violence against women in its mandate, but failed to provide a voice for over "200,000 marginalized, indigenous, Quechua-speaking women in Peru who were victims of

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<sup>53</sup> Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, 145, (2006).

<sup>54</sup> STATE OF FEAR: THE TRUTH ABOUT TERRORISM (Skylight Pictures, 2006).

<sup>55</sup> Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, 137, (2006).

<sup>56</sup> STATE OF FEAR: THE TRUTH ABOUT TERRORISM (Skylight Pictures, 2006).

<sup>57</sup> Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity*, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, 140-141, (2006).

<sup>58</sup> *Id.*, 141.

<sup>59</sup> Eduardo Gonzalez Cueva, *The Peruvian Truth and Reconciliation Commission*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, 71, (Naomi Roht-Arriaza and Javier Mariezcurrena, eds., 2006).

a state-sponsored enforced sterilization campaign.”<sup>60</sup> By ignoring forced sterilization as a violation of women’s rights, the Peruvian Truth and Reconciliation Commission compounded the harm by the failure to address and challenge Peru’s underlying issues associated with deep-rooted concepts of racism as well as reproductive rights, population control, discrimination and modernization.

In his book, *Open Veins in Latin America*, Eduardo Galeano states: “in Latin America it is more hygienic and effective to kill *guerillas* in the womb than in the mountains or the streets.”<sup>61</sup> This thought serves as a conclusion to his discussion of population control in Latin America. Development and population control programs in Latin America were almost entirely funded by outside sources, such as the United States.<sup>62</sup> Modernization and development became synonymous with population control in Latin America in the 1990s, and policies to achieve the Western idea of progress were swiftly implemented by the State. As a result of an international push to implement family planning programs, Latin American countries often forced permanent forms of contraception upon rural, indigenous, illiterate and poor women in an effort to decrease the population, and to do so by targeting the most marginalized people. Population control in Latin America was infused with eugenics thinking,<sup>63</sup> and ultimately had the aim of creating a “fit” and developed nation.<sup>64</sup>

Originally, Latin American eugenics policies did not include sterilization practices. Nancy Leys Stepan, on assessing the eugenics situation in Latin America notes that “on the whole, the eugenicists operated in a political, cultural and religious climate in which birth control, abortion for any but the most strictly defined medical reasons, and sterilization, whether for eugenic or femi-

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<sup>60</sup> Jocelyn E. Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 3 (2009).

<sup>61</sup> EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT*, 6 (1997).

<sup>62</sup> Frank Dikötter, *Race Culture: Recent Perspectives on the History of Eugenics*, 103, AM. HISTORICAL REV., 468 (April 1998). For example, the majority of Peru’s population funding, between the years of 1994 and 1998, is estimated to have come from contributions by the United States Agency for International Development (\$85USD million), the United Nations Population Fund (\$14USD million) and the United Kingdom (\$7USD million).

<sup>63</sup> Frank Dikötter explains eugenics as “giving scientific authority to social fears and moral panics, lending to racial doctrines and providing legitimacy to sterilization acts and immigrations laws.” Eugenics wording has historically referred to concepts such as “the nation,” “future generations,” and “gene pool” when explained in the economic and medical context. This collective sense of betterment for the future of a people by restricting the reproduction of the “unfit” implies a collective protection, and removes individual reproductive rights.

<sup>64</sup> NANCY LEYS STEPAN, *THE HOUR OF EUGENICS: RACE, GENDER AND NATION IN LATIN AMERICA*, 12, 1991.

nist purposes, were unacceptable.”<sup>65</sup>

In 1979, the Peruvian constitution recognized the right of families and individuals to manage their fertility, and for the following decade concern mounted regarding fertility and Peru’s population growth.<sup>66</sup> During this period, the Peruvian government adopted the National Population Policy Law in 1985 and the National Population Program in 1987. The main goal of the National Population Program was the “reduction of the growing population to a level no more than 2 percent per year by 1995.”<sup>67</sup> The law, whose initial intentions were to “guarantee the rights of all human beings to freely determine the number of their children, to comprehensive health and to the free development of their personality,” would remain in place throughout the 1990s, and is still in effect.<sup>68</sup>

Under President Fujimori’s presidency the Population Policy Law was expanded in September 1985 to include the legalization of sterilization.<sup>69</sup> Also in 1995 a wide range of contraceptive products was made available at no charge to the public. At the United Nations Fourth World Conference on Women in Beijing, Peru’s president Alberto Fujimori announced that his “government ha(d) decided to carry out an integral strategy of family planning that confront(ed) openly, for the first time in the history of our country, the serious lack of information and services available on the matter.”<sup>70</sup> Fujimori’s use of feminist rhetoric in this speech helped to garner the support of the international community, feminist activists and the Peruvian people. On the surface Peru’s population control policy seemed to benefit women’s reproductive rights, but, its deeper implications revealed a coercive program that embodied the worst aspects of eugenics thinking, population control and women’s rights violations. The Peruvian State ultimately

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<sup>65</sup> *Id.*, 201.

<sup>66</sup> Anna-Britt Coe, *From Anti-Natalist to Ultra-Conservative: Restricting Reproductive Choice in Peru*, 12 REPROD. HEALTH MATTERS, 59, (Nov. 2004).

<sup>67</sup> Vasquez del Aguila, *Invisible Women: forced sterilization, reproductive rights, and structural inequalities in Peru of Fujimori and Toledo*, 6, ESTUDOS E PESQUISAS EM PSICOLOGIA, 113, (2002).

<sup>68</sup> *Women’s Sexual and Reproductive Rights in Peru: A Shadow Report*, CENTER FOR REPRODUCTIVE RIGHTS, 16 (1998) [www.reproductiverights.org](http://www.reproductiverights.org).

<sup>69</sup> *Id.*, 17.

<sup>70</sup> Christina Ewig, *Hijacking Global Feminism: Feminists, the Catholic Church, and the Family Planning Debacle in Peru*, in GLOBAL EMPOWERMENT OF WOMEN: RESPONSES TO GLOBALIZATION AND POLITICIZED RELIGIONS, 330, (Carolyn M. Elliott, ed., 2008). Ewig quotes directly from Fujimori’s speech made on September 15, 1995.



viewed family planning as a means to reduce poverty rather than to promote women's rights.<sup>71</sup>

It is estimated that over 200,000<sup>72</sup> Peruvian women were forcibly sterilized as part of Fujimori's national family planning program from the early to mid-1990s.<sup>73</sup> In 1990, the State established a "Voluntary Surgical Contraception" program (*Anticoncepción Quirúrgica Voluntaria*), but it was not until 1995, with the assistance of international funding<sup>74</sup>, that the program became effective.<sup>75</sup> In 1998, a program manager at the Peruvian Ministry for Health stated:

The fertility rate among poor women is 6.9 children – they are poor and are producing more poor people. The president is aware that the government cannot fight poverty without reducing poor people's fertility. Thus, demographic goals are a combination of the population's right to access family planning and the government's anti-poverty strategy."<sup>76</sup>

The State's implementation of *Anticoncepción Quirúrgica Voluntaria* resulted in an intensive sterilization campaign in the rural regions of Peru. "Health festivals" (*festivales de salud*) were carried out in poor communities with the intention of coercing women into permanent forms of contraception.<sup>77</sup> Julia Tamayo, a representative from a woman's rights NGO, Flora Tristan, discovered some official goals for sterilization clinics. An obligatory quota system of annual numeric goals was formulated for program employees to meet in order to remain employed, receive promotions or obtain monetary compensation.<sup>78</sup> Tamayo's evidence concludes that only ten percent of the women sterilized under the "Voluntary Surgical Contraception" program under-

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<sup>71</sup> *Id.*, 331.

<sup>72</sup> Vasquez del Aguila, *Invisible Women: forced sterilization, reproductive rights, and structural inequalities in Peru of Fujimori and Toledo*, 6, ESTUDOS E PESQUISAS EM PSICOLOGIA, 113, (2002). Some estimates put this number at over 300,000. Rick Kearns, *Forced sterilization of indigenous case re-opened in Peru*, Indian Country Today, (February 29, 2009), <http://www.indiancountrytoday.com/global/39910172.html>. It is estimated that approximately 22,000 men underwent vasectomy procedures without formal consent,

<sup>73</sup> Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 26 (2009).

<sup>74</sup> Vasquez del Aguila, *Invisible Women: forced sterilization, reproductive rights, and structural inequalities in Peru of Fujimori and Toledo*, 6, ESTUDOS E PESQUISAS EM PSICOLOGIA, 115-116, (2002). USAID, UNFPA as well as numerous other donors, provided funding for sexual and reproductive health programs, and the Anticoncepción Quirúrgica Voluntaria program was included in the programs that received funding. This increase in funding correlates with Fujimori's 1995 UN World Conference Speech.

<sup>75</sup> Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 10 (2009).

<sup>76</sup> Anna-Britt Coe, *From Anti-Natalist to Ultra-Conservative: Restricting Reproductive Choice in Peru*, 12 REPROD. HEALTH MATTERS, 61-62, (Nov. 2004).

<sup>77</sup> Vasquez del Aguila, *Invisible Women: forced sterilization, reproductive rights, and structural inequalities in Peru of Fujimori and Toledo*, 6, ESTUDOS E PESQUISAS EM PSICOLOGIA, 113, (2002).

<sup>78</sup> Jocelyn E. Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 12 (2009).

went the procedure with “real” consent.<sup>79</sup> The sterilization clinics, in an effort to force the women to comply, would often threaten to withdraw access to healthcare, humiliate the women by calling them “irresponsible for having so many children,”<sup>80</sup> and in some cases even told the women that having more than five children was a violation of Peruvian law.<sup>81</sup> The program also utilized propaganda both in health clinics as well as in rural communities to convey the idea of a small family as being necessary for happiness and modernity.<sup>82</sup>

The Catholic Church firmly opposed the sterilization campaign in Peru, but not because it was concerned with forced sterilization as a women’s rights violation. Instead, the Church was against the right of choice for women with regard to their reproductive rights in their entirety by objecting to all forms of contraception, whether it was forced or not. The Church agenda, therefore, differed from the human rights movement’s reproductive rights goals. As a result of Peru’s increasingly stable economy and Fujimori’s widespread political support he was able to confront the Church in regards to reproductive rights.<sup>83</sup> The Church, as a result of their opposition to a woman’s right to choose a contraception method, consequently referred to the sterilization campaign as a “genocide campaign.”<sup>84</sup> This concept of forced sterilization as genocide was addressed in the final report of a Congressional subcommittee, where Fujimori was accused of “committing genocide against the Quechua people” through the *Anticoncepción Quirúrgica Voluntaria* program.<sup>85</sup> In its findings the subcommittee referred to Article 2(d) of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948: “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group,

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<sup>79</sup> Vasquez del Aguila, *Invisible Women: forced sterilization, reproductive rights, and structural inequalities in Peru of Fujimori and Toledo*, 6, ESTUDOS E PESQUISAS EM PSICOLOGIA, 113, (2002).

<sup>80</sup> *Id.*, 114-115.

<sup>81</sup> Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 13 (2009).

<sup>82</sup> Ewig, *Hijacking Global Feminism: Feminists, the Catholic Church, and the Family Planning Debacle in Peru*, in GLOBAL EMPOWERMENT OF WOMEN: RESPONSES TO GLOBALIZATION AND POLITICIZED RELIGIONS, 335, (2008).

<sup>83</sup> Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 10 (2009).

<sup>84</sup> Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 24 (2009). And, the genocide charges brought against Fujimori were thrown out because of “mistakes in the categorization of the crime.” Also see, Angel Paez, *Rights-Peru: Forcibly Sterilised Women Gain Voice in Congress*, IPS News (July 10 2006), <http://ipsnews.net/news.asp?idnews=33918>.

<sup>85</sup> Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 22-23(2009). Getgen researched this information at “See Subcomisión Investigadora de Personas e Instituciones Involucradas en Acciones de Anticoncepción Quirúrgica Voluntaria, Informe Final sobre le aplicación de la Anticoncepción Quirúrgica Voluntaria (June, 2002)

such as: (d) *imposing measures intended to prevent births within the group* (our emphasis).”<sup>86</sup> The Quechua-speaking population in the rural Andean regions of Peru was distinguished as both a racial and ethnic group in Peru, and Fujimori’s sterilization campaign targeted these groups.

In its Second Report on the Situation of Human Rights in Peru—Women’s Rights, the Inter-American Commission stated that, “a campaign to disseminate family planning methods is a positive action, so long as it is voluntary planning.”<sup>87</sup> The Report also adds that in its 1998 on-site visit to Peru it received 168 complaints of forced sterilization.<sup>88</sup> It is only within the last ten years that the Inter-American system has begun to seriously look at forced sterilization in Peru; some women have been waiting twenty years for justice. The Inter-American Commission has addressed sexual and reproductive rights twice, by way of the friendly settlement mechanism: the first was a forced sterilization case and the second an abortion case.<sup>89</sup>

The Inter-American system’s advancement in utilizing an increasingly gender approach to justice is further illustrated in *María Mamérita Mestanza Chávez v Peru*,<sup>90</sup> which not only further illustrates this progression, but also serves as a tool to observe the interfused relationship between the system and the State.<sup>91</sup>

María Mamérita Mestanza Chávez, hereinafter referred to as María Chávez, was a rural woman of about thirty-three years of age and the mother of seven children. In 1996 she began experiencing harassment by the public health center of the Encañada District (*La Encañada*).<sup>92</sup> The couple was told on numerous occasions by health center staff that if they were to refuse the sterilization procedure, María Chávez would be taken to prison for violating a law that made it illegal to have more than five children. Chávez and Mr. Suárez, her husband, were also told they would have to

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<sup>86</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948, 9 December 1948, Res. 260 (III) A, Article 2 (d).

<sup>87</sup> Second Report on the Situation of Human Rights in Peru, Inter-Am. Comm’n H.R., Chapter VII, 5, <http://www.cidh.oas.org/women/chapter7.htm>, (2000).

<sup>88</sup> *Id.*

<sup>89</sup> Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17, TEX. J. WOMEN & L. 261-262 (2007-2008). The Inter-American Court has not heard a sexual or reproductive rights case. The “abortion case,” *Ramirez Jacinto v Mexico*, involved a nine-year-old rape victim who was denied an abortion by the State of Mexico (2007).

<sup>90</sup> *María Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. Comm’n H.R., Report 71/03, <http://www.cidh.org/annualrep/2003eng/peru.12191.htm> (2003).

<sup>91</sup> Forced Sterilization is specifically mentioned in the 1998 Rome Statute (Article 7(g)), which Peru ratified in 2001. Rome Statute of the International Criminal Court, 17 July 1998, <http://untreaty.un.org/cod/icc/statute/rome.htm>.

<sup>92</sup> *María Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. Comm’n H.R., Report N° 66/00, <http://www.cidh.org/women/Peru12.191eng.htm>, 2 (2000).

pay fines in relation to this violation.<sup>93</sup> Because Ms. Chávez and Mr. Suárez were uneducated and poor, these threats seemed valid and real. Ultimately, as a result of coercion over a period of almost two years, María Chávez underwent a tubal ligation procedure on March 27, 1998. The operation was performed without prior medical examination, and María Chávez was not given a medical consent form to sign until the day after the procedure.<sup>94</sup> On March 28, María Chávez was discharged from *La Encañada* although she complained of intense headaches and stomach irritation. Her complications intensified over the following days, and in spite of Mr. Suárez's repeated attempts to get medical assistance for his wife, the health center denied the family follow-up aid. *La Encañada* instead insisted that María Chávez's poor condition was a temporary after-effect of the anesthesia used in the procedure. María Chávez died at home on April 5, 1998, nine days after her sterilization operation.<sup>95</sup> The death was ruled to have been a direct result of the procedure. Shortly after, as is reported, a physician from La Encañada attempted to offer Mr. Suárez a sum of money to forget the issue.<sup>96</sup>

On April 15, 1998 Mr. Suárez implicated the chief of *La Encañada* in the death of María Chávez, and formal criminal charges were brought before a Provincial Judge on May 15, 1998. On June 4<sup>th</sup>, the Judge declared, "that there were no grounds for opening an investigation,"<sup>97</sup> and in July of that year the Specialized Chamber for Criminal Matters confirmed that decision. The María Chávez case was formally closed in Peru on December 16, 1998.<sup>98</sup>

A number of women's rights and human rights organizations<sup>99</sup> brought a petition against Peru before the Inter-American Commission on behalf of María Chávez and her family. The Commis-

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<sup>93</sup> María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am, Comm'n H.R., Report 71/03, <http://www.cidh.org/annualrep/2003eng/peru.12191.htm>, 2 (2003).

<sup>94</sup> *Briefing Paper: Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights*, CENTER FOR REPRODUCTIVE RIGHTS, 15-16 (October 2002) [www.reproductiverights.org](http://www.reproductiverights.org).

<sup>95</sup> Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29, Third World L.J. 22-23 (2009).

<sup>96</sup> María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am. Comm'n H.R., Report N° 66/00, <http://www.cidh.org/women/Peru12.191eng.htm>, 2 (2000).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Article 44 of the American Convention and Article 12 of the Convention of Belém do Pará authorize human rights organizations to submit a petition on behalf of the victim, or the victim's family. The organizations are as follows: Office for the Defense of Women's Rights (DEMUS), Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), Asociación Pro Derechos Humanos (APRODEH), Center for Reproductive Law and Policy (CRLP), and Center for Justice and International Law (CEJIL).

sion received the complaint in June of 1999.<sup>100</sup> The petitioners claimed that Peru's family planning program was discriminatory and violated women's reproductive rights. They maintained that the State of Peru had violated the law set forth in the American Convention<sup>101</sup>, and in particular, the States' obligation to respect human rights (Article 1); the right to life (Article. 4); the right to humane treatment (Article 5) and the right to equal protection (Article 24). They also claimed that the Peruvian State had violated rights explicitly designated in Articles 3, 4, 7, 8 and 9 of the Convention of Belém do Pará.<sup>102</sup> Although the State claimed that domestic remedies had not been exhausted and that the case was therefore inadmissible before the Inter-American Commission, the Commission concluded on October 3, 2000 that the State had in fact failed to provide a domestic remedy for the case, and that it was within the Commission's jurisdiction to hear the case. The petitioners asserted in their opening remarks that this case

represents one more of a significant number of cases of women affected by the implementation of a massive, compulsory, and systematic government policy that emphasized sterilization as a method for quickly modifying the reproductive behavior of the population, especially the poor, indigenous, and rural women.<sup>103</sup>

The Commission considered that Peru's family planning project had become involuntary and intended to turn women into objects of control in order to make population growth adjustments.<sup>104</sup> By admitting this case the Inter-American Commission recognized Peru's alleged discriminatory practices in family planning programs, the State's alleged neglect in providing impartial judicial investigation and recourse for victims and its alleged failure to guarantee equality before the law.

The Inter-American Commission, the State of Peru and the petitioners agreed upon a "Friendly

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<sup>100</sup> María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am, Comm'n H.R., Report 71/03, [www.cidh.org/annualrep/2003eng/peru.12191.htm](http://www.cidh.org/annualrep/2003eng/peru.12191.htm), 1-3 (2003).

<sup>101</sup> The Petitioners also noted violations of the Protocol of San Salvador (Additional Protocol to the American Convention on Economic, Social and Cultural Rights): Articles 3 and 10 *and* the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Articles 12 and 14(2).

<sup>102</sup> Organization of American States, Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará," June 9, 1994, 24<sup>th</sup> Session. Article 3: the right to be free from violence in both the public and private spheres; Article 4: the right to recognition, enjoyment, exercise and protection of all human rights; Article 7: duty of the State to condemn all forms of violence against women and pursue policies to prevent, punish and eradicate such violence; Article 8: States' duty to progressively undertake measures such as social programs and education that emphasize women's rights; and Article 9: States' duty to take note of women's vulnerability to violence, especially those women from a racial or ethnic background, or whose status is that of a migrant, refugee or displaced persons, pregnant women, disabled women, etc.

<sup>103</sup> María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am. Comm'n H.R., Report N° 66/00, [www.cidh.org/women/Peru12.191eng.htm](http://www.cidh.org/women/Peru12.191eng.htm), 2 (2000).

<sup>104</sup> Second Report on the Situation of Human Rights in Peru, Inter-Am. Comm'n H.R., Chapter VII, 6, [www.cidh.oas.org/women/chapter7.htm](http://www.cidh.oas.org/women/chapter7.htm), (2000).

Settlement” in March of 2001.<sup>105</sup> On August 26, 2003, the representatives of both the victims and the State signed the agreement, and requested that the Commission ratify the contents.<sup>106</sup> While the extent of the agreement is expansive, certain aspects highlight the responsibilities of the State in relation to the specific victim, the 200,000 other victims indirectly affected by the case and the future proceedings of the case within the Inter-American system. The “Friendly Settlement” agreement outlined fifteen points,<sup>107</sup> of which seven are of particular interest. The third condition, “investigation and punishment,” called on Peru to thoroughly investigate the facts and legally punish any person, whether military or civilian, who participated in or perpetrated, either directly or indirectly, the forced sterilization of María Chávez.<sup>108</sup> The fourth item awarded a one-time compensation of ten thousand U.S. dollars to each beneficiary for reparation of moral injury, which amounted to \$80,000USD. The eighth, ninth and tenth conditions detailed medical and education payments to be awarded to Mr. Suárez and his seven children. It also awarded a \$20,000USD payment to Mr. Suarez to assist in the purchase of land or a home. The eleventh condition outlined “changes in laws and public policies on reproductive health and family planning,” that the State must implement as part of the “Friendly Settlement” agreement.<sup>109</sup>

The Inter-American Commission on Human Rights’ Annual Report of 2008 considered the stipulations of the agreement, recorded communications with the State and described Peru’s compliance, or lack thereof, with the agreement. The Report made mention of Peru’s December 2008 submission that detailed the implementation of the conditions of the agreement. The State maintained that monetary compensation of the amounts specified in the agreement had been distributed to the victim’s family, as well as the educational and healthcare provisions. The petitioners replied by stating that the \$US 20,000, had not been paid in whole, but was instead

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<sup>105</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, Article 48(1)(f). The ‘Friendly Settlement’ provision is provided for within the American Convention.

<sup>106</sup> María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am, Comm’n H.R., Report 71/03, [www.cidh.org/annualrep/2003eng/peru.12191.htm](http://www.cidh.org/annualrep/2003eng/peru.12191.htm), 2 (2003).

<sup>107</sup> *Id.*(1) The background of the case; (2) the State’s recognition of the crime and its responsibility to protect and enforce compliance of human rights; (3) the investigation and punishment of perpetrators; (4) monetary indemnification; (5) waives future claims by petitioner, victim, beneficiary against the State in this matter; (6) right of recovery; (7) compensation as tax-exempt; (8) medical payments; (9) education payments; (10) payment for land/house for victim; (11) changes in domestic law and public policies on reproductive health and family planning; (12) the legal basis for the case; (13) interpretation; (14) homologation; and (15) acceptance.

<sup>108</sup> María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am, Comm’n H.R., Report 71/03, [www.cidh.org/annualrep/2003eng/peru.12191.htm](http://www.cidh.org/annualrep/2003eng/peru.12191.htm), 3 (2003).

<sup>109</sup> María Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am, Comm’n H.R., Report 71/03, [www.cidh.org/annualrep/2003eng/peru.12191.htm](http://www.cidh.org/annualrep/2003eng/peru.12191.htm), 3-9 (2003).

being paid by the State in installments.<sup>110</sup> Peru's report also outlined the July 2004 establishment of the National Health and Strategy for Sexual and Reproductive Health, which focused on the training of health care professionals in family planning and contraception methods.<sup>111</sup> The petitioners are noted in this report as stating that there was no factual validation that supported the State's health training claims. The Inter-American Commission deduced that the fourth, eighth through tenth, and eleventh conditions of the agreement had been met and followed in accordance with the agreement. The third condition, "investigation and punishment," was initiated by the State in March of 2004, but the Annual Report noted that four years later no complaint had been lodged against an individual. The Commission concluded that the State of Peru had carried out the terms of the "Friendly Settlement" in part.<sup>112</sup>

In January of 2009 the Public Ministry of Peru announced that it would be re-opening investigations into the sterilization of approximately 200,000 indigenous Peruvian women.<sup>113</sup> The federal attorney had a mandate to authorize charges of genocide, torture and other criminal acts. This response by the Peruvian State to fulfill the "third" obligation under the "Friendly Settlement" agreement had the original intention of bringing justice to the thousands of victims of Peru's "Voluntary Surgical Contraception" family planning program.<sup>114</sup> However, in May 2009 the public prosecutor decided to stop the investigations, claiming that the statute of limitations had expired.<sup>115</sup> Immediately following this decision a complaint with the Inter-American Commission was filed in which it was maintained that the State of Peru, in shelving the forced sterilization investigations, violated both the terms of the "Friendly Settlement," as well as its obligations under the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW).<sup>116</sup> In its 137<sup>th</sup> Session, from October to November 13 of 2009, the Inter-American Commission chairwoman, Luz Patricia Mejia, demanded that the Peruvian government prosecute those responsible for the forced sterilization program.

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<sup>110</sup> Annual Report of the Inter-American Court of Human Rights, 2003, Inter-Am. Ct. H.R., 12, OEA/Ser.L/V/III.61 (February 9, 2004)

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, 9-17.

<sup>113</sup> Rick Kearns, *Forced sterilization of indigenous case re-opened in Peru*, Indian Country Today, (February 29, 2009), [www.indiancountrytoday.com/global/39910172.html](http://www.indiancountrytoday.com/global/39910172.html).

<sup>114</sup> *Id.*

<sup>115</sup> Angel Paez, *Rights-Peru: Forcibly Sterilised Women Gain Voice in Congress*, IPS News (July 10 2006), <http://ipsnews.net/news.asp?idnews=33918>.

<sup>116</sup> *Id.*

The *María Mamérita Mestanza Chávez v Peru* case now faces the possibility of referral by the Inter-American Commission to the Inter-American Court. This will be the first reproductive rights case to reach the judicial organ of the Inter-American system.

#### 4. Bringing it Home

The Inter-American regional system of protecting human rights can only be strong and effective if its decisions are implemented by its Member States. As has been illustrated in each of the cases mentioned in this essay, the State fell short of its responsibilities when it came to implementation of gender justice. While the State of Peru's National Population Law explicitly prohibits forced sterilization, and the General Health Law regulates sterilizations to ensure that consent is properly administered, the judicial system within Peru has failed to investigate and provide punishment for over 200,000 forced sterilizations.<sup>117</sup> The State has failed to "bring home" the recommendations of the Inter-American Commission because it has not yet recognized rural women, and especially their reproductive rights, as deserving of the resources and time to carry out judicial proceedings. Elizabeth Moen argues, "no woman, anywhere, has full reproductive freedom"<sup>118</sup> because there are internal norms and external controls in place that restrict women's rights. The rural indigenous woman in Peru is not immune to these norms and controls. The State's law, in effect, has been built within the patriarchal structure of society, where women are not included, but rather, disenfranchised.<sup>119</sup>

The Inter-American system, in order to promote its gender justice model domestically, needs to first face the challenge of the underlying issues within Latin American societies. If the status quo in Peru is fundamentally opposed to the empowerment of women through their judicial system, recommendations by the Inter-American system to the State will be consistently ignored. The Commission and the Court, both attempt to address women's rights issues by calling for training programs, reparations for victims and their beneficiaries as well as the implementation of new laws and policies that protect women's rights, but the system fails to confront the issues at the core of the problem. One can only speculate, that the reason might be that the Inter-American

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<sup>117</sup> *Women's Sexual and Reproductive Rights in Peru: A Shadow Report*, CENTER FOR REPRODUCTIVE RIGHTS, 10 (1998) [www.reproductiverights.org](http://www.reproductiverights.org).

<sup>118</sup> Elizabeth Moen, *Women's Rights and Reproductive Freedom*, 3, HUM. RTS. Q. 1 (May 1981).

<sup>119</sup> Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17, TEX. J. WOMEN & L. 248 (2007-2008).



Commission lapses into believing its role is to decide on justice in the matter before it and not to proselytize on behalf of other affected parties. If this is true then it is contrary to the jurisprudence in Velasquez Rodriguez in identifying a widespread problem and to address the State's role in collective human rights violations. In the *María Mamérita Mestanza Chávez v Peru* case,<sup>120</sup> the Inter-American Commission did not recognize the “Voluntary Surgical Contraception” program as part of a wider program of eugenics-based population control. Perhaps if the Inter-American Commission took into account the funding for Peru's sterilization program, and then explored the concepts of modernity and progress that fueled the population control ideology throughout Latin America in the 1990s, it might have reached another conclusion.

While gender justice in the Inter-American system appears to have had some success in removing some cases on “domestic violence” as private issues into the domain of state (or public) responsibility and further into a regional system as human rights, it has a long way to go to interrogate the traditional norms that historically subordinate women. At the same time it is being presented with new opportunities now to push for a wider understanding of the reasons behind such violations. Perhaps that will come when an action is brought by the Inter-American Commission on behalf of the 200,000 women who were coerced into sterilization by a State policy and practice.<sup>121</sup>

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<sup>120</sup> *María Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am, Comm'n H.R., Report 71/03, [www.cidh.org/annualrep/2003eng/peru.12191.htm](http://www.cidh.org/annualrep/2003eng/peru.12191.htm), (2003).

<sup>121</sup> The Annex to Press Release 78/09 on the Regular Period of Sessions of the IACHR states: “*With regard to Peru, the IACHR expresses... its deep concern over the possibility that this matter could remain in a state of impunity, and hopes that the necessary measures can be adopted so that this can be investigated and those responsible punished.*” <http://www.cidh.org/Comunicados/English/2009/78-09engAN.htm>.