AMICUS CURIAE BRIEF PRESENTED TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS

BY CIARA O'CONNELL, UNIVERSITY OF SUSSEX; DIANA GUARNIZO-PERALTA AND CESAR RODRIGUEZ-GARAVITO, DEJUSTICIA

IN THE CASE OF
IV V. BOLIVIA

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CONTACT INFORMATION:

CIARA O'CONNELL
UNIVERSITY OF SUSSEX
BRIGHTON, UNITED KINGDOM
C.O-CONNELL@SUSSEX.AC.UK
+1 (862) 596-8427

DIANA GUARNIZO-PERALTA
DEJUSTICIA
BOGOTÁ, COLOMBIA
DGUARNIZO@DEJUSTICIA.ORG
+57 (1) 6083605

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I. Introduction

1. These written comments are respectfully submitted to the Inter-American Court of Human Rights ("Inter-American Court") in support of the petition made by "IV" against the State of Bolivia before the Inter-Commission on Human Rights ("Inter-American Commission") on March 7th, 2007.

2. Ciara O'Connell is a member of the Inter-American Human Rights Network[1] and the Centre for Cultures of Reproduction, Technologies and Health.[2] She is also a PhD Candidate in the School of Law at the University of Sussex in the United Kingdom.[3] Her research is on gender-based reparations and reproductive rights in the Inter-American Human Rights System. Diana Guarnizo-Peralta[4] is a researcher with Dejusticia and currently leads the organization's work on economic, social and cultural rights. Cesar Rodriguez Garavito[5] is the Director and legal representer of Dejusticia. Dejusticia[6] works to strengthen the rule of law and promote human rights in Colombia and across the Global South. It is an NGO think/do tank that produces rigorous research that can contribute to action for social change. Dejusticia also carries out direct advocacy through campaigns, litigation, education and capacity-building.

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[1] Inter-American Human Rights Network, University College London, http://interamericanhumanrights.org/.
[2] Centre for Cultures of Reproduction, Technologies and Health, http://www.sussex.ac.uk/corth/.
[3] Ciara O'Connell, University of Sussex: http://www.sussex.ac.uk/profiles/303008.
[4] Diana Guarnizo-Peralta, Dejusticia, http://www.dejusticia.org/#!/investigador/186
[5] Cesar Rodriguez-Garavito, Dejusticia, http://www.dejusticia.org/#!/investigador/8
[6] Dejusticia, http://www.dejusticia.org/.

3. This case concerns the sterilization of the petitioner, “IV,” an immigrant migrant woman who was subjected to a tubal ligation procedure without her consent on July 1, 2000, in a public hospital in Bolivia. “IV” has not received justice through the Bolivian criminal court system. This case focuses on the violation of “IV’s” reproductive health and autonomy, and is indicative of a medical environment in Bolivia that is discriminatory towards women. The Inter-American Commission has determined that gender stereotyping and discrimination are structural obstacles to women’s enjoyment of their reproductive health rights, which is one of the foundational premises of this case.

II. Medical Power and Women’s Reproductive Rights

4. The responsibility afforded to members of the medical community in relation to women’s reproductive health is significant; it is loaded with power, and often leaves women in extremely vulnerable positions. Michele Foucault described medical doctors as “priests of the body,” meaning that the authority of the doctor in her/his ability to confront suffering and deny death is akin to the spiritual power typically afforded to priests.[7] This power intensifies with regard to female patients because a woman’s relationship with her doctor is ripe with gendered assumptions based on her role as a (potential) mother.

5. The power dynamic between medical professional and woman-patient is described by Kathy Davis as “paternalistic control.” In the concept of “paternalistic control” the doctor is given the power to decide in the woman’s best interest, and the woman is seen as someone in need of being controlled.[8] When describing what paternalistic control might look like in application, Sally Sheldon provides the following examples: “Paternalistic control may involve influencing a woman to continue (or equally to terminate) a pregnancy. Equally, it may be failing to tell her about some of the alternatives open to her.”[9] While exercising “paternalistic control” is most obviously done by members of the medical community, it can also be understood as a form of state intervention that “actively imposes the control of the woman as the doctor’s responsibility.”[10] As Sheldon explains, the state cannot be perceived as neutral in matters of reproductive health. However, the state can in effect distance itself from any negative connotations related to its attempts to regulate women’s reproductive rights by relying on medical doctors to appear neutral while also “support(ing) the existing status quo and the power imbalance which characterizes it.”[11]

[7] Michele Foucault, The Birth of the Clinic (London and New York: Routledge: 1989), 32.
[8] Kathy Davis, ‘Paternalism Under the Microscope,’ in Todd, A.D. and Fisher, S. (eds.) Gender and Discourse: The Power of Talk (New Jersey: Ablex Publishing, 1988) 23-4.
[9] Sally Sheldon: Medical Power and Abortion Law (London: Pluto Press, 1997), 66.
[10] *Ibid.*
[11] *Ibid.,* 74.

6. According to Rebecca Cook, "the role of health professionals is to give the individual decision-maker medical and other health-related information that contributes to the individual's power of choice and does not distort or unbalance that power."[12] In that women seeking health services may feel dependent on their health care-giver, they may feel obliged to agree with what is proposed to them, "particularly when those with the power of superior knowledge of medicine tell them that what is proposed is for their own good."[13]

7. The legal concept of informed consent, or the right to make informed choices for one's own future, requires that medical professionals refrain from exercising "paternalistic control," and instead provide women with information that is free from coercion and personal preference. The International Federation of Gynecological and Obstetrics' definition of informed consent contains the following:

> "It is important to keep in mind that informed consent is not a signature, but a process of communication and interaction. […] If physicians, for reason of their own religious or other beliefs, do not wish to fulfil […] the criteria for informed consent because they do not want to give information on some alternatives, they have an ethical obligation, as a matter of respect for their patients' human rights, to disclose their objection, and to make appropriate referrals so that the patients may obtain the full information necessary to make valid choices."[14]

8. The asymmetrical power relationship between health care provider and woman-patient creates a potentially violent situation for women; her reproductive autonomy and dignity, her *proyecto de vida*, is at risk.

III. Gender Stereotyping and the Inter-American Court

9. The Inter-American Court of Human Rights substantiated its jurisdiction over Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará") in the case of *Gonzalez et al. ("Cotton Field") v. Mexico*,[15] and in doing so determined that "the different Articles of the Convention of Belém do Pará may be used to interpret it and other pertinent Inter-American instruments."[16]

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[12] Rebecca Cook, "Women's Health and Human Rights: The Promotion and Protection of Women's Health through
International Human Rights Law," Chapter 4: International Human Rights to Improve Women's Health, 26. Available at: http://info.worldbank.org/etools/docs/library/48440/m1s5cook.pdf.

[13] *Ibid.*, 27.

[14] Ethical Issues in Obstetrics and Gynecology, FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health, October 2012, p.15. Available at: http://www.figo.org/sites/default/files/uploads/wg-publications/ethics/English%20Ethical%20Issues%20in%20Obstetrics%20and%20Gynecology.pdf

[15] G*onzález et al. ("Cotton Field") v. Mexico*, Inter-Am. Ct. H.R., (Preliminary Objection, Merits, Reparations, and Costs) 16 November 2009.

[16] *Ibid,,* ¶79.

10. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have developed the principle of due diligence as it applies to women through the Convention of Belém do Pará. The principle of due diligence is understood as including an obligation on the part of the state to *prevent* violations of women's rights.[17] Elizabeth A.H. Abi-Mershed, current Assistant Executive Secretary of the IACHR, described the concept of due diligence as it is enshrined in Article 7(b) of the Convention of Belém do Para, as requiring that

> "(S)tates parties ensure that their agents refrain from acts of violence against women, and […] that these states apply due diligence to prevent, investigate and punish such violence when perpetrated by non-state actors in the home, community or wherever it may occur. States parties undertake to ensure that these obligations are given practical effect and that women at risk for or subjected to violence have access to effective judicial protection and guarantees."[18]

11. Within the obligation to prevent violence against women, is the duty enshrined within Article 8 of the Convention of Belém do Pará:

> "(T)o modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to *counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women*."[19] [emphasis added]

12. The impact of stereotyping on women and women's lives is detrimental. Gender stereotypes "devalue (women's) attributes and characteristics," and perpetuate and reinforce "prejudices about women's inferiority […] in all sectors of society."[20] Human rights legal institutions have a part to play in challenging both the cause and effect of gender-based stereotypes. According to Rebecca Cook and Simone J. Cusack, "legal and human rights analysis can be instrumental in diagnosing a stereotype, which is a necessary prerequisite to its elimination."[21]

13. The selection of case law summarized below introduces key developments in the Inter-American Court's approach to gender stereotyping. The objective of introducing these cases is two-fold:

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[17] *"IV" v. Bolivia*, Inter-Am. Comm. H.R., Merits, Case No. 12.655, Report No. 72/14, 15 August 2014, note 169.

[18] Elizabeth A.H. Abi-Mershed, "Due Diligence and the Fight Against Gender-Based Violence in the Inter-American System," in Due Diligence and Its Application to Protect Women from Violence, Carin Benninger-Budel, ed., (Netherlands: Brill Nijhoff Law Specials, 2009) 131.

[19] Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994, Article 8(b).

[20] Rebecca Cook and Simone J. Cusack, Gender Stereotyping: Transnational Legal Perspectives (Philadelphia: University of Pennsylvania Press, 2010) 1.

[21] *Ibid.,* 37.

(i) To draw attention to the use of stereotypical language in women's rights cases that effectively *essentializes* women as (potential) mothers,[22] rather than challenges those gender-based stereotypes as they have been deemed "incompatible with international human rights law"[23] by the Inter-American Court of Human Rights.

(ii) To highlight the need to frame violations of women's reproductive rights within the larger violence against women framework (Convention of Belém do Pará), and therefore establish an argument to suggest that the Inter-American Court of Human Rights develop reparations specifically designed to address the harm/violation alleged under Article 7(b) of the Convention of Belém do Pará in *IV v. Bolivia*.

14. ***Miguel Castro Castro Prison v. Peru***[24]
In this case the Inter-American Court examined how violence against women relates to inhumane treatment.[25] The Court stated that "the pregnant women who lived through the attack (experienced) an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings of anguish, despair, and fear for the lives of their children."[26] The Court also noted "severe solitary confinement had specific effects on the inmates that were mothers […] The impossibility to communicate with their children caused an additional psychological suffering in the inmates that were mothers."[27]

15. While this case is groundbreaking in that it was the first instance in which the Inter-American Court of Human Rights applied the Convention of Belém do Pará, the Court relied in-part on a stereotypical view of *women as mothers* to determine violations of their rights under the Convention of Belém do Pará. As Patricia Palacios Zuloaga points out, the Inter-American Court's claim that women victims did not have time to become mothers because of their search for truth and justice, as well as its reliance on women's "experience of maternity,"[28] relies heavily on social stereotypes of women as mothers. According to Zuloaga, the Court's "positive shift to gender justice […] fails to extend gendered logic to reparations and (relies) on stereotypes of women in order to find violations."[29]

[22] Linda Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory," *Signs*, Vol. 13(3), 1988, 405-436.
[23] *Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica,* Inter-Am. Ct. H.R., (Merits, Reparations, and Costs) 28 November 2012, ¶302.
[24] Miguel *Castro Castro Prison v. Peru,* Inter-Am. Ct. H.R., (Merits, Reparations and Costs) 25 November 2006.
[25] I*bid*., ¶292.
[26] *Ibid.*
[27] *Ibid.,* ¶330.
[28] Patricia Palacios Zuloaga, "The Path to Gender Justice in the Inter-American Court of Human Rights," *Texas Journal of Women and Law*, Vol. 17(2), 2008, 243.
[29] *Ibid.,* 229.

16. ***González et al. (“Cotton Field”) v. Mexico***[30]

In regards to the role of gender stereotyping in this case, the Court indicated that

> “(T)he subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.” [31]

17. Alongside a number of other reparations issued in *González et al. (“Cotton Field”) v. Mexico*, the Inter-American Court ordered the State of Mexico to

> “(C)ontinue implementing permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective to *ensure due diligence* in conducting preliminary inquiries and judicial proceedings concerning gender-based discrimination, abuse and murder of women, and to *overcome stereotyping about the role of women in society*.” [emphasis added][32]

18. ***Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica***[33]

The Court examined the impact of gender-based stereotyping in this case and determined that the ban on IVF can affect men and women, and that the impact of the ban may have a disproportionate impact in women “owing to the existence of stereotypes and prejudices in society.”[34] The Court then relied on observations from the World Health Organization to conclude, “while the role and status of women in society should not be defined solely by their reproductive capacity, femininity is often defined by motherhood.”[35]

19. The *Artavia Murillo et al. v. Costa Rica* judgment included the expert witness testimony of Alicia Neuberger, who explained that,

> “(T)he gender identity model is socially defined and molded by the culture; its subsequent naturalization responds to socioeconomic, political, cultural and historic determinants. According to these determinants, women are raised and socialized to be wives and mothers, to take care of and attend to the intimate world of affections. *The ideal for women, even nowadays, is embodied in sacrifice and dedication, and the culmination of these values is represented by motherhood and the ability to give birth*… A woman’s fertility is still considered by much of society to be something natural that admits no doubts. [...]

[30] G*onzález et al. (“Cotton Field”) v. Mexico*, *supra* note 15.
[31] *Ibid.,* ¶401.
[32] G*onzález et al. (“Cotton Field”) v. Mexico*, *supra* note 15, at ¶602 (22).
[33] *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica,* Inter-Am. Ct. H.R., (Merits, Reparations, & Costs) 28 November 2012.
[34] *Ibid.,* ¶294.
[35] *Ibid.,* ¶296.

> Motherhood has been assigned to women as an essential part of their gender identity, transformed into their destiny."[36]

20. The Inter-American Court ultimately concluded in *Artavia Murillo et al. v. Costa Rica* that "gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them."[37]

21. Despite advancements made by the Inter-American Court to draw parallels between gender identity, stereotyping and women's reproductive rights violations, it is important to note the Court's earlier assertion in the *Artavia Murillo et al. v. Costa Rica* judgment: "motherhood is an essential part of the free development of a woman's personality."[38] The Inter-American Court relied on the concept of motherhood to find a violation of the right to private life under the American Convention on Human Rights.

22. Although the Inter-American Court emphasized the role of gender stereotyping on women's enjoyment of their reproductive rights in *Artavia Murillo et al. v. Costa Rica,* it did not address the issue of gender stereotyping in the reparations. The Convention of Belém do Pará was not included in *Artavia Murillo et al. v. Costa Rica,* which limited the ability of the Court to issue reparation that would address the impact of gender-based harm in this case. The gap between gender reasoning and reparation in this case indicates the need to develop women's reproductive rights cases within the violence against women legal framework.

23. ***Velásquez Paiz et al. v. Guatemala***[39]

In regards to gender stereotyping in this case, the Inter-American Court of Human Rights determined that

> "(G)ender stereotyping refers to pre-conditioned attributes, behaviors or possessed characteristics or roles that are, or should be performed by men and women respectively, and *it is possible to associate the subordination of women with practices based on socially dominant and persistent gender stereotypes.* In this sense, their creation and use becomes one of the causes and consequences of gender violence against women, these conditions are aggravated when reflected, implicitly or explicitly, in policy and practice, particularly in the reasoning and as language of state authorities." [40]

24. In the reparations issued for this case, the Inter-American Court ordered the State to

> "…incorporate within the National Education System curriculum, at all levels, a permanent education program on the need to eradicate gender-based

[36] *Ibid.,* ¶298.
[37] *Ibid.,* ¶302.
[38] *Ibid.,* ¶143.
[39] *Velásquez Paiz et al. v. Guatemala*, Inter-Am. Ct. H.R, (Preliminary Objection, Merits, Reparations, & Costs) 19 November 2015.
[40] *Ibid.,* ¶180.

> discrimination, gender stereotypes and violence against women in Guatemala, in light of the international standards on these matters and the jurisprudence of this Court."[41]

25. While the Inter-American Court has consistently ordered gender-based reparations in women's rights cases, it elected not to do so in *Artavia Murillo et al. v. Costa Rica,* which was its first women's reproductive rights case. *IV v. Bolivia* presents an opportunity for the Inter-American Court to articulate and develop the inherent connection between violence against women, as it is addressed through the Convention of Belém do Pará, and violations of women's reproductive rights. Furthermore, the Inter-American Court has the opportunity to issue gender-based reparations designed to *prevent* violations of women's reproductive rights.

IV. "*IV*" *v. Bolivia*: Risk of Repetition and the Need for General Repair (Guarantees of Non-repetition)

26. The Court has generally been open to ordering general forms of redress (guarantees of non-repetition) no just in cases of systemic violations of human rights,[42] but also in those cases where there is a risk of repetition. In cases involving health care personnel, the Court has awarded human rights training in order to prevent the repetition of a violation or a particular situation. For example, in cases related to medical malpractice the Court ordered the state to implement human rights training for justice operators and health care professionals in relation to patients' rights.[43] Reparation measures were awarded as a way to disseminate information about patients' rights and to facilitate access to justice for patients whose rights had been violated. Also, in *Ximénes-Lópes v. Brasil*, [44] a case related to inadequate treatment and hospitalization of persons with mental disabilities, the Court ordered the state to develop training and education programs for medical personal and all people working in mental health institutions, which would include the standards and guidelines related to the treatment of people with mental disabilities. In this case, training was necessary in order to transform health care structures and the behavior of a medical community that did not adequately treat people with mental disabilities.

27. In regards to the present case, there is a culture of gender bias and stereotyping among medical personnel in Bolivia that makes the possibility of repetition of this violation very likely. While the 1998 Bolivian Health Regulations[45] establish a duty for

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[41] *Ibid.,* p. 101, ¶13.

[42] G*onzález et al. ("Cotton Field") v. Mexico*, *supra* note 15, and *Velásquez Paiz et al. v. Guatemala*, *supra* note 39.

[43] *Albán-Cornejo et al. v. Ecuador*, Inter-Am. Ct. H.R, (Merits, Reparations and Costs) 22 November 2007, ¶164; and *Suárez Peralta v. Ecuador*, Inter-Am. Ct. H.R, (Preliminary Objection, Merits, Reparations & Costs) 21 May 2013, ¶206.

[44] *Ximénes-Lópes v. Brasil*, Inter-Am. Ct. H.R, (Merits, Reparations and Costs) 4 July 2006, ¶250.

[45] Norma Boliviana de Salud (Bolivian Health Standard) MSPS-98: Anticoncepción Quirúrgica Voluntaria [Voluntary Surgical Contraception], Volume 1, Oclusión Tubárica Bilateral en Riesgo Reproductivo [Bilateral

doctors to request patients' voluntary and informed consent prior to performing a tubal ligation procedure, in practice, medical professionals in Bolivia do not always apply these regulations in a consistent way. In a report published by the Center for Reproductive Rights in 2001, it was found that the requirements to access such services were not being wholly complied with by medical personnel in Bolivia. For example, in a visit carried out to the Hospital Materno Infantil Germán Urquidi in Cochabamba, the informed consent forms developed by the Bolivian Health Regulation were not found in the hospital.[46] Instead, there was a general authorization form that allowed medical doctors to practice "all the necessary tests".[47] There is no recent data that shows the level of compliance with the obligation to request informed consent in Bolivia. However, the fact that the State does not provide information about the real compliance with this duty should be understood as an indication that the situation has not improved. Even though there is no specific evidence showing that the lack of compliance with the regulation is due to the existence of a gender bias, section two of this amicus already indicated how the medical community very often exercises "paternalistic control" in relation to women's health.

28. In fact, other reports have shown how particular practices in the medical community actually hinder the application of Bolivian laws. For example, in 2014 the Plurinational Constitutional Tribunal of Bolivia deemed unconstitutional the practice of requiring women to obtain judicial authorization in order to access legal abortion services in the case of rape. However, according to information from Amnesty International, medical professionals and prosecutors in Bolivia have not complied with this judgment; they are still requiring judicial authorization to perform abortions in cases of rape. Amnesty International has determined that "a decisive work of dissemination and education is going to be necessary since there is confusion and lack of information about this topic in the health services, police, prosecutors, ombudsman and other personnel in charge of the compliance of this ruling."[48]

29. In addition, CEDAW Committee recently expressed its concern "about the persistence of discriminatory stereotypes about the roles and responsibilities of women and men in the family and in the larger society that perpetuate discrimination against women in areas such as […], health […]," in relation to Bolivia.[49]

Tube Ligation in cases of Reproductive Risk], approved by the Ministry of Health through Ministerial Resolution No. 517, November 17, 1998. In addition, Article 37 of the Code of Ethics and Medical Deontology of the Medical Association of Bolivia states that: "A person may only be sterilized in response to his or her express, voluntary and documented request for sterilization, or in the event of therapeutic necessity determined strictly by a medical board."

[46] Center for Reproductive Rights, "Derechos de la Mujer en Bolivia: Un informe Sombra," 9. Available at http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Bolivia%20CESCR%202001%20Spa.pdf

[47] *Ibid.*

[48] Amnesty International, "Bolivia: Informe para el Comité para la Eliminación de la Discriminación contra la Mujer de las Naciones Unidas, 61ª Session, 6-24 de julio de 2015," 12.

[49] UN, CEDAW (2015) Concluding Observations on the combined fifth and sixth periodic reports of the Plurinational State of Bolivia, UN. Doc. CEDAW/C/BOL/CO/5-6, ¶16.

30. If the Inter-American Court of Human Rights does not provide specific reparation measures designed to transform gender bias and stereotyping culture within the Bolivian medical profession, and society in general, there is a high likelihood that violations of women's reproductive rights, such as those experience by "IV" in this case, will continue to occur in Bolivia.

V. DEVELOPING GENDER-BASED REPARATIONS IN "*IV*" *V. BOLIVIA*

31. We suggest that the Inter-American Court of Human Rights exercise its *motu propio* capacity in order to issue guarantee of non-repetition reparations designed to address gender stereotyping and discrimination within the Bolivian medical sector. We suggest that for each of the three reparations below, the Inter-American Court requires the State to submit a follow-up report twice yearly.

Reparation Suggestion:
The Court orders the State to, within a reasonable time, adopt education and training programs to be delivered to medical students and current medical professionals in the themes of informed consent and gender-based discrimination and stereotyping. The training should be conducted as part of a permanent aspect of medical education and training, and should be developed in conjunction with civil society and the national Ombudsman Office.

32. In addition, because gender-based stereotyping and discrimination intersect with other social factors such as race, ethnicity, economic and citizenship status, and sexuality, we urge the Inter-American Court to order a reparation designed to address gender stereotyping and discrimination on a broader scale in Bolivia, as it did in its 2015 case, *Velásquez Paiz et al. v. Guatemala.*[50]

Reparation Suggestion:
The Court orders the State, within a reasonable time, to incorporate within the public education system, at all levels, a permanent education program on the need to eradicate gender-based discrimination, gender stereotypes and violence against women in Bolivia, in light of the international standards on these matters and the jurisprudence of this Court.

33. Finally, with reference to the recommendations made by the Inter-American Commission in its Merits Report,[51] we suggest that the Court order the State to adopt an informed consent framework for medical professionals that reflects the criteria of the International Federation of Gynecological and Obstetrics (FIGO).[52]

Reparation Suggestion:

[50] *Velásquez Paiz et al. v. Guatemala*, *supra* note 39.
[51] *"IV" v. Bolivia*, *supra* note 17 at ¶187(4).
[52] Ethical Issues in Obstetrics and Gynecology, *supra* note 14, at 14.

The Court orders the State, within a reasonable time, to update its standard and domestic regulations on informed consent, which will be distributed to and upheld by members of the Bolivian Medical Community. The Standard should reflect international standards such the ones developed by World Health Organization and the International Federation of Gynecological and Obstetrics' criteria on informed consent.