

SYMPOSIUM ON THE AMERICAN CONVENTION ON HUMAN RIGHTS AND ITS NEW
INTERLOCUTORS

THE “FORMALLY FEMINIST STATE”: A POTENTIAL NEW PLAYER IN
THE INTER-AMERICAN HUMAN RIGHTS SYSTEM?

*Paulina García-Del Moral**

A decade ago, the Inter-American Court of Human Rights issued a landmark judgment in the case of *González and Others (“Cotton Field”) v. Mexico*, which addressed the abduction and subsequent sexual murder of three young women in the industrial border city of Ciudad Juárez—a place known for systematic gender violence and impunity.¹ For the victims’ next of kin and the feminist and human rights activists involved in the litigation, the murders constituted *feminicidios* (femicides).² The resulting judgment has been celebrated not only for developing new standards for women’s human rights internationally, but also for its domestic impact in the form of innovative feminist laws and policies in Mexico and other Latin American countries.³ With a focus on *Cotton Field’s* impact on Mexico, this essay explores the potential rise of the “formally feminist state”—a state that adopts domestic feminist legislation and policies but then resists their implementation—as a new player on the stage of the inter-American human rights system (IAS). Drawing on insights from American sociolegal analyses on judicial deference to the presence of policies and institutional mechanisms as indicators of compliance with antidiscrimination laws, I suggest that this new player may create a different set of challenges for courts in assessing states’ lack of compliance with norms on women’s human rights.

Cotton Field: New Standards for Women’s Rights

The significance of the *Cotton Field* judgment for setting new standards for women’s human rights rests primarily on the Inter-American Court’s adoption of a gender perspective to broaden notions of state responsibility for

* *Department of Sociology & Anthropology, University of Guelph.*

¹ *González and Others (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

² See, e.g., JULIA MONÁRREZ FRAGOSO, *TRAMA DE UNA INJUSTICIA: FEMINICIDIO SEXUAL SISTÉMICO EN CIUDAD JUÁREZ* (2013); Paulina García-Del Moral, *Feminicidio: TWAIL in Action*, 110 AJIL UNBOUND 31 (2016); Marcela Lagarde, *Preface: Feminist Keys for Understanding Femicide: Theoretical, Political, and Legal Construction*, in *TERRORIZING WOMEN: FEMINICIDE IN THE AMERICAS* xi-xxv (Rosa-Linda Fregoso & Cynthia Bejarano eds., 2010).

³ See, e.g., Caroline Bettinger-López, *The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case*, 15 CUNY L. REV. 315 (2012); Ruth Rubio-Marin & Clara Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment*, 33 HUMAN RIGHTS Q. 1062 (2010); PATRICIA OLAMENDI, *FEMINICIDIO EN MÉXICO* (2017); Paulina García-Del Moral & Pamela Neumann, *The Making and Unmaking of Femicide/Femicide Laws in Mexico and Nicaragua*, 53 L. & SOC’Y REV. 452 (2019).

violence against women. First, the Court drew on understandings of violence against women as a manifestation of unequal power relations between women and men, and as an expression of gender discrimination, which are prohibited by the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Belém Do Pará Convention), as well as by other United Nations instruments on women's rights. Armed with these understandings, the Court then linked the well-documented context of systematic gender violence that characterized Ciudad Juárez to the failure of the Mexican state to act with due diligence to prevent, effectively investigate, and punish acts of violence against women. This principle obligates states to act, even if the perpetrators are private actors. Thus, the Court simultaneously recognized the justiciability of the Belém Do Pará Convention (which the Mexican state had contested) and found, for the first time, that the state's failure amounted to gender discrimination. As a result, the Court found that the Mexican state had violated its obligation to act with due diligence under the Belém Do Pará Convention and the victims' rights to life, personal integrity, and personal liberty under the American Convention of Human Rights (ACHR). The reparations ordered by the Court also incorporated a gender perspective to strengthen their potential for transforming Mexican institutions and society more generally as a means of combating gender violence.⁴ Some of the guarantees of non-repetition ordered by the Court stipulated that Mexico standardize its investigative protocols with international standards of due diligence incorporating a gender perspective, and that Mexico provide training to public officials on gender and human rights.

Far-Reaching Yet Contested: Cotton Field's Impact on Mexico

In a number of ways, the impact of *Cotton Field* on Mexico's legal and criminal justice systems at the federal and state levels has been far-reaching. *Feminicidio* became a federal crime in June 2012 when the Mexican government incorporated it into Article 325 of the Federal Criminal Code, which defined the term as the deprivation of a woman of her life for "gender reasons" under any of a number of specified circumstances.⁵ By 2017, all thirty-two Mexican states had also amended their criminal codes to introduce *feminicidio* as a crime. The criminalization of *feminicidio* complemented the 2007 *Ley General de Acceso de las Mujeres a una Vida Libre de Violencia* (General Law of Women's Access to a Life Free of Violence, or LGAMVLV), which recognized "feminicidal violence" as one modality of gender violence.⁶ To combat and eradicate this form of violence, the law mandated the creation of various national organizations, systems, programs, and policies, including the *alerta de violencia de género* (gender violence alert), which entails emergency governmental actions aimed at guaranteeing women's safety and security, in

⁴ Rubio-Marín & Sandoval, *supra* note 3.

⁵ According to Chapter V, Article 325 of the [Federal Criminal Code](#), gender reasons exist when: (1) the victim presents signs of sexual violence of any kind; (2) the victim was subjected to shameful or degrading injuries or mutilations before or after being deprived of life, including acts of necrophilia; (3) there is a history of or information about any kind of violence against the victim in the family, work, or school environment by the active subject; (4) there is a sentimental, affective, or trusting relationship between the active subject and the victim; (5) there were threats linked to the criminal act, harassment, or injuries by the active subject against the victim; (6) the victim was left without means of communicating with anyone else (*incomunicada*), for however long a time period prior to the deprivation of life; or (7) the victim's body was exposed or exhibited in a public place. This crime carries a prison sentence of forty to sixty years, in addition to monetary sanctions. As a means to combat impunity, the statute also contains provisions to punish public servants who hinder the administration of justice, "whether maliciously or negligently." Potential punishments include a prison term of three to eight years, fines, and removal or dismissal from office.

⁶ [LGAMVLV](#), Chapter V, Art. 21 defines feminicidal violence as "the extreme form of gender violence against women as an outcome of the violation of women's human rights in the public and private spheres involving the combination of misogynous conducts that may lead to societal and state impunity and result in the homicide or other violent deaths of women."

addition to reparations in accordance with international human rights law.⁷ Another example of the impact of *Cotton Field* is the 2015 decision of the National Supreme Court in the case of Mariana Lima Buendía, which declared that the investigation into all violent deaths of women must treat them as *feminicidio*, adopt a gender perspective, and honor the highest international standards of due diligence.⁸

However, the impact of *Cotton Field* has been contested in practice through ongoing resistance to the investigation and prosecution of the murder of women as *feminicidio*. According to the *Observatorio Ciudadano Nacional del Feminicidio* (National Citizen Observatory of *Feminicidio* or OCNF), as few as thirty percent of the 6,297 murders of women committed between 2014 and 2017 in twenty-five Mexican states were investigated as *feminicidio*.⁹ Of these, only a few cases were prosecuted successfully.¹⁰ In OCNF's view, some of the major challenges for the prosecution of *feminicidio* across Mexico stem from the lack of harmonization between federal and state laws. This is especially true when state criminal codes define *feminicidio* in vague terms, or when the standards of proof are almost impossible to meet. Yet the more serious obstacle is pervasive resistance among both prosecutors and judges to classifying the violent deaths of women as *feminicidio*, as well as to implementing protocols for the investigation of such cases from a gender perspective, pursuant to *Cotton Field*.¹¹ This resistance has occurred despite the proliferation of programs to train public officials in the application of a gender perspective and international norms on women's human rights.¹²

The murders of Mariana Lima Buendía and Lesvy Berlín Rivera Osorio, which were treated as suicides, illustrate the obstacle of prosecutorial resistance.¹³ Mariana Lima Buendía was murdered in her home in 2010 in the State of Mexico by her abusive partner, a police officer. Although her body bore traces of violence that were inconsistent with suicide, forensic analysts and later prosecutors refused to acknowledge these facts, along with other evidence of sexual, physical, and psychological abuse in the relationship.¹⁴ At the behest of Irinea Buendía, the victim's mother, the OCNF challenged the prosecutor's suicide ruling through litigation before the National Supreme Court, in a case that sought “to cement the legacy of *Cotton Field*.”¹⁵ Despite the judgment, which mandated the adoption of a gender perspective and the adherence to international standards of due diligence in the investigation of all violent deaths of women as *feminicidio*, the subsequent investigation of Lesvy Berlín Rivera Osorio's death in 2017 at the hands of her abusive boyfriend in Mexico City did not comply with the Court's specifications. Further, in order to legitimate its flawed investigation, the Office of the Public Prosecutor of Mexico City sought to actively discredit Lesvy by tweeting that she had substance abuse and mental health problems and had dropped out of university.¹⁶ In the last year, as a result of litigation by the OCNF and growing pressure from feminist activists, the cases against the killers of Mariana and Lesvy were reopened. Both women's partners were found guilty of *feminicidio*. More often than not, however, *feminicidio* cases remain in impunity, making the cases of Mariana and Lesvy exceptions.

⁷ *Id.*, art. 26.

⁸ [Amparo en Revisión 554/2013](#), Suprema Corte de Justicia de la Nación (2015).

⁹ OCNF, [Informe Implementación del Tipo Penal de Feminicidio en México: Desafíos para Acreditar las Razones de Género 2014–2017](#) (2018), at 35.

¹⁰ *Id.*

¹¹ *Id.* at 15.

¹² Interview with Pablo Navarrete, Juridical Coordinator of the National Women's Institute (INMUJERES) (Mexico City, March 2014).

¹³ Much recent feminist activism has focused on both *feminicidios* disguised as suicides and actual suicides resulting from sustained gender discrimination or abuse. See, e.g., Patricia Sulbarán Lovera, [Violencia Contra la Mujer: Qué es el Suicidio Feminicida y Por Qué El Salvador es el Único País de América Latina que lo Condena](#), BBC MUNDO (Nov. 20, 2018).

¹⁴ OCNF, *supra* note 9.

¹⁵ Skype Interview with Rodolfo Domínguez Márquez, OCNF litigator (April 2014).

¹⁶ OCNF, *supra* note 9, at 180.

Judicial resistance to a gender perspective is another significant obstacle. In some cases, this resistance involves the application of laws that are “adjacent” to the laws passed to address gender violence.¹⁷ These adjacent laws—such as laws on family, divorce, employment, or property rights—govern other aspects of women’s lives and very much reflect structural gendered inequalities of the context in which they were written.¹⁸ Judges may choose to apply such laws in ways that undermine laws on gender violence. For example, judges may reject enforcing protection orders that involve removing a violent husband from the household on the ground that doing so would violate men’s property rights.¹⁹ At other times, judges may produce “perverse interpretations” of laws on gender violence—that is, interpretations that go against the very essence of these laws.²⁰ A telling example involves the survivor of a *feminicidio* attempt, Keren Abuc Cerón Cuapantécatl.²¹ The judge in her case dismissed the classification of the near-fatal multiple stab wounds that her long-time abusive partner had inflicted upon her as an aggravated *feminicidio* attempt and then reclassified the crime as an aggravated homicide attempt instead. Keren successfully challenged this reclassification in a federal court, which found that the judge had not applied a gender perspective.²² Keren’s history of abuse, as well as the violence perpetrated against her, all fit the penal type of *feminicidio*.

Beyond the criminal justice system, administrative agencies are not helping to combat feminicidal violence. According to the OCNF, the National Commission to Prevent and Eradicate Violence Against Women has more often than not worked against women’s interests and rights due to its reluctance to issue gender violence alerts when feminist civil society organizations have requested them amidst escalating rates of *feminicidio*.²³ The OCNF has thus argued that the Commission is engaged in a “simulation” of support for women’s rights.²⁴

The Rise of the “Formally Feminist State”?

Given the pervasive institutional resistance to the legacy of *Cotton Field* discussed above, it may seem counter-intuitive to suggest that a “formally feminist state” may be a potential new player on the stage of the IAS. Indeed, I am not arguing that the Mexican state should be viewed as feminist by virtue of its adoption of feminist laws and policies. Rather, the remainder of this essay explores the potential implications for the Inter-American Court when the Mexican state emphasizes the simple existence of feminist laws and policies to argue that it is in compliance with new standards on women’s human rights. Analysis of the Inter-American Court’s third Monitoring Decision on *Cotton Field* from 2013 lends itself well to this exercise.²⁵

In the third Monitoring Decision, the Inter-American Court evaluated Mexico’s compliance with the *Cotton Field* judgment. The Court examined Mexico’s response to *Cotton Field*’s order to follow international standards pertaining to protocols, judicial investigation criteria, expert services, and delivery of justice for all crimes concerning the disappearance, sexual abuse, or murder of women. The Court also evaluated Mexico’s compliance with orders to implement training programs and courses for public officials in Chihuahua (and nationally) on (1) human rights

¹⁷ Cecilia Menjívar & Shannon Drysdale Walsh, *Subverting Justice: Socio-Legal Determinants of Impunity for Violence against Women in Guatemala*, 5 LAWS 31 (2016).

¹⁸ *Id.* at [7].

¹⁹ *Id.* at [17].

²⁰ Interview with Pablo Navarrete, *supra* note 12.

²¹ OCNF, *supra* note 9, at 201.

²² *Amparo Directo 114/2016*, Sexto Tribunal Colegiado del Primer Circuito, sentence of January 18, 2018.

²³ OCNF, *supra* note 9.

²⁴ Hazel Zamora Mendieta, *Pide Observatorio Ciudadano Terminar Simulación en CONAVIM*, MILENIO (Mar. 17, 2019).

²⁵ *González and Others (“Campo Algodonero”) v. Mexico*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. May 21, 2013).

and gender; (2) due diligence in conducting preliminary investigations and judicial proceedings in relation to the discrimination, abuse, and murder of women based on their gender; and (3) the elimination of stereotypes about women’s role in society.²⁶ The Court noted that the state had taken a number of actions at the federal, state, and municipal levels that satisfied these orders, although it remarked that both the Inter-American Commission and the plaintiffs’ representatives had previously pointed to the actions’ ineffectiveness.²⁷

The scholarship on legal endogeneity may offer some insights into the Inter-American Court’s Monitoring Decision. This scholarship rejects understandings of law as exogenous to the fields it regulates, arguing instead that its content and meaning are constructed through the processes that take place within those fields.²⁸ From this perspective, judicial interpretations of compliance with anti-discrimination laws may be influenced by ideas, policies, or practices that have been institutionalized in organizations.²⁹ Put differently, judges may defer to organizational policies that serve as symbolic indicators of compliance, even if they are ineffective or resisted in practice. To a certain extent, such judicial deference seems to be at play in the Inter-American Court’s 2013 Monitoring Decision, since the Court inferred compliance with *Cotton Field* from the presence of feminist policies whose implementation, as I show above, has been resisted by judges and prosecutors. As states adopt more feminist laws and policies—largely as a result of feminist pressure within and outside of the state—they may be able to claim a “feminist” position. A potential implication is that the Court may thus infer states’ compliance with the Belém Do Pará Convention or the ACHR as it adjudicates future cases of *feminicidio* or gender violence. More systematic research should be done to investigate this claim and other potential future implications for the IAS.

Conclusion

Since *Cotton Field*, various other cases of *feminicidio* and gender violence have been litigated before the Inter-American Court, indicating that the IAS will probably continue to be a salient platform for feminist activism demanding state accountability for gender violence in Latin America.³⁰ The Inter-American Court, however, will likely be facing a defendant state that can lay claim to institutionalized feminist victories in the form of laws, policies, or institutional structures and mechanisms, even if the state resists or undermines them in practice. Facing such a “formally feminist state” will likely require that the Court be increasingly aware of both overt and subtler patterns of state resistance when it adjudicates these cases and place the onus on the state to provide proof of the effectiveness of its implementation of feminist laws and policies in order to avoid engaging in undue judicial deference.

²⁶ *González and Others (“Cotton Field”) v. Mexico*, *supra* note 1, at paras. 502 & 521.

²⁷ These critiques were expressed by the Commission and the plaintiffs in reports for the Inter-American Court’s two previous monitoring decisions on the *Cotton Field* judgment. However, the Commission and the plaintiffs failed to provide the Court with new observations in 2013.

²⁸ *See, e.g.*, Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Structures*, 117 *AM. J. SOC.* 888 (2011).

²⁹ *Id.*

³⁰ *See, e.g.*, *Veliz Franco and Others v. Guatemala*, Preliminary Objection, Merits, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 277 (May 19, 2014); *Velásquez Paiz v. Guatemala*, Preliminary Objection, Merits, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 307 (Nov. 19, 2015).