VIOLENCE AGAINST WOMEN AND REPARATIONS FROM A GENDER PERSPECTIVE BEFORE INTERNATIONAL COURTS

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LIST OF ABBREVIATIONS

2006 Principles and Guidelines	Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
American Convention	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination Against Women
Convention of "Belém Do Pará"	Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women
DRC	Democratic Republic of the Congo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council of the United Nations
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	International Criminal Law
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
Nairobi Declaration	The Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation
NGO	Non-governmental organization

OAS	Organization of American States
Optional Protocol	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
PCJI	Permanent Court of International Justice
RPE	Rules of Procedure and Evidence of the Rome Statute
TFV	Trust Fund for Victims
UDHR	Universal Declaration of Human Rights
VAW	Violence against women
WGSV	Women´s Grave and Systematic Violations

EXECUTIVE SUMMARY

The purpose of the present research is to analyze whether or not human rights mechanisms and international courts award reparations from a gender perspective in cases of grave and systematic violence against women. Another aim is to compare the legal framework and provisions of the reparation's regime and the scope of the reparations awarded by the CEDAW Committee, the ECtHR, the IACHR, the IACtHR, and the ICC.

The research focuses on the concept of victim of the violation and the measures of reparations awarded from a gender perspective. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition are analyzed in the light of the *Nairobi Declaration*, as well as the literature of the subject provided by scholars in books and law journals. An interview with Sir Nigel S. Rodley is included.

The research manages to translate transitional justice concepts into International Human Rights Law and provides a methodology to compare to which extent gender-neutral reparations have an impact on women as well as providing a minimum standard of reparations from a gender perspective. It is concluded that, both the Inter-American Commission and Court of Human Rights case-law constitute the best examples of reparation's regime with a gender perspective in cases of grave or systematic violation of women's rights.

The present thesis balances the limitations of international courts and the victim's needs and interest, and provides specific measures of reparations from a gender perspective and according to international standards, measures that will benefit women who faced the most egregious violations and did not obtain reparation in domestic law.

INTRODUCTION

In the aftermath of armed conflicts and periods of war in different regions around the world, transitional justice studies contribute to developing mechanisms for transparency and accountability for the past abuses and human rights violations committed by perpetrators. In the light of the formula "No peace without justice", the reports of truth and reconciliation commissions in different regions, mostly Africa and Latin-America, have shown the need to bring to domestic or international courts those responsible for international crimes and the need to award reparations for victims of those crimes.[1] As Pablo de Greiff has rightly pointed out, "in a transition out of conflict or towards democracy […] reparations are the most tangible manifestation of the efforts of the state to remedy the harms they have suffered."[2]

In the last decades, legal research on reparations for victims of gross and systematic human rights violations before international courts and mechanism of protection have started to emerge.[3] However, there is little legal research focused on studying reparations from a victim-centered approach which considers their characteristics and particularities such as gender, age, or ethnic group.[4] Therefore, reparations from a gender perspective are crucial to satisfy the harm done to those women and girls who suffered gross or systematic violations. This becomes crucial if we acknowledge that violation of human rights affects women in different levels: on one hand, the pre-existing situation of vulnerability or discrimination suffered by women and; on the other hand there is violence which particularly affects women

[1] Pablo de Greiff, *Introduction. Repairing the Past: Compensation of Victims of Human Rights abuses in* The Handbook of Reparations, 1-13 (Oxford University Press 2006).
[2] *Id.* at 37
[3] Douglass Cassel, *The Inter-American Court of Human Rights, in* Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America (Due Process of Law Foundation ed., 2007); Cherif Bassiouni, *International Recognition of Victims' Rights*, Human Rights Law Review 203 (2006); *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, (K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens eds. Intersentia, 2005); Juan E. Mendez, *Accountability for Past Abuses*, Human Rights Quarterly vol 19, Number 2, 255-282 (1997); Cecilia Medina, *The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System*, Martinus Nijhoff Publishers (1988).
[4] Ruth Rubio-Marin, *Introduction: A Gender and Reparations Taxonomy in* The Gender Of reparations: Unsettling Sexual hierarchies while Redressing Human Rights violations (Cambridge University Press, 2009), World Bank, *Gender, Justice and Truth Commissions*, premge-sov-legjr-lac-wb, 2006.

by the sole fact that they are women, such as rape and enforced sterilization when they face the atrocities of war and armed conflicts.[5]

It is not contested that sexual violence affects women and men, however, sexual violence against women in armed conflict intensifies and it affects them in a disproportionate manner, as it shows the large scale abuses that have taken place since ancient times to World War II through the recent atrocities *inter alia*, in Bosnia and Herzegovina, Rwanda or Sierra Leone.[6] Moreover, feminist scholars correctly sustain that a) women are more vulnerable to violence because of the discriminatory pre-conditions on their daily lives before the conflict explodes and b) women face gender-specific-violations when international crimes —such as genocidal rape— are planned with the specific intention to violate women's rights because of the fact that they are women.[7] For the purposes of this research, the term 'women' includes girls.

Koening and Askin pointed out that "gender-based and sex-based crimes committed predominately against women have rarely been formally recognized and prosecuted in the international arena."[8] Nowadays, this statement cannot be sustained. Certainly, the prosecution and adjudication of systematic rape and sexual violence as genocide, as a war crime and crime against humanity in the ICTY and ICTR, feminist legal literature started to proliferate; as a result there is a comprehensive research on this field.[9] However, none of this

[5] Astrid Aafjes & Ann Tierney Goldstein, *Gender violence: The Hidden War Crime,* Women Law & Development International, 8 (1998)

[6] Anne-Marie L.M, de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, 395-399 (Intersentia, 2005) 4-18; Ruth, Rubio-Marin, *What Happened to the Women? Gender and Reparations for Human Rights Violations*, 23 (Social Science Research Council, 2006)

[7] Bouta, Tsjeard; Frerks, Georg; Bannon, Ian. *Gender, Conflict and Development*, 3, World Bank Publications, 2004; Teresa, Iacobelli, *The 'Sum of Such Actions': Investigating Mass Rape in Bosnia-Herzegovina through a Case Study of Foca in Brutality and Desire: War and Sexuality in Europe's Twentieth Century,* 261-265 (Ed. Dagmar Herzog. Palgrave Macmillan, 2008); Ruth, Rubio-Marin, above n. 6 at 3.

[8] Dorean M. Koening & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes against Women, in* 2 Women and International Law, 9 (Transnational Publishers 2000).

[9] See Kelly Dawn Askin, *War Crimes Against Women. Prosecution in International War Crimes Tribunals*, Kluwer Law Internationalm(1997); Astrid Aafjes & Ann Tierney Goldstein, above n. 5 at 8; Dorean M. Koening

bibliography refers in dept to the next step after adjudication: reparation for victims and, most important, reparation from a gender perspective.

Rebecca J. Cook argues that the International Human Rights Law has not been applied effectively for women by reason only of their condition of women.[10] This statement becomes true and has a tremendous impact while analyzing the measures of reparations awarded by international Courts. Moreover, research regarding reparations from a gender perspective in Transitional Justice mechanisms such as Truth and Reconciliation Commissions started to emerge few years ago[11] but for now, there is scarce information on reparations from a gender perspective before International Tribunals.[12]

Violence against women either grave or systematic, goes from domestic, sexual violence, torture, deprivation of liberty, deprivation of life and feminicide and take place in times of war or in peace. In his public lecture, given at CEU, Judge Theodor Meron emphasized that the convergence of human rights and humanitarian law had been achieved by international judicial bodies, as human rights continued to apply in war time.[13] At the end of the conference the author asked him about the gross and systematic violations in both bodies of law and he responded that human rights law is marching into criminal law.[14] For Dorean Koening and Kelly Askin, this convergence and confluence is progressing at an

& Kelly D. Askin, above n. 8 at 6; Ilaria Bottigliero, *Redress for Victims of Crimes under International Law*, 4, Martinus Nijhoff Publishers (2004); Anne-Marie L.M, de Brouwer, above n. 6; Franke M. Katherine, *Gendered subjects of transitional justice*, 15 Colum. J. Gender & L. 817 (2006)

[10] Rebecca J. Cook, *Women's International Human Rights Law: The way forward in* Human Rights of Women: National and International Perspectives, 3 (University of Pennsylvania Press 1994).

[11] See Ruth, Rubio-Marin, above n. 6; above n. 4.

[12] Gaby Ore Aguilar, *El derecho a la reparacion por violaciones manifiestas y sistematicas a los derechos humanos de las mujeres [The right to reparation for gross and systematic violation of women's human rights]* in Justicia y Reparacion para mujeres victimas de violencia sexual en contextos de conflicto armado interno. Seminario Internacional, 312, Consejeria en Proyectos, 2007.

[13] Audio tape: Conference on the 4th *Marek Nowicki* Memorial Lecture Series: The Humanization of the Law of War by the Hon. Judge Theodor Meron, held by the Central European University (Nov. 27 2008) (on file with author)**.**

[14] *Id.*

unparalleled pace.[15] Judge Meron's answer confirmed the idea and the importance to consider and analyze in a comprehensive manner grave and systematic violations of women's rights and their right to reparation. The present paper analyzes the case-law of those international courts and mechanisms who apply IHRL and ICL, where grave or systematic violations were assessed on merits judgments or decisions, providing as a consequence, a right to obtain reparations. The reason for choosing international courts is the binding force of their decisions, providing a real remedy for victims to obtain them. For IHRL the following courts are chosen: the European and the Inter-American Court of Human Rights.[16] In the field of ICL: the International Criminal Court. Soft-law and resolutions of the human rights mechanisms are included to some extent, as long as they can provide valuable measures of reparations from a gender perspective.

The present paper answers the question whether or not international courts and human rights mechanisms award reparations from a gender perspective in cases of grave or systematic violence against women. As it was mentioned, most of the research on reparations from a gender perspective corresponds to Transitional Justice mechanisms but not specifically in legal adjudication. *Prima facie* it can be said that international Courts provide a few measures of reparation with gender perspective. The importance of this research is to analyze and provide clear examples of measures of reparations from a gender perspective when women face grave and systematic violations, as well as to provide the developments in the field of gender justice and milestones achieved by the Tribunals. The objective of this thesis is to analyze and compare the reparations awarded, the legal framework and limitations

[15] Dorean M. Koening & Kelly D. Askin, above n.8 at 7.
[16] Although there have been multiple violations of women human rights in Africa, Angela Melo, Commissioner, explains that the Court has not received any case as regards women's rights because the Commission has not admit any, due to the "lack of awareness, poverty, societal patriarchal attitudes and even lack of legal capacity to take cases to not just the regional human rights mechanism but also the domestic courts". George Mukundi Wachira, *African Court on Human and People's Rights: Ten years on and still no justice. Report*, 20, Minority Rights Group International, (2008).

of the tribunals to award them. This research provides a list of concrete reparations measures awarded by the tribunals and some human rights mechanisms from a gender perspective including restitution, compensation, rehabilitations, satisfaction and guarantees of non-repetition. The present research will incorporate books, articles and journals. Extracts of a personal interview with Sir Nigel S. Rodley[17] are included. A brief introduction and general remarks are given in every chapter.

In Chapter 1, this research explores the key definition and concepts of reparation from a gender perspective for women victims of grave and systematic violations in IHRL. The first part of the Chapter discusses the theory of reparations in international law and the obligation of State Parties to redress human rights violation from a gender-neutral perspective. The second part starts to analyze the concept of gender and reparations, its recognition in international law, its implications and its development. The first pack of case-law analyzed is the recommendations of the CEDAW Committee.

In Chapter 2, this research describes briefly the ECtHR functions, the legal framework which protects and guarantees women's human rights and the legal provision to provide reparations. An analysis of the case-law is made in order to highlight the gender analysis of the Court while finding violations of the European Convention and, whether or not reparations with gender perspective are granted. The execution of judgments is included in order to recognize how they constitute a positive input for reparations.

In Chapter 3, one of the most interesting exercises constitutes the analysis of the Inter-American Court and its reparations regime. The chapter describes briefly the IACtHR

[17] Interview with Sir Nigel S. Rodley, Essex University, (Apr. 3 2009) (on file with the author). Sir N. Rodley is a Member of the UN Human Rights Committee. Sir Nigel S. Rodley was the former UN Special Rapporteur on Torture from 1993 to 2001. During his mandate, the Rapporteur on Torture was one of the first UN bodies who recognized that under certain circumstances rape can constitute a form of torture.

functions, the legal framework which protects and guarantees women's human rights and the legal provision to provide reparations. An analysis of the case-law is made in order to highlight the gender analysis of the Court while finding violations of the American Convention and the reparations granted.

In Chapter 4, this research describes the recent case-law of the ICC which provides recent development and challenges for the understanding of reparations of grave and systematic violations in the context of international crimes. The ICC is described briefly, as well as the reparations provisions established in the Rome Statute and RPE. It is analyzed some victim's case-law and its implication for reparations to female victims.

Finally, this research concludes that reparations from a gender perspective are granted to some extent, being the best example the IACHR and the IACtHR, but there is much more to be developing by Courts.

This research has the aim to contribute to the emerging debate of gender and reparations, to preserve it and to continue it, to recognize the work of the judicial institutions in the cases they had to decide on, and to provide in the near future and in reality, a paradise of reparations for women victims when grave and systematic violations are at stake.

CHAPTER 1 THE GENDER PERSPECTIVE OF REPARATIONS IN INTERNATIONAL HUMAN RIGHTS LAW

The present chapter describes the elemental concepts and key issues that become necessary for the present research. The first part develops the obligation to redress in international human rights law. The second part, analyzes reparations from gender perspective, their definition, their elements, their development and the need to provide this category of reparations for women victim's of grave and systematic human rights violations. The recommendations of CEDAW case-law are analyzed as a point of departure for further debate and research.

1.1. The obligation of a State to redress human rights violations in international law

Reparations for human rights violations have not always been awarded from the State to an individual person. This means that the notion of redress has its origin in a vis-à-vis obligations between States, between the sovereigns. The recognition of the obligation to make reparation was stated by the Permanent Court of International Justice (P.C.I.J, current International Court of Justice) in the *Chorzow Factory Case*: "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[18] Richard Falk suggests that although the obligation to redress was not precisely defined in terms of implementation, the ICJ is the authority in which the foundation of this obligation is developed, and the Court reinforced this principle in its further judgments.[19]

In 1924 the P.C.I.J. decided in *Mavrommatis Palestine Concessions Case* that "It is an elementary principle of international law that a State is entitle to protect its subjects, when injured by acts contrary to international law, from whom they have been unable to obtain

[18] Factory at Chorzów (Germany v. Poland) (Merits), 1928 P.C.I.J. (Ser A) No. 17, at ¶ 29 (September 13).
[19] Richard, Falk, *Reparations, International Law, and Global Justice: A new frontier in* The Handbook of Reparations, 482 (Pablo De Greiff ed., Oxford University Press 2006).

satisfaction through the ordinary channels."[20] As Falk rightly points out, the legal formulation made by the Court in *Mavrommatis* is valuable because this formulation was made before an idea of obligation of states to redress when human rights are violated in international law.[21]

Pablo de Greiff rightly suggests that "there seems to be growing consensus among international lawyers that victims of human rights abuses are entitled to reparations".[22] Indeed, there is a theory of reparations in international law which sustains the obligation of State to grant reparations for victims of human rights violations; but there is not too much clarity or consensus on the measures of the reparations that should be granted for victims or the venue to award reparations; whether they are judicial institutions such as international Courts or transitional justice mechanisms such as Truth and Reconciliation Commissions.

For the purpose of this research the definition of reparations departs from the legal international framework. A leading commentator in this subject, Dinah Shelton defines reparations as "the generic term that describes various methods available to a state to discharge or release itself from state responsibility for a breach of international law" or "the obligations of States under International Law to provide reparations for the infringement of the international order."[23] For Shelton and Ilaria Bottigliero the term redress refers to an umbrella concept for the different measures of reparation.[24] For the purposes of this research, either reparation or redress are the terms used, as both reflect accurate the legal content of the obligation.

[20] Mavrommatis Palestine Concessions, (Greece v. UK) (Merits), 1924 P.C.I.J. (Ser A) No. 2, at ¶ 12 (August 30).
[21] Richard, Falk, above n. 19 at 481-482.
[22] Pablo de Greiff, *Justice and Reparations in* The Handbook of Reparations, 490 (Oxford University Press 2006).
[23] Dinah Shelton, *Remedies in International Human Rights Law,* 44 (2nd ed. Oxford University Press, 2005)
[24] Ilaria Bottigliero, *Redress for Victims of Crimes under International Law*, 4, Martinus Nijhoff Publishers (2004). Although Bottigliero acknowledges that the term reparations reflects the legal content, she preferred to use for her research redress as it is employed in different legal regimes.

In the scope of IHRL, Shelton argues that "the legal basis for state responsibility for violation of human rights derives from breach of a human right treaty or a human rights norm of customary international law."[25] This paper focuses on treaty based violations. In IHRL there is a duty of States to provide reparation for the violation of human rights of their persons under their jurisdiction. The legal provisions which enshrined the right to reparation are enshrined in the right to an 'effective remedy' and 'compensation' in many human rights instruments and treaties, *inter alia*, the UDHR (Article 8 and 9),[26] the ICCPR (Article 2.3),[27] and the Convention against Torture (Article 14).[28]

Several scholars, legal practitioners, judges and human rights lawyers recognize that the leading authority in the topic of "reparations" is the Inter-American Court of Human Rights, as it will be discuss in Chapter 3.[29] For now it is enough to say that the Inter-American Court has established that reparation is a:

> "generic term that covers the various ways a State can redress the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees that the violations will not be repeated, among others)"; and

[25] Dinah Shelton, above n. 23 at 47.
[26] Article 8: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, UN Doc. A/RES/217A (III) of December 10, 1948.
[27] Article 2.3: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted." Article 9.5. "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." International Covenant on Civil and Political Rights, UN Doc. A/RES/2200A (XXI) of December 16, 1966.
[28] Article 14: "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment orPunishment, UN Doc. A/RES/39/46 of December 10, 1984.
[29] Arturo J., Carrillo, *Justice in Context: The relevance of the Inter-American Human Rights Law and Practice to Repairing the Past, in* The Handbook of Reparations (Pablo De Greiff ed., Oxford University Press 2006); Sergio Garcia Ramirez, *La Jurisdiccion Interamericana de Derechos Humanos: Estudios [The inter-American Human Rights jurisdiction: Studies]*, 163 (Comision de Derechos Humanos del Distrito Federal, 2006)

> reparation includes "measures that are intended to eliminate the effects of the violation that was committed." [30]

From the above cited paragraph, certainly, reparations refer to a generic term. The various ways of redress mentioned by the Court lead us to the next question to be answered: What is the meaning of the measures of reparations?

1.2. The measures of reparations

For De Greiff the *restitutio in integrum* is the "restoration of the *status quo ante*", in other words, is the "restoration of the situation exactly as it was before the injury."[31] *Restitutio* could be the adequate or ideal form to repair the human rights violation or international crimes. However, restitution will be practically impossible, for instance, in cases of a death or a tortured person.[32] Therefore, if *restitutio* aims to restore the situation as it was before the unlawful ac was committed, this measure of reparation will not be adequate for a gross human right violation.

Sergio Garcia Ramirez, former President of the IACtHR, claims that *restitutio* is an 'ideal horizon for reparations' but does not constitute an achievable measure given by the fact that it supposes to be a complete and not a partial reparation.[33] For instance, *restitutio* makes sense in cases of an unlawful or arbitrary deprivation of liberty where the release of the person might be *restitutio in integrum*; but even in this case, to give back the loss of liberty during his/her time in detention more than a reparation it will constitute a 'true miracle'.[34] Indeed, when *restitutio in integrum* is not achievable other measures of reparation are more than welcome.

[30] Case of Blake v. Guatemala, Judgment on Reparations and Costs, Inter-Am. Ct. H.R., (Ser C, No. 48) (Jan 22, 1999) at ¶¶ 31 and 34.
[31] Pablo de Greiff, above n. 22 at 455; C. Eagleton, *Measure of Damages in International Law*, 39 Yale L.J. 52, 53 (1929) cited in Dinah Shelton, above n. 23.
[32] Pablo de Greiff, above n. 22.
[33] Sergio Garcia Ramirez, *Temas de la Jurisprudencia Interamericana sobre Derechos Humanos: Votos particulaes [Topics of the inter-American Human Rights's Caselaw: Particular Opinions]*, 145,146 , Pandora, (2005)
[34] *Id.*

Throughout fifty years of evolution of reparations measures, —between 1985 and 2006— the development of victim's rights make that scholars, independent experts, UN mechanisms and NGO's put an effort to compile or define from a different perspective the reparation's regime.[35] This was possible with the expertise of Theo Van Boven and Cheriff Bassiouni, the former the drafter and the latter the reviewer, who created the *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 International Humanitarian Law.*[36] This Principles and Guidelines provide the measures or forms of reparation classified as:

a) Restitution,
b) Compensation,
c) Rehabilitation,
d) Satisfaction, and
e) Guarantees of non repetition.[37]

1.3. The reparations from a gender perspective

Why women need a specific category of reparations? First, because "the needs of each of the sexes by the time they get over the consequences of the violation can be different."[38] Second, in the understanding that a violation of a right is a pre-condition to award reparations,[39] women face specific violations according to their gender. The term used by scholars to refer

[35] Ilaria Bottigliero, above n. 24 at 179-181.
[36] *Id.*
[37] Principles 19 to 23 of the *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 International Humanitarian Law*, GA res. 147, 21 March 2006, A/RES/60/147.
[38] Clara, Sandoval et al, *Amicus curiae presented before the Inter-American Court in the Cotton Field Case*, 25 August 2009. The amicus was written by Clara Sandoval and students of the University and the Human Rights Centre of Essex, REDRESS, the International Centre for Transitional Justice, Mariclaire Acosta, Ximena Andion and Gail Aguilar Castanon on our personal character at ¶48. Available at http://www.redress.org/casework/AmicusCampoAlgodoneroFinalrev25August2009.pdf
[39] Ruth, Rubio-Marin, *What Happened to the Women? Gender and Reparations for Human Rights Violations*, 30, Social Science Research Council, (2006)

to egregious human violations both in IHRL and ICL are meant as "gross and systematic violations."

The concept of gross, systematic violations of human rights was born inside the UN four decades ago in the context of the policy of apartheid in South Africa, South West Africa and racial discrimination in Southern Rhodesia.[40] In that time, no agreement was reached for their definition.[41] Nowadays, there is no consensus between scholars about the concept of gross, grave and systematic violations.[42] However, as it will be explained there is a clearer concept for "gross, grave or systematic" violations when it applies to women human rights.

1.3.1. The grave and systematic violations of women's rights

The World Conference in Human Rights stressed the importance of the eradication of violence against women in public and private life and that "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law."[43] In particular "murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."[44] In 1998 the *Special Rapporteur on Systematic rape, sexual slavery and slavery-like practices during wartime, including internal conflict* focused on the violence perpetrated against women and gave a definition of "systematic" in his Report:

[40] It was in the 1960's when the ECOSOC by its Resolution 1235 (XLII) authorized both the Commission on Human Rights and the Sub-Commission to examine information relevant to violations of human rights and fundamental freedoms. Cecilia Medina, *The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System*, 10, Martinus Nijhoff Publishers (1988).

[41] *Id.*

[42] For Donna J. Sullivan, there is not an accepted definition for the term "grave" in IHRL, neither is a specific category of violations. IIDH, *Convención CEDAW y Protocolo Facultativo [CEDAW Convention and Optional Protocol]* 72, (2nd. ed., IIDH, 2004).Ruth Rubio-Marin, Clara Sandoval and Catalina Diaz, *Repairing Family members: Gross Human Rights Violations and Communities of Harm in* The Gender Of reparations: Unsettling Sexual hierarchies while Redressing Human Rights violations, 216 (Ruth Rubio-Marin ed., Cambridge University Press, 2009)

[43] U.N. GAOR, World Conf. on Hum. Rts., *Vienna Declaration and Program of Action*, ¶ 38, A/CONF.157/23 (1993)

[44] *Id.*

> The term "systematic" is […] an adjective to describe certain forms of rapes, not to denote the invention of a new crime or a new burden of proof that must be established to prosecute an act of rape. An act of rape, in addition to being a crime in its own right, may fall within a larger pattern of widespread or policy-based attacks on a targeted group, thereby establishing the elements of crimes against humanity […]. It is not necessary, however, to prove the occurrence of "systematic rape" in order to prosecute a single act of rape under the rubric of crimes against humanity, just as it is not necessary to prove "systematic murder" or "systematic torture" to establish a claim under crimes against humanity.[45]

From the above paragraph it is important to highlight that "systematic" can be reflected in a single rape, as it is could be in a single homicide or in a single torture. The protection of systematic violations of women's rights within the UN was made by the strengthening of the functions of the CEDAW Committee with the adoption of its Optional Protocol,[46] which entered into force on December 22, 2000.[47] For Sir. Nigel Rodley, it was necessary to protect human rights of women in the same manner of other treaties such as the Torture Convention of the UN.[48]

The Optional Protocol introduces two procedures to be implemented by the CEDAW: 1. An individual 'complaint procedure'[49] and 2. An 'inquiry procedure'.[50] Article 8.1 of the Optional Protocol provides:

> If the Committee receives reliable information indicating **grave or systematic violations** by a State Party of rights set forth in the Convention, the Committee shall

[45] U.N. Econ. & Soc. Council [ECOSOC], sub-Comm. on Prevention of Prevention of Discrimination and Protection of Minorities, *Contemporary forms of slavery. Systematic rape, sexual slavery and slavery-like practices during armed conflict*, ¶ 26, U.N. Doc. E/CN.4/sub.2/1998/13 (Jun 22, 1998) *(prepared by* Ms. Gay J. McDougall).

[46] Felipe, Gómez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women: Strengthening the Protection Mechanisms of Women's Human Rights*, 20 Ariz. J. Int'l & Comp. L. 291, 305, (2003)

[47] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999) "An Optional Protocol is a legal instrument related to an existing treaty, which addressed issues not covered by or insufficiently developed in the treaty. […] It is described as "optional" because States are not obliged to become party to it, even if they have ratified or acceded to the related convention." Inter-Parliamentary Union, *The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol. Handbook for Parliamentarians.* United Nations, 73, (2003).

[48] Interview with Sir Nigel S. Rodley, above n. 17.

[49] Articles 1 to 7 and 11 of the Optional Protocol.

[50] Articles 8 to 11 of the Optional Protocol.

> invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned. […][51]

For Andrew Byrnes, there was both too much support and opposition to include this procedure because it was designed under the parameters of the inquiry procedure of the Article 20 of the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.[52] In 2005, the procedure was adopted and for the first and unique time,[53] the CEDAW Committee initiated a confidential investigation for the grave, serious and systematic violations in its inquiry Report in Ciudad Juarez, Chihuahua, Mexico.[54] It is to celebrate the successful achievement through the recognition of this category of violations for the victims and women human rights movement; disappointingly, this Report does not provide a single recommendation for reparations.

The provisions of the Optional Protocol do not provide a definition of grave or systematic, and is silent as to whether or not the Committee can provide recommendations related to reparations. Laboni Amena claims that the power of the inquiry procedure is to investigate serious but isolated violation of women's rights; for example, *sati*; or large scale abuses such as trafficking in women or violations in situations on armed conflict.[55] For Maria Regina Tavares da Silva:

> Cases of a severe abuse of fundamental rights, such as the right to life, integrity, security or dignity, are considered **"grave".** Cases that reflect a regular or prevalent practice or

[51] G. A. Res. U.N. Doc. A/RES/54/4, (Oct. 15, 1999) (Emphasis added)
[52] Andrew Byrnes, *Slow and Steady Wins the Race: The Development of an Optional Protocol to the Women's Convention*, 91 Am. Soc'y Int'l L. Proc. 383, 387, (1997), Inter-Parliamentary Union, The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol:Handbook for Parliamentarians, 90, (United Nations 2003).
[53] By the time of the present research from the bibliography and the public information of the CEDAW Committee Official Web-Site the Ciudad Juarez Mexico case has been the only investigation completed in July 2004 under the Article 8. Available at http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm
[54] CEDAW, *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,* CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005)
[55] Laboni Amena, Hoq, *The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights*, 32 Colum. Hum. Rts. L. Rev. 677, 697, (2000-2001)

> pattern of discrimination against women as a social group on broad scale or specific groups of clearly identified individuals are **"systematic".**[56]

For jurist, Alda Facio:

> The term grave refers to the severity of the violation, in human rights law **"grave"** usually refers to violations of the right to life, physical and mental integrity, and security of the person. Therefore, discrimination against women is considered as grave when it is linked with the violation of the right to life, physical and mental integrity and security of women.
>
> […]
>
> The term **"systematic"** refers to the scale or frequency of the violations, or the existence of a scheme or policy which induces that those violations are committed.[57]

For Tavares, the discrimination is exclusively for systematic violations, for Facio discrimination applies for grave violations. For the above mentioned concepts it can be concluded that "grave" refers to discriminatory violations of women's human rights which interfere with their fundamental rights of life, liberty, security and integrity. "Systematic" refers to discriminatory policies or patterns against women as a social group which affects a large scale or wide number of victims. The reparations from a gender perspective can be applied to any violation against women but they turn strictly necessary when grave and systematic violations interfere with their fundamental rights.

[56] IWRAW Asia Pacific, *Global Consultation on the Ratification and Use of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, (IWRAW Asia Pacific, 63, 2005) Da Silva is a Portugal member of the CEDAW Committee and she gave the definition in the context of the Ciudad Juarez case.

[57] "El término grave se refiere a la severidad de la violación y en el lenguaje de los derechos humanos generalmente se denominan violaciones graves sólo a aquellas que afectan la vida o la integridad física y mental o la seguridad de las personas. Por lo tanto, la discriminación contra una mujer se considerará grave cuando esté vinculada a violaciones a derechos a la vida, a la integridad física y mental y a la seguridad de la mujer." […] "El término "sistemático" se refiere a la escala o frecuencia de las violaciones, o a la existencia de un plan o política que incentive a que se cometan dichas violaciones." Alda Facio Montejo, *CEDAW en 10 minutos [CEDAW in 10 Minutes]*, 33-34, UNIFEM Región Andina, (2006).

1.3.2. The concept of reparations from a gender perspective

In 2005 the idea of the term 'mainstreaming and reparation' was included in an initiative of a three-year research project of the International Centre for Transitional Justice.[58] In the field of transitional justice, several scholars understand reparations in two different scopes:

a) Reparations as a political project, and
b) Reparations in the adjudication in courts or tribunals.[59]

The first category corresponds to reparation programs which are a legislative or administrative initiative.[60] The examples of this category are the several national reparation programs designed, implemented, monitored or evaluated in places where transition to democracy or after conflict took place, *inter alia*, in Sierra Leone, South Africa, Chile, USA, etc.[61] The violations committed are widespread or systematic, then the goal of reparation programs is to provide some kind of justice to a pool of victims in a massive fashion, thus reparation programs are understood as an administrative measure established with the support of the government, international organizations or Truth and Reconciliation Commissions to provide reparations to victims.[62]

The second category corresponds to reparations in the adjudicative process in court's proceedings at national or international level and they award reparation in a form of compensation in individual fashion on a case-by-case basis.[63] In other words, this category deals with the international jurisdiction exercised by Courts when an individual claims to be a victim of human rights violations and the right to receive reparations. For Rubio-Marin and Pablo de Greiff there are 'three gender justice-related reasons' to prefer administrative or

[58] Ruth Rubio-Marin, *Introduction: A Gender and Reparations Taxonomy in* The Gender Of reparations: Unsettling Sexual hierarchies while Redressing Human Rights violations, 3(Cambridge University Press, 2009)
[59] Ruth, Rubio-Marin and Pablo, de Greiff, *Women and Reparations*, The Int'l J. of Transitional Justice, Vol 1, 2007, 321, 318-337.
[60] *Id.*
[61] Pablo de Greiff, *Introduction. Repairing the Past: Compensation for victims of human rights violations in* The Handbook of Reparations, 36-40 (Oxford University Press 2006)
[62] *Id.*
[63] Ruth Rubio-Marin, above n. 58 at 4-5.

legislative programs rather than judicial venues.[64] Conversely, as Gaby Ore has rightly pointed out, both administrative and judicial approaches rather than compete between them, they are complementary in order to provide better solutions to victims. [65] Furthermore, reparation programs cannot substitute the importance of the judicial venue and the binding nature of the State's obligation to redress.[66]

Ruth Rubio-Marin suggests that there are two elements of the concept of reparations from gender perspective (in the context of reparation programs):

a) the concept of victim/beneficiary, and
b) the specific measures of the reparation.[67]

The concept to be used in this research to understand 'engendered reparations' or 'reparations from a gender perspective' are both the Ruth Rubio-Marin's definition and Gaby Ore's criterion in the adjudication process considering: 1. The concept of victim. 2. The State obligation to award measures of reparation from a gender perspective.

1.3.3. The concept of victim

Women play and active and important role as peace-builders in times of conflict as the Security Council Resolution 1325 addresses.[68] On the other side of the coin, it is a fact that women have been in a passive role as victims of the most egregious violations. For Aarjes and Tierney's point of view, in times of armed conflict violence against women often

[64] Ruth, Rubio-Marin and Pablo, de Greiff, above n. 59 at 321-322.
[65] Gaby Ore Aguilar, *El derecho a la reparacion por violaciones manifiestas y sistematicas a los derechos humanos de las mujeres [The right to reparation for gross and systematic violation of women's human rights]* in Justicia y Reparacion para mujeres victimas de violencia sexual en contextos de conflicto armado interno. Seminario Internacional, 312, Consejeria en Proyectos, 2007.
[66] *Id.*
[67] Clara, Sandoval et al, above n. 38 at ¶49.
[68] S/RES/1325 Resolution 1325 (2000)

intensifies.[69] First, women are victims of violence because they are subjected to gender-based violence, second, because they may be subjected to violence that is not directly target to them but affects them because they are more vulnerable to violence as a consequence of their roles and responsibilities in society.[70]

Although several feminist scholars are aware that in times of conflict or war man and boys are victims of sexual violence, scholars correctly sustain that a) women are more vulnerable to violence because of the discriminatory pre-conditions on their daily lives before the conflict explodes, and b) women face gender-specific-violations when international crimes —such as genocidal rape— are planned with the specific intention to violate women's rights because of the fact that they are women.[71]

As it was mentioned in section 1.1.2, the *2006 Basic Principles and Guidelines* compressed the international standards enshrined in several instruments, case-law of the UN Human Rights Committee and the Inter-American and European Court of Human Rights.[72] The *2006 Basic Principles and Guidelines* provide a wide notion of victim:

> Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[73]

[69] Astrid Aafjes & Ann Tierney Goldstein, *Gender violence: The Hidden War Crime*, Women Law & Development International, 8 (1998)
[70] *Id.*
[71] Bouta, Tsjeard; Frerks, Georg; Bannon, Ian. *Gender, Conflict and Development*, 3, World Bank Publications, 2004; Teresa, Iacobelli, *The 'Sum of Such Actions': Investigating Mass Rape in Bosnia-Herzegovina through a Case Study of Foca in Brutality and Desire: War and Sexuality in Europe's Twentieth Century*, 261-265 (Ed. Dagmar Herzog. Palgrave Macmillan, 2008); Ruth, Rubio-Marin, above n. 39 at 3.
[72] Jonathan, Doak, *Victim's rights, human rights and criminal justice: reconceiving the role of third parties*, Hart, 75 (2008), M. Cherif, Bassiouni, *International recognition of Victim's Rights*, H.R.L. Review, 278, (2006)
[73] 2006 Basic Principles and Guidelines, above n. 37, Principle 8.

Jonathan Doaks and Bassiouni rightly points out that the concept of victim is broader in international law rather than domestic legislation.[74] It should be consider also that the violation of a right is a pre-condition for the right to reparation and the notion of harm means that victims might be next of kin or dependants affected by the violation.[75]

In 2007, it was subscribed by the civil society the *Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation*[76] an international instrument which "seeks to redefine reparations from a gender perspective."[77] Although this document is a declaration lacking of binding nature, it helps to provide a comprehensive interpretation to access to a judicial remedy and right to reparation's provisions contained in different human rights treaties.

The Nairobi Declaration as the *2006 Basic Principles and Guidelines* "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law."[78] Valérie Couillard suggests that the Declaration goes beyond of the *2006 Principles and Guidelines*, in the sense that the concept of victim "must be broadly defined within the context of women's and girls' experiences and their right to reparation," for example, the recognition of girls soldier's rights who were abducted and obliged to work in militia.[79] The following section explains the second element of reparations form a gender perspective.

[74] *Id.*
[75] Ruth, Rubio-Marin and Pablo, de Greiff, above n. 59 at 318-337.
[76] Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation (2007). Available at http://www.womensrightscoalition.org/site/reparation/signature_en.php
[77] Valérie, Couillard, *The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence,* Int'l J. of Transitional Justice, Volume 1,444-453, 445 (2007).
[78] Preamble, 2006 Basic Principles and Guidelines, above n. 37.
[79] Nairobi Declaration, above n. 76 at ¶ 4; Valérie, Couillard, above n. 77 at 449.

1.3.4. The measures of reparations

It was mentioned in Section 1.1.2. the different measures or forms or reparations that States provides to victims of HRL, IHL and ICL. In order to define and compare what makes a difference to understand reparations through the 'gender lenses' see **Table 1:**

MEASURE OF REPARATION	*2006 BASIC PRINCIPLES AND GUIDELINES/ GENDER NEUTRAL PERSPECTIVE*	*2007 NAIROBI DECLARATION/GENDER PERSPECTIVE*
Restitution	Restitution "should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Examples of restitution are: "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." *(Principle 19).* For Dinah Shelton "is the re-establishment of the situation that existed before the wrongful act was committed."(Shelton, above n. 23 at 47)	Restitution and reintegration by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation. (*Nairobi Declaration,* above n. 76 at 3) For Ruth Rubio-Marin and Pablo De Greiff reverting women to the *status quo ante* is the most limited option to redress women because they do not enjoy the same **legal status** as men.(Rubio-Marin and De Greiff, above n.59 at 331)
Compensation	Compensation "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (*a*) Physical or mental harm; (*b*) Lost opportunities, including employment, education and social benefits; (*c*) Material damages and loss of earnings, including loss of earning potential; (*d*) Moral damage; (*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services." *(Principle 20).* Whenever restitution is not possible, compensation is the adequate form to redress the infringement of rights. (Shelton, above n.23 at 47)	Governments must consider all forms of reparation available at individual and community levels. These include, but are not limited to, restitution, compensation and reintegration. Invariably, a combination of these forms of reparation will be required to adequately address violations of women's and girls' human rights. *(Nairobi Declaration, Key aspect F)* Scholars claim that compensation is also the most limited option to redress because women's status is commonly undervalued or neglected; both compensation and restitution are not the best form to repair in a pool of victims of gross and systematic violations as it can create unequal awards and put hierarchy between victims. (Rubio-Marin and De Grieff, above n.59 at 331; Rubio Marin, above n. 39 at 10) "Real reparation for victims of sexual violence requires much more than financial compensation."(Couillard, above n. 77 at 450)

Rehabilitation	Rehabilitation "should include medical and psychological care as well as legal and social services." *(Principle 21)*	Rubio-Marin and De Greiff describe that 'women are disproportionately burdened' as care-takers of children, sick, disabled or elderly, moreover "the lack of reparation benefits in the form of services for amputated, mutilated, wounded or otherwise disabled or dependent persons may mean that women are overburdened with unpaid work." (above n. 59 at 331) "Rehabilitation or reintegration could be the primary goal of material reparations because they are future-oriented concepts inspired in flourishing and successful life that women often never had before" and improves the victim's "quality of life and optimizes their chances of recovering a minimally functional life."(*Id.*)
Satisfaction	Satisfaction "should include, where applicable, any or all of the following: (*a*) Effective measures aimed at the cessation of continuing violations; (*b*) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (*c*) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (*d*) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (*e*) Public apology, including	Rubio-Marin and De Greiff explain that satisfaction measures can be symbolic reparations, which are awarded in individual or collective venues; satisfaction for women is significant as it can make the memory of victims a public matter and they could continue to move on. (above n.59 at 334) These scholars explain that as they are symbolic gestures, some women may not allow themselves other forms of reparation if they do not have the proper meaning; for example, assistance in finding the remains of the loved ones to give them proper burial are significant to widows, sisters and daughters who feel more comfortable as they are not perceived by their relatives as receiving blood money.(*Id*) Measures such as an official apology and recognition of state responsibility make reparation programs more sensitive to women's needs. (*Id*) As regards access to justice measures (point f of principle 22), there is a due diligence obligation of the State to prevent,

	acknowledgement of the facts and acceptance of responsibility; (*f*) Judicial and administrative sanctions against persons liable for the violations; (*g*) Commemorations and tributes to the victims; (*h*) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels." *(Principle 22)*	prosecute, punish and redress the acts of violence against women. This due diligence obligation has a 'special connotation' according to Belem do Para Convention. (Inter-Am. Comm. H. R. Access to Justice for Women Victims of violence in the Americas, OEA/Ser.L/V/II Doc. 68 Jan 20, 2007 at ¶ 23.)
Guarantees of non-repetition	These guarantees "should include, where applicable, any or all of the following measures, which will also contribute to prevention: (*a*) Ensuring effective civilian control of military and security forces; (*b*) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (*c*) Strengthening the independence of the judiciary; (*d*) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (*e*) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (*f*) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (*g*) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (*h*) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.	The two key principles of *Nairobi Declaration* are **transformation** of a society as a whole and **participation** of women to this process, the transformative potential of reparations is reflected in these measures.(Couillard, above n. 77 at 450-451) The obligation of due diligence to prevent violence against women "especially where widespread or deeply rooted practices are concerned, imposes upon the States the parallel obligation by producing adequate statistical data and consider the policies implemented by civil society." (Inter-Am. Comm. H. R. Access to Justice for Women Victims of violence in the Americas, OEA/Ser.L/V/II Doc. 68 Jan 20, 2007 at ¶ 42.) In their recommendations, the IACHR, highlight the importance of amend civil and criminal codes to be harmonized with principles of CEDAW and Belem do Para Conventions. (*Id*. at p. 122)

1.3.5. The recommendations of the CEDAW Committee

A mandatory reference to start with reparation from gender perspective arises from the individual communications of the CEDAW Committee. In 1979 the General Assembly of the UN adopted the CEDAW.[80] In 1993, the international community recognized that the human rights of women and girls are "inalienable, integral and indivisible part of universal human rights."[81] Despite the fact that the catalogue of rights included in the UDHR, the ICCPR and the ICESCR are universal and applies for every human being, it was necessary to combat effectively the *de jure* and *de facto* discrimination against women in comparison to men in every society.[82]

The General Recommendation No. 19 which complements the CEDAW defines gender-based violence as "a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."[83] Thus, it is common knowledge that violence against women is the gravest form of discrimination. For Byrnes, women suffer violation of rights in different ways and these violations are mediated through gender.[84] "The general discussion of international procedures has relevance for most sorts of violations that may be suffered by women, whether they be gender-neutral (where women "just happen" to be the victims) —if there is such a thing— or gender-specific violations."[85] In any event, violence against women is just a few of the gender-specific violations.[86]

[80] Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46), at 193, U.N. Doc A/34/46 *adopted on* Dec. 18, 1979 *entered into force* Sept. 3, 1981
[81] U.N. GAOR, World Conf. on Hum. Rts., *Vienna Declaration and Program of Action*, ¶ 18, A/CONF.157/23 (1993)
[82] Susan, Deller Ross, *Women's Human Rights: The International and Comparative Law Casebook*, 12 (University of Pennsylvania Press, 2008); UN, *Human Rights, Discrimination against women: The Convention and the Committee*, Fact Sheet No.22, 1(UN Geneva, 1995)
[83] CEDAW, Recommendation 19, ¶ 3.
[84] Andrew, Byrnes, *Toward More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures in* Human Rights of Women. National and International Perspectives, 193-194 (Rebecca J. Cook ed., University of Pennsylvania Press 1994).
[85] *Id.*
[86] *Id.*

As it was explained in section 1.4.1 the Optional Protocol of CEDAW introduces two procedures: 1. An individual 'complaint procedure'[87] and 2. An 'inquiry procedure'.[88] Although their decisions does not have binding force, Thomas Buergenthal correctly points out that the normative findings of the quasi-judicial institutions [such as CEDAW Committee] has legal significance, "evidenced by references to them in international and domestic judicial decisions" regardless the nature of whether it is law or not.[89] From a technical and legal point of view, the CEDAW Committee does not award reparations as it does not provide judgments; it provides recommendations which are monitored by Reports submitted by State parties.[90] However, these recommendations provide the obligation of the States to redress in line with the CEDAW.

Individual Complaints procedure Decisions/views

Since 2003, the CEDAW Committee has considered ten individual complaints and half of them have been inadmissible.[91] In *A.T. v. Hungary* the applicant required hospitalization for being victim of physical and psychological violence from her former husband, and the District and Regional Courts ruled against her protection, the review of the decision was pending before the Supreme Court; the author claimed for fair compensation to her and her children.[92]

The Committee on the merits stressed the importance of the obligation of the State "to act with due diligence to prevent violations of rights to investigate and punish acts of violence, and for providing compensation" and gave paramount importance to women's

[87] Articles 1 to 7 and 11 of the Optional Protocol.
[88] Articles 8 to 11 of the Optional Protocol.
[89] Thomas, Buergenthal, *The Evolving International Human Rights System,* 100 Am. J. Int'l L.783, 789 (2006).
[90] Article 18 of CEDAW.
[91] For the decisions/views of the Committee see http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm
[92] Ms. A. T. v. Hungary, Communication No. 2/2003, (January 26, 2005)

human rights to life and integrity in contrast with the right to privacy and property of the perpetrator.[93] The applicant claims just satisfaction and the Committee ordered a catalogue of recommendations to Hungary, divided in individual and general (collective).

In *Şahide Goekce (deceased) v. Austria* and *Fatma Yildirim (deceased) v. Austria* the Committee decided again on domestic violence cases where the victims were killed by their husbands as a consequence of the lack of due diligence in the prevention and investigation of state officials. [94] For a better understanding of the measures of reparations awarded see Table 2.

[93] *Id*. at ¶¶ 9.2 and 9.3.
[94] Şahide Goekce (deceased) v. Austria CEDAW/C/39/D/5/2005, 6 August 2007 at ¶¶ 12.1.1-12.1.5; Fatma Yildirim (deceased) v. Austria CEDAW /C/39/D/6/2005, 1 October 2007 at ¶¶ 12.1.1-12.1.5.

Table 2

Reparative measure awarded by CEDAW Committee/Case	Victim or Scope
Restitution	
"Take immediate and effective measures to guarantee the physical and mental integrity of [the applicant] and her family"(A.T. v. Hungary)	Direct
Compensation	
"Ensure that [the applicant] receives reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights." (A.T. v. Hungary)	Direct
Rehabilitation	
Ensure that [the applicant] receives appropriate child support and legal assistance. (A.T. v. Hungary)	Direct and Indirect
"Provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation." (A.T. v. Hungary)	Structural
"Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods." (A.T. v. Hungary)	Structural
Satisfaction	
Act "with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so." (A.T. v. Hungary; Şahide Goekce v. Austria; Fatma Yildirim v. Austria, 6/2005) "Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards." (A.T. v. Hungary) "Prosecute perpetrators of domestic violence [vigilantly and in a speedy manner] in order to convey to offenders and the public that society condemns domestic violence." (Şahide Goekce v. Austria; Fatma Yildirim v. Austria)	Structural
Guarantees of Non repetition	
"Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated." (A.T. v. Hungary)	Structural
"Implement a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters." (A.T. v. Hungary)	Structural

"Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law." (Şahide Goekce v. Austria; Fatma Yildirim v. Austria, 6/2005)	Structural
"Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation 19 of the Committee, and the Optional Protocol thereto." (A.T. v. Hungary; Şahide Goekce v. Austria; Fatma Yildirim v. Austria)	Structural
"Ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim; and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity." (Şahide Goekce v. Austria; Fatma Yildirim v. Austria)	Structural
"Ensure enhanced coordination among law enforcement and judicial officers and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence." (Şahide Goekce v. Austria; Fatma Yildirim v. Austria)	Structural

1.4. General remarks

The obligation from States to provide redress to individuals in international law was envisioned in the first judgments of the P.C.I.J. but it was until recent years that reparations from gender perspective were considered in the human rights law agenda. Women's grave and systematic violations are those discriminatory acts, omissions and policies which interfere with their fundamental rights of life, liberty, security and integrity in a large scale. These violations provide the starting point to understand reparations from a gender perspective. These reparations entail two elements: a) the notion of victim, and b) the measures of the reparation.

The first element considers a wide concept of victim, and considers the particularities of them such as age, race, ethnicity, etc. The second element considers the *Nairobi Declaration*, scholars' point of view, recommendations of the IACHR and the CEDAW case-law. The measures of reparations with a gender perspective at least should consider:

- Restitution: should be awarded exceptionally, only in the need of protective measures (A.T. v. Hungary). Reverting women to the *status quo ante* is the most limited option to redress them because they do not enjoy the same legal status as men.

- Compensation: should be awarded with other measures of reparation, in order not to make feel the victim is receiving 'blood money'. Compensation should be awarded in an equitable basis when a large scale number of victims are claiming them because it can create an uncomfortable hierarchy between victims.

- Rehabilitation: the importance of this measure is that it is future-oriented which can inspire and empower women for a better future and improves the victim's quality of life.

- Satisfaction: the most important measure of reparations preferred by victims. Its relevance implies in the foreground cessation of the violation; and it can imply as well symbolic gestures; such as, official apologies, memorialization or proper burials for widows. In the area of access to justice the right to truth and the due diligence obligation of the State to prevent, prosecute, punish and redress the acts of violence against women has a 'special connotation' according to Belem do Para Convention.

- Guarantees of Non Repetition: The two key principles of *Nairobi Declaration* are **transformation** of a society as a whole and **participation** of women to this process, the transformative potential of reparations is reflected in these measures, inter alia, harmonization of civil and criminal legislation with principles of CEDAW and Belem do Para Conventions; training to public servants and judicial operators with workshops or courses on women's human rights and effective mechanisms of prevention to eliminate violence against women

As a general rule it must be said that any of the measures mentioned can be awarded individual or collective but usually, satisfaction and guarantees of non-repetition correspond to structural reparation granted for a large number of victims. Another finding is that reparations should be given in a holistic manner, and in the best interest of the victims they must cover at least two measures. It is quite surprising to note that there is few case-law in CEDAW Committee as regards grave or systematic violations. The measures of reparations given in this Chapter are the standard of reparations from a gender perspective.

CHAPTER 2 VIOLENCE AGAINST WOMEN AND REPARATIONS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

The European Human Rights System has its origin in late 1940's when the member States of the Council of Europe took the first steps to enforce certain rights enshrined in the UDHR.[95] The ECHR entered into force in 1953 to guarantee a catalogue of civil and political rights,[96] and later on the European Social Charter and several additional Protocols were adopted to protect other human rights such as economical and social rights.[97] Although there is no specific Convention or Protocol at European-regional level to protect women human rights, it bears mention Recommendation *Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence.*[98] As section 2.3. will show, the lack of a treaty which addresses women's rights has not prevent the European Court to find violation of women's rights in the European Convention.

2.1. The European Court and Convention of Human Rights and Fundamental Freedoms

The ECtHR is the most ancient international human rights Court established in 1959 to protect human rights and it is composed by Committees, Chambers and Grand Chamber.[99] Since 1998, after Protocol No. 11 entered into force, the System changed to provide to individuals a direct access to the Court. The individual complaint procedure consists on substantive and procedural aspects.[100] If the Committee decides that the application is

[95] Thomas, Buergenthal, above n. 89 at 792.
[96] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.
[97] Thomas, Buergenthal, above note 95.
[98] Adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers' Deputies. Available at https://wcd.coe.int/ViewDoc.jsp?id=280915&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75
[99] European Court of Humans Rights, *European Court of Human RIghst in Brief*, Council of Europe, 2009. Available at http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/; Article 27 of the ECHR.
[100] The former aspect consists that any individual can fill a complaint if there is a violation of the ECHR or Protocols; the latter aspect refers to formalities which are required to be fulfill as in other international

admissible it is transferred to the Chamber who decides on the merits of the case; if there is no agreement the case is referred to the Grand Chamber.[101] If a final judgment is provided and there is a human right's violation, just satisfaction is awarded.

Van Dijk claims that individual claims of just satisfaction does not have an status of independent stage, on the contrary; they depend on the merits phase as it is considered the 'first part' of compensation.[102] The nature of the judgment is binding and its execution is monitored by the Committee of Ministers of the Council of Europe (See section 2.4.)[103]

2.2. The concept of victim and the right to 'just satisfaction'

The ECHR provides:

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.[104]

mechanisms such as: the exhaustion of domestic remedies, the case is not under the scrutiny of other international mechanisms and some other admissibility formalities. Article 35 of the ECHR. Admissibility criteria: 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that a) is anonymous; or b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly illfounded, or an abuse of the right of application. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

[101] Articles 38, 42- 45 of the ECHR.

[102] Pieter Van Dijk et al., *Theory and Practice of the European Convention of Human Rights*, 247 (4th ed. Intersentia, 2006)

[103] As a result of the caseload of the Court, Article 46 of the Protocol 14 (not yet in force) allows the Committee of Ministers to ask the Court to interpret the judgment in order to execute it, but this interpretation relates to the provisions of the Convention and does not mean that the Court can order the measures that are needed to be taken. Pieter, Van Dijk et al, above n. 101 at 242. Article 36 of the ECHR. Binding force and execution of judgments: 1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

[104] Article 34 of the ECHR.

This provision includes a broad range of persons; commentators have classified victims as actual, potential, indirect, and future victim.[105] According to the case-law of the Commission and the Court they are defined as follows:

Direct victim: is the person who suffered directly the harm. "The word victim […] refers to the person directly affected by the act or omission at issue"[106]and for the admissibility phase the applicant does not need to prove she/he is the victim because according to [Article 36] it is sufficient to 'claiming to be the victim.'[107]

Indirect victim: is the person immediately affected by the violation which directly affects another. [108] In other words, Van Dijk claims that an individual may be an applicant without him-herself suffered the violation but a closed link with the direct victim is required, for example: the family members of the next of kin of someone disappeared, imprisoned, deported or killed.[109]

Potential victim: "Category of persons of whom it could not be ascertained with certainty that they had suffered an injury."[110] This allows the applicant to complain when legislation itself violates rights even if there is not a concrete or specific action or measure implemented against the person, the Court however has required that there should exists a real risk of being directly affected by the violation.[111] Examples of this category are groups of persons who can be affected for criminal liability for the enactment of laws that prosecute homosexual acts, migration or extradition cases, and interference in private telecommunications.[112]

Future victim: Van Dijk suggests that applicants who have a near-future interest may be considered victims, for example; parents who claimed to be affected of an enacted legislation because their children could have an education against the parent's interest, convictions or likes.[113]

[105] L.F. Clements, N. Mole, A. Simmons, *European Human Rights. Taking a case under the Convention*, 163-165 (Sweet & Maxwell, 1999); Pieter, Van Dijk et al, *Theory and Practice of the European Convention of Human Rights*, 3rd Edition, 54 (Intersentia, 2006)
[106] Pieter, Van Dijk et al, above n. 105 at 48-49.
[107] *Id.*
[108] L.F. Clements, N. Mole, A. Simmons, above n. 105 at 165.
[109] Id; See Lukanov v. Bulgaria (App. 21915/93), Judgment of 20 March 1997, (1997) 24 EHRR 121; Keenan v. UK (App. 27229/95) Judgment of 6 September, (2001).
[110] Pieter, Van Dijk et al, above n 105 at 52
[111] Philip, Leach, *Taking a Case to the European Court of Human Rights*, Second Edition, 126 (Oxford University Press, 2005); Open Door and Dublin Well Women v. Ireland (App. 14234/88,14235/88), Judgment of 29 October 1992, (1993) Ser. A, No. 246.
[112] Dudgeon v. UK (App. 7525/76), Judgment of 23 September 1981, Ser. A, No. 45; (1982); Soering v. UK (App. 14038/88), Judgment of 7 July 1989, Ser A. No. 161; (1989); Klass and Others v. Germany, Judgment of 6 September 1978, Ser. A, No. 28; (1979-80).
[113] Pieter, Van Dijk et al, above n. 105 at 54-56.

The notion of victims is crucial for reparations from gender perspective because both direct victims (women) and indirect victims (family members, dependants or persons close to them) are also affected. It is presumed that harm is inflicted to victims, therefore the performance of judicial or investigation authorities at domestic level need to be sensitive to victim's requirements and needs in order to avoid re-victimization.[114] Although legislation provides alternatives to redress the harm suffered by victims in several countries, the lack of access to justice for victims hinder the possibility to obtain redress, as it was showed in the case-law of the CEDAW Committee.[115]

The ECtHR plays a subsidiary role to provide redress for victims of human rights violations when victims either a) did not receive compensation at all, or b) did not obtain fair redress in national courts.[116] Article 41 establishes that Court can provide 'just satisfaction':

> If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court, shall, if necessary afford just satisfaction to the injured party.

Commentators have rightly pointed out, that restitution is the preferred measure of reparation for courts to compensate the damages, but when is not possible to restore the situation prior of the violation, the Court usually awards compensation in form of pecuniary damages, non-pecuniary damages and costs and expenses.[117] Furthermore, both the ECtHR and the IACtHR are enabled to provide different non-monetary remedies or other measures of reparation besides 'just satisfaction'.[118]

[114] Inter-Am.C.H.R., Access to justice for women victims of violence in the Americas, OEA/Ser.L/V/II, doc. 68 (2007).
[115] Section 1.3.5.
[116] In the Brigandi Case the applicant received compensation in domestic court however this did not prevent the Court to grant compensation in equitable basis. See Brigandi v. Italy (2/1990/193/253), Judgment of 21 January 1991.
[117] Ruth Rubio-Marin, Clara Sandoval and Catalina Diaz, above n. 42. Dinah Shelton, above note 23 at 294-295.
[118] *Id.*

For someone who has study reparations in the Inter-American System it is surprising to notice that ECtHR has a narrower approach of reparations. While studying both courts, scholars correctly suggests, that ECtHR should march into the IACtHR approach, at least in gross and systematic violation cases, as it was demonstrated since 2004 when the European Court ordered the release of the prisoners as a form of reparation for their unlawful deprivation of liberty in violation of Article 5 in the cases of *Assanidze v. Georgia* and *Ilascu and Others v. Moldova and Russia*.[119]

2.3. Reparation for victims of gender based violence

Approximately, there have been eleven judgments of the ECtHR where the nuclear problem is violence against women, most of them corresponding to gross violations.[120] The application of gender perspective by the Court has not been always present. It was until recent years that an 'activist approach' for the protection of women's rights has been applied. Notably, the Court usually does not found violations in VAW cases under the non-discrimination provision (Article 14), in fact the violations have been founded mainly in the right to privacy (Article 8).[121]

In order to find whether or not the Court applies a gender perspective in its judgments, the next section stress in a chronological order the cases and how the court has dealt with: a) the concept of victim b) the gender perspective on the merits, and c) the measures of reparations awarded.

[119] Fernanda, Nicola & Ingrid, Nifosi Sutton, *Reparations in the Inter-American System: A comparative Approach,* 56 Am. U.L. Rev. 1375, 1378-1380, 1459 (2007).

[120] For an overview of cases see: Council of Europe, *Case law of the European Court of Human Rights on Violence Against Women,* CAHVIO, 10 (2009) (Document *prepared by Christin Chinkin*) Available at http://www.coe.int/t/dghl/standardsetting/violence/CAHVIO_2009_10%20Case%20law%20of%20the%20European%20Court%20of%20Human%20Rights.pdf

[121] Article 8. Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.3.1. Compensation for violation of the right to privacy and family life

For Philip Leach "Article 8(1) [of the Convention] has four elements: private life; family life; home; and correspondence."[122] In all the following cases the Court has found that States has not complied with their positive obligation for respect private and family life, which is "the duty to take appropriate steps to ensure protection of the rights in question", to prevent individuals to interfere with "the rights of another individual".[123]

In the case of *Airey v. Ireland,* Mrs. Johanna Airey and her four children were subject to domestic violence from her husband/father.[124] She claimed for decree of judicial separation to end her marriage but she did not have the economical means to afford legal for family matters before the High Court.[125] The Court found that Ireland violated the right to access to Court (art. 6-1) in breach of the **positive obligation** inherent to proceedings to respect family or private life.[126]

The Court established that Mrs. Airey is clearly the injured party which is synonymous of victim, the person directly affected by the violation and that Irish domestic law did not provide her a complete redress.[127] This is the only case where the Court has awarded other means of reparation (the Court ordered legal aid) besides moral damages and

[122] Philip, Leach, above n. 111 at 285.
[123] *Id.* For the Court to determine "whether or not a positive obligation exists, the Court will assess the fair balance between the general interest of the community and the interest of the individual." *Id.*
[124] Airey v. Ireland (App. 6289/73), Judgment of 9 October 1979.
[125] She was in disadvantage as regards her husband because all the proceedings require representation *Id.*
[126] *Id.* at ¶ 32.
[127] Airey v. Ireland (Article 50) (App. 6289/73), Judgment of 6 February 1981 at ¶ 9

cost and expenses.[128] The Court awarded £3,140 Irish pounds [3,986 EUR]* for material damages and cost and expenses.[129]

In the case of *X and Y v. The Netherlands,* the applicant, Mrs. Y, a mentally challenged young woman was forced by a man to have sexual intercourse in a private-run home for children.[130] At the time of the events, there was a gap in Dutch procedural law in detriment of Mrs. Y; her father Mr. X, filled a complaint before the Office of the Public Prosecutor in her representation.[131] As in *Airey,* the Court recalls the positive obligation under Article 8 which applies to the sphere of "relations of individuals between themselves" and the concept of private life "covers the physical and moral integrity of the person, including his or her sexual life."[132] The Court did not found violations for Mr. X as he was not considered a victim of the violations, therefore not subject of compensation; the Court found the damage for Mrs. Y undeniable and awarded in equitable basis 3, 000 Dutch Guilders [1,361 EUR*] for non-pecuniary damages.[133]

As Joanne Conaghan has rightly pointed out, *M.C. v. Bulgaria* constitutes the first significant decision in the Court's case-law that contributed to develop a new set of standards to review legislation in benefit of victims of sexual violence and contributes to encompass women's rights with human rights.[134] The applicant, a teenage girl was a victim of rape by two of her acquaintances, the investigative prosecutor closed the investigation, and the

[128] Mrs. Airey claimed for: 1. Effective access to a remedy for breakdown of marriage, which means that civil proceedings are available to her, in other words, legal aid or costs underwritten by the Government. 2. Monetary compensation for pain and mental anguish suffered by her and her children; 3. Material damages for concept of loss of opportunities, lack of suitable education for her children, expenses for travelling and re-housing. 4. Costs and expenses. *Id*. at ¶¶ 3-5.

[129] *Id*. at ¶ 11-14. * By the time of the judgment there is no exchanging rate for IEP to EURO available. The objective is to provide an estimate rate, and it is considered the ancient one found: January 1st 1999. http://www.oanda.com/convert/classic

[130] X and Y v. The Netherlands (App. 8978/80), Judgment of 26 March 1985.

[131] *Id.*

[132] *Id*. at ¶¶ 22-23.

[133] *Id.* at ¶¶ 34, 39-40. * By the time of the judgment there is no exchanging rate for NLG to EUR available. The objective is to provide an estimate rate, and it is considered the ancient one found: January 1st 1999. http://www.oanda.com/convert/classic

[134] Johanne Conaghan, *Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. BULGARIA*, Feminist Legal Studies, 13. No.1. 145-157(2005)

decision on appeal was dismissed because according to the Bulgarian Criminal Code and judicial practice, physical force or threats during the sexual intercourse need to be proved in order to established the lack of consent of the victim.[135]

The Court considered relevant international and comparative law and the definition of rape and elements of the crime required to be proved in the Ad Hoc Tribunals, and conclude that rape constitutes a detriment of physical and mental integrity and under certain circumstances, a form of torture.[136]

The Court emphasized the duty of the State to investigate and "apply effectively a criminal-law system punishing a serious crime such as rape and sexual abuse" in the light of modern international and comparative standards."[137] Finding a violation of Articles 3 and 8, the Court established on equitable basis 8,000 EUR for distress and psychological trauma caused to the victim.[138]

In *Bevacqua and S. v. Bulgaria*, two applicants, Valentina Bevacqua and her son, were subject of domestic violence, the State failed to provide interim measures for divorce proceedings.[139] The Court emphasized the duty of "due diligence" to prevent, investigate and punish acts of violence against women, whether the acts are perpetrated by the State or by private persons; the Court awarded to applicants jointly EUR 4,000 for non-pecuniary damage and EUR 3,000 for costs and expenses. [140]

[135] M.C. v. Bulgaria (App. *39272/98)* Judgment of 4 December 2003, (2004) at ¶ 64.
[136] *Id.* at ¶¶ 88-108.
[137] *Id.* at ¶ 185.
[138] *Id.* at ¶ 194.
[139] Bevaqcua and S. v. Bulgaria (App. 71127/01), Judgment of 12 June 2008 (2008)
[140] Idem at ¶¶ 52-53; 97-100. The Court made reference to Article 4(c) of The United Nations General Assembly Declaration on the Elimination of Violence against Women (1993); the third report of 20 January 2006, to the Commission on Human Rights of the UN Economic and Social Council (E/CN.4/2006/61) of the Special Rapporteur on violence against women; Osman v. the United Kingdom, Judgment of 28 October 1998, the case of Velasquez Rodriguez v. Honduras of the Inter-American Court of Human Rights; Case 12.051, Maria da Penha Maia Fernandes (Brazil) of the Inter-American Commission of Human Rights and the case of *A.T. v Hungary* of the CEDAW Committee.

2.3.2. Compensation for violation of right to life and freedom of torture and degrading treatment

The right of life and the right of freedom of torture have been recognized as fundamental values of the Convention which cannot be derogated.[141] When these rights are at stake the Court has provided compensation in proportion to the seriousness of the violation as the following cases shows.

In the Grand Chamber decision of *Aydin v. Turkey*, Mrs. Sukran Aydin, a Kurdish girl was detained, raped and subject to severe ill-treatment in the gendarmerie headquarters for four days.[142] The facts took place while there was a conflict between security forces and the PKK, the applicant and two of her family members were released; days later they filled a complaint in the Prosecutor's Office who instructed Aydin to get a medical examination for an official record of physical violence and the acknowledgment of her virginity rather than investigate the crime of rape; the investigation continued open with no results.[143]

A divided Court found a violation of the right to be free from torture and inhuman treatment (Article 3), the Court did not require a high standard of proof to assessed the rape of the victim even though the identity of the perpetrator was not confirmed and the medical records did not stated it.[144] For the Court was sufficient to know the surrounding circumstances of the detention, the acts inflicted, the purpose of getting information about PKK and her personal situation such as her vulnerability of her young age; under these circumstances, rape constituted an act of torture and amount to a breach of Article 3.[145]

[141] Aydin v. Turkey (App. 57/1996/676/866) Judgment of 25 September 1997 at ¶ 81; Kontrova v. Slovakia (App. 7510/04) Judgment of 31 of May 2007 at ¶ *64.*
[142] Aydin v. Turkey (App. 57/1996/676/866) Judgment of 25 September 1997.
[143] *Id.* at ¶¶ 39, 40 and 96.
[144] *Id.* at ¶¶ 83-87.
[145] *Id.*

The Court found also a lack of an effective remedy in the light of Article 13.[146] Whether or not the investigation of torture was made, the harm suffered by the applicant failed to meet civil compensation.[147] In this case the Court starts to discern the obligation of 'due diligence' in relation with the investigation of serious crimes such as rape, making clear that the prosecutor did not conduct a prompt, thorough and effective investigation to establish the truth of her complaint, moreover it was not performed with sensitivity according to victim needs to identify and punish those responsible.[148] The Court awarded 25,000 GBP [35,552 EUR] for non-pecuniary damage, 34,360 GBP [48,863 EUR] for costs and expenses and 3,000 GBP [4,266 EUR] to her Turkish representatives.[149]

In *Kontrova v. Slovakia*, the applicant was victim of physical and psychological violence from her husband, the applicant and her family made emergency calls to the police station, few days later her husband shot to death their two minor children and himself.[150] The District and Regional Courts dismissed the summons for several public servants accused of the criminal offence of dereliction of duty, the District Court reconsidered the judgment, and the Regional Court affirmed with no possibility of appeal.[151]

The European Court highlighted that a positive obligation arises when the right to life is at risk from criminal acts from private individuals, what is expected from the authorities is to avoid the immediate risk;[152] in this case, the failure to prevent the killing of the applicant's

[146] Article 13. Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
[147] Aydin v. Turkey, above n. 142 at ¶¶ 100 and 103.
[148] *Id.* at ¶¶ 105-109.
[149] *Id.* at ¶¶ 131-135. By the time of the judgment there is no exchanging rate for NLG to EUR available. The objective is to provide an estimate rate, and it is considered the ancient one found: January 1st 1999. http://www.oanda.com/convert/classic
[150] Kontrova v. Slovakia (App. 7510/04), Judgment of 31 of May 2007.
[151] *Id.* at ¶¶ 15-27.
[152] *Id.* at ¶¶ 49-50.

children amounted to a violation of Article 2 and 13 of the Convention.[153] The Court awarded her EUR 25,000 for non-pecuniary damages and EUR 4,300 for costs and expenses.

Branko Tomašić and Others v. Croatia, is another example of the breach of the positive obligation of authorities to prevent that a father who left prison for domestic violence, killed his wife (M.T.) and her son (V.T.) days after serving his sentence.[154] The applicants were next of kin of the deceased to whom it was awarded EUR 40,000 jointly in respect of non- pecuniary damages and EUR 1,300 for costs and expenses.[155]

Finally, a 'must read' in the ECtHR case-law is the recent judgment of *Opuz v. Turkey,* the Court for the first time found a violation of the non-discrimination provision laid down in Article 14 of the Convention in a domestic violence case.[156] The facts took place in a village where the applicant was facing an escalating physical and psychological violence from her husband (H.O.), she and her mother went in several occasions to the Prosecutor's Office to initiate criminal proceedings but the applicant had to withdraw them because of the death threats of H.O who was released several times; two weeks later after the last complaint was registered by the applicant, H.O. shot to death the applicant's mother.[157]

The Court found a violation of Articles 2 of the Convention for the failure of authorities to act according their 'due diligence' obligation even though the complaints were withdrawn to prevent the applicant's mother homicide; and a breach of Article 3 as regards

[153] *Id.* at ¶¶ 49 and 54. When finding a breach of Article 13 the Court stated that: The Court itself will in appropriate cases award just satisfaction, recognizing pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage. […]in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies. *Id.* at ¶ 64.

[154] Branko Tomašić and Others v. Croatia (App. 46598/06), Judgment of 15 January 2009.
[155] *Id.* at ¶¶ 78 and 81.
[156] Opuz v. Turkey, (App. *33401/02)*, Judgment of 9 June 2009.
[157] *Id.* at ¶¶ 9-54.

the insufficient deterrence to prevent the severe ill-treatment of the applicant.[158] The Court found very relevant arguments for the protection of women's rights.[159]

The Court did not consider the applicant's children entitled for just satisfaction, the Court awarded for non-pecuniary damages EUR 30,000 and cost and expenses EUR 6,500 less EUR 1,494 received by legal aid from the Council of Europe."[160]

2.4. Execution of judgments

The relevance of analysing briefly the execution and monitoring of judgments of the ECtHR is to overview the different remedial actions that a State Party can adopt according to the recommendations of the Committee of Ministers, which is the responsible organ of the Council of Europe to monitor the execution of judgments.[161] For example, the Committee can adopt the modality of reviewing the effectiveness of domestic remedies where structural or systematic problems underlies in national law or practice; *inter alia*, the length of the proceedings of domestic remedies in Italy or the individual compensation for more than a hundred of complaints for redress in Poland.[162] In strict sense it is clear that execution of judgments does not constitute reparation; however the recommendations or measures given (either individual, such as the end of unlawful situation or general measures, the adoption of legislation or administrative and policy changes, education and training materials for state

[158] *Id.* at ¶¶ 149 and 176.

[159] 1. Violence against women is a problem among Member States which remains clandestine given the nature of its private scope; *Id.* at ¶ 132.
2. The concept of victims is expanded, next of kin are recognized as victims of violations;[159] *Id.* at ¶ 142.
3. Although there is no 'consensus' between Member States to prosecute domestic violence when complaints are withdrawn, "it can be inferred […] that the more serious the offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints"; *Id.* at ¶ 139.
4. Balancing human rights, life and integrity of women are paramount in contrast of the property of the perpetrator; *Id.* at ¶ 147.
5. Considering the statistics and country reports of the situation of violence against women the Court established that violence against women is a form of discrimination and it found a violation under Article 14 (14+2+3). *Id.* at ¶¶ 194-202.

[160] *Id.* at ¶¶ 210-213.

[161] Article 46. Binding force and execution of judgments: 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

[162] Phillip, Leach, above n. 111 at 96-97.

officials) redress or at least, prevent more human rights violations.[163] Several of the judgments are still pending for execution control; but from all the cases analyzed just one case (Kontrova) has considered the *Committee of Ministers Rec(2002)5 on the protection of women against violence* and has required that the Bulgarian Domestic Violence Act is in line to prove that administrative and policing practices prevents VAW.[164]

[163] *Id.* at 102.
[164] Available at http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/Bulgaria_en.pdf

2.5. General remarks

The European Court of Human Rights, the oldest judicial institution in the adjudication of human rights, has provided a large number of judgments related to violence against women. For the Strasbourg system, the concept of victim in the admissibility phase is quite broad: direct, indirect, potential and future. However, the concept stretches when it comes to award reparation to victims because only the 'injured party' is the person entitled to receive reparations.

The analyzed case-law shows that in gross violations of women's human rights the Court understands as 'injured party" just the direct victims of the violation, and when there is the existence of indirect victims, children or parents who claim to be victims, as *Airey v. Ireland, X and Y v. the Netherlands, Kontrova v. Slovakia, Bevaqcua v. Bulgaria, Opuz v. Turkey*, the European Court does not award compensation to them. Compensation for indirect victims is illustrated in *Branko v. Croatia*, the only case when the next of kin of the deceased received compensation.

It is worth that the Court declares violations to the Convention of the State's non compliance with the positive obligation of the right to life and right to privacy. Since *M.C v. Bulgaria* there is a significant shift in the case-law's reasoning to include the gender perspective in the due diligence obligation, however the gender perspective has not been reflected at all in the application of Article 41. The Court has not use its discretionary power to order other measures of reparations besides pecuniary damages as it has been done in the *Airey*, when ordering a State to provide a remedy and access to justice for the applicant.

A valuable aspect of the compensation measures awarded in the European Court is the low standard of proof for sexual violence cases (*M.C.; Aydin*) and the presumption that the

harm inflicted for moral damages is always presumed and the Court does not require to prove it or to call experts or testimonies.

The consistent criterion of the Court is to award non-pecuniary damages based in equity and in a case-by-case basis. However, the Court provides larger sums of money for non-pecuniary damages in the violation of the right to life cases.

Remedial actions are taken by States according to the execution of judgments of the Committee of Ministers. Unfortunately, the landmark judgments of *M.C.* and *Opuz* are still pending of execution and there us hope that they can provide a more develop approach to enrich the remedial actions. It is disappointing to see that the only measure with gender perspective is mentioned in Kontrova, *where Committee of Ministers Rec(2002)5 on the protection of women against violence* to prove that the Bulgarian Domestic Violence Act is in line to prove that administrative and policing practices prevents VAW

It is discouraging to note that the gender perspective in the merits of the judgments does not continue until the reparations phase. The European Court and its mechanism of execution of judgments has been very limited and scarce in provide reparations from gender perspective. It is clear that reparations regime is narrow but neither the Court has used its discretionary powers to award other some of reparations apart from non-pecuniary damages, and the Committee of Ministers did it in a shy manner.

CHAPTER 3 VIOLENCE AGAINST WOMEN AND REPARATIONS BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The catalogue of human rights in the American Convention was framed into the historical and cultural context where gross violations of human rights occurred during the times of dictatorships and repressive governments in Latin-America.[165] The American Convention established the main organs for the Inter-American System of Protection: the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR).[166]

An important function of the IACHR is the creation of Special Rapporteurs, the Commission created in 1994 the Special Rapporteur on Women's Rights, who supervises the respect and the implementation of the non-discrimination principle, the right to equal protection of the law to monitors the situation of VAW in the State Parties who signed or ratified the Belem do Para Convention and the American Convention.[167]

3.1. The Belem do Para, the American Convention and the Inter-American Court of Human Rights

In 1979 was established by the ACHR the Inter-American Court of Human Rights, the Court has jurisdiction over the States Parties who ratified or adhered the Convention and who accepted the binding competence of the Court.[168] As the European Court, the Inter-American has individual and inter-state complaints and provides provisional measures,[169] and it has a

[165] The American Convention of Human Rights *adopted in* 1969 and came *into force* in 1978. Thomas, Buergenthal, above n.89 at 9.
[166] Article 33 of the ACHR, available at www.corteidh.or.cr The Commission is a main organ of the OAS, a quasi-judicial body whose mains functions are the protection and defense of human rights in the continent; this can be reflected in its country reports, in its *in situ*/in site visits, in its recommendations to the States to ameliorate the situation of human rights in a given country and, in the analysis of individual petitions to declare their admissibility and the merits procedure. Article 41 of the ACHR and Article 18 of the Statute of the IACHR, available at www.corteidh.or.cr
[167] See Marta, Altolaguirre, *Situación de los Derechos Humanos de las Mujeres: El caso de Ciudad Juárez [The Situation of Women's Human Rights: The Ciudad Juarez case] in* Claudia, Martin and Diego, Rodríguez-Pinzón *et al*, Derecho Internacional de los Derechos Humanos, 514 (Fontamara 2004)
[168] Article 62 of the ACHR.
[169] Article 63.2 of the ACHR.

compulsory and advisory jurisdiction.[170] A major difference from the European is the proceedings of individual complaints, the individuals does not have direct access to the Court.[171]

The Court has competence to declare violations of the ACHR and other regional treaties[172] and, according to Cecilia Medina's interpretation of Article 12 of the Belem do Para Convention; the Court has competence to declare violations of this Convention.[173] The Court is composed by seven judges who are elected among the members of OAS and are independent and qualified persons. [174] Since its creation four women have been judges[175] and currently one of them is the former President of the Court, Cecilia Medina Quiroga.

The "Belem do Para" Convention[176] is the only regional treaty which explicit prohibits violence against women and impose the due diligence obligation of States Parties to prosecute, investigate, punish and redress this violence and establish effective and adequate procedures to provide women access to justice and reparations.[177] The Convention defines violence against women "as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the

[170] Article 64 of the ACHR.
[171] Article 61 of the ACHR. It is the Commission who decides on the admissibility of applications, if no friendly settlement is reached between the parties, it is under the discretion of the Commission to bring a case before the Inter-American Court. Article 50 of the ACHR. It can be said *prima facie* that the Inter-American System resembles the previous machinery of the European System previous the Protocol 11 entered into force, so far the Inter-American has an evidently less number of cases adjudicated since its creation, approximately 204 judgments for cases and 19 Advisory Opinions. www.corteidh.orc.cr
[172] The Court has declared violations of the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons. See Case of Gomez Paquiyauri Brothers v. Peru, Judgment on Merits, Reparations and Costs, Inter-Am. Ct. H.R., (Series C No. 110) (Jul. 8, 2004); Case of Blake v. Guatemala, Inter-Am. Ct. H.R. Judgment on Merits, (Ser. C No. 36) (Jan 24, 1998).
[173] Cecilia Medina Quiroga, *Derechos Humanos de la Mujer, Donde estamos ahora en las Americas?* [*Human Rigths of Women: Where are we now in the Americas?*], *in* Essays in Honour of Alice Yotopoulos-marangopoulos 907 (Centro de Derechos Humanos, Facultad de de Derecho, Universidad de Chile trans. 2003), available at http://www.publicacionescdh.uchile.cl/Libros/18ensayos/Medina_DondeEstamos.pdf
[174] Article 52 of the ACHR.
[175] http://www.corteidh.or.cr/composicion.cfm
[176] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women "Convention of Belem do Para" *adopted on* Jun. 9 1994, at the twenty-fourth regular session of the OAS General Assembly *entry into force* March 5 1995.
[177] Article 7 of 'Belem do Para' Convention.

private sphere."[178] The Convention is one of the most ratified treaties in the OAS, but has been applied by the Inter-American Court in just one case.[179]

3.2. The concept of victim and the obligation of the States

Creative, interesting, wide-reaching, advanced, innovative and impressive are some of the adjectives for commentators and legal operators to describe the reparation's regime of the Inter-American Court.[180] The question of who is entitled to reparations has been answered in similar terms of those conceived by the European Court to understand direct victim as a nuclear concept, and indirect and potential victims as an enlargement of the concept of direct victim.[181] As Garcia Ramirez has rightly pointed out, the technical distinction between the direct and indirect victims does not entail more hierarchy or higher legal protection to one of these categories.[182] However, given the nature of the reparations awarded by the IACtHR, the challenge is to define to which extent indirect victims are entitled to reparations where mass violations occurred or a considerable number of victims claim their right to reparations. In fact, the Court had not applied consistent criteria to award reparations for indirect victims, usually the next of kin of the direct victim.[183]

Article 63.1 of the American Convention on Human Rights states that:

[178] Article 1 of 'Belem do Para' Convention. Progressive measures such as the promotion of awareness about the problem in the country, training for judicial operators, educational programs to break the stereotype of inferiority of women to change social and cultural patterns and research and recompilation of data are also measures for a State to comply with the Convention. Article 8 of 'Belem do Para' Convention.

[179] Inter-Am. Comm. H. R. Access to Justice for Women Victims of violence in the Americas, Executive Summary. OEA/Ser.L/V/II Doc. 68 Jan 20, 2007 at ¶ 3, Case of Penal Miguel Castro Castro v. Perú, Judgment on Merits, Reparations and Costs, Inter-Am. Ct. H.R., (Ser. C No. 160) (Nov 25, 2008)

[180] Sergio Garcia Ramirez, above n. 27 at 165; Dinah Shelton, above n. 23 at 299; Arturo J. Carrillo, above n. 27 at 507; Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 Colum. J. Transnat'l L. 351, 353 (2008)

[181] For Garcia Ramirez, direct victim is the person who suffers a detriment in his/her fundamental rights as an immediate effect of the violation where no intermediary is needed, in the contrary, a direct victim is someone who experiments a detriment on her/his rights as an immediate consequence suffered by the direct victim. Sergio Garcia Ramirez, above n. 33 at 131-132

[182] *Id.* at 132.

[183] For an analysis of the criteria used by the Inter-American and European Court in awarding pecuniary and non-pecuniary damages for the next of kin see Ruth Rubio-Marin, Clara Sandoval and Catalina Diaz, above n 39.

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.

It is out of the scope of this research to analyze the whole reparations regime of the Inter-American Court. It is enough to understand that besides compensation, (the common type of reparation provided by the European Court) the IACtHR has ordered states to adopt *inter alia* legislative measures; prompt and thorough investigation and punishment to prevent impunity; public apologies; construction of monuments; creation of public funds, and capacity building in human rights for public servants and legal operators.[184] These measures are shaped into a wide range of remedial orders which covers the whole categories provided in the *Basic Principles and Guidelines* (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition).

It bears mention that several commentators have highlighted how the Inter-American jurisprudence help to build transitional justice mechanisms to end impunity and the search for truth in places where gross violations have occurred.[185] Judith Schonsteiner has rightly pointed out, that the reparations measures granted for a group and members of an indigenous community has been shaped "in the form of development programs" which include "development funds; more specific measures like housing, health, production, and infrastructure programs; a program providing for subsistence needs; or communication systems for health emergencies; [and] resettlement measures […] where the communities concerned were displaced in the aftermath of violations that occurred in their villages."[186] Therefore, it is important to stress that at this point, the development of the Court's

[184] Thomas M. Antkowiak, above n 180.
[185] Arturo J. Carrillo, above n. 29; Douglass Cassel, above n. 3.
[186] Judith Schonsteiner, *Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights*, 23 Am. U. Int'l L. Rev. 127, 138-139 (2007)

jurisprudence has introduced the transitional justice mechanism of reparation programs, with the purpose of giving them binding force through their judgments, in order to establish a minimum standards for States to implement the reparations. So far, the Court has not extended a reparation program with gender perspective but it has awarded some measures as it is shown in the next section.

Another challenge for the Court is whether reparations should be granted in an individual or collective manner. Schonsteiner claims that the early jurisprudence of the IACtHR was victim-centered because of the fact that the system was created to award reparations for direct victims, from the admissibility criteria to the burden and standard of proof.[187] "However, this does not prevent the Court from defining the term "victim" in a broad sense, thus permitting the possibility for a group to be the victim of the violation and hence the beneficiary of reparation."[188] As a consequence, a new shift in the Court's jurisprudence started to emerge when next of kin were at stake.

Reparations for next of kin can be divided twofold: 1. Family members receive compensation when the victim is deceased as a consequence of a violation of the right to life.[189] 2. Family members receive compensation when they suffer directly harm as a consequence of a violation of the right to integrity, fair trial and judicial remedies.[190] For Clara Sandoval there is a different regime to award reparation to those next of kin who had

[187] *Id*.
[188] It was also of great help that the Inter-American Commission started to accumulate and add numerous victims before the procedure of the Court. *Id.* 131-133.
[189] *Id.* at 133. See Case of Pueblo Bello Massacre v. Colombia, Judgment on Merits, Reparations and Costs, Inter-Am. Ct. H.R., (Ser C. No. 140) (Jan. 31 2006) ¶¶240-241; Case of Serrano Cruz Sisters v. El Salvador, Judgment on Merits, Reparations and Costs, Inter-Am. Ct. H.R.,(Ser C No. 120) (Mar. 1 2005)¶ 210 ; Case of Garrido y Baigoria v. Argentina case, Judgment on Reparations and Costs, Inter-Am. Ct. H.R. (Ser C. No.39) (Aug. 21 1998) ¶¶ 54-56.
[190] *Id.* at 133. See Case of the 'White Van' Paniagua-Morales et al v. Guatemala case, Judgment on Reparations and Costs, Inter-Am. Ct. H.R., (Ser C No. 76) (May 25, 2001) ¶ 85; The 'Street Children' Villagran Morales at al v. Guatemala case, Judgment on Reparations and Costs, Inter-Am. Ct. H.R., (Ser C No. 77) (May 26, 2001)

been considered as injured parties or beneficiaries of reparations and those next of kin who had been considered victims.[191]

3.3. The measures of reparations for victims of gender based violence

The Inter-American Court has been more sympathetic to victim's needs rather than the European Court. However, the IACtHR has introduced in few cases the gender perspective when analyzing human rights violations on the judgments of merits. It is interesting to note that the Inter-American Commission of Human Rights has addresses several cases considering women's human rights violations from a gender perspective, but most of them have concluded in the Commission's merit phase without reaching the Court.[192]

The nature of the Commission's resolutions are not binding for States[193] however, they provide important guidelines for reparations. The common denominator to redress in gender based violence cases is the obligation of due diligence to investigate, prosecute and punish those responsible of women's human rights violations,[194] either in the private or public sphere. Some other measures have considered, pecuniary compensation,[195] the judgment itself,[196] medical treatment;[197] to more structural measures such as disciplinary measures for

[191] Ruth Rubio-Marin, Clara Sandoval and Catalina Diaz, above n. 42.
[192] Case 11.565, Ana, Beatriz y Celia Gonzalez Perez v. Mexico, Inter-Am. C.H.R. 53/01, OEA/Ser. L/V/II.11, Doc. 20 rev (2001); Case 12.051, Maria da Penha Maia Fernandes v. Brazil, Inter-Am. C.H.R. 54/01, OEA/Ser.L/V/II.11, Doc. 20 rev (2001); Case 12.230, Zoilamerica Narvaez Murillo v. Nicaragua, Inter-Am. C.H.R. 118/01, OEA/Ser.L/V/II.106, Doc. 3 rev (2000); Case 12.191, Maria Mamerita Mestanza Chavez v. Peru, Inter-Am. C.H.R. 66/00, OEA/Ser.L/V/II.111, Doc. 20 rev (2001); Case 12.350 MZ v. Colombia, Inter-Am. C.H.R. 73/01, OEA/Ser.L/V/II.114, Doc. 5 rev (2001). although there are some cases where parties have reached friendly settlement resolutions on discrimination grounds, gender based violence cases hardly reach friendly settlement. Elizabeth A.H. Abi-Mershed, *El Sistema Interamericano de Derechos Humanos y los Derechos de la Mujer: Avances y Desafios* [The Inter-American System of Human Rights and The Right's of Women: Progress and Challenges] in Derecho Internacional de los Derechos Humanos, 492-494 (Claudia Martin *et al.* Eds, Fontamara, 2004)
[193] Articles 50 and 51 of the ACHR.
[194] Elizabeth A.H. Abi-Mershed, *Reparations and the Issue of Culture, Gender, Indigenous Populations and Freedom of Expression, in* Conference: Reparations in the Inter-American System: A comparative approach, 56 Am. U.L. Rev. 1375, 1446 (2007)
[195] Case 12.051, Maria da Penha Maia Fernandes v. Brazil, above n. 192.
[196] Case 10.506, X & Y v. Argentina, Inter-Am. C.H.R., Report No. 38/96, OEA/Ser.L/V/II.95, doc. 7 rev. P 50 (1996).
[197]); Case 12.191, Maria Mamerita Mestanza Chavez v. Peru, above n. 192. M.M. v. Peru, Case 12.041, Inter-Am. C.H.R. (Mar. 6, 2000)

state officials;[198] changes in legislation to be in compliance with Belem do Para Convention,[199] training for judicial operators[200] and increase the number of police stations in areas where violence against women occurs.[201]

As Karla Quintana and Patricia Palacios rightly points out, the role of the IACtHR regarding gender justice has been modest.[202] However, since the landmark case of Castro-Castro prison the Court starts to pave the way for a gender and reparation perspective. Given the gross or systematic nature of the violations occurred in Peru, Guatemala, Suriname and recently Mexico, most of the human rights violations have been declared under the "right to human treatment."

Women have been considered beneficiaries of reparations,[203] but these reparations are not ordered as direct violations of women's human rights. The next section stress in a chronological order the cases and how the court has dealt with: a) the concept of victim b) the gender perspective on the merits, and c) the measures of reparations awarded.

3.3.1. Reparation for violation of the right to human treatment

Article 5 of the American Convention on Human Rights provides the right to human treatment.[204] Before the IACtHR the standard to prove sexual violence is extremely high.[205]

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[198] *Id.*

[199] Case 12.051, Maria da Penha Maia Fernandes v. Brazil, above n. 192; Case 10.506, X & Y v. Argentina, above n. 208.

[200] Case 12.051, Maria da Penha Maia Fernandes v. Brazil, above n. 192.

[201] *Id.*

[202] Karla, Quintana Osuna, *Recognition of Women's Rights before the Inter-American Court of Human Rights*, Harvard Human Rights Journal, Issue 2, Volume 29 (2008); Patricia, Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, LL.M. Long Paper, Harvard Law School, May 2007. Available at http://www.utexas.edu/law/academics/centers/humanrights/get_involved/writing-prize07-zuloaga.pdf

[203] Case of Aloeboetoe et al. v. Suriname case, Judgment on Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C No. 15) (Sep. 10, 1993).

[204] Article 5. Right to Humane Treatment: 1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment

One of the most important cases in the Inter-American Court's history is the *Loayza Tamayo v. Peru Case.*[206] A civilian was judged before Military Courts in the context of the former President Alberto Fujimori's regime and its fight against terrorism. Although Ma. Elena Loayza gave proof of her rape; this judgment has been criticized because of its high standard of proof settled by the Court as regards sexual violence. The Court without explanation did not consider this issue to amount of a violation of Article 5. Although the Court's judgment on merits and reparations were gender neutral, the reparations awarded had a great impact on her life and next of kin. [207] (See Table 3).

Years later, in the *Plan de Sanchez Massacre Case v. Guatemala*[208] gross violations were committed against civilian population, among them, women, children and the elderly in Mayan villages in 1982. Military officials arrived to the villages and started to bring on fire houses, they joined groups of people and killed them, women and girls were raped. Those who flew and returned the other day to their villages were forced to bury in communal graves the charred bodies. For many years, the whole village was on control on the military and the survivors were threaten and molested if they denounced the abused they were subjected to. The harm inflicted at individual and community level was clearly explained in the oral hearing at the Inter-American Court:

> The harm inflicted in the community had an individual, family and community impact. The "family roles were disrupted by the death of the women." Their rapes destroyed

appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

[205] Case of Caballero-Delgado and Santana v. Colombia, Judgment on Merits, Inter-Am. Ct. H. R. (Ser C No. 22) (Dec, 8 1995). The Court did not acknowledge or discuss Maria del Carmen Santana forced nudity while declaring violations of Article 5.

[206] Case of Loayza-Tamayo v. Peru, Judgment on Reparation and Costs, Inter-Am. Ct. H. R. (Ser C No. 42) (Nov. 27, 1998).

[207] *Id.* at ¶ 192.

[208] Case of Plan de Sánchez Massacre v. Guatemala , Judgment on Merits, Inter-Am. Ct. H.R., (Ser C No. 105)(Apr. 29, 2004).

their dignity and it became a 'collective shame'. The lack of access to justice still continues the profound trauma of the inhabitants.[209]

During the Merits phase, the Court found that twenty young indigenous women and girls were raped by military agents.[210] Karla Quintana claims that it is unclear the standard of proof of rape because the Government did not contradict the facts in this matter, then it is difficult to understand what would have been the standard of proof required by the Court.[211] This paper suggests that when gross violations occurred (as the facts of this case shows) the Court is willing to accept a low standard of proof regarding sexual violence and rape.

Again, reparation orders were gender neutral but they started to trigger or envision some reparations with gender perspective. The judgment identifies how the Court deals with reparation measures in a collective fashion. It could become a complex task when a pool of victims that have not been identified or have the same name, however the Court managed to grant them reparations.[212] First, the Court provided a concept of 'beneficiaries' to those persons survivors of the massacre to be entitled of pecuniary and non-pecuniary damage, the Court enlarged the number of persons entitled to reparations for more than 300 persons (clearly, not direct victims) because they were considered an 'injured party' according to Article 63.[213] Again, reparation orders were gender neutral but some of them had an impact on women. **(See Table 3)**.

As the case of *M.C. v. Bulgaria* before the ECtHR, the *Castro Castro Prison case* becomes the first landmark judgment where the IACtHR implemented the gender perspective on the merits, assessed direct violations of the provisions of 'Belem do Para' Convention and

[209] Expert testimony of psychologist Nieves Gómez Dupuis, Case of Plan de Sánchez Massacre v. Guatemala, Judgment on Reparations and Costs, Inter-Am. Ct. H.R., (Ser C No. 116)(Nov. 19, 2004) at ¶38.
[210] *Id.* at ¶¶ 60-61.
[211] Karla, Quintana, above n. 202 at 303.
[212] Case of Plan de Sánchez Massacre v. Guatemala, above n. 209 at ¶ 67.
[213] *Id.*

some reparations with a gender perspective.[214] In Peru, under the control of armed police forces during the Alberto Fujimori´s regime and its fight against terrorism, police forces perpetrated violent attacks for four days in the maximum security prison Castro Castro. The Court found multiple violations of the right to human treatment, freedom of torture, liberty, fair trial and judicial remedies perpetrated against the inmates. The gross violations committed against women were considered by the Tribunal are summarized as follows:

a) The suffering of pregnant women during the attack,
b) Forced nudity in front to armed men in the hospital,
c) Lack of hygienic supplements,
d) Vaginal "inspection",
e) Confinement,
f) Lack of pre- and post-partum care.[215]

The Court, for the first time, declared violations of the "Belem do Para" Convention as the lack of compliance with the due diligence obligation "to prevent, investigate, and impose penalties for violence against women",[216] and "to prevent and punish cruel, inhuman and degrading treatments and torture."[217] As in *Plan de Sanchez Massacre case*, the Court ordered several gender-neutral reparations some of them having a positive impact on women. (See **Table 3**)

3.3.2. Reparation for violation of the right to life

Finally, in the *Case of González-Banda et al. ("Cotton field") v. México*, the Court will have in the near future the opportunity to establish violations in the context of feminicide violence that occurs in a border-town between Mexico and the U.S. called Ciudad Juarez. Since 1993 a series of disappearing, abductions and homicides of women and girls have taken place in this

[214] Case of Miguel Castro Castro Prison v. Peru, Judgment on Merits, Reparations and Costs, Inter-Am. Ct. H. R., (Ser C No. 160) (Nov. 25, 2006)
[215] Karla, Quintana, above n. 202 at 306.
[216] Article 7 (b) of Belem do Para Convention. Case of Miguel Castro Castro Prison v. Peru, Judgment on Merits, Reparations and Costs, Inter-Am. Ct. H. R., (Ser C No. 160) (Nov. 25, 2006) at ¶ 408.
[217] Karla, Quintana, above n. 202 at 308.

city.[218] Most of the victims lived in poverty conditions; they were young mothers, workers or students who were abducted and subject to egregious sexual violence before being murdered.[219] In many cases, the bodies and human rests appeared in isolated fields or in mountain skirts after days of being in the open and found by neighbors or peasants, not by the official authorities.[220] An estimate number of homicides is around 423 and 40 women still missing.[221] It is estimated that one third of the total cases —approximately 120 victims— presents sexual violence and have been raped by their captors.[222] The lack of access to justice and impunity of the crimes has not provided an adequate for the next of kin of the victims.[223]

By an interim resolution, the Court took a narrow approach and admits just three out of eleven victims, reasoning that admitting more victims will breach the principle of equality of arms and the remaining eight victims did not fill the individual petition before the Commission to start proceedings.[224] This argument threats the development of Court´s jurisprudence because is limiting to direct victims the access to reparations.

The three cases admitted are emblematic and exemplifies perfectly the feminicide violence described in Ciudad Juarez. There is hope that the Court declared violations at least of the right to life, freedom of torture, fair trial and judicial remedies. An *amicus curiae* was

[218] CEDAW, *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,* 22, CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005) at ¶ 7

[219] *Id*. at ¶ 7; Inter-Am. C.H.R., *The Situation of the Rights of Women in Ciudad Juarez, México: The Right to be Free from Violence and Discrimination*, ¶ 44, OEA/Ser.L/V/II.117, Doc. 44, Original: Spanish, (March 7, 2003) (Prepared by Marta Altolaguirre).

[220] Amnesty International, *Ten years of abductions and murders of Women in Ciudad Juarez and Chihuahua*, ¶ 7, 28, AMR 41/026/2003/ (Aug. 11, 2003).

[221] National Commission of Human Rights, *Segundo Informe de Evaluacion Integral de las acciones realizadas por los tres ambitos de gobierno en relación a los feminicidios en el municipio de Juarez, Chihuahua* [*Second Report of the Comprehensive Evaluation of the actions performed by the three branches of government in relation with the feminicides in the municipality of Juarez, Chihuahua*] 49, (2008) available at http://www.cndh.org.mx/; The CEDAW Report , above n. 218 at ¶ 61

[222] *Id.*

[223] Above n. 218.

[224] Case of *González-Banda et al. ("Cotton field") v. México*, Order of the Inter-American Court of Human Rights (Only in Spanish) (Jan 19 2009)

submitted before the Court in order to suggest concrete measures of reparations from a gender perspective.[225] **(See Table 3)**

3.4. Execution of judgments[226]

The *amicus curiae* outlined that there is an incomplete or total lack of compliance by Member States of reparation judgments where women human rights were at stake.[227] In the *Plan de Sanchez* case, the government complied partially the reparation orders without being gender sensitive for the rehabilitation measures ordered by the Court.[228] *Castro-Castro Prison* case, the Peruvian State has not submitted its annual report to inform the Court the compliance of the judgment.[229] The *amicus* provided examples of successful mechanisms both from international and domestic jurisdiction to comply with individual and collective reparations, mechanisms which include the government, the civil society, the victims and other stakeholders, in order to preserve the compliance of the IACtHR judgments and its credibility before the Member States of the American Convention.[230]

[225] Clara, Sandoval et al, above n. 38.
[226] Article 68.1 of the American Convention.
[227] Clara, Sandoval et al, above n. 225 at ¶114.
[228] Id. at ¶116.
[229] Id. at ¶117.
[230] *Id.* at 119-138.

TABLE 3

Reparative measure/ Case	Victim
Restitution	
• Release from prison (Loayza Tamayo v. Peru) • Reinstallation in her previous teaching position and employer benefits (Loayza Tamayo v. Peru)	Direct
Compensation	
• Material reimbursement (Loayza Tamayo v. Peru) • Compensation for her and family members (Loayza Tamayo v. Peru)(Cotton Field) <u>Material damages:</u> • US $ 49,190.30 plus $ 5,000 for each of her children and medical expenses. (Loayza Tamayo v. Peru) • Based on fairness $ 5,000 US per victim (Plan de Sanchez Massacre v. Guatemala) • Reimbursement of burial and funeral expenses <u>Non pecuniary damages:</u> • US $3,000 for the direct victim (Loayza Tamayo v. Peru) • US $5,000 for victims that were pregnant; US $30,000 for victims of rape and US $10,000 to six women victims of sexual violence (Miguel Castro-Castro prison v. Peru) • US $20,000 per victim based on fairness (Plan de Sanchez Massacre v. Guatemala)	Direct/ Indirect
Rehabilitation	
• Physical and psychological treatment to the victims and their next of kin, free of charge, performed by professionals and considering the sufferings of each individual victim. (Loayza Tamayo v. Peru) (Plan de Sanchez Massacre v. Guatemala) (Miguel Castro-Castro prison v. Peru) • Social services with gender perspective including medical, psychological and legal services and creation of shelters (Cotton Field)	Direct/Indirect Structural
Satisfaction	
• The judgment by itself is a form of satisfaction (Plan de Sanchez) (Cotton Field) • US $ 25, 000 to the infrastructure of the Chapel the preserve the collective memory of victims (Plan de Sanchez Massacre v. Guatemala) • Investigation, prosecution and punishment of those responsible (Loayza Tamayo v. Peru) (Plan de Sanchez Massacre v. Guatemala) • Investigation, prosecution and punishment of those responsible according with the due diligence obligation of the Belem do Para Convention (Miguel Castro-Castro prison v. Peru)(Cotton field) • Public Pardon and acknowledgment of responsibility to victims and commemorate the executed in the massacre with the presence of high-ranking State Officials and members of the community to be	Structural

performed in Spanish and Mayan language with the presence of the media (Plan de Sanchez Massacre v. Guatemala) • Public apologies and media coverage (Cotton Field) • Translation of the judgment in Maya-Achi language (Plan de Sanchez Massacre v. Guatemala) • Publication of parts of the judgment in the Official Gazette and daily newspapers. (Plan de Sanchez Massacre v. Guatemala) (Cotton Field) • Construction of a monument to preserve the memory of the victims (Cotton Field) • Disciplinary measured for state officials (Maria Mamerita)	
Guarantees of Non Repetition	
• Legal amendments for legislation of terrorism and treason (Loayza Tamayo v. Peru) • Constitutional and legal amendments to investigate at federal level violence against women in cases of impunity and lack of due diligence (Cotton Field) • changes in legislation to be in compliance with Belem do Para Convention (Maria da Penha, X and Y) • Implement a housing program for those survivors who require in the next 5 years(Plan de Sanchez Massacre v. Guatemala) • Implement development programs in health, education, production and infrastructure of the community and provide social services according to international standards such as paved roads and potable water in the next 5 years(Plan de Sanchez Massacre v. Guatemala) • Increase the number of police stations in areas where violence against women occurs (Maria da Penha) • Implement effective crime prevention policies to combat disappearances and kidnappings (Cotton Field) • Create a national data system of feminicides and missing women (Cotton Field) • Create a Program for the Protection of Victims and Witnesses (Cotton Field) • Human Rights educational programs to police forces according to international standards of treatment of inmates (Miguel Castro-Castro prison v. Peru) • Gender and women human's rights workshops to judicial operators (Cotton Field)	Structural

3.5. General remarks

The Inter-American Commission´s resolutions and the Court´s judgments provided the best examples of reparations from a gender perspective. The limitation of the IACtHR is the scarce number of judgments where violence against women is decided on the merits. This be explained because: 1. There are few cases which passes the Commission´s filter, 2. There is a high standard of proof for sexual violence cases settled by the Court *(Loayza Tamayo; Plan de Sanchez Massacre*), and 3. The scarce number of women on the bench.

However, the limitations have not prevented the Court to develop its jurisprudence in gender issues. In contrast with the ECtHR, The Inter-American Court has expanded the concept of victims entitled to reparations. In its early judgments, the Court has interpreted as 'injured party' both direct victims and indirect victims in the understanding of being beneficiaries of reparations. However in the *Cotton Field Case* the Court started to narrow the concept of victims under the principle of equality of arms.

As a general rule, the Court has provided comprehensive gender-neutral reparations from individual, next of kin, and members of a community which has an impact of women. The Court has awarded restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition but few of these measures comply with the standard of reparation from a gender perspective *(Castro-Castro, Cotton Field).* One difference with the ECtHR while giving compensation for non-pecuniary damages is the presumption that the harm inflicted is not presumed thus, the Court has required experts or testimonies (*Plan de Sanchez Massacre, Cotton Field Case).*

A similar finding both in the IACtHR and ECthR is the gender perspective in the due diligence obligation of the States (*Miguel Castro-Castro prison v. Peru).* Another finding is that moral damages are quantified in fairness and in a case-by-case basis, and the Court

provides larger sums of money for non-pecuniary damages if the violation is related to the right to life cases.

The landmark judgments of *Castro Castro prison* and *Cotton Field Case* are still pending of execution. A major challenge for the IACtHR is to monitor in an effective manner the reparation measures ordered to strength the credibility of the Court´s judgments.

CHAPTER 4 VIOLENCE AGAINST WOMEN AND REPARATIONS BEFORE THE INTERNATIONAL CRIMINAL COURT

As Arsanjani and Reisman have rightly pointed out, there are two different types of international criminal tribunals: those created after the alleged crimes have ended by a "military victory or political settlement" such as the Nuremberg and Tokyo International Military Tribunals, the ICTY or the ICTR (*ex post* tribunal), and the tribunals which are settled before or in the midst of the hostilities or the violent acts (*ex ante* tribunal), the archetypical example of an *ex ante* is the International Criminal Court.[231] For Dickinson, there is a difference between international courts (such as ICTR, ICTY and ICC) and hybrid domestic-international courts (East Timor, Sierra Leone, Kosovo) which could complement both the national or international criminal jurisdictions.[232] The ICC is an *ex ante* international Tribunal, however these are modest adjectives to understand the ICC.

4.1. The International Criminal Court

In fact, it was a long way to crystallize a permanent ICC. As Cassese claims, there were attempts and fails, and the eventual adoption of the ICC Statute corresponds to five different phases in history: [233] On 17 July 1998, the international community met in Rome, Italy to end with the impunity of those responsible of genocide, war crimes and crimes against humanity; that day 120 States vote in favor in a Diplomatic Conference in the UN for the adoption of the

[231] Mahnoush H. Arsanjani and W. Michael Reisman, *The International Criminal Court and the Congo: From theory to reality in* The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni 325-326. (Leila Nadya Sadat and Michael P. Scharf ed. Martin Nijhoff Publishers, 1998)

[232] Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 Am. J. Int'l L. 295, 2003.

[233] a. The period immediately after First World War where there were just attempts to establish international criminal institutions (1919-1945); b. The criminal trials of the IMT of Nuremberg and Tokyo in the aftermath of Second World War (1945-1947); c. The drafting period of an international criminal court by the International Law Commission of the UN (1950-1954); d. The post-cold war 'New world order' and the establishment of the ad hoc Tribunals (1993-1994) and e. The drafting of the Rome Statute (1994-1998). Antonio Cassese, International Criminal Law, Chapter 18, Oxford University Press (2003)

Rome Statute which creates the ICC.[234] The Statute entered into force on 1 July 2002, and as of 21 July 2009 the Statute has been ratified by 110 countries from different continents.[235]

The ICC is a permanent Court created with the purpose of "deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity"[236], "to exercise its criminal jurisdiction over those responsible for international crimes".[237]

Indeed, there have been detractors and critics for the international criminal law and tribunals.[238] It is out of the scope of this thesis to get into deep debate on this issue. It is sufficient to say that the present paper agrees that international criminal law is a right venue to punish perpetrators of international crimes.[239]

The ICC is a permanent tribunal with jurisdiction over genocide, war crimes, crimes against humanity and aggression.[240] The referral of cases can be made by a State Party, the Prosecutor *motu propio* or the Security Council under Chapter VII of the UN Charter.[241] Only

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[234] Mexican Coalition for an International Criminal Court, *Estatuto de Roma de la Corte Penal Internacional. Reglas de Procedimiento y Prueba y Elementos de los Crimenes [Rome Statute of the International Criminal Court. Rules of Procedure and Evidence and Elements of the Crime]* 2, (Coalition for an International Criminal Court, 2004)

[235] Rome Statute of the International Criminal Court. Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. Entry into force: 1 July 2002, in accordance with article 126. *Available at* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf;
http://www.icc-cpi.int/Menus/ASP/states+parties/

[236] Marlise Simons, Without Fanfare or Cases, International Court Sets Up, NY Times A3 (July 1, 2002) cited in Jack, Goldsmith, Centennial Tribute Essay: The Self-Defeating International Criminal Court, 70 U. Chi. L. Rev. 89, 2003.

[237] Preamble of the Rome Statute.

[238] Carrie Gustafson, *International Criminal Courts: Some dissident views on the continuation of war by penal means*, 21 Hous. J. Int'l L. 51, 1998.

[239] On the contrary of what detractors have said, domestic criminal law can have advantages from the international criminal law for example, it can unify domestic criminal law standards in line with international criminal law, such as procedural rights and elements of the crime. In fact, provisions of the Rome Statute have been carefully adopted to comply with the standards set forth by international human rights law and jurisprudence, in specific, the rights of the accused and fair trial rights are an extension of this body of law.
Salvatore, Zappala, Human Rights in International Criminal Proceedings, 1-7, Oxford University Press (2005)

[240] Articles 5, 6, 7 and 8 of the Rome Statute. According to Article 9, "elements of the crime assist the Court in the interpretation and application of articles 6, 7 and 8."

[241] Article 15 of the Rome Statute.

individuals can be responsible for the commission of crimes.[242] The phases of the criminal process are the investigation, pre-trial and trial before pre-Trial Chambers and a Grand Chamber with possibility of revision or appeal.[243]

4.2. The Rome Statue and reparations

The Rome Statute is a master piece for victim's rights in international criminal law. None of the *ex after* tribunals has provided *locus standi* and a wide participation of victims during the process as the ICC does.[244] The *ad hoc* Tribunals, specifically the ICTY, provided some compensation measures under Rule 106[245] but the claims must be presented and granted before national courts, and compensation was narrowed to restitution of property.[246]

It is well known that both the ICTR and ICTY provided a very comprehensive case-law for women's rights, that rape and other forms of sexual violence amounted to genocide, war crimes and crimes against humanity.[247] However, it is disappointing and discouraging for victim's rights that so far, no victim directed affected by the facts has obtained some form of compensation or restitution of property.[248] The lack of redress measures or reparations' regime for victims of genocide, war crimes and crimes against humanity can be explained by the fact that these tribunals were focus on punishing the responsible of crimes, based on an

[242] Article 25 of the Rome Statute.
[243] Parts V to VIII of the Rome Statute.
[244] Salvatore, Zappala, above n. 239, at 220.
[245] Rule 106
Compensation to Victims
(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim. (B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation. (C) For the purposes of a claim made under Sub-rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.
[246] Anne-Marie L.M, de Brouwer, above n. 6 at 395-399.
[247] Kelly, Down Askin, *Gender crimes jurisprudence in the ICTR: positive developments*, J.I.C.J., 1007-1018 (2008); Franke M. Katherine, *Gendered subjects of transitional justice*, 15 Colum. J. Gender & L. 817 (2006); Kelly Down Askin, *Prosecuting War Time rape and other gender related-crimes under International Law: Extraordinary advances, enduring obstacles*, Berkley Journal of International Law, 288, 317 (2003); Vesna Nikolić-Ristanović, Sexual Violence, *in Women, Violence and War. Wartime Victimization of Refugees in the Balkans*, (Borislav Radović trans., Central European University Press, 2000).
[248] Anne-Marie L.M, de Brouwer, above n. 6 at 399.

adversarial-common-law system which centered its attention on the rights of the accused rather than victims.[249] It bears mention that victims in *ad hoc* Tribunals played a role as mere witnesses and it has been criticized that they received services and help from the Tribunals only if they were able to testify.[250]

Zappala has rightly pointed out, that there are two different types to address victim's needs; while the *ad hoc* Tribunals included participation of victims based on a *service perspective,* to assist sexual violence victims with psychological and physical support for them so they can provided testimonies before the Tribunal; the ICC provides a more comprehensive perspective called the *procedural level*, which, apart from provide the *service perspective,* it allows victims to participate in investigation, prosecutions, being witnesses and most importantly, to obtain reparations.[251] The scope of reparations and victim's rights in the drafting of the Rome Statute did not find consensus right immediately. Muttukumaru notes that the right to reparation for victims presented contentious issues during the negotiations while drafting the Statute.[252]

4.3. The concept of victim and the right to reparations

The RPE have been written in the basis of an adversarial criminal law model as it is considered that an adversarial criminal law system provides more guarantees and rights for the accused.[253] In fact, in national jurisdictions a victim-centered model corresponds to

[249] Salvatore, Zappala, above n. 239, at 219.
[250] Yael, Weitz, Rwandan genocide: Taking notes from the holocaust reparations movement, 15 Cardozo J.L. & Gender 357, 380-381 (2009).
[251] Salvatore, Zappala, above n. 239, at 221.
[252] The issues can be summarized as: whether or not victims have right to reparation before the ICC, whether this right is limited to compensation measures or should it be expanded and, whether States have obligation to redress and at whose instance this right can be claimed.[252] It is important to highlight that the United Kingdom and France were the two countries —both with different judicial systems— who drafted the reparation's provisions, therefore the consensus agreed in Rome reflects the importance for State parties to include reparation's regime for victims. Christopher Muttukumaru, Reparation to Victims, *in The International Criminal Court: the making of the Rome Statute : issues, negotiations, results,* 262-263 (Roy S. Lee, ed. Kluwer Law International, 1999)
[253] Salvatore, Zappala, above n. 239, at 16.

inquisitorial system;[254] where the system provides *locus standi* or other rights in order to let victims to participate in the proceedings, or for being real parties in an investigation phase and ask for reparation; in some countries victims play a role as *parte civile* or *coadyuvantes*.[255]

Article 75 of the Rome Statute establishes:

> **Reparations to victims**
> 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
> Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.[…] [256]

Certainly, Article 75 of the Statute does not explain the concept and scope of 'victim.' Actually is on the Rule 85 of the RPE:

> **Definition of victims**
> For the purposes of the Statute and the Rules of Procedure and Evidence:
> (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

[254] *Id.*

[255] For example, Article 20 Section C of the Mexican Constitution establishes *inter alia* that victims can provide evidence during the investigation and the trial, receive medical and psychological rehabilitation services from the Prosecutor's Office, ask for reparation and challenge the Prosecutor's Office decisions when reparations have not been satisfied.

[256] Article 75. 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

> Rule 98 of the RPE:
> **Trust Fund**
> […] 2. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.

From the above cited paragraphs we can conclude that the concept of victim is broad and includes individual and/or collective, natural or legal persons. There is not a concept of 'beneficiaries' or 'injured party' as the Inter-American or the ECHR have understood; even better, the ICC has provided victims with standing and status before the proceedings. Certainly, restitution, compensation and rehabilitation are measures that shall be considered by the Court, but this does not prevent the Court to adopt some other measures such as satisfaction and guarantees of non repetition.

Zappala notes that Rule 85.a. is counterproductive for the ICC System because "considering the procedural rights of victims, […] may allow too many subjects to present their views under the relevant rules."[257] This paper does not concur with Zappalas's statement because the drafters of the ICC system considered the large-scale number of victims and their participation, as it will be sustain with the recent and relevant case-law of the ICC. Until November 1st 2009, there are four cases which have been referred to the ICC for alleged international crimes: Uganda, DRC, Central African Republic and Sudan.

There are two judgments deciding on participation of victims as regards the situation in the DRC. From a procedural point of view, it is not clear the role/status of victims as they are not parties during the investigation or a trial but it is clear they have a more active role than witnesses. Actually there are three keys to understand victim's rights in the ICC legal framework:

[257] Salvatore, Zappala, above n. 239, at 220-221.

1. Their right to participate in the proceedings,

2. Their right of victim's protection, and

3. Their right to reparation.[258]

The right of victim's protection as it was mentioned is a service provided by the Victims and Witness Unit and is not reparation *per se*. It is foreseeable the relation between the participation of victims and their right to obtain reparation. Article 53 of the Rome Statute provides that the Prosecutor shall take into consideration the interest of victims to initiate an investigation; therefore victims can submit evidence but bearing in mind that the victim's interest **shall** balance the rights of the accused.[259]

It should be considered that in the context of an armed conflict or its aftermath it is difficult for the Court to admit all the people to claim to be victims, the difficulty of their identification as the consequence of the lack of documents because of the conflict, and the Prosecutor's Office was on the opinion of not to admit victim's evidence during the investigation phase. In its decision of Jan 18 2008, in the case of *The Prosecutor v. Thomas Lubanga Dyilo* the Trial Chamber raised two important issues: 1. whether applicant victims have the right to participate in trial; 2. whether their interest are affected in proceedings.[260] As regards the first issue, the Trial Chamber provided a test for a person to be a victim:

1. Whether victim is a natural or legal person before or during the trial or both (Rule 85) and their personal circumstances,
2. They should have suffered harm,

[258] Lorna Mc Gregor, *International Criminal Law Seminar*, University of Essex, February 2009. (Notes on file with the author).

[259] Article 19.3 of the Rome Statute: The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
Article 68 victim's interest balance. Article 68.3 of the Rome Statute: Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

[260] The Prosecutor v. Thomas Lubanga Dyilo, Decision on victim's participation, ICC-01/04-01/06 (Jan 18 2008) at ¶86.

3. The harm is a result of the commission of a crime alleged within the jurisdiction of the Court, and
4. A necessary link of the harm suffered and their statements.[261]

The Court applies the *Basic Principles and Guidelines* of the UN to interpret that the harm can be inflicted in individual or collective form.[262] Certainly, the Court provides a wide and extended concept of victim.

As regards the second issue, the Court highlighted that the interests of victims are wide, *inter alia*: reparations, express their views, establish the truth and facts, protect their dignity and safety during trial and being recognized as victims, therefore participation of victims is not limited in receiving reparations.[263] The Trial Chamber's decision established that the evidence concerning reparations may be consider during the trial with the aim of making the procedure expeditious and effective and to establish the truth, in this sense; this decision does not undermine the rights of defense or presumption of innocence of the accused.[264] However, the Chamber can "separate the evidence that relates to the charges from the evidence that solely relates to reparations [stage]" after the accused is convicted but always bearing in mind the fair trial rights of the accused.[265]

[261] *Id.* at ¶¶ 90 and 99.
[262] The ICC recalls Principle 8: For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Id. at ¶92.
[263] *Id.* at ¶97.
[264] *Id.* at ¶119.
[265] *Id.* at ¶121. The Chamber also ordered that the Victims Protection and Reparations Section make recommendations to the Trial Chamber for a common legal representative for victims, in order to provide flexible guidelines to avoid conflict of interests of victim's and permit advantages for a better understanding between the common representative and the hundred of victims for example, language and the link of time, place and circumstances. *Id.* at ¶123-124.

4.4. Gender and reparations in international crimes

The gender spectrum in the ICC legal framework is compound by several provisions in the Rome Statute, the RPE and the Elements of the Crimes. One of the most controversial and debatable provisions while drafting ICC law was the definition of the term gender.[266] Authors have catalogued the gender provisions in the following clusters:[267]

- Structural provisions: staff with expertise in issues of gender in the various organs of the Court including the number of women judges and staff in the prosecutor's and other offices to be proportional.[268]

- Procedural Provisions: Ensure proper investigations and prosecution and the trial process.[269]

- Substantive provision: A non-adverse-distinction clause that includes gender as one of the enumerated grounds in the international crimes such as genocide, war crimes and crimes against humanity.[270]

Certainly, reparation from a gender perspective is not explicitly recognized in the ICC legal framework. This paper suggests including victim's right to reparation as part of procedural provisions in the understanding that evidence regarding reparations and reparations as such are closely link with procedural rules obeying the best interest of victims.

Until this date, there has not been yet any judgment on the Trial Chamber for the individual innocence or guilt of the accused thus, no reparations has been awarded in any of the four situations referred to the ICC. However, several projects have been submitted to the

[266] Cate Steains, Gender Issues in The International Criminal Court*: the making of the Rome Statute : issues, negotiations, results*, 371 (Roy S. Lee, ed. Kluwer Law International, 1999)
[267] *Id.* at 357.
[268] *Id.;* Women's Initiatives for Gender Justice, Gender Integration in the Statute of the International Criminal Court. Available at www.iccwomen.org
[269] *Id.*
[270] *Id.*

TFV; these projects will impact approximately 380,000 direct and indirect victims. From the public information, the 34 Projects (16 for DRC and 18 for Northern Uganda) will consider the gender perspective.[271]

The question to be answered is to which extent reparation measures should be awarded. Clearly, there is a trend in the ICC to provide 'structural' reparations for a pool of victims. However there is not too much clarity as regards of the measures in the sense of whether the Court will take a 'reparation program approach' (as a Truth and Reconciliation Commission) or the Court will be more modest and will provide some measures. Whatever the scenario will be, as many NGO's and other stakeholders are involved in the reparation process, the ICC should at least provide some guidelines for reparations for sexual violence for rehabilitation, satisfaction and guarantees of non repetition considering the experience of the valuable reparation measures awarded by CEDAW, IACHR and IACtHR suited to the context of the conflict in question.

4.5. Execution of judgments

To date, there is not a final judgment in the ICC which states the guilt of the accused therefore; no execution of judgment has been put in practice. This does not prevent this research to consider some issues set forth before the Pre-Trial Chamber which help to understand the rationale behind of reparations and domestic courts. According to the Rome Statute and RPE, the convicted person should provide reparations, if the convicted is in a situation of indigence or there is a large number of victims to redress, reparations can be awarded through the TFV.[272] The Rome Statute and RPE are silent as regards a mechanism to supervise the compliance of reparation orders. However, there is hope that NGO's in

[271] Available at http://www2.icc-cpi.int/
[272] Article 75.2., 79 and Rule 98.

collaboration with the TFV could create rules or mechanisms to oversight the implementation of reparation orders.

The Rome Statue enshrines what it can be called 'the best interest of victims for reparations' while stating that "Nothing in [Article 75] shall be interpreted as prejudicing the rights of victims under national or international law."[273] This principle is significant while studying the situation in Uganda as follows:

The Office of Public Council for Victims presented before the Pre-Trial Chamber II a decision regarding the Juba Agreement in the Uganda's case and it's admissibility under Article 19.1 of the Rome Statute.[274] There was disagreement as to whether or not the Special division of the High Court of Uganda could exercise jurisdiction over the international crimes included in the arrest warrants, allegedly committed by Joseph Kony and others.[275] The mentioned Office highlighted that the Juba Agreement and its Annexure are silent on respect of participation of victims before the Special division of the High Court, moreover Uganda's common law system does not recognize victim's participation in proceedings, and therefore the standards for victim's participation before the ICC are not included in the Juba Agreement.[276] Despite the fact that reparations are included in the Juba Agreement, the legal framework of Uganda and the practice before national Court's does not have a "clear" or "consistent" criteria to award reparations in an effective manner.[277] The Office of Public Council asked the Pre-Trial Chamber to "to take [its] observations into consideration and to suspend the proceedings under article 19(1) of the Rome Statute; or, in the alternative, to

[273] Article 75.6
[274] Article 19. Challenges to the jurisdiction of the Court or the admissibility of a case
1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
[275] Pre-Trial Chamber II, Situation in Uganda. In the case of the Prosecutors v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, ICC-02/04-01/05 (Nov. 18, 2008)
[276] *Id.* at ¶¶ 31 and 32.
[277] *Id.* at ¶¶ 44, 48 and 54.

declare the case admissible pending the effective establishment of the Special division of the High Court."[278]

This admissibility phase decision shows the importance of reparations as important rights of victims and the need of their effectiveness to be implemented before national courts. Although the TFV will provide monetary compensation to victims; there might be several reparation orders that will be implemented before national courts for a pool of victims, therefore it is important to stress the national's reparation regime according to ICC standards.

It is expected from the ICC to provide due reparations according to victim's needs and the Court's decisions seem to go on this direction. As well as the IACtHR, it will be very important the presence of NGO's and groups of victims to create control mechanisms and oversight the implementation of reparations from gender perspective, in benefit of thousands of victims who have been unable to obtain civil remedies or reparations under Ugandan law.[279]

[278] *Id.* at ¶ 56.
[279] Amnesty International, *Uganda: Doubly Traumatised. Lack of Access to justice for female victims of sexual and gender- based violence in northern Uganda*, 30 November 2007, AFR 59/005/2007 at 28.

4.6. General remarks

There is a trend in the ICC to provide reparations with a gender perspective affirmed by its judgments related to victim´s participation and national standards on reparations. A difficulty founded is the lack of information as regards the new pilot projects that the ICC and the TFV are implementing towards victims. These projects incorporate reparations for women victims of sexual violence, but it is not clear the scope or the measures of reparation that will be awarded. This research has shown that the ICC could go beyond of restitution, compensation and rehabilitation.

There are many findings as regards the status of victims. The recognition of victim´s rights in ICL is gradual, and the reparations regime in the ICC provides the more generous and benevolent provisions for victim´s rights. Reparations is one of the tree rights of victims that is linked with victim´s participation, however the victim´s participation (such as the evidence collected) should be in a fair balance with the rights of the accused.

The ICC has a broad concept of victims and it seems that this concept will be respected for the reparation´s phase. The ICC included in one of its decisions the *2006 Basic Principles and Guidelines* in order to establish that the harm inflicted can be individual or collective. This is crucial for grave and systematic violations of women rights, in the understanding that the Court will not limit reparations in an individual level; on the contrary they will be awarded in mass scale. The Court should consider as a point of departure the list of reparations provided by the CEDAW, IACtHR and IACHR. In order to sustain the reparation´s regime of the ICC an effective control mechanism should be considered to benefit thousand of women victims who did not obtain redress in their domestic law.

CONCLUSIONS

The present thesis accomplished the aim to provide specific reparation measures with a gender perspective which were awarded by international courts and human rights mechanisms.[280] It is confirmed that none of the international courts or human rights mechanisms follow the same standards to provide reparations in the understanding that each of them has different legal provisions, as well as different methods to interpret what it can be called the "reparation clause." In a general evaluation, both the Inter-American Commission and Court of Human Rights case-law constitute the best examples of reparation's regime with gender perspective in cases of grave or systematic violation of women's rights.

There are difficulties and challenges in international courts to award reparations from a gender perspective and to maintain consistency in awarding these reparations in a comprehensive or holistic manner. While analyzing the case-law, international courts have preferred some reparation measures than others. Surprisingly, none of the courts or mechanisms has interpreted in their legal analysis the Nairobi Declaration to expand the women's right to a remedy and reparation. Moreover, the degree of the protection of women's rights in case law started recently, when Courts started to include the Recommendation *Rec(2002)5* of the Committee of Ministers, the CEDAW and the Belem do Para Convention.

On the foreground, the ECtHR has admitted the highest number of cases of violence against women. The Court's judgments on the merits provide a deep analysis of women's human rights and the Court lowered the standard of proof for sexual and domestic violence cases even if the violations have been committed in the "private sphere". Indeed, there has been a shift in the Courts' case-law since *M.C. v. Bulgaria* and *Castro-Castro prison v. Peru*

[280] See Tables 1, 2 and 3.

because both Human Rights Courts welcome the gender perspective in its merits analysis and awarded some reparations, but the difficulty comes when the landmark cases of *M.C v. Bulgaria* and *Opuz v. Turkey* are still pending of the monitoring by the Committee of Ministers; the same applies to *Cotton field v. Mexico* because the judgment on the merits and reparations has not been hold to date.

Another difficulty presented on this research was to include transitional justice concepts into a legal research. From the transitional justice perspective, the results of this thesis could be interpreted, in the sense that International Courts do not award reparation from a gender perspective. The efforts and decisions made by these Courts cannot be underestimated under this criterion. Therefore, it was necessary to include the legal framework of the Court´s jurisdiction to provide reparations. As it was shown, every Tribunal has its own competence, its own legal framework and its own rules of procedure. By understanding the limitations of the Courts and comparing their reparation's regime, it is credible and relevant to conclude, from a legal perspective that the Inter-American Court have awarded some reparations from a gender perspective.

There are different findings while analyzing the legal framework and the case-law of Courts. The ECtHR is the only Court that does not provide structural reparations measures to collectivities or groups of individuals and it has not used its redress faculties to award measures of reparations other than monetary compensation. The execution of judgment's mechanism has not provided structural measures in benefit of women. Certainly, there is a trend in the other Courts and mechanisms to provide reparations to direct, indirect, beneficiaries, groups or collectivities, where structural reparations are of fundamental importance for women in the sense that they could transform to some extent the social fabric where causes and consequences of VAW is either grave or systematic.

Certainly, *restitutio in integrum* is not an adequate reparation with gender perspective in the sense that the situation previous to the violation is composed by discriminatory practices or laws in detriment of women's rights. The case-law analyzed affirm this statement when Courts have not awarded *restitutio* if the *status quo ante* does not provide equal protection of women, therefore this measure of reparation should be disregarded by Courts.

As regards compensation, the gold rule for both Human Rights Courts is to provide monetary compensation in fairness considering the particular situation of the victim in a case by case basis. While the IACthR has been more creative to award reparation for material and moral damages, the ECtHR has a narrow approach. However, the ECtHR has always considered moral damages in cases of VAW without asking the victim to provide evidence of the moral harm. There is a consistent criterion in both Courts to award more economical benefits when there is a violation of the right to life. On the contrary, the ICC through the TFV is likely to provide compensation using mathematical rules or a more rigid approach for thousands of victims.

Structural reparation measures such as rehabilitation, satisfaction and guarantees of non-repetition are of fundamental importance to redress domestic violence, grave violations in massacres, the use of force against female inmates or feminicide violence where impunity and the lack of access to justice prevails in the roots of the judicial system. The research founds a common ground in the reparations awarded for women's human rights violations: the State obligation of 'due diligence' with a special connotation to prevent, investigate and punish those responsible of the violations. The significance of this finding is that a treaty obligation of a State can be converted into a model of reparation from the gender perspective, in the understanding that there is no justice without investigation and punishment of perpetrators.

The incipient system of ICC has provided a strong legal framework for victim's rights and their participation in proceedings, though the development is gradual. This Court provides the widest concept for victims, from individual as well as legal persons. Indeed, there is a trend in the Inter-American Court and the ICC to include reparation programs in their judgments. After all, it is proved that in order to respect and guarantee women's human rights, reparations need to be addressed according to their specific condition and circumstances as the current reparation projects before the TFV seem to follow in the near future.

The present paper managed to translate transitional justice concepts into International Human Rights Law. This thesis also provides a methodology to compare to which extent gender-neutral reparations have an impact on women as well as providing *international standards of reparations from a gender perspective* to be complied. These standards consist on the compilation of the Nairobi Declaration, scholars' literature and the case law analyzed. The present thesis contribute to continue the debate of gender and reparations awarded by the CEDAW Committee, the IACHR, the ECtHR, the IACtHR and the ICC and paves the way for a more in depth study which could consider future judgments, balancing the limitations of international courts and the victim's rights and interest, to benefit in reality women who faced the most egregious grave or systematic violations and did not obtain reparation measures in their domestic law.

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