

PROGRESS AND CHALLENGES FOR THE RECOGNITION, PROTECTION AND PROMOTION OF INDIGENOUS WOMEN'S HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM

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Abstract: In this study, we begin by analysing the guiding legal principles and international standards that States must consider when developing laws, programs, and policies to protect indigenous women's human rights as members of their communities. Besides, we try to find out what priority issues States are trying to address. Once we establish the theoretical framework, we will review how, in practice, the Inter-American Commission and Court have examined some of the leading cases concerning the protection of the economic, social, and cultural rights of indigenous women. All this will lead us to understand the bases of indigenous women's worldview. Therefore, we attempt to understand the role what role indigenous, tribal or autochthonous women has played in society to date. Thus, this will allow us to analyze strategies developed to guarantee their right to life and their integral protection in order to evaluate how the phenomenon of their empowerment, conquest of public spaces, political participation and personal development is being assisted.

Keywords: Indigenous women, worldview, Inter-American Law, collective rights, individualized approach, honour and dignity.

SUMMARY: 1. INTRODUCTION; 2. INTER-AMERICAN STANDARDS OF PROTECTION FOR INDIGENOUS WOMEN AS A MEMBERS OF A GROUP OR COLLECTIVE; 3. INTERNATIONAL-LEGAL DUTIES OF THE ORGANISATION OF AMERICAN STATES' MEMBERS; 3.1. Duty to recognize the indigenous peoples. 3.2. Duty of prevention. 3.3. Duty of indigenous women's protection. 3.4. Duty of special attention in armed conflicts. 3.5. Duty to guarantee adequate access to justice and due diligence in the development of the investigation. 3.6. Duty to penalize and repair the damage caused; 4. LEADING CASES BEFORE THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: THE IMPLEMENTATION OF COLLECTIVE RIGHTS TO INDIVIDUAL PETITIONS; 4.1. The recognition of slaughtered indigenous women. 4.2. Enforced disappearance investigation. 4.3. Prevention of femicide. 4.4. Towards the protection of indigenous women's honour and dignity; 5. CONCLUSIONS.

1. INTRODUCTION

In the Americas, the path to equality requires visibility and effective participation of these groups who traditionally had been excluded and discriminated just as indigenous women. Thus, the progress to equality and the full exercise of their rights is a prerequisite to assert effective democracies in the XXI century (Brysk 2000).

Indigenous women face a series of obstacles such as: few opportunities to access labour market, geographical and economic difficulties to access health care and education services, limited access to social services and programs, high illiteracy rates,

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low participation in political process and social alienation (Chilisa 2002). Political, social and economic exclusion of indigenous women contributes to a permanent situation of structural discrimination, making them more vulnerable to different violent acts.

Although they can become a target of discriminations and human rights violations, indigenous women cannot be considered just victims (Gargallo 2013). Their situation is designated by the specific gender construction of their communities, the different social and geographical realities, and adjustments to the dominant society. Therefore, indigenous women are not, *de facto*, a homogeneous group, but they represent a great diversity of situations, needs and claims.

Consequently, every jurist, who tries to understand each particular situation of these women, should base his/her work on a wider (world) view: the conception of a sort of a group or sorority composed of all indigenous women in the Americas (Martí i Puig 2004). This will allow him/her to identify a set of minimum standards of protection for all indigenous, tribal, and native women in the region.

2. INTER-AMERICAN STANDARDS OF PROTECTION FOR INDIGENOUS WOMEN AS MEMBERS OF A GROUP OR COLLECTIVE

We can be confused when we use the term standard. This phenomenon occurs when we use it to allude to irrefutable norms in International Law. Nevertheless, we use this term sometimes to highlight some minimum levels of protection in case of the absence of explicit or no adequate regulations in a particular legal system such as a domestic, regional, or state legal system (Cruz Ángeles 2022b).

In the last few years, we had to concrete the minimum level of protection for indigenous women in the Inter-American human rights system. We start from the initial situation where we have to face a high level of abstraction and generalization: "native people's recognition and protection" (Cunningham 2002). Therefore, we must determine its content and its implementation. In this regard, native women's protection requires a study of a double situation. On the one hand, which role does it play *ad intra*; in other terms, what is its status or which role does it play in the native, indigenous or tribal community. On the other hand, which risk does it face *ad intra* or *ad extra* due to the fact of being a woman.

Self-determination² and cultural identity rights have been recognized to all people considered as native, indigenous, or tribal as a whole (Niezen 2009). *Jus cogens* status

² The principle of self-determination is a democratic political principle by which people can choose their administration. Nevertheless, this principle has acquired a legal character and has prompted several positive law provisions, even acceptable *erga omnes*. The purposes of the United Nations are: (...) 2. Friendly relations among nations must be developed by the United Nations on the basis of equal rights and self-determination. (...). The Charter of the United Nations. "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court. (ICJ, East Timor, order of 30 June 1995).

includes the acknowledgment of the right to determine its economic, social, and cultural³ development to guarantee its existence and well-being as distinct people⁴.

Self-determination right, enforceable *erga omnes*, involves a recognition exercise to the property right of native, indigenous, or tribal peoples over the territory occupied. We do not need to document this territory because of administrative or civil procedures before states authorities. We can substantiate it on pieces of evidence of effective and continuous occupation. In addition, we must recognize and respect relationships established between members of these communities and their religious sites (see *inter alia*, worship or pilgrimage place, dedicated to ancient deities, or cemeteries where they can honour their ancestors (Pallares 2007).

Thus, it is essential to recognize this unique relationship between native or tribal community members and its territory and nature since they, as actual occupiers or proprietaries, might regularize their situation before the state authorities. Therefore, to reach an agreement, all public policies or actions, directly or indirectly, accomplished by state authorities should consult them (including women), respecting their culture and informing them previously (Dietz & Mateos 2015).

Accordingly, we must establish a minimum standard: "native women's recognition and protection in the Americas", a model we should be adapted to so that we must examine different situations and behaviours. But, how can we build a narrative and identity around a figure, traditionally, so invisible? Necessarily, we must start from the process of recognition of their communities, the legal treatment they have received, and attend to the particular needs they have. We must establish a series of priorities to recognize and meet their specific needs.: respect for their right to life, and then we must demand the establishment of measures that guarantee their comprehensive protection.

The many forms of discrimination against indigenous women, namely *inter alia*, gender-based, ethnicity, race, or socio-economic situation, create barriers to access essential services like education. Only one out of ten native girls conclude their primary and secondary school in Latin America. Among the reasons, we could highlight lack of adequate infrastructure; lack of native languages learning systems; their socio-economic situation; the insecurity they experienced; rapes that may cause early pregnancies. Discrimination against indigenous women affects the limited access to the social security system. Besides, settlements are far from hospitals or

³ Peoples' self-determination designated that all peoples have the right freely determine, without external interference, their political status and to pursue their economic, social and cultural development by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations (General Assembly, Resolution 2625 (XXV), 24th October 1970. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).

⁴ The principle of self-determination is also the right of people to manage their internal and external affairs without external interference and force use.

health centres, so they do not have adequate services. These barriers have an impact on native women's health: infections and illness, high maternal mortality ratio, and massive violations against their sexual and reproductive rights, for instance, forced sterilization cases.

Indigenous peoples sometimes face difficulties accessing essential resources such as safe water or food due to the historical indifference towards their poverty and their right to control their lands and natural resources (Cruz Ángeles 2022a). The loss of their territories and natural resources, pollution, and extractive activities obstruct the protection of subsistence activities such as gathering food, agriculture and shepherding. This situation forces indigenous women to leave their birthplace, exposing themselves and becoming more vulnerable to human rights violations.

All these continuous and intersectional discriminations against indigenous women result in violent episodes⁵ in specific contexts: in armed conflicts; during development, investment, and extraction project execution; related to the militarization of their territories; deprivation of freedom; domestic violence; as human rights defender; in urban areas; and in migratory processes, or forced displacements. In all these situations, discrimination contributes to creating a stereotype of them as inferior beings, sexually available, or, simply, easy targets as the weaker sex. Therefore, we must enable proper procedures to guarantee their right to access to justice⁶. Then, we could prevent, investigate, judge, penalize and provide compensation in case of violent acts or disappearance of indigenous women, using adequate and effective judicial remedies for the victims and their relatives.

Member States of the Organization of American States should adopt an approach that respects the ethnic and cultural identity, language, and individual traits of indigenous women. Besides, they should take measures including providing interpreting and translating free services as they are required; having a multidisciplinary staff throughout the trial; respecting the culture and indigenous worldwide; integrating a gender perspective, and providing training to court officials in intercultural gender-based topics. Furthermore, the state judicial system should act with due diligence and apply a holistic perspective, considering particular circumstances of each case and potential barriers faced by indigenous

⁵ The Convention of Belém do Pará considers violence against women as any action or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women whether in the public or the private sphere. the IACtHR considers that obstetric violence encompasses all situations of disrespectful, abusive, negligent treatment, or denial of treatment in the pre-pregnancy stage, during pregnancy, childbirth, and the postpartum period, in health centres. Besides, spiritual violence manifests itself when acts of violence and discrimination against indigenous women impact those women individually and the collective identity of the communities to which they belong. Therefore, obstetric and spiritual violence are forms of violence against women, prohibited by the Convention.

⁶ The right to access to justice, as a principle of distribution of rights and benefits of each individual, should operate according to a reference standard covered, directly or indirectly, by positive law. This legal system provides the likelihood for justifying the action related to a legal standard. Therefore, justice is related to reasonableness, and it distinguishes itself from equity, considering its higher degree of abstraction.

women to access this system⁷. The goal is to guarantee respect to the victim's cultural traits, namely her worldview and her notion of justice in the reparations provided; reject any prejudice or stereotype; include participation and the victims' point of view, and promote structural transformations. In addition, Member States must respect that indigenous people have the right to promote, develop, and retain their justice system and their customary law. Consequently, the State must respect indigenous rights as a representation of their self-determination right, and these indigenous systems should act with due diligence and guarantee indigenous women's access to justice without any discrimination.

A priori, despite this list of *de facto* situations that could seem a bit ambiguous, it involves a valued catalogue of minimum standards to protect. Inter-American legislator reflects this on the legal corpus constituted by different instruments of recognition and protection of human rights - see, *inter alia*, the American Declaration of the Rights and Duties of Man (1948), the American Convention of Human Rights (1969), the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women "Convention of Belém do Pará" (1994), the American Declaration on the Rights of Indigenous Peoples (2016)- leaving in the Commission and the Inter-American Court of Human Rights hands its interpretation to determine its exact sense by a legal process.

3. INTERNATIONAL-LEGAL DUTIES OF THE ORGANISATION OF AMERICAN STATES' MEMBERS

The Inter-American Commission on Human Rights (IACHR) considers a *numerus clausus* principle list should regulate states authorities' actions and omissions, inviting Member States to consider the following criteria as useful to develop their public policies⁸: every native, indigenous or tribal woman should be conceived as an empowered actress⁹, analysing the case facts from an intersectional perspective¹⁰, involved in self-determination¹¹ procedures as an active participant¹²

⁷ Consider, *inter alia*, institutional discrimination, geographic distance, cultural or language barriers, civil servants' cultural insensibility, fear of family or community reactions, ignorance of the legal system or their rights, economic difficulties, or lack of legislation or public politics aimed at addressing their particular problems.

⁸ The inclusion of these principles in IACHR reports could be considered an attempt at unofficial codification, undoubtedly non-legally binding, but with some authority, because it reflects the State practice in this work area.

⁹ We should consider indigenous women as rights holders and not only as potential victims or targets of human rights violations. Regardless of whether they might have suffered violence or discrimination, we should highlight their role in the history of the fight for peoples' self-determination, individual or collective rights, and their rights as women.

¹⁰ A multidimensional identity requires an intersectional approach to evaluate the forms of discrimination against women. This superposition of discrimination causes suggests new forms of compounded discrimination that manifest in different experiences from an indigenous woman to another.

¹¹ We should not consider indigenous women's rights as disintegrators and external to the indigenous fight or related to "external values" or "Western values" that enforce individual rights over community rights. Paradoxically, this fake dichotomy between community rights and women's rights has become ingrained in indigenous women's vulnerability to potential episodes of abuse and violence.

¹² Indigenous, native or tribal women should have the opportunity to participate in all processes that affect their rights. This principle is recognized under articles XXII (paragraphs 1 and 2) and XXXII of the American Declaration on the Rights of Indigenous Peoples, articles 5 and 23 of the United Nations Declaration on the Rights of Indigenous Peoples, and article 7 of ILO Convention No. 169, *inter alia*.

with her worldview¹³ (Cruz Zúñiga 2021). Besides, her human rights are indivisible, interdependent, and interconnected¹⁴, and therefore they should be considered in their individual and collective dimension¹⁵.

As soft law rules, these guidelines principles are a starting point to outline a list of specific states' duties of actions or omissions in the following sections. To this end, we will focus on the study of the positive law's sources -especially, Resolution AG/RES.2867 (XLIV-O/14) "American Declaration on the Rights of Indigenous Peoples Project" and the Inter-American Commission and Court of Human Rights' decisions-without assessing possible philosophical, anthropological or sociological interpretations-(Serrano Rojas 2019). We do not consider them since they could create possible duties of *iusnaturalism*.

3.1. Duty to recognize the indigenous peoples

To begin with, Member States of the Organisation of American States (OAS) must fully recognize the legal status of all the indigenous peoples members while respecting their organization, in other words, their institutions and promoting the full exercise of their human rights¹⁶. However, how could we identify as tribal, indigenous, or native communities members? In the Inter-American system, self-identification is an essential criterion. Therefore, states authorities must respect the right to this self-identification as indigenous people, community, or tribe, individually and collectively, according to their practices or institutions. Once identified, indigenous people will be able to determine if they would like to live in solitary confinement (or not), living freely, depending on their culture (Paredes Peñafiel 2020). Consequently, Member States must adopt suitable measures and policies with full knowledge and participation of indigenous women and organizations to recognize, respect, and protect their right to life and their individual and collective integrity¹⁷. Implying, necessarily, the explicit prohibition of any activity that could be considered as genocidal practice or attempted extermination of this population¹⁸.

¹³ It is essential to consider indigenous women's worldview and the concept of their rights and welfare, just as the forms of violence and discrimination against them. The definition of the substance of indigenous women's rights encompasses what is stated in international instruments and the way indigenous women understand and express the implementation of these instruments in their experience.

¹⁴ In its jurisprudence, the IACtHR has reiterated the entire interdependent interrelated nature of all human rights. These principles appear in the instruments that regulate the effectiveness of the Inter-American system of Human Rights and the Universal System of Human Rights, applicable to the signatory States of the Americas.

¹⁵ Violence against indigenous women should be perceived as an attack against them individually and as harm to the collective identity of the communities to which they belong. Besides, it is a form of spiritual violence. Consequently, this reasserts indigenous women and their communities suffer the impact of violence in a very particular way.

¹⁶ Article IX of the American Declaration on Rights of Indigenous Peoples.

¹⁷ Article XXVI of the American Declaration on Rights of Indigenous Peoples.

¹⁸ Article XI of the American Declaration on Rights of Indigenous Peoples.

The recognition of the indigenous women's legal status also requires respect for the indigenous peoples' right to self-government on issues related to domestic or locals' affairs, as well as their right to fund their autonomous functions¹⁹. This (self)-government controls, necessarily, the territory traditionally possessed, occupied, used, or acquired²⁰, throughout a spiritual, cultural, and material relation. Moreover, this (self)-government assumes its duties to preserve the territory and to (self)-manage its resources -considering as property owners either this population or their generations to come-²¹ (Puelo 2019).

As for indigenous, native, or tribal women, OAS Member States must recognize the full enjoyment of their civil, political, economic, social, and cultural rights, just as their right to maintain their cultural and spiritual identity, religious traditions, worldview, and values²². Besides, they must protect their sacred sites, places of worship, and all human rights reflected in the national or international legislation²³. To do this, Member States should provide effective remedies, including legal remedies for the compensation of collective or individual rights.

3.2. Duty of prevention

All the members of indigenous communities have the right not to be a target of racism, race discrimination, xenophobia, or other forms of intolerance²⁴. To guarantee their right to no discrimination, states should work together with indigenous people (including women) to adopt necessary measures to prevent and eradicate all forms of violence and discrimination, especially against women and indigenous children²⁵ (Stavenhagen 2006).

Moreover, the American Declaration on the Rights of Indigenous peoples also anticipates two specific prevention duties against a possible abusive practice that affects the indigenous, tribal, or native women. The first of these considers that state members should take measures to prevent and ban the fact that indigenous women may be the target of an investigation, biological or medical experimentation programs, and sterilization without previous and informed consent. Additionally, it considers that state members should respect their right to access their data, medical records, and investigation documents conducted by individuals and private or public institutions²⁶. The second specific duty compels Member States to adopt all immediate and effective measures to eliminate any labour exploitation of indigenous peoples, in particular, indigenous children, women, or elders²⁷.

¹⁹ Article XXI of the American Declaration on Rights of Indigenous Peoples.

²⁰ Article XV of the American Declaration on Rights of Indigenous Peoples.

²¹ Article XXV of the American Declaration on Rights of Indigenous Peoples.

²² To delve into the issue, see Fernández Míguez, S. & Faundes Peñafiel, J. J. (2019). “Emergencia de las mujeres indígenas en América Latina. Debates sobre género, etnicidad e identidad cultural”, in *Revista Chilena de Derecho y Ciencia Política*, vol. 10, n°. 2, pp. 53-96.

²³ Article XXXI ss of the American Declaration on Rights of the Indigenous Peoples.

²⁴ Article XX of the American Declaration on Rights of the Indigenous Peoples.

²⁵ Article VII.3. of the American Declaration on Rights of Indigenous Peoples.

²⁶ Article XVIII of the American Declaration on Rights of Indigenous Peoples.

²⁷ Article XXVII of the American Declaration on Rights of Indigenous Peoples.

This last duty, which prevents all practices considered as hard labour or slavery, is completed with the imposition of labour duties, namely: the duty to protect indigenous workers or employees in recruitment under fair and equal terms of employment, in formal or informal work systems; imposition, implementation, and improvement of labour inspections with special attention in regions, companies or work activities in which indigenous employees are involved. With all these measures, the government pretends Member States to encourage indigenous peoples' jobs, guaranteeing that they are informed about their rights as employees according to applicable legislation.

3.3. Duty of indigenous women's protection

State members concede that violence against indigenous peoples, especially against women, obstructs or prevents the full enjoyment of all human rights and fundamental freedoms²⁸. Consequently, states must adopt jointly with indigenous peoples necessary measures to prevent and eradicate all forms of violence, in particular against indigenous women and children. Violence against women is understood to mean any action or conduct based on gender that causes death, harm, or physical, sexual, or psychological pain in the public or private sphere²⁹ (Figueroa Romero & Burguete Cal y Mayor 2017).

The IACHR considers spiritual and obstetric violence as a form of violence against women, banned for the Convention of Belém do Pará. Obstetric violence encompasses situations of disrespectful, abusive, negligent treatment, or denial of treatment during pregnancy, childbirth, and postpartum period in public and private health centres. This violence may be present at any moment during maternal health services through actions such as refusal to provide complete information about her health and treatments; indifference to pain; verbal humiliation; forced or coerced medical procedures; sexual, physical, or psychological forms of violence; intrusive process; unnecessary use of medication, among other actions. Spiritual violence manifests itself when acts of violence and discrimination against indigenous women impact those women individually and the collective identity of the communities to which they belong.

²⁸ Article VII of the American Declaration on Rights of Indigenous Peoples.

²⁹ Article 2 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women "Convention of Belém do Pará". "Violence against women shall be understood to include physical, sexual and psychological violence: a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse; b. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and c. that is perpetrated or condoned by the state or its agents regardless of where it occurs".

3.4. Duty of special attention in armed conflicts

According to International Humanitarian Law³⁰, indigenous women have the right to receive special protection that guarantees their security in situations or periods of domestic or international armed conflict. This is due to the situation of special vulnerability in which women find themselves in this type of situation (before possible physical attacks that usually lead to rapes and mass murders). Therefore, following international agreements, states should take every appropriate measure to protect the human rights, institutions, lands, territories, and resources of indigenous women and their communities in case of armed conflict.

Furthermore, the American Declaration on the Rights of Indigenous Peoples establishes obligations that Member States must not do. In this sense, they will not be able to develop military activities in indigenous territories unless it is justified on the grounds of the public interest or it may be settled with interested indigenous peoples. Either they will not be able to draft any indigenous child or teenager into their armed forces -under any circumstances-. Moreover, they will indicate to state authorities how they should act in case of an armed conflict that affects, directly or indirectly, their territory, lands, resources, or people. In conclusion, they should take effective remedies for all the damages and prejudices caused by the conflict, and they should guarantee the right to access justice, protection, and adequate remedies for all the damage caused to the victims³¹.

3.5. Duty to guarantee adequate access to justice and due diligence in the development of the investigation

Articles 8 and 25 of the American Convention of Human Rights, Article XVII of the American Declaration of the Rights and Duties of Man, and Article 7 of the Convention of Belém do Pará establish that women have the right to appeal a judicial remedy to guarantee the proper procedure when they report human rights violations. They also establish the States' obligation to act diligently to prevent, investigate, judge, penalize and provide a remedy in these cases. The Inter-American Court of Human Rights establishes in some sentences that every victim of human rights violations has the right to an investigation to clarify the facts and responsibilities. In that regard, Inter-American Court's sentence to Rio Negro and Dos Erres Massacres displays that the right to access to justice must guarantee, in a reasonable period, the victims' and relatives' right to a full investigation to clarify the facts and demand accountability.

The Commission has recognized four guiding principles related to the duty to act with due diligence for States in case of violence against indigenous women.

To begin with, the Commission establishes that the State could incur international responsibility for failure to act with due diligence to prevent, investigate, penalize and

³⁰ Including the Fourth Geneva Convention (1949) related to the due protection to civil people in times of warfare, and Protocol II (1977) related to the protection of victims of non-international armed conflicts.

³¹ Article XXX of the American Declaration on Rights of Indigenous Peoples.

provide a remedy to violence against women. Besides, this duty applies to all acts of violence committed by individuals in some circumstances³².

Then, the Commission establishes that the State should recognize the connexion between discrimination, violence against women, and due diligence, which involves the duty to take measures to tackle and respond to violence against women, just as to prevent the discrimination that perpetuates this problem. The State should adopt measures to modify women's and men's patterns of social and cultural behaviours. Besides, it should adopt measures to eliminate prejudices and consuetudinary practices based on the premise of inferiority or superiority of gender and stereotyped roles imposed on women and men³³.

Next, the Commission recognizes a connexion between the duty to act with due diligence and the obligation of the State to guarantee access to adequate legal resources for violence victims and their relatives.³⁴

Finally, the Commission analyses how some women groups take a particular risk to suffer violent acts due to intersectional forms of discrimination to which girls and women from some ethnic, racial, and otherwise groups are exposed. In these cases, the State should consider this factor to adopt prevention measures for all forms of violence³⁵.

3.6. Duty to penalize and repair the damage caused

In their latest decisions, the Commission and the Inter-American Court of Human Rights analyse and include reparations with a transformative approach requiring that the State address inequality and structural discrimination affecting all women, including indigenous women. According to Special Rapporteur on violence against women³⁶:

“Interventions that seek only to ameliorate the abuse and which do not factor in women’s realities are not challenging the fundamental gender inequalities and discrimination that contribute to the abuse in the first place.”

In legal precedents about transformative reparations, the Inter-American Commission and the Court have emphasized State members' duty to eliminate discrimination

³² See e.g. *inter alia*, Jessica Lenahan et al. (United States), Claudia Ivette González et al. (Mexico). Admissibility reports and substantive reports.

³³ Jessica Lenahan et al. (United States). Case no.12.626, 21 July 2011.

³⁴ See e.g., Jessica Lenahan et al. (United States) & Maria da Penha Maia Fernandes (Brasil). Admissibility reports and substantive reports

³⁵ See e.g., Jessica Lenahan et al. (United States). Substantive reports.

³⁶ United Nations, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo, A/HRC/17/26, 2 May 2011, para. 31.

in all internal legal systems. In some decisions, the Inter-American Commission and the Court have explicitly recognized the need to restructure social stereotypes of gender and to adopt educative and training programs with a gender perspective and legislative and institutional reform with a transformative approach.³⁷

4. LEADING CASES BEFORE THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: THE IMPLEMENTATION OF COLLECTIVE RIGHTS TO INDIVIDUAL PETITIONS

Through different mechanisms, the Inter-American Commission has systematically received reports that reflect the seriousness of the indigenous women's human rights situation in the American continent. To respond to this situation, the Commission has considered different instruments such as hearings, thematic and national reports, press releases, working visits, and individual petitions, among others.

In the mentioned hearings, different States, indigenous women, civil society organizations, and experts have informed the Inter-American Commission about the significant situation of discrimination faced by indigenous women in the American continent in different fields such as health care, property ownership, education, employment, and political participation (Galafassi & Riffo 2018). They have also informed the Commission about the different forms of violence against indigenous women, identifying two important needs: on the one hand, an interconnected and culturally appropriate approach for the processing of violations of indigenous women's human rights; on the other hand, a response from all State sectors to the problems they deal.

The Commission's thematic and national reports have documented different violations of indigenous women's human rights in the Americas. Most of these reports are the result of working visits in loco in different States and include the conclusions of many meetings between indigenous women, state authorities, victims, and civil society organizations.

Moreover, the Commission has also considered, in reports on the merits, some individual petitions in which they report different violations of indigenous women's human rights - see, e.g., *inter alia*, the case of Ana, Beatriz, and Celia González Pérez v. Mexico³⁸

³⁷ See e.g., *inter alia*, IACtHR. González et al. (“Cotton field”) v. Mexico; Jessica Lenahan et al. (United States); Paloma Angélica Escobar Ledezma (Mexico); Claudina Velásquez Paiz (Guatemala); Gladys Carol Espinoza González (Peru); Ana Teresa Yarce (Colombia); Atala Riffo and daughters (Chile); Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica; Veliz Franco et al. (Guatemala); Fernández Ortega et al. (Mexico); Rosendo Cantú et al. v. México.

³⁸ IACHR, Report n° 52/01, Merits. Ana, Beatriz and Celia González Pérez (Mexico), April 4, 2001. A case regarding three Tzeltal native sisters who were detained and interrogated by a group of military personnel for two hours in order to force them to confess their membership in the *Zapatista* National Liberation Army (in Spanish *Ejército Zapatista de Liberación Nacional*). The sisters, one of them was, at the moment, a child, were separated from their mother, beaten, and raped several times. In its final decision about the merits of the case, the Commission considered sexual violence as torture and concluded that there was a violation of the sisters' rights to humane treatment, to dignity, and to privacy.

or the case of *Mary and Carrie Dann v. the United States*³⁹-. Considering the Commission's work as a "filter" where all petitions of the Inter-American system reach, we will focus on a thematic study of the most notable case law of the Inter-American Court regarding the recognition and protections of indigenous women's human rights in the continent.

4.1. The recognition of slaughtered indigenous women

In the case of *Plan de Sánchez Massacre v. Guatemala*⁴⁰, the Inter-American Court of Human Rights recognized the existence of a domestic armed conflict between 1962 and 1996 that entailed a significant loss of human life and material resources in Guatemala. Based on the safeguard of National Security, the Army identified the members of the Mayan people as "domestic enemies" as they deemed that they belonged to guerrilla forces, and they refused to participate in the Civil Defense Patrols or *Patrullas de Autodefensa Civil* (hereinafter 'PAC'). Consequently, these people were victims of massacres and scorched earth operations that involved complete destruction of their communities, houses, livestock, harvests, and other elements of survival, their culture, the use of their own cultural symbols, their social, economic, and political institutions, their cultural and religious values and practices.

Sunday, 18th July 1982 a commando of roughly sixty military and patrol members arrived at *Plan de Sánchez* that mistreated, raped and executed defenceless inhabitants of the village. Approximately 268 people, included children, were executed in the massacre. The Commission and the representatives of the victims requested the Court to describe the fact alleged by the victims as "genocide". The Court replied that in adjudicatory matters "it is only competent to find violations of the American Convention on Human Rights and of other instruments of the Inter-American system for the protection of human rights that enable it to do so". Nevertheless, the Court notes that "facts such as those stated which gravely affected the members of the Maya achí people in their identity and values and that took place within a pattern of massacres, constitute an aggravated impact that entails international responsibility of the State, which this Court will take into account when it decides on reparations"⁴¹.

³⁹ IACHR, Report n°75/02, Merits, *Mary and Carrie Dann (United States)*, December 27, 2002. This case addresses several rights of two Western Shoshone indigenous people sisters: the right to equality, a fair trial, and property of ancestral lands. The petitioners argued that the State has interfered with their use and occupation of their ancestral lands. They also contend that the State has appropriated the lands as federal property through an unfair procedure before the Indian Claims Commission. The Inter-American Commission has concluded that the State should resolve land claims. Moreover, it has also indicated that the Dann sisters did not have the opportunity to appeal to the Court in order to request the protection of their right to property under conditions of equality and considering the collective and individual nature of their claim. Both actions contravened the American Declaration of the Rights and Duties of Man.

⁴⁰ Inter American Court of Human Rights. Case of *Plan de Sánchez Massacre v. Guatemala*. Judgment of April 29, 2004.

⁴¹ *Ibid*, para. 51.

Another matter of similar nature is *Mapiripán Massacre v. Colombia*⁴² that stated that in July 1997, one hundred members of the *Autodefensas Unidas de Colombia* (AUC), led by members of the Army, surrounded and took control of the town, of communications, and of the public offices, and intimidated, tortured and murdered their inhabitants. Even though they filed appeals, state authorities did not conduct great research or penalize the perpetrators.

In this case, the Inter-American Court noted, as the European Court of Human Rights did too, that human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolutive interpretation is consistent with general rules of interpretation guaranteed in Article 29 of the American Convention, just as those set forth in the Vienna Convention on Treaty Law. In this sense, the obligation to respect the right to life of every person takes on special aspects in the case of children and women⁴³. Thus, it becomes an obligation to "prevent situations that might lead, by action or omission, to their encumbrance". Therefore, the Court deems that the State did not create the conditions or did not take the necessary actions so that boys and girls have and develop a decent life, but rather exposed them to a climate of violence and insecurity.

This doctrine is restated and developed in the case of the Yakye Axa⁴⁴ Indigenous Paraguayan Community, whose population is estimated at 300 individuals. At the end of the 19th century, great areas of lands of the Paraguayan Chaco were sold to British businessmen and the Anglican Church established several missions in the region. New settlers began to exploit livestock businesses where they offered a job to the indigenous community members. In early 1986, the members of the Yakye Axa Indigenous Community moved to another land due to their bad living conditions on the cattle ranches. Nevertheless, this did not improve their living conditions. Thus, in 1993, community members decided to begin procedures to claim the lands that they consider their traditional habitat. They filed several appeals, but they were not successful. Since 1996, some Yakye Axa Community members have settled in a side of a road. Between 28 and 57 families are estimated to live in this place. The rest of the community members dispersed among other villages. In this case, the Commission wonders whether Paraguay is responsible for the death of several members of the Yakye Axa Community due to causes that could have been avoided with

⁴² Inter American Court of Human Rights. Case of the "Mapiripán Massacre" v. Colombia. Judgment of September 15, 2005.

⁴³ In the line of thought of De Paz González, I. (2022). *Mujeres en el sistema interamericano. Sobrevivientes y constructoras de la jurisprudencia progresista*. México, Tirant lo Blanch, Colección Justicia Interamericana, *passim*. More transversally, this author has also worked on the issue in Cruz Ángeles, J. (2022b). "Las obligaciones estatales en materia de reconocimiento y protección de las mujeres indígenas, autóctonas o tribales en las Américas". In: M. A. Martín López (Coord.) *Desafíos, necesidades y oportunidades para el mundo rural. La llamada a la aplicación de los derechos de los campesinos y otras personas que trabajan en el ámbito rural*. Madrid, Spain: Dykinson, *passim*.

⁴⁴ Inter American Court of Human Rights. Case of the Yakye Axa Indigenous Community v. Paraguay. Judgment of June 17, 2005.

adequate food and medical care, and as a consequence of the lack of an appropriate and convenient response by the State to the Community's claim to its ancestral land. In this way, Inter-American Court found out the violation of the right to life, based on the fact that "the State did not provide the conditions or take the necessary measures so that women, children and elderly could have and develop a decent life", but rather exposed them to "a climate of violence and insecurity". The Court added that "it did not have sufficient evidence to establish the causes to these deaths".

In a more recent case (2012)⁴⁵, the Guatemalan army has been again accused of causing more than 500 deaths between 1962 and 1996. The massacres involved in this case were perpetrated on the 4th of March 1980 in Rio Negro ⁴⁶chapel, on the 13th of February 1982 in the village of Xococ⁴⁷, on the 13th of March 1982 on Cerro Pacoxom⁴⁸, on the 14th of May 1982 in Los Encuentros⁴⁹ and on the 14th of September 1982 in Agua Fría⁵⁰. People, who escaped from these massacres, took shelter in the mountains for a couple of years, deprived of their possessions, sleeping outdoors and constantly moving to escape from the soldiers and patrols that followed them. Moreover, Rio Negro Community members have several problems finding food, just as children and adults died of starvation due to crops destruction caused by the army and the patrols. Some women had to give birth in the mountain, and they could register them later under fake dates and birthplaces to protect them. When the Amnesty Law of 1983 came into force, some survivors of the massacres were resettled by the government in the Pacux colony. Their living conditions were very precarious, and lands were inadequate for subsistence farming. Moreover, this resettlement entailed the loss of the community's connection with their culture, natural resources, properties and Maya Achi language.

The Inter-American Court deems that States authorities should have opened a reliable, lawful and effective investigation *ex officio* and promptly of the massacre and not only of the violation of the right to life. Moreover, the Court confirms that the living conditions in Pacux colony have not allowed the inhabitants to restart their traditional economic activities and that they had to participate in economic activities that do not provide them with stable incomes. Consequently, this situation contributed to the disintegration of the social structure and their cultural and spiritual life. These bad living conditions and general abandonment cause a suffering that affects necessarily their mental and moral integrity. Therefore, the Court established the following reparations:

⁴⁵ Inter American Court of Human Rights. Case of the Río Negro Massacres v. Guatemala. Judgment of September 4, 2012.

⁴⁶ On March 4, 1980, seven Rio Negro community leaders were executed, another two leaders were also executed the same day.

⁴⁷ On February 13, 1982, approximately 70 persons of the Rio Negro community (men, women and children)

⁴⁸ On March 13, 1982, patrollers and soldiers dug a mass grave and proceeded to kill the Rio Negro people present. Their corpses were thrown into a mass grave. During the massacre, patrollers and soldiers chose seventeen Rio Negro community children who were forced to live with members of the Xococ community.

⁴⁹ In the massacre of May 14, at least 79 people were killed.

⁵⁰ On September 14, at least 92 people were killed.

(1) the sentence itself, (2) a reliable and effective investigation intended to judge and, eventually, penalize the perpetrators, (3) an effective search for the whereabouts of the victims forcibly disappeared, (4) publications of the sentence in Spanish and Maya Achi language, (5) acknowledgment of international responsibility, (6) infrastructure projects and essential services for Rio Negro community members, (7) design and implementation of a project to rescue the Maya Achi culture, (8) medical and psychological treatment to the victims and (9) compensations.

4.2. Enforced disappearance investigation

In several countries in the Americas, enforced disappearance of persons has been a state practice during periods of domestic armed conflicts, undertaken mainly by law enforcement agents. They arrested insurgency movements members or persons entailed to be prone to the insurgency. They held them, prisoners, underground without notifying any appropriate, independent, or impartial authority, tortured them physically or psychologically to obtain some information, or even caused their death.

We found early records related to enforced disappearances in cases such as, *inter alia*, Véliz Franco v. Guatemala⁵¹, Serrano-Cruz sisters⁵² v. El Salvador or Velásquez Rodríguez v. Honduras⁵³. Although, the most emblematic case is undoubtedly Tiu Tojín v. Guatemala⁵⁴ related to a report of an indigenous women's disappearance. This case concerns the international responsibility of the State for María Tiu Tojín and her daughter's enforced disappearances, just as the lack of investigation and sanction of the perpetrators. The facts of this case started on the 29th of August 1990 when officers of the Guatemalan army along with Civil Defence Patrols arrived at Santa Clara, municipality of Chajul, where they arrested 86 inhabitants. This community comprises a group of displaced families that sought refuge in the mountains as a resistance to the Guatemalan army's strategies against the displaced population during domestic armed conflict.

Among the detained people were Mrs. María Tiu Tojín, 27 years old, and her daughter Josefa, one month old, who belonged to the Maya ethnic group. María Tiu Tojín was a member of organizations that promoted the non-participation of the Civil Self-Defence Patrols during the domestic armed conflict. The 86 detainees were transferred to the military base in the Santa María Nebaj. In this place, María Tiu Tojín and her daughter were seen for the last time. Despite of the number of appeals filed requesting investigations and sanctions to the perpetrators, they have never been carried out.

⁵¹ Inter American Court of Human Rights. Case of María Isabel Véliz Franco v. Guatemala. Judgement of May 19, 2014.

⁵² Inter American Court of Human Rights. Case of Serrano-Cruz sisters v. El Salvador. Judgement of September 9, 2005.

⁵³ In this case, a student at the National Autonomous University (in Spanish 'Universidad Nacional Autónoma') disappeared on September 12, 1981 in a parking lot in downtown Tegucigalpa. He was kidnapped by several heavily armed men in civilian clothes and using a vehicle without license plates. Despite several complaints were filed, State authorities did not start the appropriate investigations.

⁵⁴ Inter American Court of Human Rights. Case of Tiu Tojín v. Guatemala. Judgment of November 26, 2008.

As it has been documented in other cases of similar nature⁵⁵, armed conflict creates a scenario propitious for exposing the population to a variety of violations. Moreover, the Guatemalan system of administration of justice proved to be ineffective in warranting law enforcement and protection of victims' and relatives' rights. Thus, the lack of investigation constitutes a determining factor in the systematic human rights violations.

From its first sentence in the case *Velásquez Rodríguez*, the Inter-American Court reaffirmed that the enforced disappearance constitutes an unlawful act of a permanent nature that violates multiple legal norms. In this sense, it results in arbitrary deprivation of liberty and puts the detainee's identity, security, and her or his life at risk. Thus, articles II and III of the Inter-American Convention on Forced disappearance of persons⁵⁶ enshrine this nature of the enforced disappearance. Considering the nature of the rights violated, the Inter-American Convention established that forced disappearance constitutes a serious violation of non-derogable human rights, a major abandonment of essential founding principles of the Inter-American system. Moreover, forced disappearance in the case of *Tiu Tojín* was part of a pattern of massive and systematic violations of human rights committed in a domestic armed conflict in detriment of some groups of the population in Guatemala. As such, this disappearance has particular consequences regarding to the obligation to guarantee the human rights protected under the American Convention of Human Rights⁵⁷.

⁵⁵ This Court has issued a judgment in six Guatemalan cases related to nine massacres committed during an armed conflict and perpetrated against these sections of the population by members of the Guatemalan Army. Namely, the Plan de Sanchez, Dos Erres, Rio Negro massacres, Residents of the Village of Chichupac and Neighbouring Communities, Municipality of Rabinal massacre, case of *Coc Max et al.* (*Xamán* massacre), and the village of Los Josefinos.

⁵⁶ The Inter-American Convention on Forced disappearance of persons. Article II. "For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees" Article III. "The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined. The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person."

⁵⁷ The Inter-American Court recognizes the international responsibility of States under the terms set forth in the paragraphs 12 to 23 of the Judgment and has determined that the State was responsible for violating the rights enshrined in the articles 4.1, 5.1 and 5.2; 7.1, 7.2, 7.4, 7.5 and 7.6; 8.1 and 25.1 of the Inter-American Court of Human Rights, related to article 1.1 of the same treaty and to article I of the Inter-American Convention on Forced Disappearance of Persons, detrimental to *María Tojín*.

4.3. Prevention of femicide

This casuistry is defined in the context of high-level violence against women and children and impunity by its perpetrators⁵⁸. In the case of *Véliz Franco et al. v. Guatemala*⁵⁹, the pattern of violence included the brutality against the victim(s), the signs of sexual abuse, the mutilation of the corpse, and the kidnappings before the murder, confirming the disproportionate cruelty against the victims⁶⁰. Maria Isabel Véliz Franco was fifteen years old at the time of her death. She lived with her family, and during school holidays, she worked as a warehouse clerk. After her disappearance, the victim's mother reported to the authorities that a warehouse co-worker claimed to have seen how they forced her daughter to climb into a vehicle. Nevertheless, any positive results were not found in the official investigations⁶¹.

The Inter-American Court indicated that the duty to guarantee encompassed all these legal, political, administrative, and cultural-related measures that promote the safeguard of human rights. Besides, these measures guarantee that possible violations would be considered an illegal act which, per se, could lead to sanctions for the perpetrators, just as the obligation to compensate their victims. The obligation to prevent is of means or behaviour, and its breach is not proven merely because of a violated right. Nevertheless, the Court pointed out that there are two key moments in which the duty of prevention should be analysed: before the alleged victim's disappearance and the investigation before the location of the corpse. Considering the first one, the Court deemed that the possible lack of prevention of disappearance does not entail per se the international responsibility of the State because, although the State knew or should know the increase of violent acts, above all against women and children, it has not been established that the State was aware of the real and prompt risk for the victim. Considering the second key moment, we should clarify whether, under the

⁵⁸ As an example of the context of violence suffered by indigenous women throughout the continent, see, inter alia, “Missing and Murdered Indigenous Women in British Columbia, Canada”. Report of the Inter-American Commission on Human Rights, December 31, 2014, available at: <https://www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf>

⁵⁹ Inter American Court of Human Rights. Case of *Veliz Franco v. Guatemala*. Judgment of May 19, 2014.

⁶⁰ In Guatemala, figures provided indicate that between 2000 and 2011, there was a gradual increase of violent deaths of women. Just between 2001 and 2004, 1.188 murders of women were registered and the increase in the growth rate of these murders was almost twice as high as that of the men murders. This pattern of violence was connected to a context of women discrimination in Guatemala. Moreover, this context was replicated in the investigation where authorities used to discredit and blame the victims for their lifestyle or clothes.

⁶¹ The victim's mother alleged that there was a discriminatory bias in the investigations. According to her statement, the criminal investigations experts in charge of the case nicknamed her daughter “La Loca”, referring to aspects of her clothes, her social life and her night life, and her religious beliefs. They also considered as a motive for her death the “possible infidelity in the case of a boyfriend”. Moreover, when her mother went to the Prosecutor's Office to know the progress made in the investigations, they told her that her daughter was killed because she was a prostitute and they laughed at the case.

particular circumstances of this case and its context, the State was aware of the existence of a real and prompt risk of aggression for María Isabel, and whether, consequently, there was an obligation of due diligence that entails exhaustive research. In particular, early and prompt action by police, prosecution, and legal authorities are essentials to provide the appropriate and necessary measures to determine the victim's whereabouts. Moreover, appropriate procedures for denunciations are necessities as well as effective investigations in the early hours. Authorities should presume that the missing person is alive until they end the uncertainty about its disappearance.

This doctrine is (re)affirmed and developed in the case *González et al. v. Mexico* - also known as the case "Campo Algodonero" - refers to the State's international responsibility due to the lack of diligence in the investigations related to the disappearance and death of Claude Ivette González⁶², Esmeralda Monreal⁶³ and Laura Bernice Ramos Monárrez⁶⁴. Their corpses showed signs of sexual violence. It was established that the three women were deprived of liberty before their death. Despite the actions brought by their relatives, there was no investigation or sanction for the perpetrators.

Considering the obligation of prevention, it is alleged that the States must adopt comprehensive measures to comply with due diligence in case of violence against women. In particular, they should have a proper judicial framework of protection, its effective implementation, a prevention policy, and practices that allow the effective action to reports. The prevention strategy must be comprehensive to prevent risk factors and strengthen institutions to provide an effective response to cases of violence against women. Moreover, States should adopt measures of prevention in specific cases in which it is evident that some women and girls could be violence victims. In addition, as we have studied in previous sections, to all these obligations set forth in the American Convention, in cases of violence against women, States have the obligation set forth in the Convention of Belém do Pará.

4.4. Towards the protection of indigenous women's honour and dignity

Article 11 of the American Convention on Human Rights⁶⁵ recognizes that "everyone has the right to have his/her honor respected and his/her dignity" and prohibits "unlawful attacks on his/her honor or reputation". Moreover, this precept suggests a

⁶² Claudia Ivette González, worker at a "maquiladora" industry, was 20 years old when she disappeared on October 10, 2001

⁶³ Esmeralda Herrera Monreal, who worked as a maid, was 15 years old when she disappeared on October 29, 2001.

⁶⁴ Laura Bernice Ramos Monárrez, a seventeen-years-old student, disappeared on September 22, 2001.

⁶⁵ American Convention on Human Rights (Pact of San Jose). Article 11. Right to Privacy. "1. Everyone has the right to have his/her honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his/her private life, his/her family, his/her home, or his/her correspondence, or of unlawful attacks on his/her honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks." (author's translation to integrate an inclusive language)

broader content, "non-susceptible to exhaustive definitions"⁶⁶, related to private life that can encompass issues as private as the protection of residence, communications, or even sexual orientation and gender identity. Based on this premise, in a recent court decision, the IACtHR stated that privacy:

"Include, among other dimensions, the freedom to make decisions related to various areas of person's life, a peaceful personal space, the option of reserving certain aspects of private life, and control of the dissemination of personal information to the public".

The court doctrine concerning the right to private and family life is still at an early stage if we compare it to the development of jurisprudence in other areas of law within the framework of advisory opinions and contentious cases (Cruz Ángeles 2018). Nevertheless, we observe systematically the development of its content and its scope from its decision in the case of the Ituango Massacres⁶⁷. Since then, several cases, that include the violation of this right, have arrived at the Court. Among them, we can emphasize the case of Rosendo Cantú et al. v. Mexico⁶⁸, considering the subject of our survey. This case describes how a significant percentage of the population belongs to indigenous communities that preserve their traditions and cultural identity and live in marginalized municipalities with a high level of poverty. Valentina Rosendo Cantú is an indigenous woman that belongs to Méphaa indigenous community in the State of Guerrero. In 2002 when she was 17 years old, she was in a stream near her home. When she was about to bathe, eight soldiers, accompanied by a detained civilian, approached her and surrounded her. Two of them questioned her while another one aimed the gun at her. He hit her in the stomach, causing her to fall to the ground. Then, they took off her skirt and her underwear, and one of them sexually penetrated her. When he finished, another soldier, who questioned her, proceeded to do the same. Both, Valentina Rosendo Cantú and her husband, filed a series of appeals, requesting an investigation to identify and penalize the perpetrators. Nevertheless, the investigation was submitted to the military jurisdiction, and they closed the case. The Inter-American Court considered that the rape of Mrs. Rosendo Cantú violated values and essential aspects of her private life, representing an intrusion in her sexual life⁶⁹.

⁶⁶ Inter American Court of Human Rights. Case of Fernández Ortega et al. v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 30, 2010. Series C No. 215, para. 129. and Inter American Court of Human Rights. Case of Rosendo Cantú et al. v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216, para. 119. As a result of the adaptation of the European Convention on Human Rights as regards Pact of San Jose -or the American Convention on Human Rights-, it seems curious how article 11 is titled "Protección de la Honra y de la Dignidad" in the Spanish version of the American Convention while the English version kept the explicit reference in its title: "Right to Privacy".

⁶⁷ Inter American Court of Human Rights. Case of the Ituango Massacres v. Colombia. Judgment of July 1, 2006.

⁶⁸ Inter American Court of Human Rights. Case of Rosendo Cantú et al. v. Mexico. Judgment of August 31, 2010.

⁶⁹ *Ibid*, Considerations of Court, para. 7.

This doctrine is confirmed in the case of *Inés Fernández Ortega et al. v. Mexico*⁷⁰. She also resided at the state of Guerrero, and, at the time of the facts, was twenty-five years old. In 2002, Mrs. Fernández Ortega was at home with her four children, when a group of approximately eleven soldiers, wearing uniforms and armed, came into her house. One of them grasped her hands and, pointing her with his gun, told her to lie on the ground. Once she was on the ground, another soldier raped her while the other two observed the scene. She filed a series of appeals to investigate and penalize the perpetrators. State authorities ignored her complaints, and, finally, her case was submitted to the Inter-American Court. The Court established that the residence and the right to private and family life are intrinsically connected since the residence becomes a space where private and family life can evolve freely. Regarding the rape, the Court reiterated that article 11 (related to "protection of honour and dignity") deems the protection of indigenous women against sexual assaults and rapes, annulling her basic bodily functions and her ability to decide freely (Rodríguez 2008).

The settled jurisprudence of the Court on sexual assaults considered the absence of people, beyond the victim and the aggressor(s), at the moment of the aggression, among other characteristics. Thus, considering the nature of this type of violence, graphic or documentary evidence is very difficult to find. That's why, victim' statement constitutes essential evidence for the case. Therefore, the lack of medical evidence cannot diminish the veracity of the alleged victim' statement. Moreover, in these cases, it is vital that obstetrician–gynaecologists reports should be done in the first 72 hours.

5. CONCLUSIONS

Historically, indigenous women have suffered double discrimination: *ad intra* and *ad extra*. Initially, her own community limited her responsibilities to tasks related to motherhood and home care. In this area, it is important to highlight how we obviate their importance as a vehicle of cultural identity. Envisage, for instance, a native craftsmanship practice, the inheritance process of culinary recipes, and the learning process of an endangered language or dialect. That is why we need to deconstruct the indigenous woman's identity, namely: analysis and acknowledgment of the native woman's creation and transmission of cultural identity: contribution to the creation of a new narrative around her figure, and promotion of her inclusion in spaces for politic participation beyond the domestic sphere.

Starting from the recognition of their value in their communities, the American States must integrate them and hear their voices in the processes of self-determination, as well as recognition of the economic, social, and cultural rights of their communities. To do this, State authorities should run pre-informed consultation, culturally appropriate, and in

⁷⁰ Inter American Court of Human Rights. Case of Fernández Ortega et al. v. Mexico. Judgment of August 30, 2010.

good faith with indigenous people authorities to reach agreements, including indigenous women and girls in these procedures. Thus, we can take into account their own demands and make visible their real needs.

Indigenous women's recognition and protection should be considered a cornerstone of state politics on equality and non-discrimination as a response to this double intersectional discrimination against them. After all, we cannot forget that indigenous women are not the only ones who experienced structural discrimination related to possible state authorities' abuses, but also the community can also experience this abuse.

The Inter-American Commission and Court have already addressed the issue of discrimination against indigenous women, especially when there were external attacks or interference. If we review the case law, we can observe that a procedure of victims' recognition and protection is in the earliest stage. There is an essential protection of their lives and physical integrities against "massacres" or coordinated military attacks against an indigenous community. Nevertheless, this protection can also be extended into more specific contexts, such as the forced disappearance of persons. Therefore, on the one hand, we need to define the concept and typology of "femicide"; on the other hand, we defend the establishment of effective procedures to prevent, research the facts and compensate the victims against possible attacks.

However, beyond abuses or external interference, what is it about indigenous women's discrimination in their community, people, or tribe that no one is addressing? On this matter, we should emphasize that the complexity of the cultural construction of gender in indigenous people is still an unexplored issue in scientific literature. In general, studies related to gender relations and the unequal situation of women kept them hidden. Consequently, the available information is inadequate to plan and implement well-founded public politics. Although women's structural subordination against men exists in almost all societies (including indigenous people organized on kinship), distribution of power and female and men roles are different according to the combination of descent, marriage, and residence rules. These rules structure social relations and determine domestic units' rights of representation, heritage, access to productive assets, health and reproduction issues, education, and migration, among others.

Thus, we should go beyond the indigenous women's concept of "victim". Therefore, state authorities and indigenous authorities must coordinate and support a process of empowerment and conquest of public spaces. As we achieve this objective, the (new) indigenous woman's legal status will demand the recognition and protection of several civil and political rights. Among them, we should highlight the absence or the lack of a deeper jurisprudential development regarding the protection of their right to honour and dignity -apart from possible episodes of violence and sexual assault- or, in other words, the development of the recognition and protection of their private and family life. Accordingly, indigenous women will remain part of their community, and, as women, they must start taking their place as effective members of their societies.

6. REFERENCES

- BRYSK, A. (2000). *From tribal village to global village: Indian Rights and International relation in Latin America*. California: Stanford University Press, *passim*.
- CHILISA, B. (2002). *Indigenous research methodologies*. California: Sage, *passim*.
- CRUZ ÁNGELES, J. (2018). *Derechos humanos y nuevos modelos de familia. Estudio en el marco de los sistemas europeo e interamericano de protección de derechos humanos*. Navarra, Spain: Thomson Reuters Aranzadi, pp. 153-270.
- CRUZ ÁNGELES, J. (2022a). “La naturaleza jurídica de las fuentes de agua potable en comunidades indígenas de las Américas: ¿derecho fundamental o bien susceptible de apropiación, explotación y comercialización?” in *Revista Electrónica Iberoamericana*, Vol. 16, n°. 1, *passim*. <https://doi.org/10.20318/reib.2022.7018>
- CRUZ ÁNGELES, J. (2022b). “Las obligaciones estatales en materia de reconocimiento y protección de las mujeres indígenas, autóctonas o tribales en las Américas”. In: M. A. Martín López (Ed.) *Desafíos, necesidades y oportunidades para el mundo rural. La llamada a la aplicación de los derechos de los campesinos y otras personas que trabajan en el ámbito rural*. Madrid, Spain: Dykinson, *passim*.
- CRUZ ZÚÑIGA, P. (2021). “Derechos humanos, globalización y los procesos de lucha y resistencia de las mujeres indígenas en América Latina”, in *Revista Internacional de Pensamiento Crítico*, 1ª época, vol. 16, pp. 41-64. <https://doi.org/10.46661/revintpensampolit.6319>
- CUNNINGHAM, M. (2002). *Mujeres Indígenas en Derecho Internacional*. Conference submitted in the Latin American Studies Association International Conferences (LASA), Toronto, *passim*.
- DE PAZ GONZÁLEZ, I. (2022). *Mujeres en el sistema interamericano. Sobrevivientes y constructoras de la jurisprudencia progresista*. México, Tirant lo Blanch, Colección Justicia Interamericana, *passim*.
- DE PAZ GONZÁLEZ, I. (2018). *The Social Rights Jurisprudence in the Inter-American Court of Human Rights. Shadow and Light in International Human Rights*. México, Elgar Studies in Human Rights, pp. 1-35. <https://doi.org/10.4337/9781788113045>
- DIETZ, G., & MATEOS, L. (2015). “Entre culturas, entre saberes, entre poderes: la etnografía reflexiva en el acompañamiento de procesos de interculturalidad educativa”, in X. Leyva, J. Alonso, A. Hernández, A. Escobar, A. Köhler, A. Cumes... W. Mignolo (Eds.), *Prácticas otras de conocimiento(s). Entre crisis y guerras* (Volume III, pp. 281-313). Chiapas, México: Retos. <https://doi.org/10.2307/j.ctvn5tzv7.14>
- FERNÁNDEZ MÍGUEZ, S. & FAUNDES PEÑAFIEL, J. J. (2019). “Emergencia de las mujeres indígenas en América Latina. Debates sobre género, etnicidad e identidad cultural”, in *Revista Chilena de Derecho y Ciencia Política*, vol. 10, n°. 2, pp. 53-96. <https://doi.org/10.7770/rchdcp-V10N2-art2051>

- FIGUEROA ROMERO, D. & BURGUETE CAL y MAYOR, A. (2017). “Etnizando metodologías de investigación social: formación para el fortalecimiento del liderazgo de las mujeres indígenas”, in *Revista de Investigación Educativa*, n°. 25, pp. 5-33. <https://doi.org/10.25009/cpue.v0i25.2533>
- GALAFASSI, G. y RIFFO, L. (2018). *Del sueño de Cristóbal Colón al hoy llamado «extractivismo». Peripecias y avatares de un largo y continuo proceso de expropiación para la acumulación: una necesaria discusión crítica*, Theomai, (38), pp. 232-245.
- GARGALLO, F. (2013). *Feminismos desde Abya Yala. Ideas y proposiciones de las mujeres de 607 pueblos en nuestra América*. Ciudad de México: Editorial Corte y Confección, p. 26.
- MARTÍ I PUIG, S. (2004). “Sobre la emergencia y el impacto de los movimientos indígenas en las arenas políticas de América Latina. Algunas claves interpretativas desde lo local y lo global”. In J. M. Sanahuja & S. Martí i Puig (Coords.), *Etnicidad, autonomía y gobernabilidad en América Latina* (pp. 167-196). Spain: Universidad de Salamanca.
- NIEZEN, R. (2009). *The Rediscovered Self. Indigenous Identity and Cultural Justice*. Montreal: McGill-Queen’s University Press, *passim*.
- PALLARES, A. (2007). “Contesting Membership: Citizenship, Pluriculturalism (s), and the Contemporary Indigenous Movement”. En A. K. Clark & M. Becker (Eds.), *High-land Indians and the State in Modern Ecuador* (pp. 139 -154). Pittsburgh: University of Pittsburgh Press. <https://doi.org/10.2307/j.ctt5vkvf9b.14>
- PAREDES PEÑAFIEL, A.P. (2020). “A habilidade das mulheres indígenas de América Latina de transitar em uma pluralidade de mundos” in *Mediações – Revista de Ciências Sociais*, 25(3), pp. 801-805.
- PUELO, A.H. (2019). *Claves ecofeministas para rebeldes que aman a la Tierra y a los animales*, Plaza y Valdés, Madrid.
- RODRÍGUEZ, J. (2008). *Reproducción adolescente y desigualdades en América Latina y el Caribe: un llamado a la reflexión y a la acción*, Madrid, ECLAC and OIJ, *passim*.
- SERRANO ROJAS, E. P. (2019). “La relectura de la historia, un arma de lucha de las mujeres indígenas” in *Revista de la Facultad de Derecho y Ciencias Políticas – UNSAAC*, vol. 4, n°. 11, pp. 197-204. <https://doi.org/10.51343/rfdcp.v4i11.147>
- STAVENHAGEN, R. (2006). “Los derechos de los pueblos indígenas: esperanzas, logros y reclamos”, in M. Berraondo (Coord.), *Pueblos indígenas y derechos humanos*, Bilbao, Universidad de Deusto, pp. 21-28.

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ANNEX I. PERCENTAGE OF INDIGENOUS CITIZENS OVER TOTAL POPULATION -BY COUNTRY IN AMERICA- (2021)



Source: Designed by PhD. Javier Serrano Lara, member of the Department of Geography at Universitat de València (Spain).