

Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment

Ruth Rubio-Marín* & Clara Sandoval**

ABSTRACT

This article puts forward the elements of a holistic gender approach to reparations to be followed by international tribunals in cases of violence and discrimination against women, and uses them to test the reparation's jurisprudence of the Inter-American Court of Human Rights, giving particular attention to the *Castro Castro Prison* and the *Cotton Field* decisions. The article considers the significant progress made by the Court so far, as well as the major challenge that still lies ahead in making reparations gender-sensitive and delivering, although in a modest way, transformative remedies able to subvert sexual hierarchies.

I. INTRODUCTION

The Inter-American Court of Human Rights (the Court or the Inter-American Court) has been slow to incorporate considerations of gender justice into

its jurisprudence.¹ Nevertheless, since 2004, when the Court decided the *Massacre of Plan de Sánchez v. Guatemala* case, several judgments have displayed greater sensitivity to gender concerns.² Until recently, however, this positive shift was limited almost entirely to the merits of the cases. The Court's inability to extend this awareness to the domain of reparations remained a serious deficiency.³

From this perspective, the *Cotton Field v. Mexico*⁴ case (*González et al.*) in 2009 presented the Court with a unique opportunity to strengthen its gender approach, both in its treatment of the merits and reparations awards. The case dealt with the abduction, sexual abuse, and killing of Claudia Ivette González (20), Esmeralda Herrera Monreal (15), and Laura Berenice Ramos Monárrez (17) by non-state actors in 2001, and the subsequent failure of the state to act with due diligence in the investigation, prosecution, and punishment of the perpetrators and to treat in a dignified way the next of kin of the deceased.⁵ The remains of the three victims were found in a cotton field where five other female bodies were also discovered.

Cotton Field was the first case to reach the Court related to the abduction and killing of more than 300 women and girls by non-state actors since 1993 in Ciudad Juárez (Chihuahua, Mexico). These cases are known as "Feminicidios of Ciudad Juárez," because the victims were women and girls from fifteen to twenty-five years old who were disappeared, and often subjected to sexual violence⁶ before being killed and often mutilated.⁷ These disappearances and killings were considered by the Court to be gender-based, not only because they targeted women and girls specifically, but also because they took place in the context of a prevalent culture of discrimination against women.⁸ The response of the Mexican authorities to these crimes was indeed plagued with irregularities, stereotypes, lack of adequate investigation, and impunity.⁹

For the first time the Court, in the *Cotton Field* decision, articulated the need to provide reparations that do justice to women. Most tellingly,

1. Patricia Palacios-Zuloaga, The Path to Gender Justice in the Inter-American Court of Human Rights 91 (2007) (unpublished manuscript, on file with authors); Cecilia Medina, *Derechos Humanos de la Mujer: Donde Estamos Ahora en las Américas*, 18 ENSAYOS JUSTICIA TRANSICIONAL, ESTADO DE DERECHO Y DEMOCRACIA 9–10 (2005), available at <http://www.cdh.uchile.cl/publicaciones/libros/18ensayos.tpl>.
2. Palacios-Zuloaga, *supra* note 1, at 27.
3. *Id.* at 4.
4. González et al. ("Cotton Field") v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 205 (16 Nov. 2009).
5. *Id.*
6. *Id.* ¶ 127.
7. *Id.*
8. *Id.* ¶ 144.
9. *Id.* ¶ 146.

* Ruth Rubio-Marín is Professor of Comparative Public Law at the European University Institute in Florence.

** Clara Sandoval is Senior Lecturer at the School of Law at the University of Essex and Co-Convenor of the Essex Transitional Justice Network.

Clara wishes to thank Ariel Dulitzky, Michael Duttwiler, Tatiana Olarte, and Annick Pijnenburg for their helpful comments on this article.

the judgment suggested a significant redefinition of the Court's concept of adequate reparations by highlighting that, when the violations occur in a context of structural discrimination, reparations cannot simply return victims to the situation they were in before the violation took place (one of discrimination); instead, reparations should aim to transform or change the pre-existing situation.¹⁰

This article takes up the challenge presented by the Court and articulates criteria for identifying gender-sensitive reparations in Section II. Section III relies on the criteria explained in Section II to test the reparations jurisprudence of the Court. To this effect, the article provides an overview of the case law prior to the *Cotton Field* decision to identify the main shortcomings and outlines the gradual steps that have allowed the Court to articulate this new concept of gender-sensitive and transformative reparations. In particular, it considers the *Castro Castro Prison v. Peru*¹¹ case as the most relevant precedent. Finally, Section IV assesses both this concept of gender-sensitive reparations and the Court's strengths and weaknesses in applying it to the facts of the *Cotton Field* case, hoping to shed light on how future cases could follow—and also improve upon—this groundbreaking precedent.

II. A HOLISTIC GENDER APPROACH TO REPARATIONS

A holistic gender approach to Court-ordered reparations requires diverse and sequentially ordered components. These components can be structured around two main categories. The first and logically prior category refers to the preconditions for the application of gender-sensitive reparations, including the proper identification of the relevant facts, violations, and victims in each case as well as the proper assessment of the harms that accompany the violations. Only when this is duly done can gender-sensitive reparations measures take place. Defining these reparations measures in turn requires the ability to craft remedies that are gender specific as well as gender transformative. Next, is an examination of the sequences and the specific components within each of these categories.

A. Establishing the Relevant Facts

The following are some of the preconditions for redressing the differential impact of human rights violations on women. They relate, in particular, to

10. *Id.* ¶ 450.

11. *Castro Castro Prison v. Peru*, Inter-Am. Ct. H. R. (ser. C) No. 160 (25 Nov. 2006).

the treatment of the merits of a case. The starting point must always be the proper identification of the facts of a case, especially, for our purposes, of those that affect women distinctively. One clear example is the need to give due recognition to sexual violence, which often accompanies other forms of violence (such as detentions, disappearances, or massacres), and ensure that those forms of sexual violence actually map the experiences of the women effected. Limiting the analysis to a rape-centered understanding of sexual violence, for instance, may obscure other forms of equally grave sexual and reproductive violence such as sexual mutilation, sexual slavery, and forced abortion.¹² The Court, for example, got the relevant facts correct in *Gelman v. Uruguay*, its most recent case related among other violations, to violence against women, where it found that Maria Claudia Garcia had been detained and disappeared while pregnant, and that such a situation and the treatment she received, were the result of her gender and constituted violence against women.¹³

The Inter-American Court receives information about the alleged facts from the Inter-American Commission on Human Rights (the Inter-American Commission or the Commission), when it refers a case to the Court and transmits a report adopted under Article 51 of the American Convention on Human Rights (the American Convention or the Convention).¹⁴ The report includes information from both the alleged victim or his or her legal representative, and from the state in question.¹⁵ Once the allegations are presented with corroborating evidence, the Court has discretion to clarify, gather further evidence, and establish presumptions of fact.¹⁶ Therefore, although the Court is not alone in establishing the facts, it can to an extent, consider them proven and draw links between the facts established and the potential set of violations of the Convention.

B. Properly Identifying the Alleged Violations and Victims

Once the facts are established, it is important to correctly identify the alleged victims in the particular case and the rights that have been violated.

12. Ruth Rubio-Marín & Pablo de Greiff, *Women and Reparations*, 1 INT'L J. TRANS'L JUST. 327 (2007).

13. *Gelman v. Uruguay*, Inter-Am. Ct. H. R. (ser. C) No. 221, 97–98 (24 Feb. 2011).

14. Article 35 of the Rules of Procedure of the Court indicates that the report presented to the Court should contain "all the facts that allegedly give rise to a violation and identify the alleged victims." Inter-American Commission on Human Rights, Rules of Procedure of the Inter-American Court on Human Rights, art. 35 (16 Nov. 2009) (hereinafter Rules of Procedure), available at <http://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm>.

15. *Id.* arts. 40, 41.

16. *Id.* arts. 57–59.

This is not the sole responsibility of the Court, because the alleged victims and violations are to be presented to the Court by the Commission and by the victims or their legal representatives.¹⁷

In relation to the identification of victims, according to the recent jurisprudence of the Court and its New Rules of Procedure,¹⁸ victims are only those whose rights have been breached under the American Convention or another Inter-American System treaty according to a judgment by the Court.¹⁹ It is primarily the job of the legal representatives and the Commission to properly identify the alleged victims so that the Court can then assess whether those who claim to have suffered harm were in such a situation as a result of a violation of a right protected under the Convention or other applicable treaty. The Inter-American Court recognizes that victims can include, not only those who suffer direct harm (such as the person killed), but also the next of kin, and even dependents who suffer as a consequence of the primary violation.²⁰

As for the assessment of the facts and evidence to determine the existing violations, it can always invoke the principle of *iura novit curia*. According to this principle, even if the parties do not allege certain violations, the Court is obliged to apply existing law and, as a consequence, can consider violations other than those alleged by the parties as long as they clearly emanate from facts that have been duly proven.²¹ The Court should always consider whether rights under the American Convention other than those claimed to have been breached were also violated.

Crucial to the determination of whether a certain violation has taken place is the question of the standard and burden of proof. The careful legal treatment of important cases such as *Velásquez Rodríguez v. Honduras* by the Inter-American Court has made obvious the "intimate relationship between the effective protection of substantive rights and the allocation and standard of proof."²² Such treatment is essential not only in disappearance cases where

17. *Id.* arts. 35, 40.

18. Clara Sandoval, *The Concepts of "Injured Party" and "Victim" of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations*, in *REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEM IN THE MAKING* 243 (Carla Ferstman et al. eds., 2009).

19. Rules of Procedure, *supra* note 14, arts. 2.25, 2.33.

20. See, e.g., *Blake v. Guatemala*, Inter-Am Ct. H. R. (ser. C) No. 36, ¶ 115 (24 Jan. 1998); *Street Children v. Guatemala*, Inter-Am. Ct. H. R. (ser. C) No. 63, ¶¶ 171–77 (19 Nov. 1999).

21. *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H. R. (ser. C) No. 4, ¶ 163 (29 July 1988).

22. JULIANE KOKOTT, *THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW: CIVIL AND COMMON LAW APPROACHES WITH SPECIAL REFERENCE TO THE AMERICAN AND GERMAN LEGAL SYSTEMS* 141 (1998).

the state has full control of the evidence, as in *Velásquez Rodríguez*, but also in cases on gender violence, given the existence of different cultural or religious factors which may render proving that a certain violation took place particularly difficult. The treatment of both types of cases calls for the application of two guiding principles: first, the alleged victim should not be required to prove the impossible or else his or her rights would become meaningless; and second, general rules of evidence should include mechanisms to balance the rigidity of the burden and standard of proof. Particularly important in this context is the use of presumptions linked to otherwise known patterns of misconduct that could be disproved by the respondent state. It is promising that the Inter-American Court followed these guiding principles in *Rosendo Cantú and others* and in *Fernández Ortega and others*,²³ its two most recent cases against Mexico, where it considered proven that rape and sexual violence had taken place despite the inexistence of incontrovertible evidence.

C. Properly Identifying the Harm and those Harmed by the Violations

Properly identifying the consequences and harms ensuing from the violations is crucial to determine adequate reparations. Legally speaking, a tribunal, international or domestic, is obliged to determine such harm. A state that breaches an international obligation has to produce adequate reparation for the breach itself and for the harm it causes.²⁴ The incorporation of this principle is found in Article 63.1 of the American Convention, which authorizes the Court to award reparations. The article states:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.²⁵

23. *Rosendo Cantú and others v. Mexico*, Inter-Am. Ct. H. R. (Ser. C) No 216, 85–106 (31 Aug. 2010); *Fernández Ortega v. Mexico*, Inter-Am. Ct. H. R. (Ser. C) No 215, 95–116 (30 Aug 2010).

24. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries (Nov. 2001), U.N. Doc. A/56/10, arts. 1, 31 (hereinafter *Draft Articles*), available at <http://www.unhcr.org/refworld/docid/3ddb8f804.html>.

25. American Convention on Human Rights, signed 22 Nov. 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, O.A.S. Doc. OEA/ser.L/V/II.23, doc. 21, rev. 6 art. 63(1) (1979) (entered into force 18 July 1978).

International law and the Inter-American Court acknowledge two genres of harm—namely, pecuniary (material) and non-pecuniary (moral) damages,²⁶ encompassing different manifestations of injury. International law and the Court also recognize three different forms of reparations—namely, restitution, compensation, and satisfaction.²⁷ In the context of gross human rights violations, rehabilitation and guarantees of non-repetition have also been acknowledged as valid forms of reparations.²⁸

The importance of the notion of harm is a necessary part of an agenda that seeks to render reparations gender-sensitive in at least two important ways. On the one hand, the notion of harm links the violations to the set of affected individuals, allowing the proper identification of the circle of beneficiaries. On the other, giving adequate relevance to the notion of harm allows for understanding that different harms may ensue from the same violations and that one of the determining factors may be the gender of the victim.

It has been argued that, "looking at the harms produced by violations allows for an understanding of rights violations not only or primordially as an undue dispossession of 'assets' but rather as a distortion of relationships and network systems that are sustained by those rights in a way that is especially relevant to women."²⁹ Sensitivity to the harm that women suffer as a result of human rights violations would mean, that even if the main victim in a particular case is a man, because he was killed, there will be a recognition that his killing has a direct impact on his family—for example, when his wife is forced to become a breadwinner while still caring for the other family members and pursuing justice for the killing of her partner.

Moreover, it is crucial to understand the harm that women experience and the pre-existing structures of subordination that account for its compounded nature. Indeed, the "compound effect of the . . . violence, discrimination, and exploitation that women and girls are subject to (the so-called 'violence continuum') becomes most vivid when we examine the gendered nature of the harms that women endure and the short and long-term effects on their lives."³⁰ For example, as a result of cultural understandings around femininity, a woman or girl subjected to sexual violence would be considered to be less marriageable, less able to have children, or to make a living, compared to a man subjected to the same offence. The social and

26. Draft Articles, *supra* note 24, art. 31.

27. *Id.* art. 34.

28. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, 16 Dec. 2005, UNGA Res. 60/147, Principles 21, 23.

29. Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 63, 91 (Ruth Rubio-Marín ed., 2009).

30. *Id.*

cultural stigma that typically accompanies such sexual violence as well as its physiological aftermath may account for this difference.³¹

Concerning the identification of reparations beneficiaries, for almost two decades it was the practice of the Court to define the term "injured party" under Article 63.1 of the Convention as those who suffered harm as a direct result of a violation of the Convention, even if the Court did not consider them as victims in the decision on the merits. In this way, the Court recognized that persons other than the victims of violations of rights under the Convention could also suffer as a consequence. It made sense, then, to have a separate section within the reparations considerations of the Court to identify the injured parties, given that not all of them would have been mentioned in the consideration of the merits and that, if mentioned, they would have not been acknowledged as victims of violations.³²

In recent years, the Court has departed from this important jurisprudence in a significant way: it has opted for narrowing the meaning of "injured party" to only those whose rights under the Convention, or other applicable treaty, have been declared by the Court to have been violated.³³ This procedural change means that the primary responsibility for adequately identifying the victims lies in the hands of the Commission when it presents a new case to the Court. If the Commission fails to do so, this translates into the loss of the procedural opportunity to recognize beneficiaries. Poor litigation of cases and lack of awareness of the many ways in which women can be affected, even by those violations that target men, will translate into the incapacity of the system to acknowledge women as victims of violations of rights under the Convention.

As for the identification and proof of harm, technically speaking the Commission and the legal representatives of the victims are the ones called on to provide the Inter-American Court with a correct identification of the harms at stake, bearing in mind that any harm alleged must be a direct result of the violation of a particular human right. However, the principle of *iura novit curia* also obliges the Court to draw the link between the violation, the harm, and the reparations benefit, even if the Commission and the legal representatives of the victims fail to properly formulate their reparations claim, at least as long as the facts, violations, and ensuing harms have adequately been proven.³⁴

Furthermore, as with the treatment of the merits of a case, the *onus probandi* of the harm suffered rests with the victims and the Commission. They

31. *Id.* at 91–92.

32. Sandoval, *supra* note 18.

33. Rules of Procedure, *supra* note 14, art. 2.33. See also *Las Dos Erres v. Guatemala*, Inter-Am. Ct. H. R. (ser. C) No. 211, ¶ 225 (24 Nov. 2009).

34. Rules of Procedure, *supra* note 14, art. 35;

are the ones called on to explain and to prove to the Court the extent of the damage suffered. Harm is not always easy to document or to render visible. For example, quantifying the economic and non-pecuniary costs incurred by a woman who lost her partner, and who as a result, had to abruptly combine her family chores with becoming a breadwinner while searching for justice is not an easy task, particularly in cultures where women's activities are seen to be without intrinsic economic value. This means that standards of evidence might need to be adapted and the burden of proof partly shifted on to the state or at least alleviated through the use of inferences or presumptions.

D. Engendering Reparations: Considering Adequate Reparations Measures and Their Transformative Potential

Once the preconditions have been fulfilled, it becomes possible to think about ways of rendering reparations that are gender-sensitive. This requires choosing reparation measures that are adequate to redress the specific harms (including those that are gender-specific) and to seek to improve the starting position of victims and address the structural conditions that enabled the violations to take place.³⁵ In the following sections concrete examples are used to illustrate what such choices may require. It is important to note that engendering reparations calls for the identification of adequate and transformative remedies.

Reparation measures must be adequate. When they are, they can help victims cope with the concrete effects of the violation in their lives. Because some of the effects may be gender-specific, special attention should be given to the need to articulate reparations that do justice to women, avoiding different possible forms of gender bias. In principle, a central aim of reparations is to bring the victim to the situation he or she was in before the violation took place. Arguably, the law would be wrong if, discarding alternative options, it simply sought to return women to the *status quo ante*, when doing so entails perpetuating conditions of discrimination, violence, and poverty—which were often at the root of the violence and which accounted for the specific and compounded form of harm that women experienced. It is therefore our claim that, whenever possible, the specific design of reparations benefits should aim to subvert, even if in a modest way, those pre-existing conditions.³⁶ Realizing the transformative potential of reparations

35. Anne Saris & Katherine Lofts, *Reparation Programmes: A Gendered Perspective in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY* (Carla Ferstman et al. eds., 2009).

36. Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 29, at 102; Rashida Manjoo, *Report of the Special Rapporteur of Violence Against Women, its Causes and its Consequences*, U.N. Doc. A/HRC/14/22 (23 Apr. 2010), ¶ 85.

entails creatively using the different forms of reparations already mentioned and, particularly, guarantees of non-repetition given their preventive role as well as their potential reach. Certainly, both international and domestic courts have limited powers to bring about social change, but their potential as engines of change cannot be disregarded either.

III. THE REPARATIONS JURISPRUDENCE OF THE COURT IN CASES OF VIOLENCE AGAINST WOMEN BEFORE THE COTTON FIELD CASE: THE CASTRO CASTRO PRISON PRECEDENT

So far, it has been argued that the Inter-American Court, or any other human rights tribunal, should fulfill certain preconditions and then follow some sequential steps to put itself in a position to award gender-sensitive reparations to victims. We will now illustrate this by taking a systematic look at the Court's jurisprudence concerning violence against women. In doing so, we will try to underline its achievements and limitations. In particular, this section considers the holistic gender approach to reparations described in Section II, and applies it to the jurisprudence of the Court prior to the *Cotton Field* case, paying particular attention to the *Castro Castro Prison v. Peru* decision as an important precedent.

A. The Jurisprudence Before *Castro Castro Prison*

In several cases brought to it before *Castro Castro Prison*, the Court was unable to fulfill the preconditions necessary to adequately address gender-sensitive reparations. The Court failed to properly identify the facts, violations, or gender-specific harms that had taken place in different cases where women had been targeted, missing important opportunities to establish adequate rules on the standard and burden of proof of such violations and harms. This was paramount in cases involving allegations of sexual violence. For example, in *Caballero Delgado and Santana v. Colombia*, where a man and a woman disappeared after having been detained by the armed forces, two witnesses indicated to the Court that they had seen the woman naked after her detention.³⁷ Nevertheless, the Court considered these testimonies to be vague and did not elaborate on the sexual violence dimension of nudity or on what the adequate standard of proof in cases such as this should be.³⁸ Likewise, in *Loayza Tamayo v. Peru*, the first case to reach the Court in

37. *Caballero Delgado and Santana v. Colombia*, Inter-Am. Ct. H. R. (ser. C) No. 31, ¶¶ 36, 38 (8 Dec. 1995).

38. *Palacios-Zuloaga*, *supra* note 1, at 11–12.

which rape was alleged to have taken place, even though the victim was under *incommunicado* detention for ten days,³⁹ the Court concluded that given the nature of the allegation and the lack of evidence, it could not consider the rape proven.⁴⁰ The same approach was still evident several years later in *Maritza Urrutia v. Guatemala*,⁴¹ in which the victim, while in detention, and as indicated by the Commission, "was deliberately subjected to psychological torture arising from the threat and continual possibility of being assassinated, physically tortured, or raped."⁴² Despite acknowledging that Ms. Urrutia had been subjected to psychological torture in violation of Article 5 of the American Convention, the Court did not refer to the threats of rape as a form of sexual violence that could affect women distinctively from men.⁴³ Although the Court was presented with these allegations, the Court failed to take the allegations seriously, which was reflected in the reparations awarded in these cases.⁴⁴

A change in the jurisprudence of the Court commenced after 2004, when it began to show more sensitivity to women's rights—but without articulating a solid legal approach towards their protection. This period is one in which the Court started to adequately fulfill the preconditions to award gender-sensitive reparations. For instance, in the case of *Massacre of Plan de Sánchez v. Guatemala*, concerning the lack of investigation, prosecution, and punishment of members of the army and civilians who carried out a massacre of more than 268 Mayan people in 1982, the Court found that approximately twenty girls and young women were separated from the rest of the group, taken to a house, raped, and killed.⁴⁵ The facts of the case were adequately established. Since Guatemala accepted international responsibility for the violations in the case, the Court did not address rape in the judgment on the merits but only at the reparation stage, where, relying on known patterns of violent conduct, it considered proven that in Guatemala "the rape of women was a State practice, executed in the context of massacres, designed to destroy the dignity of women at the cultural, social, family, and individual levels," and where it recognized that

39. Loayza Tamayo v. Peru, Inter-Am. Ct. H. R. (ser. C) No. 33, ¶ 2.b (17 Sept. 1997).

40. *Id.* ¶ 58. In relation to this case, see the interview with Cecilia Medina Quiroga, former President of the Inter-American Court, in *Centro de Derechos Humanos, Edición Especial Boletín de Jurisprudencia de la Corte Inter-Americana de Derechos Humanos: Caso González y Otras ("Campo Algodonero") vs. México*, available at <http://www.estadodederechocdh.uchile.cl/boletin/4/?email=csando@essex.ac.uk>.

41. Maritza Urrutia v. Guatemala, 2003 Inter-Am. Ct. H. R. (ser. C) No. 103 (27 Nov. 2003).

42. *Id.* ¶ 78.b.

43. *Id.* ¶ 94.

44. Palacios-Zuloaga, *supra* note 1, at 14–15.

45. Massacre of Plan de Sánchez v. Guatemala, Inter-Am. Ct. H. R. (ser. C) No. 105, ¶ 42.18 (29 Apr. 2004).

the harm endured by the raped women was still present in their families and communities.⁴⁶ Although the Commission and the petitioners requested reparations specifically tailored for victims of rape, such as psychological and physical health support,⁴⁷ the Court did not acknowledge or make reference to the particular harm endured by these women when considering reparation measures; it simply opted to award reparations without distinctions. In other words, the Court failed to acknowledge the relevance of the specific harm that women suffered when crafting reparations. The Court proceeded to show more sensitivity to women's rights in later cases, such as *Mapiripán v. Colombia*,⁴⁸ *Ituango v. Colombia*,⁴⁹ and *Yean and Bosico v. The Dominican Republic*,⁵⁰ but it still failed to fully articulate the different components of a holistic gender approach to reparations.

B. The Castro Castro Prison Case

The most significant change before the *Cotton Field* case is found in *Castro Castro Prison v. Peru*. This case concerned the state execution of "operation transfer I" at the Miguel Castro Castro Prison in Lima in May 1992, where hundreds of detained persons accused of terrorism were either arbitrarily killed, tortured, or subjected to other cruel, inhuman, and degrading treatment. There were 135 female inmates located in pavilion 1A together with fifty men. In pavilion 4B, there were approximately 400 male inmates.⁵¹ All of them were suspected Shining Path members. The case concerned the lack of investigation, prosecution, and punishment of those responsible for the mentioned crimes.

Peru acknowledged partial international responsibility for the events that took place between 6 and 9 May (during the execution of the "operation") but not for acts that took place during the following days, such as forcing men and pregnant women to lie face down on the floor for several days without adequate protection;⁵² forcing women in hospitals to remain naked in front of male security guards and to have to go to the toilet with them;⁵³ and forcing vaginal inspection.⁵⁴ The Court considered that all of

46. Massacre of Plan de Sánchez v. Guatemala, Reparations, Inter-Am. Ct. H. R. (ser. C) No. 116, ¶ 49.19 (19 Nov. 2004).

47. *Id.* ¶¶ 90(i), 91(b).

48. Mapiripán v. Colombia, Inter-Am. Ct. H. R. (ser. C) No. 134, ¶ 175 (15 Sep. 2005).

49. Ituango v. Colombia, Inter-Am. Ct. H. R. (ser. C) No. 148, ¶ 212 (1 July 2006).

50. Yean and Bosico v. The Dominican Republic, Inter-Am. Ct. H. R. (ser. C) No. 156, ¶ 134 (8 Sept. 2005).

51. Castro Castro, *supra* note 11, ¶ 197.13.

52. *Id.* ¶¶ 197.42, 197.57.

53. *Id.* ¶ 197.49.

54. *Id.* ¶ 197.50.

these subsequent facts and events were duly proven. In particular, relying on evidence such as the report of the Peruvian Truth and Reconciliation Commission,⁵⁵ the Court found that in Peru there was a general practice of sexual violence against women as a strategy of war and that the "operation" consisted of a deliberate attack on women, in particular, those who were considered to be members of the Shining Path.⁵⁶

Given the particular abuses that women suffered in the case, and the emphasis put on such violations by the Commission and even more so by the common intervener,⁵⁷ the Court, for the first time in its history, faced the question of how to deal with such violations from a gender-sensitive perspective. In the end, the Court concluded that "women . . . were affected by the acts of violence differently than the men, that some acts of violence were directed specifically towards the women and others affected them in greater proportion than the men."⁵⁸ It thereby laid the foundations for the development of a gender-sensitive approach to reparations.⁵⁹

C. Preconditions for Gender-sensitive Reparations in the *Castro Castro Prison Decision*

At the level of preconditions, the Court took important steps to underline the importance of, and the need for, adequate legal treatment of violence against women as an instance of human rights violations. One way in which it did so was by applying the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women⁶⁰ (Belém do Pará Convention) to better interpret and understand the alleged violations (including the definition of torture and inhuman treatment and the definition of the due diligence standard to investigate, prosecute, and punish).

The Organization of American States adopted the Belém do Pará Convention in 1994. This treaty is the most widely ratified human rights treaty in the region, with thirty-two ratifications out of a possible thirty-five. It is the only treaty in force under international law specifically targeted at combating violence against women.⁶¹

55. *Id.* ¶¶ 206, 225–27.

56. *Id.*

57. When in a case there are several alleged victims or representatives, a common intervener should be appointed by the victims to represent them at the proceedings. See Rules of Procedure, *supra* note 14, art. 25.

58. *Castro Castro*, *supra* note 11, ¶ 223.

59. Palacios-Zuloaga, *supra* note 1; Karla Quintana-Osuna, *Recognition of Women Rights Before the Inter-American Court of Human Rights*, 21 HARV. HUM. RTS. J. 309 (2008).

60. Belém do Pará Convention, signed 9 June 1994, (entered into force 5 Mar. 1995).

61. *Id.*

Although Peru did not ratify this Convention until 4 June 1996, more than four years after the events at Castro Castro Prison, and the Inter-American Commission did not request the Court to consider possible violations of this Convention when it referred the case, in the proceedings both the common intervener and the Commission based their understanding of the violations suffered by women on the Belém do Pará Convention. The Commission believed that the treaty could be used for interpretation purposes based on Article 29 of the Convention.⁶² The common intervener was more radical in its use of the Belém do Pará Convention as black letter law. She alleged a violation of Article 5 (right to human treatment) of the American Convention and of Articles 1, 6, 7, 8, and 9 of the Belém do Pará Convention.⁶³

That the Court had contentious jurisdiction over the Belém do Pará Convention was a difficult argument to put forward. The treaty does not have an express article granting the Inter-American Court contentious jurisdiction over possible breaches of international obligations; it only expressly grants the Court *advisory* jurisdiction over the Convention.⁶⁴ An additional problem was that some of the facts of the case are dated prior to Peru's ratification of the Convention, and treaties do not apply retroactively. The Court did not expressly state its position in relation to its possible jurisdiction over the Convention, rather the Court found violations of the duty to prevent, investigate, prosecute, and punish perpetrators of violence against women according to Article 7(b) of the Belém do Pará Convention from 1996 onwards; Articles 1.1, 8, and 25, of the American Convention; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.⁶⁵ Peru did not object to this jurisdiction. Nevertheless, the Court declined jurisdiction in applying the Convention in relation to other violations because of the timeframe in which they occurred, but it still used the Convention to interpret Article 5 of the American Convention.⁶⁶

One of the main allegations in the case concerned the torture and inhumane treatment of men and women at the prison. The Court seized the opportunity to clarify the ways in which violence against women can breach the right to humane treatment. For example, in relation to pregnant women having to lie face down or to crawl on their stomachs during the execution

62. *Id.* ¶ 228(q).

63. *Id.* ¶ 260.

64. Belém do Pará, *supra* note 60, art. 11.

65. *Castro Castro*, *supra* note 11, ¶¶ 379, 394, 404, 408. With regards to the obligation of due diligence derived from the American Convention, *supra* note 25, arts. 8, 25 and the Belém do Pará Convention, *supra* note 60, art. 1.1, though symbolically important, did not bring anything new to its earlier jurisprudence. The Court simply re-stated that when crimes against humanity take place, the state has an obligation to investigate, prosecute, and punish, and to take due consideration of the facts that constitute violence against women.

66. *Id.* ¶ 276.

of the operation, the Court considered that this produced additional suffering amounting to psychological torture, given that they could reasonably be worried about their own lives as well as their babies' lives.⁶⁷ As for those who had to lie face down in the days after the end of the operation, the Court considered this to be inhumane treatment that particularly affected pregnant women.⁶⁸ The Court also considered inhumane treatment the solitary confinement of mothers who were unable to see or communicate with their children⁶⁹ or to receive natal and post-natal attention.⁷⁰

More importantly, the Court endorsed a broad definition of sexual violence and declared the presence of a clear link between sexual violence and the right to humane treatment. The Court defined sexual violence as "actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever."⁷¹ For instance, it considered situations where women were forced to be nude to be sexual violence that amounted to inhumane treatment because they were constantly exposed to the gaze of men.⁷² With regard to one woman who was subjected to a vaginal inspection by hooded men in one of the hospitals, the Court considered the treatment to amount to torture.⁷³

D. Engendering Reparations in the *Castro Castro Prison* Decision

The fulfillment of these preconditions allowed the Court in the *Castro Castro Prison* case to articulate for the first time some of the components of a holistic gender approach to reparations. A central assumption of the Court when addressing reparations was that women who were subjected to gender-specific violence experienced more harm than those who did not. In particular, taking into consideration the seriousness of each of the acts against women's dignity, the Court awarded additional sums of money for moral damages to women who suffered from sexual violence. So while each surviving victim in the case (male or female) received a lump sum of money depending on the degree of their employment disability or the suffering they endured,⁷⁴ the women who were pregnant each received an additional \$5,000, the

67. *Id.* ¶¶ 290, 292, 293.

68. *Id.* ¶ 298.

69. *Id.* ¶¶ 330.

70. *Id.* ¶¶ 331–32.

71. *Id.* ¶ 306.

72. *Id.*

73. *Id.* ¶ 309, ¶¶ 311–12.

74. *Id.* ¶ 433(c)(i–iv). Between \$20,000 and \$4,000.

woman who was raped received an additional \$30,000, and the six women who were forced to remain naked each received an additional \$10,000.⁷⁵

However, when it came to the assessment of material damages, the Court failed to award different amounts of material damages to women subjected to gender violence, failing to explain why it thought this was not necessary. Furthermore, the Court failed to award adequate satisfaction measures and guarantees of non-repetition when it was both desirable and possible to do so. For example, given that the Court ordered the training of police personnel on human rights, it could have specifically ordered training on the kind of measures required to avoid and prevent violence against women.⁷⁶ Finally, when dealing with rehabilitation, the Court missed an important opportunity to address the specific psychological, physical, social, and legal support that women subjected to violence might require. Transformative forms of reparation were not awarded.

IV. THE GENDER OF REPARATIONS IN THE *COTTON FIELD* CASE

The case of *Cotton Field v. Mexico* was the first case of violence against women to ever reach an international court referring to a context of generalized violence and discrimination against women (such as in Ciudad Juárez), which has for more than a decade been the object of close attention and documentation by different international bodies, including the UN system and the OAS.⁷⁷ It was also the first case to reach the Court in which the systematic abduction, sexual violence, and killing of women were committed by non-state actors. However, the responsibility of the state was engaged because it was not diligent in dealing with the situation. It is also

75. *Id.* ¶ 433(c)(viii–x).

76. *Id.* ¶ 452.

77. For example, the UN has monitored the situation through some of its special procedures. See Asma Jahangir, Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, *Report of her visit to Mexico*, U.N. Doc. E/CN.4/2000/3/Add.3, (25 Nov. 1999); Yakin Ertürk, Special Rapporteur on Violence Against Women, its Causes and Consequences, *Integration of the Human Rights of Women and a Gender Perspective: Violence against Women, Report of her Visit to Mexico*, U.N. Doc. E/CN.4/2006/61/Add.4, (13 Jan. 2006). See also, through its treaty monitoring bodies, Committee on the Elimination of Discrimination against Women, *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico*, U.N. Doc. CEDAW/C/2005/OP.8/Mexico, (27 Jan. 2005). The OAS has paid attention to the situation through the Inter-American Commission and its rapporteur on the rights of women. See, Marta Altolaguirre, Special Rapporteur on the Rights of Women, Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, U.N. Doc. OEA/Ser.LV/II.117.Doc.44, (7 Mar. 2003).

a case where the Court found that the state breached the obligation of non-discrimination under the American Convention. The case stands out for the involvement of civil society institutions, including both nongovernmental organizations (NGOs) that acted as representatives of victims⁷⁸ and NGOs and associations of different types that presented *amici curiae*.⁷⁹

Cotton Field was the third case decided by the Court against Mexico,⁸⁰ one of the most powerful states in the Americas region, and the first against Mexico related to serious human rights violations, and the existence of a general pattern of discrimination and violence against women. Mexico ratified the American Convention on Human Rights on 24 March 1981 but only accepted the contentious jurisdiction of the Court on 16 December 1998. It also ratified the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention) on 12 November 1998.

An important feature of Mexico's position in the case, and one that cannot be underestimated when assessing the Court's treatment of reparations, was its partial acknowledgment of international responsibility for violations of its due diligence obligations under Articles 8 (right to fair trial) and 25 (right to judicial protection) of the American Convention to the detriment of the three direct victims in the case due to the irregularities in the investigations between 2001 and 2003, and for violations of Article 5 of the American Convention in relation to the next of kin of the direct victims, given that they suffered as a result of the disappearances of their loved ones.⁸¹ Mexico, did not acknowledge international responsibility for violations of Articles 4 (right to life), 5 (right to human treatment), 7 (right to personal liberty), 11 (right to privacy), and 19 (rights of the child) of the American Convention to the detriment of the direct victims in the case as well as in relation to their next of kin; Article 7 of the Belém do Pará Convention; nor Articles 8, 25,

78. The three cases were filed by the mothers of the three victims and by the Red de Ciudadanía de No Violencia y por la Dignidad Humana. When the Commission referred the case to the Court, two other local nongovernmental organizations and one international nongovernmental organization appeared as representatives of the victims: the Asociación Nacional de Abogados Democráticos A. C., the Centro para el Desarrollo Integral de la Mujer A. C., and the Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer (CLADEM).

79. Altogether thirteen *amici* were filed, providing the Court with diverse views on issues relevant to the judgment, such as the jurisdiction of the Court to apply the Belém do Pará Convention, violence against women, gender, and reparations.

80. The other two cases decided before the *Cotton Field* case were *Alfonso Martín del Campo Dodd v. Mexico*, Inter-Am. Ct. H. R. (ser. C) No. 113 (3 Sept. 2004) (declared inadmissible); *Castañeda Gutman v. Mexico*, Inter-Am. Ct. H. R. (ser. C) No. 184 (6 Aug. 2008). After the judgment in the *Cotton Field*, the Court also released its judgment in *Radilla Pacheco v. Mexico*, 2009 Inter-Am Ct. H. R. (ser. C) No. 209 (23 Nov. 2009).

81. *Cotton Field v. Mexico*, *supra* note 4, ¶ 20.

and 1.1 of the American Convention after 2003.⁸² All of these were factors considered by the Court in awarding reparations.

A. Preconditions for Gender-Sensitive Reparations in the *Cotton Field* Decision

The *Cotton Field* decision clarified issues concerning the proper identification of facts, violations, victims, and harms. The application of the Belém do Pará Convention proved particularly useful in this endeavor. Indeed, the case put an end to the question of contentious jurisdiction over violations of the Convention and thus facilitates the bringing of gender violence cases before the Court. Mexico had argued that the Court lacked jurisdiction *ratione materiae* over the Convention. The petitioners and the Commission considered that the Court had jurisdiction over Article 7 of the Convention. The petitioners also alleged jurisdiction over Articles 8 and 9.⁸³

Following a strict legal analysis based on the Vienna Convention on the Law of Treaties (Articles 31 and 32) and the application of a key hermeneutic principle that favors the values promoted by the Inter-American system and the protection of human beings,⁸⁴ the Court considered that although the Convention does not expressly grant jurisdiction to the Court, Article 12 implicitly allows such jurisdiction as it recognizes the competence of the Commission to receive complaints of violations of Article 7 of the Belém do Pará Convention and to process them according to the rules incorporated in the American Convention, which include the referral of a case to the Court when applicable.⁸⁵ The Court, however, considered that it lacked competence *ratione materiae* to find violations of Article 8 and 9 of the Convention, given that the treaty only grants such jurisdiction over Article 7. This did not deter the Court from acknowledging that it can use these articles for interpretation purposes.⁸⁶

Not only did the Court affirm its jurisdiction over the Convention but, more importantly, the application of the Convention to the case was more significant than in *Castro Castro Prison* because it was used by the Court to define violence against women, to better characterize the facts of the case, and to then articulate what the obligation of due diligence entails. Therefore, the fulfillment of two preconditions was facilitated by the application of this treaty.

82. *Id.* ¶ 29.

83. *Id.* ¶ 31.

84. *Id.* ¶ 33.

85. *Id.* ¶¶ 40–41.

86. *Id.* ¶ 79.

B. Establishing the Relevant Facts

The Court dealt in innovative ways with the evidence available, overcoming a lack of precise information in relation to different alleged facts. The first important move made by the Court in this regard was in its treatment of the evidence available to prove that in Ciudad Juárez a pattern of violence and discrimination against women existed at the time of the facts. The Court carried out careful research and analysis and, relying on reports produced by international bodies such as the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW), the Inter-American Commission, and even Amnesty International, as well as on key statements made by the state acknowledging the existence of discrimination against women in Ciudad Juárez, arrived at the conclusion that there was a "complex phenomenon [. . .] of violence against women since 1993."⁸⁷ This phenomenon had particular features:⁸⁸ a specific type of victim,⁸⁹ gender violence,⁹⁰ irregularities in the way Mexico led the investigations in the cases, discriminatory attitudes by members of the justice system,⁹¹ and impunity⁹²—the latter being particularly significant in relation to cases that involved sexual violence (calculated to be one third of all of them).⁹³

Having established the broader framework, the Court then moved on to analyze the concrete cases of Esmeralda Herrera Monreal, Claudia Ivette González, and Laura Berenice Ramos Monárrez. Here the Court shifted the burden of proof to overcome evidentiary obstacles. For example, the Commission and the petitioners alleged that Mexico did not carry out any investigation within the first seventy-two hours of the abduction of the three women and the notification of their disappearance to the authorities. When confronting the state's reply that this allegation was not duly proven, the Court declared that the burden of proof should fall on the state and not on the Commission or the petitioners, given that the state is in the best position to provide evidence of investigations conducted by public authorities.⁹⁴ This allowed the Court to conclude that Mexico was unable to prove that effective steps had been taken to find the whereabouts of the victims.⁹⁵

In relation to whether the victims were subjected to sexual violence, the Court found that although sexual violence was not fully proven to have

87. *Id.* ¶ 121.

88. *Id.*

89. *Id.* ¶¶ 122–23.

90. *Id.* ¶¶ 124–27, 132–33.

91. *Id.* ¶ 154.

92. *Id.* ¶¶ 158, 163.

93. *Id.* ¶ 164.

94. *Id.* ¶ 179.

95. *Id.* ¶¶ 181, 284.

taken place in relation to the three female victims, given the state in which the body of Esmeralda was found, it was possible to infer that she had been subjected to sexual violence. The Court also applied this presumption to Laura and Claudia. A key element for the application of the presumption was the existence of many similar cases in Ciudad Juárez under review, where the female bodies were found with signs of sexual violence. Also relevant was the fact that Mexico, despite knowing that many of the abducted and killed women displayed signs of sexual violence, did not conduct proper autopsies.⁹⁶ According to the Court, following the Minnesota Protocol, when an autopsy is carried out it is important, among other things, to carefully examine the genitalia of the victim to find evidence of sexual violence⁹⁷ and, if such violence is believed to have taken place, to preserve different genital secretions and hair.⁹⁸ Such procedures were not followed in the cases of Esmeralda, Claudia, or Laura. In the end, the way the Court alleviated the standard and burden of proof to establish the relevant facts was of paramount importance for the proper treatment of the violations in the case.

C. Properly Identifying the Alleged Violations, Harms and Victims

In contrast to *Castro Castro Prison*, the Court took steps in the *Cotton Field* case to flesh out the duty of due diligence from a gender perspective. In interpreting the duty of due diligence, the Court was guided by Article 7(b) of the Belém do Pará Convention, which orders the state "to prevent, investigate, and impose penalties for violence against women" in connection with the American Convention.⁹⁹ The Court found that states have an obligation to establish a policy of prevention capable of adequately responding to the risk factors faced by women and strengthen the institutions in charge of addressing violence against women.¹⁰⁰ In the case of *Cotton Field*, the Court found that the state had a particularly strong obligation to prevent in the first hours after the abduction and disappearance of the three women, given that it knew that they could be subjected to sexual violence and be killed.¹⁰¹ Therefore, Mexico should have taken all the necessary measures to find their whereabouts and should have had an adequate complaint system in place.¹⁰²

96. *Id.* ¶ 220.

97. *Id.* ¶ 310.

98. *Id.*

99. Belém do Pará, *supra* note 60, art. 7(b).

100. *Cotton Field v. Mexico*, *supra* note 4, ¶ 258.

101. *Id.* ¶ 283.

102. *Id.*

Regarding the obligation to investigate, the Court stressed the measures that should be taken by any state in relation to the collection of evidence of sexual violence during an autopsy of a person who has been killed with violence, and in securing the evidence at the scene of the crime. The Court also pointed out that when systematic human rights violations are taking place, not taking into account such context during an investigation could jeopardize the investigation itself.¹⁰³ Therefore, the Court found that there is an obligation *ex officio* on the state to consider the possible connections between the systematic practice taking place and the case under investigation.¹⁰⁴ This was not duly done by Mexican authorities.

While these examples all illustrate the interest of the Court in crafting a gender-sensitive interpretation of various rights under the American Convention and in fleshing out the meaning of the duty of due diligence, the Court failed to properly address other violations alleged to have taken place, such as the possible violation of the right to privacy, honor, and dignity under Article 11 of the Convention.¹⁰⁵ The representatives of the victims alleged that the reputations of the next of kin of the three girls had been harmed by state authorities when they were trying to find the whereabouts of their loved ones and seek justice, as the authorities often ridiculed their efforts.¹⁰⁶ The Court decided not to declare a violation of the right considering that it had already dealt with such allegations when dealing with violations of the right to humane treatment (Article 5 of the Convention). The Court, however, failed to distinguish the types of acts that would give rise to a violation of Article 11 of the Convention as opposed to Article 5 and it failed to identify the possible gender dimension of a case that is treated as a possible violation of the right to privacy.¹⁰⁷ Nevertheless, all in all, the Court fulfilled the preconditions for adequate reparation.

Finally, with regard to the identification of the groups of victims, the *Cotton Field* decision is interesting because it signals that despite the changes in jurisprudence already outlined by the Court, the Court is still willing to broadly interpret who the injured parties are. As mentioned, in principle the Commission is the one mandated to identify the alleged victims. In the application filed by the Commission with the Court, though, the Commission only identified as victims Claudia, Laura, and Esmeralda, their mothers Josefina, Irma, Benita and "their next of kin," without clearly identifying who the latter were.¹⁰⁸ The Commission had presented the Court with a list of who

103. *Id.* ¶ 366.

104. *Id.* ¶ 368.

105. American Convention, *supra* note 25, art. 11.

106. *Cotton Field v. Mexico*, *supra* note 4, ¶¶ 441–45.

107. American Convention, *supra* note 25, art. 5.

108. Inter-American Commission on Human Rights, *Application filed with the Inter-American Court of Human Rights in the case of Cotton Field against the United Mexican States* (4 Nov. 2007), ¶ 1.

the petitioners considered ought to receive reparations, which went beyond the nuclear family and included, for example, six cousins of the victims, one sister in law and eleven siblings. All of this, together with the fact that Mexico had acknowledged its international responsibility for the suffering caused to the next of kin, and did not object to those identified as victims by the petitioners and the Commission, allowed the Court to consider all of them as the "alleged victims" in the case.¹⁰⁹ Hereby, another precondition was duly met by the Court which was willing to embrace as beneficiaries a wide group of affected individuals.

While it appears the Court was ready to be flexible, it ultimately decided not to consider the five other women whose bodies were also found in the cotton field as victims in this case. Likewise, it did not take into consideration the beneficiaries of these five women. This arguably affected the adequate recognition of victims in the case. The legal representatives requested the Commission to consider them as victims on different occasions but the Commission never responded to the request.¹¹⁰ As a result, when the case was referred to the Court, the legal representatives of the victims also asked the Court directly to consider them as victims but the tribunal denied the request alleging the need to respect due process of law since the Court could not add new victims to the case that were not duly recognized as such by the Commission and in relation to which the state was unable to exercise its right to defense.¹¹¹ Therefore, as a result of the failure of the Commission to adequately address the legal representatives' requests, the Court was unable to deal with the other victims found in the cotton field.

D. Engendering Reparations

The Overall Framework: The Concept of Gender-Sensitive and Transformative Reparations

The Court began its analysis of reparations by putting forward one of the key components for a holistic gender approach to reparations—namely, that they should be inspired by a transformative agenda. More specifically, the Court stated that:

[B]earing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State [. . .], the reparations

109. González et al. ("Cotton Field") v. Mexico, Resolution, Order of the Court of 19 Jan. 2009, ¶¶ 47–52 (2009), available at http://www.corteidh.or.cr/docs/asuntos/asunto_algodonero_2.pdf.

110. *Id.* ¶ 44.

111. *Id.* ¶ 45.

must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.¹¹²

The Court complemented this key principle—that reparations should include a transformative dimension—with seven other elements: 1) reparations should have a direct connection with the violations found by the Court; 2) they should repair in a proportional manner pecuniary and non-pecuniary damages; 3) they cannot be a source of enrichment or impoverishment; 4) reparations must aim at restitution to, “restore the victims to their situation prior to the violation insofar as possible, [but only] to the extent that this does not interfere with the obligation not to discriminate”;¹¹³ 5) reparations should be “designed to identify and eliminate the factors that cause discrimination”;¹¹⁴ 6) they should take into account a gender perspective, “bearing in mind the different impact that violence has on men and on women”;¹¹⁵ and 7) they should take into account all the measures alleged by the state to have been taken to repair the harm.¹¹⁶

When carefully looked at, it is clear that elements one to three and seven simply enunciate agreed principles of international law that regulate reparations in any kind of situation where an international obligation is breached either against another state or against an individual. Thus, the elements that seem to encapsulate what the Court understands by transformative reparations are elements four and five, while element six expressly incorporates the gender dimension. According to four and five, restitution is the primary aim of reparation unless restitution implies breaching the mandate of non-discrimination, a corner-stone human right principle, in which case reparations should aim to also help in the process of subverting those structures that made the violation possible. Likewise, they are applicable to any case where discrimination is at stake and not only to cases that involve gender discrimination. Element six highlights the importance of engendering the notion of harm to duly reflect the fact that gender bias often occurs in the understanding, measuring, and compensation of harm.

B. Applying the Test

1. Identifying and Assessing Harms for Pecuniary Damages

The Court usually awards pecuniary damages for consequential damage and loss of earnings. Consequential damages usually entail the recognition

112. *Cotton Field v. Mexico*, *supra* note 4, ¶ 450.

113. *Id.* ¶ 451.

114. *Id.*

115. *Id.*

116. *Id.*

of economic harm that results from the victim having to incur expenses to deal with the consequences of the violation(s). The Court recognized that the next of kin suffered consequential damage as a result both of the funeral expenses that had to be paid for each of the three girls and of trying to find their whereabouts. Although neither the legal representatives of the victims nor the Commission provided supporting documentation of these alleged harms, the Court lowered the standard of proof. Thus, the Court presumed that the funerary expenses alleged by the next of kin had been incurred, and awarded the mothers the sum of money that remained after deducting what the state had already paid towards this end.¹¹⁷ Similar treatment was given to expenses incurred while the next of kin searched for the bodies of their children, which the Court awarded based on equity.¹¹⁸ The Court did not fully recognize the pecuniary harm derived from the subsequent efforts that the next of kin of the victims had undergone in order to seek justice after the victims mortal remains were found. Although, the Court recognized that they incurred some legal costs and expenses, such as those to attend the public hearing in Chile. Nevertheless, the Court awarded \$45,000, a low sum of money based on equity, to each of the mothers for them to pay their own legal costs and expenses as well as those of their legal representatives.¹¹⁹ The claim for legal costs and expenses put forward by the legal representatives amounted to \$297,848.70.¹²⁰

Damage for loss of earnings was only quantified in relation to the three deceased victims. Here, too, the Court presumed that the deceased victims were working and had a monthly salary, even though there was no supporting documentation in this regard, basing its award on the salary for the alleged job quantified by the state.¹²¹ Nevertheless, the Court failed to identify and assess the income the mothers of the victims (and of other next of kin) lost as a consequence of having to look for their children and to seek justice. This failure occurred despite the fact that the judgment made very visible the activities carried out by the mothers and other next of kin, including those who were threatened and as a result had to leave the country. Given the fact that the task of seeking justice for loved ones often falls disproportionately on female family members, the Court missed an opportunity to highlight the gender specificity of this form of loss.

2. Identifying and Assessing Harms for Non-pecuniary Damages

The compensation award for moral damages to the next of kin of the deceased girls and to the three of them was slightly higher than in other similar

117. *Id.* ¶¶ 561–67.

118. *Id.* ¶ 566.

119. *Id.* ¶ 596.

120. *Id.* ¶ 592.

121. *Id.* ¶¶ 568–78.

cases where the state was also considered to be responsible for failure to protect, such as *Pueblo Bello v. Colombia*,¹²² even if the reasons justifying the award were almost identical. The Court acknowledged most of the different sources of non-material harm suffered by the victims, and tried to redress this harm despite its unquantifiable nature. Among the grounds taken into account by the Court were: the harm produced as a result of the lack of adequate investigation into the abduction and killings of the girls; the actual abduction and killing of the girls; and the threats that the next of kin were subjected to.¹²³ The Court took particular account of the impact of the harm among certain family members but, unlike in other occasions, not on the family unit. As such, it awarded \$10,000, the basic sum of money offered by Mexico as compensation for moral damage, and in some cases granted an additional amount of money.¹²⁴ For example, the Court awarded an additional \$4,000 to the mothers because they were the ones seeking justice, and granted \$3,000 more to one of the mothers because she was subjected to threats while other next of kin received \$1,000 for this harm.¹²⁵ In the end the Court awarded the following reparations:

Table 1.

	<i>Cotton Field</i> ¹²⁶
Non-pecuniary damages for the girls	\$40,000 to Esmeralda and Laura given that they were children \$38,000 to Claudia Ivette
For their next of kin	\$18,000 for one of the mothers and \$15,000 for the other two mothers (given that they searched for justice and were harassed but with a different level of seriousness) \$11,000 for each sibling, sister in law and niece. If any of them was also harassed, the award was \$12,000.

The Court assessed compensation for non-pecuniary harm based on the allegations of the parties to the case and the harms identified when declaring the violations. There was no need to prove additional harm.

122. *Pueblo Bello v. Colombia*, Inter-Am. Ct. H. R. (ser. C) No. 140, ¶ 258 (31 Jan. 2006).

123. *Cotton Field*, *supra* note 4, ¶ 483.

124. *Id.* ¶ 581.

125. *Id.* ¶ 584.

126. *Id.* ¶ 586.

3. Adequate Reparations Going Beyond Compensation Measures: Satisfaction and Rehabilitation

Beyond compensation for non-pecuniary damages, the Court also awarded satisfaction measures to the victims, acknowledging that compensation is insufficient to repair the non-material damage suffered and the need to rely on non-pecuniary means to dignify the memory of the deceased.¹²⁷ Both the Commission and the legal representatives of the victims requested the Court to award similar forms of satisfaction measures with small variations in their delivery to the victims.¹²⁸ They requested the publication of the judgment, the state's public acknowledgment of international responsibility, and the construction of a monument or memorial. In addition, the representatives of the victims also asked the Court to order Mexico to declare 6 November as a national day to pay tribute to the victims of *feminicidios*. The state only offered the publication of the judgment and the acknowledgment of international responsibility, including an apology for the lack of due diligence in the investigations.¹²⁹ The Court awarded everything the Commission and the legal representatives of the victims requested except for the national day.

The Court ordered physical and mental health rehabilitation measures for the victims of the case. Each victim received the opportunity to have free access to medical and psychological services and to medication according to their own needs for as long as necessary. The Court ordered Mexico to employ qualified people to deliver these services. Among other things, such personnel should be trained to deal with the consequences of gender violence.¹³⁰

4. Guarantees of Non-repetition: In Search of Structural Transformation

The Court also recognized that impunity generated suffering and hence non-material harm in the victims of the *Cotton Field* case.¹³¹ In view of this, the Court ordered Mexico to investigate, prosecute, and punish the perpetrators of the abduction, killing, and inhumane treatment of the girls, not only as a primary obligation under the American Convention but also as a reparation measure and as a guarantee of non-repetition. The Court specifically indicated that sexual violence should be investigated and that the contextual situation should be taken into account. Also, the Court stressed the need

127. *Id.* ¶¶ 465, 471.

128. *Id.* ¶¶ 465–66.

129. *Id.* ¶ 467.

130. *Id.* ¶¶ 548–49.

131. *Id.* ¶ 454.

to regularly inform the victims of the outcomes of the investigations and to involve personnel who have expertise in the treatment of violence and discrimination against women.¹³² Importantly, the Court also ordered Mexico to investigate the public servants who failed to carry out their jobs with due diligence¹³³ as well as the threats and persecution of some of the next kin of the deceased victims.¹³⁴

The Commission and the victims' representatives requested the Court to order Mexico to design and implement a coordinated and long-term public policy to guarantee that cases of violence against women would be prevented and investigated, the alleged perpetrators prosecuted, punished, and the victims redressed.¹³⁵ Mexico argued that it already had such a policy in place, substantiating its claim with evidence of legal and policy measures taken between 2001 and 2009.¹³⁶ The Court considered that the Commission and the victims' representatives had not provided the Court with "sufficient arguments" to prove that the measures adopted by Mexico did not constitute such a policy.¹³⁷ It thus abstained from ordering this guarantee of non-repetition. The Court recalled that the Commission and the victims' representatives have the obligation to substantiate their requests for reparations and that this duty "is not fulfilled by general requests with no factual or legal arguments or evidence that would allow the Tribunal to examine their purpose, reasonableness, and scope."¹³⁸ The Court, however, made it clear that it lacked relevant information to measure the effectiveness of the measures adopted by the state.

The treatment of this guarantee of non-repetition by the Court is at a minimum controversial. Clearly, any request for reparation requires those alleging it to prove the extent of the harm. Nevertheless, the nature of a guarantee of non-repetition is not that of an ordinary reparation measure. Guarantees of non-repetition are inherently forward looking and have a structural component, which is why arguably a different standard and lesser burden of proof should apply. Moreover, if a guarantee of non-repetition is to be treated as a normal reparation measure, then the Court should be open to relying on the use of presumptions and inverting the burden of proof, as it often does when dealing with systematic human rights violations. Ultimately, it is not reasonable to expect the Commission or the victims' representatives to fully substantiate why such a complex set of measures adopted by Mexico is not able to prevent further violations, particularly

132. *Id.* ¶ 455(ii).

133. *Id.* ¶¶ 456–60.

134. *Id.* ¶¶ 461–62.

135. *Id.* ¶ 475.

136. *Id.* ¶¶ 476–77.

137. *Id.* ¶ 493.

138. *Id.*

when the problem in Ciudad Juárez appears to go beyond the mere enactment of laws, given the prevalent structure of discrimination and violence against women. In such a situation, and given that the state is the one that has the information about the effectiveness and coordination of its policies, the Court should have asked the state (and not the Commission or the victims) to provide evidence—not only as to whether such a policy exists but, more importantly, as to why such a policy can be expected to effectively prevent future violations. Even more, the Court could have taken a more constructive approach to the problem and called for the establishment of an expert team to assess the effectiveness of such measures, identify their shortcomings, and put forward recommendations. After all, this was the only reparation request with transformative potential. The Court lost a valuable opportunity to engage fully with the transformative potential of reparations after embracing the concept in theory.

In spite of these deficiencies, other guarantees of non-repetition were granted by the Court. Some of these are crucial to engendering the principle of due diligence. For instance, the Court ordered Mexico to continue the standardization of its investigative protocols in relation to cases of sexual violence, following the guidelines of the Istanbul and Minnesota Protocols, and to provide the Court with a report on this guarantee of non-repetition annually for three years.¹³⁹ The Court also indicated to Mexico the parameters to be taken into account in the implementation of rapid investigation responses when a woman or girl disappears. It recalled, among other things, that this is an obligation *ex officio* that the state has to act very quickly and diligently and that the whereabouts of the person should be searched for in places where it is reasonable to believe they could be found.¹⁴⁰ Mexico was again ordered to inform the Court about the implementation of these guarantees of non-repetition for a period of three years on an annual basis. Finally, other important guarantees of non-repetition included the creation and updating of a national database with information of all missing women and girls and their genetic information,¹⁴¹ a measure that could be important to investigations of such abductions and identification of the bodies found. Also, the Court ordered Mexico to provide training to personnel directly or indirectly involved in the prevention, investigation, and prosecution of violence against women. Such training should place emphasis on women's rights, engendering due diligence during different judicial proceedings, and overcoming social stereotypes.¹⁴²

139. *Id.* ¶¶ 497–502.

140. *Id.* ¶ 506.

141. *Id.* ¶ 512.

142. *Id.* ¶¶ 451–52.

V. CONCLUSIONS

The *Cotton Field* case marks a significant moment of change in the gender jurisprudence of the Inter-American Court of Human Rights. One of its key achievements is the attempt to understand the meaning of human rights from a gender perspective and to try to apply such sensitivity not only in the treatment of the facts and the alleged violations but also in relation to the award of reparations. This already shows a clear departure from the previous jurisprudence of the Court. Still, what is perhaps most valuable about the judgment is its recognition that the treatment of reparations in cases involving discrimination calls not for restitution but for transformative redress, since it would be against the core foundations of human rights law to redress women, or for that matter any other subordinated group, by returning them to the situation that allowed the violations to happen in the first place. The establishment of this principle is the main legacy of the Court for future cases.

Despite these great achievements, the specific treatment of reparations in this landmark case has also shown some of the challenges that the Court will need to face in the future if it is willing to apply its own doctrine thoroughly. The key question seems to be how best to articulate a transformative approach to reparations in concrete terms. The *Cotton Field* decision shows that implementing corrective reparations is a major challenge, not only because reparations are dependent on what the parties allege before the Court to be the adequate means for redress, but also because the Court has limited powers when it comes to redressing structural problems. However limited, though, the Court should exercise those powers and not shy away from the opportunity to trigger broader structural reform by engaging other political actors. From this perspective, the Court lost a major opportunity to apply its own concept of transformative reparations to the awards it made. Unfortunately, the recent cases of *Rosendo Cantú and other* and *Fernández Ortega and others v. Mexico*, dealing with gender violence, rape and discrimination, among other violations, do not even refer to the concept of transformative reparations nor offer any attempt to try to materialize it: new lost opportunities.

It has been maintained that guarantees of non-repetition—inherently forward looking—offer the greatest potential to challenge discrimination. Certainly, in the *Cotton Field* case, the Court was willing to emphasize the need for a gender-sensitive approach when interpreting the obligation to investigate, prosecute, and punish all perpetrators. It is regrettable, however, that it failed to adequately consider the need to require a national policy on due diligence in cases of widespread violence against women since this was an opportunity to really engage with transformative reparations. In future cases, the Court should consider the extent to which it makes sense

to treat guarantees of non-repetition by simply replicating the way it treats other reparation measures. In particular, the Court may want to consider whether it can grant such measures only based on what the parties request from the Court or whether it can exercise its *motu proprio* capacity and award other guarantees of non-repetition as it did, for instance, in *Rochela v. Colombia*.¹⁴³ Also, the Court should consider whether the standard and burden of proof in relation to these measures should be the same one that the tribunal applies to ordinary reparation measures (restitution, compensation, rehabilitation, and satisfaction).

Transformative reparations and guarantees of non-repetition require the Court to be willing to depart from a narrowly conceived role of administering justice in individual cases and to enter the domain of institutional reform and policy-making by requiring states to address structural shortcomings in the protection of human rights. However, when the shortcomings are indeed structural, triggering systemic transformation is both a necessary and legitimate task for an international human rights tribunal.

143. *Rochela v. Colombia*, Inter-Am. Ct. H. R. (ser. C) No. 163, ¶¶ 286–303 (11 May 2007).