

## Notes from the Inter-American System for the Panel Discussion on Reparations for Women Subjected to Violence

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*...[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 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.*

Inter-American Court of Human Rights, Cotton Field Case<sup>2</sup>

### Introduction

The present notes are intended to share some basic information about advances in the inter-American human rights system in the area of reparations for women subjected to violence, while recognizing that we are still in the early stages of moving forward. In this regard, the notes are intended to provide references for those interested in investigating further. In speaking about reparations, I'm following the broad substantive understanding of remedies referred to by Special Rapporteur Manjoo in her first thematic report as "the outcomes of the proceedings," or "the measures of redress granted to victims,"<sup>3</sup> in this instance by the Inter-American Commission on Human Rights ("Inter-American Commission") and the Inter-American Court of Human Rights ("Inter-American Court" or "Court").

The recent sentence issued by the Inter-American Court of Human Rights ("Inter-American Court" or "Court") in the Case of González et al., known as the "Cotton Field Case" includes reparations for violence against women that seek to be responsive to the specificities of the causes and consequences of such violence. The Cotton Field Case concerns three young victims of gender-based violence in Ciudad Juárez, Mexico, and the deficiencies in the police, judicial and public policy sectors that permitted and perpetuated the practice of violence that led to their deaths. The reparations draw from the Court's analysis of the gender-specific causes and consequences of that violence. That sentence, in turn, drew from and was made possible by an evolving incorporation of the perspective of gender within the regional human rights system as a whole.

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This is an unfinished draft, intended to share with participants in the meeting.

<sup>2</sup> I/A Court HR, Case of González et al. ("Cotton Field") v. Mexico, Judgment of Nov. 16, 2009, para. 450 available at: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.doc)>.

<sup>3</sup> Advance edited version, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/14/22, 19 April 2010.

The incorporation of the perspective of gender within the system<sup>4</sup> has been possible first and foremost because of the adoption and entry into force of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”). It is the most widely ratified of all of the regional human rights treaties and has served as the basis for understanding the link between violence and discrimination for reasons of gender and applying that link within the individual petition system as well as the other mechanisms the system offers.<sup>5</sup> It may be noted that almost all of the member states of the OAS are also parties to the Convention on the Elimination of all Forms of Discrimination against Women, so the Commission and Court have necessarily taken its provisions into account into understanding those states’ obligations.

The other development that has been fundamental for the incorporation of the perspective of gender in the work of the Inter-American Commission was the creation of its Special Rapporteurship on the Rights of Women, at roughly the time of the approval of the Convention of Belém do Pará. The Rapporteurship assists the Commission in the full range of its functions, and provides specialized attention to issues including discrimination and violence based on gender, as well as access to justice for women subjected to these human rights violations.

It bears noting that in recent years the Inter-American Commission has included more women commissioners, and the Court more women judges, and that some of the commissioners and judges have had the benefit of prior experience working in the area of women’s rights. This has been an important factor, given that election to serve on the supervisory mechanisms was dominated almost exclusively by men for the first decades of the system’s history.

Given that human rights mechanisms are still very much in the process of incorporating the perspective of gender, so as to be able to effectively respond to such problems as violence and discrimination against women, the foregoing points remain issues of relevance. They are just some of the factors that have supported advances in favor of reparations for women victims of violence.

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<sup>4</sup> The contrast between the decisions of the Inter-American Commission on Human Rights and the Inter-American Court before and after beginning to provide specific attention to violence and discrimination against women is dramatic. This can be readily demonstrated with reference to the Loayza Case, which included a claim of rape by state agents, and was brought by the Commission before the Inter-American Court. The case was litigated with very little attention to that claim, and the claim was rejected with virtually no analysis. See I/A Court HR, Case of Loayza-Tamayo v. Peru, Merits. Judgment of September 17, 1997. Series C No. 33, paras. 45.e, 56-58. As will be discussed below, through more recent cases the Commission and Court have developed analytical approaches that begin to take into account the gender-specific causes and consequences of these kinds of violations, as well as the kinds of reparations that correspond. Compare Loayza-Tamayo to I/A Court HR, Case of the Miguel Castro-Castro Prison v. Peru, Judgment of Aug. 2, 2008, Ser. C No. 181, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_181\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_181_ing.doc), which includes in depth analysis of gender-based violence against women inmates.

<sup>5</sup> 32 of the 35 member states are parties. Please note that the Inter-American Commission on Human Rights provides comprehensive information about its work online at [www.cidh.org](http://www.cidh.org). The site includes the instruments of the system, as well as all published reports and a search mechanism, in both English and Spanish. The site includes all reports cited herein. The Inter-American Court of Human Rights provides information including all of its sentences at [www.corteidh.or.cr](http://www.corteidh.or.cr).

## **A few examples of advances within the system**

In order to understand what the Cotton Field Case represents, it would be useful to make at least brief reference to some of the prior advances in the system in the area of gender-sensitive reparations. To take just a few examples, we could look at the cases of *María da Penha Maia Fernandes* decided by the Inter-American Commission, the Commission's report on *Violence and Discrimination against Women in the Armed Conflict in Colombia*, and then at the Commission's response to the situation of violence against women in Ciudad Juarez and the Cotton Field Case decided by the Inter-American Court at the end of 2009. This leaves out many other useful references, but provides a basis to begin an examination. These notes conclude with a look at another trio of cases concerning rape by state agents and what they may signify moving forward.

### **The first individual case decided under the Convention of Belém do Pará: Maria da Penha**

The first case dealt with by the Inter-American Commission on Human Rights under the Convention of Belém do Pará concerned violence against a woman in the domestic sphere, the violence to which Maria da Penha Maia Fernandes had been subjected by her then-husband. The abuse, including attempts to kill her, left the victim paralyzed. When the Commission decided the case, the criminal proceedings against the victim's husband had been pending for some 16 years. He had not been imprisoned, and appeals against an initial conviction had been pending for years. The Commission applied both the American Convention on Human Rights and the Convention of Belém do Pará in establishing Brazil's obligation to apply due diligence to investigate, prosecute and punish the violence against her.<sup>6</sup>

In its findings, the Commission took into account the pattern and practice of violence against women in Brazil in establishing that the measures taken by the state to combat the problem were insufficient and had not had any effect in the particular case. This was the first case in the regional system to demonstrate what the state obligation to apply due diligence could require in a case of violence at the hands of a private individual. As indicated, one of the central themes running through the Commission's analysis is the need for states to take action to combat impunity, a requirement that continues to be a central issue in cases concerning gender violence.

The recommendations include completing the criminal process against the perpetrator; investigating and determining responsibility for the delay and obstacles in the process; actual and symbolic compensation for the delay and denial of justice; reforms to the procedures to seek justice to simplify and expedite it, and make it more effective; measures to train officials; and more support for specialized police and judicial services for women victims of violence.<sup>7</sup>

Looking specifically to the question of reparations, and what difference the process before the Commission has made, it is important to understand that the Commission's report grew out of and was incorporated back into a larger strategy at the

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<sup>6</sup> IACHR, Report no. 54/01, Case 12.051, *Maria da Penha Maia Fernandes*, (Brazil), 16 April 2001.

<sup>7</sup> A more detailed look at the recommendations would note the reference to establishing mechanisms to serve as alternatives to judicial mechanisms, a point which may merit further analysis.

national level. The findings of the report helped to impel a number of changes at the local level, including that the perpetrator was finally brought before the judiciary, sentenced and imprisoned for a period. More broadly, the case and report helped draw attention to deficiencies in both law and practice, and that attention led to the 2006 adoption of a new law on Domestic and Family Violence against Women known as the 'María da Penha law'. The new law includes measures to prevent harm to women, including better and more ample protective measures, as well as improved state responses for women who have been subjected to violence.<sup>8</sup> The State also provided the victim with monetary compensation.<sup>9</sup> Compliance with the recommendations is not yet complete, and the Commission continues monitoring the steps the State must take to fully discharge its international responsibility in the case.<sup>10</sup>

### **The role of general reports in seeking remedies for past wrongs: Violence against women in the conflict in Colombia**

General or thematic reports don't produce the same kind of individualized reparations as an individual case. They do, however, include specific recommendations, and there is generally a process to review the extent to which those recommendations are implemented in practice. These kinds of reports, in turn, provide useful information and analysis in dealing with individual cases that arise in the same or similar contexts. As will be referred to below in the discussion of the Cotton Field Case, the general report the Commission published on the situation of violence against women in Ciudad Juarez was a key element in the developments that led to the case brought before the Court. Because individual cases are subject to diverse limiting factors, it is important to consider other mechanisms that can open paths to reparations for violence against women.

In 2006 the Commission issued a report prepared by its Special Rapporteurship on *Violence and Discrimination against Women in the Armed Conflict in Colombia*,<sup>11</sup> which examines the obligations of the state with respect to its agents, members of the paramilitary forces and non-state actors. The report analyzes issues of violence and discrimination and how the situation of conflict further exacerbates these human rights violations. It looks at how the actors in the armed conflict employ different forms of physical, psychological and sexual violence to 'wound the enemy' by dehumanizing the victim, injuring her family and spreading terror in her community, with the objective of widening their control of territory and resources. It then examines violence intended to forcibly displace women. It also analyzes how sexual violence can be involved in the forced recruitment of women who are required to provide sexual services to members of

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<sup>8</sup> See IACHR, Press Release no. 30/06, 'The IACHR Rapporteurship on the Rights of Women Celebrates the Adoption in Brazil of a Specific Law to Prevent and Eradicate Domestic and Family Violence' (recognizing as well that the process to adopt the law had included substantive participation on the part of civil society), 11 August 2006; The law itself can be accessed in Portuguese at <[https://www.planalto.gov.br/ccivil\\_03/\\_Ato2004-2006/2006/Lei/L11340.htm](https://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Lei/L11340.htm)>.

<sup>9</sup> For a recent summary of the status of implementation of the recommendations, see the Commission's Annual Report for 2009, chapter III (chart and narrative that follows), at <http://www.cidh.oas.org/annualrep/2009eng/Chap.III.h.eng.htm>.

<sup>10</sup> See generally, IACHR, Annual Report 2009, Chapter III.D, Status of compliance with the recommendations of the IACHR, which summarizes this process.

<sup>11</sup> IACHR, OEA/Ser.L/V/II., Doc. 67, 18 October 2006. Available at: <[http://www.cidh.oas.org/annualrep/2009eng/Chap.V.4.htm#\\_ftn2](http://www.cidh.oas.org/annualrep/2009eng/Chap.V.4.htm#_ftn2)>.

guerrilla or paramilitary forces. Finally, it looks at violence intended to subject women to measures of social control imposed by illegal armed groups in territories under their control. The report gives particular attention to the situation of indigenous women and Afro-Colombian women who suffer multiple forms of discrimination that leave them especially vulnerable to the infliction of violence.

The recommendations are numerous, and center around the need to incorporate the perspective of gender in a real and effective way in state policy. There are general recommendations in this regard, as well as recommendations by type of attention and response, which concern legislation, public policies, state institutions and programs, diagnosis and prevention, public services for displaced women, administration of justice, civil and political participation, and truth, justice and reparation.

Since publication of that report, the Commission has continued to monitor the issues identified as priorities with respect to the violence and discrimination that women suffer in the context of the armed conflict in the country. The Commission has held issues-related hearings and has received updated information from a variety of sectors, among them the government, civil society organizations and networks, international agencies and others.

In its report following up on advances and obstacles in the implementation of its recommendations, the Commission recognizes that the State has made some progress in adopting laws and public policies more conducive to improving its response and the public services provided to women affected by the violence and discrimination. The Commission also takes note of the landmark court rulings delivered between 2006 and 2009 that have been vital in better protecting the rights of women, especially women displaced by the armed conflict. However, the Commission reiterates its concerns and corresponding recommendations insofar as the physical, psychological and sexual forms of violence perpetrated by the armed forces and the police, demobilized combatants, and outlaw groups continue to control the physical persons and lives of women. Indigenous and Afro-Colombian women and girls remain principal victims of this violence, but continue to encounter the greatest obstacles in obtaining justice, with the result that these crimes go unpunished.

### **Violence against Women in Ciudad Juárez, Mexico: The general situation and the Cotton Field Case**

The Cotton Field Case forms part of a series of efforts within the regional human rights system to address the situation of violence against women in Ciudad Juárez, Mexico. Those efforts began in 2001, when the Commission's Special Rapporteur on Women's Rights began receiving requests for action from representatives of civil society in Ciudad Juárez. Those requests and the information presented led in turn to a 2002 visit by the Commission's Special Rapporteurship which led in turn to presentations of requests for precautionary measures and individual petitions during and after the visit. The visit also led to a 2003 report on the general situation with a series of recommendations, and a follow-up process that included hearings on the status of compliance with those recommendations, followed by an emphasis on processing the individual cases that had been presented. The processing and decision of the individual cases drew in important part from the knowledge gained through the prior activities. During this period, efforts were also underway by a variety of UN mechanisms, including work by the Special Rapporteur on Violence against Women and CEDAW, as well as

ngo's, civil society, the National Human Rights Commission, Amnesty International and CLADEM, among others.

The Commission's report, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, analyzes the grave situation of violence faced by the women and girls of that city, including murder and disappearance, as well as sexual and domestic violence, and offers recommendations to assist the state in amplifying its efforts to respect and ensure those rights.<sup>12</sup> It is important to understand that the Commission was petitioned by representatives of civil society to take action on the situation in Ciudad Juárez principally on the basis of a string of what were then called 'serial' killings of young women. What the Commission found and detailed in its report, however, was a broader panorama of violence, of which the 'serial' killings were one manifestation. That pattern of violence was marked by a lack of measures of prevention or protection, and by a response that was deficient to the point of creating a climate of impunity for the perpetrators of the killings. The situation of violence was in turn inextricably linked with a larger situation of discrimination. That discrimination was particularly manifest in the way that complaints of violence against women were dealt with by the police and judiciary.

The recommendations issued by the Commission focus on ending the impunity that has characterized the vast majority of these crimes as a key means to punish past killings and prevent future killings. They consist of general recommendations, recommendations concerning the application of due diligence to investigate these crimes and prosecute and punish those responsible, and recommendations concerning the application of due diligence to prevent future such crimes. In terms of the recommendations concerning investigation and punishment, the Commission focuses more specifically on the need to: develop additional resources and technical capacities; provide independent oversight of investigating authorities; develop investigation plans that take into account the prevalence of violence against women as well as possible links between cases; the need to investigate 'cold' cases and correct past deficiencies; develop investigation plans seeking to cross-reference cases of disappearance with established deaths; provide enhanced training in technical aspects and in the causes and consequences of violence based on gender; and to establish mechanisms to hold officials who fail to discharge their responsibilities under the law accountable.

The Cotton Field Case, decided by the Court in late 2009, deals with the fate of Laura Berenice (17 years old), Claudia Ivette (20) and Esmeralda (15), who were abducted and killed within the pattern of gender-based violence in Ciudad Juárez, and whose bodies were then abandoned with those of five other young women in the cotton field that gave the case its name. The Court found the State responsible for having failed to take the measures necessary to safeguard the rights of these young women, most especially for having failed to promptly and effectively investigate their disappearance, and for having failed to clarify their deaths after their bodies were found. This was not a case in which it was demonstrated that state agents had abducted the young women, but rather in which it was proven that the State had failed to take the measures available to it to respond to a known situation of risk with due measures of response.

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<sup>12</sup> IACHR, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, Doc. 44, 7 March 2003.

In analyzing the responsibility of the State, the Court reviewed the extensive pleadings and information concerning the context of violence in which the specific killings took place, and concluded:

*...since 1993, there has been an increase in the murders of women, with at least 264 victims up until 2001, and 379 up to 2005. However, besides these figures, which the Tribunal notes are unreliable, it is a matter of concern that some of these crimes appear to have involved extreme levels of violence, including sexual violence and that, in general, they have been influenced, as the State has accepted, by a culture of gender-based discrimination which, according to various probative sources, has had an impact on both the motives and the method of the crimes, as well as on the response of the authorities. In this regard, the ineffective responses and the indifferent attitudes that have been documented in relation to the investigation of these crimes should be noted, since they appear to have permitted the perpetuation of the violence against women in Ciudad Juárez. The Court finds that, up until 2005, most of the crimes had not been resolved, and murders with characteristics of sexual violence present higher levels of impunity.*

The relationship between this context and the specific facts, and between what the State knew about this context and the duty that it had to protect these three victims form an important basis for the sentence and the corresponding reparations.

In its sentence the Court reviews in detail some of the deficiencies in the response of the State, which included failing to take measures of investigation during the crucial first hours and days after the disappearance of the girls, notwithstanding that it was on notice of the risk that they would be subjected to sexual violence and murder; manifestations on the part of officials of disrespect and stereotyping against the victims; failures in the initial stages of investigation after their bodies were found; and numerous irregularities in the ensuing investigation, including contradictions and defects in the autopsies and in the identification and treatment of the remains and a general failure to investigate in order to truly clarify the crimes.

The Court concluded that the State bore responsibility for:

*The irregularities in the handling of evidence, the alleged fabrication of guilty parties, the delay in the investigations, the absence of lines of inquiry that took into account the context of violence against women in which the three women were killed, and the inexistence of investigations against public officials for alleged serious negligence, violate the right of access to justice and to effective judicial protection, and the right of the next of kin and of society to know the truth about what happened. In addition, it reveals that the State has failed to comply with ensuring the rights to life, personal integrity and personal liberty of the three victims by conducting a conscientious and competent investigation. The foregoing allows the Court to conclude that impunity exists in the instant case and that the measures of domestic law adopted have been insufficient to deal with the serious human rights violations that occurred.<sup>13</sup>*

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<sup>13</sup> Sentence, para. 388.

The Court went on to establish that “This judicial ineffectiveness when dealing with individual cases of violence against women encourages an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted as part of daily life.”<sup>14</sup>

The Court also took into account the ways in which the violence against the victims, and the inadequate and even disrespectful response of the officials constituted forms of discrimination:

*Bearing in mind the statements made by the State [disrespectful and even hostile statements by officials against the victims] ..., the 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.*<sup>15</sup>

The Inter-American Court has developed a rich case law in determining reparations, which includes among other aspects, determining beneficiaries, material and non-material damages, guarantees of non-repetition, satisfaction, rehabilitation, and measures against impunity -- namely investigation, prosecution and punishment of those responsible for the violations established. In the Cotton Field Case, the Court took a distinct approach in specifically indicating that it would analyze the pleadings concerning reparations based on the criteria that they:

*(i) refer directly to the violations declared by the Tribunal; (ii) repair the pecuniary and non-pecuniary damage proportionately; (iii) do not make the beneficiaries richer or poorer; (iv) restore the victims to their situation prior to the violation insofar as possible, to the extent that this does not interfere with the obligation not to discriminate; (v) are designed to identify and eliminate the factors that cause discrimination; (vi) are adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women, and (vii) take into account all the juridical acts and actions in the case file which, according to the State, tend to repair the damage caused.*<sup>16</sup>

One of the key advances in the reparations is the idea that they should not only repair the damage to restore the status quo ante (to the extent possible), but should go further to redress and transform the underlying causes and consequences of the situation of violence, discrimination and impunity. The Court has for many years now ordered measures of non-repetition that have a structural component, and the amplitude of its practice in this regard has been one of its strengths. However, the idea of transformative reparations to remedy structural discrimination that was set out in the Cotton Field Case represents a further step forward.

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<sup>14</sup> Sentence, para. 388.

<sup>15</sup> Sentence, para. 401.

<sup>16</sup> Sentence, para. 451.



Another important advance in the reparations is the attention to the incorporation of the perspective of gender in the investigation of these crimes. The Court orders the State to not only investigate, prosecute and punish the perpetrators, but also to incorporate lines of inquiry to investigate the gender-based and sexual violence, and ensure that those charged with the investigation have training and experience in cases of gender-based discrimination and violence. Further, the Court orders the State to:

*...continue standardizing all its protocols, manuals, prosecutorial investigation criteria, expert services, and services to provide justice that are used to investigate all the crimes relating to the disappearance, sexual abuse and murders of women in accordance with the Istanbul Protocol, the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, and the international standards to search for disappeared persons, based on a gender perspective...<sup>17</sup>*

The Court orders a series of additional measures designed to require the State to bring its response mechanisms in line with international standards.

The foregoing points are just a few of those dealt with by the Inter-American Court in its judgment, which seeks to address and redress the gravity and profundity of the problem that was placed before it.

## **Conclusion**

As we move forward with cases concerning violence against women in the Inter-American system, the Court has just heard oral arguments in two cases concerning the rape of indigenous women by soldiers in the State of Guerrero, Mexico.<sup>18</sup> These cases follow an earlier case before the Inter-American Commission, which is now in the follow-up stage.<sup>19</sup> In these cases the Commission and Court have been called on to examine the multiple levels of discrimination that indigenous women, living in rural areas and with few resources, face as victims of violence who then face discrimination and additional obstacles in trying to obtain access to justice. Dealing with these multiple intersections of discrimination poses a further set of crucial challenges.

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<sup>17</sup> Sentence, desiderandum 18.

<sup>18</sup> The cases of Inés Fernández Ortega and Valentina Rosendo Cantú, currently pending decision before the Court.

<sup>19</sup> IACHR, Report 53/01, merits, Case 11.565, Ana, Beatriz and Celia González Pérez (Mexico), *Annual Report of the IACHR 2000*.