BUILDING BRIDGES

Contemporary perspectives on gender, sexuality and international human rights law

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Universidad del Rosario

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Abstract
This book includes a collection of essays authored by academics, activists, and practitioners reflecting on critical advances and challenges in the areas of gender and sexuality and their linkages to international law and human rights. Feminists have long intervened to advance women's rights, substantial equality, and the eradication of gender-based violence using international law as an important tool, through policy action and the litigation of cases before the universal and regional human rights systems and other strategies. The LGBTIQ+ community has also injected a queer perspective to international law. Therefore, a diversity of scholars and activists discuss in this volume paramount issues in international law and explore them with a feminist, queer or gendered, and human rights perspectives. The essays promote a rich discussion of critical topics such as those connected to intersectional discrimination, violence against women and LGBTIQ+ persons, sexual and reproductive rights, and challenges to protect human rights in situations of armed conflict and contexts of crisis.

Keywords: Law; LGBTIQ+ Rights; Gender; Sexuality; Gender Equality; Gender Studies; International Law; Contemporary Perspectives; Social Justice.

Construyendo puentes: perspectivas contemporáneas sobre género, sexualidad y derecho internacional de los derechos humanos

Resumen
Este libro incluye una colección de ensayos escritos por académicos, activistas y profesionales que reflexionan sobre avances y desafíos críticos en las áreas de género y sexualidad, y sus vínculos con el derecho internacional y los derechos humanos. Las feministas han intervenido durante mucho tiempo para promover los derechos de las mujeres, la igualdad sustancial y la erradicación de la violencia de género utilizando el derecho internacional como una herramienta importante, a través de acciones políticas y el litigio de casos ante los sistemas universales y regionales de derechos humanos y otras estrategias. La comunidad LGBTIQ+ también ha inyectado una perspectiva queer al derecho internacional. Por ello, en este volumen, una diversidad de académicos y activistas discuten cuestiones fundamentales del derecho internacional y las exploran desde una perspectiva feminista, queer o de género y de derechos humanos. Los ensayos promueven una rica discusión sobre temas críticos como los relacionados con la discriminación interseccional, la violencia contra las mujeres y las personas LGBTIQ+, los derechos sexuales y reproductivos y los desafíos para proteger los derechos humanos en situaciones de conflicto armado y contextos de crisis.

Palabras clave: derecho; derechos LGBTIQ+; género; sexualidad; igualdad de género; estudios de género; derecho internacional; perspectivas contemporáneas; justicia social.

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BUILDING BRIDGES: CONTEMPORARY PERSPECTIVES ON GENDER, SEXUALITY AND INTERNATIONAL HUMAN RIGHTS LAW

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Introduction

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Rosa Celorio**

International law has proven to be an area of the law with a moving, fast-evolving, and non-static nature. As noted by Hilary Charlesworth (1995), feminist critiques of international law have been consistent in "searching for the silences of the discipline" (1) toward how gender has changed the structures and content of international legal systems. These critiques raise an implicit theoretical question regarding how we think and reflect on *what* international law as a field of study *is* and which bodies and identities have been excluded or privileged through international discourses of respect for human rights and democratic global governance. Most recently, queer studies have also intervened in international law and refreshed feminist debates on the understandings of gender identity (Otto 2015). As transgender persons battle for their rights to be recognized worldwide, a historically contested question persists: Who is a woman, and who is a man? The meaning of what is "female" and "masculine" in terms of identity politics has also transcended into public disputes in the legal arena. Gender and queer studies have also raised this critical question: "Can gender identity be abandoned at all?" (Gilleri 2022).

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In essence, scholarship developments concerning gender and sexuality have been prominent in recent years, calling for enhanced feminist, queer, gendered, human rights, and intersectional approaches. Academics, practitioners, and civil society organizations are undertaking critical scholarship and research in this field, advancing salient theories and methodologies to reconcile doctrines and practices with new tendencies and emerging issues. Prominent in these developments have been the judgments issued by international and national courts, United Nations organs, bodies, and mechanisms, and the regional human rights protection systems in the Americas and Europe, and by global human rights bodies worldwide. Social mobilization, protest, and the role of movements advancing the rights of all women—including those with non-conforming gender identities and sexual orientations—have been key propellers in these developments. Courts, commissions, and other entities are constantly pushing the boundaries of treaties, instruments, terminology, and legal interpretations to advance the protection of the rights of all individuals and collectivities in the areas of discrimination, equality, identity, expression, autonomy, and dignity. Therefore, this book delves into the work of international bodies, driving inquiry into the usefulness and need of gender and queer approaches when crafting treaties, analyzing human rights cases, and implementing international legal standards in national settings.

However, the reconfiguration of international law due to the inclusion of gender and sexuality in its normative and discursive practices has brought advances and challenges rarely explored jointly by activists, scholars, and legal practitioners who are reshaping the field. Therefore, as its first objective, this book aims to bring together influential voices and experts in the international law field to build bridges between their fields of expertise. Coming from a wide array of professional backgrounds and perspectives, the 33 authors of this publication make it a unique one, enriching each other and highlighting different views on similar issues. Besides benefiting from having this dialogue, this book underscores common strategies and challenges between activists and scholars in their international quest for gender justice.

This book also features relevant feminist discussions and queer critiques regarding mainstream human rights approaches in advancing lesbian, gay, bisexual, trans, intersex, queer, and other non-binary persons (LGBTIQ+)

rights in international law. Considering the unsettled debate over how to name and refer to sexual minorities, this book presents a wide array of terms regarding gender identity and sexual preferences and does not pretend to establish fixed linguistic labels to refer to them. The LGBTIQ+ reference used in this introduction is the best way the editors have found to make an inclusive and respectful reference to the rights of sexual minorities.

We have also respected how the authors use terms or letters of the alphabet to refer to non-conforming with heterosexual or non-binary gender identities. We also recognize that discussions regarding linguistic categories and their meaning evolve constantly due to legal developments and social mobilization processes that question their relevance and push for new ones. In this dynamic relationship of social movements and legal terminology, it is ironic that we continue to refer to something as sophisticated as gender and sexuality as "queer theory" or "gender perspective." We acknowledge the difficulties of dealing with these ironic complexities and hope this book promotes future in-depth dialogue regarding them.

Consequently, this collection of essays reflects contemporary debates related to gender and sexuality issues in international law explored by human rights activists, legal scholars, and transitional justice lawyers. Many authors of this collection are personally acquainted with human rights, international law frameworks, and backstage negotiation settings. Their personal experience, either through the litigation of cases before human rights systems, their participation in high-level meetings to develop international treaties and conventions, or as witnesses, negotiators of peace processes, and transitional justice bodies, enrich their essays with a practical perspective over unsettled debates and theoretical discussions. Some essays contain important critiques of the scope of international legal developments, showing the limitations of using international law to advance gender equality and sexual rights, the downsides of international litigation for victims of gender-based violence, and the constant challenges of having consensus over normative language regarding gender identity.

In this way, the essays discuss critical issues and themes that have currently shaped the work and inquiries of scholars and practitioners in their areas of study, including those connected to intersectional discrimination, violence against women and LGBTIQ+ persons, sexual and reproductive rights, and challenges to protect human rights in situations of armed

conflict and crisis. The approach of this publication is critical and interactive, proposing ways to make international legal standards in this area more effective and impactful in the daily lives of women and LGBTIQ+ persons. While several essays depict the complexities of UN bodies and regional human rights systems, such as the Inter-American System of Human Rights, in their encounter with gender and sexuality, others analyze how these issues are internalized by the justice systems of different countries worldwide facing complex situations. Therefore, the book has both a regional and a global scope, highlighting specific human rights systems and common worldwide problems.

The essays are tailored to a broad audience, including the academic sector, civil society, international organizations, and different national and international tribunals, to promote different perspectives in crafting and implementing international law today and the politics of sexuality and gender embedded within this field. The essays are also meant to motivate new research agendas for the future. In this sense, this book results from an ongoing conversation between scholars and activists of the North and Global South, who are producing knowledge solidly grounded in theory and practice and working in tandem with communities and networks to propel dialogue on gender and sexuality issues. The essays in this volume reflect empirical and scholarly methodologies, experiences from practice, and tensions and challenges related to gender and sexuality in international law frameworks, discourses, and cases.

The authors first discussed their essays in a virtual symposium hosted by the Universidad del Rosario Law School and the International and Comparative Law Program of the George Washington University Law School in October 2021. All the panels reflected the growing need to include and discuss gender and sexual diversity in the international law agenda, as well as the importance of revisiting the unstable categories of *sex* and *gender* to promote inclusive interpretations for women, LGB, intersex, and transgender persons. Among the main concerns raised by the panelists was how to bridge the gap between theory and practice in the field of international law, considering the ongoing convergence of gender and sexuality issues with structural discrimination and violence in national settings.

Others raised awareness on the difficulties of rebuilding—with legal tools—the experience of persons suffering from human rights violations

that deeply touch their identity and *who they are*. Thus, from that point of view, the essays motivate inquiry on how cases involving sexuality and gender litigated before international legal bodies can promote that states implement transformative reparations beyond traditional restitution and compensation measures, as suggested in previous literature on this topic (Rubio-Marín 2009; Weber 2018). Therefore, reparations are discussed in several essays of this book, especially in cases from the Inter-American System of Human Rights and gender-based violence in regions with historical conflicts. Another critical challenge explored is how to effectively incorporate gender and queer perspectives domestically and legally, with the help of policymakers, judges, civil society, and survivors.

More than providing answers on how to achieve the international goals of feminist and LGBTIQ+ movements, this collective work raises plenty of new questions and ongoing inquiries regarding the inclusion of feminist and queer approaches in international law. How are these theoretical approaches different? How can they be applied together when analyzing international law principles and cases? Considering that this is a question arising from an unsettled debate, Diane Otto (2015) suggests that "feminist and queer human rights advocates need to work in coalition" (315) if they want to challenge the binarism and biological foundations still prevalent in international and human rights law.

This book first responds to the need to promote spaces for dialogue among scholars and activists from different social movements to discuss different approaches to what *subjectivity and subjectivation* (Smith 2016) mean for realizing gender justice, with international law as a common discourse among them. As this book shows, how we become subjects and how our bodies, desires, and personalities are endowed in complex legal processes and normative international discourses where our identity is at stake is a shared theme implied among the essays compiled here.

Along with this principal general inquiry, the essays of this publication address five other relevant questions. The first one is connected to the current legal approaches of queer and feminist legal scholars and how a focus on gender and sexuality is advancing international law scholarship. The second one emphasizes lessons learned by the women's rights and LGBTIQ+ movements in using international law to promote gender and sexuality issues, achieve their incorporation in treaties, and increase the

participation of marginalized individuals in global and regional arenas. A third line of analysis is related to how international and human rights law can be adapted to contemporary issues affecting women and LGBTIQ+ persons and to ongoing problems such as armed conflicts. The fourth focus is on current gaps and needs in developing legal standards in international and human rights law more than 25 years after the adoption of the landmark Beijing Declaration and Platform for Action. The fifth inquiry is how to turn a widely used term—*intersectional discrimination*—into an impactful goal in laws, policies, programs, and justice system administration. These five questions constitute the heart and backbone of this book.

The essays discuss many of these questions and exemplify them with concrete cases and developments at the international and national levels. The first section of the book, "Human Rights Perspectives to Advance Sexual and Reproductive Rights in Latin America," shows how *sexual and reproductive rights* have advanced as human rights through the litigation of cases and thematic reports, particularly in the Inter-American System of Human Rights, in an era of contrasting regressions in some countries of the region. The section opens with a necessary critique presented by Isabel Barbosa, Francesca Nardi, Rebecca Reingold, and Estefanía Vela of the conceptualization of obstetric violence as a crime and how international human rights frameworks can provide a better understanding of its significance and implications for women's reproductive lives.

The groundbreaking judgment of the Inter-American Court of Human Rights (IACtHR) in the case of *Guzmán Albarracín et al. v. Ecuador* is discussed by Catalina Martínez Coral and Carmen Cecilia Martínez, portraying the high-impact litigation skills of the Center for Reproductive Rights in its mission to turn into a reality the international obligation of states to provide comprehensive information on sexual and reproductive health within educational systems without discrimination and free from ideologies or restrictive approaches to human rights. The authors also show how the IACtHR included a gender perspective in crafting the remedies addressed to the State of Ecuador. Finally, Lidia Casas, Sara Correa, Tamara Novoa, and Alejandra Ramm delve into the power of the law to promote sexual and reproductive education in Latin America and evaluate university-level sex education by medical and midwifery students through an empirical study conducted in Chile.

The second section, "Defying International Law: LGBTIQ+ Rights Mobilization," is devoted to issues concerning lesbian, gay, bisexual, queer, and trans persons and the challenges they face to be named as such in international law, including current interpretations of the term *gender* and its different conceptions. María Susana Peralta Ramón, Ana Salazar Londoño, José Elías Turizo Vanegas, and Silvia De La Paz De la Cadena argue that LGB persons live between the lines of patchy interpretations of human rights conventions advanced by international bodies in dealing with LGB issues and the "womanization of LGB people" pushed by mainstream activism. They contest that these strategies fail to capture the complexity of human sexuality and gender identity in the recognition of the rights of lesbian, gay, and bisexual people in current developments of international law.

On the other hand, Robinson Sánchez's work discusses the successful legal mobilization process undertaken by transgender organizations to incorporate gender identity as a protected category at the regional level in the Organization of American States (OAS) and the Inter-American System of Human Rights (IASHR). Finally, Lisa Davis and Danny Bradley analyze in depth how *queering* the draft of the new crimes against humanity treaty can be seen as progress in gender justice when clear and inclusive language is reflected in international conventions. All these essays agree with the importance of international networks to advance LGBTIQ+ rights and with analyzing discursive legal forms when using categories that deal with gender identity. In addition, the articles are enriched by the incredible advocacy work of the authors before international bodies as part of renowned NGOs or as scholars with significant ties to LGBTIQ+ groups.

The third section of the book focuses on "Intersectional Approaches to International Law: Gender, Sex, Race, and Ethnicity as Cornerstones." All essays in this section discuss legal developments in the field of intersectional discrimination and its meaning and application in human rights law. Mónica Arango Olaya provides an insightful account of the recent ruling of the IACtHR in the case of *Vicky Hernández et al. v. Honduras* and its comprehensive interpretation of the Belém do Pará Convention to reach *trans* women, thereby underscoring the theoretical connection between intersectionality and substantive equality in international human rights law. Arango Olaya explores whether it is possible to reconcile "sameness," understood as shared experiences of harm based on group identities, and

"difference," as distinct experiences of harm linked to other conditions of disadvantage in group-based discrimination analysis. Therefore, she discusses the potential of considering intersectionality beyond discrimination law to advance gender equality.

The chapter "The Intersectional Approach in Inter-American Case Law" by Oscar Parra and F. Antonio Franco Franco explores a different angle in this jurisprudential line, arguing that intersectionality is a useful concept for judicial interventions in human rights cases. This essay advances two premises related to the future application of an intersectional approach in international jurisprudence. First, it argues for the need to abandon the exclusive use of categories to understand the concept of discrimination and analyze instead how their fusion impacts social disadvantage. Second, it proposes to explore more deeply the context underlying many cases of intersectional discrimination and the stereotypes and social realities that fuel this problem. This article also suggests introducing a new system of reparations in the work of the IACtHR, which considers intersectional discrimination as a continuum instead of analyzing independent categories of discrimination.

Laura Cahier's reflection analyzes how indigenous women's critical perspectives and right-based claims fit within international human rights law. Cahier underscores the essential role played by indigenous women activists to clarify the scope of the states' international obligations while considering their intersectional experiences of discrimination. From distinct theoretical perspectives, all these essays propose an interactive view of the intersectional approach within human rights law, as opposed to an additive-cumulative analysis of suspected discriminatory categories, to properly reflect the connection between structures of inequality and oppression in the experience of victims.

The fourth section, "Revisiting International Law and Gender-Based Violence in Complex Contexts," extensively discusses the issue of *gender-based violence* in countries historically affected by armed conflicts and post-conflict situations globally. In particular, the Colombian post-conflict context is explored in two articles. Lina M. Céspedes-Báez and Felipe Jaramillo Ruíz examine the contradictions in the Colombian Constitutional Court case law in addressing sex work. The authors show how the Constitutional Court's rulings have framed this issue in a complex set of

regulations that reach beyond criminal law, where international legal discourses reshaping national and transnational feminist discussions regarding the commercialization of sex are also present in constitutional law. This essay reminds us of the dynamic nature of international law and its constant engagement with challenging feminist issues in national courts. On the other hand, Ana María Ospina and Farid Samir Benavides Vanegas analyze the cases of sexual violence that have reached the Appellate Section of the Tribunal for Peace and guide the work of the Chambers and Sections of the Special Jurisdiction for Peace (JEP, for its acronym in Spanish). They discuss their theoretical basis and limitations to address the arduous justice-seeking road for sexual violence survivors in the Colombian transitional justice process.

The last section also discusses the right of women to participate in conflict resolution, mediation, and peace-resolution processes. Rebecca Ego reflects on whether the exclusion of women from conflict resolution violates international human rights law. In conclusion, embracing the complexity of gender and sexuality in international law shows the methodological challenges for both activists and scholars in their responses to multiple forms of discrimination and violence. In this way, feminist, queer, and LGBTI-focused scholarship can be crucial to advance better legal practices in this field. Finally, Chelsea Ullman, Raluca Popa, Mary Ellsberg, Rea Abada Chiongson, Deviyani Dixit, Skylar Wynn, and Florencia Savoca Truzzo delve into pernicious challenges that survivors of gender-based violence face in a variety of countries such as Afghanistan, Honduras, Papua New Guinea, the Philippines, South Sudan, and Tunisia to offer guidance on integrating a survivor-centered response to human rights practitioners working in these settings. They explore how the complexity of the context impacts a survivor's access to justice.

The editors of this publication believe in the power of international law to shape and improve the living experiences of women and LGBTIQ+ individuals and groups, in building bridges between scholars and activists to provide a second avenue of justice when it is not attained at the national level, and in transforming national structures to advance human rights protection. A close, rigorous, theoretical, and practical look at contemporary developments in international law on gender and sexuality is a significant step toward achieving the effectiveness of legal principles in

this area and eliminating gaps between theory and its practice. The editors are deeply grateful to all the authors who participated in this publication and the October 2021 symposium for sharing their research, reflections, time, and expertise.

We are also grateful to the Universidad del Rosario for publishing this volume and to *Red Alas*, a Latin American network of scholars who work to include gender and sexuality in legal research and education, for its support and co-sponsorship. Lastly, the editors dedicate this publication to all women and LGBTIQ+ persons seeking to use international law to improve their lives and exercise their rights at the national level. We also acknowledge the importance of social movements and international coalitions in pushing the boundaries of international law in the areas of gender and sexuality. You have our admiration, and you give us hope.

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Section I
Human Rights Perspectives to Advance Sexual and Reproductive Rights in Latin America

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A Critique of the Conceptualization and Criminalization of Obstetric Violence in International Human Rights Frameworks

Isabel Barbosa*
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Rebecca Reingold***
Estefanía Vela****

Introduction

Since the 1970s, feminists have resorted to criminal law frameworks to combat various forms of gender-based violence against women. Defining this type of violence as a crime has served not only to increase public awareness around this issue but also to facilitate the involvement of the criminal justice system in its prevention and redress at the national level in countries throughout the world in the 1990s (Houston 2014, 258-264; Erez 2002). Around the same time, feminists also succeeded in bringing gender-based violence against women and its criminal law framing to the agendas of international organizations (Hall 2015). The turn towards criminalization to address gender-based violence against women is notable, given consistent

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ambivalence among feminists about engaging with the criminal justice system in other contexts (Houston 2014, 221).

In a similar vein, feminists in Latin America began to use the concept of "obstetric violence"[1] to refer to a range of harmful practices pregnant people[2] experience when accessing health services related to pregnancy, childbirth, and postpartum care in the 1990s (Kukura 2018; Oja and Yamin 2016; Erdman 2015; Zacher Dixon 2015; Gallardo Duarte 2022). Feminists simultaneously advocated for the prohibition of obstetric violence through the adoption of administrative or criminal laws at the national level, often grounding their arguments in international human rights frameworks. International human rights bodies have, in turn, called for additional countries to criminalize obstetric violence at the national level. Most recently, a new wave of bills seeking to criminalize obstetric violence has emerged in countries in Latin America and Europe.

The harmful practices referenced above that pregnant people may experience when accessing health services related to pregnancy, childbirth, and postpartum care indeed constitute human rights violations. However, is it always necessary or appropriate to rely on a criminal law framework to prevent and redress these violations? Do international human rights frameworks require it? What are the arguments against using it?

This article challenges the assumption that international human rights frameworks always require the use of criminalization to tackle the harmful practices pregnant people experience when accessing health services related to pregnancy, childbirth, and postpartum care. First, it briefly outlines the concept of obstetric violence and some of the challenges associated with reaching a universally agreed-upon definition. Second, it explores efforts to criminalize obstetric violence, focusing on regions where this approach originally emerged or has gained particular traction in recent years, namely Latin America and Europe, respectively. Third, it considers the treatment of obstetric violence by international human rights bodies, paying particular

[1] The authors use this term throughout the article because it is central to the object of their critique.

[2] The authors prefer to use the gender-inclusive language of "pregnant people" whenever possible but adhere to other sources' use of terminology, such as "pregnant women," as appropriate.

attention to their calls for action by member states. Fourth, it refutes the argument that criminalization of obstetric violence is always necessary, especially from a human rights perspective. Fifth, it highlights the limitations and even dangers associated with counting primarily on a criminal law framework in this context, particularly in light of the concept's broad framing. In conclusion, this article cautions against placing a disproportionate emphasis on solutions grounded in criminal law and, in the process, overlooking or undervaluing alternative approaches to addressing these harmful practices.

1. Conceptualization and Definition of Obstetric Violence

While the term "obstetric violence" holds rhetorical power to address harmful practices pregnant people experience when accessing health services related to pregnancy, childbirth, and postpartum care, some academics are also cautious about the application of violence framing in this context. First, violence framing "begs for a response from criminal law, but relying on criminalization to eliminate socially undesirable conduct can have devastating consequences, especially for people who belong to racial, ethnic, and religious minorities" (Kukura 2018, 764). Second, it can potentially increase distrust between healthcare providers and patients, eroding trust in the healthcare system (Kukura 2018, 765).

This debate is ever more complex because there is no universally agreed-upon definition of the concept among either advocates or academics, leading to differences across law and policy frameworks at the national and international levels (Pérez D'Gregorio 2015). As Kukura explains, "The subjectivity inherent in how obstetric violence is experienced complicates the work of defining and categorizing such mistreatment with precision" (2018, 728). However, many definitions share similarities, giving a general sense of what actions and omissions fall under the concept of "obstetric violence."

Venezuela, the first country to incorporate a definition of obstetric violence into its national legislation, defines it as

> the appropriation of a woman's body and reproductive processes by health personnel in the form of dehumanizing treatment, abusive medicalization, and pathologization of natural processes involving a woman's loss of autonomy and of the capacity to freely make her

> own decisions about her body and her sexuality, which has negative consequences for a woman's quality of life.[3] (Asamblea Nacional de la República Bolivariana de Venezuela 2007, art. 15, par. 13)

Notably, the Follow-Up Mechanism of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention) (MESECVI) has since relied on this definition when issuing recommendations to countries in the Americas, as explored in further detail below (MESECVI 2012, 38).

In turn, the World Health Organization (WHO) has framed much of the conduct constituting obstetric violence as "disrespectful and abusive treatment during childbirth," which can include

> outright physical abuse, profound humiliation and verbal abuse, coercive or unconsented medical procedures (including sterilization), lack of confidentiality, failure to get fully informed consent, refusal to give pain medication, gross violations of privacy, refusal of admission to health facilities, neglecting women during childbirth to suffer life-threatening, avoidable complications, and detention of women and their newborns in facilities after childbirth due to an inability to pay. (WHO 2015, 1)

Finally, Elizabeth Kukura (2018) recognizes many of the challenges associated with defining obstetric violence and, instead, proposes to classify mistreatment occurring during childbirth into broad, fluid categories, namely abuse, coercion, and disrespect. According to Kukura, mistreatment in this context happens "along a continuum of severity, ranging from less dramatic forms of subtle humiliation to coercion, unconsented clinical care, and more extreme instances of verbal and physical abuse" (2018, 728).

2. Criminalization of Obstetric Violence in Latin America and Europe

The push for action on obstetric violence began in different countries of Latin America, with feminist groups and activists leading the charge to

[3] Unless otherwise noted, all translations are of the authors.

improve the quality of health services related to pregnancy, childbirth, and postpartum care that pregnant people receive across the region (Williams et al. 2018, 1208). This framework for addressing the problem "specifically locates 'obstetric violence' at the nexus of gender-based violence and clinical malpractice, and interweaves elements of both respectful treatment and quality care" (UNGA 2019, 20). The countries in the region that responded to these calls to action adopted legislation that addresses obstetric violence in slightly different ways; nevertheless, similarities among the laws suggest a shared regional approach (Williams et al. 2018), such as the framing of obstetric violence as a form of gender-based violence against women, occasionally tied to criminal offenses that specifically target obstetric violence. For the purposes of this article, the "criminalization" of obstetric violence refers to making it a criminal offense,[4] regardless of the penalty imposed[5] and the type of legislation relied upon.[6]

It is important to note that various law and policy frameworks, ranging from human rights law to tort law and professional standards, arguably encompass many actions and omissions that constitute obstetric violence (Kukura 2018, 762). For example, various countries already have civil liability laws that cover different types of medical negligence and abuse (Diaz-Tello 2016, 60). Similarly, criminal laws around the world address actions like abuse of power, threatening behavior, bodily injury, and endangerment of the patient's life (GIRE 2015). These general provisions tend to predate the push for action on obstetric violence and, as a result, often do not reference the concept of "obstetric violence" specifically.

In 2007, Venezuela became the first country in Latin America to adopt legislation defining obstetric violence and establishing it as a criminal offense. Penalties for obstetric violence under the law include a criminal fine and referral of the offender to the relevant professional association for disciplinary action (Asamblea Nacional de la República Bolivariana

[4] In particular, this article focuses on the criminalization of obstetric violence as its own concept, as opposed to the criminalization of certain acts and omissions that might fall under it, such as forced sterilization.

[5] Criminal offenses can lead to penalties of criminal fines, imprisonment, or a combination of both.

[6] Criminal offenses can be included in criminal legislation (e.g., Criminal Codes) or other types of legislation (e.g., laws addressing gender-based violence against women).

de Venezuela 2007, art. 51). Notably, this law is explicitly geared towards the protection of the rights enshrined not only in the Constitution of Venezuela but also in international treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) (UNGA 1979) and the Belém do Pará Convention. Similarly, in Mexico, where criminal law is addressed at the state level, states like Chiapas, Veracruz, and Guerrero include obstetric violence as a criminal offense in their respective criminal codes, imposing both criminal fines and imprisonment as penalties. Chiapas and Veracruz have also added the concept of "obstetric violence" to their state laws addressing gender-based violence against women (GIRE 2015).

Other countries in the region have incorporated the concept of obstetric violence into their national-level legislation on gender-based violence against women but have not explicitly established it as a criminal offense, including Argentina, Ecuador, Panama, Paraguay, Peru, and Uruguay. While countries like Peru simply refrained from establishing obstetric violence as a criminal offense, countries like Argentina were careful to state that obstetric violence did not rise to this level. In Paraguay, the law defines obstetric violence but without listing it with other criminal offenses. In Ecuador, the law explicitly indicates that additional legislative actions must be taken to make obstetric violence a criminal offense. In Mexico, states such as Chihuahua, Colima, Durango, Guanajuato, Hidalgo, Quintana Roo, San Luís Potosí, and Tamaulipas have taken action to add the concept of "obstetric violence" to laws addressing gender-based violence against women (GIRE 2015) but have not reformed their criminal codes to include it there as well.

The push for state action on obstetric violence may have begun in Latin America by framing it as part of the efforts to address gender-based violence against women and—in some countries—criminalizing it. However, this trend has since continued to spread within and beyond Latin America.[7] In Europe, a new wave of legislation seeking to criminalize obstetric violence

[7] This new wave of legislation extends beyond Europe. In June 2021, Chile introduced the bill Ley Adriana, named for a young woman who had suffered obstetric violence, which proposes amending the Criminal Code to incorporate the crime of obstetric violence (Bustos 2021).

emerged in early to mid-2021. In a few months, Spain, Portugal, and San Marino have begun to consider bills that would introduce specific provisions on obstetric violence to existing legislation, some of which would rise to the level of making it a criminal offense.

San Marino's legislature is considering a bill that proposes reforms to the Law on the Protection and Promotion of Sexual and Reproductive Health of the San Marino Population, which includes the criminalization of obstetric violence (Consiglio Grande e Generale 2021). The bill defines obstetric violence as "acts or omissions made by the doctor, midwife or paramedical staff aimed at expropriating the woman of her autonomy and dignity during all stages of pregnancy and postnatal period" (Consiglio Grande e Generale 2021, art. 15). Portugal's bill proposes criminalizing obstetric violence—in order to strengthen the rights of women in pregnancy and childbirth—by amending the Criminal Code (Lusa 2021). It defines obstetric violence as any conduct directed at women during labor, childbirth, or puerperium, practiced without their consent, which, through an act of physical or psychological violence, causes their pain, harm, or unnecessary suffering or limits their power of choice and decision (Lusa 2021). Both bills seek to establish imprisonment (up to 6 years in San Marino) as the penalty for committing acts that constitute obstetric violence (Consiglio Grande e Generale 2021, art. 154).[8]

Similarly, in response to the recommendations of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in the case of *S.F.M. v. Spain* (CEDAW Committee 2020), discussed in

[8] It specifies other acts that constitute obstetric violence, including "denying appropriate assistance in case of obstetric emergencies; forcing the woman to give birth in a supine position with her legs raised, hindering or preventing early contact of the infant with the mother without medical justification; hindering or preventing the physiological process of childbirth through the use of childbirth acceleration techniques without the express, free, informed and conscious consent of the woman; performing a caesarean section in the absence of medical indications and without the express, free, informed and conscious consent of the woman; [and] exposing the woman's body violating her personal dignity." In addition to these offenses, "anyone who obstructs or limits women's rights to prenatal tests [and] to information relating to voluntary termination of pregnancy or makes it difficult to access by placing non-regulatory obstacles, such as unnecessary medical examinations, psychological examinations or additional consultations, not foreseen by health protocols, and in general any unjustified excess of restrictions on access to voluntary termination of pregnancy" is considered to have committed obstetric violence (Consiglio Grande e Generale 2021, art. 15).

further detail below, the legislature in Spain is considering a reform to its 2010 Law on Sexual and Reproductive Health and Voluntary Termination of Pregnancy that would address obstetric violence (Agencias 2021). During the consultations on the bill organized by the Ministry of Equality and Gender, medical colleges and professional associations of doctors have denounced the obstetric violence provisions, arguing that "obstetric violence is a term that does not conform to the reality of care and that criminalizes the work of professionals who act under scientific rigor and medical ethics"[9] (La Voz 2021).

3. Treatment of Obstetric Violence by International Human Rights Bodies

Besides spreading to countries in other parts of the world, the incorporation of obstetric violence into law and policy frameworks in Latin American countries—and particularly through criminalization—also informed how international human rights bodies framed not only the problem but also calls for action by member states to prevent and redress it. While international human rights treaties do not make explicit references to the concept of "obstetric violence," bodies that interpret their content and monitor the member states' implementation efforts have pushed for all forms of obstetric violence to be formally recognized and criminalized.

At the regional level, neither the Belém do Pará Convention (OAS 1994) nor the Istanbul Convention Action against Violence against Women and Domestic Violence (Council of Europe 2011) explicitly include obstetric violence as a form of gender-based violence against women. However, the MESECVI, which analyzes the progress of member states towards the implementation of the Belém do Pará Convention, has not only referenced the concept of "obstetric violence" but also called for responses to be necessarily grounded in criminal law. In 2012, its Second Hemispheric Report urged states that have not yet done so to include provisions that "make obstetric

[9] The Ministry of Equality and Gender has been holding public consultations with stakeholders that will shape the bill's drafting. The text of the bill has not yet been published, so it is unclear how the Spanish government will choose to define or sanction obstetric violence.

violence a punishable offense" (MESECVI 2012, 98).[10] Similarly, the 2014 MESECVI Guide to the Application of the Inter-American Convention to Prevention, Punishment and Eradication of Violence against Women identified "specific legislation that includes the punishment of obstetric violence" as an indicator for measuring the implementation of this treaty (MESECVI 2014, 39).

In its reports on individual countries' progress towards implementing the Belém do Pará Convention, the MESECVI seems to suggest that national-level criminalization of obstetric violence is necessary for member states to comply with their obligations under this treaty. On the one hand, when countries lack laws on obstetric violence, their reports tend to emphasize the need for such laws to be passed and enforced. MESECVI's 2020 country report for El Salvador, for example, commended the country's adoption of a general law on gender-based violence against women in 2012 but noted that it was insufficient to address the problem of obstetric violence (MESECVI 2020). In particular, following the NGO Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM, for its acronym in Spanish), the MESECVI stated that failure to recognize obstetric violence legally serves to normalize harmful practices (MESECVI 2020). On the other hand, even when countries do have laws specifically recognizing and addressing obstetric violence, the MESECVI country reports tend to emphasize the need for such laws to be grounded in criminal law. For example, while the MESECVI's 2017 country report for the Bahamas recognized the country's mechanism for resolving complaints of obstetric violence through civil lawsuits and disciplinary actions, it stressed the need to "criminalize obstetric violence and provide for criminal punishments against public officials and health professionals (not just civilians)" (par. 54).

At the universal level, like the Belém do Pará Convention and the Istanbul Convention, the CEDAW Convention (UNGA 1979) also fails

[10] In its recommendations, the report (MESECVI 2012) calls for states to "adopt provisions to criminalize obstetric violence" (98) and urges them to "elaborate on the elements of what constitutes a natural process before, during and after birth, without excessive reliance on medication and in which women and adolescent girls are appropriately informed and enjoy the necessary guarantees to ensure their free and voluntary consent to the procedures associated with their sexual health" (39).

to include explicit references to obstetric violence. The CEDAW Committee, however, has used the term in its recommendations to member states, though in a less consistent way than the MESECVI. On the one hand, for instance, in its concluding observations to Mexico, the CEDAW Committee merely urged the country to "harmonize federal and State laws to define obstetric violence as a form of institutional and gender-based violence" (CEDAW Committee 2023, par. 17) and do so in accordance with its general law on gender-based violence against women, without any reference to a need for criminalization. On the other hand, its 2020 concluding observations to Bulgaria explicitly called for the country to "criminalize obstetric violence and other forms of violence during delivery" (CEDAW Committee 2020, 42). However, when considering a case of obstetric violence involving unnecessary medical interventions during childbirth that same year, the CEDAW Committee (2020, 34) recommended that Spain address the problem by conducting research to inform public policies and providing training to health professionals and other actors, without, again, explicitly calling for criminalization.

Finally, the former United Nations Special Rapporteur on Violence against Women, Dubravka Šimonović, has also relied on the term "obstetric violence," in addition to mistreatment or violence against women during childbirth, in her 2019 report entitled "A human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence" (UNGA 2019). However, unlike the MESECVI and the CEDAW Committee, this report does not explicitly call for criminalization. Instead, it focuses on calling for states to adopt public policies aimed at the prevention of obstetric violence (e.g., through the decriminalization of home births, birth companion of choice, etc.) and accountability for survivors (e.g., through accountability mechanisms, professional accountability, sanctions, adequate remedies, etc.) (UNGA 2019).

4. A Rebuttal to Criminalization "Mandates" under International Human Rights Law

Some countries are already adopting the framing of gender-based violence against women to address obstetric violence, while others specifically rely on criminal law for this end. Framing obstetric violence as a form of

gender-based violence against women and subsequently criminalizing such conduct has clear connections to the women's rights framework developed under international human rights law. At the national level, Venezuela is a clear example. At the global level, the MESECVI and the CEDAW Committee have, at times, albeit inconsistently, urged member states to criminalize obstetric violence, seeming to suggest that criminalization is always necessary to uphold the rights enshrined in the Belém do Pará Convention and the CEDAW Convention, respectively.

However, this idea is not necessarily supported by international human rights law. International human rights treaties and interpreting bodies often give member states some leeway in the selection and adoption of national-level laws and policy measures needed to prevent and address human rights violations, occasionally calling upon them to criminalize certain (but not all) forms of violence, particularly those constituting grave human rights violations (Pinto 2018).

While it is common—and even desirable—for international human rights bodies to provide guidance to member states regarding concrete steps that may be taken to realize human rights fully, criminalization mandates in treaties themselves are rare. For example, the CEDAW Convention includes only one explicit reference to criminal law when it calls upon member states to "repeal all national penal provisions which constitute discrimination against women" (UNGA 1979, art. 2g). In this case, criminal law constitutes a threat to women's rights, rather than a tool to realize them. In addition, the CEDAW Convention only uses the word "sanctions" on two occasions, without specifying the type of sanctions and merely referring in general terms to a broad obligation of member states to adopt some measure to eliminate discrimination (UNGA 1979, art. 2b and art. 11(2)a). Similarly, the Belém do Pará Convention only mentions "penal" provisions once, when it calls upon member states to pass legislation that is "needed" to "prevent, punish, and eradicate violence against women" (OAS 1994, art. 7c). Although it uses the terms "sanctions," "punish," and "punishment" on several occasions—including in the title—the Convention fails to define them clearly or clarify what specific obligations they generate.

Notably, other international human rights treaties do explicitly call for criminalization. For example, both the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNGA

1984) and the Inter-American Convention to Prevent and Punish Torture (OAS 1985), in their Articles 4 and 6, respectively, require each member state to "ensure that all acts of torture are offences under its criminal law." Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (UNGA 1965) indicates that member states shall declare hate speech "an offence punishable by law" (art. 4). The Istanbul Convention falls into this category as well, consistently urging member states to take all necessary measures to make sure a variety of conducts (i.e., psychological violence, stalking, physical violence, sexual violence, forced marriage, female genital mutilation, forced abortion, forced sterilization, and sexual harassment) are "criminalized." While each of these treaties leaves little room for conflicting interpretations of these calls for action, the same cannot be said for other treaties, such as the Belém do Pará Convention and the CEDAW Convention, especially when considering the scope of conduct covered under its broad definition of violence.

Criminalization can indeed be considered—or even mandated for the most extreme forms of violence—but it is not the only path forward to preventing and redressing all human rights violations. Accordingly, the fact that obstetric violence constitutes a clear violation of various human rights, including the right to a life free of violence, does not necessarily translate into an obligation to criminalize it in all its forms, especially considering the broad range of conduct this concept currently encompasses.

5. Limitations and Dangers of Relying on a Criminal Law Framework

The question then becomes whether criminalization is an adequate and desirable measure within the law and policy framework to address obstetric violence in its entirety. Various arguments would suggest it is not. Critiques of criminalization within human rights and social justice movements are not new. For decades, scholars and activists have documented and denounced a variety of problems with criminalization on a wide array of issues in the health context. Studies on drugs (Csete et al. 2016) and HIV (Jürgens et al. 2009) policies, for example, have shown that not only does criminalization rarely fulfill its promises (reducing drug consumption or HIV infection rates), but that it has various pernicious effects both on people's lives and on entire communities. Within the feminist movement, the work on abortion (Cook

2014) is a traditional example that also highlights the variety of problems with criminalization, considering that it has been used to reproduce harmful gender stereotypes and limit women's reproductive freedom.

In recent years, diverse feminist critiques have arisen in response to an increase in criminal measures implemented in the name of women's rights (see Larrauri 1994, 2007; Birgin 2000; Davis 2003; Bodelón 2009; Spade 2015; Miller and Roseman 2019; Halley et al. 2018; Gruber 2020). Consequently, the critiques are varied and provide important lessons that can inform the conceptualization of obstetric violence laws and policies. They provide historical, political, and even legal reasons to be wary of criminal law.

6. Criminal Law Logic

Like other branches of law, criminal law has its own rules. Ultimately, this is part of what makes each branch of law unique: they operate under their own logic and have their own principles, relevant actors, and potential reach. Although criminal law can be used, for instance, to impose criminal fines, its most distinctive feature—and what truly sets it apart—is the potential to imprison people, which has led to the developing of a framework with significant consequences for anti-violence activism.

For instance, under the rule of law, the principle of legality is a fundamental guide for state actors, particularly those that exercise punitive power. In this regard, international human rights bodies have long established that precisely because of the high stakes on personal liberty, criminal law must be meticulous when describing punishable conduct and associated penalties to prevent public authorities from being arbitrary (Ministerio Público Fiscal de la Ciudad Autónoma de Buenos Aires 2013, 112). Thus, definitions that might be acceptable under civil or administrative law are not necessarily acceptable under criminal law, where there is no room for ambiguity. However, as explored above, there is still no academic consensus on the concept of obstetric violence, nor is there uniformity in what has been included in legislation (Kukura 2018, 762). In fact, definitions such as the one used by the MESECVI could be problematic under the criminal law framework, given, precisely, their breadth.

Furthermore, criminal law has a highly stringent burden of proof. In criminal law, as the saying goes, a defendant is "innocent until proven

guilty." It is guilt—not innocence—that must be proven at trial, and guilt must, in turn, be proven "beyond reasonable doubt" (Open Society Justice Initiative 2013, 7). In practice, this high threshold for evidence can become an obstacle for victims of gender-based violence against women. By establishing such a threshold, criminal law can inadvertently (and, at times, unlawfully) result in victims being subjected to intense questioning, often up to pushing them to make their accounts inconsistent. This has been documented in relation to other forms of gender-based violence against women and should be taken into account in the debate about criminalizing obstetric violence (Baker 2015; Busby 2014).

7. Criminal (In)Effectiveness and Overall Insufficiency

In addition to the inherent complexities of criminal law, there is the issue of its effectiveness or lack thereof in preventing and redressing conduct that constitutes obstetric violence. According to Corral (2019), for instance, in Veracruz, the first state in Mexico to criminalize obstetric violence in 2010, only six criminal investigations were opened regarding this crime between 2010 and 2017. According to the author, none of these resulted in a trial, let alone in conviction. Given Mexico's history of impunity, this is not surprising (Le Clercq Ortega and Rodríguez Sánchez Lara 2020). Most crimes—the exceptions being petty theft and drug-related crimes (Pérez Correa 2015)—go unreported and unpunished (INEGI 2020), meaning that criminalization can fall short of the promise of accountability and redress for acts of violence in this country.

Nevertheless, even if the use of criminal law were to achieve the expected results, it would be insufficient in the face of systemic problems. First, criminal law typically focuses on individuals as opposed to institutions. When applied to obstetric violence, this means that criminal law places the focus on "bad" health professionals—"bad" doctors and "bad" nurses—instead of the broader health systems within which they operate. Of course, the logic is that punishing individuals can potentially trigger a systemic effect by making others think twice before engaging in the same conduct. However, many acts and omissions that constitute obstetric violence are not only permitted but promoted within current health systems, and criminalization does not necessarily address the conditions that enable or incentivize this type of behavior (Lamble 2019; Spade 2015, 44-46). For

instance, Castro (2014) has shown that the hierarchical and violent behavior of some doctors in the delivery room cannot be fully understood without considering the overall profession's values and practices. He maintains that the authoritarian medical *habitus* begins during the years of medical school training, residency, and specialization (Castro 2014). Doctors' training is grounded in the principles of hierarchy, inequality, and punishment, and they later reproduce these values in their practice. Punishing a single doctor, or even multiple doctors, for living up to the profession's standards does nothing to change the profession's standards. Per Castro's findings, the attempt to tackle obstetric violence should, therefore, include reforming health professionals' training.

Second, criminal law traditionally focuses on punishment rather than comprehensive redress. It is not designed to repair the damage done to victims, change the behavior of individuals beyond the parties involved in a matter, or prevent similar harm from occurring systemically. Going back to Castro's example, criminal law can lead to the punishment of one or more health professionals, but it does not usually concern itself with guarantees of non-repetition within a particular healthcare setting or the broader health system.

8. Alternatives

In addition to criminal law, there are a variety of law and policy measures that can be adopted to address obstetric violence, as suggested by Special Rapporteur on Violence Against Women Dubravka Šimonović in the mentioned report (UNGA 2019). From a systemic perspective, these include initiatives geared towards altering the incentives around acts and omissions that constitute obstetric violence, such as economic, budgetary, and educational measures, among others. From an individual perspective, it is worth, at least, considering other adjudication systems. For example, civil law can lead to reparations on the part of health professionals and healthcare institutions; administrative law can lead to disciplinary complaints, particularly in public healthcare institutions, as can the rules governing professional associations; and then there is international human rights law, albeit in a subsidiary capacity.

Regardless of the respective limitations of each of these alternative measures, the fact is that states have multiple legal and policy frameworks

at their disposal that might—or might not—be better suited to address the acts and omissions that constitute obstetric violence. States should take a nuanced approach, considering alternative law and policy measures before jumping to the conclusion that all forms of this type of gender-based violence against women must necessarily be tackled by criminalization. This is particularly relevant in contexts where human and financial resources for addressing obstetric violence are scarce, and there is a need to prioritize among the various measures that might be available, especially where efforts to promote, adopt, and implement criminal law actually in effect supplant the development or improvement of other law and policy measures.

Conclusions

Given the severity of the harm that mistreatment during pregnancy, childbirth, and postpartum care can cause to a patient, it is not surprising that various national and international bodies—often in response to calls to action from the feminist movement—have adopted a gender-based violence against women approach and occasionally a criminal law framework to name and address this pervasive problem. On the one hand, the power associated with this rhetorical framing has raised awareness among decision-makers of this pervasive problem and resulted in the adoption of criminal laws at the national level geared towards preventing and redressing these harmful practices. On the other hand, some feminist scholars have expressed concerns about possible unintended consequences and missed opportunities associated with the trend of relying primarily on a criminal law framework to develop solutions once a conduct or range of conduct is labeled or framed as violence.

Moreover, on a normative level, while international human rights law clearly establishes that obstetric violence results in the violation of various human rights, it does not necessarily impose an obligation on member states to criminalize obstetric violence in all its forms. As in the case of other forms of gender-based violence against women, various non-criminal law and policy measures can be and have been used to tackle obstetric violence, ranging from civil law to professional standard setting. Alternatives to criminalization may ultimately be more effective, given the critiques of criminal law's logic, efficacy, and scope.

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Before and after *Guzmán Albarracín*: Challenges to Advance Sexual and Reproductive Education in Latin America*

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Introduction

Sexual and reproductive education has been proven and internationally recognized as an effective method to reduce early childbirth, unsafe abortions, maternal mortality, and sexual violence and to promote gender equality and sexual and reproductive health and rights (Vanwesenbeeck et al. 2015). Nevertheless, *in the ever-polarized political climate of the region* (Shepard 2000), discussing sexuality and reproduction with children and adolescents has traditionally been taboo (Kellogg and Stepan 1978, 576). Even when societies agree on the core principles of sexual and reproductive rights, the sexuality of children and adolescents is still denied and publicly condemned; privately, it is excused since it is regarded as shameful and a sign of weakness to comply with the predominant moral codes (Shepard 2000), thus leaving them out of the scope of public policies or even the

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public discourse. However, over the last decades, social movements, such as feminism, have brought the issue to the public agenda, denouncing the influence of the Catholic Church and the political strength of more conservative political actors and stressing how they negatively affect human rights (Morán Faúndes 2013). Moreover, multiple human rights bodies and regional courts have acknowledged the issue as to whether imparting comprehensive sexual education to children and adolescents constitutes a human right and, if so, to what extent.[1] The answer, according to these bodies, is yes.

However, in Latin America and the Caribbean, the implementation of sexual and reproductive education has been null or precarious. As UNESCO has stated, the fact that over half of the countries in Latin America and the Caribbean have, to some extent, policies on sexual education lacks relevance if they are not implemented adequately (UNESCO 2021, 52). The region continues to see a rising number of pregnancies of girls under 14 years old (PAHO 2018), which directly impacts their lives and livelihood and their prospects in education, work, and income, among others, affecting their physical, mental, and social health and wellbeing (Gómez de la Torre, Castello, and Cevallos 2016, 45). For example, in Peru, only 8% of teachers impart Comprehensive Sex Education, and only 21% of children receive information on reproductive rights in school (Hiperderecho 2020). In Guatemala, 56.47% of adolescents stated that they did not receive information about how to prevent pregnancy (Rodas Andrade 2019, 25). This percentage is even higher for adolescents who live in rural or remote areas (Rodas Andrade 2019, 25). In fact, in a knowledge test given to teaching staff in Guatemala on human reproduction, anatomy, and physiology, teachers answered only 5 out of 9 questions correctly, and 89% of them reported that they would prefer to have an expert instruct the course (Rodas Andrade 2019, 25).

The lack of sexual education is particularly problematic in Latin America and the Caribbean. Nevertheless, in 2018, 72% of the countries

[1] For more details, see CRC 2003, par. 2, 16, 28, 39c; CRC 2013, par. 21; CRC 2016, par. 39 and 60; CEDAW Committee 1999, par. 18, 22-23, and 31e; CEDAW Committee 2017, par. 68; ECHR 2017, par. 35.

in the region[2] did not have specific resources allocated to sex education (Asociación Chilena de Protección de la Familia 2018, 19). In a context where sexual violence is a systemic and structural issue and where there is a substantial lack of access to reproductive healthcare,[3] sexual education serves as the first instrument to assure that girls and adolescents are capable of identifying scenarios of violence and adopting informed decisions about their sexuality and reproduction, as will be developed further later in this paper. Precisely, in Latin America, three out of ten adolescents have suffered some form of sexual harassment in schools (UNICEF 2018), and 1.1 million girls within the region have suffered some form of sexual violence (UNICEF 2017, 6).

The case of Ecuador is paradigmatic of this structural regional problem. Between 2015 and 2017, there were 4,584 reports of sexual abuse in Ecuadorian schools (Ministerio de Educación 2018), with teachers registered as the main aggressors, and in 2018, there was a 55% rise in the number of claims of similar cases (Asamblea Nacional de la República del Ecuador 2018). Also, in the last decade, the pregnancy rate of girls between 10 and 14 years of age has increased by 74% in Ecuador (IACHR 2019, 111, par. 232). It has been reported that each day, seven girls under 14 years of age and 158 girls between 15 and 19 years of age give birth in the country. Likewise, a survey revealed that 51.36% of students believed that the main cause of unwanted pregnancies was the deficient sex education provided in Ecuador (Camacho and Jordán 2018).

Bearing in mind this national context, in June 2020, in the case of *Guzmán Albarracín v. Ecuador*, the Inter-American Court of Human Rights (IACtHR) (2020) developed landmark standards on significant issues regarding sexual and reproductive health, indicating that the right to education includes the right to sexual and reproductive education. For the first time, the IACtHR recognized sexual and reproductive education

[2] Argentina, Chile, Uruguay, Costa Rica, Bolivia, Ecuador, Colombia, Guatemala, El Salvador, Honduras, Paraguay, Venezuela, and Nicaragua.

[3] According to the Center for Reproductive Rights (n. d.), "80% of sexual violations of girls and adolescents are concentrated in victims between 10 and 14 years old." Also, "girls under 15 are four times more likely to die during pregnancy or childbirth than an adult woman," and "97% of women of reproductive age live in countries with restrictive abortion laws."

as a human right with special importance for children, adolescents, and other groups of special protection.

In this essay, we explore the challenges and lessons learned through the international litigation strategy of this case to achieve the unprecedented standard of sexual and reproductive education established by the IACtHR in the case of *Guzmán Albarracín*. First, we briefly present the case as a paradigmatic one, considering the context of sexual violence against girls and adolescents in Ecuador, Latin America, and the Caribbean. Second, we explain the IACtHR's main developments pertaining to sexual and reproductive rights, as well as some aspects not examined by it in this case that remain to be developed to further advance the protection of sexual and reproductive rights. Third, we analyze the standard of sexual and reproductive education, its challenges, and opportunities, which leads to the conclusion that states obliged under the Inter-American Convention of Human Rights and the Additional Protocol to the American Convention on Human Rights must provide comprehensive, scientifically based, gender stereotype-free, and intersectional sexual and reproductive education to children and adolescents, considering their evolving capacities, in order to provide them with emotional tools to understand the implications of sexual and emotional relationships—paying close attention to what consent entails—to prevent sexual harassment and abuse. This represents an advance in sexual and reproductive rights in the region. Nevertheless, we argue that the IACtHR missed the opportunity to recognize the autonomy of children and adolescents to make autonomous decisions over their bodies, sexuality, and reproduction.

1. Why the Case of Paola Guzmán Albarracín is Paradigmatic?[4]

Sexual harassment and rape are complex phenomena that reflect the underlying dynamics of gender and power in our cultures (Lonsway, Cortina, and Magley 2008). Although both forms of sexual violence are differentiated, they have core similarities that allow for a common analysis. For instance, women and girls are the most affected by sexual violence (WHO

[4] The facts of the case are referenced as verified in the Court's decision (IACtHR 2020).

2018, 6); additionally, there are myths surrounding the causes that mostly blame the victims based on sexist remarks such as "she provoked it," "she is overreacting," or ultimately "she is lying" (Lonsway, Cortina, and Magley 2008, 600). These myths constitute stereotypes that have consequences in the prevention, investigation, and overall discussion of sexual violence.[5] The issue gets more complex when the perpetrator is a figure of authority because *quid pro quo* logic comes into play. Therefore, sexual harassment in schools is silenced, and victims do not ever seek justice, which makes it more difficult for the Commission and the IACtHR to set standards on the matter.

Paola Guzmán Albarracín was a 14-year-old Ecuadorian girl, a victim of sexual harassment and rape within her school. The school's vice principal—who was several decades older than her—took advantage of Paola's academic difficulties and sexually harassed her over two years, a situation that was well known by the school authorities (IACtHR 2020, 15-17, par. 49-52).[6]

The harassment and rape she was subjected to caused Paola great pain and suffering and led her to make the decision to ingest white phosphorus, poisoning herself. On the school bus, Paola told her friends what she had done. Her schoolmates informed the school authorities, but they failed to take any steps to save her life. Instead, they took Paola to the school's nursing office to *pray to God*. Due to the school authorities' inaction, Paola's schoolmates informed her mother about her situation, who took Paola to a hospital upon arriving at the school. Unfortunately, it was too late to save Paola's life, and she died some hours later, on December 13, 2002 (IACtHR 2020, 17-18, par. 53-54).

After Paola's death, her mother sought justice for her daughter, but there were major procedural failures within Ecuador's legal system that prevented her from achieving her aim. The authorities considered that Paola had "seduced" the vice principal, thus placing the blame on her (IACtHR

[5] See the cases of *González et al. ("Cotton Field") v. Mexico* (IACtHR 2009, 98-99, par. 400) and *Bedoya Lima et al. v. Colombia* (IACtHR 2021a, 51, par. 138).

[6] There were reasonable motives to argue that as a result of the abuse, Paola became pregnant and that the vice principal pressured her to have an abortion (IACtHR 2020, 17, note 40). However, the IACtHR failed to consider those facts as proven (45, par. 145).

2020, 23, par. 76) on the grounds of a gender stereotype that ended up influencing the proceedings (57-58, par. 191). To this date, the case remains in impunity at the national level.

With this recognition of gender stereotypes behind the national proceedings, the IACtHR made clear that sexual harassment is a gender-based form of violence, highlighting the power dynamics behind the interactions of Paola Guzmán and the vice principal (IACtHR 2020, 46, par. 146). In this sense, the IACtHR remarked that Paola's gender was decisive for the configuration of the abusive circumstances (43-44, par. 141), recognizing, moreover, that adolescents have the right to decide over their bodies and sexuality (37, par. 124). Nevertheless, since Paola Guzmán did not have the emotional tools to identify the predatory nature of the relationship with the vice principal, she was not able to exercise said autonomy and rather was a victim of sexual violence (39-40, par. 131). Furthermore, the IACtHR acknowledged the role that sexual education plays in the exercise of autonomy and sexual liberties of adolescents like Paola Guzmán, and in so indicated that states are obliged to implement comprehensive and integral programs of sexual education to comply with the obligation of prevention of sexual violence against children under the Inter-American Convention of Human Rights and the instruments that complement it (36-37, par. 120).

2. Advancing International Human Rights Standards to Access Sexual and Reproductive Education: Settled Standards and Incoming Challenges

Due to the ineffectiveness of the national criminal system, in 2006, Paola's case was presented by the Center for Reproductive Rights and CEPAM-Guayaquil to the Inter-American Commission on Human Rights (OAS 2019). After a long process, on June 24, 2020, the IACtHr issued a judgment on Paola's case, finding Ecuador responsible for violating Paola's rights to life, personal integrity, protection of honor and dignity, education, and children's rights. It further determined that this constituted a breach of the state's duty of non-discrimination to prevent violence against women, as well as its duties to ensure due process and remedies (IACtHR 2020, 79-80, par. 276).

The IACtHR's ruling on Paola's case is the first one to create human rights standards on a state's obligation to prevent sexual harassment against

adolescents and girls in schools and to ensure their access to sexual and reproductive education. This decision contains at least five new international standards that constitute duties under the American Convention: the duty to adopt adequate measures to prevent human rights violations such as sexual violence within educational contexts; to eradicate gender stereotypes from educational environments and judicial systems; to adopt measures that promote the empowerment of girls and challenge patriarchal norms and stereotypes to prevent or reverse all types of discrimination; to recognize that girls and adolescents have the right to sexual freedom and control of their own bodies, according to their evolving capacities, and to guarantee access to sexual and reproductive education to girls and adolescents so that they understand the implications of emotional relationships.

The IACtHR developed further its previous case law on the evolving capacities of children and adolescents regarding their sexual and reproductive rights. It explained that the rights to personal integrity and privacy entail sexual freedom and control over their own bodies, all of which can be exercised according to their evolving capacity and maturity. In other words, adolescents have the power to make decisions over their sexuality and bodies and the right to receive information and education that allows them to strengthen their ability to exercise these freedoms. In this sense, the IACtHR also established that the right to education includes sexual and reproductive education (IACtHR 2020, 42-43, par. 139), which is fundamental for developing emotional capacities and informed decision-making, as will be discussed later.

In the case of Paola Guzmán, the IACtHR determined that she was a victim of sexual violence and rape due to the predatory relationship established by the vice principal to her detriment, which affected her education and autonomy and contributed directly to her ultimate suicide (IACtHR 2020, 48, par. 151). It verified that the lack of sexual education within the school context, being the vice principal Paola's aggressor, invalidated her consent to have a sexual relationship with him. The fact that these circumstances were normalized in the public school contributed to the state's tolerance of acts of violence, which not only constituted a breach of Paola's right to education but reflected the lack of capacity of school officials to identify and address sexual violence within the school context.

This is the first case before the IACtHR that frames sexual harassment when exercised by someone in a position of power and trust, who takes advantage of their position to invalidate the consent of the victims, as a form of sexual violence (IACtHR 2020, 38, par. 127, and 39, par. 131) since consent cannot be valid in such circumstances. As a result, the IACtHR's decision provides that states have the duty to prevent sexual violence in school settings and denounce aggressors, empowering girls to challenge the patriarchal norms and stereotypes that affect them and strengthen the capacity of family members and school officials to be able to support and accompany the victims of these violent acts (IACtHR 2020, 44-45, par. 142).

The IACtHR further determined that Ecuador failed to bring those facts to justice free from gender stereotypes. The ruling analyzed in detail the gender stereotypes that influenced state authorities. Paola was considered a *provocateur*, which facilitated the sexual violence perpetuated against her, tolerated by the school and the judicial system. According to the IACtHR, this stereotype assumes that "any woman who approaches a man for help does so with the intention of seducing him and opens the door to a transaction where their bodies and sexuality are part of that exchange" (IACtHR 2020, 56-57, par. 191). This stereotype not only normalizes violence but also blames the victim for the aggression, leading to the idea that, in reality, children and adolescents do not deserve protection or access to justice because the blame for the aggression falls on them and not on the abuser. Thus, Paola was discriminated against even after her regretful death (IACtHR 2020, 58, par. 195).

These standards are of the utmost importance. As the IACtHR's judgments pertain to violations of the American Convention on Human Rights, the legal instrument that gives jurisdiction to this Court, its decisions are binding not only on the state in question but also on the 25 states of the Americas that have ratified the American Convention. Thus, the mentioned standards must have an impact throughout the continent.

The IACtHR further elaborated on gender perspective through remedies. Aside from individual remedies, it ordered Ecuador to identify, adopt, and implement measures to address sexual violence in schools. It further developed that Ecuador should address this by "a) providing continuously updated statistical information on school-related sexual violence against children; b) detecting and reporting cases of sexual violence against children

in schools, c) personnel training in the education sector to prevent and address sexual violence, and d) providing guidance, assistance, and support to victims of sexual violence in schools and/or to their families." It also required Ecuador to make adequate consultations on the topic with girls (IACtHR 2020, 72-73, par. 245-246). The broad structural remedy is valuable. Even though it does not clarify the extent of the measures to be adopted, an analysis of the remedy from a gender perspective leads to the understanding that this measure will fail to attain its objective if it does not develop girls' autonomy and education as a means to prevent sexual violence from occurring. This analysis was pivotal in two judgments where—based on this precedent—the IACtHR ordered El Salvador and Bolivia to incorporate comprehensive sexual education within their school curricula.[7]

Nevertheless, the IACtHR also left some aspects undeveloped concerning the recognition and protection of sexual and reproductive rights in the Inter-American System. Since it did not find evidence of Paola's pregnancy, it did not examine the violation of her rights to autonomy, privacy, and sexual and reproductive health associated with the arbitrary interference of the vice principal who forced Paola to undergo an abortion, according to the representatives of the victims (IACtHR 2020, 28, par. 97). Examining these aspects could have led to the recognition that children and adolescents, considering their evolving capacities, have the right to make informed and autonomous decisions over their bodies, sexuality, and reproduction. The IACtHR could have ruled that, in the case of Paola Guzmán, this right was violated, given the circumstances under which the alleged abortion was practiced. Paola Guzmán was deprived of the possibility to make autonomous decisions over her body, sexuality, and reproduction because she did not have the tools, nor was she allowed to make a free and informed decision to continue or terminate her pregnancy (IACtHR 2020).

3. Sexual Consent and the Right to Education: A New Standard in the Inter-American System

One of the main developments in the ruling is the recognition that the right to education, enshrined within the Additional Protocol to the American

[7] See the cases of *Angulo Losada v. Bolivia* (IACtHR 2022) and *Manuela et al. v. El Salvador* (IACtHR 2021b).

Convention, includes sexual and reproductive education, which enables girls and boys to adequately understand the implications of sexual and emotional relationships, particularly regarding their ability to consent sex in contexts free of violence (IACtHR 2020, 42-43, par. 139). The IACtHR recognized sexual and reproductive education as a human right *per se* and as a fundamental tool for girls to understand sexual violence and, in consequence, to denounce it (IACtHR 2020, 43, par. 140). Developing this standard is pivotal since it establishes the minimum due diligence standards state parties to the American Convention and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" must comply with to prevent sexual violence against children and adolescents.

Thus, it must be emphasized that sexual education is directly intertwined with many other rights, such as equality and non-discrimination regarding age, as Paola's case reflected. The *Guzmán Albarracín* judgment is an example of how sex education is fundamental to preventing cases of sexual violence against girls and adolescents who otherwise may not be able to identify these predatory actions against them; however, it further contributes to the understanding of the capacities of adolescents to fully exercise their sexual and reproductive freedoms. These evolving capacities are directly related to the right to access information and education under international human rights law.

Thus, sex education as a state obligation must be provided comprehensively and without discrimination and be evidence-based, scientifically rigorous, and appropriate to the age of children and adolescents (IACtHR 2020, 42-43, par. 139). The comprehensive approach to sexual and reproductive education entails that states should aim not only to provide scientifically accurate information but also tools and critical thinking skills that go beyond the mere anatomical and biological aspects of reproduction and sexuality (Braeken and Cardinal 2008, 58). Such a toolkit allows children and adolescents a better understanding of their sexual rights and their exercise, challenging the obstacles deterring them. Also, it helps them to develop autonomy and the capacity to make responsible and informed decisions (Anderson 2010, 105) and challenge stereotypes (Schwarz 2007, 139).

Sexual and reproductive education without discrimination entails the obligation of the states to provide information free of gender stereotypes and

foster critical thinking skills in children and adolescents to identify oppressive gender dynamics, norms, and values within their society (Braeken and Cardinal 2008, 52). Children and adolescents are constantly exposed to the media and sociocultural constructions of sexual and reproductive aspects of life (Pillard 2007, 962). Without proper critical thinking skills, these representations continue to reproduce pervasive stereotypes and patterns of inequality. In this sense, sexual and reproductive education should constantly seek to "be egalitarian without ignoring the realities of sex inequality" (Pillard 2007, 961).

In addition, sexual and reproductive education should be appropriate to the age of children and adolescents, which means that the information provided must be fully understandable to the child or teenager to whom it is addressed. Even though the IACtHR did not determine when this education should be initiated, other international bodies consider that it should start early and be a lifelong process (Braeken and Cardinal 2008, 54; see also SIECUS 2004). In addition, the education directed to children and adolescents should encourage them to exercise their rights to participate and be heard, as enshrined in article 12 of the Convention of the Rights of the Child (UNGA 1989). In this sense, to guarantee that the information provided is appropriate for the children and adolescents it is aimed at, they should be actively included in the planning process. In fact, comprehensive sexual and reproductive education should empower children and adolescents with participatory techniques that gradually allow them to guide and address information they identify as essential for their needs and interests.

Consequently, states cannot ban sexual and reproductive education (IACtHR 2020, 42-43, par. 139) in schools because access to this type of education has been established as a human right in the region. In the same way, states cannot rely anymore on an abstinence-only approach to sexual education since this approach does not fulfill the requirements established by the IACtHR's standard. Despite the popularity of abstinence-only approaches in several Latin American countries, this type of sexual and reproductive education lacks evidence of its effectiveness, and it disregards the rights of children and adolescents (Santelli et al. 2006). In fact, multiple studies have shown that "adolescents who receive comprehensive sexual education are less likely to become pregnant than both adolescents who receive no instruction and adolescents who receive abstinence-only instruction"

(Kohler, Manhart, and Lafferty 2008, 349; see also Rubenstein 2017; Kirby 2002; Collins, Alagiri, and Summers 2002). In addition, the abstinence-only approach reproduces stereotypes and moral double standards on gender and sexuality (Anderson 2010, 83; see also Pillard 2007), violating the right to a comprehensive sexual education free of discrimination. Finally, abstinence-only approaches produce shame around sexual activity, silencing victims of sexual violence, in contrast with the main objective of sexual and reproductive education pointed out by the IACtHR.

In this context, the ruling provides a new safeguard towards addressing a patriarchal culture that normalizes sexual harassment in public schools, promoting the education of children and adolescents on how to identify and denounce these deplorable practices. Also, it advances the contents of sexual and reproductive education as a public duty, guiding states in the implementation of this new obligation.

Conclusions

The ruling of the IACtHR on the case *Guzmán Albarracín et al. v. Ecuador* has set important precedents for Latin America and the Caribbean region regarding the recognition and protection of the sexual and reproductive rights of girls and adolescents. The transformation of these legal obligations into concrete actions requires states to adopt effective public policy measures to prevent sexual violence and discriminatory stereotypes, especially in the case of adolescents. A successful model in Ecuador could serve as a cornerstone to implement these human rights standards throughout the region. The IACtHR's decision recognizes that girls and adolescents have the capacity to sexually consent to relations, as well as the duty of states to adopt measures toward guaranteeing the realization of their sexual freedom without violence. In particular, it acknowledges sexual and reproductive education as a human right with a unique impact on exercising other rights.

This decision is a relevant precedent that should inspire other regional and national courts, as well as policymakers worldwide, to adopt measures that guarantee access to a comprehensive sexual and reproductive education so that they understand the implications of emotional relationships, identify sexual abuse, and exercise their sexual and reproductive rights. Also, sexual and reproductive education is a tool that provides an opportunity for change and improves the quality of life of children and adolescents in

the future. Besides its fundamental function of helping to identify sexual violence, it is also a tool to eradicate stereotypes that are normalized and that fuel gender inequality. However, it should not be ignored that the implementation of sexual education is "a complex process of ongoing interaction between individuals, their social environments and overall possibilities" (Vanwesenbeeck et al. 2015, 482). In this sense, the new standard creates an opportunity for cooperation between diverse actors, such as state entities, civil society organizations, communities, healthcare providers, and education programs, together with children and adolescents. The participation and inclusion of children and adolescents, taking into account their evolving capacities, is fundamental to creating and implementing an effective program of sexual and reproductive education in the region.

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Evaluations of University-Level Sex Education by Medical and Midwifery Students in Chile

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Introduction

The World Health Organization (WHO 2018) has recognized sex education as a central requirement to enjoy a pleasurable and risk-free sexual and reproductive life. Having failed to guarantee equitable, quality sex education, Chile owes a historical debt in this respect. As recently as October 2020, a comprehensive sex education bill that sought to tackle these shortcomings failed to pass in Congress.[1] This state of affairs is partly due to the inadequacy of the legal framework. In their study, Palma, Reyes, and Moreno (2013) noted that Law 20418 of 2010—the ruling sex education legislation—tends to reduce this issue to birth control and gives schools

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[1] The Chilean Education Act is an organic law whose amendment requires a 4/7 majority, equivalent to 89 votes. The Bill received 73 "for" and 67 "against" votes and 2 abstentions.

wide latitude to set the curriculum based on their core values. The Congressional Advisory System of the Chilean Chamber of Deputies has further concluded that the legislation has been ineffective in providing content, noting that it "inhibits education based on knowledge and empirical evidence, […] and prevents training from a neutral and objective perspective" (Comité de Evaluación de La Ley 2018, 112).

Chile ended two unprecedented constitutional reform processes, both voted against. It experienced the pendulum on several proposals, one of them the state's general obligations on human rights and the other, the right to comprehensive education. The first process had a gender parity composition in the Constitutional Convention. It incorporated a clause on a comprehensive right to education, spelling out the obligation of sex education in school curricula. The Constitutional Convention, in the first attempt, received several citizen proposals for constitutional clauses related to sexual and reproductive rights, including the right to sex education. For instance, some of these pursued to enshrine non-sexist and comprehensive education (Iniciativa Nº 44.190) and the right to menstrual education (Iniciativa Nº 67.162), whereas other initiatives promoted freedom from non-state interference in education (Iniciativa Nº 9.378). In the second constitutional process, with an overwhelming extreme right-wing composition in the elected constitutional counsel, the proposed constitutional text went in the opposite direction. Even though it strengthened freedom from non-state interference in education, even when public funding was involved, the ultra-conservative constitutional draft was rejected. Consequently, the situation returned to square one, given that although a constitutional mandate is an important step forward, constitutions, laws, and regulations must be implemented to avoid the gap between law in books and law in action.

The inadequacy of the sex education framework also reflects the prevalence of conservative views advocating freedom from state intervention and reducing sex education to birth control (Arenas et al. 2016). Studies with high school students reveal that they consider education to be insufficient, focused on biological aspects—mainly lectures and no participation—without involving issues such as emotions, changes in people, and the consequences of exercising sexuality (Obach, Sadler, and Jofré 2017). Figueroa Silva (2012) describes the situation as a "hindrance" that obstructs comprehensive policymaking. As UNESCO has stated, sex

education should be a broad-based teaching and learning process, encompassing social, cognitive, psychological, and physical dimensions based on scientific information, human rights, and gender equality (UNESCO 2019). The need for science-based sex education within a human rights framework becomes particularly relevant given the alarming increase in the rates of HIV and sexually transmitted infections (STIs) (Ministerio de Salud 2018). In 2016, UNAIDS (2017) placed Chile among the top ten countries with the steepest increases in HIV/AIDS cases. As healthcare practitioners play a key role in either reinforcing or eroding deep-rooted myths and prejudices regarding sexuality, knowledge of their attitudes and evaluations, especially on issues that stir moral debate (such as Law 21030 decriminalizing abortion on three grounds), has special importance.

A review of the literature reveals precious little research on Chilean post-secondary sex education, let alone on whether the sex education imparted to students enrolled in health programs impacts the services they will be called upon to provide and the attendant benefits to users. Godoy-Flores and Lee-Muñoz (2019) carried out a study with a small sample of dentistry students on their sexual practices on oral sex. Regarding sexual health knowledge among the participating students, their behaviors demonstrated deficient knowledge about preventive methods for oral sex practices and their associated risks. Another study showed that medical students do not receive an education that considers cultural diversity, which entails the inability to address stereotypes against the LGBTQ+ community (Ortiz-Moreira et al. 2018). Another Chilean university implemented a teaching project in a sexual and reproductive education course for its midwifery students. The methodology involved students—guided by a teacher—planning a sex education intervention with high school students in vulnerable urban districts of Santiago. The project entitled *Aprender sirve, servir enseña* [*Learning Serves, Serving Teaches*] had two purposes: to educate university students and for them to learn by teaching sex education (Gysling Caselli and Flandes Vargas 2018). Furthermore, research with nursing students in 2003 revealed attitudes and beliefs about HIV/AIDS in two universities (Rivas et al. 2009). Among the findings on attitudes, some stand out, such as the lack of skills to assist patients or the fear of contagion with phrases like: "I am not prepared to accompany the patient in the process"; "I do not have the tools to establish a trusting relationship with the patient"; "How

can I establish a trusting relationship with the patient?"; "I have difficulties treating and caring for them"; "I am afraid of contagion."

Sex education is an integral part of the right to education, as spelled out in international human rights law. As such, based on an empirical study, this article seeks to contribute to a better understanding of the perceptions of future healthcare practitioners currently enrolled in midwifery and medical schools about the sex education they receive and its implications for human rights.

1. Methodology

The study used quantitative methodology through a cross-sectional design. Data was collected from medical and midwifery students in seven Metropolitan Santiago universities through a survey posted to the Qualtrics platform. Fieldwork was conducted from October 2017 to May 2018, i.e., shortly after passing the law that decriminalized abortion on three grounds (September 2017). This article analyzes student perceptions and assessments of sexual and reproductive health education received as part of their university training. Five schools from four universities helped share the survey link through their own communication channels and social media. In three schools that did not reply to our invitation to participate, research assistants passed out flyers that contained a QR link access code. To encourage participation, respondents entered into a draw for 25 gift cards worth about US$30 each.

Sampling

Non-probabilistic theoretical sampling (Corbetta 2007) was performed based on the following selection criteria: (1) universities teaching midwifery and/or medicine with specialization in obstetrics and gynecology, and (2) public, private, secular, and confessional (i.e., Catholic) universities. Seven institutions were selected, with a total enrollment of about 7,000 medical and midwifery students, representing 72% of medical students and 38% of midwifery students in Metropolitan Santiago (CNED 2019). The survey was forwarded to 2,148 recipients, 459 of whom accessed the included link. After data collection was complete, respondents who did not meet the selection criteria and those who answered less than 40% of the survey were purged. Also excluded were respondents who did not complete the

section on sexual and reproductive health education. The final sample consisted of 322 students with an average age of 22, including 61% females and 38% males. About 42% had attended a private secondary school, 36% attended a subsidized private school, and 21% attended a municipal school. Of these, 25% were studying midwifery and 75% medicine, including 3% who said they wished to specialize in obstetrics and gynecology; 43% were in their first or second year of study, 33% in the third or fourth year, 13% in the fifth or sixth year, and 11% in their seventh or eighth year. Of the total sample, 78% were enrolled in a secular and 22% in a confessional (Catholic) university. About 48% reported a religious affiliation. On political allegiance, 48% reported identifying with the left or center, 24% with the right or center-right, and 28% with the center or none (Table 1).

2. Analysis

Data was processed in the SPSS Statistics 21 package using a two-stage strategy. Stage one included a bivariate analysis to examine the relationship between university type and perceptions of sexual and reproductive health education. To explain student evaluations of the sex education received, a multiple linear regression dependency model was constructed. The dependent variable was: "Rate the sexual and reproductive health education your school provides," with scores ranging from 1 (terrible) to 7 (excellent) and a significance of $p<=0.05$. Independent variables were: (i) Type of university (secular or Catholic); (ii) Gender; (iii) Age range; (iv) Field of study (midwifery, general medicine, and medicine with specialization in obstetrics and gynecology); (v) Region of secondary education completion; (vi) Political self-identification/affinity; (vii) Religious beliefs; (viii) Frequency of attendance to religious services (grouped in brackets); (ix) Year of instruction; and (x) Type of secondary school attended, as a proxy for socioeconomic status. Also used as an independent variable was the question: "Which of the following best describes your school regarding sexual and reproductive health matters?" Respondents had to state their degree of agreement from 1 (strongly disagree) to 5 (strongly agree) with the following statements: (i) Pluralistic (allows diverse viewpoints); (ii) Homogeneous (allows only one viewpoint); and (iii) Focused on women's rights. Stage two included qualitative analysis of the following open question: "What should your university do to improve the treatment of sexual and reproductive health

issues?" Comments were grouped into nine categories using inductive coding (Table 2).

3. Results

Students gave an average score of 5.4 (on a scale of 1 to 7) to how their schools teach sexual and reproductive health. In the Chilean context, this is considered acceptable but not outstanding. The largest differences occur when cross-referencing with secularity and with the imprint students associate with their universities. Those who gave high marks to the sexual and reproductive health education received identified their schools as "pluralistic" and "focused on women's rights." Respondents who saw their school as "homogeneous" tended to give sex education training poorer marks (mean of 5.5 vs. 4.7, $p<0.05$) (Table 3). While the multiple linear regression used all variables, only some yielded significant relationships, which helps clarify sex education ratings. Significantly, sociodemographic variables (religion, age, gender, region of secondary education completion, type of secondary school, and political self-identification/affinity) did not explain the evaluation of the sexual and reproductive health education received.

Variables that did prove significant were the year of instruction, the university's confessional nature, and the imprint students associated with their schools. Proving to be more relevant than sociodemographic variables were perceptions on the type of university (confessional or secular, homogeneous or pluralistic, and focused on fetal rights or women's rights or not). Students who rated well the sexual and reproductive health education received were further along in their programs (fifth to seventh years and recent graduates) (Beta 0.60, CI: 0.09, 1.12) and considered their schools to be more pluralistic (Beta 0.57, CI: -0.02, 1.15) and/or focused on women's rights (Beta 0.55, CI: 0.15, 0.95). Students who saw their schools as homogeneous on sexual and reproductive health issues (Beta -0.80, CI: -1.34, -0.25) did not have as good an opinion. The third significant variable was whether a university was confessional or secular. Students in confessional universities gave poorer marks to the sexual and reproductive health education received (Beta -1.32, CI: -2.15, -0.50) than their peers in secular institutions (Table 4). This illustrates the relevance of a school's confessional or secular nature over student sociodemographic variables; this is probably because students in Catholic universities perceive their institutions as providing

sexual and reproductive health training that is more homogeneous, less pluralistic, less science-based, and less oriented to women's rights, which is negatively evaluated regardless of sociodemographic profile.

To find out more about student views on sexual and reproductive health education and their educational needs, we examined responses to the following open-ended question: "What should your university do to improve the treatment of sexual and reproductive health issues?" Grouped, coded answers (Table 2) show that a key recommendation was to provide *objective, unbiased information* (23%) and that content delivery should use "a science-based approach." As a medical student from a private Catholic university stated, "The school should be more objective in the delivery of knowledge and leave personal beliefs out."

These recommendations also speak to the need for a more pluralistic education that provides a broader view of sexual and reproductive health issues. As a midwifery student respondent from a private Catholic university noted, "Offer other perspectives, as not everyone is Catholic or has the same affinities. In short, do not force people to think like you, and do not turn public health into a moral or religious issue."

Respondents also highlighted *incorporating content on abortion* (20%), with special emphasis on hands-on skills. This is a highly relevant point, as 82% of respondents felt that, since abortion on three specific grounds is no longer a crime, this development called for curricular changes in sexual and reproductive health courses. As a medical student from a private Catholic university said, "Teach proper abortion methods, based on the university's vision and mission, if you will, but without neglecting the practical tools. After all, we will consciously and judiciously decide how to use them."

These suggestions also emphasized the need to integrate other pregnancy termination know-how, including related legal and psychosocial aspects, counseling, and post-abortion care. A further set of recommendations was for schools to *increase and widen sexual and reproductive health content* (17%), albeit without referring to specific topics. Similarly, a significant number of respondents felt that such contents should be part of required courses. As a medical student from a public secular university pointed out, "Offer specific components so we can formally work on these issues and be evaluated on them."

Respondents also suggested that universities *carry out sex education campaigns* (12%) aimed at both the university community and the population in general. These comments spoke not just to their training needs as future healthcare practitioners but also to the proactive social role universities ought to play in preventing sexually transmitted infections (STIs) and providing public information on contraception. Less frequent responses added that schools should *offer sexual health content in the first years of training* (5%), *incorporate multidisciplinary content,* notably from the social sciences and the law (5%), and *incorporate and deepen content on contraception* (2%).

4. Sex Education and Human Rights

Education is a pillar for individual development. In many cases, it enables social advancement so that each person can develop their own life plan. Education as a social right not only impacts the individual but also the collective. Kweitel and Ceriani (2003) refer to it as a hinge between political and social rights. Education makes it possible to exercise other rights; on the contrary, a lack of education reduces the chances of having a decent job and social security, not to mention the right to housing. In turn, education based on respect and equal consideration for others facilitates the elimination of stereotypes that undermine historically subordinated groups. Thus, sex education as a component of the right to education enables people to make informed decisions in the area of sexuality and reproduction, which will impact their health and life course. Therefore, the centrality of education must be considered a state obligation. In the case of sex education for those who will provide services or knowledge to others, such as health professionals or teachers, comprehensive sex education will reduce stereotypical beliefs and certainly improve services.

In line with the Convention on the Rights of the Child (1989), the World Health Organization has issued a range of guidelines designed to assist countries and policymakers in providing children and adolescents with comprehensive sex education intended to both protect and prepare them for adult life (WHO 2019). In addition, Article 16(e) of the Convention on the Elimination of All Forms of Discrimination against Women (UNGA 1979) expressly cites reproductive education among state party obligations. Similarly, the authoritative interpretations of human rights

treaty monitoring bodies have emphasized comprehensive sex education obligations. For example, General Comment No. 4 of the Committee on the Rights of the Child (CRC 2003, par. 28.) urges state parties to provide adolescents with access to sexual and reproductive information. Likewise, General Comment No. 20 (CRC 2016, par. 59) reiterates this and adds the need for gender-based education.

General Comment No. 36 of the United Nations Human Rights Committee (2019, par. 8) encourages providing evidence-based, quality sexual and reproductive health education to reduce the stigma associated with abortion, as does Comment No. 22 on Sexual and Reproductive Health of the United Nations Committee on Economic, Social and Cultural Rights (CESCR 2016). Both committees also call on state parties to provide science-based education. Yet, the challenges of including sex education in the curriculum are not specific to Chile. European countries have faced multiple barriers trying to discuss topics such as sexual diversity, teenage sex, and gender, to name a few (Mijatović 2020). In response, the Council of Europe has repeatedly called for member countries to remove barriers to comprehensive sex education and reminded them of international human rights standards and Council guidelines meant to ensure that children and adolescents receive unbiased, evidence-based information (Mijatović 2020).

The importance of providing sex education on sexual and reproductive health in public schools was raised in the case of *Guzmán Albarracín et al. v. Ecuador* by the Inter-American Court of Human Rights (IACtHR 2020). The victim, a 16-year-old adolescent who experienced sexual harassment from the school vice principal, committed suicide because of getting pregnant as a result of these acts of violence.[2] The petitioners argued that if she had received sex education, she would have enjoyed greater agency to make decisions about her sexuality and reproduction, allowing her to report the sexual harassment she experienced (IACtHR 2020, 28, par. 96, note 87). Although contending, Ecuador had enacted a sex education law (*Ley de Educación Sexual y del Amor*) in 1998. Nevertheless, it was up to school authorities to adapt the curricula given their schools' cultural

[2] Her pregnancy was not confirmed in the criminal investigation due to flawed forensic analyses. However, the testimonies of her friends point out that she was facing an unwanted pregnancy (IACtHR 2020).

reality and submit the plan to the Guidance and Counseling Department and school parents for approval. However, there was no evidence that the public school where the victim studied had in fact implemented sex education (IACtHR 2020, 41, par. 138, note 133). The IACtHR reasoned that the right to education includes the right to comprehensive sexual education in the terms established by the United Nations Committee on Economic, Social and Cultural Rights (CESCR 2016). Education must be evidence-based, rigorous, free of discrimination, and age-appropriate (IACtHR 2020, 42-43, par. 139).

Integrating sex education into health-related disciplines that ought to provide future practitioners with adequate tools is especially relevant when school education, as is the case of Chile, is found wanting. Proper education can help debunk myths and prejudices, especially around politically charged issues that may reproduce or reinforce gender stereotypes. Molina, Alarcón, and Molina (2021) reviewed the experience of incorporating an elective course on sexuality and reproduction education for students of health careers at the Universidad de Chile. The study measured the knowledge prior to beginning the course. The questionnaire asked, for instance, about masturbation (Q. Frequent masturbation in adolescents may cause feelings of guilt but not necessarily physiological damage), which 47% answered incorrectly. In another query about the possibility of pregnancy in the first sexual intercourse, 66% of students responded incorrectly (Q. The teenager who initiates unprotected sexual activity, only in the first intercourse, is sure not to become pregnant). The authors concluded that the course fulfilled the role of reducing the knowledge gap in sexuality and reproduction while demonstrating, at the same time, the shortcomings of the sex education received during school education. The general outcomes revealed that in the 2018 and 2019 courses, 61% and 53% of responses were incorrect, respectively; all questions related to myths and stereotyping. Of the medical students, 7% and 5% failed the course in 2018 and 2019, respectively. The outcomes were of great concern to the researchers, given future healthcare professionals' role in resolving queries and offering general recommendations to patients. Research at several universities has shown that medical students get little training in reviewing sexual health with patients, a shortcoming that directly impacts addressing sexual history, behavior, conditions, relationships with the LGBT+ population, and

abortion (Worly et al. 2018; Shindel et al. 2016). Among insufficiently addressed topics, these authors cite sex trafficking, sexual health for women with disabilities, and culturally appropriate approaches. Other studies have added that unfamiliarity or prejudice arising from subpar physician training will impact the sexual and reproductive health of sexual minorities (Quinn et al. 2021).

Topics such as abortion, teenage contraception, and conscientious objection often prompt a wide range of views. Being in positions of authority, teachers can either squelch dissent or foster respectful debate. Even if culturally resisted, challenging topics should be addressed in the classroom, ensuring that future practitioners train technically and also learn to approach issues of sexuality and reproduction, including a human rights perspective in their practice in diverse societies (Zaidi, Henderson, and O'Brien 2021). As transpires from the students' accounts in this study, shunning seemingly controversial topics or framing them as if they had a single answer can prevent students from a chance for ethical deliberation. Furthermore, placing personal beliefs above professional ethics will always be problematic in clinical practice. Similarly, evasive attitudes, such as covering the mechanics of contraception but not the right to receive it as needed, preclude proper student discussion (Zaidi, Henderson, and O'Brien 2021, 1265).

In Nigeria, a study aimed at emphasizing gender-sensitive, rights-based teaching over a population-control approach identified significant sexual and reproductive health shortcomings in medical training. The study, conducted in a country where abortion is restricted, concluded that training should include proper abortion and post-abortion care to improve related indicators (Oye-Adeniran et al. 2004, 88-89). A Scottish medical school carried out projects involving medical students. One of them offered students the opportunity to be trained as peer-group sex educators and deliver a sex education program in Edinburgh schools. The aim was that medical students develop communication skills, knowledge, and awareness of sexual health issues (Faulder et al. 2004). To prepare for the training, the researchers used a questionnaire presenting a set of fictional vignettes on clinical scenarios to assess students' theoretical confidence in dealing with reproductive and sexual health consultations, such as dysfunctional erection, emergency contraception and unprotected sex, genital herpes and

sexual activity, and vaginal bleeding in a post-menopause woman. The results compared the responses of those students who participated in the project with those who did not. The mean total score for confidence with the case vignettes was significantly higher for students who had completed the sex education project than those who had not participated. Similarly, a literature review revealed that medical students from various countries consider their training in many areas of sexual and reproductive education inadequate and reported curricular gaps. The studies showed that students generally received sexual and reproductive health education favorably, demonstrating increased knowledge and comfort with these topics after an education session (French and Steinauer 2022).

Conclusions

This article reviews perceptions of sex education among medical and midwifery students enrolled in public, private, religious, and secular universities in Chile, showing that most participants felt that the sexual and reproductive health programs imparted at their schools could be improved. Respondents specifically considered that related contents ought to be addressed from a more pluralistic, science-based standpoint that recognizes women's sexual and reproductive rights and provides hands-on abortion care tools. Recent research (Ramm et al. 2020; Casas et al. 2020) agrees on the need for medical and midwifery training to include up-to-date, science-based theoretical and practical knowledge on ethical and legal aspects regarding pregnancy termination to more properly address confidentiality issues and conscientious objection. This article further shows that a school's religious or secular nature can be a central factor in accounting for student views on the sexual and reproductive health education they receive. Respondents attending confessional schools evaluated poorly the sex education received, while those who gave it good marks saw their schools as being more pluralistic and open to women's rights. These results match other research findings indicating that teaching these subjects in confessional schools tends to be colored by religious beliefs (Biggs et al. 2019; Baba et al. 2020; Casas and Lawson 2016; Casas 2019).

Fostering sexual and reproductive rights requires enhancing healthcare practitioner training based on more comprehensive approaches following human rights frameworks (UNESCO 2014; 2019). Inadequate instruction

can result in inferior care and impact the well-being of the general population, especially women who are the principal users of sexual and reproductive services (Vargas Trujillo, Jaramillo Sierra, and Trujillo Maza 2012). This situation gets exacerbated in the case of women with additional vulnerabilities, including low income, lower educational level, disabilities, indigenous ethnicity, minority gender identity, or LGBT+ orientation. In short, comprehensive sex education is a key component of health and educational rights, and post-secondary sex education—as imparted by universities—cannot be subtracted from the curriculum. Chile needs to move towards guaranteeing science-based sex education that is consistent with women's sexual and reproductive rights, irrespective of a university's confessional or secular makeup.

Mella and Rebolledo (2020) argue that contemporary Chile presents two forces in dispute on sex education: the church,[3] on the one hand, and feminist movements,[4] on the other. As a consequence, Chile experienced two failed constitutional processes. Future reforms in educational curricula will depend on universities to increase knowledge and develop communicational and ethical skills to deal with sexual and reproductive health issues among students from medical and midwifery schools. The government must move forward with a political willingness to design and implement public policies at all educational levels.

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[3] We would argue that it is not about a specific church but rather churches, given that evangelical churches are relevant players too.

[4] The feminist movements have pursued to incorporate with no success sex education in the constitution and the legislation. In March 2024, the right-wing political forces filed a constitutional impeachment against the approved law on gender-based violence against women because it includes the obligation for educational institutions to promote non-sexist education. The Constitutional Court, in a divided vote, upheld the challenged provision, which might be an opportunity to advance the inclusion of sex education not only in schools but also in higher educational institutions.

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Annexes

Table 1. Characteristics of medical and obstetrics students responding the survey

		N	%
TOTAL		322	100
Age			
	17-19	75	23
	20-24	188	58
	25-31	56	17
	No answer	3	1
Gender			
	Female	198	61
	Male	122	38
	Other	2	1
Field of study			
	Midwifery	81	25
	Medicine, no specialization defined	231	72
	Medicine, specialization gynecology	10	3
Year of instruction			
	1rs-2nd	139	43
	3rd-4th	107	33
	5th-7th/just graduated	76	24

		N	%
Chilean born		314	98
Lived for more than one year out of Chile		19	6
Region of secondary education completion			
	Metropolitan Santiago	252	78
	Northern Chile	20	6
	Southern Chile	48	15
	Another country	2	1
Single		317	98
Political self-identification/affinity			
	Center/none	90	28
	Right/center right	78	24
	Left/center left	153	48
Frequency of church or religious service attendance			
	Once a week /2-3 times in a month	42	13
	Once a month/2-3 times in a year	48	15
	Almost never /never	228	71
	No answer	4	1
Religious beliefs			
	Catholic	125	39
	Evangelical/Protestant	15	5
	Another	13	4
	None/Non believer/Agnostic	169	52
Type of secondary school			
	Public	69	21
	Private subsidized (public funding)	117	36
	Private	136	42
Studies at a secular university		252	78
Studies at a private university		200	62

Table 2. What would you recommend to your university to improve the teaching on sexual and reproductive health issues?

CATEGORIES/TOTAL	N	%
	198	100
Deliver objective and bias-free information	45	23
Incorporate content on abortion	39	20
Increase and widen sexual and reproductive health content	34	17
Carry out sex education campaigns	23	12
Nothing to improve	18	9
Other	15	8
Offer sexual health content in the first years of training	10	5
Incorporate multidisciplinary content	10	5
Incorporate and deepen content on contraception	4	2

Table 3. Dependent variable and university view on sexual and reproductive health issues

Concepts that best represent the view of your university on issues related to sexual and reproductive health	Quality of sexual and reproductive education at the university (from 1 = terrible to 7 = excellent)		
	Type of university		
	Secular	Confessional	General
Focused on women's rights	5.5 (SD: 1.15)	5.7 (SD: 1.17)	5.5 (SD: 1.17)
Pluralistic	5.5 (SD: 1.06)	5.1 (SD: 1.07)	5.5 (SD: 1.06)
Homogeneous	4.0 (SD:1.83)	5.2 (SD: 1.67)	4.7 (SD: 1.80)

Table 4. Linear regression with dependent variable: Thinking on a scale from 1 to 7, where 1 is terrible and 7 is excellent, how would you evaluate the teaching on sexual and reproductive health issues you receive at your university?

Thinking on a scale from 1 to 7, where 1 is terrible and 7 is excellent, how would you evaluate the teaching on sexual and reproductive health issues that you receive at your university?		Unstandardized coefficients B	Beta standardized coefficients	p>z	95% Confidence Interval for B	
				Lower limit	Upper limit	
Type of university						
	Confessional	-1.32	-0.40	0.00*	-2.15	-0.50

Thinking on a scale from 1 to 7, where 1 is terrible and 7 is excellent, how would you evaluate the teaching on sexual and reproductive health issues that you receive at your university?		Unstandardized coefficients B	Beta standardized coefficients	p>z	95% Confidence Interval for B	
				Lower limit	Upper limit	
	Secular (Ref)					
Religion						
	No religious identification	0.09	0.04	0.61	-0.25	0.43
	Identifies with a religion (Ref)					
University view						
	Focused on women's rights	0.55	0.20	0.01*	0.15	0.95
	Focused on fetal rights	-0.19	-0.07	0.53	-0.78	0.41
	Homogeneous	-0.80	-0.25	0.00*	-1.34	-0.25
	Pluralistic	0.57	0.20	0.06*	-0.02	1.15
Sex						
	Female	0.04	0.02	0.81	-0.32	0.41
	Male (Ref)					
Region of secondary education completion						
	Metropolitan Santiago	0.18	0.06	0.37	-0.21	0.57
	Other (Ref)					
Field of study						
	Medicine. no specialization defined (Ref.)					
	Medicine. specialization gynecology	-0.12	-0.02	0.80	-1.03	0.79
	Midwifery	0.16	0.06	0.46	-0.27	0.60
Type of school						
	Public (Ref.)					
	Private subsidized (public funding)	-0.10	-0.04	0.64	-0.51	0.31
	Private	0.01	0.00	0.96	-0.43	0.45
Political self-identification/affinity						
	Center/None (Ref.)					
	Right/Center right	-0.02	0.00	0.95	-0.52	0.48
	Left/Center left	0.08	0.03	0.68	-0.29	0.44

Continue

Thinking on a scale from 1 to 7, where 1 is terrible and 7 is excellent, how would you evaluate the teaching on sexual and reproductive health issues that you receive at your university?		Unstandardized coefficients B	Beta standardized coefficients	p>z	95% Confidence Interval for B	
				Lower limit	Upper limit	
Age						
	17-19	0.32	0.11	0.16	-0.12	0.77
	20-24 (Ref)					
	25-37	-0.05	-0.02	0.83	-0.55	0.44
Year of study						
	1st-2nd (Ref.)					
	3th-4th	0.13	0.05	0.57	-0.31	0.56
	5th-7th/just graduated	0.60	0.21	0.02*	0.09	1.12
Frequency of church or religious service attendance						
	Almost never /never (Ref.)					
	Once a month/2-3 times per year	0.14	0.03	0.63	-0.44	0.73
	Once a week /2-3 times per month	0.50	0.12	0.10	-0.10	1.10
(Constant)		5.25		0.00	4.15	6.36

Section II
Defying International Law: LBGTIQ+ Rights Mobilization

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Living between the Lines: Challenges to Advance LGB Rights within International Law

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Give me strength, Susie, write me of hope
and love, and of hearts that endure.

—Emily Dickinson, *Open Me Carefully: Emily Dickinson's Intimate Letters to Susan Huntington Dickinson*

Introduction

The past century has been fundamental in the development of human rights and the recognition and protection of marginalized groups in domestic and

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international law. Regardless, LGB[1] people continue to be left in oblivion when it comes to binding law in the international arena. What is left is a mediocre examination of sexuality and dangerous efforts to blend sexuality issues with preexisting agendas (i.e., women's agenda) to find a crack as a means to appear in discussions and legislation. These efforts have been made—as a cry for help—primarily by NGOs and LGB people, but have found obstacles because of ongoing resistance in the international arena to LGB rights.

In this paper, we are looking to explore and prove how the rights of LGB people face two main issues in international law: patchy interpretations and the womanization of LGB people. We will demonstrate how this negatively affects people with non-normative sexualities because it impedes us from having actual and constant protection of our rights and because it simplifies the existence of LGB people to the point where the complexity of human sexuality vanishes before the eyes of international law. To prove this, we review the literature regarding both queer theory and international law to show the importance of the division between *gender* and *sexuality* and the possible theoretical problems regarding international law's protection of LGB people. Afterward, we will propose two arguments. First, we will explore how whenever there is an effort by LGB activists to include LGB existence in law, international law is superficial and ends up being an extension of the Universal Declaration of Human Rights or an overinterpretation of the word "sex" without establishing a comprehensive sexuality agenda.[2] From now on, this argument will be denominated "patchy interpretations." Second, we will show how whenever issues of sexuality arise, they tend to get smashed into the women's rights agenda by something we will from now on call the "womanization of LGB people."

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[1] We discuss specifically LGB and exclude the T because our focus is on sexuality and not on gender identity. Although we know trans people continue to face a variety of difficulties in the international law arena, we consider that gender identity is a topic that deserves to be treated in a way that would require much more space and further in-depth research.

[2] When we refer to an agenda on sexuality, and although we are focusing specifically on what is usually considered diverse forms of sexuality, we do not want to exclude or perpetuate the misconception that heterosexual people do not have or cannot explore their sexuality. That is why we are not proposing a "gay agenda" but one based on sexuality.

1. Sexuality in International Human Rights Law

This section will briefly expose the state of the art regarding sexuality in international law to discuss the place of LGB people in the International Human Rights System. To do so we will start by summarizing the positions of human rights bodies in the universal system and then study the academic literature on the matter. In 2016, the United Nations Human Rights Council created the position of Independent Expert on Sexual Orientation and Gender Identity. Before this landmark decision, the United Nations Human Rights Committee had been interpreting the International Covenant on Civil and Political Rights (ICCPR) to expand the scope of the universal and non-discrimination clauses to sexual minorities.[3] However, despite having binding status *inter alia*, these decisions do not have general applicability for other LGB people.

Similarly, bodies such as the Office of the United Nations High Commissioner for Human Rights (OHCHR 2011; 2015) have expressed how the universal clauses or general forms in the non-discrimination clauses of human rights treaties, such as the one in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, must protect LGB people to ensure a fair life for "everyone" (OHCHR 2012)gay, bisexual and trans- gender (LGBT. This interpretation, which has been adopted by other committees (CEDAW Committee 2010), remains amidst a political dispute due to the absence of a binding clause in the treaties that directly addresses sexuality rights in a non-heterosexual understanding. Other international documents, like the 2006 Yogyakarta Principles, acknowledge the need to explicitly protect sexual minorities but lack enforceability.

This article surveyed queer studies and critical approaches to international law because they can explain LGB existence, the phenomenon of human sexuality, and the scope of protection that sexuality and LGB people have in international law. Two contemporary philosophers, both lesbians, have proposed that gender and sexuality, despite their common areas, are different human experiences with their own complexity and, therefore, can be studied independently. First, Eve Kosofsky Sedgwick's central idea

[3] See *Toonen v. Australia* (United Nations Human Rights Committee 1994) and *X v. Colombia* (United Nations Human Rights Committee 2007).

in *Epistemology of the Closet* (1990) is that since homosexual relationships are seen as deviated and voluntary, we are punished for making the wrong decision on our sexual desires. This sanction has nothing to do with gender; it is rooted only in sexuality. Second, Judith Butler has created and analyzed the concept of the "heterosexual matrix." According to it, based on its sex, the individual must have a certain gender and desire. Since both sex and gender are categories created by culture, queer people exist outside this matrix by defying the norm that a certain sex must match a determined gender and desire, making us invisible to culture (Butler 1990). Once again, gender and sexuality are proven to be profoundly intertwined but also worthy of being studied separately (like we will do in this essay).

Furthermore, Janet Halley (2006) explains how sexuality as an analytic lens can offer a better understanding than gender in matters such as sexual practices and consent. This argument calls for the abandonment of feminism[4] as an all-encompassing category. This type of analysis can also be seen in the work of Paul Preciado (2008), who studies how we live sexuality daily. This sexuality approach led him to propose the "pharmacopornographic" system as a way of understanding how, within capitalism, there is a conjunction of exploitation and voracious sexual drive condensed—and called for—in pornography. Pornography represents the idea that people depend on sexual images and substances to maintain a voracious sex drive in which men are meant to come, and women are meant to be fucked.

These authors are relevant to our work, given that they demonstrate that sexuality can be an autonomous object of study despite its proximity and deep connection to gender. Life experiences of LGB people and sexual orientation, in general, are better understood when interpreted through the lens of sexuality and not through the gendered lens. A broader comprehension is achieved when it is recognized that not all human experiences are related to identifying as male or female since deeply human experiences can be explained by how we live, recognize, name, and comprehend our own sexuality. Sexuality puts desire, the body, and sexual and romantic

[4] Specifically, radical feminism, given that it can transform itself into governance feminism, which is the inclusion of the "women's rights" discourse in the institutional legal liberal agenda. This type of argumentation will develop essentialisms, endanger minorities, strengthen antidemocratic institutions (like jails), and hinder women's autonomy.

relationships in the center stage. This does not necessarily happen with gender. While both are parts of our identity, they are different parts of it; in the context of international law, gender has greatly overshadowed sexuality, leaving those whose differences are rooted in sexual practices or desire unseen.

On the other hand, critical studies of international law include an agenda against discrimination, particularly discrimination based on sexual orientation. The two main reasons why international law cannot properly deal with sexuality are given by Hilary Charlesworth, Eric Heinze, and Eduard Jordaan. Charlesworth (2002) argues that discrimination is not well addressed by international law because it is a structural subject being treated by a "discipline of crises," which only reacts to international events and does not reflect on its own practices nor has a *continuum* of concatenated thoughts. For their part, Heinze (2001) and Jordaan (2016) have explained how countries have resisted discussing and acting on sexuality issues, arguing that they are excessively complex. Other authors have identified that legal strategies used to deal with discrimination based on sexual orientation and gender identity carry significant risks. For example, Gabrielle Simm (2021) mentions the strategy of "queering international law," which specifically focuses on the opportunities CEDAW offers to LGB people. This requires a new reading of international women's rights covenants to include the perspective of sexual minorities where they were not considered. Nonetheless, Dianne Otto (1996) recalls how "queering international law" tends to support an international system that has not recognized sexual minorities. Even when it gets included by queering the interpretation of the legal framework, the result is a binary understanding of gender. In response to this risk, we adopt the proposal of introducing a multi-gendered identities approach to international law (Otto 2006), a strategy that aims to erode the hierarchy of genders embedded in international law.

Based on our analysis of this literature, there is still space for pushing the frontier of the international understanding of LGB existence through human rights treaties. Regarding previous approaches to the international protection of LGB people, we consider that, without forgetting the importance of the arguments under which current international law instruments include obligations for states on LGB protection, there is still no serious consideration of sexuality in all its singularity and intricacy. Therefore,

there is a lack of appropriate protection and understanding of sexuality that needs to be addressed by international human rights bodies.

2. The Hermeneutic Violence of Patchy Interpretations

The first way in which LGB people exist in the universal human rights system is through patchy interpretations of the current body of law. Such bodies of law were drafted and signed between 1948 and 1995 by states and legal scholars who came together to think and negotiate definitions, limits, and state obligations regarding human dignity and protected ways of life. From 1939 to 1945, Nazi soldiers persecuted and tried to exterminate LGBT individuals. A pink or black triangle was to be worn to "warn" about their perverse sexual orientation or gender identity before being enslaved and executed. All this was known and well documented throughout the drafting processes and treaty negotiation hearings. Everyone knew it, and they started protecting human rights in international arenas because of what the Nazis had done to human beings. Everyone knew it, and yet no single treaty mentioned the protection of queer individuals nor protection regarding the safe exercise of sexual orientation or gender identity for all human beings. The fallacy that such rights were not included because queer persons were not "visible" or that our risks were not "known" is a dangerous one. It legitimizes the idea that LGB persons just recently started existing, and previous parties were only well-intentioned but oblivious. That is not true. Our existence has made waves and shaken every institution since at least the sixteenth century (Martin 2021). It was a long-standing pact of heteronormativity and cisnormativity as the only valuable ways to live human sexuality and gender expression. That is why we were left with what social pressure and progressive judges were able to provide. That is not a bullet-proof strategy; however, it is the only one we could create under such terrible circumstances.

The absence of an explicit mention of sexual orientation as illegitimate grounds for discrimination brings to light a problem that has been pointed out by José Martínez de Pisón Cavero (2020) and which is at the center of our argument: protection for LGB individuals in the universal human rights system is left to interpretation, and this is a precarious way of protecting LGB people. Many international human rights bodies have protected and continue to protect the rights of LGB people. However, this

protection has been based on risky interpretations of existing human rights instruments, a situation that puts them in precarious places from which to demand further future protection.

The first instances of patchy interpretations we found in international law are those consisting of *hermeneutic violence*, i.e., forced interpretations that stretch words beyond their natural meaning to make room for non-heterosexual persons. It is a concept created around the close reading method, originally from the literature discipline. It seeks to convey the idea that texts and words are alive, but their interpretations are not limitless: the context in which they are mentioned will shape their meaning. Therefore, international law texts can be revisited and reinterpreted, but this exercise is not infinite and not exempt from costs and risks. This situation can be found in decisions adopted by the CEDAW Committee and the United Nations Human Rights Council. As Martínez de Pisón Cavero (2020) mentions, these bodies have protected LGB individuals by interpreting that the prohibition of discrimination based on sex includes sexual orientation.

Thus, hermeneutic violence can first be seen in the decisions and recommendations of the CEDAW Committee. Both in its General Recommendation No. 28 and in the Concluding observations on Uganda, this international body argues that states are obliged to protect lesbians from discrimination based on their sexual orientation, considering the Convention's obligation to protect women from discrimination based on sex (CEDAW Committee 2010). This use of "sex" to include "sexual orientation" is clearly an interpretation legally "stretched" by the Committee. The problem is that these concepts have different meanings, and the CEDAW Committee does not clarify their difference. Recently, the LGBT movement has underlined the importance of distinguishing them (GLAAD n. d.). So, this interpretation, despite being a significant effort to include lesbians in the protection granted to women by the CEDAW Committee, is mainly made up of thin air. As mentioned before, hermeneutic violence has some risks, being the loss of meaning altogether the greater one. If "sex" can mean sexual orientation, gender identity, sex characteristics, and so on, then the concept can no longer be used as an argument. Hermeneutic violence will render words useless. This can be part of a higher risk when engaging in judicial activism: our requests will always be *too much* and should not be considered.

Another example of this *modus operandi* can be seen in the *Toonen v. Australia* decision by the United Nations Human Rights Committee (1994). In this decision, the Committee protected homosexual sexual activity, arguing that the ICCPR includes these protections in its prohibition of discrimination based on "sex." In this interpretative move, the Human Rights Committee did the same as its CEDAW Committee counterpart, reading "sexual orientation" into "sex" (United Nations Human Rights Committee 1994). Here, once again, LGB people were protected through a patchy interpretation and not through a specific reference to sexual orientation.

Related to these instances of hermeneutic violence is the issue surrounding the idea of gender ideology. Once again, this is a matter of interpretation. As Marija Antić and Ivana Radačić (2020) point out, the concept of "gender ideology" emerged in the UN stage in the context of the fight over whether sexual orientation and gender identity are included whenever "gender" appears in conventions about women's issues. The use of gender ideology as a political weapon against the rights of LGBT persons, as described by Antić and Radačić (2020), shows how problematic this protection through interpretation can be, resulting in a harsh backlash against those who "are included" under these patchy interpretations of sex discrimination.

The second patchy interpretation is evident in the international protection of LGB people, considering that this protection is only possible through their inclusion when international bodies address general protections or general dispositions. An illustrative historical example of this situation can be seen in the 1996 Beijing Declaration and Platform for Action, where the suppression of any mention of sexual orientation landed LGB people, particularly lesbians, in the uncertain territory of alluding to their sexuality as "other status," a general mandate of non-discrimination against women. The battle over the meaning of "other status" was immediate. After adopting the Beijing Declaration, political statements were issued both by countries that explicitly interpreted "other status" as including sexual orientation and by others who asserted there was no obligation in this Declaration to protect women discriminated against due to their sexual orientation (Otto 1995). The latter interpretation of states leaves lesbian, trans, and bisexual women unprotected by international declarations in the domestic sphere.

A more recent example of this situation can be seen in the United Nations Human Rights Committee's ruling on *Fedotova v. Russian Federation* (2012). The decision considers that the ICCPR protects freedom of speech when used in communications aimed at promoting tolerance towards the LGBT population. This protection was given without a mention of sexual orientation or sexual identity in the ICCPR or a comprehensive understanding of general dispositions to protect the human rights of the covenant. It was founded on an extensive interpretation of the equality and no discrimination paragraph, which protects any person against discrimination based on "other status" (art. 26). The same move applied to the meaning of the state's obligation to guarantee freedom of speech without discrimination (art. 19). Similarly, the Committee protected the right of homosexual couples to pensions based on article 26 of the ICCPR in *X v. Colombia* (United Nations Human Rights Committee 2007). Similar solutions include the interpretation of "other status" in the International Covenant on Economic, Social and Cultural Rights (CESCR 2009) and the interpretation of "discrimination of any kind" by the United Nations Committee against Torture (CAT 2008).

Even though these kinds of international protections for LGB individuals are important, they are insufficient. UN bodies have considered that no new international instruments are required to achieve the complete protection of the rights of LGB individuals. Studies presented by UNAIDS (Cáceres et al. 2008) and the Office of the United Nations High Commissioner for Human Rights (OHCHR 2012) have analyzed general clauses of equality and non-discrimination to provide the necessary protection to LGB persons. However, we disagree. As shown above, the protection of LGB individuals through interpretation has been patchy and results in hermeneutic violence, which gives legal weapons to conservative countermovements to promote backlash on sexual rights, as is the case of advancing the discourse of gender ideology. This type of protection is also very fragile because it relies on the will of "the experts," those who interpret human rights law. If key members of international bodies change, LGB persons could suddenly find themselves excluded from protection under the universal human rights system. Looking at this strategy and knowing that the explicit protection of LGB people only exists in soft law (e.g., Human

Rights Council Resolutions or the Yogyakarta Principles), there is no legal certainty in protecting our rights at the core of human rights law.

3. Womanization of LGB People

There is a second way that has brought queer people into existence and, therefore, protected their rights under international law: the womanization of LGB people. This road includes the Beijing argument that lesbians are, first and ultimately, women. Therefore, the claim for recognition of the feminization of gay and bisexual men. Even though this strategy has been fruitful for LGBT organizations throughout the world, its implications must be carefully studied, for it has been a "gendered" solution to a sexuality issue. In particular, the constant absence of a non-heteronormative sexuality agenda in international law can harm LGB interests and tear them with a knife made up of a binary conception of gender. In this sense, Halley's (2006) argument that feminists' structuralist paranoia[5] is detrimental to movements not rooted solely in gender needs further consideration. We will analyze the sources of this type of LGB inclusion and its implications and, finally, go back to Halley's critique.

This path of inclusion has been cleared mainly by LGBT organizations that have tried to take advantage of the existing international law structures built around gender, the inclusion of the "gender approach," and other feminist claims to advance women's equality. Such strategy—and its complications—dates to the United Nations 4th World Conference on Women held in Beijing, where lesbians gathered and pushed for a specific mention of "sexual orientation," which was traded by feminists for the more universal protection of *women* (a political subject that plants its concerns in the idea that "gender = m>f") (Otto 1995). The documentary *Lesbians Free Everyone* (Ditsie 2020) shows lesbian participation and activism during this conference. Their principal strategy was to portray lesbians as women so they could be covered under the protection and recognition of women's human rights. This is the beginning of the efforts to include homosexuals

[5] Halley (2006) calls "structuralist paranoia" those endless efforts to interpret the world through a unique lens. In this case, it is a sign of misinterpretation, using a tool beyond its actual capacities to explain a social phenomenon.

under the group "women," to strip them of their identity as "queers" or "lesbians" and, instead, to make their female identity prevail.

Regarding the Beijing Conference, Otto reflects on her participation at the African Caucus of nongovernmental representatives, in which she struggled to advocate for including references to "sexual orientation" in the Beijing Platform for Action (Otto 2007). She saw feminist claims and interpretations of international law discussed with a close reference to African preferences, needs, and critiques. Her speech, on the other hand, revolved around the idea of sexuality and the urgency of queering international law. She felt out of place. Her participation was seen as a request that went too far and did not acknowledge the most immediate needs of women in Africa. Her case is an example of how the feminist agenda has no urgency to include non-heteronormative sexuality claims or LGB interests. This is a common obstacle LGB activists face when trying to change international law: while gender issues are seen as inevitable and relevant, sexuality can always wait for a better moment, a better audience, or a better chance to succeed.

On the other hand, international bodies in charge of making decisions, reviewing cases, and interpreting international instruments have also womanized LGB people by forgetting their sexuality and the differential impacts discrimination and violence have in our lives. Usually, when petitions are presented to international human rights bodies, gay and bisexual men are seen as feminized individuals, lesbians as women who enforce their right to sexuality without restraints, and transgender people as behaving like women (trans women) or socialized as women (trans men). This makes them legible subjects to the feminist international agenda, for its structure can only hold up a differential lens in favor of women, who are *always* the losing player in the courts of life and law.[6] This is useful for the immediate protection of individuals but harmful to the goal of sexuality and LGB presence in international law. To illustrate this, we will analyze several decisions that womanize LGB people as a form of legal protection in international law.

[6] Halley has argued that feminists have gathered more power than they acknowledge and have failed to subvert patriarchal hierarchies. According to Halley, governance feminists have decided to relegate other forms of oppression in their work, ignoring other social movements' needs and claims (Halley et al. 2018).

Otto (2006) and Simm (2021) report how queering the CEDAW has been the most fruitful expression of this technique. In *ON and DP v. Russian Federation*, the CEDAW Committee "upheld a complaint about discrimination on the basis of sexual orientation" (Simm 2021). For the first time, it included analyses of different manifestations of violence suffered by the petitioners because they were women and lesbians. Nevertheless, the recognition of the violation of the petitioners' rights was rooted in the interpretation of "discrimination based on sex," which restates the international trend of human rights treaty bodies making patchy interpretations of "sexual orientation" in their efforts to "queer" international law. Nevertheless, the possibility of including an intersectional lens only occurs once the "woman disguise" of LGB persons has been convincing enough, once queer people have been womanized enough.

The need to womanize LGB individuals comes from two main weaknesses to advance gender equality in the Women, Peace and Security (WPS) agenda found by Lucía Baca (2021), which can be extended to other areas of international law: a binary conception of gender and the homogenization of the political subject "women." In this way, gender is only understood as "men" and "women": two different bodies with certain behaviors that constitute "humanity." The reasons and foundations of such labels go unquestioned. On the other hand, women are seen only as cisgender and heterosexual women, with one-dimensioned complexities in their lives: poor women *or* Indigenous women *or* raped women *or* lesbian women. International law cannot see more than one layer on top of the identity of women, which means that it cannot see nor solve problems analyzing the complexity and intersectionality of persons whose bodies and sexualities are marginalized from the heterosexual legal matrix. As Kimberle Crenshaw (1991) insists, intersectionality does not consist of stacking layers of differential consequences or identity politics over bodies. It is about seeing a new complex reality or situation invisible before understanding how two or more aspects of the self overlap in the life of each person. UN Security Council's Resolution 1325 and other international instruments do not mention sexual orientation, gender identity, or sexual practices; therefore, protection for LGB people can only be guaranteed if we are disguised or presented as *women*, for only these female bodies are covered under the protective shadow of international law.

In particular, the WPS agenda has the greatest promises to fulfill and the most challenging obstacles to overcome. The first is that China and Russia, two permanent members of the Security Council with significant political power, have opposed (and probably will continue opposing) any resolution referring specifically to LGB people (Simm 2021). The second one is the delay in addressing violence and discrimination suffered by LGB persons in this forum. In 2015, LGB concerns were discussed for the first time during an informal meeting between the Security Council members and two gay survivors of persecution (Deen 2015). Therefore, LGBT organizations have sought refuge, protection, and participation under the "womanization method" by insisting on gendered solutions already used by international human rights bodies for homosexual, bisexual, or transgender women. This results in the feminization of gay men and lesbians by trading off their lives into the gender agenda. Although it is a speedy route that allows us to be seen and to exist in the international law arena, this shortcut has high costs to the sexuality agenda and to LGB people asking for international protection since it does not comprehensively address sexuality issues, offering only "patchy" solutions. Moreover, this promotes a legal abyss between these approaches and the LGB community. In the long run, the womanization of LGB people will continue to erase non-heteronormative sexualities from the human rights project worldwide, and, as a terrible consequence, LGB people will continue to drive wedges between LB women (who have a clearer entry to international protection) and GB men (who would have to jump through numerous hoops to demonstrate their behavior as female-perceived and worthy of protection).

This brings us to the critique that both Otto and Halley have made for several years, i.e., the discourse of the feminist/gay governance (Simm 2021; Halley et al. 2018) is harmful to those lives and bodies that cannot be entirely explained by feminism nor be fully protected by the liberal, white, and masculinist Gay Agenda (Simm 2021). Pursuing the womanization of LGB people will continue to feed the feminist structuralist paranoia described by Halley (Cossman et al. 2003), only stretching a truly worn-out gender technique of mainstreaming a subject that cannot be fully understood, depicted, or protected by a binary gaze. Consequences include having a strongly heteronormative sexuality agenda in international law (treating abortion, male-to-female rape, and child pregnancy as main issues)

and leaving behind necessary and urgent questions about HIV, discrimination, creative sexual practices, consent outside of the criminal aspects, prejudice-based violence against LGBT people during armed conflicts,[7] sexual pleasure, sexual respect, and damaging side effects of contraceptives, among other topics, not adequately studied, seen, protected, or seriously addressed by international law.

Conclusions: Rediscovering Sexuality in International Law: The Way Forward to Advance LGB Rights

When we start to navigate in depth the understanding and treatment of sexuality under international law, we hit a wall with a conundrum: the lack of legal certainty given to LGB persons or a specialized international instrument or protocol to protect them. Due to the lack of complexity used by international bodies to explore sexuality, two additional issues arise. First, since the majority of LGB issues are treated under the womanization of LGB people method without a real agenda to advance sexual rights, lesbian, gay, and bisexual persons vanish within international law because it simplifies their existence. They only have a place and validation through specific cases where they must fit through the cracks using patchy interpretations as their best outcome. Second, when sexuality issues are not explored in depth and thus are not fully untangled, the explanatory characteristic inherent to sexuality gets lost in translation, as one of the mentioned consequences of hermeneutic violence. The power of sexuality comes from its nexus to intimacy, the body, and all that this complex relationship represents for society and the self. The fact that sexuality is also about getting to know oneself—considering that our bodies have long left their mere reproductive purposes so we can also focus on the pleasurable part of sex—constitutes a change in the mentality of society. This should also promote a shift in the legal way of understanding sexual phenomena. When taking into consideration the power and complexity of sexuality, human conduct stops focusing on a crime-free life and starts to include the notion of a good life.

[7] See Jaime Hagen's website for more material on queering the WPS agenda: https://www.jamiejhagen.com/queering-peace-and-security

Such a shift also poses an opportunity to free ourselves from the shackles of an over-restrictive promise of liberal law and its normative tools because it is impossible to codify every way how harm or discrimination can occur. On the contrary, proposals should focus primarily on the existence of autonomous and complex beings who are constantly under threat because everything they are could be a reason for harm. This means that international law should specifically protect diversity, particularly sexual diversity, considering it at the core of a person's entitlement to have a good life. For this reason, Otto's text (2016) resonates with our idea that international law should transgress patriarchal judicial and social systems by granting power to those who have not been seen before or whose existence has been denied since their sexuality is exercised in the margins.

After all, we are not close to proposing any concrete actions in this article. We can only support a structured critique of the current situation regarding sexuality in international law and warn against two worn-out methods of including LGB people in preexisting agendas. Our aim in the recognition of these harmful practices of interpretation of sexuality is for international human rights bodies to avoid reinforcing hermeneutic violence on LGB persons. Hyper-specialization does not seem to be the way out (successful and useless-for-everyone-else judicial cases prove it). A comprehensive interpretation of every international instrument for LGB inclusion is nothing different from a queer dream. Nevertheless, different ranges of LGB protection according to the diverse political interests of interpretative authorities prove how far we are from it. Perhaps cultural de-stigmatization of marginalized sexualities is a better answer to advance also an integral protection for LGB rights: understanding sexuality as a human concern and, therefore, demanding respect for their life experiences—including curiosity, care, health information, pleasure, and other related issues—with an autonomous and binding international instrument.

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Regional Trans-Activism: Legal Mobilization to Advance Gender Identity in the OAS and the IAHRS

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Introduction

The essay will describe the process carried out by transgender organizations to achieve the incorporation of gender identity as a protected category at the regional level in the Inter-American Human Rights System (IAHRS). I argue that some local organizations of transgender people in Latin America and the Caribbean took advantage of new scenarios to frame gender identity as a human rights discourse in the region, mobilizing resources for the participation of civil society in the General Assembly of the Organization of American States (OAS), and of domestic and regional political opportunities. The Coalition of Lesbian, Gay, Bisexual, Travesti, Transgender, Transsexual, and Intersex Organizations from Latin America and the Caribbean (LGBTTTI Coalition) was formed to promote a regional discourse on the human rights situation of transgender people and incorporate gender identity as a protected category in the IAHRS. This incorporation can be observed in the creation of an LGBTI Rapporteurship at the Inter-American Commission on Human Rights (IACHR), the preparation of reports and thematic hearings regarding LGBTI rights, and the first cases of transgender

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people in the Inter-American Court of Human Rights (IACtHR)[1] and its Advisory Opinion OC-24/17 (IACtHR 2017).

This study is based on a review of the literature on legal mobilization and transnational activism, the participant observation of the author during two General Assemblies of the OAS (in 2016 and 2019), preparatory workshops organized by the LGBTTTI Coalition, and his own experience as an activist for the rights of LGBTI people that has allowed him to build a link with social organizations such as Fundación GAAT (Bogotá, Colombia), Corporación Opción por el Derecho a Ser y el Deber de Hacer (Bogotá, Colombia), and the FEMM Organization, which has participated in a more recent work coalition before the OAS with LGBTI organizations called Voces por la Equidad. Thus, a qualitative analysis of academic and gray literature was conducted, contrasted with interviews with activists participating in these scenarios and the author's field diary notes.

Studies on legal mobilization have analyzed the use of law by social movements to advance their social and political agendas, the bills of rights, and legal resources available to protect them, despite the mistrust of social movements in the law (Kessler 1990; McCann 2006; Polletta 2017). In this way, courts have become a new scene of struggle for some social movements, accomplishing three things: 1) to frame rights as discourses, 2) to advocate with the state, and 3) to advance their human rights agendas.

Literature on legal mobilization has focused on judicial adjudication, considering how social movements use the court as a stage to achieve social change (Barclay and Chomsky 2014; Azuero and Albarracín 2009; Albarracín Caballero 2011). This has been the experience of activism of trans people to attain recognition of gender identity as a category protected by international human rights law courts. Thus, litigation before the International Service for Human Rights (ISHR) in the cases of *Azul Rojas Marín et al. v. Peru* (IACtHR 2020) and *Vicky Hernández et al. v. Honduras* (IACtHR 2021) and even in the Advisory Opinion AO-24/17 (IACtHR 2017) are examples of transgender legal mobilization. The advisory function of the IACtHR is considered another form of adjudication of this court.

[1] See, for example, *Azul Rojas Marín et al. v. Peru* (IACtHR 2020) and *Vicky Hernández et al. v. Honduras* (IACtHR 2021).

Literature has also identified parliamentary advocacy as a form of legal mobilization (Hilson 2002; Delamata 2013). The adjudication processes of courts are possible thanks to the interpretation of constitutional rights and the international instruments for their protection. This idea is combined with the effort made here to explain that advances in judicial adjudication that incorporate the category of gender identity in the IAHRS are part of the mobilization process that LGBTI organizations in the region, including organizations of trans people, have carried out to incorporate this category in human rights instruments (including soft law) in the OAS and its regional human rights system. Then, these instruments are employed by social movements in international litigation. Thus, those strategies are designed in both scenarios, which implies that now we are walking on two feet, using both routes in mobilization (advocacy and adjudication). Therefore, this type of analysis requires a comprehensive look at regulatory developments and the use social organizations make of them for their legal mobilization strategies, even though both aspects are usually studied independently in legal and socio-legal studies.

In order to understand this process, this essay uses three sociological approaches to the study of social movements to describe legal mobilization for gender identity in the IAHRS: 1) the construction of framing based on gender identity, 2) mobilization of resources for the participation of trans people in regional scenarios, and 3) processes of political opportunity that made these advances possible. Finally, a reflection is included on this legal mobilization as a transnational exercise nourished by mobilization in the domestic sphere.

1. Framing Violence against Trans Persons or the Incorporation of Gender Identity in the ISHR

Framing has been understood as the process by which people develop a particular conceptualization of a topic or reorient their thinking about this topic (Chong and Druckman 2007), just as identity-based social movements do to build new narratives about population groups that society has used in a negative or contrary way to the expectations of social mobilization in a way that broadens the framework of social imaginaries, in which these movements are related to society (Benford and Snow 2000).

This is especially relevant in the social mobilization of LGBTI people, who, in their collective action, propose new categories to explain their identity processes (sexual orientation, gender identity, expressions of gender, body diversities, among others) to help re-signify social expressions (gays, lesbians, queer, among others) that are socially conceived in a negative way that translates into prejudice violence. For example, Judith Butler (2017) explains that contemporary wars create a framing process by which some lives deserve to be mourned and others do not. These frameworks are built from social values and norms, in this case from Western ones, and are expressed through different media.

Law is a way that has been used by social movements, such as the LGBTI movement, to dispute those social meanings with violence (Lemaitre 2009). In this way, it acts as a kind of master frame whose symbols and categories can be used as a frame for the demands of social movements (Pedriana 2006). Literature has also explained that transgender people have used law as a form of struggle for social meanings on gender identity (Salas-Herrera 2019, 29); nevertheless, it recognizes that the legal reforms undertaken tend to perpetuate the imbalance of power that leads to trans vulnerability (Büchely and Salas 2019). This analysis illustrates how the law has become a terrain of struggle for framing regarding gender identity and trans life experiences.

The category of gender identity has been incorporated in different international discourses in instruments such as the Yogyakarta Principles adopted in 2006 and updated in 2017 and the 2015 report of the United Nations Human Rights Council on discrimination and violence against people because of their sexual orientation and gender identity (Edelman 2020).

This allows us to understand part of the exercise of legal mobilization that trans people have been carrying out in the LGBTTTI Coalition and the new coalition Voces por la Equidad in the OAS and the IAHRS. The struggle for the conception of trans life experiences in the OAS and the IAHRS has resulted in the incorporation of the category of gender identity in different instruments. In this sense, it is worth highlighting the work that the IACHR's LGBTI Rapporteurship has been carrying out, such as the cases of *Azul Rojas Marín et al. v. Peru* (IACtHR 2020) and V*icky Hernández et al. v. Honduras* (IACtHR 2021), the Advisory Opinion AO-24/17

(IACtHR 2017), and the inclusion of this category in the Inter-American Convention against All Forms of Discrimination and Intolerance as well as in the Inter-American Convention on Protecting the Human Rights of Older Persons, which are the firsts international treaties that explicitly incorporated gender identity as a category protected by human rights.

All these instruments offer transgender people in the region a new framework or a new narrative of trans life experiences from the point of view of the law for their relationship with the regional human rights system and also with states. This framework has been used by organizations to seek changes in domestic law through courts. An example of this is the appeal of unconstitutionality that the Red Lésbica Cattrachas presented to the Constitutional Chamber of the Supreme Court of Justice of Honduras after the issuance of the IACtHR Advisory Opinion AO-24/17 (2017), which seeks, among other things, the recognition of gender identity in the Honduran constitutional framework.

The incorporation of the concept of gender identity in national and international human rights mechanisms provides courts with tools to understand violence against trans people. This concept helps to understand that such violence occurs because these people identify themselves as women, men, or non-binary regardless of the gender assignment made to them by society and thus challenge the values and social expectations that society has about them, exposing them to prejudiced violence.

2. Mobilizing Resources for Legal Change before the OAS and the IAHRS

Resource mobilization theory is another way to study the functioning of social movements, focusing on the analysis of the possibilities of success of a social movement linked to the control of the organization's resources, including money, staff, experience, third-party support, access to the media, etc. (Pedriana 2006, 1720; Jenkins 1994; McCarthy and Zald 1977, 1218). From this perspective, it is relevant to point out some elements of resource mobilization of the LGBTTTI Coalition that can explain part of the success the mobilization of said organization has had within the OAS and the IAHRS. This success is measured in the annual participation, since 2008, of people from the LGBTI sectors in the OAS General Assembly and in other regional settings, in addition to the significant presence of trans

people thanks to the link of the Latin American Network of Trans People (REDLACTRANS) in the LGBTTTI Coalition.

This success could be explained through resource mobilization theory by analyzing the structure of said Coalition, which has at least one clear sponsor, is an organization that coordinates its operation, and has alliances with grassroots organizations in different countries of the region or networks of regional organizations. During the observation made at the 2016 and 2019 General Assemblies of the OAS, it was possible to identify this structure with the participation of the Arcus Foundation as main sponsor—an organization installed in New York City that supports projects in different countries worldwide. The role of the sponsor has been fundamental to enable the attendance of a significant diversity of activists from organizations from several countries of the region in the General Assemblies of the OAS since the organization responsible for the Coalition's participation in said international forum guarantees expenses of transportation and lodging for people during the period in which each General Assembly takes place and during the week in which workshops are held prior to it.

In any case, some organizations and networks that participate in the Coalition also make their own efforts to guarantee their participation in these events, which have also been open to local organizations of the host country of the General Assembly and other activists who come to the event by other coalitions. Regarding the coordination of the operations of the LGBTTTI Coalition, it has been carried out through the work of Synergía–Initiatives for Human Rights. Although this organization was founded in 2017, it was an initiative of activists who had participated in the coordination of the LGBTTTI Coalition, such as Marcelo Ferreyra and Stefano Fabeni, and other activists from the Coalition, such as Mirta Moragas Mereles and Fanny Gómez, who was a lawyer for the Rapporteurship on the Rights of LGBTI Persons.

In this mobilization of human resources for organizations that belong to the Coalition, it is worth highlighting the particular work of lawyers, who formed a legal support team for legal mobilization actions, working in a more or less articulated manner, as occurred in the presentation of Amicus Curiae in the *Vicky Hernández et al. v. Honduras* case (IACtHR 2021) presented by the Red Lésbica Cattrachas. The role of lawyers as a way of mobilizing resources has been analyzed in the literature on legal

mobilization (McCann and Silverstein 1998; Burstein 1991). Although the literature has pointed out some criticisms of the work of lawyers, studies have shown that despite the validity of these criticisms, lawyers have also tended to be very critical and assertive in responding to the "traps of legal action" and the "liberal biases" of legal norms, finding many similarities between the understandings, goals, and tactical preferences of advocates and non-advocates in the two movements (McCann and Silverstein 1998, 266). This allows thinking that resource mobilization focused on lawyers enables the use of some legal tools to respond to the demands of social movements despite this tactic being limited by the judicial system.

The coordination work has consisted of different features, including operational aspects, such as the management and contracting of accommodation, transportation, and facilities for the organized events, follow-up of registrations to OAS events, relationship with OAS officials in charge of organizing civil society participation in the General Assembly, reports to sponsors, etc.; strategic aspects, such as the design and implementation of preliminary preparatory workshops, follow-up of the negotiation of the declarations and decisions of the OAS General Assembly, coordination of actions, preparation of documents during the General Assembly, and management of meetings with diplomatic bodies, state officials, Commissioners of the IACHR, and representatives of different instances of the OAS and other coalitions, among others; and, finally, the promotion of the Coalition's work outside the annual meetings of the OAS General Assembly and support in Washington DC for the initiatives of the organizations that belong to the Coalition.

Another element of the Coalition's structure is the organizations working in the countries of the region and some regional networks of organizations. In this regard, the Coalition has been careful to select organizations that work in countries of different sub-regions, such as the Southern Cone, the Andean Region, Central America, and the Caribbean. The latter has been especially relevant because it has allowed the Coalition to establish dialogue with the Caribbean Community (CARICOM) states, which, together with some Central American countries and Paraguay, are the most reluctant to advance in the recognition of the rights of LGBTI persons within the framework of the OAS. Additionally, they have advocacy work before the OAS and the IAHRS, although the work of these organizations

has been recognized in other regional or universal forums. When an applicant organization is from a country already represented in the Coalition, the other organizations from that country must endorse their participation to prevent tensions between them. These criteria are a good experience in mobilizing resources, in this case human resources, because it allows the Coalition to have a strong team, including a group of at least five lawyers that can promote dialogue with the diplomatic representations of a wide range of OAS member states and strengthen the experiences of legal mobilization before the ISHR, as happened with the work of Germán Rincón Perfetti in the case of *Duque v. Colombia* (IACtHR 2016) and PROMSEX in the *Azul Rojas Marín et al. v. Peru* case (IACtHR 2020).

At this point, it is also relevant to point out the importance of regional networks such as REDLACTRANS and the Red de Mujeres Trabajadoras Sexuales (REDTRASEX) that allow the Coalition to strengthen the regional work of these networks with their alliances and resources for regional mobilization, reinforce the presence of activists working on specific issues of interest to the Coalition, such as gender identity, sex work, and sexual and reproductive rights, and achieve a greater degree of legitimacy and act as a speaker of their own experiences in the fight against conservative movements or so-called "anti-rights" that do not recognize transgender gender identity as a category that should be protected or sex work as an activity that should be defended within the framework of the human rights discourse.

3. Theory of Political Opportunity in Legal Mobilization for Gender Identity in the ISHR

The theory of political opportunity in social movement studies has emerged to try to fill a gap in the theory of resource mobilization, considering the absence of analysis of the conjunctural and structural conditions that allow understanding collective action, that is, thinking about the external factors that promote social mobilization, such as the emergence of new actors or political contexts (Tarrow 1996; Tilly 1978; Kriesi 2004; Wahlström and Peterson 2006). The term "political opportunity" has been used to study the favorable context for legal mobilization for equal marriage in the United States (Barclay and Chomsky 2014) and the success of legal mobilization campaigns in Chile for the right to HIV/AIDS services of organizations such as VIVOPOSITIVO and MOVILH (Perricone 2020).

From this perspective, three aspects of political opportunity should be highlighted in the legal mobilization for gender identity in the ISHR: the change of rules in the OAS to strengthen the participation of civil society, which led to the expansion of the participation of LGBTI people in it; the development of normative changes at the domestic level in different countries of the region to protect the rights of transgender people and incorporate gender identity as a protected category; and the growth of progressive governments and parties in the region that favored the incorporation of LGBTI rights at the domestic and regional levels. These elements were used by the LGBTTTI Coalition to maintain its presence on OAS stages and to increase the participation of transgender people.

The impact of strengthening the incidence of LGBTI organizations in the OAS and the IAHRS based on changes in regulations on civil society participation in the OAS General Assembly has already been stated in the literature (Robinson 2017). This process was consolidated in 2008 when the OAS General Assembly adopted for the first time a resolution on the rights of LGBTI persons, recognizing human rights violations against this population and calling on the states to take action to prevent them (OAS 2008). In the 2008 General Assembly, held in Medellín, LGBTI organizations from the region participated widely to promote the OAS statement; from there has initiated the work of the LGBTTTTI Coalition in the general assemblies of this international organization, although its beginnings date back to the 2006 Regional Conference of the Americas against Racism. This process is closely related to what is described regarding framing because it is where the normative frameworks used later by courts are built. For this reason, this essay proposes an articulated look at different approaches to social movements in sociology.

Regarding the favorable context caused by normative changes at the domestic level, various countries of the region began to recognize the rights of transgender people and gender identity as a protected category—countries like Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, and Ecuador—after a robust process of social mobilization of the organizations of transgender people in those countries. All these experiences of normative transformation in the region allow inferring the existence of a more favorable environment for debates on gender identity in the OAS and

the IAHRS since its non-inclusion represented a strange category and alien to the legal systems of the countries that form part of the system.

Another element that stands out in relation to political opportunity in this exercise of legal mobilization in the ISHR is the growth of progressive governments and parties in the region that favored incorporating the rights of LGBTI persons at the domestic and regional levels. In this regard, it is important to point out countries that, during the initial mobilization stage of the LGBTTTI Coalition, were under the mandate of progressive governments related to the social struggles of the LGBTI movement at the domestic level (Brazil, Uruguay, and Argentina). This allowed the creation of the LGBTI Core Group in 2016 to support the implementation of mandates contained in OAS resolutions on human rights, sexual orientation, and gender identity and expression. The group was founded by Argentina, Brazil, Canada, Chile, Colombia, Mexico, the United States, and Uruguay. In contrast, when conservative governments arrived in countries like Argentina, Colombia, and Brazil, their positions at the OAS slowed down the progress achieved on the rights of LGBTI people, even though the presence of conservative governments has not meant the withdrawal of any state from the LGBTI Core Group. In any case, changes in government and their positions as allies or not of the rights of LGBTI people is a situation of permanent analysis by the LGBTTTI Coalition.

4. Transnational Activism for the Recognition of Gender Identity in the IAHRS

The case of legal mobilization for gender identity as a protected category in the IAHRS also allows exploring the transnationalization of legal mobilization in domestic spheres. Literature (Tarrow 2005) describes two classic mechanisms through which collective action transits to the transnational scene. The first one is the diffusion of movements across borders, an example of this being REDLACTRANS, which led to promoting the enactment of gender identity laws in different countries of the region. The second one is international mobilization, which could be better explained in the activism carried out by the LGBTTTI Coalition and REDLACTRANS on the stage of the OAS and the IAHRS to promote gender identity as a protected category and which has resulted in the series of international instruments previously enunciated. Something that had already happened with sexual

orientation in the *Atala Riffo and daughters v. Chile* case (IACtHR 2012), which shows progressiveness in the IAHRS to respond to the framing of LGBTI people.

These forms of transnational collective action develop in a more dynamic context of international relations in which increasingly more non-state actors operate, interacting with states, international organizations, and among themselves as transnational networks of activism. These networks, although diverse in their agendas, have managed to propose alternative communication channels to the voices and speeches of powerful actors that often silence the demands of some social groups, allow voices that have been silenced to be heard on the international stage, impacting these scenarios and the domestic processes themselves, and promote the multiplication of these voices at the national and international levels (Keck and Sikkink 1998). This is what REDLACTRANS has been doing with gender identity at the domestic level in different countries of the region and in the inter-American sphere with its participation in the LGBTTTI Coalition.

These opportunities offered by transnational activism networks have been significant for mobilizing the claims of transgender people in regions like Latin America and the Caribbean, where there is a pronounced disparity among the countries regarding regulations on gender identity. On the one hand, some countries have issued specific regulations on changing the name and sex on the identity document (Argentina, Uruguay, Bolivia, Colombia, and Chile). On the other, there are countries that are reluctant to recognize these rights (Paraguay and Haiti, among others); nevertheless, they must interact with trans activists who come to international forums to denounce the violence they experience in their countries and which are translated as human rights violations. Said interaction not only happens in a political sphere, such as the OAS General Assembly, but also in legal spheres, as occurred in the *Azul Rojas Marín et al. v. Peru* (IACtHR 2020) case or has been occurring in the *Vicky Hernández et al. v. Honduras* case (IACtHR 2021). Similarly, on occasions, international decisions have ended in domestic courts, as happened with the appeal of unconstitutionality presented by Cattrachas before the Constitutional Chamber of the Supreme Court of Justice of Honduras after the issuance of the Advisory Opinion AO-24/17 (IACtHR 2017).

These ideas make it possible to explain the transnational component of the process described above regarding the operation of the LGBTTTI Coalition, which is building a new regional framing on violence against LGBTI people and trans people in particular. This process is strengthened thanks to the parallel process occurring at the universal level (Baisley 2016) and in other regional systems, the management of financial resources and human talent of the Coalition and its organizations, and the political context in different countries of the region that have advanced the rights of this population.

Therefore, the exercise of legal mobilization for gender identity in the IAHRS is a result of the response in some domestic and regional spheres to a new framing of trans people as subjects protected by rights systems against prejudiced violence, the mobilization of resources to make visible and promote this new framing at a transnational level, and the political opportunities of governments and entities sensitive to the incorporation of this framing in their areas of influence. Thus, the legal mobilization of trans people makes this abstract subject of human rights protection more complex by recognizing that this subject is crossed by a gender identity that subjects them to violence, and, consequently, their gender identity must be protected in the human rights systems.

Conclusions

In sum, part of the success of the legal mobilization of the LGBTTTI Coalition, and in particular of the organizations of transgender people, in incorporating gender identity as a protected category in the IAHRS has been due to actions such as the constant work to include gender identity in instruments and documents prepared by the bodies of the OAS and the IAHRS to build a new narrative of violence against transgender people as human rights violations at the international level, successful campaigns to mobilize resources, both from donors and within the organizations of the Coalition, to increase their participation in the OAS General Assembly and IAHRS bodies to protect the rights of LGBTI people and, in particular, trans people, taking advantage of the political context thanks to the change of rules in the OAS to strengthen civil society participation, which led to the expansion of the participation of LGBTI people in it, and the normative developments at the domestic level in different countries of the region

to protect the rights of trans people and incorporate gender identity as a protected category, as well as the growth of governments and progressive parties in the region that favored the incorporation of LGBTI rights at the domestic and regional levels.

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A Win for Gender Justice: Queering the Draft Crimes against Humanity Treaty

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Introduction

When it comes to the law, a few words can mean the difference between having one's rights protected—or not. After a worldwide campaign and many long meetings and legal arguments, a draft convention on crimes against humanity (CAH) created by the United Nations (UN) International Law Commission (ILC) dropped an outdated definition of gender in the

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crime of persecution.[1] Adopted from the Rome Statute, which governs the International Criminal Court (ICC),[2] and only twenty words long, the opaque definition ran the risk of being coopted by conservative states and used to limit legal protections for women and lesbian, gay, bisexual, transgender, queer, intersex (LGBTQI+[3]), non-binary, and gender non-conforming people during conflict and atrocities. Behind this definition of gender and how it has come to be interpreted is a long history of women's and LGBTQI+ global advocates contending with regressive forces (Davis 2018a, 513, 543). It was in significant part thanks to grassroots women's, LGBTQI+, and other social justice organizations' persistent advocacy that the final draft of the CAH treaty sent to the United Nations for consideration removed the outdated definition.[4]

If ratified by states, this new treaty could aid in the prevention of and provide accountability[5] for these crimes during atrocity and conflict. The only permanent court in existence for prosecuting such crimes, the ICC, lacks a mechanism for interstate cooperation, and most states lack coverage of CAH in their domestic legislation. The CAH treaty would help

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[1] The UN Charter gave a mandate to the ILC, comprised of international legal experts, to study and recommend ways in which international law can be progressively developed and codified. The ILC's Drafting Committee for the crimes against humanity convention gained approval from the full ILC and has since sent the draft to the UN General Assembly's Sixth Committee for subsequent debates in 2019, 2020, and 2021.

[2] Article 7, par. 3, of the Rome Statute (ICC 1998) includes a definition of gender that qualifies the provision on persecution. In this instance, persecution refers to a provision of crimes against humanity, not to persecution as a legal standard under the 1951 Refugee Convention.

[3] The plus sign represents people who identify with the broader LGBTQI community, but use other terms for self-identification. While the acronym LGBTQI+ is inclusive of a broad range of persons, it is not exhaustive, nor is it the universally standard acronym.

[4] While the definition of *gender* is understood as a social construct under the Rome Statute, the wording has never been adopted again since its drafting over two decades ago. Since then, international human rights law continues to affirm the definition of gender as a social construct, affirmed by numerous UN and regional treaty bodies and courts over the last two and half decades. See, for example, CAT (2008; 2012; 2016), CEDAW Committee (1992; 2010; 2015), CESCR (2005; 2009), IACtHR (2017, par. 32), OHCHR (2000), UNGA (2001; 2018), United Nations (1996).

[5] "There are myriad forms of accountability, ranging from restorative justice models to international tribunals to domestic court proceedings, but a first step to any justice process is agreement on what constitutes a crime or wrongdoing" (Davis 2021, 3).

move states towards recognizing such atrocities in their own jurisdictions and providing structural ways to collaborate when victims or perpetrators cross borders.

Unfortunately, the initial draft CAH treaty adopted the definition of gender from the Rome Statute, cutting-and-pasting decades-old language: "It is understood that the term 'gender' refers to the two sexes, male and female, within the context of society" (ICC 1998, art. 7.3).[6] While advocates succeeded in substituting the word "gender" for "sex" in the Rome Statute, the definition on its own does not make clear who is protected. While it is understood to be inclusive of all gender crimes that meet the threshold for persecution, largely due to its opaque nature, there has never been a successful prosecution of gender persecution at the ICC (Davis 2018a; 2021, 3). Not surprisingly, no other mechanism had adopted this outdated definition until the draft CAH came into form (Davis 2018a, 543; Davis et al. 2018).

Including the Rome Statute's definition of "gender" within the draft crimes against humanity treaty raised serious concerns. If the treaty adopted an outdated definition of gender, some states may inevitably use it to shirk their responsibility for addressing gender-based crimes. Only some—not all—people would be protected from crimes against humanity. Today, law scholars and the ICC's Office of the Prosecutor (OTP) understand this definition to include LGBTQI+ people and, more broadly, women and men persecuted for transgressing gender regulations that are policed and enforced through egregious crimes.[7] Yet without a mechanism to consistently implement the treaty's provisions under the international law framework, such implementation would be left to states and their own inconsistent interpretations. While the new treaty would help bring crimes against humanity into domestic penal codes, something few states have done, it does not create an accountability mechanism (like the Rome Statute's creation of the ICC). Implementation is left up to individual states, leaving conservative governments with the option of taking advantage of the definition's opacity and ignoring conflict-related gender-based crimes.

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[6] The Rome Statute of the ICC was adopted on July 17, 1998, and entered into force on July 1, 2002.

[7] For a comprehensive overview of gender persecution as a crime against humanity, see Davis (2021).

Worse, the outdated definition of "gender" could be misused to limit the understanding of gender, which could lead to the exclusion of certain gender persecution acts.

Language and definitions are a key legal terrain through which advocates advance their agendas. Human rights advocates determined to defend progressive gains and gender protections in international and domestic human rights law must be ready to advance both a defensive strategy (anticipating attacks and parrying them away) and a proactive strategy (building expansive protections into core international legal documents to counter pressures to scale back human rights). In the case of the draft CAH treaty, the Rome Statute's definition of gender was a potential liability that conservative states and right-wing actors might have used to undermine gender-sensitive and gender-informed justice. In particular, some conservative governments and religious right-wing organizations seek to justify discrimination against women and LGBTQI+ people by arguing that gender should be narrowly defined to include only the biological categories of male and female, conflating the term "gender" with "sex" and reinforcing a false binary. With a worldview that seeks to establish rigid gender assignments, fundamentalists fear that women turn away from "traditional family values" and break out of "traditional roles," such as mothers and caretakers, and instead seek education or join the workforce (Copelon 2000). They attempt to erase LGBTQI+ rights altogether (Butler 2021) and undermine recognition of LGBTQI+ rights by promoting false narratives of so-called gender ideology. Such oppressive worldviews also have consequences for men—including rigid standards of masculinity and militarization.[8]

This article tells the story of how a small coalition of advocates—led by MADRE, OutRight International (OutRight), the Human Rights and Gender Justice Clinic (HRGJ Clinic) of the City University of New York (CUNY) School of Law, and the Center for Socio-Legal Research (CSLR) at the Universidad de los Andes School of Law, Bogotá, Colombia—successfully challenged sexist and homophobic norms by waging a fight on the contested terrain of legal language. It starts with a look back at the adoption of the Rome Statute and the women's rights movement that laid

[8] For a discussion of privileging masculinity and militarization, see Enloe (2000, 32-34).

the groundwork for the new convention on crimes against humanity. It explains how this new coalition collaborated with gender justice advocates and grassroots organizations to remove an opaque definition of gender in a treaty designed to address some of the world's most serious harms. It concludes with an explanation of what these legal advancements may mean for gender justice and equal rights.

1. The Road to Rome: Protecting Women's Rights under International Law

To understand how the gender definition came about, we need to turn the clock back to 1995, when the UN General Assembly called for the formation of a new draft convention, which would create the world's first international criminal court.

In the 1990s, MADRE housed the Women's Caucus for Gender Justice, a worldwide coalition of women's rights activists working to address gender gaps in the draft Rome Statute. The HRGJ Clinic of CUNY Law School, known then as the International Women's Human Rights (IWHR) Clinic, served as the secretariat for the Caucus and coordinated an effort to ensure the statute accounted for gender in crimes, procedure, evidence, and ICC composition. At the same time, OutRight (then the International Gay and Lesbian Human Rights Commission) was advocating at the Beijing World Conference on Women and the UN General Assembly for recognition of the heightened vulnerabilities experienced by LGBTQI+ people based on their gender (Outright International 2018).

Caucus members provided practical recommendations for addressing gender-based crimes, backed by international law. A socially conservative opposition objected, fearing that the term "gender" would increase protections for women and LGBTQI+ persons. While only a handful of delegates initially supported activists, momentum started to build and support increased significantly by the time the Rome Conference came about. Ultimately, advocates were successful in swapping the word "sex" for "gender" in the Rome Statute—an advance hailed as one of the most important safeguards for gender justice under international criminal law and a major achievement of global women's movements in the 1990s.

However, it came with an opaque definition in a footnote: "It is understood that the term 'gender' refers to the two sexes, male and female, within

the context of society." No other protected class under persecution has a definition in the statute.

Despite this, codifying the grounds of "gender" under persecution was a milestone victory in Rome. Advocates successfully defined "gender" as the socially constructed understanding of what it means to be "male" and "female" (Oosterveld 2005, 82). At stake was the risk of further concretizing women's rights as secondary rights and the exclusion of rights for LGBTQI+ persons altogether (Davis 2018a, 537-540). By replacing "sex" with "gender" coupled with the phrase "within the context of society," the Rome Statute encompasses the full spectrum of gender persecution committed in conflict and atrocity.

Women's rights advocates also successfully mobilized for other advances. They rallied drafters to abandon language that equated "rape" to "outrages on personal dignity" and to broaden the category for sexual violence to not only include rape but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other undefined forms of sexual violence of comparable gravity (ICC 1998, art. 7(1)g). These were significant wins in the gender justice discourse and the result of a formidable movement of women's rights advocates who mobilized to ensure that gender issues were not sidelined in the Statute (Copelon 2000).

A key component of this success was combining activism with legal strategy. Patricia Viseur Sellers, then Special Adviser on Gender to the Prosecutor of the ICC,[9] in an e-mail to author Lisa Davis,[10] noted that "the participation of women's rights activists on issues of international criminal and humanitarian law (as opposed to human rights law) [has been a] phenomenal step in 'genderizing' the structural content of international law as it pertains to the 'masculine' arenas of war, genocide and crimes against humanity" (Davis 2018a, 535). Gender strategies in international criminal tribunals grew from the notion that women's rights are human rights (Bunch 1990). Today, advocates are calling for a gender justice world.

[9] In September 2021, Sellers was appointed Special Adviser on Slavery Crimes to the Prosecutor of the ICC.

[10] E-mail from Patricia Viseur Sellers, Special Adviser on Gender for Prosecution Strategies, to Lisa Davis, Associate Professor of Law and Co-Director of the HRGJ Clinic at the CUNY School of Law, July 23, 2015, on file with author.

2. The Birth of a Campaign

In the late fall of 2014, author Lisa Davis received a text from Patricia Viseur Sellers: "Have you heard about the new crimes against humanity convention being drafted?" She had not heard of it and, after checking with others attuned to gender developments in international criminal law, it seemed few had. "We need to ensure it includes a gender lens," the text continued.

Feminist legal scholars and activists would be up against a strong tide of opposition, as has nearly always been the case when advocating for women or LGBTQI+ inclusion in international law. The ILC had voted to add the drafting of a treaty on crimes against humanity to its agenda in the summer of 2014. It had shared previous drafts with member states and had consulted with some civil society members; however, the effort was largely unknown outside of a small circle, and input from the broader international human rights community had been minimal.

In December 2017, during the ICC Assembly of States Parties, a comment was made at an NGO side event: a new draft convention on crimes against humanity was open for public comment by the ILC. Within days of hearing the news, MADRE, OutRight, the HRGJ Clinic at CUNY Law School, and CSLR at the Universidad de los Andes Law School formed a coalition. Building on the legacy of the Women's Caucus for Gender Justice at Rome,[11] the coalition worked to ensure that the draft treaty affirmed the understanding of gender as a social construct, reflecting the progress made since the Rome Conference. Coalition leaders recognized that the effort needed to be global in its reach to guarantee that intersectional lenses were applied to the draft treaty.

By the start of 2018, the ILC's crimes against humanity convention was in its final draft stages; however, women's, LGBTQI+, disability, Indigenous, and racial and ethnic minority civil society groups had not yet weighed in. The coalition responded by distributing a toolkit (Outright International 2018) to ensure broad civil society input, not only on the gender definition, but also with a lens towards other categories that would be impacted by the convention, including disability, Indigenous, Aboriginal, youth, caste, and racial and ethnic minority groups, to name a few. The

[11] Now known as the Women's Initiatives for Gender Justice.

toolkit provided advocates with ways to stay informed and to contribute by signing on to submissions to the ILC, writing their own submissions, and spreading the word to other groups that may be impacted. Translated from English into four additional languages, the toolkit was shared far and wide and built the momentum for broader engagement and participation across the world.

Time was short, with only one year until the December 1, 2018, deadline (UNGA 2017) to rally states, UN agencies, and civil society organizations to make submissions to the ILC. The rise of conservativism and populism meant that the environment in which advocacy efforts were carried out was likely to be hostile. The first six months were spent organizing experts' briefings in New York and London to work out legal arguments on gender, sexual slavery, and other key components of the treaty. Patricia Viseur Sellers mentored the coalition, helping to explicate international criminal law arguments.

Twenty-five feminist legal experts, scholars, and activists in the fields of international criminal law and LGBTQI+ and women's rights converged at the CUNY Law School in March 2018 and then again later in London to discuss the draft treaty. Experts examined the legal theories and current debates regarding the criminalization of persecution on the grounds of gender discrimination contained within the draft. In addition to submitting comments to the ILC, participants determined that they needed to raise the issue among other civil society groups and meet with a cross-regional group of states to advocate for the adoption of contemporary gender language in the treaty.

To raise awareness, members of the coalition hosted workshops and briefings with LGBTQI+ and women's rights activists across the globe. In July 2018, Lisa Davis and Jessica Stern, then Executive Director of OutRight International, led a workshop at Leiden University Law School where they engaged participants in an analysis of the draft treaty's gender provisions and solicited their feedback on recommendations discussed at previous experts' workshops. For example, in July, coalition members engaged in an interactive session in The Hague, the Netherlands, with LGBTQI+ activists from around the world to solicit their engagement and feedback on the gender-related provisions under the proposed treaty. In October, coalition members hosted a briefing with LGBTQI+ and women's rights activists

in Bogotá, Colombia, along with international human rights and criminal law experts. In November, members traveled to Erbil, Iraq, to discuss strategies for calling attention to the lack of accountability and redress for gender-based crimes committed by ISIS and the potential impact of the new CAH treaty.

In New York, the coalition brought together leaders from the LGBTQI+ rights movement worldwide for an experts' meeting at CUNY School of Law. Some activists proposed that a definition of gender needed to be included in the treaty (compared to removing it entirely) to ensure that the term "gender" was not conflated with "sex." A definition was also seen as a potential advocacy tool if worded correctly. Without a definition (or if the opaque wording adopted from the Rome Statute was maintained), states may resort to an inaccurate or unevolved understanding of gender on their own. Others argued that removing the definition would better enable future progress in understanding gender, as well as more nuanced interpretations in national jurisdictions.

Participants noted the significance of the ICC Office of the Prosecutor's (OTP) *Policy Paper on Sexual and Gender-Based Crimes* (Office of the Prosecutor 2014), which clarifies that the term "gender" under the Rome Statute is understood as a social construct and that this understanding has been in use for some years. Others pointed out that the OTP's definition has its limitations and includes the phrase "women and men, girls and boys," which is binary in nature and potentially exclusive of non-binary or queer identities. However, participants also understood that the OTP's definition is indicative of how perpetrators assign roles and that the binary fits the perpetrators' perception of victims and does not intend to codify a binary worldview (Davis 2021, 15). Ultimately, the group suggested the full removal of the definition, or alternatively, adding the OTP's definition. If the ILC resorted to a definition, they would most likely turn to that of the OTP since it is the only explicit definition of gender within international criminal law and informs the OTP's work at the ICC.

Advocates also discussed the binary nature of other provisions within the draft treaty and the need to recognize that transgender men and non-binary persons may also be subjected to forced pregnancy, forced sterilization, and prostitution. The definitions for these crimes under the CAH chapeau had also been copied directly from the Rome Statute into the draft

crimes against humanity convention by the ILC. Civil society submissions to the ILC, advocating for more inclusive understandings, raised many of these issues.

One significant threat that experts from all workshops identified was the rise in fundamentalist and right-wing religious groups that had taken an interest in the term "gender." As Davis (2019a) explains, "fundamentalists around the world are promulgating fear and justifying discrimination with claims that women and LGBTIQ rights advocates want to impose what they call 'gender ideology'—a supposed attack on 'natural families,' 'feminine values' and the male-or-female binary as the will of God." The experts also observed that the shrinking of civil society spaces through attacks and intimidation of human rights defenders (OHCHR n. d.; Amnesty International 2019) would make civil society-led advocacy efforts more difficult.

With the rise of extremism across the globe, participants debated whether or not to advocate for including sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) in the list of persecutory grounds, which would be a major step for recognizing LGBTQI+ rights under international criminal law. Some feared that SOGIESC could be misinterpreted as distinct from gender or rejected by the ILC altogether, setting a bad precedent. Ultimately, advocates agreed that including SOGIESC should be recommended as an option (along with removing the definition of gender) to the ILC to bring international criminal law in line with international human rights law and provide full protection of the law to LGBTQI+ and non-binary persons.

3. The Campaign Momentum Grows

With outreach to civil society underway, the coalition needed to better understand the views of the treaty drafters and hosted an event in May 2018 with ILC members. Patricia Viseur Sellers, Valerie Oosterveld,[12] and Lisa Davis presented contextual analysis for the draft's gender-related provisions and opened the floor for discussion. Some commissioners expressed interest

[12] Professor of Law, Western Law School. In 1998, Oosterveld was a member of the Canadian delegation to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC. In this role, she negotiated various gender provisions, as Canada played a leading role in pressing for a gender-sensitive Rome Statute.

in modernizing the treaty language. A few were hesitant to change the language that had been contentious in Rome, while others shared that they had never considered the issue. Notably, the commissioners indicated they would need to hear from states about the matter. It was apparent that while legal experts and civil society comments on the treaty would be impactful, submissions from UN member states would be critical for the final draft of the convention.

By the summer of 2018, the coalition started to engage the UN LGBTI Core Group at their annual retreat, organized by OutRight, as the next step in the campaign. The reason was simple: if there were any group of governments amenable to reflecting the social construction of gender in the draft treaty, it would be the Core Group. Established in 2008, the Core Group is an informal group of UN member states that have expressed commitment to LGBTQI+ rights and work for LGBTQI+-related interests at the UN level in New York. The retreat provided an opportunity to engage with like-minded states about the importance of updating the treaty language and, in particular, recognizing gender-based persecution committed against LGBTQI+ persons.

Many Core Group members also serve as representatives to the UN General Assembly's Third Committee on human rights issues and humanitarian and social affairs. Third Committee members debate and negotiate resolutions on a range of human rights topics, organize thematic discussions about pertinent issues, and link the work of the wider human rights system to the UN General Assembly (UNGA n.d.a). For example, in October 2017 and November 2018, the Core Group made joint statements to the Third Committee, and it hosted high-level events focusing on LGBTQI+ rights during the annual General Debate of the UN General Assembly (UN LGBTI Core Group 2017).

While engaging with Third Committee members was a critical step toward building member states' support, the coalition also needed to work with the Sixth Committee of the UN General Assembly. The Sixth Committee focused on legal matters and was ultimately responsible for the fate of the draft treaty (UNGA n.d.b). Sixth Committee members had previously reviewed the content of the draft treaty, but the review lacked an adequate gender lens and consequently overlooked the impact of the Rome Statute language. The coalition convened some twenty member-state

representatives, bringing together the legal minds from the Sixth Committee with the human rights expertise of Third Committee members. With members of both committees present, the discussion blended human rights and legal perspectives, leading to a rich and informative dialogue.

The coalition assembled a lineup of experts who were able to address the international criminal and human rights law issues of concern with the two committees. The experts provided the criminal legal context that appeals to Sixth Committee members and the human rights legal framework that resonates with Third Committee members. Patricia Viseur Sellers initiated the session, explaining the historical impact of past gender language and the legal ramifications of gender language in the current draft treaty. Lisa Davis followed by describing how opaque language could be used by governments to shirk responsibility for holding crimes committed on the basis of gender accountable. Rene Urueña, Associate Professor and Director of Research at the Universidad de los Andes School of Law, explained how fundamentalists argued for a conservative interpretation of the definition of "gender" that negatively impacted the Colombian peace process.[13] The refusal to apply a gender analysis in the Colombian context had a detrimental effect on the Peace Accords, with women's rights being narrowed and LGBTQI+ language stripped out altogether. Jessica Stern closed the panel by offering an analysis of how the progress on gender, specifically relating to SOGIESC, has led to this moment. Stern provided an in-depth overview of the progress made in international human rights law for LGBTQI+ people, pointing to the dearth of progress under international criminal law and demonstrating the stark lack of jurisprudence available for holding perpetrators accountable for targeting real or perceived LGBTQI+ persons.

This briefing became a turning point in the campaign. It demonstrated to states the impact the ILC draft could have on accountability for crimes committed against LGBTQI+ people. As one state representative said, "Once you see it, you cannot un-see it," especially since the language "has passed unaddressed and with unintended consequences." Under the leadership of OutRight, the coalition followed up with one-on-one conversations

[13] Rene Urueña participated in the formation of the Special Jurisdiction for Peace in Colombia and is considered an expert on that peace process.

with member states that would eventually have the greatest impact on submissions to the ILC.

In the two months following, OutRight staff worked with the Third and Sixth Committees to encourage state submissions to the ILC. They held bilateral meetings with about thirty key UN member states in total. MADRE continued to engage with grassroots women's groups, and CUNY Law School liaised with various UN Special Rapporteurs and experts. These combined efforts mobilized key contributions from governments, pivotal expertise, and input from international human rights and peace and security mechanisms.

Ultimately, during the one-year time frame to deliver submissions to the ILC, the coalition held two experts' workshops and seven briefings over four continents to receive feedback from experts and activists on the recommendations and legal reasoning. The first briefing was held with members of the ILC. Two briefings were held with states and four with women's and LGBTQI+ rights activists from around the world. The HRGJ Clinic compiled feedback from the workshops and briefings, and Davis drafted the final submission to the ILC that offered a holistic legal analysis and a recommendation that the drafters either remove or revise the gender definition in the draft crimes against humanity treaty (Davis et al. 2018). The arguments and recommendations were circulated in five languages as a sign-on letter to gather global support from civil society.

4. Gender Justice Success

By December 1, 2018, hundreds of activists, states, UN experts, scholars, and activists voiced their concerns to the ILC. Nearly 600 organizations and academic institutions representing over 100 countries or territories signed the open letter circulated by the coalition (ILC 2019a). At least nine other civil society coalitions sent submissions calling for the ILC to remove or revise the definition of gender. These included 60 human rights organizations from Africa led by the Southern Africa Litigation Center, twelve transgender rights groups, two intersex organizations, the Women's Initiatives for Gender Justice, Human Rights Watch, the Center for Constitutional Rights, Global Justice Center, and others.

Out of 35 states, 19 proffered submissions to the ILC affirming women's rights and LGBTQI+ rights under international criminal law and

asserting the need for the new CAH treaty to reflect this principle (ILC 2019a). For example, Chile (ILC 2019a, 35-36), Costa Rica (ILC 2019a, 36-37), and Liechtenstein (ILC 2019a, 42) proposed either removing the gender definition or revising it to reflect the text contained in the OTP's 2014 Policy Paper. Costa Rica described the gender definition as "obsolete" because it "ignores developments over the last two decades in the areas of human rights and international criminal law" (ILC 2019a, 41). Canada stated that the definition was "under-inclusive and inaccurate" and "tethers the concept of gender to that of sex," despite the fact that "the term 'sex' has been used to refer to biological attributes whereas the term 'gender' refers to socially constructed roles" (ILC 2019a, 33). The United Kingdom not only recognized the limitations of an opaque definition of gender, it also raised concerns about the outdated definition of "sex" that focuses on binary biological determinants (ILC 2019a, 53). Sweden, which commented on behalf of the Nordic states, affirmed that the "Nordic countries are of the view that the definition of 'gender' does not reflect current realities and content of international law" (ILC 2019a, 50). These were but a few states' comments. No state wrote in support of the Rome Statute's gender definition.

Twenty-four UN Special Rapporteurs and other UN experts joined a submission organized by the Special Rapporteur on extrajudicial, summary, or arbitrary executions, calling on the ILC to either remove or revise the definition of gender. The experts affirmed that gender is an "evolving social and ideological construct that justifies inequality and provides a means to categorize, order and symbolize power relations" and listed how each of the respective mandates has upheld this understanding (Callamard et al. 2018).

Ultimately, the ILC Rapporteur for the draft crimes against humanity convention, charged with leading the drafting process, agreed that it was best not to include a definition of gender. In his fourth and final report issued in February 2019, the Rapporteur wrote that the definition of gender in the Rome Statute had been criticized by scholars for being "puzzling and bizarre" and "stunningly narrow" (ILC 2019b, 36, note 206). He added that the phrase "within the context of society," when read in conjunction with Article 21(3) of the Rome Statute, provides a more in-depth interpretation than what conservative audiences might suggest (ILC 2019b, 36, par. 85). Article 21(3) requires that the interpretation and application of the Rome

Statute by the ICC be consistent with internationally recognized human rights. Acknowledging that the ILC's draft articles on CAH do not contain a provision comparable to Article 21(3), the Rapporteur recommended the gender definition's removal from the text (ILC 2019b, 136, par. 85). In May 2019, the ILC formally adopted the draft crimes against humanity convention without the gender definition (ILC 2019c). Today, the ILC not only acknowledges that the term "gender" is understood as a social construct but also encourages states to follow international law precedents confirming this (Davis and Bradley 2022; UNGA 2019, 41-42).

In its final report to the UN General Assembly on the draft treaty in September 2019, the ILC concluded that "since the adoption of the Rome Statute, several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term 'gender' [as a social construct]" (UNGA 2019, 45, par. 41). The ILC went on to encourage states to follow international law precedents that affirm gender as a social construct (UNGA 2019, 46, par. 42). The ILC's determination that international law defines gender as a social construct means that the ICC must also apply this definition as it is obligated under Article 21(3) of the Rome Statute to interpret legal terms in the light of evolving international law.

5. The Road Ahead: Expanding the Grounds for Persecution

Despite the lack of gender analysis in developing the draft crimes against humanity convention, the ILC has historically played a critical role in codifying evolving state practices to better reflect advancements under international law. The Rome Statute is a prime example of this effort. Through the advocacy mobilization from civil society and the ILC's work, the Statute includes gender persecution, which was revolutionary for its time.

Since Rome, developments under international law have identified sexual orientation, gender identity, and, more recently, sex characteristics as vulnerable categories in need of protection from discrimination. Recognizing this, an astonishing twenty UN Rapporteurs signed a submission to the ILC on the draft CAH treaty, arguing that while sexual orientation and gender identity are subsumed under the definition of the category of gender, their status under customary international law warrants their elevation and independent status as stand-alone protected categories. The Rapporteurs

argued for including sex characteristics as a protected category and urged recognizing additional protection grounds, including social origin, age, disability, health, Indigenous, refugee, statelessness, or migratory status (Callamard et al. 2018). The submission calls for all of these categories to be added to the existing grounds of persecution, reflecting current international law developments. However, the ILC Rapporteur found that the persecutory categories under the draft treaty, and as adopted by Rome, include the catch-all phrase of "or other grounds," which embraces evolving persecutory categories (ILC 2019b, 26, par. 61). Accordingly, he recommended the text remain the same, except for removing the definition of gender.

The campaign resided within a broad feminist critique of international criminal law. Ideally, the draft treaty would have been written using a feminist and gender lens at the outset. Throughout the treaty development process, feminist legal scholars and human rights civil society advocates were either not consulted or too readily dismissed when consulted. This dismissal normalized their absence and the exclusion of a feminist critique.

The absence of a gender lens in treaty development is not new. Since its inception 70 years ago, the ILC has only ever seen the appointment of seven women commissioners. No LGBTQI+ or non-binary commissioners have ever served. In the decades of debates on establishing a permanent international court, sexual and gender-based crimes were largely undiscussed and further invisibilized. It was not until the 1990s that women's rights advocates brought sexual and gender-based violence to the forefront in discussions during the international tribunals for the former Yugoslavia and Rwanda (Oosterveld 2005, 59).

The need to rally in the twelfth hour for the removal of an opaque definition speaks to the historical invisibility and de-prioritization of gender-based harms routinely missing from treaty development discussions. The feminist critique and intersectional analysis that did nonetheless come to bear on the process for the proposed CAH treaty not only impacted the draft language, it also changed the gender justice discourse, laying a foundation for future progress.

Yet, while significant and historic, this win is a subtle one. National interpretation and implementation will be the key determinants of success if the draft treaty becomes law. A text that holistically recognizes gender

persecution is a powerful start, but local action and vigilance are needed to bring the treaty to life. Mobilization on the international level may eventually be redeployed in national jurisdictions to ensure that states hold perpetrators accountable for gender persecution and commit to the precepts of the treaty.

Conclusions

Despite the remaining gaps and hurdles, a new convention on CAH could help bring atrocities to light and perpetrators to justice. The only permanent court in existence for prosecuting such crimes, the ILC, does not have a mechanism for interstate cooperation, and few states have crimes against humanity incorporated into their domestic legislation (Davis 2018b). If the draft treaty is adopted and ratified in its current form, it would be one of the most consequential steps forward in the legal recognition of gender persecution under international criminal law in over two decades. Even without adoption into law, the draft convention has long-lasting implications on the discourse of gender-based violence under customary international law and, ultimately, on whose rights are protected.

What this process has made clear is that all of us working together can make a difference because we all have rights that must be protected (Davis 2019b). A clear language that reflects the existing and inclusive understanding of gender would send a powerful message that women, girls, and LGBTQI+ persons cannot be sidelined and that survivors of gender harm deserve accountability and justice.

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Section III
Intersectional Approaches to International Law: Gender, Sex, Race, and Ethnicity as Cornerstones

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Between Sameness and Difference: Intersectionality in the Inter-American Court of Human Rights*

Mónica Arango Olaya**

Introduction

Vicky Hernández, an HIV-positive, Honduran trans woman, human rights defender, and sex worker, was brutally murdered in the context of a state of siege in San Pedro de Sula during the 2009 *coup d'état* (Malkin 2009). Her death was the culmination of a continuum of violence she endured throughout her life. The violation of her human rights was determined by the interplay of her identities, health, socioeconomic status, and work. In March 2021, the Inter-American Court of Human Rights (IACtHR) ruled that Honduras was responsible for violating Vicky's rights to life, personal integrity, access to justice, freedom of expression, name, and freedom from discrimination, among others (IACtHR 2021). In a groundbreaking move, the IACtHR held that the Convention on the Prevention, Punishment, and

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Eradication of Violence against Women (UNGA 1994) was applicable and framed her murder as gender-based violence. This is a landmark moment in the jurisprudence of the IACtHR as the application of this Convention recognizes trans women as women. This declaration should be celebrated as an example of the successful mobilization of different LGTBQI+ human rights defenders. However, a critical analysis of the decision and its implications points to its shortcomings in applying a necessary intersectional analysis within discrimination law and beyond.

Intersectionality theory has been discussed in scholarship on discrimination law for decades (Crenshaw 1989; Fredman 2011; Atrey 2019; Cho 2013). However, international human rights law standards, such as General Comments from the United Nations (UN) Treaty Monitoring Bodies, reports from the Inter-American Commission of Human Rights (IACHR), and decisions from the IACtHR, have adopted the concept with broad variations (Truscan and Bourke-Martignoni 2016; Cusack and Pusey 2013). While recognizing the interaction of inter- and intra-group differences and similarities in the experience of discrimination is invaluable, there is still a gap between intersectional theory and its application in human rights law. Vicky Hernández's case provides a platform to ask how human rights standards should capture a multiple axes experience of vulnerability and disadvantage. Moreover, how can we effectively reconcile *sameness* as shared experiences of harm based on group identities and *difference* as distinct experiences of harm linked to other conditions of disadvantage in group-based discrimination analysis? Finally, can we advance an intersectional perspective of human rights violations beyond discrimination?

In this article, I provide a starting point from which these questions may be answered while critically assessing the role of intersectionality in the IACtHR jurisprudence through the *Vicky Hernández* decision. I argue that the development of the IACtHR jurisprudence on intersectional discrimination must engage more systematically with the interplay of differences underscored by intersectionality theory to capture its full potential for advancing substantive equality. For example, while the Belém do Pará Convention—as the convention that recognizes due diligence obligations for states to prevent, investigate, and prosecute violence against women—applies to trans women, its application should reflect that their experience of violence is both similar to and distinct from women's experiences.

Analogous to Crenshaw's concept of intersectionality that draws on differences between black and white women's oppression (Crenshaw 1989), trans women's experience differs from women's experience of disadvantage. These different identities within the women category may share some experiences and not others. In this way, intersectionality is a tool to untangle and map sameness and difference from a substantive equality viewpoint. Therefore, applying the Belém do Pará Convention to trans women without an intersectional approach may risk erasing the unique experience of trans women by subsuming it within the broad category of "women." My argument is that trans women's experience of violence is qualified by the intersection of their identities as women, trans, and beyond, which is different from other women's experience of violence. These differences must be addressed by applying intersectionality theory, particularly where it has implications for recognizing and remedying structural disadvantages.

The remainder of this article is divided into four sections. In the first section, I contextualize the development of intersectional discrimination in IACtHR jurisprudence. In second section, I highlight the aspects of the *Vicky Hernández* decision relevant to intersectional analysis and point out how the case departed from previous standards. I also point out the potential of considering intersectionality beyond discrimination law. Some scholars have argued in favor of applying intersectionality outside the equality and discrimination field to the broad human rights field (Atrey and Dunne 2020). I consider the significance of such an argument here. In the third section, I discuss the implications of sameness and difference categories for trans women within intersectionality standards. Finally, I offer some conclusions.

1. Intersectional Discrimination in the IACtHR Jurisprudence

1.1. Intersectional Discrimination

Discrimination law standards have traditionally understood discrimination as dependent on one main ground, such as race or sex. This is known as a single-axis approach. For example, in the case of *YATAMA v. Nicaragua* (IACtHR 2005), the IACtHR ruled that requiring indigenous communities to constitute political parties violated the prohibition of discrimination and

the right to equality and exercise of political rights, among others, based on ethnic origin. Similarly, in the *Miguel Castro-Castro Prison v. Peru* (IACtHR 2006) case, the IACtHR understood the sexual violence that took place in the prison as discrimination and underscored the state's duty not to discriminate against women in prison. In both cases, the IACtHR set a discrimination axis from which it analyzed the cases: ethnic origin and gender, respectively. The idea that a single-axis approach does not govern discrimination analyses, but rather compounding and multiple forms of disadvantage determine how we experience human rights as expressions of structural power dynamics loosely defines intersectional discrimination. Intersectional discrimination is different from compounded or multiple discrimination in which the assessment sees different axes of discrimination as grounds, but they are analyzed separately, not through their interplay. The five principal strands proposed by Atrey (2019) to articulate intersectionality are useful for understanding the concept:

> First, [intersectionality] is concerned with tracing both *sameness and difference* in experiences based on multiple group identities; secondly, it is concerned with tracing the sameness and difference in *patterns of group disadvantage* understood broadly in terms of subordination, marginalization, violence, disempowerment, deprivation, exploitation, and all other forms of disadvantage suffered by social groups; thirdly, in order to make sense of these same and different patterns of group disadvantage, they must be considered as a whole, namely with *integrity*; fourthly, intersectionality can only be appreciated in its full socio-economic, cultural, and political *context* that shapes people's identities and patterns of group disadvantage associated with them; and lastly, the purpose of this intersectional analysis is to further broadly conceived *transformative* aims which remove, rectify, and reform the disadvantage suffered by intersectional groups. (Atrey 2019, 36; emphasis added)

As also stated by Atrey, this analytic lens helps us understand the complexity of human experience and "opens ways of addressing the disadvantage associated with it" (2019, 33). This approach shifts how we understand human rights violations by trying to capture the complexity of human life.

In analyzing the role of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention) in advancing intersectional approaches to women's discrimination, Campbell (2015) has also emphasized how an intersectional perspective must move beyond gatekeeping grounds of discrimination to capture multiple identities expansively and fluidly. The latter argument sees grounds as legally accepted categories on which discrimination can happen or as a constraint when disadvantage and vulnerability fall beyond those accepted categories. In the context where they address grounds as constraints, legal frameworks have few and restricted grounds. This is not the case with the American Convention, as I explain below, because of the open nature of the non-discrimination clause. Beyond the idea of grounds as constraints, Atrey has proposed integrating intersectionality into human rights analyses past the discrimination framework. For example, this would raise questions such as how intersectionality impacts the realization of the right to health or life beyond equality. Both these authors make the point that for an analysis to be intersectional, it must take as its starting point the unique intersectional experience of the particular individual or group at issue.

Intersectionality matters because it advances substantive equality. The complexity of equality law oscillates between formal equality, recognized in Article 24 of the American Convention on Human Rights (OAS 1969),[1] and substantive equality, which aims to redress disadvantage in its structural sense, guaranteed by Article 1.1 of the same Convention (Fredman 2011; 2016). On the one hand, formal equality, which enshrines the principle of legality, guarantees identical treatment to equals. Difference in the treatment as legitimate or illegitimate is grounded on a justification under the necessity and proportionality analyses (Shelton 2011, 27-28). On the other hand, substantive equality seeks to address the material impacts of laws and situations on disadvantaged groups of people. For example, gender-based violence is a form of discrimination that understands the impact of violence as a cause and consequence of gender. This is why substantive equality is not only concerned with the relational perspective of formal equality but

[1] Article 24 can also address substantive equality as it has a prohibition on discrimination. However, as the clause is worded, it is understood as arbitrary treatment concerning legal categories beyond the American Convention. See González Le Saux and Parra Vera (2008).

also understands the structural context that makes groups of people experience human rights in different and detrimental ways. The principle of non-discrimination is an expression of substantive equality.

Discrimination is broadly understood as an illegitimate differentiated treatment based on a particular characteristic, such as gender, race, age, disability, origin, or belief, among others, manifested in direct, indirect, and intersectional ways (Atrey 2019, 33; Chow 2016, 457). Discrimination grounds capture the power asymmetries certain groups of people experience because of their identities, status, characteristics, and other criteria. Their function as suspect categories is to elevate legal scrutiny in non-discrimination law and protect the right to substantive equality. Today, intersectionality lies at the core of the complex challenges in discrimination law, as it aims to capture the difference and diversity of experiences of disadvantage within those statuses, categories, and contexts. Therefore, its application not only has symbolic power in making evident those differences as sources of disadvantage but also underscores the transformative aim discussed by Atrey to remove and rectify structural power asymmetries.

Non-discrimination cases in the IACtHR jurisprudence can be tracked to 2005 (González Le Saux and Parra Vera 2008, 151). From this point onwards, and based on rich standards and reports from the IACHR (IACHR 1999), the IACtHR has developed a robust non-discrimination jurisprudence. Article 1.1. of the American Convention is the basis of this jurisprudence. This non-discrimination clause is subordinated and open. It states:

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. (OAS 1969)

It is a subordinated clause, as its application is connected to the guarantee of other rights and freedoms, much like Article 14 of the European Convention on Human Rights. González Le Saux and Parra Vera (2008) have argued that the clause holds three obligations: the respect and guarantee

of freedoms and rights enshrined in the Convention and a third duty not to discriminate. Therefore, the declaration of a violation of the right not to be discriminated against should always be made in conjunction with a substantive right (González Le Saux and Parra Vera 2008, 158). The clause is open in that it sets a list of possible grounds of discrimination as "race, color, sex, language, religion, political or other opinion, national or social origin, economic status [and] birth," but admits "any other social condition." The open character of the non-discrimination clause has allowed the expansion of grounds of discrimination to include, for example, HIV-positive status, refugee status, gender stereotypes, gender identity and expression, and poverty, among others, as "social conditions" grounds for discrimination, developing the scope of Article 1.1.

1.2. Three Periods of Intersectional Discrimination

The IACtHR jurisprudence on intersectional discrimination is nascent (Góngora Mera 2020; Vargas Vera 2016). While the IACtHR has had multiple opportunities to address intersectional discrimination, it has arguably only recognized it explicitly in at least seven cases up to 2021. Some authors consider that it has substantively applied intersectionality in various cases without naming it as such (Celorio 2019, 818). I only include in this overview the cases in which the IACtHR has used the concept. However, I include references to its substantive applications in the second period. I identify three distinct periods in the development of intersectional discrimination in the IACtHR jurisprudence. These distinctions are guided by decisions in which the IACtHR explicitly used intersectional discrimination as a category of analysis, identifying and defining it. The first period, *the single-axis approach*, occurred between 2005 and 2008. During this period, the IACtHR jurisprudence did not include intersectional approaches but initiated the development of its jurisprudence under Article 1.1 from single-axis analyses.

The second period, between 2009 and 2014, *transitioning toward an intersectional analysis*, was characterized by the IACtHR's acknowledgment of different grounds of discrimination endured by petitioners, such as gender and ethnicity. This recognition set the stage for a more nuanced approach to substantive equality by incorporating more complex views of people's experiences of human rights. Yet, the IACtHR did not frame or

develop those different grounds of discrimination under intersectionality. During this period, the petitioners and the IACHR explicitly argued before the IACtHR for intersectional discrimination analyses (Zota-Bernal 2015, 76-79). However, there was no uniform understanding of the concept. Góngora Mera has analyzed such applications, demonstrating that the arguments varied between combined, double, aggravated, and multiple discrimination claims, each with different meanings (2020, 403). Regardless, the IACtHR did not explicitly recognize intersectional discrimination in any of those forms. For some authors, during this period, intersectionality considerations were applied substantively through recognizing different axes of disadvantage (Celorio 2019). Still, there was no development of the concept nor analyses of the interplay of the grounds identified as grounds of discrimination. This is why, in my view, it can be understood as a transition period.

For example, in *Fernández Ortega et al. v. Mexico* (2010) and *Valentina Rosendo Cantú v. Mexico* (2010), the IACtHR ruled on the human rights violations against two different Indigenous women who were both raped by soldiers and denied access to adequate health services and justice. While, in both cases, the family representatives and the IACHR argued that the rape was perpetrated based on the survivors' identities as *Indigenous* women and its intersectional nature, the IACtHR did not analyze the implications of those identities from an intersectional perspective. Instead, it relied on two separate single-axis analyses. First, about gender, and second, about Indigenous identity. In both cases, it declared violations of the women's rights to be free from violence and to personal integrity, dignity, and private life, in conjunction with the right to be free from discrimination, from a single gender-based discrimination axis. Simultaneously, it held a violation of the survivors' right to judicial protection because, during both investigations, their Indigenous identity was disregarded, as there was no translation of the proceedings to their languages. The previous analysis points to a recognition of different identities as grounds of discrimination accepted by Article 1.1 of the American Convention, but not to their *interaction*. Until this point, there was no analysis of the "inter" group identities' interaction in discrimination claims.

Finally, during the third period from 2015 until 2021, *developing intersectionality*, the IACtHR has recognized and developed intersectional

discrimination in at least seven cases but has not applied a systematic analysis. Its standards oscillate between (i) single-axis discrimination analysis to which intersectional analysis is added, (ii) intersectional discrimination through specificity, and (iii) multiple and intersectional discrimination analyses. The boundaries between those different approaches are not clear-cut. In some of these cases, the IACtHR has made an effort to address intersectionality as the interplay of different axes of disadvantage. In others, the verification of the discrimination ground and its direct impact on the differentiated treatment missed applying the *integrity* analysis of intersectionality, explained above. Therefore, the analysis of the *interplay* between different axes of disadvantage, as the essential characteristic of intersectionality, has sometimes been ignored. Instead, some of the analyses suggest a multiple discrimination approach. Regardless of such an uneven approach, in one of the cases during this period, the *Cuscul Pivoral* case, the IACtHR set a three-step test to determine intersectional discrimination violations in a promising signal to provide order in the development of intersectional discrimination.

1.3. Single-Axis Plus Intersectional Discrimination

The single-axis plus intersectional discrimination approach has been used in two cases. In each case, it followed two stages. First, the IACtHR identified a main discrimination ground. Second, it analyzed whether there was intersectional discrimination. In *Gonzales Lluy et al. v. Ecuador* (IACtHR 2015), the IACtHR determined HIV-positive status as the reason for discrimination under the "social condition" ground and the basis of an illegitimate difference of treatment for the expulsion of a girl from a public school. However, at the second stage of the analysis, it ruled that the scope of her discrimination was intersectional, based on her age, gender, HIV-positive status, and socioeconomic position (Vargas Vera 2016). The IACtHR, for the first time, defined intersectional discrimination as a distinct form of discrimination in which different risk factors create a *specific type of vulnerability* (IACtHR 2015, par. 290).[2] For the IACtHR, the different

[2] The European Court of Human Rights (ECHR) has used the concept of vulnerability in discrimination cases. It has been criticized as ambiguous, paternalistic, and ineffective in protecting vulnerable groups against discrimination (Kim 2021).

grounds amounted to multiple vulnerability factors and discrimination risks. It held that, without each of them, her experience would have been different. Hence, her discrimination was based on multiple grounds but was specific in their interplay. For example, it analyzed how poverty had affected her access to the health system. The IACtHR's approach emphasized the grounds' interplay, as opposed to a multiple discrimination framework. In advancing this analysis, it appraised intersectional discrimination but maintained a single-axis framework with HIV as the "main" ground.

The IACtHR divided its non-repetition remedies into measures on the right to health and the right to education and non-discrimination. As to the right to health, it noted the diverse policies in place to guarantee HIV-related health services and abstained from ordering any policy or legal reform. However, it ordered capacity-building training for health professionals on best practices for HIV healthcare and HIV-related rights. For the latter, it noted diverse policies to prevent discrimination of HIV-positive youth in the education system. Therefore, it did not issue any orders to adopt further policies. Thus, the intersectional dimension of the discrimination suffered by the petitioner was not considered in the non-repetition measures adopted by the IACtHR.

In the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil* (IACtHR 2020a), the IACtHR considered intersectional discrimination in the context of the structural poverty of 66 victims. Sixty of those died in an explosion at the factory due to a lack of prevention measures when working in unhealthy and insecure conditions. It used the main axis ground of the discrimination plus intersectionality model. In the first stage, the IACtHR considered intersectional discrimination on the basis of poverty as a "social condition" ground under Article 1.1. (IACtHR 2020a, par. 185), which was also appreciated as structural discrimination. In the second stage of the analysis, it understood gender, age, race, and pregnancy as criteria to deem the group's condition of extreme vulnerability as intersectional discrimination (IACtHR 2020a, par. 191). Therefore, these characteristics were considered compounding factors that increased the comparative disadvantage of the victims. This analysis implicitly used the three-step test criteria of grounds, aggravation, and specificity of harm developed in the *Cuscul Pivaral et al. v. Guatemala* case (IACtHR 2018a), discussed later. However, it further considered the association

between these intersectional factors and structural discrimination to apply structural remedies within the umbrella of substantive equality. Notably, and under the intersectional discrimination violation, the IACtHR ordered the creation of specific policies for the socioeconomic development of the population of Santo Antônio de Jesus (IACtHR 2020a, par. 289).

1.4. Intersectional Discrimination through Specificity

In *V.R.P., V.P.C. et al. v. Nicaragua* (IACtHR 2018b), the IACtHR applied a more progressive approach, considering the violation of the right of access to justice of a girl who had been raped at eight years of age with no effective investigation or prosecution of the crime. Stating a transversal intersectional analysis based on age and gender, the IACtHR developed due diligence standards to prevent, investigate, and prosecute gender-based violence against girls. This transversal approach considered that age and gender, in their interplay, produced a specific type of harm that required distinct considerations as to state obligations and reparations. Therefore, the experience of disadvantage marked by the intersection of gender and age was considered in its integrity. This case has some similarities with the case of *Gonzales Lluy* in that the interplay of the survivor's identities is taken into account. However, in this decision, there is no single-axis discrimination analysis.

The IACtHR mirrored these considerations in the non-repetition measures it ordered. While noting diverse policies and efforts made by the state to tackle sexual violence against children, it ordered the adoption of different standardized guidelines for the investigation and integral attention to cases of sexual violence against children. It also ordered the creation of an ombudsman for children to provide free criminal legal counsel to children victims of sexual violence, as well as capacity building for public servants (IACtHR 2018b, par. 373-395).

1.5. Multiple and Intersectional Discrimination[3]

Finally, in the last group of four cases, the IACtHR analyzed the alleged grounds of discrimination separately and then their interplay as a cause

[3] The case of *The Hacienda Brazil Verde Workers v. Brazil* (IACtHR 2016b) is not included in this typology, as the concept of intersectional discrimination in relation to

of differentiated disadvantage, converging intersectional and multiple discrimination analyses. In the *I.V. v. Bolivia* (IACtHR 2016a) case, the IACtHR upheld the single-axis approach through the sex ground when analyzing the forced sterilization of a migrant Peruvian woman (par. 243). Despite stating that it would verify whether the petitioner had suffered intersectional discrimination, it conducted a multiple intersectional discrimination analysis. Instead of analyzing the impact of the interplay of these different identities on the violations of her rights, it looked for direct connections between each of those grounds and the differentiated treatment. This is why it discarded intersectional discrimination in relation to her forced sterilization. The IACtHR did not find a connection between her nationality and the violation of her rights to personal integrity and sexual and reproductive rights. However, it did find that she had been discriminated against in an intersectional way in her right to access justice. It did so by analyzing the impact of her refugee (social condition) and economic status (Article 1.1) as the basis of discrimination in accessing justice. It concluded that the change of location of the proceedings had made access to justice inaccessible for her, given that she had no economic means to pay for the trip and had been unprotected because of her refugee status (par. 318-321). The decision shows that the IACtHR was still struggling to fully embrace intersectionality theory in the practice of adjudicating discrimination claims, as the substantive approach seems to discard the interplay of her conditions of disadvantage but analyze different axes of discrimination in its multiple fashions.

The IACtHR focused its non-repetition measures on ordering the state to adopt policies to guarantee reproductive rights and consent information. It ordered the creation and distribution of information leaflets at health care centers that should explain women's health and reproductive rights and all the elements of the right to consent to reproductive health services. It also ordered capacity-building for health professionals. While very important, these measures do not account for the intersectional nature of the violations.

In the *Ramírez Escobar et al. v. Guatemala* case (IACtHR 2018c), the IACtHR considered whether a declaration of abandonment of two children

structural discrimination on the basis of economic status was only developed in the concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

and the authorization of their international adoption amounted to intersectional discrimination. It first clarified that it was not a violation of the right to equality under the law but a case of discrimination. Second, it analyzed each alleged ground of discrimination—poverty, gender stereotypes, and sexual orientation—to determine whether those were protected grounds under Article 1.1 of the American Convention and the scope of state duties for each of those grounds. For the IACtHR, the grounds to justify the separation of the children from their family—poverty, that her mother "abandoned" them because she worked, and that her grandmother was not fit to take care of them because of her sexual orientation—were discriminatory. Finally, while analyzing each ground and its impact on the declaration of abandonment of the children, the IACtHR was explicit that this was a case of intersectional discrimination, not compounded or multiple discrimination (IACtHR 2018c, par. 277). This is why, at the end of the analysis, the IACtHR considered the interaction of each of those axes of discrimination (par. 303-304). This case took a technical intersectional definition and approach and not only considered axes of discrimination as grounds but fully considered the context of the situation beyond those axes as grounds. The decision was a precursor to the three-step test that would be adopted later, even though, in this one, there is no mention of the gravity of the violations because of the intersectional approach.

As a measure of non-repetition, the IACtHR ordered the elaboration of a documentary film that would account for all the violations declared in the case. The film should also be translated into the Maya K'iche language. Additionally, it ordered the creation of a national program to supervise children's institutionalization. Notably, these measures did not explicitly mention the factors contributing to intersectional discrimination.

In the *Cuscul Pivaral et al. v. Guatemala* (IACtHR 2018a) case, the IACtHR analyzed serious omissions in the medical treatment of 49 HIV-positive people. The intersectional discrimination analysis was applied to two of the petitioners, who were pregnant women. The IACtHR held that they had suffered intersectional discrimination in accessing healthcare services as they were denied adequate treatment to prevent vertical HIV transmission based on being women, HIV-positive, and pregnant. The decision assessed each of the different grounds of discrimination and their interplay, and it underscored that intersectional discrimination

was not an accumulation of discrimination grounds but the result of the negative impact of diverse factors. While assessing the grounds to verify intersectional discrimination, it did not revert to a multiple discrimination analysis. The analysis of each ground and the interplay between them considered whether those characteristics were indeed accepted grounds for discrimination rather than considering their disaggregated relationship to the illegitimate differentiated treatment.

As non-repetition measures, the IACtHR ordered the creation of a supervision program that would ensure integral healthcare for HIV-positive people. Likewise, the state was ordered to collect information regarding the statuses and identities of HIV-positive people. Such information would have to be used to create a mechanism to enhance the availability, accessibility, and quality of services. Among other measures, it ordered the state to guarantee consent-driven HIV tests for pregnant women and special care for HIV-positive pregnant women. Therefore, the IACtHR considered all the identified elements as the basis for intersectional discrimination.

Góngora Mera (2020) is on point when affirming that the *Cuscul Pivaral* case suggests a three-step analysis of intersectional discrimination (420-21). The steps include the verification of the alleged basis of discrimination as a ground, the specificity of the discrimination from the analysis of the interplay of the grounds, and, finally, the verification of an aggravated impact. One interesting point yet to be developed by jurisprudence is whether any of these categories could suggest the amelioration of the impact, which would be in cases where an element part of the context acts as an advantage. These standards as a three-step analysis are further explained by Judge Ferrer Macgor's concurring opinion (IACtHR 2018a).

In *Guzmán Albarracín et al. v. Ecuador* (2020), the IACtHR (2020b) held that Ecuador had violated Paola's right not to be discriminated against based on her age (minor) and gender for the sexual violence perpetrated by the vice principal of her school. For the IACtHR, the acts of sexual violence understood as discrimination took place in the context of structural sexual violence in schools. It ruled that while the state was aware of such violence, it had not adopted measures to prevent it (par. 142-143). Likewise, it determined a violation of the guarantee of non-discrimination based on gender and age as intersectional discrimination. The analysis did not define intersectionality or apply the three-step test used in the

previous jurisprudence. However, it underscored the connection between sexual violence and discrimination and referred to the interplay of the abovementioned axes of discrimination. While brief, such analysis adopted the integrity factor of intersectionality theory by considering the interplay between different identities as grounds for discrimination within a context of structural sexual violence (par. 143).

The IACtHR ordered expansive non-repetition measures tailored to expand information systems on sexual violence of children in schools, preventive measures of sexual violence, capacity-building training of teachers in public schools, and support systems and advice for victims and their families. Such measures account for the intersectional nature of the discrimination suffered by Paola (2020b, par. 245-246).

The IACtHR's appraisal of intersectional discrimination as a distinct form of discrimination is groundbreaking. It has allowed the recognition of different axes of disadvantage and evidenced how those impinge on exercising human rights. Moreover, it has served as a framework to include new grounds for discrimination through Article 1.1's "any other social condition" clause as a platform to tackle structural discrimination as the basis for structural remedies. These approaches show how intersectionality as a method of analysis allows the possibility of identifying systemic discrimination and its causes and consequences and rendering structural remedies to address them.

However, the previous jurisprudence also evidences the IACtHR's struggle to consider intersectional discrimination fully and thus further develop substantive equality standards. It shows tensions between conceptions of multiple and intersectional discrimination. It poses questions about whether the introduction of aggravation as the standard of scrutiny in the three-step test to determine the existence of an intersectional discrimination violation is problematic. While intersectional discrimination is indeed graver than single-axis discrimination, should it be appraised as a category for scrutiny? For example, how do you measure what is more severe comparatively? This seems to be clear-cut when compared to single-axis discrimination, but when assessing more complex cases, is it graver to violate the rights of an Indigenous girl? Or of a black trans woman? The role of intersectionality is to unveil subordination, marginalization, violence, disempowerment, deprivation, exploitation, and all other forms of

disadvantage to transform them. Such an exercise aims to uphold substantive equality by addressing the asymmetry of how people experience human rights. It does so by approaching subjects as multidimensional entities, not by comparing harm in levels of gravity based on the number of bases for disadvantage for the violation of human rights. In any case, intersectionality does suggest a hierarchy of harm within equality law. This hierarchy escalates from violations of equality of treatment to discrimination harms, culminating with intersectional discrimination.

In the next section, I explain the *Vicky Hernández et al. v. Honduras* case and demonstrate how the IACtHR departed from such standards and stopped halfway while conducting an intersectional analysis.

2. The Vicky Hernández et al. v. Honduras case

In the *Vicky Hernández* case (2021), the IACtHR issued a complex decision in which the role of intersectionality is unclear. It did not apply the three-step analysis used in previous jurisprudence and regressed to the single-axis approach to discrimination through gender identity. However, it considered different disadvantage factors but did not explain if it understood them as discrimination grounds nor analyzed their interplay. Additionally, it declared an intersectional discrimination violation when considering gender-based violence but did not develop specific standards that would account for such findings. This uneven application of the standards could suggest an intersectional approach beyond discrimination; however, the analysis falls short in recognizing Vicky's multidimensional disadvantage in its integrity, and as subordination factors, I explain these points below.

2.1. The decision

Vicky Hernández was murdered against the backdrop of pervasive discrimination and violence against LGBTQI+ people in Honduras. As a sex worker and human rights defender, she had endured constant violence. Two months before her murder, she had been attacked with an axe. When she complained to the police, she was told that they hoped she died. In the dawn of June 29, 2009, under the *coup d'état*, she was found dead, half-naked, and with indications of sexual violence. The investigation of her death did not comply with minimum due process standards and did not examine if the violence she suffered was based on discrimination. The

IACtHR analyzed the right to non-discrimination in its interconnection with two sets of rights—first, the rights to life, personal integrity, and access to justice, and, second, the rights to legal personality, freedom of expression, private life, and name. This analysis considered gender identity and expression as the main axis of discrimination, as ground under the "social condition" category recognized by Article 1.1.

In the decision, the IACtHR concluded that the control exerted by the military and police over peoples' movement at the time of the murder indicated that the state might have been involved in the violation of Vicky's rights to life and personal integrity. While the analysis underscored Vicky's status as a sex worker and the contextual violence against trans sex workers carried out with impunity in Honduras, it did not determine sex work as a discrimination ground (2021, par. 100). Similarly, the IACtHR held that the duty to investigate required the state/police to inquire whether there were discriminatory motives that fueled the murder. This analysis recognizes some of Vicky's identities and conditions of disadvantage; however, it does not examine how they interact with the violation of her rights, whether they are the basis of discrimination or contextual considerations, and the consequences of either avenue.

Regarding the second set of rights violations, the IACtHR established that these had taken place within three different contexts: as a consequence of Vicky's murder, during the criminal investigations, and within the general legal context in which the state did not legally recognize transgender identity and expression. The IACtHR held that it was reasonable to infer that the violence exercised against Vicky was based on her gender identity and expression, as there were indications that she had experienced sexual violence, was an LGBTQI rights defender, was dressed as a sex worker, registered as a man in the investigations, and that there was a general context of violence against trans women in Honduras (2021, par. 112-113). The IACtHR also recognized the right to gender identity and expression as part of the right to freedom of expression, and such recognition was interconnected with the right to legal personality.

Finally, the IACtHR held that the state had violated Vicky's right to be free from violence based on her gender under Article 7 of the Belém do Pará Convention (2021, par. 128). This conclusion was based on a 2011 report from the Office of the United Nations High Commissioner

of Human Rights, which stated that transphobic violence is gender-based violence as it is a form of violence against people who defy gender norms (HRC 2011). The IACtHR also established that gender identity contributed in an intersectional way to women's vulnerability to gender-based violence (2021, par. 129). This consideration situated trans women within the application of women's standards but hinted at a recognition of difference through intersectionality. However, it did not elaborate on the assertion or its implications for applying standards developed for different experiences of violence.

Further, the IACtHR reasoned that even though violence based on gender identity was not recognized explicitly in it, the Belém do Pará Convention was a living instrument. In its view, when Article 9 calls for due consideration of certain factors "amongst others," this includes gender identity or expression.[4] It concluded that the state violated its due diligence duty to eliminate, protect against, investigate, and prosecute gender-based violence. It also underscored specific state obligations to investigate crimes based on gender identity and that Vicky's additional characteristics converged in an intersectional way to situate her in a particular position of vulnerability. This evinces how the IACtHR used gender identity and expression as the main axis of discrimination and simply mentioned "other" factors, which were not explicit nor analyzed in their interplay, thereby departing from a substantive intersectional analysis.

2.2. Intersectionality beyond discrimination?

The previous analysis, in which some categories of disadvantage are accounted for but not recognized as grounds for discrimination, could be understood as a way of applying intersectionality beyond discrimination. Atrey (2020) has proposed this as a necessary approach, specifically when discrimination grounds act as gatekeepers. In her view, non-discrimination is grounded on the idea that "for a certain characteristic which distinguished

[4] The partially dissenting votes of Judges Odio Benito and Vio Grossi offer different reasons why they think the Belém do Pará Convention was not applicable. Feminist debates have extensively discussed whether trans women are women. For example, see Chu (2019), Solanas (2013), and Stock (2021). I do not address such debate in this article as I understand that trans women as women are protected by the Belém do Pará Convention.

someone from others, they would have not suffered a violation of their rights" (Atrey 2020, 29). This is distinct from the difference model in which she argues that difference is the reason why human rights matter and the justification for why they should be guaranteed. In this approach, the difference in how we experience human rights because of our distinct characteristics should be considered in their application beyond non-discrimination analyses. As argued by Atrey, non-discrimination as a human rights norm is limited to addressing difference "centrally—as fundamentally constitutive of the basis of human rights; comprehensively—going beyond an identitarian view of difference and towards structures of power; and materially—in terms of material or class-based inequalities" (Atrey 2020, 32). Intersectionality allows us to question the contextual structures of power that dictate the experience of human rights within and outside discrimination categories. It can recognize sameness in shared experiences of oppression by being part of certain groups and differences in departing from a single discrimination axis and considering the interplay of multiple factors that shape someone's disadvantage, which is not necessarily comprised of recognized discrimination categories. These disadvantages determine how we experience the denial or realization of human rights within power structures.

As explained above, the three-step analysis of intersectional discrimination constrains the assessment of differentiated treatment to the recognized grounds of Article 1.1. This is relevant for Vicky's disadvantage as a sex worker and as a human rights defender, as neither has been acknowledged as grounds of discrimination. While this last category has elevated protections as a basis of vulnerability, it has not been addressed as a ground of discrimination (IACtHR 2014, par. 157). Similarly, the status of sex workers has only been discussed before the IACHR but not recognized as a ground. The fact that the type of work a person does has been considered a basis of disadvantage shows the close links between what we do, our identities, and the experience of human rights violations. For sex workers, stigma plays a central role as a motive of prejudice and violence (Brems and Timmer 2016), while human rights defenders arguably are disadvantaged because they pose a threat to dominant power structures. In this way, the first step of the intersectional discrimination standard used by the IACtHR could have excluded categories of disadvantage relevant to human rights adjudication.

Some might contest that the open non-discrimination clause allows for "any social condition" to be treated as a ground of discrimination. This open nature has been determinant in the jurisprudence of the IACtHR to incorporate the lived experiences of discrimination of groups and statuses that were initially not incorporated, such as LGBTQI+ groups and cases in which poverty explains part of the rights violations. Therefore, the flexibility of the clause should direct us to advocate for including those categories as grounds for discrimination. More so, the recognition of those factors in the decision might even amount to a recognition in this direction. Discrimination grounds are considered under three criteria: 1) permanent traits essential for identity; 2) being part of traditionally marginalized, subordinated, or excluded groups; and 3) criteria "irrelevant for an equitable distribution of social benefits, rights and charges" (IACtHR 2016a, par. 240). However, the decision never assessed or determined how it understood the role of Vicky's work, economic and health statuses in the enjoyment of her human rights. It centered its discrimination assessment on her gender expression and identity. The advantage of addressing them as grounds would have been the recognition of inter- and intragroup sameness and difference and its transformational potential. As contextual references, it set a standard in which these factors *might* or might not play a role in reparations analyses, which would aim to transform such disadvantages.

The IACtHR's reference to Vicky's multiple identities certainly recognizes elements of her experience of different human rights violations but does not amount to an intersectional analysis (Atrey 2017). The inclusion of structural violence against trans women who are sex workers as relevant for the analysis of the rights violations captured some of that experience. Likewise, the duties set for an investigation that considers those categories, as well as her HIV-positive status and her identity as a human rights defender, also provided visibility to those disadvantages. However, without interrogating how these categories interacted in Vicky's specific circumstances, the IACtHR relegated them to an unspecified role as context, potential multiple discrimination, or impacting the violation of her rights beyond discrimination. The interplay of these categories, identities, and statuses is the basis of Vicky's distinct experience of denial of human rights. Therefore, their recognition was important to protect her rights to

substantive equality and be free from violence, and, in particular, for the transformative dimension as it explains the causes of her rights violations.

The abovementioned unspecified role of the different factors of disadvantage and their interplay is reflected in the reparations. The IACtHR ordered expansive remedies to address the structural discrimination of trans women. Among, other determinations, it ruled that investigations should inquire whether a victim's death was based on gender identity discrimination *and* whether being a sex worker and/or a human rights defender had played a role. It also ordered Honduras to make a film documentary about Vicky's story in the context of violence and discrimination against trans women in the country. Further, it ordered the adoption of a protocol for investigating crimes against LGBTQI people, focusing on capacity-building on non-discrimination against gender identity or sexual orientation. These reparations show coherence with the determination of discrimination based on gender identity as the main discrimination axis and impose the duty to determine whether death was based on a victim's identity or capacity as a sex worker or human rights defender. Such reparations implicitly recognize these factors as conditions of disadvantage but do not account for them in their integrity or explain the consequences if the murder had been motivated by those factors. However, it does show the scope and groundbreaking work of the IACtHR in providing structural reparations to tackle structural discrimination.

The lack of application of a substantive intersectional discrimination approach and the IACtHR's previous standards missed the opportunity to recognize the sameness and differences of Vicky's experience through the interplay of different axes of oppression. It leaves unclear whether these categories are understood as grounds for discrimination, which, in their interplay, create intersectional discrimination or conditions of oppression beyond the discrimination analysis. In the next section, I problematize the implications of departing from the IACtHR's intersectional standards within the sameness and difference paradigm for the case of Vicky as a trans woman.

3. Between Sameness and Difference

The lack of a substantive intersectional application of the Belém do Pará Convention in the *Vicky Hernández* case (IACtHR 2021) standardizes trans

women's and women's experiences of violence and misses an opportunity to recognize differences within intragroup identities and develop specific standards to address such structural violence. Sameness and difference are central to intersectionality in discrimination law.[5] While sameness recognizes shared group-based structural inequalities as power structures, difference allows us to assess the implications of different factors of oppression in the experience of human rights across inter and intra vulnerable group identities and factors of disadvantage. Recognizing differences in discrimination is essential not only as a way to make visible stigma and structural and systematic situations of oppression but also to provide consequences through remedies and the qualifications of state duties. Difference allows the possibility to depart from standardized notions of experiences of disadvantage and ultimately matters for identity recognition and the materialization of substantive equality.

Gender identity has been defined from various perspectives. The preamble of the Yogyakarta Principles and the UN Independent Expert on Sexual Orientation and Gender Identity defines it as the expression of the experience of gender (International Commission of Jurists 2007). Chu (2018) problematizes this understanding as a choice that comes from desire. She explains how unpopular it is to hold the notion that "transition expresses not the truth of an identity but the force of a desire. This would require understanding transness as a matter not of who one *is*, but of what one *wants*" (Chu 2018). However, both positions arrive at the same outcome: trans women are women. Moreover, trans women exist beyond academic debates. Vicky's decision applies standards created for women's protection from violence to trans women. Scholarship and activism have proposed different notions of how the law should capture gender identity (Jaramillo Vélez, Cristina, and Carlson 2021). For some, gender identity as the self-perceived identification regardless of biological conditions means sameness between women and trans women and so forth, and therefore equal

[5] The concepts of sameness and difference have been addressed and criticized in heated debates about the application and scope of the right to equality, particularly within the distinction between formal and substantive equality and positive and negative duties. See, for example, MacKinnon (1983, 636) and Fredman (1997, 16). My point here is situated in the context of the application of standards within substantive equality.

treatment. For others, such assimilation loses the complexity of contested notions of the binary world. It normalizes the non-binary, as trans, into the binary, as women. Within this view, gender has a rich spectrum of differences beyond men and women categories, which should be accounted for in shaping legal standards. Therefore, trans women, trans men, queer and non-binary identifications, and any other identification are tied to context and should not necessarily be fitted to conform to the dual categories of men and women nor its legal standards. These differences matter for symbolic reasons, as naming means recognizing and being able to see differences, but also because such visibility of causes of harm entails the adoption of necessary redress measures, including transformative components.

Trans women experience violence in a particular way, inextricably linked to the intersections of their multiple identities, characteristics, and social conditions, which give rise to distinct layers of oppression.[6] One of them is definitively defined by gender, which, as opposed to sex, is a legal category encompassing social power structures that alter advantages or disadvantages traditionally linked to social roles. The gender-based category has been a way to designate women's experience of subordination. Others, however, are distinct. As reported by ILGA LAC in 2020, Latin America is the most dangerous place for trans persons, with 80% of the reported crimes in the world (De Grazia 2020, 99). The think tank defines such violence as hate crimes and as stemming from transphobic violence, which intertwines a set of conditions making up the trans experience, such as home expulsion, exclusion from the formal educational system and the labor market, being destined for sex work, lack of access to the healthcare system, institutional pathologizing, and constant exposure to street sex work and police harassment and impunity (De Grazia 2020, 101). Vicky's experience of violence exemplifies most of these types of violence based on prejudice. Her multidimensional disadvantages explain the continuum of violence she suffered throughout her life, which concluded with her murder.

[6] The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has recognized these intersections in multiple General Recommendations. In its *General Recommendation No. 33*, it has stated that gender-based discrimination is linked to other factors, such as being transgender, which aggravates the violence against them (CEDAW Committee 2015, par. 8-9).

A multidimensional approach to Vicky's disadvantage through intersectional discrimination would have recognized those differences and similitudes. In fact, this differentiation was presented before the IACtHR. Vicky's representatives (IACtHR 2021, par. 181), the IACHR (2018, par. 66), and some *amicus* briefs (IACtHR 2021, par. 8) argued for the recognition of Vicky's assassination as *trans* femicide[7] instead of femicide.[8] The IACtHR did not rule on the matter. Regardless of the disregard of trans femicide as a legal and criminal law concept, the rationality behind the argument was to underscore a difference in the experience of gender-based violence by trans women. The silence of the IACtHR in both aspects and the application of the Belém do Pará Convention suggests the creation of a trans subject subsumed into the general women category despite significant experiential differences.

Kapur (2018) has argued that human rights have had a "normalizing role, function and outcome of LGBT human rights advocacy" as the "contingency of the human rights project ultimately serves to regulate, discipline and normalize and sustain governing norms, including dominant gender and sexual norms, as well as to negate the aspirations for lasting freedom of those subjects who fail or refuse to conform these norms" (56). Drawing on Butler, Kapur explains the centrality of *recognition* for reparation and remedy in human rights. Therefore, subjects not recognized in such terms cannot experience injury or harm. For example, the investigation of Vicky's murder did not consider or inquire into the sexual violence she experienced. It was as if because she was a sex worker, she could not be raped. In this sense, Kapur explains that while the human rights project has a resistance component, it operates as a normalizing device to "preserve a hegemonic gender, sexual, cultural, and racial order by vetting out elements considered threatening, dangerous and contaminating" (Kapur 2018, 60). On the contrary, the queer experience is an anti-normative project, which Kapur

[7] "A murder based on prejudice toward her gender identity and expression as a trans woman" (IACHR 2018, par. 66).

[8] "On gender-related killings and attempted killings of women, also referred to as 'femicide' or 'feminicide'" (CEDAW Committee 2017, 49).

argues has not been translated into human rights advocacy and scholarship pushing for legal inclusion (Butler 2011; Jacek Kornak 2015, 56).[9]

Human rights have the potential to capture distinct forms of oppression that can question the normalizing power structures. Intersectionality offers us a way to use the sameness and difference paradigm to recognize power structures and transform them while, at the same time, recognizing identities, characteristics, and situations that shape specific forms of disadvantage. The application of gender-based violence norms in the *Vicky Hernández* case without a substantive intersectional analysis has applied the sameness rationality without recognizing difference, constraining the identity that parts of the trans community have advocated for over the past few decades. For Kapur (2018), the main loss of the human rights project is that it is unable to "challenge the normative framework within which sexuality is addressed" (61). In the *Vicky Hernández* case, the application of gender-based violence standards without further questioning perpetuated an intragroup assimilation. This view upholds a vision in which gender can only be defined through women's experiences, included in special protections such as the Belém do Pará Convention univocally, or men, for which the general human rights protection applies. But what happens to trans women's experience of violence? Moreover, what happens to those who are not within any of those categories but share disadvantages? For example, which standards should apply to trans men? Or other gender queer identifications? It is here where intersectionality might be able to provide a disruptive tool to reconcile sameness and difference while acknowledging the complexity of harm toward a transformative aim.

The IACtHR decision stops midway in using intersectionality as a tool for recognition and transformation to reconcile the sameness of the disadvantage within the women category, but not the difference in the experience of violence as a trans, sex worker, human rights defender, poor, and HIV-positive woman. Such an approach could have advanced visions that also included the arguments on trans femicide presented by different actors in the proceedings, upholding its participatory dimension. This is

[9] Kornak (2015) explains from his reading of Butler that "'queer' is a category which might be mobilized in the context of political struggles to rearticulate the concepts of sex and the body in democratic discourses" (54).

not foreign to the IACtHR, as it is the approach set out in *V.R.P., V.P.C. et al. v. Nicaragua*, which developed specific standards for gender-based sexual violence against girls from an intersectionality perspective. The fact that the *Vicky Hernández* decision mentions intersectionality but does not fully develop it has symbolic and material consequences. Symbolically, they shape how disadvantage and subordination are conceived for trans women. Materially, they sideline the role each factor of disadvantage played in the violation of her human rights.

Conclusions: Within and beyond Discrimination

In this essay, I have set out the IACtHR intersectional discrimination standards up to the *Vicky Hernández* case and argued that while there is a substantive application of a three-step analysis, the IACtHR's jurisprudence has been uneven and unsystematic. I have also shown that the lack of clarity on the role of recognizing the different axes of disadvantage that Vicky experienced left a void in the intersectional discrimination standards. Nonetheless, such void might have some potential as an intersectionality analysis beyond discrimination that could capture conditions that have not been necessarily recognized as discrimination grounds but play a determinant role in the violation of human rights. I have also problematized the concept of sameness and difference within such standards to argue that disregarding intersectionality, and therefore difference, has dire implications for the development of gender-based violence standards for trans women. In analyzing how the *Vicky Hernández* case fits in the IACtHR's jurisprudence, I have shown that some factors of her disadvantage were recognized but unaccounted for in their interplay. In this way, the relevance of Vicky's multiple identities and factors of disadvantage that marked her experience of oppression was diluted, as was the opportunity for the IACtHR to take intersectionality and, therefore, substantive equality a step forward. It will be key for the development of intersectionality jurisprudence that approaches this category of discrimination systematically. One way of doing this is by unifying its standards. In doing that, the IACtHR has an opportunity to re-imagine and take forward the application of Article 1.1 of the American Convention by addressing the interplay of its grounds and underscoring their similitudes and differences, which portray complex experiences of disadvantages.

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The Intersectional Approach in Inter-American Case Law

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But I who am bound by my mirror
as well as my bed
see causes in colour
as well as sex
and sit here wondering
which me will survive
all these liberations.

Who Said It Was Simple, Audre Lorde

Introduction

On September 1, 2015, the Inter-American Court of Human Rights (IACtHR), in the *Gonzales Lluy et al. v. Ecuador* case (IACtHR 2015), passed the first judgment in which it expressly used the intersectional approach to analyze the particulars of the discrimination that had occurred in the said case. This case was about an Ecuadorian girl, Talia Gonzales Lluy, who had suffered discrimination associated with her specific condition of

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living with HIV, as a girl and a woman, and in a situation of poverty that impacted her access to social rights. The IACtHR considered that the discrimination was not only multiple—in relation to each of said factors—but a specific form of discrimination also emerged in this case because of the intersection between said discriminations. It indicated then that "if any of these factors had not existed, the discrimination would have been of a different nature" (IACtHR 2015, 82, par. 290).

The decision of the IACtHR is significant because it considers the discussions that have revolved around identity diversity and situational complexity caused by the essentialist categorization of population groups. The trend to "categorize" individuals into a single group is criticized, standardizing the type of inequality or oppression suffered, which is not limited to just one of the possible variables of discrimination.

It has not been easy for the IACtHR to take this step; indeed, it has focused its analysis on the international liability of states, which limits the assessment scope of many aspects of identity and the specific situation of each victim in different cases. This specific situation is often difficult to express in the technical and legal components of the dispute filed at international headquarters. For example, if intersectionality is impacted by the lack of access to certain social rights or a situation of poverty, should the international liability of the state regarding each of these rights or in the face of this situation be proven? At this point, one challenge may be associated with the fact that if intersectional discrimination is attributed to the state, it could implicitly indicate that the state is internationally liable for all variables and factors that lead to this situation. The foregoing could disproportionately raise the burden of proof in some cases.

In addition, the international sphere makes this type of analysis much more difficult because the purpose of the Inter-American dispute entails an initial debate in the domestic sphere under the light of domestic remedies. If discrimination variables are not addressed internally, it is more challenging to do so internationally. Would domestic remedies have to be exhausted with respect to each discrimination variable? Finally, the question arises as to what specific types of remedies could correspond to victims who have suffered from intersectional discrimination.

Thus, embracing the intersectional approach has many implications, theoretically, politically, and in litigation practice. Therefore, this text

analyzes the following questions: What is the meaning and scope of the turn given by the IACtHR towards the intersectional approach? Is it something new, or is it just a different name for what the IACtHR has been doing in its practice regarding the principle of equality and non-discrimination? Although the IACtHR refers to the concept of intersectionality, is it really performing intersectional analyses, or, in some cases, is it just repeating additive analyses, that is, determining the existence of discriminations without assessing their interaction?

Hence comes the importance of delving into the contributions and challenges generated by the intersectional approach in the Inter-American System. In this article, we take as a starting point some of the theoretical and contextual debates in which the intersectional proposal arises, particularly as an anti-essentialist and anti-categorical criticism against antidiscrimination law regarding feminism and, at an operational level, based on the creation of policies and other measures, against inequality. The theoretical potential of intersectionality precisely occurs because it represents a change in the analytical position regarding the dichotomous, binary, or essentialist thinking that usually prevails in the face of the categorization of population groups. To analyze these conceptual and legal practice challenges, we will first examine the genesis and scope of the intersectional approach and then assess cases of the IACtHR on the matter. We will conclude this study with final considerations on some current and future challenges regarding this topic.

1. The Intersectional Approach

Discrimination has been understood as a matter of vulnerable groups or minorities. That understanding disregards the complexity of the human condition and the fact that some people may suffer from multiple oppressive factors that converge and thus turn their experiences into juxtaposed situations of inequality. These complex expressions challenge the measures proposed by the hegemonic discourses of antidiscrimination law, for example, in the judicial sphere, which has tended to understand discrimination based on an essentialist point of view.[1] These remedies have been based on

[1] According to Angela Harris, the essentialism of gender, race, or any possible category is a second voice that tries to speak for all people from rigid classifications. The result of this

the idea that the impact on human rights only exists as a function of one-dimensional categorizations associated with groups deemed minorities or vulnerable groups so that complex experiences become more difficult to identify, assess, and address with effective remedies.

To enrich legal theory within the framework of antidiscrimination law, it is necessary to abandon the essentialist narrative, subverting it through the stories of specific cases and historically silenced aspects, considering that the recognition of difference must be relational rather than inherent and that the understanding of the entirety and common factors has to respond to an authentic act of will instead of being the result of a determinism of discovering what is "natural" (Harris 1990, 608-615). Therefore, it is essential to be open to anti-hegemonic discourses associated with complex problems of discrimination that make it possible to demonstrate how systems of inequality and oppression can become juxtaposed such that they condition the experience of segregation and oppression based on simultaneity.

Many authors have proposed concepts and analytical frameworks to understand the relationships between different orders of power and how complex discriminations have been relegated within hegemonic discourses. Gil Hernández (2016, 159) offers a compilation of the most notable ones: *multiple oppressions* [Mary Ann Weathers 1989], *simultaneity of oppressions* [Combahee River Collective 1977], *intersectionality* [Kimberlé Crenshaw 1989], *matrix of domination-matrix of oppression* [Patricia Hill Collins 1990], *consubstantiality* [Mara Viveros 2012], and *power matrices* [Jannia Gómez 2013], among others. Mara Viveros Vigoya (2016) also points out that feminists and scholars such as Angela Davis, Audre Lorde, bell hooks, June Jordan, Norma Alarcón, Chela Sandoval, Cherríe Moraga, Gloria Anzaldúa, Chandra Talpade Mohanty, and María Lugones, among others, have expressed their views across various fields and writings, challenging the hegemony of "white" feminism due to the race and gender biases inherent in the category of women as defined by traditional antidiscrimination law (4). All these proposals share the same anti-essentialist critique against

essentialism is the framing of the lives of people who experience multiple forms of oppression to additive problems and the use of categories as a single experience applicable to all individuals said to belong to these groups. This facilitates the organization of experiences in accordance with the universal ideals of categorizations held as unique and unchangeable (1990, 584-607).

categorical understandings in antidiscrimination matters, with a clear emphasis on the challenges posed by complex forms of segregation and disadvantage. At the same time, they differ in how they describe the scope and nature of this phenomenon, as well as the possible solutions or paths available to address it.

Undoubtedly, Kimberlé Crenshaw has created the most useful tool to comprehensively analyze and understand the experience of people who face intersectional discrimination. Her approach relies on cases that illustrate these forms of oppression, thereby exposing the multidimensionality of these women's life experiences and the distortion that arises when a single identity or categorical element is employed to conduct analysis and provide remedies. The exposure of this one-dimensional approach has demonstrated how the complex reality of Afro-American women in the conceptualization, identification, and treatment of discrimination on the grounds of sex and race is unknown, as it limits the analysis to the segregation and inequality suffered by members who, in each identity group, turn out to be "the privileged ones" in terms of representativeness (Crenshaw 1989, 140).

Crenshaw demonstrated the inability of judicial operators to deal with cases of intersectional discrimination, as they were deeply permeated by the categorical logic typical of traditional antidiscrimination discourse. This difficulty was due to various reasons, such as the flagrant refusal of the courts to conduct compound and complex analyses regarding Afro-American women beyond the stereotype of gender or race or those events in which the courts implicitly suggested that the intersectional realities did not really exist. However, the common problem involved a trend for the judiciary to ignore, deliberately or unconsciously, that Afro-descendant women could experience discrimination in various ways and many times, which, in turn, contrasts with an implicit—and explicit—prejudice of considering that exclusion, oppression, and inequality must always and exclusively be unidirectional (Crenshaw 1989, 148-149).

Properly understanding intersectional discrimination requires a complex analysis of its own. In the case of Afro-American women, for example, intersectional discrimination should be understood not by the addition or subtraction of the factors of oppression (woman + Afro-descendant) but by reasons of the autonomous entity of the black woman, that is, a compound and complex category that is the result of the intersection (not addition)

of the referred identity categories (Crenshaw 1989, 149-150). Identity intersection becomes important when oppression systems converge and condition the life experiences of those who suffer from it. This compels us to understand that the said reality is not one-dimensional or merely contextual and that the factors, generally separated within the framework of the classic antidiscrimination discourse, must be carefully evaluated, given their insufficiency to explain and confront said phenomena. In the case of African-American women, for example, the author proposes that responses to their antidiscrimination claims should be readjusted because it is not correct to offer them judicial remedies based on the premise that they must choose a single expression of the discrimination they suffer or, even worse, assign jurisdictional measures imposing said choice (Crenshaw 2004, 9). A conscious reading of this intersection assumes that the categories, far from being autonomous, interchangeable, or suppressible, are an inseparable confluence that must be confronted consistently and critically (Crenshaw 1989, 149-150).

Intersectionality implies a necessary anti-essentialist reading by emphasizing the difficulties raised by differences within the traditional categories of identity used by antidiscrimination laws. It serves as a tool to mitigate the totalizing effects of rigid categorization through the resignification of complex, irreducible, varied, and variable effects that are stressed when multiple axes of differentiation (economic, political, cultural, physical, subjective, and experiential) intersect and condition the experience of inequality and oppression in the efficient access and enjoyment of human rights. The intersectional approach focuses on the contextual element by recognizing that social identity categories and the power systems that give them meaning are molded through time and geographic location: just as discursive paradigms are transformed, so are notions of gender, class, and ethnicity. By recognizing that the social construction of identities is mutually constitutive, intersectionality resists the simple addition of multiple and parallel identities and sources of subordination (Chow 2016, 5-7).

Not all multiple discrimination is necessarily associated with intersectionality or, even more so, is equivalent to it. Multiple or compound discrimination is related to a type of cumulative impact that affects people in a particular and concrete way based on several factors that feed the situation-position of disadvantage in additive terms that do not correspond

to the interdependence between them.[2] A differentiating aspect of these concepts is constituted by the concern to determine how, in certain cases, these different causes interact with each other beyond their nominal conjunction, which implies assessing whether the discrimination factors are really projected separately or simultaneously and in confluence. Intersectionality not only describes a scenario of inequality based on different reasons or diverse oppressive structures but also evokes a simultaneous concurrence of different causes of discrimination (IACtHR 2015, concurring vote, 3-4).

2. Intersectionality and Its Judicial Application in the Inter-American Sphere

One way of facing the problems deriving from intersectional discrimination warrants an analysis of what constitutes life experiences in which this phenomenon occurs and how human rights courts, as is the case of the IACtHR, approach them from the judicial sphere. Therefore, it is necessary to review Inter-American case law on the matter of oppression or violations of rights based on intersectionality to identify the appearance and evolution of this analysis, as well as the correction in its application based on specialized theory and the scope and limits of the proposed approach illustrated above, seeking to strengthen this evolutionary process and thus contribute to more effective judicial decisions in the face of complex discrimination cases.

The first case in which the IACtHR expressly introduced the notion of intersectionality was that of *Gonzales Lluy et al. v. Ecuador* (2015). In this case, the international liability of the Ecuadorian State was analyzed for the alleged violation of several conventional rights to the detriment of a girl, who was discriminated against because there were multiple factors of vulnerability and risk of discrimination that converged and were associated with her condition as a minor, a female, a person living in poverty

[2] Crenshaw herself warns of this type of discrimination when referring to the case *De Graffen Reed v. General Motors*, where black women claimed to have been segregated in access to work that was guaranteed only for African-American men or white women: "mixed or compound discrimination […] is about the combination of racial discrimination (only black men were hired to work assembly lines) and gender (only white women were hired to work in offices). Therefore, black women are specifically affected by the combination of these two different forms of discrimination" (Crenshaw 2004, 13).

and person with HIV. Under this premise, the Court considered that the discrimination was not caused only by multiple factors but also resulted in a specific form of discrimination deriving from the intersection of said factors, that is, "if one of those factors had not existed, the discrimination would have been different" (IACtHR 2015, 82, par. 290).

In this case, the IACtHR applied a merged complexity analysis to consider the confluence of different factors and the nature of their inseparability. Thus, in addition to noting the multiplicity of identity and contextual factors, the IACtHR was concerned with reflecting on how their intersection was approached. However, in some passages of the argumentation, it can be interpreted that the IACtHR applied an additive approach rather than a merged one by the conjunction of categories because of different scenarios in which each identity characteristic—independently—had an impact on the experience of discrimination, which could correspond—inadvertently—to the model of addition of types of oppression and not precisely to that of intersectionality.[3] Moreover, the argument of the IACtHR could be associated with a logic that each discrimination factor adds a more serious level to the experience of the victim so that, in the end, the existence of all the factors makes it possible to label it as more severe than the case of those who, in comparison, do not present all these factors. It is worth remembering that the intersectional approach does not seek to indicate a greater severity in the type of discrimination but rather emphasizes the difference and the specific characteristics in the experience of discrimina-

[3] Indeed, the IACtHR considered the following: "Poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV. The situation of poverty also had an impact on the difficulties to gain access to the education system and to lead a decent life. Subsequently, because she was a child with HIV, the obstacles that Talía suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. As a child with HIV, she required greater support from the State to implement her life project. As a woman, Talía has described the dilemmas she feels as regards future maternity and her interaction in an intimate relationship, and has indicated that she has not had appropriate counseling. In sum, Talía's case illustrates that HIV-related stigmatization does not affect everyone in the same way and that the impact is more severe on members of vulnerable groups. Based on all the foregoing, the Court concludes that Talía Gonzales Lluy suffered discrimination derived from her situation as a person living with HIV, a child, a female, and living in conditions of poverty" (IACtHR 2015, 82, par. 290-291).

tion, which should be made more visible in the judicial argumentation and narration developed.

In *The Hacienda Brasil Verde Workers v. Brazil* case (IACtHR 2016a), concerning the case of the submission to slavery and human trafficking of 85 workers rescued from *Brasil Verde*, located in the state of Pará, the IACtHR based its decision on the notion of structural discrimination regarding the situation of poverty of the victims, in part, taking as a reference the intersectional approach. Indeed, the IACtHR considered that poverty is part of the content of the prohibition to discriminate based on the economic position of an individual or a group of people, and "since it is a multidimensional phenomenon, it may be approached based on different grounds for protection in light of Article 1(1) of the American Convention, such as economic status, social origin or any other social condition" (2016a, 16, par. 50). These categories of protection could be protected separately or in multiple or intersectional ways, taking into account the specific case. To analyze this particular case, the IACtHR considered that although victims who are subjected to slavery and its analogous forms are "*generally, normally, or almost always*" poor people who have historically been discriminated against because of their race, sex, and/or origin as indigenous migrants, this does not exclude the fact that there are people who are not necessarily included within these express categories but who are equally poor, marginalized, or excluded. Nevertheless, when, in addition to the situation of poverty, there is another category, such as race, gender, ethnic origin, etc., as provided in Article 1(1), there will be a situation of multiple/compounded or intersectional discrimination depending on the particulars of the case (IACtHR 2016a).

On this occasion, the IACtHR is careful to differentiate scenarios in which discrimination may be due to a main factor from others with an interactive one. In other words, it integrates different factors that may converge to make the scenario of discrimination a different scenario that cannot be well understood if it is considered only based on a single category, for example, poverty. However, terms such as multiple or compounded situations are used interchangeably and equated to that of the intersectional approach, ignoring the specific characteristics of both notions, especially when, in this case, the characteristics of the damage of many of the victims were due to an intersectional scenario given the continuum of historical

and contextual factors that were behind the flagrant violation reported: submission to slavery.

In the case of *I.V. v. Bolivia* (IACtHR 2016b), the IACtHR analyzed the story of a Peruvian woman who, due to state persecution, was forced to migrate to Bolivia, where she acquired refugee status and had to undergo surgery to give birth to her daughter, a medical procedure in which hysteroscopy sterilization was performed without consent. To analyze the violation suffered, the IACtHR noted that, in this case, multiple factors of discrimination had converged in an intersectional manner in the access to justice associated with the victim's condition of being a woman and her socio-economic position and refugee status. Furthermore, said discrimination also converged with a violation of access to justice based on the socio-economic position of the victim, given that changes in jurisdiction for filing a criminal complaint caused a geographical obstacle to accessibility to the judicial system. "This constituted discrimination in access to justice based on the socio-economic situation pursuant to Article 1(1) of the Convention" (IACtHR 2016b, 97, par. 319), a discrimination that was caused not only by multiple factors but also resulted in a specific form of discrimination that derived from the intersection of said factors, "that is, if any of these factors had not existed, the discrimination would have been of a different nature" (IACtHR 2016b, 98, par. 321). On this occasion, the IACtHR's considerations were oriented towards an analysis more typical of intersectionality because it considered that the combination of discrimination factors constitutes a different/special experience (of a fused nature) that impacts on or explains the complex reality of rights violations, implying thus the need to guarantee measures that are much more holistic than those of discrimination on one-dimensional grounds, certainly not less or more important than those that are intersected.

In the case of *V.R.P., V.P.C. et al. v. Nicaragua* (IACtHR 2018a), which refers to the violation of different conventional rights of a girl victim of sexual abuse to whom the state did not grant adequate response, the IACtHR focused its analysis on the probity and sufficiency of the investigations and criminal proceedings initiated at the domestic level. In this regard, the court expressly warned that it would adopt an intersectional approach that takes into account the gender and age status of the victim, given that the special protection measures states are bound by are based on the fact that

girls, children, and adolescents are considered more vulnerable to human rights violations, which is also determined by other factors, such as age, the particular conditions of the person, and their degree of development and maturity, among others. The IACtHR emphasized, however, that in the case of little girls, "this vulnerability to human rights violations may be framed in and increased by factors of historical discrimination that have contributed to the fact that women and girls suffer greater levels of sexual violence, especially within the family" (IACtHR 2018a, 42, par. 156). Thus, they may face various legal and economic obstacles and barriers that undermine the principle of their progressive autonomy as subjects of rights or do not ensure legal and technical assistance that allows them to enforce their rights and interests in the processes that concern them. These obstacles "not only contribute to the denial of justice, but are also discriminatory, because they do not allow them to exercise the right of access to justice in equal conditions" (IACtHR 2018a, 43, par. 156).

Note that despite the express acceptance of the intersectional approach, when the IACtHR analyzes the violations and discrimination component in this case, it does so departing from the notion of vulnerability in the case of boys and girls and the factors that "enhance" or worsen said susceptibility to discrimination against their rights. Thus, it applies an additive approach to violations and does not actually begin from the consideration that aspects such as gender, age, socio-economic conditions, and the social environment are part of a complex intersected reality that in concrete contexts (such as sexual abuse) cause differentiated damage, not because these factors are added or subtracted, but because the intersectional characteristics that express the experience of the victim are special and specific and, therefore, deserve remedies consistent with these characteristics. The purpose of the intersectional approach is not only to be able to adequately analyze the complex scenario of discrimination (something that is allowed by the additive approach to a certain degree) but also, above all, to demonstrate that because it is complex, the judicial remedy must address each of these complexities and each of these confluent factors, and not separately subtract them with decontextualized remedies. Both the analysis and the remedy against discrimination must respond to the intersectional situation; therefore, the judicial sphere is a favorable setting for this type of intervention against discrimination.

Similarly, in *Ramírez Escobar et al. v. Guatemala* (IACtHR 2018b), a case in which the IACtHR analyzed the alleged conventional violations on account of an irregular adoption that was endorsed by the Guatemalan judicial authorities and resulted in the permanent separation between the children given up for adoption and their biological parents. The IACtHR noted that it was necessary to verify the different alleged grounds of discrimination, especially in the case of the biological mother, because different vulnerability factors or sources of discrimination associated with her condition as a single mother living in poverty would have converged in an intersectional manner with being a lesbian mother. Thus, the discrimination experienced by Ms. Ramírez Escobar results from the intersection of all the reasons for which she was discriminated against. To this end, the IACtHR considered that because allegedly several people were victims of discrimination for coincident reasons, it should carry out a separate analysis of each of the alleged discriminatory reasons without prejudice to the fact that the intersectional confluence of discrimination factors results in a discriminatory experience that differs from the simple accumulation of different causes of discrimination against a person (IACtHR 2018b).

The IACtHR concluded that the intersecting factors in the case of the mother of the children put up for adoption converged in an intersectional manner because she was a single mother in a situation of poverty and belonged to the groups most vulnerable to be victims of illegal or arbitrary separation from children in the context of irregular adoptions in which the facts of this case occurred. The IACtHR highlighted that this discrimination was intersectional because it was the product of numerous factors that interacted with and conditioned each other. Once again, there is a trend towards the additive approach treated nominally as an intersectional perspective to analyze violations in the case. In fact, in this case, the IACtHR indicated that it would carry out an analysis of each of the allegedly discriminatory reasons separately; however, it recognized that intersectionality results in a discriminatory experience that differs from the simple accumulation of different causes of discrimination against a person (IACtHR 2018b). Despite these slightly illustrated contradictions, it should be noted that the IACtHR has been favoring the original meaning of the concept of intersectionality. It has expressly acknowledged it and

tried in some way to make sense of it in the resolution of its most recent cases. However, it is in the practical aspect that there could be a limited approach because it does not go beyond concluding that a reality has been intersectional, which does not impact the remedies that would necessarily have to be consistent with the nature of the discrimination determined in the case.

In the case of *Guzmán Albarracín et al. v. Ecuador* (IACtHR 2020), the IACtHR analyzed the case of an Ecuadorian girl between 14 and 16 of age who was subjected to various forms of abuse against her sexual integrity by a board member of her secondary-education school, which ultimately led to her suicide. This violation of her rights was then also inflicted by other representatives of the educational institution, the doctor who treated her, and even the judicial authorities who allegedly handled the case with gender stereotypes. On this occasion, the international court analyzed the conventional violations based on the discriminatory nature of the sexual violence suffered by the victim under the premise that gender violence and violence against women imply a form of discrimination and that "sexual violence against girls not only reflects a prohibited form of discrimination based on gender, but can also be discriminatory based on age" (IACtHR 2020, 43, par. 141). Therefore, considering that Article 1(1) of the American Convention prohibits any type of discrimination with respect to groups in special situations of vulnerability, which is precisely the case of girls and boys, "who may be disproportionately and more severely affected by acts of discrimination and gender-based violence" (IACtHR 2020, 43-44, par. 141).

Regarding this, the IACtHR considered that within the framework of the obligation not to discriminate, states are obliged to adopt positive measures to reverse or change discriminatory situations that are detrimental to certain groups within their societies. Additionally, they need to take "proactive measures to promote the empowerment of girls, challenge patriarchal and other harmful gender norms and stereotyping and promote legal reforms to address direct and indirect discrimination against girls" (IACtHR 2020, 44, par. 142). This specific provision, which encourages reforms in internal systems and a behavioral adjustment in the face of structures of discrimination, became the conclusion reached by the IACtHR

when it warned that the acts of harassment and sexual abuse committed against the victim not only constituted acts of violence and discrimination in themselves but also included many factors of vulnerability and risk of discrimination, such as age and the condition of being a woman, which converged in an intersectional manner. Although these acts of violence and discrimination were also framed in a structural situation in which sexual violence in educational institutions was an existing and known problem, the state did not adopt any effective measures to reverse it.

Said violence, which was not isolated but structural, was discriminatory in an intersectional way, with the adolescent being affected by her gender and age. It was also tolerated by state authorities, given that the state did not adopt adequate measures to address acts of sexual violence in educational settings and did not provide education on sexual and reproductive rights to the victim, which worsened her situation of vulnerability. For the IACtHR, the discrimination suffered by the victim was due to a context in which "her vulnerability as an adolescent girl was heightened by a situation, which was not exceptional, of a lack of effective actions to prevent sexual violence in schools and address institutional tolerance" (IACtHR 2020, 40, par. 135), because she did not have an education that would allow her to understand the sexual violence involved in the acts she suffered and lacked an institutional system that would provide support for her treatment or reporting it.

These vulnerability factors, interpreted by the IACtHR as ingredients of the mentioned intersectional discrimination, are clearly analyzed from an additive-cumulative approach and not precisely from the interactive approach that intersectionality deserves, due to which all the structures of inequality and oppression analyzed are connected and converging in the identity and concrete experience of the victim. Each of these factors must be understood as essential elements of the experience suffered and not as dispensable elements that add degrees of damage. Although the IACtHR refers to the intersectional approach in its analysis of the case of *Guzmán Albarracín et al. v. Ecuador*, which is a significant contribution to the evolution of the antidiscrimination law that this court has been consolidating, it could still strengthen this analysis and the implementation strategy since the experience of the victim is not exhausted or condensed in the sum of the identity or structural conditions that exacerbated the violation of her

rights with an implicit effect comparing experiences that do not have those same factors (as if it were a discrimination competition, some being more serious than others). Such a conclusion would imply that, in the opposite situation, the form of violation could be subtracted or reduced according to elements that could counteract the damage, such as socio-economic position, race or ethnicity, or academic training. The crux of intersectionality lies in a careful analysis of each specific experience and the intersection of factors that, although they could be disaggregated independently, can only be understood from their joint examination to find, from there, the specific remedy that seeks to counteract the violations of the rights of these complex experiences of discrimination.

In one of the most recent litigations, *Vicky Hernández et al. v. Honduras* (IACtHR 2021), the IACtHR studied the case of a transgender woman who was both a sexual worker and an LGBTIQ activist in Honduras. The facts of the case are related to the night of the *coup d'état* on June 29, 2009, when Vicky and two partners of hers were assaulted by members of the national police. Days after, the dead body of Vicky was found on the street. Even though an investigation regarding Vicky's death was initiated, it was soon after declared inconclusive and then filed. In this case, based on the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Belém do Pará Convention") and given the fact that Honduras was declared responsible for Vicky's death, the IACtHR considered that the victim "was a trans woman sex worker living with HIV, and that she carried out activities in defense of the rights of trans women. These characteristics placed Vicky Hernández in a particularly vulnerable situation where numerous factors of discrimination converged intersectionally" (IACtHR 2021, 35, par. 135).

To reach its decision, the IACtHR considered that Article 9 of the Belém do Pará Convention urges states to observe "the vulnerability of women to violence by reason of, among others, their race or ethnic background, or their status as migrants, refugees or displaced persons" (OAS 1994, art. 9) when adopting measures to prevent, punish, and eradicate violence against women. According to the IACtHR, this list of factors is not *numerus clausus*, as indicated by the expression "among others." Therefore, it may be deemed that, in certain circumstances, such as those of

this case—which relates to a trans woman—"gender identity constitutes a factor that may contribute, intersectionally, to the vulnerability of women to gender-based violence" (IACtHR 2021, 34, par. 129).

This additive approach that prevails in the IACtHR jurisprudence is even more evident when, in this case, the court explains that "sexual orientation and gender identity are categories protected by the American Convention and that any discriminatory law, act or practice based on a person's sexual orientation or gender identity is prohibited" (IACtHR 2021, 34, par, 129). In other words, the IACtHR still uses the additive-cumulative approach to identity categories instead of applying an interactive one. By doing so, it divests itself of a more complex study approach that could lead to addressing the violations from a more interactive and comprehensive understanding of cases instead of the traditional remedies proposed by non-discrimination law.

Conclusions

Intersectionality is both a metaphor and a theoretical and practical approach that, since its appearance, has presented various re-readings and reinterpretations not only in legal theory and gender studies but also in many disciplines of social sciences, health, and other knowledge areas. It is, above all, a useful approach for judicial intervention against discrimination, which, notwithstanding the difficulties it raises, suggests important advantages in the judicial sphere of adjudication and protection of human rights in the region. However, the success of its application depends on a precise understanding of its scope, limits, and differences compared to other approaches, as well as the evolution it brings to current judicial practice.

An intersectional analysis in the judicial setting requires two fundamental premises: first, abandoning the exclusive and limited use of the categorical approach in cases of complex discrimination and, instead, understanding that the experiences of those who go before human rights courts are based on "multiple identities that may be linked to more than a single source [of oppression]" (Ontario Human Rights Commission 2001, 28). Second, it requires an analysis that allows considering the various "contextual factors" (OHRC, 2001, 28) that may surround the facts of a particular case, which implies examining the underlying discriminatory stereotypes, scrutinizing the purpose or purposes of the legislation, regulation, or public

policy in question associated with the discriminatory situation, warning and highlighting the nature and/or situation of the victim, and identifying and highlighting the social, political, and legal history of the person and their treatment-position in the social system, all from a perspective of converging factors, not from a merely additive understanding.

Intersectional analysis can ultimately become the lens through which to examine the social context of a person; thus, effective judicial remedies can be directed against specific social situations that condition the violation of rights. In this way, it would be possible to account for the *continuum* of the oppression suffered, in addition to promoting a measure of satisfaction and reparation of rights in the face of inequality and discrimination that responds to that line of contextual conditions associated with the case to overcome the limits that the essentialist reading of traditional approaches to antidiscrimination law entail. Similarly—and above all—effective remedies and reparations can be applied considering the complexity that intersectional discrimination entails for our contemporary societies. Therefore, a new reparation procedure in the IACtHR is very much needed. This final part of the Inter-American process must include the autonomy and actions required (with separate special hearings and guarantees of non-repetition expert reports, among other mechanisms) to develop the most suitable possible measures when addressing intersectional discrimination cases.

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Indigenous Women at the United Nations: Exploring Their Creative Claims and Critical Perspectives on International Human Rights Law

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Introduction

March 11, 2019. 630 2nd Av., New York City. Just a few blocks away from the United Nations (UN) headquarters, down in the basement of the Armenian Church, the Native Women's Association of Canada (NWAC) is hosting a side event to the 63rd Session of the UN Commission on the Status of Women entitled "Empowering Indigenous Women and Girls in Canada."[1] The room is crowded, mainly with Indigenous women representatives and activists from Canada and other countries around the world, civil society organizations, and some UN staff members. During the panel discussion, NWAC speakers describe the disproportionate levels of discrimination and violence facing First Nations, Métis, and Inuit women and girls living in Canada. They depict how such discrimination and violence are rooted in the country's colonial history and patriarchal structures (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019; Razack 2016). They discuss the alleged responsibility of the State of Canada, including the lack of disaggregated data on discrimination and violence

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[1] Excerpts from the author's field notes (New York, March 11, 2019).

facing Indigenous women and girls, the insufficient financial and political support to programs and initiatives aimed at addressing violence and trauma, the difficulties for survivors to access justice, and the shortage of culturally appropriate legal aid and psychosocial support (CEDAW Committee 2016, par. 15-17).

Since the 1970s, NWAC has mobilized to defend the rights of Indigenous women who live both on and off reserves in Canada, including regarding "employment, labour and business, health, violence prevention and safety, justice and human rights, environment, early learning childcare and international affairs" (NWAC n.d.). As the side event is reaching its end, the conversation touches upon global alliances among Indigenous women and strategies to foster advocacy campaigns in international fora. One of the speakers declares, "I think our women have to stand together. We must think globally. We have a better chance to stand together because we are not led by ego but by emotions and care. At the same time, we are also fighting to get back power at the local level."[2] Loud applauses are heard throughout the room, marking the end of the side event and the moment for participants to rush back to the UN headquarters, where the session of the UN Commission on the Status of Women is taking place. A few days later, NWAC publishes a post on Facebook: "The #NWACAccord positions Indigenous women to have a voice at decision-making tables. We are at #UNCSW63 building international alliances to ensure Indigenous women around the world have the same opportunities" (NWAC 2019).

This side event is not anecdotal nor isolated. The participation of Indigenous women representatives in UN events and the organization of public meetings, webinars, or consultations have become part of their regular international advocacy agenda. Over the last decades, Indigenous women have mobilized on the regional and international stages to raise awareness about the specific human rights issues they face (Nadal 2021, 153-179), including pointing out the legislative and policy frameworks—such as laws, regulations, programs, administrative procedures, institutional structures—that directly or indirectly discriminate against them. At the UN level, Indigenous women have actively advocated for the enhanced

[2] Excerpts from the author's field notes (New York, March 11, 2019).

recognition, protection, and implementation of their rights before UN bodies and human rights mechanisms, and, in particular, special procedures and treaty bodies. They have also denounced the social structures—including patriarchy, colonialism, and racism—that exist in nation-states at large or within their communities and normalize the multiple forms of violence and discrimination they are confronted with.

Although only a few international legal documents explicitly mention Indigenous women's rights, growing attention is paid to their specific experiences under international human rights law (Suzack 2016). The recent adoption of General Recommendation No. 39 on the rights of Indigenous women and girls by the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) is indicative of this development. Nonetheless, the rights of Indigenous women have long remained in the shadow, and the attention paid to Indigenous women's specific experiences is still inadequate, considering the scale of human rights abuses they face throughout the world (Kuokkanen 2016). According to Sami researcher Rauna Kuokkanen, legal scholarship has also insufficiently considered Indigenous women's specific experiences and the intersections between Indigenous rights and women's rights. She notes that the research on Indigenous self-determination tends to be un-gendered, while academic research on women's rights generally excludes the concepts of indigeneity, nation-state, or colonization (Kuokkanen 2012, 226).

In light of these observations, this chapter focuses on the following question: How do Indigenous women's critical perspectives and right-based claims fit within international human rights law? It explores the essential role played by Indigenous women activists who have mobilized in international fora to advance the protection of their rights under international human rights law and to clarify the scope of states' obligations in light of their intersectional experiences. This chapter demonstrates that the international Indigenous women's rights movement has made creative proposals to reinvigorate the interpretation and implementation of international human rights standards from their own intersectional positioning as *women* and *Indigenous*.

1. Indigenous Women's Advocacy at the United Nations

1.1. Seeking for a Space between the Women's Rights Movement and the Indigenous Rights Movement at the United Nations

Although Indigenous women have long engaged in international advocacy campaigns, they have often been overlooked and underrepresented in discussions about women's rights and Indigenous rights at the UN (Corntassel and Parisi 2007, 81). Corntassel and Parisi (2007) argue that "due to colonization and imperial influences, both women's rights and Indigenous rights movements have been problematic spaces for Indigenous women's participation in treaty making and standard setting in legal fora" (81). In a context where insufficient attention has been given to intersectional perspectives they have articulated and advocated for, Indigenous women have often been required to "make trade-offs" as *women* or members of *Indigenous peoples* (Corntassel and Parisi 2007, 81).

On the one hand, until the mid-2000s, the international women's rights movement had mainly focused on gender-specific human rights violations from a single-axis approach.[3] The emphasis on gender-based discrimination and individual equality rights within certain feminist movements—especially within white liberal feminist theory and activism—partially eclipsed the specific circumstances of certain groups of women, including Indigenous women and girls. Aligned with the concept of "coloniality of gender" described by María Lugones (2011),[4] Indigenous women have advocated for the inclusion of an intersectional perspective to reflect how their experiences are shaped by multiple and interlocking systems of privilege and oppression, such as the discrimination and violence emerging at the intersection of sexism and colonialism (Charlesworth, Chinkin, and Wright 1991).

[3] For a history of the emergence of critical approaches to white liberal feminism, see, e.g., Colin and Quiroz (2023, 191-208) and Montanaro (2023).

[4] Drawing on the colonial history of the Americas, Lugones (2011) articulates the concepts of "coloniality of gender" and "modern/colonial gender system" to illustrate the multiple and fragmented identities of women and to highlight the need for any reflection on gender to take account of other forms of domination, in particular the racist structures of modern societies and the consequences of colonialism. Such theoretical developments destabilize hegemonic feminist theories and taxonomies.

On the other hand, the Indigenous rights movement has constituted an unprecedented "path of Indigenous resistance and transformative politics" (Lightfoot 2016, 254) for Indigenous peoples and communities throughout the world, including women and girls.[5] Nevertheless, the emphasis placed by activists and researchers[6] on Indigenous peoples' collective rights, including the right to self-determination, has overshadowed the connection of those rights with other areas relevant to Indigenous women, including gender issues (Hodgson 2002, 1044; see also Sjørslev 1998, 311).

Referring to the weak attention paid to intragroup differences in both movements, Rauna Kuokkanen (2016) considers that "the situation whereby the feminist movement overemphasizes gender discrimination and the Indigenous movement focuses on colonialism reflects the failure of identity politics to attend to intragroup difference or oppression" (137). Facing this lack of attention and representation, Indigenous women have engaged in a "politics of intersectionality in framing their diplomatic engagement" (Corntassel and Parisi 2007, 82) by leading political activities and strategies to advocate for the advancement of their individual rights as *women* and of their collective rights as members of *Indigenous peoples*.

1.2. The Affirmation of Indigenous Women's Political Agenda in the International Arena

Indigenous women have achieved growing visibility in international fora by articulating creative demands of rights that emphasize the interconnections between Indigenous self-determination and their individual agency. Indigenous trade union leader Domitila Barrios de Chungara is often referred to as one of the first Indigenous woman to have made a public intervention in the international arena during the First UN World Conference on Women held in Mexico in 1975 (Nadal 2021, 158). Born into a very poor family in Bolivia, she was a member of the miners' union and took part in several

[5] For a history of the mobilization of Indigenous representatives at the UN, see Morin (2005) and Bellier, Cloud, and Lacroix (2017).

[6] For instance, due to the politization of Indigenous rights and the fear of undermining their claims, few anthropologists have examined discrimination and violence existing in communities or tribes. But *cf.* Macleod (2008).

hunger strikes in the 1960s and 1970s. Colin and Quiroz (2023) describe the political tensions with white feminists arising during the 1975 conference:

> She [Domitila Barrios de Chungara] joined the Bolivian women's delegation at the UN World Conference on Women in Mexico in 1975. There she spoke out and confronted white feminists, in particular the activist and writer Betty Friedan. The latter urged her to put aside her class activism and "warmongering" and join them in the "real struggle." Barrios answered that their lives were not the same and that she did not recognize herself in her feminism. (203; translation from French to English by the author)

In September 1995, the Fourth UN World Conference on Women was a turning point for strengthening an international Indigenous women's rights movement. Organized in Beijing, this global event generated intense preparatory work among Indigenous women's organizations, especially at the local level—i.e., community workshops, consultation initiatives, thematic reports, and efforts to build collective agendas (Espinosa 1997, 239). For instance, in August 1995, the First Continental Meeting of Indigenous Women of the Americas was held in Quito and gathered Indigenous women leaders from the continent. In a document known as the Sun Declaration (*Declaración del Sol*), they agreed on an agenda to be taken to Beijing a few weeks later (ECMIA and CHIRAPAQ 2015, 21-22). According to Quechua activist Tarcila Rivera Zea, this document was one of the first to delineate the aspirations and position of Indigenous women *vis-à-vis* the Indigenous rights movement, the non-Indigenous women's rights movement, NGOs working with Indigenous women, states, and international organizations like the UN (Rivera Zea 2008, 333-334).

A few weeks later, during the Beijing Conference, Indigenous women from all regions gathered in an outdoor tent in Huairou, where they discussed the shortcomings of the conference's agenda in light of their specific circumstances and experiences (Valladares de la Cruz 2008). As recalled by Tarcila Rivera Zea, "Indigenous women from all over the world would be gathered, some from the world's richest countries, some from the poorest, and with different languages and cultures" (ECMIA and CHIRAPAQ 2015, 22). Two political achievements can be noted as a result of Indigenous

women's energetic participation at the Beijing Conference. For the first time, the Beijing Declaration and Platform for Action contains explicit references to the specific concerns of Indigenous women in various areas, including violence, lack of political participation, and environmental destruction. Secondly, Indigenous women adopted the Beijing Declaration of Indigenous Women, which is a symbolic document that articulated their rights-based demands in matters like self-determination, the environment, access to health services with cultural relevance, cultural revitalization, or the adoption of alternative economic and development models ("Beijing Declaration of Indigenous Women" 1995).

Since the 1995 Beijing conference, Indigenous women have achieved enhanced visibility as a result of an international advocacy agenda led by various organizations and alliances, such as the Enlace Continental de Mujeres Indígenas de las Américas (ECMIA, Continental Network of Indigenous Women of the Americas) or the Foro Internacional de Mujeres Indígenas (FIMI, International Forum of Indigenous Women). Similar to the international Indigenous rights movement, the international Indigenous women's rights movement has "no artificial bureaucracy, structure, or designated leader" (Henderson 2008, 34). It rather operates like a network with common strategies and objectives and shared cultural and spiritual groundings (Henderson 2008, 34).

The movement also stands out for its ability to operate at multiple levels, thus bridging the local with the global. The use of social media has allowed Indigenous women to raise awareness at the international level about specific issues they face locally, in and off Indigenous territories. In particular, during the COVID-19 pandemic, online events, like webinars or consultation meetings, were organized to facilitate the participation and representation of Indigenous women from local communities in UN discussions. In the meantime, the pandemic has also deepened the inequalities of access to the UN human rights system due to the pervasiveness of the digital divide affecting some Indigenous communities, especially in the most isolated and rural areas.[7] As such, it would be relevant for UN

[7] For instance, for a study on how the digital divide in Guatemala has disproportionately affected Indigenous communities during the COVID-19 pandemic, see Cahier and Garance (2022,79-81, 87-89).

bodies and human rights mechanisms to strengthen cooperation with local Indigenous communities and civil society organizations to provide convenient and safe spaces with internet connection as a means of supporting Indigenous women's participation.

Civil society organizations led by Indigenous women have also focused on training, peer-to-peer learning, and capacity-building to ensure that representatives and activists develop the required abilities and have the necessary resources to navigate the complex architecture of the UN system. For instance, just before the annual session of the UN Permanent Forum on Indigenous Issues (UNPFII) in New York, FIMI gathers every year a group of Indigenous women activists from different regions of the world at Columbia University to train them on the use of UN human rights norms, mechanisms, and procedures as well as strategies to advance their agenda at the UN. The conjunction of capacity-building with growing representation has allowed Indigenous women to gain more visibility in UN discussions related to women or Indigenous rights and other themes, such as climate change and the environment, intellectual property rights, or sustainable development.

Although areas of divergence exist regarding local specificities, Indigenous women representatives and activists have gathered around a shared political agenda at the UN that focuses on contemporary issues disproportionately affecting them, both as *women* and *Indigenous*. Based on this intersectional positioning, the international Indigenous women's rights movement has elaborated and agreed upon various documents delineating shared perspectives and strategies, such as the Declaration of the International Forum of Indigenous Women Beijing+ 5 (New York, 2000), the Declaration of the Indigenous Women's Network on Biodiversity (Malaysia, 2004), and the Political Positioning and Plan of Action of Indigenous Women of the World (Peru, 2013). These documents provide a clear account of the concerns and issues they wish to raise during UN discussions, including the long-lasting effects of colonialism, the intersectional forms of violence and discrimination affecting them, the violations of their collective and individual rights associated with the exploitation of Indigenous lands and resources located in Indigenous territories, the exclusion of Indigenous women from most decision-making bodies at the local, national, and global levels, the growing number of attacks against Indigenous women human

rights defenders, the environmental crisis and the multi-layered effects of climate change on their rights, the erosion of their cultural, social and economic rights, or the specific circumstances of Indigenous women living in contexts of armed conflict and post-conflict, or who are internally displaced, stateless, migrants, refugees, or asylum-seekers.

1.3. Approaching the Diversity of Feminist Movements at the United Nations

As noted earlier in this chapter, the recognition of women's rights as part of the international human rights law framework and the gender mainstreaming process within the UN system have long been dominated by liberal feminist movements. Sosa argues that "early feminist studies promoted the idea that women formed a homogenous category" (Sosa 2017a, 87) who shared common experiences regardless of their Indigenous origin, race, ethnicity, class, or sexual orientation, among other social identities. In her comprehensive study of the UN human rights framework on violence against women, Sosa shows that UN documents and instruments did not incorporate intersectionality until the mid-2000s, when reports of the UN Secretary-General and the UN Special Rapporteur on Violence Against Women started documenting the specific experiences of some groups of women, including Indigenous women, in a more systematic way (Sosa 2017b, 252).

Despite the lack of systematic attention to intra-group differences, global feminist campaigns and advocacy strategies have been key in advancing the UN framework on women's rights and securing achievements in standard-setting, including the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 (Nussbaum 2016, 599). Indigenous women's rights movements share with the global feminist campaigns "a strong commitment to analyzing systemic forms of gender injustice at the local level of the nation-state" and "an obligation to engage in a wider critical dialogue with other social justice movements in order to construct shared 'typologies' that show how forces interact to generate the systemic conditions of women's oppression" (Suzack 2016, 149).

Nevertheless, women activists belonging to marginalized communities have shed light on the relevance of overcoming the narrow definition of

discrimination against women based on a single axis (gender) and infusing non-Western experiences, lived realities, and perceptions into international human rights law (see, e.g., Talpade Mohanty 2003). Kuokkanen explains that "a focus on gender discrimination tends to overemphasize individual equality and rights rather than explicating structural violence and the interlocking systems of domination affecting indigenous women's lives" (Kuokkanen 2012, 232). Attempting to define "Indigenous feminism" is a complex task considering the diversity of Indigenous women's organizations, their strong anchoring in local contexts, or the distinct experiences of colonization, histories, cultural traditions, beliefs, and worldviews of Indigenous communities worldwide. As recalled by Suzack, "Indigenous-feminist issues are evolving, diverse and situationally complex" (2016, 149). Furthermore, some Indigenous women do not label themselves as "feminists," often based on the argument that their political struggles cannot be separated from their Indigenous male counterparts' fight for self-determination.

Nonetheless, the international Indigenous women's rights movement is bound by shared political objectives. Kuokkanen defines Indigenous feminism as "a theoretical intervention located at the intersection of indigenous peoples political struggles for decolonization and self-determination and indigenous women's engagement in issues of gender equality and social justice in both indigenous and non-indigenous contexts" (Knobblock and Kuokkanen 2015, 275). According to her, one of the core claims by Indigenous feminist movements has been to "insist on incorporating a critical examination of racism and colonialism as an inseparable part of all feminist theory and practice" (Knobblock and Kuokkanen 2015, 277). A principal difference between Indigenous feminism and non-Indigenous feminism thus relates to the attention devoted to understanding the roots, effects, and consequences of colonialism and nation-building on women's experiences of human rights violations. Kuokkanen further explains that

> for indigenous women, the key issue is to pursue a human rights framework that not only simultaneously advances individual and collective rights, but also explicitly addresses gender-specific human rights violations of indigenous women in a way that does not disregard the continued practices and effects of colonialism. (Knobblock and Kuokkanen 2015, 277)

Even though not all Indigenous women may explicitly refer to the concept of intersectionality (Corntassel and Parisi 2007, 85), most of their claims and activities at the global level are shaped by their intersecting identities and guided by the simultaneous pursuit of both their collective and individual rights. The intersectionality perspective has enabled Indigenous women to go beyond single-axis approaches to emphasize the complex ways in which their social identities overlap and create compounding experiences of discrimination and concurrent forms of oppression based on two or more grounds, such as their gender identity, Indigenous status, sexual orientation, age, class, disability, religion or belief, or health status. According to Teresa Zapeta, Executive Director of FIMI, one of the main contributions of Indigenous women has thus been to understand the issue of inequalities and marginalization confronting some women "not only as a power struggle between genders but as encompassing all the different diversities" (FIMI n.d.).

A comparison between the 1995 Beijing Declaration and Platform for Action and the Beijing Declaration of Indigenous Women—both drafted at the same moment—reveals the commonalities and divergences between the global feminist campaign to secure women's human rights and the Indigenous women's rights movement. In particular, the Beijing Declaration of Indigenous Women extends beyond the issue of gender discrimination, violence, and inequality to include topics relevant to women belonging to Indigenous peoples, such as the consequences of colonization, forced land removal or deprivation, or environmental destruction. This symbolic declaration reflects an understanding of women's rights and gender justice rooted in the perspectives, experiences, and epistemologies of Indigenous peoples. For instance, Indigenous women often refer to the concepts of complementarity and duality to analyze gender relations in Indigenous communities (Macleod 2008, 128-129) while highlighting the interdependence between individual and collective rights and the interconnections between women's rights and Indigenous rights, including the right to self-determination (Valladares de la Cruz 2008, 47-65).

2. Assessing the Incorporation of Indigenous Women's Demands of Rights in International Human Rights Law

2.1. The Protection of Indigenous Women's Rights under International Human Rights Law

Although only a few international soft-law documents explicitly mention Indigenous women's specific circumstances, core international human rights treaties include relevant provisions concerning the individual and collective rights of Indigenous women (CEDAW Committee 2022, par. 13). In particular, the international framework on women's rights provides relevant safeguards for Indigenous women, articulated around the central principle of equality and non-discrimination. As women, their rights are protected under CEDAW, which calls for states, *inter alia*, to "condemn discrimination against women in all its forms" and to adopt appropriate measures and policies to guarantee them "the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men" (CEDAW 2022, art. 2 and 3). Although CEDAW does not contain any explicit reference to Indigenous women, CEDAW Committee's General Recommendation No. 39 recalls that "the rights under CEDAW are applicable to all Indigenous women and girls, inside and outside of their territories" (CEDAW Committee 2022, par. 8).

In addition to the rights contained in core international human rights treaties, Indigenous women are ensured with the specific rights guaranteed to Indigenous peoples under international law, including the 1989 International Labor Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples and the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP recognizes Indigenous peoples' right to self-determination along with a broad range of collective rights in the political, economic, social, and cultural spheres, including, for instance, the right to lands and territories they have traditionally inhabited. As recalled by the CEDAW Committee in its General Recommendation No. 39, "all of the rights recognized in UNDRIP are relevant to Indigenous women, both as members of their peoples and communities and as individual Indigenous women" (CEDAW Committee 2022, par. 13).

Three articles out of 46 in UNDRIP specifically relate to Indigenous women's rights and specific needs. Article 21§2 calls for states to "take

effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions" and pay specific attention to the rights and needs of Indigenous women. Article 22§1 reiterates the necessity to pay particular attention to some categories of Indigenous individuals, including elders, women, youth, children, and people with disabilities, in relation to the implementation of UNDRIP. Article 22§2 calls for states to "take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination." In addition to these two articles, Article 44 aligns with the principle of equality and non-discrimination by recalling that "all the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals."

Nonetheless, the implementation of Indigenous women's rights remains weak at the state level and fragilized by the pervasiveness of discriminatory laws, policies, and practices shaped by colonialism and patriarchy in many countries. According to Cheryl Suzack, "Indigenous women continue to struggle in local contexts to achieve a minimum level of state support to alter colonial and nation-state policies that have contributed to their cultural dislocation and social marginalization" (2016, 146). In this context, Indigenous women have continued to mobilize in global fora to strengthen international human rights norms and standards regarding their intersectional experiences and to foster their implementation by states. Although much remains to be achieved, the inclusion of Indigenous women's concerns in international human rights law is facilitated by a twofold process: 1) the timid but ongoing mainstreaming of intersectionality within the UN system, and 2) the growing attention paid to the specific needs of Indigenous women by UN human rights mechanisms in setting, interpreting, and implementing international human rights standards.

2.2. The Mainstreaming of Intersectionality within the UN System's Efforts to Promote and Protect Human Rights

Since Crenshaw's theoretical developments on intersectionality in the late 1980s (Crenshaw 1989), feminist scholars have thoroughly expounded said concept (Anders and Devita 2014, 36-37), which has become a robust tool to analyze how complex forms of domination are structured along multiple and

intersecting social identities. Since the mid-2000s, UN bodies and human rights mechanisms have timidly but growingly referred to intersectionality in the context of standard-setting, policy development, and programming. In 2004, the UNPFII released key recommendations concerning Indigenous women, including calling on the "UN systems to mainstream indigenous gender issues and to integrate the special needs and concerns of indigenous women into their programmes and policies" (UNPFII 2004, par. 8). In particular, it recommended "compiling and integrating disaggregated data," "integrating indigenous experts on indigenous women's issues in their programming staff," "appointing indigenous focal points on indigenous women's issues," "increasing outreach to indigenous women's organizations worldwide," and "increasing the outreach and information flow to and from the academic community, including indigenous educational institutions, on indigenous women's issues" (UNPFII 2004, par. 8).

Nonetheless, Sosa notes that "when looking at the UN documents individually, the process of the introduction of intersectionality shows some drawbacks and inconsistencies" (Sosa 2017b, 252). In 2015, Victoria Tauli-Corpuz, then-UN Special Rapporteur on the Rights of Indigenous Peoples, presented a groundbreaking report to the 30th Session of the Human Rights Council on the situation of Indigenous women and girls around the world (HRC 2015, par. 5). Tauli-Corpuz observed that the attention of much of the UN human rights and development policy architecture to Indigenous women's experience had been limited (HRC 2015, par. 74). She highlighted the "gaps and weaknesses in analysis include a lack of geographical balance, limited inclusion of collective rights, little exploration of intersectionality in relation to the vulnerability of indigenous women and a lack of exploration of the gender implications to rights issues affecting indigenous communities" (HRC 2015, par. 74).

More recently, some efforts by UN human rights mechanisms and UN agencies—such as the ILO or UN Women—have advanced the inclusion of an intersectional approach. In particular, the UN Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples, and the UNPFII have growingly addressed the specific situation of Indigenous women through comprehensive assessments with an intersectional approach. At the inter-agency level, the UN Network on Racial Discrimination and Protection of Minorities, a platform that brings

together more than twenty UN departments, agencies, and programs, published a *Guidance Note on Intersectionality, Racial Discrimination and Protection of Minorities* in 2022 that seeks to encourage an intersectionality perspective in the context of UN policy development, programming, and project implementation as a means of strengthening system-wide efforts to eliminate all forms of discrimination (United Nations Network on Racial Discrimination and Protection of Minorities 2022).

Nonetheless, more efforts are needed to further the systematic adoption of an intersectionality approach within the UN system, particularly in connection to the rights of Indigenous women and girls. Long sought after by the international Indigenous women's rights movement, the recent adoption of General Recommendation No. 39 on the rights of Indigenous women and girls by the CEDAW Committee is a promising development in this respect.

2.3. CEDAW Committee's General Recommendation No. 39 on the Rights of Indigenous Women and Girls (2022): A Long Sought-After Achievement for the International Indigenous Women's Rights Movement

The CEDAW Committee issued various general recommendations, which contain explicit references to Indigenous women, including General Recommendations No. 24 on women and health (1999), No. 30 on women in conflict prevention, conflict, and post-conflict situations (2013), No. 33 on women's access to justice (2015), No. 34 on the rights of rural women (2016), No. 35 on gender-based violence (2017), No. 36 on the rights of women and girls to education (2017), and No. 37 on gender-related dimensions of disaster risk reduction in a changing climate (2018). Nevertheless, until October 2022, the absence of a specific general recommendation on the rights of Indigenous women and girls prevented adequate follow-up of states' compliance with their international obligations in this regard (CEDAW Committee 2021).

Indigenous women had long advocated for a general recommendation that would interpret CEDAW in a way consistent with their specific views, experiences, and circumstances and give explicit guidance to articulate the international framework on women's rights with Indigenous rights (Women's Human Rights Institute 2020). Despite the absence of an explicit

provision on Indigenous women's rights within CEDAW, they have highlighted how this core international human rights treaty could be interpreted consistently with other international instruments concerning Indigenous rights, especially UNDRIP. In 2004, the UNPFII was among the first UN entities to underscore the need for a general recommendation to clarify State parties' obligations regarding the rights of Indigenous women and girls. Later on, in its 18th session held in 2019, the UNPFII recommended that this general recommendation "take into consideration issues related to individual and collective rights, equality, non-discrimination and self-determination; social and economic rights, including rights […] to land, territory and resources; the right to water and food; cultural rights; civil and political rights; and the right to live free from violence" (UNPFII 2019, par. 53).

The two-year-long drafting process of General Recommendation No. 39 was quite remarkable and distinctive as it involved collaboration between the international Indigenous women's rights movement, local organizations of Indigenous women, and the CEDAW Committee. In particular, the CEDAW Committee convened regional consultation meetings to collect inputs from Indigenous women at various stages of the drafting process. For instance, in December 2020, a consultation meeting was organized simultaneously on Zoom and Facebook to collect the views of Indigenous women from Latin America and the Caribbean. Attended by more than 300 participants, the virtual event provided a space for UN members, including the Director of UN Women for the Latin American region and the Vice President of the CEDAW Committee, and Indigenous women activists, such as Otilia Lux de Cotí, Tarcila Rivera Zea, Myrna Cunningham, and Guillermina Juárez, to discuss expectations regarding the content of the future general recommendation.[8] For example, when asked about the themes that should be addressed by the CEDAW Committee, Indigenous women participants proposed empowerment, multicultural education, representation, interculturality, climate change, socioeconomic opportunities, social inclusion, food and water security, political participation, and governance. When questioned on how they could contribute to the development of the

[8] Abstracts from the author's field notes (December, 2020).

general recommendation, Indigenous women suggested organizing workshops in communities, bridging the digital divide, ensuring a balance among diverse generations, including youth and the elderly, opening horizontal dialogues with as many participants as possible from local communities, and ensuring broader cooperation between civil society organizations, schools, and traditional authorities to open up spaces of discussion at various scales.

On October 26, 2022, after a two-year-long drafting process "tak[ing] into account the voices of Indigenous women and girls as driving actors and leaders in and outside of their communities" (CEDAW Committee 2022, par. 2), the CEDAW Committee adopted the first-ever general recommendation on the rights of Indigenous women and girls. General Recommendation No. 39 is a remarkable document that provides "guidance to States parties on legislative, policy, and other relevant measures to ensure the implementation of their obligations in relation to the rights of Indigenous women and girls under CEDAW" (CEDAW Committee 2022, par. 1). Promoting a gender, intersectional, and intercultural approach, General Recommendation No. 39 examines the international women's rights framework from the standpoint of Indigenous women. Recognizing the individual and collective dimensions of Indigenous women's rights, this document provides much-needed guidance to state parties on how to implement international women's rights in a manner that is consistent with Indigenous rights, especially the right to self-determination as guaranteed under international law. General Recommendation No. 39 does not only represent a move away from the single-axis approach focused on gender toward an intersectionality perspective, but it also reflects a renewed conceptual understanding of Indigenous women's rights as a set of collective and individual rights anchored in their experiences, views, and epistemologies. This recognition of the individual and collective dimensions of Indigenous women's self-determination represents a shift long sought after by Indigenous women representatives, activists, and scholars.

3. What Challenges Lie Ahead for the Protection of Indigenous Women's Rights under International Human Rights Law?

Despite recent legal and political achievements at the UN, systematic attention to the specific vulnerability of Indigenous women has remained fragile

and limited, considering the scale of abuses they have suffered throughout the world. This last section identifies a series of challenges that need to be addressed to better promote, protect, and fulfill the human rights of Indigenous women.

A first challenge concerns the weak implementation of the rights of Indigenous women and girls at the national level, as many states still lack domestic policies, legislation, or case law promoting and protecting the individual and collective rights of Indigenous women. UN human rights mechanisms have a crucial role in providing guidance to states on legislative, policy, and other relevant measures to implement such rights and in following-up implementation at the domestic level. Enhanced consultation with Indigenous women and systematic attention to their specific situation by UN human rights mechanisms, including treaty bodies and special procedures, is crucial to advance standard-setting, implementation, and monitoring regarding issues particularly affecting them. Collaboration with regional human rights protection systems is also key in supporting the implementation and monitoring of Indigenous women's rights at the country level.

Furthermore, meaningful consultation and collaboration with Indigenous peoples—including traditional authorities, community leaders, spiritual leaders, and women from communities—is central to advancing the implementation of Indigenous women's rights in local contexts. Indigenous peoples have the right to maintain their own political systems and judicial structures as they constitute a fundamental component of their rights to autonomy and self-determination under international law. Advancing systematic consultation and collaboration with Indigenous communities is thus essential to ensure that Indigenous customary laws, justice systems, and practices are consistent with international human rights standards. For instance, the CEDAW Committee's General Recommendation No. 39 recalls that both non-Indigenous and Indigenous justice systems have the obligation to act in a timely fashion to offer appropriate and effective remedies for Indigenous women and girls who are survivors of violence (CEDAW Committee 2022, par. 27).

A second challenge relates to the emergence of new global issues that require creative and renewed interpretation of some international human rights norms and standards to efficiently address the circumstances and

experiences of Indigenous women in specific local contexts. In addition to long-standing issues such as intersectional forms of discrimination and violence, comprehensive attention must be paid to emerging and multi-layered challenges that have disproportionate impacts on Indigenous women and girls, like the global environmental crisis, the issue of exploitation and access to Indigenous lands and territories in a context of growing militarization by national armies and private entities, drug cartels, mining, and logging activities, the alarming rise in attacks against Indigenous women human rights defenders, or the abuses suffered by Indigenous women forced to flee away from their lands due to conflicts or climate change.[9] International human rights mechanisms have a critical role in advancing international standards regarding these pressing issues, for instance, by clarifying the responsibility of non-state actors for environmental degradation in Indigenous territories and cases of "environmental violence" against Indigenous women (Cahier 2022).

A third challenge concerns the assessment of the specific forms of discrimination and violence facing Indigenous women in a context where they arise at the intersection of multiple systems of oppression, such as sexism, colonialism, racism, ableism, ageism, or transphobia (Zota-Bernal 2015, 85). UN bodies and human rights mechanisms have growingly referred to intersectionality in standard-setting, policy, and programming. Nonetheless, stronger, sustained, and systematic efforts are needed to transform the concept of intersectionality into a set of practical tools and guidelines that states can use to take effective political, legal, and judicial measures to prevent, address, and redress intersectional forms of violence and discrimination. In this regard, the UN human rights system has multiple tools at its disposal—such as country visits, thematic reports, and follow-up procedures by treaty bodies and special procedures—to document, assess, and monitor intersectional forms of violence and discrimination confronting Indigenous women in local contexts and to provide guidance to states on how to address them.

A fourth challenge is to foster the active participation and representation of Indigenous women in the UN system, aiming to ensure that their

[9] For instance, about the human rights violations facing Indigenous women during migration from Central America to the United States, see Speed (2019).

views are properly taken into account in the development, interpretation, and implementation of human rights norms and standards as well as in the elaboration of policies and programs. Over the last few years, the Office of the UN High Commissioner for Human Rights (OHCHR) has taken positive steps to increase the participation of Indigenous peoples within UN entities, including through the Indigenous Fellowship Program. Fostering the participation and representation of Indigenous women requires a shift away from the "vulnerability rhetoric" that solely depicts them as "victims" and eventually neglects their agency and key role as leaders,[10] knowledge-bearers, and culture-transmitters among their peoples and society as a whole (CEDAW Committee 2022, par. 2). Rather, some authors consider that it is preferable to focus on their positive right to participate in decision-making and governance at all levels since the views and inputs by Indigenous women living in and off Indigenous territories are essential to develop and implement standards, policies and programming that have the capacity to tackle structures that perpetuate oppression (Kuokkanen 2016, 131).

A fifth challenge relates to the conditions of possibility of Indigenous women and girls in a context where access to education and socioeconomic resources are crucial to achieving self-determination, autonomy, and capacity-building. Kuokkanen notes that "Indigenous self-determination cannot be achieved without taking into account pressing issues involving Indigenous women's social, economic, civil, and political rights" (2012, 226). This enlarged conception of self-determination highlights the need to articulate a set of coherent measures that simultaneously cover the spectrum of collective and individual rights guaranteed to Indigenous women, including the political, economic, social, cultural, and spiritual spheres.

A last challenge concerns the emancipatory nature of international human rights law. Although some authors have analyzed international law as a tool for the domination of the most marginalized groups (Bachand 2018), this chapter has shown that actors like Indigenous women have used human rights standards and mechanisms to protect themselves from

[10] "This vulnerability rhetoric, coupled with the absence of enumerated positive rights in UNDRIP relevant to Indigenous women, stagnates the argument that Indigenous peoples have shifted from objects to subjects of international law" (Sinclair-Blakemore 2019, 42).

greater vulnerability and harm and to point out states' lack of compliance with international human rights law. Nonetheless, international law can only be emancipatory if the most marginalized communities and groups know their rights, have access to human rights mechanisms, and speak the legal language of human rights. To put it differently, is contemporary international law accessible to all when, for instance, it is only practiced in non-Indigenous languages? This issue is complex and deserves further developments that would exceed the reasonable length of this chapter. Yet, it shows the necessity to articulate a decolonial approach to international law, including considering and incorporating other languages, experiences, worldviews, or systems of knowledge, such as those of Indigenous communities, within the elaboration and implementation of international human rights norms and standards.[11]

Conclusions

This chapter has presented the UN as a site of mobilization and resistance for Indigenous women representatives and human rights defenders who have sought to drive critical and creative developments based on their identities as *women* and *Indigenous*. With an intersectional agenda and dynamic advocacy campaigns, the international Indigenous women's movement has played a central role in securing political and legal achievements at the UN level, such as the adoption of General Recommendation No. 39 by the CEDAW Committee. Nonetheless, because their rights and those of their peoples are still threatened and violated in many parts of the world, Indigenous women continue to mobilize in global events like the Climate Change Conference (COP 27) organized in November 2022 in Sharm el-Sheikh, Egypt. They have been calling for renewed efforts by the UN system to tackle pressing issues like climate change and environmental destruction. In the face of contemporary and multi-layered challenges, the international Indigenous women's rights movement has advocated for a shift away from single-issue actions toward holistic, comprehensive, and intersectional efforts that have the potential to tackle structural forms of

[11] On decolonial approaches to international law, see, e.g., Santos (2021) and Geslin (2020).

oppression and to achieve transformative change at the global, national and local levels.

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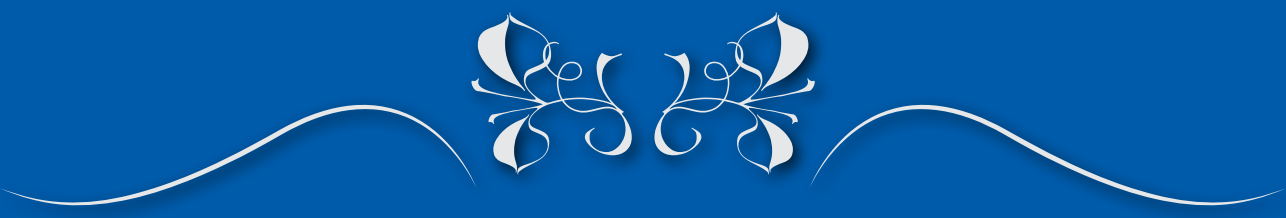
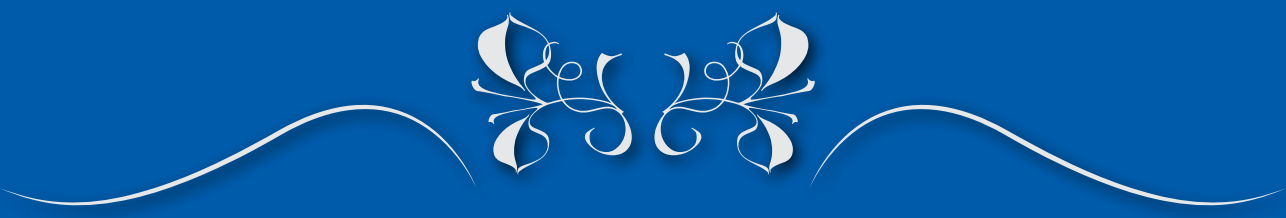
Section IV
Revisiting International Law and Gender-Based Violence in Complex Contexts





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Who Is Afraid of the Colombian Constitutional Court? Ambivalence and Fragmentation in the Regulation of Sex Work in Colombia

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Introduction

Different authors have written about the commercialization of sex in Colombia.[1] Gallego-Montes (2020) investigates the relationship between prostitution and the country's armed conflict. Nieto Olivar (2015) examines the tensions that arose between feminist abolitionists and sex workers in the debate regarding the enactment of a law aimed at regulating the commercialization of sex. Restrepo (2018) studies how the Colombian Constitutional Court has appropriated a sentimental and humanitarian stand toward the commercialization of sex, which has supported abolitionist and regulatory initiatives. Tirado Acero, Laverde Rodríguez, and Bedoya

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[1] In this chapter, we focus on the commercialization of sex between adults. Throughout this paper, we use the terms *prostitution* and *sex work.* We prefer the latter since it acknowledges that individuals who engage in this activity work to make a living by selling "their own sexual labour in exchange for a resource" (Smith and Mac 2020, 1). The term *prostitution* has usually been deployed to condemn this activity. We resort to this word in this document when the cited authors and the Constitutional Court use it.

Chavarriaga (2019) have analyzed the Constitutional Court's role in framing the provision of sexual services as work and the need for its comprehensive regulation. However, few studies have researched in depth how the rulings of the Constitutional Court entangle the commercialization of sex with a complex set of regulations that go beyond criminal law, contributing to turning this activity into a dangerous endeavor that constantly oscillates between legality and illegality.

In transnational feminist arenas, the commercialization of sex has been a repeating debate. Other than the rejection of the total criminalization of sex work, a lack of consensus dominates the discussions (Bernstein 1999). The divisions regarding the commercialization of sex have even been categorized as a split in feminist theorizing (Piscitelli 2012). At its core, disputes about the commercialization of sex arise when pushing for policymaking. While some feminists focus on abolishing prostitution, others call for the complete decriminalization and legalization of sex work. These differences reflect the plurality of standpoints in feminist studies.

Nonetheless, the abolitionist approach has garnered the most support in mainstream international norms. For instance, Jaramillo Ruiz and Céspedes-Báez (2020) show how the United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) has tended to conflate sex work with sex trafficking and to offer a unidimensional portrait of women in sex work as victims without analyzing in-depth the structural social, economic, and political conditions that enable it and the role of the states in this dynamic. Similarly, by coining the term governance feminism, Halley (2018a) has analyzed and criticized feminists who defend protectionist and victimhood narratives regarding the commercialization of sex.

The Colombian Constitutional Court has been a site for discussing and reshaping national and transnational feminist debates around sex work between adults (Tirado Acero, Laverde Rodríguez, and Bedoya Chavarriaga 2019; Restrepo 2018). Since its establishment in the early 1990s, this Court has been a crucial forum to litigate sex work-related issues, in which state authorities, citizens, sex workers, and owners of establishments offering and hosting sex work services have had the opportunity to advance their interpretations of their constitutional rights in the context of the commercialization of sex. In doing so, the Constitutional Court has been a setting

for deliberating on different approaches to this issue. As such, the rulings of this judicial body on the commercialization of sex offer vital insights into the translation, appropriation, and modification of transnational feminist debates on this subject, exposing how legal institutions strategically deploy or silence feminist positions and ideas to regulate sexuality.

Engaging with the legal dimensions of the commercialization of sex implies interacting with international law. Feminists have strategically used this body of law to advance their positions on the subject. For this reason, international law is a coveted incidence tool, a site of contestation, and a field to produce knowledge on the subject. When the Constitutional Court tackles the issue of the commercialization of sex, it recalls international law following its guidance, deploying it to stress its arguments or ignoring its pertinence to decide a case. Therefore, this chapter provides vital insight into how international and national laws interact in the regulation of sexuality.

This article takes a critical stand against unidimensional approaches by revealing the contradictions of Colombia's legal system regarding adult sex work. Thus, we ask the following research question: How has the Colombian Constitutional Court approached the commercialization of sex? In doing so, this article seeks to contribute to the literature that explores the incidence of international and national laws in regulating the commercialization of sex in domestic settings.

The article is divided into three key sections apart from this introduction. First, we analyze the most relevant feminist theories regarding sex work and prostitution. Based on these theoretical underpinnings, in the second section, we present and examine how the Colombian Constitutional Court has played an active role in blurring the legal landscape sex workers have to navigate in Colombia. We show how the Court has deployed international law to support a legal discourse that pretends to protect sex workers but also endorses criminal and non-criminal law regulations that do not fully pay heed to their rights and interests. The last section offers key conclusions and questions for future research.

1. Feminist Understandings of the Commercialization of Sex

The commercialization of sex has been one of the repeating themes in feminist scholarship (Bernstein 1999; Bindel 2017). The views regarding the commercialization of sex are anything but homogenous. Although

most feminist authors condemn the complete criminalization of sex work/prostitution, tensions arise regarding the possible approaches to tackle the commercialization of sex (Jeffreys 2009; Kissil and Davey 2010; Outshoorn 2019).

As Halley et al. (2006) explain, there are four mainstream regulations for the commercialization of sex, which range from complete criminalization to complete legalization with two intermediate options. The first approach, complete criminalization, penalizes each actor and every activity involved in the commercialization of sex. Under this approach, "the sex worker and the john, *and* all third party involvement (of the pimp, the brothel-keeper, and the landlord) can be prosecuted and punished criminally" (Halley et al. 2006, 338; emphasis in the original). In contrast, complete legalization seeks total decriminalization for the activity and the approval of legal rules to make it a licit trade, such as labor, zoning, or contract law rules. In the middle stands what Halley et al. (2006) call "*abolitionism or partial decriminalization*" and "*complete*, as opposed to partial, *decriminalization*" (339; emphasis in the original). While abolitionism deploys criminal law selectively against some or all the actors involved in it except for the sex worker who is considered a victim, specifically of patriarchy, complete decriminalization's objective is to stop passing specific regulations to ban the commercialization of sex and use general criminal offenses to prosecute and punish some of the people involved in it.

Most feminist authors reject the total criminalization of sex work/prostitution (Halley et al. 2006). This unison derives from a common understanding that the criminalization of sex workers replicates patriarchal norms, punishing those who sell sexual services and failing to challenge the relations of power and structural conditions that underlie the commercialization of sex (Piscitelli 2012). The consensus ends there. As such, feminist scholarship tends to fall within one of the three other approaches.

Halley et al. (2006) show that abolitionism or partial decriminalization is the dominant position backed by prominent Anglo-American feminists. From this perspective, sex workers are victims, and the criminalization of the buyer and the third parties involved is a valuable instrument to abolish this harmful practice. The authors trace the origins of this feminist stand to the United States. More precisely, they show how feminist scholars, such as MacKinnon (1983), pushed for legal reforms to abolish prostitution.

Through strategic litigation and legal reform, the Anglo-American feminist approach gained momentum in national and international frameworks (Jaramillo Ruiz and Céspedes-Báez 2020).

Nevertheless, the spread of the abolitionist approach is not only the result of Anglo-American feminist efforts. The convergence of political agendas can explain its propagation. For example, Jackson, Reed, and Brents (2017) explore the coalition formed by "anti-prostitution feminists, Christian evangelicals, and the political right […] to pass the Trafficking Victims Protection Act in 2000." A similar alliance emerged in Brazil, where Christian and child protection movements collaborated with abolitionist feminists to criminalize activities related to the commercialization of sex (Piscitelli 2012).

The influence of the abolitionist approach is also the result of its insistence on conflating sex work with other criminal activities (Vianna and Lowenkron 2017; Bindel 2017). Notably, the link between prostitution and sex trafficking has been deployed to further the abolitionist stand (Adriaenssens, Geymonat, and Oso 2016). These efforts have successfully blurred the difference between sex trafficking and sex work, pushing narratives of victimhood and driving protectionist policies that criminalize the commercialization of sex (Piscitelli 2012; Jaramillo Ruiz and Céspedes-Báez 2020; Halley 2018b).

Two legal instruments exemplify the relative success of the abolitionist approach: 1) the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which was adopted in November 2000; and 2) the United States of America Trafficking Victims Protection Act (TVPA) of 2000. These two instruments have positioned sex trafficking at the core of international debates regarding violence against women, privileging criminalization measures that protect trafficked persons and serving as a way of justifying the abolition of prostitution (Halley 2018b).

The predominance of abolitionist legal frameworks is not exempt from critique. For example, Franke (2016) problematizes how the abolitionist approach shames female sexuality. Along the same line, Lowenkron and Piscitelli (2015) and Vianna and Lowenkron (2017) show how state abolitionist narratives replicate asymmetries in feminist power, in which Western and colonial conceptions tend to prevail. As a case in point, Piscetelli (2011;

2012; 2014) claims that the conceptualizations about sex work in public debate are substantially different from the experiences of sex workers. While images of victimhood and exploitation prevail in the public arena, the author shows that sex workers condemn the stigmatization of their services and face multiple challenges to being heard in government decision-making processes. Similarly, Halley (2018b) warns about the dangers of censuring and prohibiting all sexual services.

Recently, Smith and Mac (2020) have contributed to the debate from the point of view of sex workers, challenging both the abolitionist approach and the narratives of empowerment and sex positivity of sex work by admonishing about the dangers of giving more power to the police and calling for an in-depth analysis of the backdrop against which individuals decide to participate in the commercialization of sex. Their contribution has been essential since they have brought to the discussion the sex workers' perspective, in which they analyze not only the downsides of abolitionism but also the simplistic vision that depicts sex work as something glamorous, enjoyable, and radically free. As they point out, sex work, like any other type of work, is conditioned by many variables such as race, age, and sexual orientation. In their words, "those who do experience sexual gratification at work are likely those who already have the most control over their working conditions" (Smith and Mac 2020, 13).

As a reaction to the split regarding the commercialization of sex, O'Neil (2001) calls on feminist authors to "build bridges across the divides between feminists who are working in the sex industry and feminists who are not (including intra-group differences)" (5). Similarly, Shrage (1994) has argued that the commercialization of sex is neither an inherently oppressive practice nor a subversive sexual form of emancipation. In this line, Rigotti (2021) has recently claimed that the narratives regarding prostitution have been transposed into legal frameworks across the European Union. For the author, despite their differences, the divergent approaches to prostitution have one thing in common: they are not suitable for addressing the multi-faceted realm of the commercialization of sex.

These authors situate the debate on the contingent historical, cultural, and institutional forces that forge the modalities of the commercialization of sex. Their theories place a magnifying glass over the sexual and reproductive behavior codes, rejecting reductionism and ethnocentrism

in feminist understandings. As a core premise, rather than taking a position or furthering a particular approach to the commercialization of sex, these feminist studies help track legal technologies that control social life, determining their impact on individuals, groups, and communities. In this sense, these authors take a critical stand that unveils the political implications and consequences of regulative practices.

Building on this understanding, we look closer into the way the Colombian Constitutional Court has tackled the issue of sex work in the country and how, in doing so, it has determined the multiple regulations and deregulations that define it. As stated in the introduction, we want to uncover and examine the contradictions of Colombia's legal systems, underscoring the challenges of categorizing the country's normativity within a single approach to the commercialization of sex. Furthermore, we show how international frameworks are transposed into Colombia's normativity, revealing the selectivity and changes that emerge when this Court engages with international law.

2. Litigation of Sex Work-Related Issues in the Colombian Constitutional Court[2]

The Colombian Constitutional Court has been a critical actor in framing the debate on sex work in the country. It has been an essential forum to litigate sex workers' rights, discuss different approaches to the commercialization of sex, and determine the Colombian state's obligations in this matter. Since its establishment in 1992, the Court has defended the partial decriminalization of sex work. Therefore, it has deemed licit for individuals to offer and buy sex and has endorsed the criminalization of procuring ("Sentencia T-620-95"; "Sentencia C-636/09"). To justify this stance, the Court has underscored, at the same time, the constitutional impossibility of criminalizing sex workers and the undesirability of this activity in a society in which human dignity is a core value ("Sentencia T-620-95"; "Sentencia T-629-10"; Restrepo 2018).[3]

[2] The work of Esteban Restrepo (2018) on this subject has been particularly helpful to guide our analysis of the Colombian Constitutional Court's case law on sex work.

[3] All quotations from the Constitutional Court's decisions were translated into English by the authors.

Even though the Court has nuanced over the years its condemnation of sex work and since 2010 has abandoned the idea that sex workers are immoral individuals, its approach has remained constant in defending the legality of the activity and, simultaneously, regarding it as one the state cannot promote without violating its fundamental principles. The Court has strategically deployed these two tenets to maintain an abolitionist and partial decriminalization approach to sex work, supporting an indirect banning of this activity based on criminal and non-criminal norms. The Court's construal of urban law, particularly zoning, labor law, and police rules in circumstances in which sex work is involved, has implied a constitutional endorsement of situations that make selling sex more dangerous, expose sex workers to the arbitrariness of certain administrative authorities, such as the police, and justify the limited application of labor law to protect them.

During the 1990s, the Court barely cited international law in its rulings on the commercialization of sex, only using it to reinforce the idea that this activity could be regulated and controlled for the sake of the common good and the rights of others ("Sentencia SU-476-97"). However, from 2009 onwards, international law became one of the core arguments to support its decisions and dissenting and concurring opinions on this matter. Since then, the Court has cited international law instruments, such as the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, to support the constitutionality of criminalizing procuring ("Sentencia C-636/09"). It has also used international law to differentiate coerced forms of prostitution from consented types of sex work ("Sentencia T-629-10") and to challenge this consent-based understanding by considering the commercialization of sex a violation of sex workers' human dignity when third parties get involved and profit from this type of trade ("Sentencia T-109-21").

In 1995, the Constitutional Court adjudicated its first *tutela*[4] case about sex work ("Sentencia T-620-95"). This decision would define the

[4] *Tutela* is a constitutional cause of action to protect fundamental rights (República de Colombia, 1991, art. 86). It was established in the 1991 Constitution; since then, it has been a crucial legal instrument to open a dialogic space in the country to discuss controversial issues such as LGBT rights, the status and lack of protection of armed conflict-related internal

Court's stance in this matter for the following fifteen years. In this ruling, three male Justices repeatedly used the term prostitution to highlight the immorality of sex work and support the existence of segregated zones to prevent the "propagation" of this way of life. However, they reluctantly determined that the constitutional right to free development of personality impedes the prohibition of this activity. In this opportunity, the plaintiff wanted the municipality to close "the brothels and canteens" located next to the residential complex where he lived with his wife and his two children ("Sentencia T-620-95," Section I.1). He alleged that these places did not have permits to function and that they fueled crime, drug trafficking, and disorder. In particular, he emphasized that "prostitutes" exhibited themselves in public, disregarding social mores and endangering his family. He claimed that the presence of "brothels and canteens" violated his and his family's rights to tranquility, privacy, and safety.

To decide this matter, in 1995, the Constitutional Court upheld the lower court decision in favor of the plaintiff. The Court did so without giving a cursory analysis of sex workers' rights and living conditions. Thus, it ordered the municipality to close the sex work establishments in the plaintiff's residential area. Furthermore, although the Court underlined the importance of employing police regulations to tackle the commercialization of sex, it also recognized the futility of state efforts directed at completely eradicating prostitution.

Shortly after, in 1997, the Court granted certiorari to review a similar case in an upscale neighborhood of Bogotá, the country's capital city ("Sentencia SU-476-97"). The Court analyzed the case as a full chamber to issue a unified decision. In this case, the plaintiff claimed that the presence

displaced populations, and euthanasia, among others. It is a subsidiary cause of action, so if there is another cause of action to effectively and timely protect fundamental rights, *tutela* cannot be used. Therefore, the *tutela* judge has to evaluate whether there is another cause of action to protect those rights and whether it has the ability to do so effectively and in a timely fashion. *Tutela* lawsuits are filed before lower courts, and the Constitutional Court can grant certiorari to revise them. The Court is divided into sub-chambers to revise lower court *tutela* decisions. This procedure might lead to contradictory decisions on the same subject. To solve this situation, the Court can decide to study the case in the full chamber to unify its precedent. These decisions are called "unification decisions" (*sentencias de unificación*) and are identified by the acronym "SU" after their name in Spanish (Presidencia de la República de Colombia, 1991, art. 32-36).

of sex workers and travesties in his neighborhood and the public disorder they allegedly caused violated his rights to life, integrity, privacy, and dignified housing, among others. He and other neighbors indicated that every night, a significant number of "prostitutes and semi-naked travesties" openly offered and performed sex services in this zone ("Sentencia SU-476-97," Section 3). Also, he declared that sex workers were involved in fights and scandals, underscoring that drug trafficking and robbery were taking place in this setting. The plaintiff sought the prohibition of sex work in this neighborhood. The Court asked the metropolitan police to produce a report on the subject, which confirmed this situation. There is no evidence that the Court heard sex workers during the proceedings.

To issue a unification decision on this case, in 1997, the Court cited its sparse 1995 precedent, invoked the notion of public order, and backed its position using the American Convention on Human Rights and the Declaration of the Rights of Men and of the Citizen ("Sentencia SU-476-97," Section 3.2). In doing so, the *tutela* sub-chamber indicated that it is possible to establish limits to citizens' freedoms to foster the "safety, tranquility, public health, and morality" needed for communal living. Therefore, authorities should regulate and implement measures to achieve and maintain this order, always respecting fundamental rights and human dignity. Also, it emphasized the role of mayors and the police as holders of administrative police power and public servants in charge of guaranteeing public order in designing and implementing such measures.

These considerations supported the constitutional stand that, even though the right to free development of personality prevented the prohibition of sex work, this activity could not impinge on other people's rights. Notably, the Court stressed the impact the commercialization of sex could have on children and crime levels. Thus, it pointed out that the Colombian state should adopt measures to prevent sex work, offering rehabilitation opportunities to sex workers and restricting this activity to areas far away from residential zones. As a result, the Court decided in favor of the plaintiff, prohibiting sex work in the residential area and ordering the mayor and the police to comply with their responsibilities in maintaining public order.

In this 1997 ruling, one of the Justices of the sub-chamber issued a separate opinion criticizing how the Court sidelined sex workers' voices and did not issue any order to protect their rights. For him, sex workers

had the constitutional right to be heard and participate in the decision-making processes concerning their rights. Therefore, he indicated that City Hall authorities had the duty to promote the inclusion of sex workers in decision-making processes related to zoning. Furthermore, he did not endorse the public order rationale to adjudicate the case. He considered its invocation a dangerous invitation to administrative authorities to curtail fundamental rights.

In 1999, a citizen challenged the constitutionality of the 1989 disciplinary military code provisions that categorized the establishment of personal relations with "prostitutes and procurers" and engaging or procuring sex work as a breach of military honor ("Sentencia C-507-99"). Based on the right to free development of personality, the Court found unconstitutional the provision that made personal relations with sex workers a disciplinary fault. Namely, the Court considered that if sex work is not legally reprehensible, third parties establishing relationships with sex workers cannot be deemed at fault for doing so. However, the Court affirmed the constitutional validity of the provision that made engaging in and procuring sex work a military disciplinary fault. The Court underscored that procuring sex is a crime; therefore, it is reasonable to have it as a disciplinary fault. However, the Court did not offer specific arguments to support the constitutionality of engaging in sex work as a disciplinary fault, apart from equating it to procuring and underscoring that such activity impacts "military honor and decency" ("Sentencia C-507-99," Section 5.13).

These rulings from the 1990s hold a lasting influence on the Court's approach to the commercialization of sex. Namely, the initial tension between protecting the right to free development of personality and treating sex work as a reprehensible activity has become a contested, nuanced, and replicated precedent. As this debate unfolds, as shown in what follows, the Court has deployed international law to support the linkage of sex work with ideas of vulnerability, discrimination, inequality, and exploitation (Restrepo 2018). Thus, international law has provided a backbone for the constitutional framing of sex work and the legal treatment given to individuals who participate in the commercialization of sex in Colombia.

In 2009, the constitutionality of the criminalization of procuring ("*inducción a la prostitución*" in Spanish) was raised before the Constitutional Court ("Sentencia C-636/09"). This constitutional lawsuit stemmed

from the Constitutional Court precedent that had asserted the legality of sex work based on the protection of the right to the free development of personality. More precisely, the plaintiff held that if sex work was considered legal, it was plausible to challenge the constitutionality of the laws criminalizing the procurement of these types of sexual services. The Court drew on its 1995 precedent and international criminal law to settle the case, reiterating that prostitution was an undesirable activity that violates human dignity. Citing the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Court endorsed the Colombian Congress's autonomy to penalize procuring, underscoring the crucial role of this criminal prohibition in controlling an activity deemed disgraceful. It also questioned the possibility of individuals freely consenting to sex work and assimilated all the manifestations of prostitution to trafficking persons. In doing so, the Court reproduced a rationale in which sex work's partial criminalization is framed as a constitutional necessity. It justified this decision based on the interplay between international and domestic law, arguing that these normative frames should be complemented with other non-criminal regulations to discourage sex work and prevent its proliferation.

Between 2010 and 2022, the Court continued to back the deployment of regulations different from criminal law to control the commercialization of sex, particularly zoning measures. It also strengthened the legal association of sex work with human trafficking by invoking international criminal law. However, during this period, the Court introduced a new dimension to its approach to sex work: labor rights. For instance, in 2010, the Court granted certiorari to study the case of a sex worker who filed a *tutela* after being fired from the bar where she worked because of her pregnancy ("Sentencia T-629-10"). In this case, the Court issued a landmark decision granting some labor rights to the plaintiff. It analyzed the complex regulation of sex work in international human rights law, international criminal law, and domestic law.

In this ruling, the Court highlighted how the international community has sought to abolish this trade by deploying criminal and human rights regulations, particularly the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) ("Sentencia T-629-10," Section 2.4.2.). Moreover, the Court acknowledged that multiple areas of domestic law regulate this activity, including criminal law, tax law, mercantile law, and urban law. It noted that criminal law punishes procuring or forcing somebody into sex work. However, municipal law, mercantile law, zoning, and police regulations do not prohibit sex work. Instead, these regulations aim to establish areas where this practice is not allowed, parameters for sex work in bars and locales, tax obligations for this activity, rules of behavior for sex workers, and state commitments to offer rehabilitation programs for this population.

Based on this rationality, the Court reiterated the right to the protection of the free development of personality to support the legality of sex work when individuals consent freely to it and when all the participants in this trade do not get involved in criminal activities, such as procuring or coercion, respect human dignity, and comply with their legal obligations stemming from these different areas of law ("Sentencia T-629-10," par. 100). As such, the Court considered it legal for individuals to independently or as part of a contract with others, such as bar owners, offer sex services. In the specific case under study, the Court found that, even though the plaintiff and the defendant had not signed a contract, their relationship configured a labor contract. Therefore, the Court ruled in favor of the plaintiff and ordered the bar owner to pay her sixty days of salary as compensation and the vacation period. However, the Court denied her reinstatement claim, arguing that the Colombian state cannot promote sex work in any form and granting this petition would do precisely that. Namely, the Justices reiterated their conception of sex work as a violation of the right to human dignity and Colombian international law obligations ("Sentencia T-629-10," par. 218).

The 2010 ruling is an example of how considering sex work legal and, at the same time, a form of undignified labor entangles sex workers in a set of regulations that do not further the realization of their rights beyond granting them minimum labor rights. More precisely, although the Court's ruling protects sex workers from incarceration for engaging in the commercialization of sex, it also upholds the possibility of sex

workers' detention by allowing police to arrest them for violating zoning regulations. As such, the Court's blurry stand, which recognizes the right to free development of personality to prohibit the criminalization of sex workers but also reaffirms arguments of human dignity and maintenance of public order to limit the commercialization of sex, has allowed the state to continue adopting measures to prevent this trade. Furthermore, the constitutionality of criminalizing activities like procuring has created the conditions to discriminate against sex workers and expose them to danger and heavy policing. In sum, the Court's rationale and selective application of domestic and international rulings reveal one contradiction in the legal efforts to regulate the commercialization of sex: the rights of the sex workers it supposedly intends to protect are waged strategically against the fundamental rights of others to public order and the legal obligation to protect the victims of sex trafficking.

The 2010 Court's decision further complicates the criminalization of procuring. Recognizing labor rights in favor of the plaintiff implied taking into consideration the activities the defendant developed and their legality. Based on municipal, mercantile, and police regulations of bars and locales that offer sex work services to the public and on the notion that sex work is legal if individuals consent freely to do it, the Court found that the defendant was not a procurer but just an employer. In this line, the Court indicated that sex work is an economic activity and that different individuals in different roles can try to make a living from it. According to the Court, bar owners can hire sex workers if they respect their free will and human dignity and as long as they do not resort to promoting sex work as a way to start their business.

Nevertheless, introducing this line to distinguish between legal and illegal profiting from sex work does nothing to make more precise the legal landscape sex workers have to navigate. Instead, perhaps, it augments the power the police, public servants, and other participants in the market can have over sex workers' lives. The ambiguity of this ruling makes it difficult to establish whether locale owners will be deemed procurers in the face of the law. It also makes it challenging for sex workers to approach the authorities to protect their rights since they cannot be sure about the status of their legal relationship according to the law.

After 2010, litigation about zoning and police regulation has been a reminder of the limited rights and precarious situations of sex workers in Colombian law. For instance, in 2015, the Court decided a *tutela* action in which a woman bar owner sought the protection of her and the sex workers' right to work, due process, and free development of personality, among others ("Sentencia T-736-15"). After a citizen filed a popular action in 2011 to protect the community's right to safety and public health, the municipality was obligated to issue new zoning to guarantee that sex work did not occur in residential zones and near schools and relocate the venues offering this service. Even though the municipality passed new zoning regulations, it did not comply with relocating the plaintiff's locale, and the police ordered the bar's closure.

The Court's ruling mandated that the municipality relocate the plaintiff's bar to a suitable area and assist her in obtaining all the permits needed to function correctly. Echoing its precedent, it underscored the legality of sex work and the bars where this activity unfolds as long as this trade does not involve procuring or coercion. In addition, it pointed out that the regulation of sex work is fragmented and incomplete, which has contributed to the legal insecurity of this population. At the same time, it indicated that the objective the municipality was pursuing in closing the bar was legitimate, for it complied with the orders issued in the context of a popular action aimed at protecting the community's public interest and tranquility. In doing so, the Court reiterated that the legality of sex work did not prohibit state authorities from limiting this activity. However, when doing so, authorities had to design and implement actions to diminish the impact that changing zoning rules could have on sex workers, as a vulnerable and discriminated population.

The language and the rationale of the 2015 decision were a slight departure from the approach the Court had structured since 1995 on sex work. It openly rejected the characterization of sex work as undignified and emphasized the vulnerability of this population. Additionally, it reiterated that adults could consent to this line of work. Nevertheless, the Court reaffirmed that national and international law criminalized procuring and forced prostitution, specifically mentioning the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the Protocol to Prevent, Suppress and Punish Trafficking in

Persons, Especially Women and Children, the CEDAW Convention, and other United Nations General Assembly resolutions ("Sentencia T-736-15," par. 33). Based on these international norms, it backed the necessity of the state to control it to guarantee public order and other community rights like social tranquility and public health.

One year later, in 2016, this nuanced precedent served as a foundation for drafting a *tutela* decision to protect two sex workers' rights to work, personal integrity, due process, freedom of movement, and not to experience discrimination after police personnel detained them in a public square where they were seated with other individuals ("Sentencia T-594-16"). They alleged that the police profiled and detained them for being sex workers. Moreover, they indicated that the police personnel robbed, insulted, and physically attacked them. On the contrary, the police argued that they had to detain them because these two individuals were in a state of exaltation. For the police, authorities had the power to patrol and safeguard public space to prevent its invasion and the occurrence of criminal activity among street vendors, including individuals selling sex.

This new take on sex work lasted until 2019. That year, the Court issued a unification decision on a case in which a woman bar owner filed a *tutela* after her locale was closed because the municipality determined that it did not comply with zoning and urban regulations ("Sentencia SU062/19"). The city alleged that the bar did not have a permit to function and was located in a residential neighborhood close to a school. The plaintiff wanted to protect her and the sex workers' rights to equality, due process, and work. Specifically, she asked the Court to order the municipality to relocate her bar and to design and implement economic alternatives for sex workers. In 2017, one of the sub-chambers of the Constitutional Court decided in favor of the plaintiff and ordered the municipality to reopen her establishment once it complied with all regulations ("Sentencia T-073-17"). The municipality challenged this decision and asked for its annulment since it did not follow the Court's precedent regarding municipalities' autonomy to zone and organize its territory without the interference of other authorities. It also reminded the Court that its precedent indicated that property rights are not absolute and have to yield to zoning rules. The Court's full chamber accepted this argument and voided the 2017 decision.

As mentioned, the Court's 2019 unified ruling nullified its 2017 decision. Namely, the Court sought to clarify the precedent for cases in which authorities use zoning regulations to close or ban locales offering sex work services. To do so, it understood this litigation as a case involving an alleged violation of the plaintiff's right to free enterprise. Therefore, the Court determined that the plaintiff could not represent the interests of the sex workers offering their services at her bar. For this reason, it could not study the violation of their right to work or analyze the effects of the bar's closure on the sex workers involved. Since the decision limited its study to identifying the constitutional validity of limiting free enterprise through zoning regulations, international law did not play any role in structuring the verdict. In its decision, the Court stated that police and zoning regulations could limit free enterprise to protect other fundamental rights, such as public order and the community's general interest.

In this ruling, the Court also examined the constitutional implications of zoning regulations. It concluded that the Colombian Constitution did not grant the right to free enterprise to develop businesses to offer sex work services, implying that there is no constitutionally protected right to zoning regulations to allow these businesses to function in specific areas of municipalities. Concurrently, it explained that the absence of such rules does not imply the prohibition of prostitution. To support this argument, the Court cited the option the municipality gave the plaintiff to reopen her bar in a place "far away from the urban area" ("Sentencia SU062/19," par. 86 and 97).

The ruling against the plaintiff was not unanimous. The dissenting and concurring opinions illustrate opposite approaches to sex work. On the one hand, two Justices endorsed an abolitionist view. One of them cited international law to argue that the Court's decision was a lost opportunity to systematically assess its precedent on prostitution and protect the human dignity of the victims of this activity. She condemned individuals like the plaintiff who profited from prostitution. For her, consenting to this line of work is impossible. Thus, the only alternative for protecting prostitutes is to abolish the commercialization of sex.

On the other hand, three Justices considered sex workers a vulnerable population, underscoring that adopting an abolitionist approach did not protect their rights. One of them argued that the ruling sanctioned an implicit prohibition of sex work, letting municipalities decide whether

they issue zoning regulations to determine the areas where this work can take place. He claimed that the Court's decision contributed to pushing sex workers to ghettos, making them invisible. The other two Justices agreed that the ruling should not have protected the rights of the plaintiff. However, they criticized its lack of analysis of the situation of the sex workers who labored at her bar.

The Court's stand after 2020 reiterated the limited labor rights of sex workers but also started to frame this activity as a product of extreme neoliberalism ("Sentencia T-109-21"). In a 2021 case, a webcammer filed a *tutela* because her employer fired her after she got pregnant. In her lawsuit, she expressed that she had to enter this line of work because of the lack of labor opportunities. She also offered details of the workplace's dire conditions and her employer's arbitrary behavior against her. For example, she informed the Court that her employer had ordered her to make up for the time she could not work during her pregnancy.

The Court ruled in favor of the plaintiff and established the existence of a labor contract between her and the owner of the webcam locale. Hence, it mandated that the defendant must pay her severance and social security benefits. However, as in the 2010 ruling, the Court denied her claim for reinstatement. The Court stressed the impossibility of consent when women's economic, ethnic, and migratory circumstances force them to opt for this line of work. It also indicated that there is an international consensus that profiting from the sexual exploitation of another human being is against human dignity, even when there is consent. Therefore, the Court considered it impossible to reinstate the plaintiff into the job she had lost as a webcammer. Instead, the decision ordered the authorities of the municipality where she resided to help her access all the available social assistance programs and to guide her in finding a different job. At the same time, it ordered Congress to regulate this activity in a way that protects sex workers' rights in this context since its lack of regulation was an essential factor in fostering abuses against them[5].

[5] At the time of writing, the Government of President Gustavo Petro is preparing a labor law reform. The Ministry of Labor has met with the representatives of sex workers in the country to hear their proposal on the subject. Also, the Minister of Labor has indicated

In this ruling, one of the Justices dissented. He considered that, according to the case facts, the defendant sexually exploited the plaintiff. Therefore, it was impossible to characterize their relationship as a labor law contract. In this line, he was against ordering the defendant to pay her severance and other related social benefits. Instead, he argued in favor of ordering the municipality where she lived to support her through social assistance programs and provide her guidance to find a different job.

As shown in this chapter, after almost three decades, the Constitutional Court has supported the partial criminalization of sex work by relying on international law. Namely, it has used international law to claim that the commercialization of sex violates sex workers' human dignity, that this activity is linked to human trafficking, and that third parties profiting from this line of work should be criminalized. Before 2009, the Court rarely deployed international law to decide sex work-related cases. Namely, during the 1990s and the first decade of the 2000s, when international law was not an essential part of its discourse, the Court only used international law to invoke free will. However, after 2009, international criminal law has become part of the narrative to shape what the Court perceives as an international abolitionist consensus. For the Court, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the CEDAW Convention are evidence of this basic agreement of the international community. When integrating international law into its decisions, the Court has emphasized sex workers' victimhood and vulnerability, a discourse that has carved its space in this area of law and transnational feminism (Restrepo 2018). Furthermore, the Court has used international law to frame sex work as a form of exploitation, presenting sex workers as victims of others and of the economic model. As such, the Court has struggled to defend the decriminalization of sex workers.

After the Court ruled the constitutionality of procuring in 2009, it started to envision sex workers as vulnerable individuals given the stigma surrounding their activity, the conditions on which they decide to

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that the government is committed to complying with the Constitutional Court's order to regulate sex work (Umaña, 2023).

participate in the commercialization of sex, and the fragmentation of the regulation that applies to their activity (Restrepo 2018). Also, it deployed international law to differentiate between forced prostitution and sex work that is freely consented to and to underscore that there is a thin line between them. Even though the Court has criticized that the fragmentation and lack of regulation of sex work contribute to their discrimination, it has significantly helped to amplify this situation by granting only partial labor rights to sex workers in a country where unemployment and informality are rampant and with no evidence of efficient social programs to offer them other viable options to make a living (El Espectador 2021). Moreover, the Court does so when it deploys public order arguments, protects zoning regulations without paying heed to sex workers' rights, and pretends to draw a clear line to differentiate certain bar owners who hire sex workers from procurers.

Conclusions

Sex work has been a divisive issue for feminists, lawyers, Justices, and the public. Theory and law play a key role in shaping the lives of sex workers and society's understanding of their activity, experience, and challenges. Feminist scholarship about the meaning and genesis of sex work has been crucial in promoting the predominance of the abolitionist approach in international law (Halley et al. 2006). As a prescriptive and normative standard, legal regulation has been essential in determining our perception of this trade. The Colombian Constitutional Court has been a central participant in the debates about sex work in the country. Its influence on the discussion has gone beyond replicating the basic premises of the controversy. The Court's case law has helped to forge and support a complex and fragmented regulation of sex work inspired mainly by the abolitionist model. Since 2009, international law has been a source and an argument to support this stance.

In this legal scenario, sex workers are considered vulnerable and discriminated against, third parties involved in the commercialization of sex are generally deemed criminally responsible, and the state is envisioned as a controller and a rescuer (Restrepo 2018). This stance cultivates the coexistence of heavy and selective policing of the activity, broad zoning discretion for municipalities, limited labor rights, a discourse that reinforces the

indignity of sex work, and the absence of an in-depth examination of the part the state and its law have in creating the conditions that enable this line of work. Hence, even though the Court has adopted a more sympathetic language towards individuals who engage in this economic activity, a systematic reading of its precedent reveals how it has deployed a mix of criminal and non-criminal law regulations to govern, condemn, and fatally entangle sex work in an opaque matrix of legality and illegality.

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The Investigation of Sexual Violence in the Colombian Special Jurisdiction for Peace (JEP)

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Introduction

The Colombian government and the guerrilla organization Revolutionary Armed Forces of Colombia-People's Army (FARC-EP, for its acronym in Spanish) signed the Final Peace Agreement (FPA) on November 24, 2016, which was ratified by the Colombian Congress on December 1 of that same year. The FPA ended an armed conflict of more than 50 years with the FARC-EP, although it did not bring about the demobilization of other existing guerrilla groups in the country. The agreement was characterized by including an ethnic and a gender perspective to promote that different transitional justice institutions adopt a perspective that makes visible diverse forms of violence suffered by ethnic groups, women, and LGBTI persons.

The Special Jurisdiction for Peace (JEP, for its acronym in Spanish) is responsible for administering justice within the comprehensive peace system and investigating international crimes committed by armed actors under its jurisdiction, all within the non-international armed conflict (NIAC) framework. The JEP began by organizing its work through macro-cases and,

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consequently, opened seven macro-cases that combined a territorial perspective (Nariño, Cauca, Valle del Cauca, and Urabá), the victims involved (Unión Patriótica), and the crimes committed (kidnapping and other forms of deprivation of liberty committed by FARC-EP, illegal recruitment, and extrajudicial executions committed by the public force and illegally presented as casualties in combat).[1] In all of them, a transversal approach was adopted to make visible the effects caused to ethnic peoples, women, and LGBTI persons. However, since 2021, the JEP has been modifying its research strategies, concentrating on crimes committed by armed actors (in the case of the FARC-EP) and state-led policies (in the case of the military).

Some civil society organizations questioned the JEP's strategy and demanded the opening of a macro-case on sexual violence that investigates all gender-based violence in a unified manner. For these organizations, a comprehensive investigation of gender-based violence is necessary to accomplish the objectives of the comprehensive peace system: justice, truth, and reparation (Alianza Cinco Claves 2021). For the organizations that make up the Alianza Cinco Claves (Five Keys Alliance),[2] this is a historic opportunity to implement the gender perspective effectively in transitional justice mechanisms. They argue that a unified investigation will reveal the conditions that gave rise to gender-based violence and contribute to overcoming the obstacles to access to justice for women and LGBTI persons.

Recently, the Chamber of Recognition of Truth and Responsibility and Determination of Facts and Conducts (hereinafter "Chamber of Recognition") announced the opening of Macro-Case 11 on gender-based violence, moving the investigation from the grouping phase to the determination of facts and conducts phase.[3] This case includes sexual and reproductive vio-

[1] A macro-case is a figure that groups many events and cases given a determined pattern of criminal behavior. For example, Macro-Case 1 on kidnapping and other forms of deprivation of liberty committed by FARC-EP is based on a universe of 21,369 identified victims and 1,000 testimonies (JEP 2024).

[2] The non-governmental organizations (NOGs) that are part of the Cinco Claves Alliance are Colombia Diversa, Women's Link, Red Nacional de Mujeres, Corporación Humanas, and Corporación Sisma Mujer.

[3] The Chamber of Recognition is one of the three Chambers of Justice of the JEP, tasked with implementing selection and prioritization criteria to open cases on the most serious and representative crimes committed in the armed conflict (JEP n.d.).

lence and crimes committed due to prejudice. The Chamber of Recognition called on civil society organizations to expand their reports to minimize the under-registration of victims and reduce the significant gaps identified in the available information (JEP 2023). Despite the importance of the issue, few cases of sexual violence have reached the Appeal Section of the Tribunal for Peace, so jurisprudence on this issue requires further development to guide the work of the Chambers and Sections of the JEP. In this essay, we present this jurisprudence and show its theoretical ground and its limitations.

In this text, we analyze the first decisions of the Appeals Section on sexual violence perpetrated within the NIAC framework. We deal with the decisions of the Appeal Section of the Tribunal for Peace, considering it the body of hermeneutic closure of the jurisdiction and the one that definitively establishes the meaning of transitional law. We make an exception with Auto 19 of the Chamber of Recognition, as it was the first decision in which the highest hierarchy of responsible perpetrators was selected. However, it did not include sexual violence as one of the policies of the FARC-EP secretariat, which provoked criticism from some women's organizations, particularly from the capital city of Bogotá.

1. The Study of Sexual Violence in the Context of Armed Conflict

Sexual violence has been the object of analysis by international jurisprudence,[4] studying elements such as patterns, policies, and the systematic nature of

[4] In any case, it is necessary not to limit violence against women to acts of sexual violence. There exist other types of damages that are usually overlooked by the literature and that constitute criminal acts affecting women in a particular and differentiated way (Lemaitre and Sandvik 2014). It is also necessary to distinguish between sexual violence and other types of criminal behavior. Laudati and Mertens (2019) draw attention to how the category of sexual violence has allowed the strategic use of the term to place it in a kind of causal relationship with environmental damage. These authors show that the rape of women in Congo has been connected with the exploitation of the country's territory. This might occur in three ways: i) sexual violence is presented as a tool to free selected areas for illegal exploitation; ii) rape can be used to terrorize, pacify, and demoralize the local population to make them more obedient and prevent them from obstructing the activities of armed groups in areas of illegal exploitation; and iii) rape can be used as a form of retaliation or punishment for community interference in illegal access to resources. The problem with this relationship is that it ignores daily violence and tends to see only that which is used as an instrument of war by armed actors. On the need to desecuritize sexual violence and further politicize it, see Meger (2016).

behaviors. The experience of the courts when analyzing this type of conduct in the context of armed conflict focuses on the study of its public dimensions, such as forced subordination, punishment for victims, or rewards for soldiers. However, we should not fall into the trap of thinking that acts not committed within an organization's policy are, by themselves, unrelated to the conflict just because they were committed opportunistically by a member of the armed group (Brown 2019, 506). In the study of sexual violence, it is essential to consider not only the context of the conflict but also how it allows the exercise of power relations already present in the corresponding community. Faced with the existence of a context of coercion, it is not possible to affirm that there is a full capacity to consent to a sexual relationship.[5]

In her essay "Conflict-Related Sexual Violence and the Policy Implications of Recent Research," Elisabeth Wood (2014) argues that the distinction between "strategic" and "opportunistic" sexual violence, common in the literature on the subject that grapples with the difference between "ordered" and "not ordered" violence, is an insufficient distinction to grasp the phenomenon. She defines opportunistic sexual violence as that "conducted for private reasons rather than organizational purposes" and strategic sexual violence as "instances of rape purposefully adopted in pursuit of organizational objectives" (14). She argues that such distinction does not hold as the cases sustaining the "strategic" type do not always fit the definition; thus, the existence of a strategy deliberately adopted is inferred from the effects of the actions rather than demonstrated. Furthermore, the distinction cannot accommodate the lack of punishment for sexual violence when it is forbidden in the organization, nor the cases when sexual violence is the result of peer pressure rather than opportunistic individual orders or choice. To supplement this distinction, she introduces the category of "practice" for a more complete understanding of sexual violence (Wood 2014, 14).

[5] Brown (2018) analyzes the case of sexual abuse committed by members of the security forces in camps for displaced persons and concludes that, given the coercive context, it is a crime of sexual violence. For this, she pays attention to the existence of an unequal power relationship. However, it is necessary to distinguish between the existence of a crime of sexual violence due to the absence of consent and its relationship with armed conflict.

In a more recent essay, Kim Thuy Seelinger and Elisabeth Wood (2021) propose to differentiate sexual violence as *policy* from sexual violence as *practice*. Sexual violence can be understood as a policy adopted by armed organizations when it is part of a military strategy, but also when it is adapted to accomplish non-military objectives (like granting sexual rewards to soldiers or controlling the sexual and reproductive lives of female combatants). Additionally, sexual violence can be understood as a practice when, in the absence of explicit commands to enforce it, it still occurs frequently because it is tolerated by commanders and promoted by the gendered social dynamics of war. The authors highlight that

> the conditions under which the combatants' social dynamics support rape as a frequent practice include the presence of gender norms and beliefs that support the exercise of rape as a social activity and a gender hierarchy that legitimizes the targeting of particular social groups. Rape is more likely to occur as a practice in units that are unsupervised, mobilized far from their base of operations, or have been mobilized for an extended period. (Seelinger and Wood 2021, 10)

Sexual violence as practice reflects gender roles, gendered social hierarchies, organizational socialization, and beliefs of combatants who enact it and commanders who do not prohibit the violence. The authors argue that, although it is challenging to determine whether sexual violence is an organizational policy or a practice, in the absence of evidence of it being a policy, it should be assumed to be a practice.

From a critical perspective, Janet Halley (2008) analyzes the problems of making sexual violence the central issue in the discussion of gender-based violence in armed conflicts. She questions that sexual violence is presented as the priority crime to be sanctioned and "above the hierarchy" of other gender-based violence crimes, as if it were more serious than war, without ignoring its severity. After analyzing the jurisprudence of international criminal courts, she points out that sexual violence is often presented as the central element of the conflict, as in the cases of the former Yugoslavia and Rwanda. She highlights how the feminist movement has managed to frame sexual violence as a priority crime under international criminal law and presents a critical reading of the memoir *A Woman in Berlin*, where

the sexual violence depicted in the text as well as the survival strategies by German women during the occupation of the Red Army in 1945 allow her to problematize rape as the "ultimate evil." Although sexual violence appears in the narrative of a German survivor in the postwar period, the victim's suffering or lack of consent does not occupy the central space of the story (Halley 2008). During the capture and occupation of Berlin by the Soviet army, German women accepted the sexual expectations of Russian soldiers as a deliberate strategy to obtain food and survive in times of tremendous scarcity. Contrary to what Brown has argued, Halley does not consider that in all cases of rape in which the environment is coercive, one can speak of the absence of consent.

In the Colombian case, particularly in the decisions of the Appeals Section of JEP, the analysis of Wood (2014) and Seelinger and Wood (2021) has been used several times to argue that not all forms of sexual violence in the NIAC framework are necessarily the result of organizational policies. However, as discussed further, some civil society organizations have not agreed with the legal use of this approach.

2. Investigation of Sexual Violence at the JEP

There are few cases in which the Appeals Section has dealt with the analysis of sexual violence. Although violations against children and adolescents have been studied in some of them, especially in cases of sexual crimes committed by members of the armed forces, the lack of material relationship with the conflict was so evident that there was no need to carry out a doctrinal study of the law in the commission of acts of sexual violence within the NIAC framework. Despite this, progress has been made in some doctrinal developments based on the theory supported by Seelinger and Wood (2021), which has generated doubts in some organizations and, in any case, calls for reflection on the role of social science in the configuration of the jurisprudence of a transitional justice court that applies international criminal law. In what follows, we summarize and analyze each relevant case examined by the Appeals Section.

2.1. "Auto TP-SA 171": Constitutive Sexual Violence and Circumstantial Sexual Violence

The first case with a complete study of this problem is "Auto TP-SA 171" (2019a), which evaluates whether the sexual violence of a retired police officer against his daughter, a girl under 14 years of age, is related to NIAC. The applicant argued that the members of the armed forces committing sexual crimes should receive the benefits provided in Laws 1957 of 2019 and 1820 of 2016, given that these crimes should be treated as if they had been committed within the context of NIAC. To answer this claim, the Appeals Section distinguished between *constitutive* and *circumstantial* sexual violence. The first is characterized by being a weapon of war or a social or territorial control mechanism. For the JEP,

> usually, [constitutive sexual violence] is used as a terror tactic within the framework of a military strategy of intimidation, silencing, punishment, spatial domination, usurpation, indoctrination, humiliation, or coercion against the enemy, their relatives or those who, from the perspective of the aggressor, make up their support networks. But sexual violence is also used against the civilian population that inhabits places of influence or in dispute in circumstances in which social domination favors plans for the consolidation or expansion of the military apparatus. The concerted planning of the act is indicative of the impact it intends to have on the armed confrontation; however, the punishable conduct can be committed without prior agreement or express order from the superior. ("Auto TP-SA 171," 2019a, 6)[6]

The decision also considered that sexual violence that is *circumstantial* to the confrontation is that which is committed *in the context* of armed conflict. This decision affirms that this type of violence is aimed at satisfying the sexual desire of the aggressor in circumstances that are collateral to the conflict but give rise to *opportunistic or habitual violence*. A decision of the Appeal Section in 2019 considered that the existence of an armed conflict opens the door to a confrontation of masculinities and power relations

[6] Unless otherwise stated, the translation of the jurisprudence cited in this article is made by the authors.

among people, favoring discrimination and violence against vulnerable and historically disadvantaged groups, such as women and girls. In this context, the Appeal Section specifies what constitutes circumstantial sexual violence:

> *Circumstantial* sexual crimes take place precisely when one of the actors obtains a personal benefit from this asymmetry of power that allows them to reduce a person's autonomy. When aggressions present sporadically, they are considered opportunistic. They are circumscribed to specific situations where the aggressor takes advantage of the opportunity to commit the abuse by virtue of authority, intimidation, or coercion, which means being armed. However, when offenses are reiterated and systematic, such as those committed within the armed organization or even against group members or collaborators, the violence acquires the characteristic of habit. […] But when the habitual violence pursues a collective goal, orchestrated by the leaders of the groups, such as rewarding the troops, the relationship to the NIAC could be understood as *indirect* and not *in the context of*, given that it intends to contribute to the war effort. ("Auto TP-SA 171," 2019a, 7)

This second type of sexual violence is problematic, as the elements of proof required in the decision are difficult to gather, such as "verbal or non-verbal communication between the aggressor and his victim" ("Auto TP-SA 171," 2019a, 7). The document states that there is a relationship with the conflict when it has invested the perpetrator with power to commit the act, which is done to satisfy his personal interest. However, at this point, the relationship between sexual violence and the conflict is confused with the victim's freedom to decide on her body, considering that the existence of a coercive environment is what shows that the act is not consented to by the victim. The same occurs when it is stated that the person takes advantage of the victim's inability to express her consent.

Based on this analysis, the Appeals Section concludes that the police officer committed this crime by abusing his parental authority, not his status as a police officer. Furthermore, it considers that the police officer abused the circumstances arising from the conflict even to a lesser degree because the National Police is an armed civilian body that only exceptionally takes

part in an armed conflict ("Sentencia TP-SA-168," 2020). The jurisprudence established in this case has been criticized by the organizations that make up the Cinco Claves Alliance, considering that it does not adhere to international standards on the matter, and, therefore, it may also affect the understanding of the subject by the Chambers. These criticisms are summarized below.

- In "Auto TP-SA 171" (2019a), the Appeals Section of the Tribunal for Peace lays out a new categorization that ignores the international and national precedents that present the criteria for the application of international humanitarian law on the nature and content of the close nexus with the conflict and on its application in matters of sexual violence. In short, the decision "ignores all the legal construction developed to date on sexual violence and armed conflict" (Alianza Cinco Claves 2020, 51). The Appeals Section seems to be more concerned with establishing its own classification to delimit conducts that fall within the JEP based on the criteria *for cause*, *in direct* or *indirect relationship* and *on occasion*, "without substantiating where the new categories arise, were created or how it deduces them from the normative parameters and jurisprudential precedents to which its decisions should be subordinated" (Alianza Cinco Claves 2020, 51).
- "Auto TP-SA-171" ignores and omits any allusion to "Auto 009-15" (2015) of the Constitutional Court of Colombia regarding the factual hypotheses of sexual violence documented there and in a complementary manner to "Auto 092-08" (2008). Even more seriously, it does not apply the presumption of a close and sufficient relationship between sexual violence and armed conflict. However, it is logical to state that the elements that "Auto TP-SA 171" mentions to configure the so-called "circumstantial violence" are not obvious or easy to verify. In the same way, "Auto TP-SA 171" disregards the objective and subjective contextual factors that support the presumption established in "Auto 009-15," as well as the obstacles that victims face in evidentiary matters to access justice (Alianza Cinco Claves 2020, 52).

- The new categorization is hiding in the "circumstantial" category a misunderstanding and a misuse of "opportunistic violence"—that Wood (2014) finds insufficient—opening the way to prejudiced and reductionist readings that can treat sexual violence as a private matter, only explained by the sexual desire of a private individual. The ruling opens a door for opportunistic sexual violence—accurately understood in the light of normative parameters and jurisprudential precedents—–not being acknowledged unless a close link with armed conflict is demonstrated and instead being automatically separated from armed conflict. The *a priori* reading that violence occurred only in search of satisfying the individual sexual desire of the aggressor would end up denying the direct relationship of sexual violence with armed conflict and dissociating the facts from the context and influence of armed conflict outright. "On the contrary, for the Supreme Court of Justice, the perpetrator's sexual pleasure is legally irrelevant when assessing the facts. Likewise, internationally, a distinction has been made between personal motivation and intent, which in the case of sexual violence is discriminatory, the latter being relevant only for trial purposes" (Alianza Cinco Claves 2020, 52-53).
- The evaluation of cases should follow an inductive approach, looking at "what the facts say in their heterogeneity and complexity, seeking to grasp and understand how sexual violence occurs in practice or, in other words, which practices of sexual violence are being deployed by specific actors and in what localized social contexts" (Alianza Cinco Claves 2020, 53) An inductive method would be consistent with the obligation of due diligence in the investigation and prosecution of sexual violence. The ruling in question proceeds in the opposite manner, starting with the presentation of general classificatory categories and typologies akin to academic debate but not to the investigation of concrete cases of sexual violence, insofar as it imposes such typology on the cases of the JEP in a manner that "exceeds the current regulatory framework" (Alianza Cinco Claves 2020, 53).

2.2. "Auto SRVR 19": Sexual Violence in the Context of Other Crimes

In February 2021, the Chamber of Recognition issued the Order for the Determination of Facts and Conducts in Case 001 on kidnapping and other forms of deprivation of liberty, considering the members of the FARC-EP secretariat responsible for various conducts. The Order highlighted the presence of acts of kidnapping and hostage-taking and also showed that, during the captivity, some of the abducted women were victims of sexual violence. The decision has been criticized, considering that it does not adequately reflect the reality of what happened due to the absence of a gender perspective in its methodology. The Chamber of Recognition is questioned because it does not see a pattern of sexual violence and does not make an analysis of gender relations pre-existing the event ("Auto SRVR 19" 2021).

Despite these criticisms, the Order focuses on the actions of the guerrilla secretariat and the policies they implemented. The existence of acts of sexual violence, which are given visibility, is not unknown. Still, notably, the existence of an organizational and secretariat policy could not be verified. This does not exclude the recognition of the commission of crimes, the existence of sexual violence, and, above all, tolerant conduct towards such acts, insofar as what mattered was to obtain the financing of the organization without dwelling on considerations about the integrity and well-being of the kidnapped persons. This case illustrates the limits pointed out by Wood (2014) in the dichotomy of occasional versus strategic sexual violence and shows the utility of the typology laid out in Salinger and Wood (2021) since sexual crimes can be tolerated and do occur, even if not part of an organizational policy that can be demonstrated to exist. As such, they fit the "sexual violence as practice" category.

2.3. "Auto TP-SA 206": Absence of Relationship with NIAC

In this case, the Appeals Section studied the case filed by a former member of the military forces, convicted of committing acts of sexual violence against his daughter, who was under 14 years of age. According to the former army member, the conviction against him was the result of an attempt by the guerrillas to discredit him and the armed forces. For the appellant, this act results from the war; therefore, it has an indirect relationship with NIAC. In this order, the Appeals Section cites the Inter-American Court

of Human Rights decisions and the Colombian Constitutional Court. The decision affirms that "in the territories in which armed groups exercise territorial control, the condition of being a woman emerges as a risk factor that accentuates the gender discrimination to which they have traditionally been exposed due to patriarchal and *machista* concepts culturally ingrained. The mere fact of exercising activities or roles outside of subjugating stereotypes, such as belonging to social, community, or political organizations or developing leadership and promotion of human rights in areas affected by the armed conflict, makes them an obstacle to the purposes of the armed organizations, which, to neutralize them, do not hesitate to undertake acts of persecution and murder against them and their family groups and support networks due to coercive control strategies of public and private behavior of people" ("Auto TP-SA 206" 2019b, 8-9). For the Appeals Section, although the existence of gender-based patterns of domination cannot be ignored, the JEP's competence is limited to those acts related to the conflict, that is, those in which the conflict is what allows them to be enhanced, exploited, and capitalized by the armed actors ("Auto TP-SA 206" 2019b).

The link with the conflict is analyzed by evaluating the context in which the actions of the armed groups took place; thus, the existence of territorial and social control can be an element that allows affirming the relationship of the act with NIAC to identify the "contextual risk factors" of sexual crimes. These crimes, committed mainly against women, girls, adolescents, and ethnic minorities subjected in controlled territories by armed groups, can be forced sexual exploitation, forced sexual prostitution, pregnancy, and the transmission of sexual diseases, as well as submission to the stereotyped determination of roles, clothing, companionship, circulation, and the development of sexual and affective activity. The latter—of a subjective order—are presented by sub-differentiated approaches: (i) age (boys, girls, and adolescents); (ii) ethnic or racial belonging (women who belong to Indigenous and Afro-descendant communities); and (iii) disability status (women, children, and adolescents). When these circumstances are demonstrated, it is possible to "reasonably presume that acts of sexual violence," perpetrated in territories where armed groups exercise significant social territorial control, "are directly linked to the armed conflict" and, therefore, are a factor of new displacements or a factor of revictimization for women who have settled there after being displaced ("Auto TP-SA 206" 2019b, 8-9).

The Appeals Section reiterates its doctrine on the difference between opportunistic and constitutive violence, and it bases its interpretation not only on "Auto TP-SA 171" (2019a) but also on Ruling T-718 of 2017 of the Constitutional Court ("Sentencia T-718" 2017). However, in the latter decision, the Court highlights the structural nature of sexual violence as a weapon of war or as an opportunistic pleasure mechanism. The Appeals Section found that the crime under its study was not related to the conflict since it was not an action resulting from some social or territorial control.

The JEP adopted a similar decision in 2019 in "Auto TP-SA 314" where there was also an act of sexual violence against a girl under the age of 14, also by a former member of the Navy (2019c). For the Appeals Section, "circumstantial sexual crimes occur precisely when one of the actors takes personal advantage of this asymmetry of forces to reduce the autonomy of others" ("Auto TP-SA 314" 2019c, 7). When attacks occur sporadically, they are considered opportunistic. They are limited to particular situations in which the aggressor abuses the body of the other by virtue of authority, intimidation, or coercion, which means being armed. But when the offenses are systematic and repeated, such as those perpetrated within a war organization and to the detriment of kidnapped civilians or even of the group's own members or collaborators—some recruited by force—violence also acquires the connotation of being habitual. It is clear that, in circumstances like these, the crime responds to exploitative attitudes derived from generalized practices of abuse of authority, tolerance, and impunity. But when habitual violence is oriented towards a collective goal, orchestrated by the leaders of the group, and whose objective is to provide for the welfare or motivation of the troops, the relationship with NIAC could be classified as indirect and not on occasion since they intend to contribute to the general war effort ("Auto TP-SA 314" 2019c, 7-8).

In this order, Law 1719 of 2014 is cited, which establishes the criteria to consider when determining whether an act is related to NIAC: "i) context in which the facts under investigation occurred, ii) circumstances in which they occurred, iii) patterns of commission of the punishable conduct, iv) generalized or systematic nature of the attack by virtue of which the conduct is carried out, v) knowledge of the generalized or systematic attack, vi) belonging of the active subject to an organized apparatus of power that

acts criminally, and vii) commission of the conduct in development of an organized group policy" ("Auto TP-SA 314" 2019c, 8).

2.4. "Auto TP-SA 502": Motion for a National Case of Sexual Violence

In this case, the Appeals Section learned of the request for accreditation of a victim who was not found within the time frame of the territorial case. Similarly, analyzing facts related to the armed conflict through macro-cases was deemed reasonable. To have a comprehensive look at the phenomenon of sexual violence, the Appeals Section presented a motion, not mandatory, to open a macro-case of sexual violence ("Auto TP-SA 502" 2020).

In "Auto TP-SA 711" (2021), the Appeals Section analyzed the precedent on sexual violence within the framework of an armed conflict and applied the criteria developed for a case in which members of the Navy committed acts of sexual violence against Indigenous women. The Appeals Section concluded by highlighting that "the conflict influenced the selection of the target since, apparently, the victims were constrained to obtain information about the people who, after an alleged combat with the Navy, fled the scene. It was also able to influence the capacity, modality, and disposition of the perpetrators to carry out the punishable behaviors. The confrontation—presumed or real—arranged the troops, initially, to repel hostile fire according to the training received and, later, presumably, after the heat of the combat, to complete the anti-kidnapping and anti-extortion mission that they went to develop at the Wasimal territory (*ranchería*), located in the village of Ware, municipality of Albania, to intimidate the Indigenous people who were locked up in the corral, and to threaten Indigenous women with rape and abuse some of them" ("Auto TP-SA 711," 2021, 19).

Conclusions

Colombia's peace agreement has as one of its articulating axes the inclusion of the gender perspective in transitional justice mechanisms. This should be seen in the cases handled by the JEP and, within them, those of sexual violence. The JEP approach has been based on the distinction between violence as a weapon of war and opportunistic violence, which has been criticized by some civil society organizations, arguing that other constitutional and

international law precedents on how to analyze sexual violence during the armed conflict have not been applied. Hopefully, in future cases, there will be a balance between the national and international jurisprudence on the matter, and a precedent will be developed that considers the advances achieved in the women's rights movement. Either way, the objective is to give these cases and their effective sanctions greater visibility and a more nuanced understanding.

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Conflict Resolution through Mediation: A Gender Perspective

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Introduction

This paper discusses the right of women to participate in conflict resolution, mediation, and peace processes and mainly contemplates the following question: How does the exclusion of women from conflict resolution, in general, violate international human rights law? And further, how does the inclusion of women in the mentioned areas affect the overall result reached? It offers modern examples of the involvement of women in mediating conflict and observes the current situation of the Women, Peace, and Security Resolution 25 years after its enactment. A woman's right to participation is enshrined in numerous international human rights treaties, some of which have transcended into customary international law, from which no derogation may be permitted (UNGA 1966, art. 25). This right cannot exclude peace processes. While states have taken considerable action to advance the status of women in multiple economic, social, and civil settings, the status of women in the field of conflict resolution and peacebuilding remains extremely weak, a large part of which is attributed to the slow or absent state action in this particular field, as well as multiple obstacles in the way of women, especially in conflict-affected zones.

While there are multiple studies about the role of women in peace processes in general, less scholarship examines the issue from a legal

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perspective, which encompasses the right of women to participate and various gender-specific violations of human rights law during conflicts that can only be addressed by women. This paper will present a brief history of women's participation in conflict mediation in the era preceding the United Nations Security Council (UNSC) Resolution 1325 and explore the current international legal framework asserting women's right to participate. It will discuss women's right to participate in conflict resolution based on their general right to participate and to be protected from conflict and violence and the role that women play in conflict resolution.

1. The History of Women's Participation in Conflict Resolution

In observing the peace processes conducted across the previous years, it is evident that women have had almost no significant role in mediating such agreements. In fact, during the period between 1992 and 2011, based on a sample of 31 peace processes conducted across different continents, peace processes involved zero women as chief mediators, except for the Democratic Republic of the Congo ("*Acte d'engagement*") in 2008 and Kenya (in its Agreement on the Principles of Partnership of the Coalition Government) in 2008 (UN Women 2012). On average, women's role as chief mediators in the mentioned sample amounted to only 2.4%. Furthermore, women's participation as negotiators was an average of 9% (UN Women 2012, 2). Not only was women's participation extremely low, but textual references and consideration given to the gender-specific impact of armed conflict on women were also excluded. This was, in part, due to women's lack of participation (UN Women 2012, 3). However, notably, after the enactment of UNSC Resolution 1325, the number of agreements addressing women's concerns increased from an average of 11% to 27% (UN Women 2012, 17).

2. Legal Basis

2.1. The Right to Participation

2.1.1. International treaties

Without a doubt, there is a firm international legal basis outlining the right of women to participate. Article 25 of the International Covenant on Civil

and Political Rights (ICCPR) stresses the right of every citizen, with no distinction based on gender, to take part in public affairs and have access to public service (UNGA 1966, art. 25). The term "public service" in the ICCPR covers multiple areas of executive and legislative decision-making, but also goes further to include positions related to the formulation of national and international policies and their implementation (Human Rights Committee 1996). Thus, the right to formulate domestic and global policies does not exclude post-conflict situations and, thus, should include women's participation in conflict resolution and other post-conflict policy creation. On the other hand, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention), one of the most widely ratified conventions, also addresses the issue of women's right to participation in political and public life on the domestic and the international levels (UNGA 1979).

However, the right to participate in public life, as outlined in the CEDAW Convention, is not limited to political or legislative positions of power in the state's branches of government but also includes the right of women to be included in international negotiations, mediations, and peace negotiations (CEDAW Committee 2013). In fact, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) emphasizes that states must enhance women's participation and fair representation in the field of conflict resolution through temporary special measures (UNGA 1979, art. 4.1) and tackle the additional obstacles that impede women's fair participation in the field of conflict resolution. The Committee further invites state parties participating in conflict resolution to include women in negotiation and mediation and to provide special technical assistance to the countries where armed conflict took place, which can further enhance women's participation (CEDAW Committee 2013, par. 47). Thus, it is clear from the CEDAW Committee's clarifications that the right to participation, as provided in the CEDAW Convention, includes women's right to participate in mediation and conflict resolution, and shows that states have a duty to adopt the appropriate measures to facilitate and enhance this participation (CEDAW Committee 2013). In addition to the right of women to participate in mediation, negotiation, and conflict resolution, as outlined in both the ICCPR and the CEDAW Convention, it is important to note that the various gender-specific violations during conflict

reaffirm the right of women's participation to address the mentioned violations from a more effective gender perspective, as outlined in Section 2.2.

2.1.2. United Nations Security Council Resolution 1325

It is undisputed that women and girls are particularly affected by armed conflict and are likely to be victims of multiple crimes and acts of violence that are distinct and additional to the ones directly linked to armed conflict. Multiple forms of sexual aggression and gender-based violence occur during wartime, as is further discussed in Section 2.2 below. Hundreds of thousands of women reported being subjected to rape and sexual violence during the armed conflicts in East Timor, Rwanda, and Kosovo (Rehn and Johnson Sirleaf 2002). As a result of this history of violence, the international community recognized not only the devastating impact of armed conflict on women but also the significant role of women in peace processes and their right to participate in post-conflict mediation and peacebuilding. Consequently, on October 31, 2000, the UNSC adopted Resolution 1325, emphasizing the gender component of conflict resolution in post-conflict societies as well as in executing peace agreements (UNSC 2000, par. 8). It was the first time that the UNSC had explicitly recognized both the disproportionate impact of armed conflict on women and the essential role of women in mediation and peacebuilding.

The essence of UNSC Resolution 1325 lies in four main pillars: prevention of violence against women, enhancement of women's participation in decision-making positions of conflict resolution, safeguarding of women's rights during conflict, and, finally, inclusion of gender-specific post-conflict relief efforts (Shepherd 2020). The Resolution focused, for the most part, on the role of women in resolving conflict and emphasized their role in mediating conflict by calling for increasing women's participation in this area (UNSC 2000, par. 2), advancing pertinent research and studies related to the gender perspectives of conflict resolution (par. 16) and adopting measures that involve women in the implementation of peace agreements (par. 8.b). All the mentioned provisions reassert the notion that women are entitled to the right to participate not only based on both the ICCPR and the CEDAW Convention but also under UNSC Resolution 1325. In fact, this Resolution became another cornerstone for women's right to participate, in addition to the existing international legal framework. It

emphasized the right of women to participate in mediation and conflict resolution more explicitly, confirming the will of the UNSC in including those areas in the connotation of the right to participate.

2.2. The Right to Protection from Violence during Conflict

2.2.1. CEDAW Convention, UNSC Resolution 1325, case law

Women's role in conflict resolution and mediation stems not only from their inherent right to participation, which is enshrined in the mentioned international legal instruments, but also from their right to be protected in times of conflict. Indeed, one of the reasons for adopting UNSC Resolution 1325 and increasing women's participation in conflict resolution was based on the recognition of the disproportionate impact of armed conflict on women (Bell and O'Rourke 2010). The participation of women in conflict resolution, mediation, and post-conflict situations introduces a gender perspective that can tackle the issue of protection from violence more effectively. Firstly, the introduction of a gender lens can be effective in conflict prevention, i.e., the inclusion of female stakeholders in preventive diplomacy, such as in military expenditure and nuclear disarmament. Similarly, the use of gender analysis of conflict can contribute to more adequate responses to conflict and conflict prevention (UNGA 1979).

While the CEDAW Convention demands that such preventive measures be non-discriminatory, the CEDAW Committee further calls on state parties to guarantee women's participation in preventive diplomacy and formal and informal conflict prevention efforts (UNGA 1979). Second, the gender lens can also be utilized to protect women during conflict, i.e., from violence occurring *during* conflict. Women are not only victims of discrimination in times of peace, but this discrimination is aggravated in times of conflict, as women become exposed to a greater risk of violence by armed groups (UNGA 1979) and are often used as tactics of war to instill fear and humiliate a certain group. Multiple incidents of sexual violence are reported by women during and after conflicts (Rehn and Johnson Sirleaf 2002), especially as a military tactic. Thus, there is no doubt that women are impacted differently in conflict. In the case of *Democratic Republic Congo v. Burundi, Rwanda, Uganda*, armed forces directly linked to the governments

of the defendants murdered and raped around 856 individuals, most of whom were women (ACHPR 2003).

Furthermore, it was claimed that the Rwandan and Ugandan forces attempted to spread AIDS and HIV among women through rape (ACHRP 2003, 86), which were ruled as violations of both the CEDAW Convention and the African Charter on Human and People's Rights, according to the African Commission. Additionally, cases of gender-based violence during armed conflict, namely crimes of rape, have also been considered by the international community as crimes against humanity in certain international tribunals (ICTR 1998) or war crimes in others (ICTY 1998). The right of women to prevent and to be protected from such violence is not only a right under the CEDAW Convention but also under UNSC Resolution 1325. According to a study by Shepherd (2020), the term "prevention," as used in UNSC Resolution 1325, refers to the prevention of conflict, prevention of sexual violence, and prevention of violent extremism (325-329). Indeed, the Preamble of UNSC Resolution 1325 forms a nexus between the protection of women from sexual violence and conflict prevention and states that gender equality can be an effective conflict deterrent and a conflict prevention strategy (Shepherd 2020, 328). Furthermore, Resolution 1325 calls on the parties in a conflict to take special measures to protect women and girls from gender-based violence, namely sexual abuse (UNSC 2000, par. 10).

Thus, apart from women's right to participate, in general, participating in mediation and peace processes also stems from the right of women to be protected from violence, which can happen through gender considerations and perspectives they bring to the negotiating table.

2.2.2. State responsibility to protect from violence

The prohibition of gender-based violence has acquired the status of customary international law as a result of continuous state practice combined with the *opinio juris* (CEDAW Committee 2017, par. 34), and this notion cannot be any different during times of conflict. Perpetrators of such violence during conflict can be state actors, like military groups or the armed forces, or non-state actors, such as peacekeepers or civilians. In both cases, states have an obligation to protect women from violence during armed conflicts. Although the CEDAW Convention in itself does not explicitly indicate the

prohibition of violence against women, the CEDAW Committee affirmed the state's obligation to investigate and punish acts of violence (CEDAW Committee 1992) and confirmed that violence occurring by private actors is also within the responsibility of states (CEDAW Committee 2004). Thus, states have a duty to both legislate and incorporate policy to prevent this abuse by private actors alike, as well as to investigate and prosecute all perpetrators of such crimes (UNGA 1994).

Several cases in regional and domestic courts further reiterated the obligation of states to conduct due diligence and fulfill their duties of protecting, preventing, and investigating human rights violations in general (IACtHR 1988) and cases of violence against women in specific.[1] Both the European Court of Human Rights (ECHR) and the Inter-American Commission on Human Rights (IACHR) further noted that states have an affirmative duty to take all measures to stop violence against women.[2] In addition, the CEDAW Committee has decided, based on similar complaints it received, that states were also to be held liable for failing to exercise due diligence and failing to protect women who face imminent danger.[3] In addition to the responsibility of states to protect women from violence during peacetime, this obligation does not diminish during times of conflict. Concerning violence occurring during conflicts, states have multiple duties, including prohibiting all forms of gender violence, preventing and investigating sexual violence, adopting codes of conduct for peacekeepers and the police and military, and ensuring women's access to justice, to name a few (UNGA 1979).

Indeed, UNSC Resolution 1325 can be viewed in light of the state's Responsibility to Protect (RtoP), a concept developed parallel to Resolution 1325 and emphasized in UNSC Resolution 1674 (UNSC 2006; Dharmapuri 2012). This concept placed significant responsibility on states to protect civilians during armed conflict and prosecute all perpetrators of

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[1] See *Jessica Lenahan (Gonzales) et al. v. United States* (OAS 2011); *Opuz v. Turkey* (ECHR 2009); *González et al. ("Cotton Field") v. Mexico* (IACtHR 2009); *Aydin v. Turkey* (ECHR 1997); *M.C. v. Bulgaria* (ECHR 2003).

[2] See *Maria de Penha Maia Fernandes v. Brasil* (IACHR 2001); *Bevacqua and S. v. Bulgaria* (ECHR 2008).

[3] See, e.g., *Goekce v. Austria* (CEDAW Committee 2007a) and *Yildirim v. Austria* (CEDAW Committee, 2007b).

international crimes (UNSC 2006, par. 8), yet further included a special allusion to sexual violence during armed conflict and the responsibility of states to prevent it (par. 19). Furthermore, the text of UNSC Resolution 1325 can also infer state responsibility to protect, namely in addressing that violations committed towards women and girls are a threat to international peace, from which the state holds this responsibility (Dharmapuri 2012, 249). Moreover, in applying this gender lens to armed conflict within the UNSC Resolution 1325, states would act within the RtoP framework (Dharmapuri 2012, 249).

3. Mediation through a Gender Lens

In Paragraph 16 of UNSC Resolution 1325, the states called for further studies and scholarship on the role of women in conflict resolution and its analysis from a gender lens (UNSC 2000). Conflict resolution involves one of the most notorious methods of conducting it—the mediation process. Mediation is generally referred to as the introduction of a third party to the dispute, who serves as a middle ground between contesting parties, aiming to resolve or ease reciprocated attenuations and reach a peaceful agreement (Barkun 1964). Scholarship has shown the specific role that the gender component plays in mediation in general, be it the style of negotiating for the overall nature and effectiveness of the final agreement. The following is a general overview of gender-related differences in mediation, followed by the effects of some gender-related differences in the mediation of armed conflict especially.

3.1. Effects of Women's Participation in Mediation of Armed Conflict in Specific

Within the scope of armed conflicts involving multiple state actors, resolution and ceasefires are usually clouded with various hindrances that make it somewhat difficult to reach an agreement regarding political, economic (Mitchell 1989), or even historical components in some cases. Power imbalances and disputed jurisdiction also constitute an obstacle to resorting to traditional methods of conflict resolution. This is why the settlement of disputes by traditional means proves to be difficult, and the role of the mediator proves to be extremely important. The inclusion of women in peace processes, whether in mediation (as legal professionals) or as gender

consultants, will have an overall impact on the text of the agreement (UN Women 2012) and the approach used. It will most likely incorporate specific gender components that would not have been noted without including women. The following sections will describe the effects of women's participation in conflict mediation in greater detail.

3.1.1. Textual emphasis on gender-specific issues in armed conflict

As indicated above, women are exposed to several rights violations during armed conflicts that are gender-specific, be it trafficking, sexual exploitation, or domestic violence, or health-related, such as reproductive health and deteriorating mental health, among others. The absence of women mediators negotiating with contesting parties in an armed conflict will most likely attenuate the attention and importance given to gender-specific issues, such as sexual violence, for example, and introducing them to peace agreements. In 2009, mediators stated that they had not addressed the issue of sexual violence at all in the process of mediation, which is what led the UN to issue specific guidelines on the matter (UN Women 2012). However, it was later noted that the absence of addressing such matters was not due to the lack of clear and pertinent guidelines but the absence of women themselves in the mediating process (UN Women 2012), who would bring this gender debate to the table. It is for this reason that the UN General Assembly encouraged the Secretary-General to appoint women as lead mediators, stressing the need to introduce the appropriate level of gender expertise in the process (UNGA 2011, par. 9). As mentioned, incorporating a gender angle to peace agreements results in a higher likelihood of textual inclusion of gender-relevant content. Addressing sexual violence in ceasefire agreements was absent in most peace accords investigated between 1989 and 2008, and so were the issues of women's land ownership rights and gender-specific aid (UN Women 2012, 16). In a subsequent study of peace accords between 2008 and 2012, it was noted that only three agreements addressed gender-based violence against women, and only one addressed women and reparations (UN Women 2012, 19). It is highly concerning to see that very few peace agreements and mediation processes have included any reference to sexual violence and, especially, that only two agreements referred to sexual violence as requiring a specific response in the justice section.

However, it is important to note that in the peace processes of Guatemala, Burundi, Sudan-Darfur, and Uganda, not only was there uniquely gender-specific language and reference to sexual violence, but also significant participation of women in the processes. Thus, it is hard to ignore the effect of women's participation on gender-specific textual references (UN Women 2012, 22). It can be inferred that the participation of women in conflict resolution and peace processes increases the likelihood of including textual references to the concerns of women and their protection. To reassert the mentioned claim, one can observe several peace agreements where women's participation directly impacted the language of the agreement. For example, in El Salvador, women were included in peace talks representing the Farabundo Martí National Liberation Front and well-connected to female civil society groups, which resulted in effective communication of the issue of women's needs, especially in addressing discrimination against women. This resulted in a peace agreement that included female reintegration programs and land transfer programs of which the beneficiaries were women (Krause, Krause, and Bränfors 2018).

In Guatemala, the inclusion of women in the peace process, along with their liaison with female civil society advocates and their communication with them, led to an agreement that included multiple provisions relating to women, including the allocation of resources, land rights, health care rights, education, among others (Krause, Krause, and Bränfors 2018, 1003). Even more so, in the Democratic Republic of the Congo, a similar result was observed, whereby women were represented in the negotiations along with an expert group of women, which resulted in an agreement that included some of the demands and concerns of women, in addition to a constitution that emphasized women's right to participate (Krause, Krause, and Bränfors 2018, 1004). Thus, existing case studies and scholarship confirm a link between women's participation in negotiations and the inclusion of women's rights issues and demands in the agreement.

3.1.2. Durability of agreements

The high number of conflicts occurring in multiple countries has prompted a serious search for alternative factors to incorporate into the peace process that can influence the duration of peace agreements. Women's inclusion must not be disregarded as one. Krause, Krause, and Bränfors (2018,

1005) have shown a strong connection between the inclusion of women in peace negotiations and mediation, on the one hand, and the sustainability of peace, on the other. It was shown that where women were involved in mediating conflict, there was a lower chance of resumption of war (United Nations Department of Political Affairs 2017). Even more so, due to women's increasing focus on women's needs and human needs in general, peace may be longer-lasting instead of merely being an imminent reality (Mitchell 1989, 305). Women bring several strategies and methods as mediators, and their participation has had notable effects on the durability of the agreements (Mitchell 1989, 304).

As noted, in most cases, women often have particular regard for fostering friendly relations among the parties, which will consequently lead to a lasting agreement since it not only addresses the current conflict cessation but also long-term amicability between both parties). Thus, women's focus on the relational aspect leads to a higher chance of reaching a sustainable long-term agreement that will likely last and develop into more amicable relationships. As to the likelihood of reaching an agreement, women play another major significant role. Conventionally, men make up most of the armed forces, militias, fighters, and even politicians. Given the diversity in the interests of both parties in conflict, which mainly are formed by men, it may be increasingly difficult for them to reach an agreement. In general, the tendency of male-dominated peace negotiations has been merely putting a halt to conflict, while women's approach entailed greater emphasis on long-term peace (Mitchell 1989, 305).

As mentioned previously in Section 3.1.1, women use a more conceding approach to mediation in general, which can prove to be useful in the context of international conflict. As opposed to the men's competitive approach to mediation, this approach can yield more useful results for the contesting parties. Even more so, reaching an agreement is in itself a challenging task that requires middle ground and bargaining; thus, adopting a competitive style (as is dominant in men) will make the process much more difficult. In international conflicts, this competitive tactic of bargaining will likely have social repercussions that will have a great cost to the parties. When each party tries to advance its own interests, with no middle ground, it will most likely be at the expense of the social interests of the other parties. Thus, the approach adopted by women, which, in most cases, is based

on cooperation, will most likely result in reaching a middle ground more efficiently and an overall agreement in general (Mitchell 1989). Furthermore, in many cases, in mediating international conflicts, it is not only important to reach a final agreement but also to foster an amicable and sustainable relationship between the contesting parties ((Mitchell 1989, 295, citing Eckel, De Oliveira, and Grossman 2008), which can only be reached through the adoption of an approach that is more mutual instead of aggressive.

Conclusions

Women have the right to participate not only in public life and political activity but also in peace negotiations, mediation, and conflict resolution under the existing international human rights legal framework. The ICCPR and the CEDAW Convention have asserted this right, and UNSC Resolution 1325 helped solidify this framework. As the conventions reach the standard of customary international law and the UNSC emphasizes promoting peace and security, the legal basis for women's participation is firmly established. Moreover, we have examined how another argument for women's inclusion in mediating conflict stems from women's particular perspectives during armed conflict, namely gender-based violence and women's right to be protected from it. It was further argued that states have the responsibility to protect, prevent, and prosecute all acts of gender-based violence during conflict. Women undoubtedly make a significant difference in the process and the outcome of conflict resolution agreements, as argued in the paper. They bring a new approach to the table through a gender perspective that is often overlooked. In addition, they promote lasting and sustainable agreements by adding a multifaceted approach to peace and not merely the cessation of conflict. Thus, inclusion is not only a right for women but also an obligation for states to achieve lasting peace and end atrocities. Today, years after the adoption of UNSC Resolution 1325, women are still not adequately represented in conflict resolution and mediation. Therefore, civil society groups and the UN must continue working towards incorporating a higher number of women mediators and negotiators in post-conflict peace processes to achieve sustainable peace and security.

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Access to Justice for Survivors of Gender-Based Violence in Complex Contexts

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Introduction

Complex situations exacerbate violence against women and girls and put them at even greater risk of suffering different forms of violence. While conflict, in particular, gives rise to new manifestations of systematic gender-based violence (GBV), women and girls often remain at the greatest risk of physical, sexual, or emotional injury in their own homes and from family members or their intimate partners. Additionally, justice systems often break down in times of conflict or crisis, leaving women few options for recourse when they have experienced violence. Thus, in crises, women are more likely to experience violent crimes and less likely to receive justice

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(UN Women et al. 2018). A focus on fragility, conflict and post-conflict settings, health emergencies, and other complex situations remains a gap in current research and practitioners' understanding of what works to effectively respond to or prevent GBV (Murphy et al. 2022). Much scholarship and program evaluation on GBV focuses on non-conflict or complex situations, and more is needed to understand the situation of women and girls in these settings and what can be done to address their needs.

1. Objectives

The main objective of this essay is to analyze approaches to the rule of law and justice programming on GBV in complex situations and offer guidance to practitioners working in these contexts on integrating a survivor-centered response. This essay will explore how complexity in a context impacts a survivor's access to justice. The paper draws on research from six countries selected for their unique complexity (Afghanistan, Honduras, Papua New Guinea, Philippines, South Sudan, and Tunisia) to synthesize cross-cutting findings and recommendations. These countries were chosen because they represent a diversity of regions and a variety of complex situations (e.g., conflict, post-conflict, COVID-19 pandemic, recent democratic transition, and acute climate emergencies). The selection of these complex situations offers a unique exploration into the specificities of each context but also allows us to compare across settings that are as diverse as possible, approximating a "most different systems" design (Mills, Durepos, and Wiebe 2010).[1]

The research team set out to answer the following three research questions:

- What are the main challenges for justice mechanisms in addressing GBV in complex situations?
- What approaches work or show promise for improving access to justice for GBV survivors in complex situations?
- What justice innovations have been shown to increase the effectiveness of the justice system in responding to GBV in complex situations?

[1] In comparative research, "most-different systems" designs are used to compare very different cases, all with the same dependent variable in common; thus, any other circumstance present in all these cases can be regarded as the independent variable.

2. Methodology

These research questions were selected, in part, because they address key gaps in the field of GBV research and, in part, because they represent an intersection between the research and expertise of the two organizations conducting this study—the International Development Law Organization (IDLO) and the Global Women's Institute (GWI). These two organizations were well-placed to explore this research gap.

To answer these questions, the present study used a mix of qualitative methodological approaches that allowed the research team to explore in depth access to justice for survivors in these six complex contexts through the voices of key stakeholders. These methods included a desk review, primary qualitative data collection, and an expert group meeting to review emerging findings and recommendations.

For the desk review, the research team reviewed documents related to access to justice and GBV. These documents included reports in these six settings that addressed access to justice (including reports by UN actors, civil society actors, researchers, and others) and law and policy documents. Some documents were specific to focus countries, and others were global in scope (reflecting justice trends and promising access to justice approaches outside of focus countries). This document review provided the foundation of this paper and crystallized key areas of inquiry across contexts, guiding the development of qualitative data collection tools.

The research team identified key stakeholders across each of the six focus countries for informant interviews and focus group discussions. These stakeholders included key formal justice actors, lawyers, GBV service providers, multilateral agencies, donors, non-governmental organizations (NGOs), civil society organizations (CSOs), women's rights activists, and researchers. The research team developed semi-structured interview questionnaires for key informants and focus group discussion guides using participatory approaches that included group exercises in focus groups. The research team collected qualitative data across the six focus countries. Interviews and focus groups were audio recorded with permission, and researchers took detailed notes that were coded and analyzed through a qualitative data program.

When data collection was mainly complete, the researchers presented their emerging findings and recommendations to a global group of justice

experts who had the opportunity to reflect on these findings and share promising approaches from their work. This feedback was incorporated into the final report.

The findings presented here from the six focus countries reflect these three methodological approaches and, where appropriate, relevant references from the desk review. The research was conducted roughly in six months in 2021 and before the August 2021 crisis in Afghanistan, precipitated by the withdrawal of US forces, which may limit the applicability of the findings and recommendations to the Afghan context. Nevertheless, we believe this event did not significantly impact the research carried out in the other five settings.

3. International Standards on Access to Justice for GBV

Women's right to access to justice for GBV is a foundational principle of international human rights law (UN Women et al. 2018). The prohibition of GBV is based on the right to life and the right not to be subjected to torture and ill-treatment, therefore requiring the highest priority of enforcement (Edwards 2010; African Union 2003; Council of Europe 2014; OAS 1994). In terms of violence against women (VAW), which is a form of GBV, access to justice means that states must implement a range of measures, including amending domestic law to ensure that acts of VAW are properly defined as crimes, ensuring appropriate procedures for investigations and prosecutions, and guaranteeing access to effective remedies and reparation (CEDAW Committee 1992; 2013; 2015; 2017).

Placing VAW on the global human rights agenda is one of the most impressive successes of the international women's rights movement over the last half a century (Kelly 2005, 471-495). Although VAW was not integral to the recognized women's rights at the 1979 adoption of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention), by virtue of General Recommendations 19 and 35 issued by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), it is a core element now, with most governments worldwide adopting measures to address the problem. VAW has been interpreted in many of these global human rights documents as a form of discrimination based on sex and/or gender. This change has resulted from decades of transnational women's mobilization. The key elements of

access to justice for victims/survivors of GBV under General Recommendation 35 of the CEDAW Committee (2017) include: 1) all forms of GBV against women must be defined as crimes, 2) clear criminal law on rape and sexual violence, 3) requirements of effective investigation, 4) effective prosecution, 5) identification of gender stereotyping, and 6) access to justice and reparation[2] for victims of VAW, including transformative remedies to deal with root causes of GBV.

The 1990s and 2000s brought the dramatic expansion of the international movement against GBV through international conferences, UN declarations, and international NGO activism (Chinkin and Charlesworth 2000; Merry 2005; Celorio 2022). These efforts include the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention) (OAS 1994), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Union 2003), adopted in 2003 by the African Union, and the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (Council of Europe 2011). Together, the CEDAW Convention and the three regional treaties make up a global human rights legal framework to strategically and effectively address all forms of VAW. Importantly, as a foundamental provision of the right of access to justice for GBV, the standards established by the CEDAW Convention apply under all circumstances—in conflict, post-conflict, and peacetime—and other international rules are complementary to the rules of international human rights law (CEDAW Committee 2013).

4. Cross-Cutting Findings

Women seeking justice face numerous obstacles in general and specifically in cases of GBV. The International Development Law Organization (IDLO) has identified the following elements obstructing justice or influencing access to justice based on research and guidance developed internationally (UNDP 2004).

[2] See CEDAW Committee (2017, par. 33). Furthermore, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation provide that reparation should take several forms: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition (UNGA 2006).

Table 1. Barriers to access to justice

Legal and regulatory barriers	• Discriminatory laws • Lack of standing to bring a claim • Lack of a dispute resolution or justice mechanism (right to a remedy through enforcement of decisions) • Formalistic and complex laws and procedures
Economic and financial barriers	• Prohibitive costs of using justice mechanisms o Procedural costs o Representation costs (availability of legal aid) • Prohibitive cost of trying to resolve a dispute due to corollary expenses related to transportation, childcare, or other incidental costs
Practical and institutional barriers	• Lack of information and legal awareness • Geographical distribution of justice institutions • Office hours and physical availability of justice mechanisms • Communication constraints • Delays • Competence and efficiency or lack of accountability (qualifications and training) of justice professionals • Failure to adequately and effectively enforce laws and/or regulations
Cultural and social barriers	• Stereotyping and gender bias in society • Inequitable composition of male and female professionals within the justice system • Actual or perceived discriminatory treatment within the justice system • Capacity of justice professionals to understand underlying gender differences and act independently and impartially • Stigma or fear of social ostracism or damage to reputation for using the justice system

Source: EBRD and IDLO (2019).

In its analysis of the right of women and girls to access to justice, the CEDAW Committee has emphasized the risks that women and girls face when seeking justice. These risks include fear of retaliation from families and communities for having reported violence, fear for personal safety during subsequent investigations or judicial proceedings, risk of further violence from the perpetrator(s) or those connected to the perpetrator(s), including law enforcement and justice personnel, and risk of being subjected to harassment, humiliation or defamation, and pressure to withdraw their complaint or not to provide testimony (UN Women 2011). These risks must be taken into account to ensure that survivors can seek reparation in safety and dignity.

Each of the six focus countries reflects a uniquely complex context, grappling with challenges like conflict, climate change, impunity, corruption, and economic insecurity. Analysis of these focus countries reveals nuances that must be carefully considered to improve access to justice for GBV survivors globally.

a. Local women's organizations play an essential role in case management and access to justice for survivors of GBV

Informants from the present research shared that survivors often face significant challenges navigating the justice system, and strong women's organizations and networks are working to mitigate these challenges, even in exceedingly difficult environments. Femili PNG (Papua New Guinea) is an NGO established by a former provincial Family Support Centre staff who recognized the difficulties of navigating the criminal justice system for survivors seeking formal justice. Femili PNG focuses on strong case management, with the idea that walking a survivor through the referral pathway would improve the uptake of different services:

> When Femili PNG started, it was hard to give services because survivors don't know where to go. We would give psychological and medical care but what about justice? People wouldn't know where to go after we would help. Femili PNG was created so that cases don't get lost in the process. (Ellsberg et al. 2019, 50)

Femili PNG's innovative approach centers on survivors rather than services. Their solid partnerships and ability to coordinate with various service providers enable them to successfully take on high-risk cases that would normally be dropped in the complex bureaucracy. Femili PNG has been called the "glue between the police force, courts, health systems and women's shelters" (Howes, Ilave, and Plana 2017, 69). As a key informant indicated: "Survivors are being supported throughout the process." A 2019 study found that support from Femili PNG resulted in an increased likelihood of a survivor receiving an interim protection order (Putt and Dinnen 2020).

The support of local women's organizations has been a key safeguard in certain complex situations, including when climate disaster strikes. Unhan

Kababayen-an Tinabanan Organization (UKTO) is a local organization in the Philippines that facilitates the participation of rural women and mainstreaming issues related to violence against women and children. UKTO had been working with the Barangay Disaster Risk Reduction (BDRR) team before Typhoon Ruby struck in 2014, including checking evacuation centers, conducting headcounts, and preparing other necessary data. This facilitated the distribution of relief goods, which extended to 14 other barangays and prevented unnecessary deaths when the typhoon hit (Women's Legal and Human Rights Bureau 2017).

b. In some countries, there remain important gaps in the legal framework to address GBV; however, even where the framework exists, laws are not enough

For example, Tunisia has been in a democratic transition since the late 2010-early 2011 revolution, offering an opportunity for progress on women's rights. A new constitution was adopted in January 2014 (subsequently superseded in 2022), and gender equality is enshrined in the document: "The State commits to protect women's accrued rights and work to strengthen and develop those rights. The State works to achieve parity between men and women in elected councils. The State is taking the necessary measures to eradicate violence against women." In addition, within this context of democratic transition, Tunisia promulgated a law on VAW in 2018. However, certain inequalities persist at the level of the law but especially at the level of society: women face indifference or stereotyping by state authorities when it comes to investigating crimes committed against them. Some women remain unaware of the rights afforded them by the law, and the persistent gaps in the justice system and the bureaucracy result in slowness in responding to cases.

Some contexts still lack a dedicated law on VAW, including South Sudan, where advocates are pushing for legislation. Significant gaps exist in legal frameworks that harm women and girls, for example, failure to criminalize marital rape (as is the case in Afghanistan) or to clearly define marriageable age, leaving girls vulnerable to early and forced marriage (as is the case in South Sudan).

Discriminatory provisions of existing laws also harm GBV survivors. In Honduras and across much of Latin America, the crime of *estupro* (or

statutory rape) includes two situations: a) non-consensual sexual assault against a person between 14 and 18 years of age, and b) carnal access that occurs through deception or taking advantage of a situation of manifest superiority. According to the observations issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR), the concept of *estupro* in the new Penal Code of Honduras is problematic since its definition is included in the aggravating circumstances of the crime of rape; therefore, there is a risk that acts constituting both the crime of *estupro* and the crime of rape with aggravating circumstances could be prosecuted for *estupro*, which would incur much lower penalties than rape (OACNUDH 2019). This means that, in effect, adolescent victims of rape do not have the same protections as adult women or young girls because *estupro* may be resolved through civil rather than criminal means, often with the payment of fines.

c. Impunity and normalization of violence have a deleterious effect on survivors' access to justice and reparation

South Sudan has been plagued by layered political, ethnic, and intercommunal conflicts for decades. The weakening of the rule of law as a result of these crises and a culture of impunity around violence have made it less likely that perpetrators will be held accountable. In addition, as can happen in a conflict setting, many of the same actors who are now enforcing justice through the formal system committed acts of GBV during the civil conflict, hindering survivors' trust in the ability of the system to ensure accountability. Very few GBV perpetrators have faced any meaningful accountability through the formal justice system, further disincentivizing survivors to report. As a key informant from South Sudan stated: "There is not only a justice gap, but true immunity and impunity."

Impunity is also a challenge in Honduras despite undeniable advances in the normative field. Impunity not only fosters the continuation of violence but also a great mistrust among women in the justice system. This translates into a small number of pending trials and convictions compared to the high number of complaints. Women's organizations affirm that 96% of cases of violence, femicides, and domestic violence go unpunished (Oxfam en Honduras 2019). Impunity was also mentioned as a factor when the abuser breaches protection orders, as underlined by a key informant

from Honduras: "No unit monitors whether the aggressor is complying with the protective measures. The survivor has to inform the court if there is a breach, and this is a responsibility that should be exercised by justice operators. In the case of a breach of the protective order, the perpetrator pays a fine in the attorney general's office, and nothing happens."

d. Economic insecurity and corruption weaken access to justice

Because judges in South Sudan are appointed rather than elected within a context marked by corruption, informants in the present research shared that judges are thus incentivized to please their bosses, which calls their independence into question and limits space to exercise true justice. Further threatening the judiciary independence is corruption. Some judges have taken bribes to accept cases or rule a certain way, as explained by a key informant: "People are poor […] if I have a case today and I have money, maybe I'm on the wrong side, I pay 1,000 dollars, or 500 dollars to a judge. He will take it because he is paid less than a hundred-dollar salary; maybe they are paid like twenty dollars, that's their salary. They take that […] so the independence of the judiciary is in question in South Sudan."

Organized crime has permeated all levels of society in Honduras, promoting corruption and violence and hindering access to justice for GBV survivors. Organized crime in Honduras mainly consists of gangs and groups related to drug trafficking. According to the Mesoamerican Initiative of Human Rights Defenders, the heightened military and police presence, as well as the forced displacement of populations for the exploitation of natural resources, has led to widespread abuses, physical attacks, and violation of women's human rights. According to the Observatory of Violence at the Universidad Nacional Autónoma de Honduras, 52% of reported femicides in 2019 were linked to organized crime, defined as murders by hit men, gang members, revenge killings, and kidnapping, or in the context of extortion, drug trafficking, and trafficking of persons (Observatorio Nacional de la Violencia 2019).

In 2016, the Organization of American States (OAS) launched the Mission to Support the Fight against Corruption and Impunity in Honduras. Its mandate ended in January 2020 due to a lack of support from the Honduran government. During the period under review, the Mission promoted various legislative reforms and public policy initiatives to strengthen

anti-corruption efforts, though the national congress refused to approve these measures. Further, a new Penal Code entered into force in Honduras in 2020. It was widely criticized for a lack of transparency and consultation with civil society, and it reduced penalties for several corruption-related offenses, including embezzlement, influence peddling, obstruction of justice, and bribery. The law was also retroactive and would benefit those already convicted or facing prosecution (WOLA 2020). Most notably, it reduced, and in some cases eliminated, carceral penalties for the crimes of extortion, kidnapping, and drug trafficking, exacerbating the perception that the Honduran government is unwilling to address organized crime. This insecurity, perception of impunity, and corruption add to a context in which survivors of violence do not trust the justice systems available to address their needs.

e. Protection for survivors is critically important when accessing justice and tends to be weak across settings

In South Sudan, no system is available for survivors to access protection orders. Survivors, witnesses, family members, and others fear retribution by the perpetrator if a survivor reports GBV. If a survivor has reported intimate partner violence, she may need to stay with her parents or family members to keep her safe while the case is resolved. Without the support of family, survivors are often at great risk. Shelters are not widely available across South Sudan, though there is one in Wau and select other states. There are similar challenges with shelters in Honduras, where the shelter network functions through NGOs that do not receive state funding and are difficult to access outside of the capital city of Tegucigalpa, as described by a key informant: "There is no transitional housing to enable women to file complaints in the main cities of the country. A woman who travels from the interior of the country to file a complaint in the cities finds that she does not have a place to stay while the process is taking place. Those who can stay in the homes of relatives."

The use of protection orders (POs) and interim protection orders (IPOs) has increased the protection of survivors in the Papua New Guinea context. Making family POs more accessible to women not only fosters women's access to justice but also upholds the core values of a survivor-centered approach, as the majority of survivors affirm that what they want is to stop

violence, not put their partners in jail: "A lot of women in the communities say we don't want our husbands to go to jail; we want them to change."

A recent mixed-methods research study on family POs in Papua New Guinea found that approximately one-fifth of the population had heard of IPOs, and more than 80% of IPO applicants felt safer as a result (Putt et al. 2019). Many women who received IPOs, however, did not go on to convert these into POs. The primary reason for attrition is that clients did not return to pick up the applications or did not appear in court. Some women gave up due to lengthy delays, difficulty navigating the complex process and paperwork, regular court adjournments, and clerks/magistrates being away for weeks at a time. Others cited changes in the husband's behavior or attitudes, safety concerns, or the client returning to her home village. As one key informant reflected on the effectiveness of POs, "once the husbands see that the law is involved, it tends to deter their behavior."

f. There are limits to humanitarian machinery's ability to address development issues like access to justice and GBV prevention

In contexts where there is an acute humanitarian emergency and where multilateral humanitarian actors are responding to GBV, this can limit the nature of the response and the strengthening of access to justice for GBV survivors. For example, the UN Mission in South Sudan (UNMISS) was created in the immediate wake of South Sudan's independence in 2011 to protect civilians, promote and maintain peace, address humanitarian needs, and document human rights violations. UNMISS took critical life-saving measures during civil conflicts that have erupted since independence, including the establishment of Protection of Civilians sites, which sheltered tens of thousands of South Sudanese citizens fleeing violence (Day 2019). Informants described the relevant role UNMISS has played in connecting GBV survivors with justice, including offering transportation of legal experts to survivors in more rural areas and the utilization of mobile courts for GBV survivors. UNMISS has also worked with the United Nations Development Programme (UNDP) to establish the first GBV court in South Sudan and conduct training of key justice actors on juvenile issues (UNSC 2020).

However, given the transitory nature of the UNMISS mandate, one informant expressed fear that women may be left unprotected or unable to

access the courts if UNMISS were to shut down. The mandate of UNMISS is also narrowly focused on humanitarian action as opposed to development activities. Though this narrow scope of work is not a requirement of other UN and NGO actors working in South Sudan, other actors have followed the lead of UNMISS, limiting their funded work to humanitarian activity. This has obstructed support for strengthening justice institutions and the capacity of justice actors and implementing GBV-related laws. Greater efforts should be made to draw a link between humanitarian and development needs, with access to justice for GBV survivors being crucial to both sets of goals. Additionally, given the complexity and depth of humanitarian challenges in South Sudan, needs that are perceived as more urgent or life-saving can be prioritized over GBV response.

g. Customary justice systems are often more widely accessed than the formal justice system but can reinforce patriarchal norms and fail to address survivor needs

In many countries emerging from conflict, existing customary and informal justice (CIJ) mechanisms represent the only form of justice available for women (IDLO 2020; Divon and Bøås 2017, 1381-1398). This can present both challenges and opportunities, as CIJ mechanisms can be valuable tools in the aftermath of conflict. However, given that the processes and decisions of these mechanisms may discriminate against women, it is critical to carefully consider their role in facilitating access to justice for women, such as defining the type of violations they will be addressing and the possibility of challenging their decisions in the formal justice system (IDLO 2020).

Justice for GBV survivors in Papua New Guinea is most frequently accessed at the local level through customary village courts, particularly in remote areas where formal justice systems may not be accessible. Village courts often focus on restoring justice and maintaining a peaceful family unit instead of ensuring individual accountability for perpetrators or protecting victims and their human rights. Therefore, mediation and compensation are the main tools used in Papua New Guinea village courts. Survivors often have limited choice in these issues and do not benefit from the compensation. Instead, the family members involved in the negotiations receive the compensation, and survivors often find themselves at risk of experiencing GBV again. For example, when the bride price has been

paid, women have few options if they wish to leave their husbands due to violence. If she returns to her birth family, they are unlikely to accept her for fear of having to return the bride price. If she does leave, she may be required to relinquish her children to the husband's family as payment for the bride price.

Most disputes in Afghanistan are resolved through informal justice institutions outside the state's formal justice system. Most domestic violence cases are resolved within families by relatives through family *Jirgas* (or tribal councils). Usually, family *Jirgas* will convince both husband and wife to repair the relationship and advise women to stay with their husbands despite abuse. *Jirgas* tend not to respect the confidentiality of cases or women's rights. Key informants summed up some challenges for survivors with customary justice:

> One challenge women face is that their families and society will not allow them to seek formal justice. And in *Jirgas,* they are forcing women to forgive the perpetrator and not to refer their cases to justice sectors. The decisions (of *Jirgas*) that are based on customary laws will take them back to violence. (Key informant in Afghanistan)
>
> The challenges and problems in the justice sector cause families to go for customary law, as it is less time-consuming. However, the problem with customary law is that it is biased towards men rather than women. Most of the time, women are not involved, and decisions are made without their presence. (Key informant in Afghanistan)

h. Key justice actors require additional capacity strengthening to sensitize them to the needs of survivors and increase awareness of laws and their appropriate implementation

The right to reparation for GBV requires that women and girls can access justice in ways that reflect the reality of the harm they have experienced and provide meaningful remedies. Legal systems have tended to be inflexible in recognizing women's experiences and often actively compound the harm of the crime by causing secondary victimization during the investigation and prosecution (Ngonze 2009). Justice actors may lack adequate capacity to address the needs of GBV survivors, including insufficient knowledge

of the laws, lack of understanding of GBV, language barriers, patriarchal attitudes and beliefs, and variability in legal training.

In South Sudan, there is widespread mistrust and fear of the police, given the crimes perpetrated by armed actors during civil conflicts. Police do not always understand key considerations for GBV cases or the laws and support available to survivors. Some police officers are recruited as former soldiers who have never been trained as police officers, resulting in uneven implementation of the law. Survivors have reported negative experiences with the male-dominated police force, including being asked invasive, embarrassing questions while reporting or being victim-blamed: "(The police) turn the whole issue into mockery."

There has been little privacy in police stations for GBV survivors to share their experiences with police officers, which has a chilling effect on reporting. There has been some effort to change this through Specialized Protection Units, which offer specialized space and response for GBV survivors.

Informants in Honduras also referred to a lack of gender perspective among the police, which discourages reporting. Informants gave examples of women not being able to report because of the way they looked or domestic violence cases where women were told to work things out with their husbands. Women's organizations find that some justice operators are reluctant to accept that domestic violence is as serious a crime as other criminal matters (Oxfam en Honduras 2019). Similarly, other cases were cited in which the police actively collaborated with the perpetrators, either by alerting them to the survivor's complaints or taking bribes from them. As one informant shared, "The police lack credibility. Sometimes survivors are afraid to press charges because they are not treated well."

Conclusions

The present original research leads to a few key conclusions. First, a solid legal and policy framework is crucial to addressing GBV and supporting survivors. Gaps in the legal framework leave women and girls without legal recourse when they experience various forms of GBV. Law and policy must fill existing gaps and include the institutionalization of GBV response across government layers for higher impact. It is also critical to increase funding for justice implementation, with priority given to local organizations.

Justice is an expensive component of service delivery, requiring sufficient financing to execute effectively. It is essential that the most knowledgeable local organizations guide justice programming in complex contexts. Larger international actors might reframe their role as strengthening the capacity of local organizations to lead justice-related programming.

Prioritization of long-term GBV prevention programming is also crucial in securing women's access to justice. Too often, prevention is overlooked in a humanitarian crisis or not funded long enough to make lasting change. Funders should prioritize interventions for social norm change, with the knowledge that sustained funding over time is necessary to realize a reduction in GBV. This long-term, core funding allows organizations that know the context best to be most effective, learning and course-correcting as necessary.

GBV survivors accessing justice also need increased protection. Women are at great risk when they choose to report violence, and there is a lack of protection available to survivors. Increasing protections (including safe spaces, shelters, protection orders, and other services) may increase feelings of safety and willingness to report violence. When women and girls do report violence, they should be assisted by justice actors, including police, judges, traditional chiefs, and lawyers, who have a strengthened capacity to meet their needs. Thus, it is recommended to continue and increase capacity-strengthening efforts for justice actors, which would help foster trust in the justice system and its use. This includes promoting women in roles as key justice actors.

Key non-state actors must be held accountable for their role so that GBV survivors have efficient access to justice. Organized crime groups, religious organizations, and other private actors can play a role in women's and girls' experience of GBV and/or their subsequent access to justice. When these groups perpetrate GBV, they must be made responsible. These groups may also be more actively engaged to facilitate survivors' access to justice.

When the judiciary or governments are committed to GBV, their involvement must be monitored in a dedicated way. Rigorous monitoring of the courts and justice mechanisms is necessary to ensure consistent and fair application of the law, root out corruption, and increase trust. Monitoring and accountability are required to ensure that government engagement regarding GBV manifests through action.

This research also points to relevant new directions for research. Scholarship in this field must continue to work toward decolonizing and building the GBV evidence base. More rigorously collected data on GBV is needed for advocacy, legal reform, and more solid justice programming. This includes prevalence data, though not exclusively. Funding for data collection should focus on women telling their stories and building the evidence base through their own experiences. Finally, more evidence on how policies and programs affect GBV survivors in complex contexts is needed to demonstrate best practices.

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This book includes a collection of essays authored by academics, activists, and practitioners reflecting on critical advances and challenges in the areas of gender and sexuality and their linkages to international law and human rights. Feminists have long intervened to advance women's rights, substantial equality, and the eradication of gender-based violence using international law as an important tool, through policy action and the litigation of cases before the universal and regional human rights systems and other strategies. The LGBTIQ+ community has also injected a queer perspective to international law. Therefore, a diversity of scholars and activists discuss in this volume paramount issues in international law and explore them with a feminist, queer or gendered, and human rights perspectives. The essays promote a rich discussion of critical topics such as those connected to intersectional discrimination, violence against women and LGBTIQ+ persons, sexual and reproductive rights, and challenges to protect human rights in situations of armed conflict and contexts of crisis.

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