

**Taking Women Rights Seriously: International Standards to Protect Women
Against Violence**

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Introduction

The rights of women are violated every day, everywhere in the world. Women are abused, tortured, raped, murdered and discriminated against based on stereotypes. This violence and discrimination is disproportionate and unjustifiable in comparison with men. Indeed, the persistence of violence against women reminds us of one of our greatest failures as a democratic society. The approach to violence against women as a problem has changed in the last decades especially regarding two of the main approaches to the problem. The first approach sees the violence as a neutral issue (i.e. whether a victim is male or female is not relevant) that is as a private problem between individuals, not a public problem that the State is obligated to rectify. In the second approach violence against women is non-neutral; that is, women are victims of violence based on their condition of being women; furthermore, their condition reflects and reinforces inequalities between men and women. Therefore, the States have to take special measures and enact special laws to prevent violence and discrimination, as well as to protect women's rights.

Most of the countries around the world have ratified international conventions, and have adopted laws and measures to protect and prevent violence against women. However, there is still a gap between law and practice, especially because there are several problems in accessing justice and there are high levels of impunity in some jurisdictions. In fact, international tribunals have protected and readdressed cases of gender- based violence in the last decades.

This thesis will analyse violence against women under international human rights law through case studies in three international jurisdictions: the Inter-American System, the European Court and the Committee on the Elimination of Discrimination against Women of United Nations (CEDAW Committee). The purpose of this study, on the one

hand, is to identify how international tribunals address gender-based violence and to identify the degree of State responsibility toward the problem. On the other hand, this thesis analyses the arguments and roles that different actors (e.g. tribunals, State parties, petitioners, and civil society) play in the cases before international tribunals.

Furthermore, this thesis is focused on the most important precedents regarding gender-based violence from the two regional human rights tribunals (European and Inter-American) and also from the CEDAW Committee. The first chapter studies the international conventions, the scope of the problem of gender-based violence, and the State's responsibility to prevent and protect women's rights regarding these types of violations. The second chapter studies cases before the CEDAW Committee, especially the standards and the doctrine to protect women's rights in the context of violence involving private actors. The third chapter examines the particular aspects of the case-law of the Inter-American Court of Human Rights. It analyses violence against women as a gender problem, and how the Court has readdressed the cases and the implementation of the judgments on the domestic level. The fourth chapter studies jurisprudence in general regarding women's cases, and two cases from the European Court of Human Rights in relation to the positive obligations of States and reparations owed to the victims of violence. This case-law study has a number of important limitations that need to be considered because each jurisdiction has different quantitative developments and also the approach about remedies is substantially diverse. Finally, the terms 'gender-based violence' and 'violence against women' are frequently used interchangeably, but there are some differences. First of all, the term 'gender-based violence' refers to violence directed against a person because of his or her gender and the expectations of his or her gender role in a society. Indeed, this term focuses on the relation between men and women in the society regarding power and subordination at a

particular time. Men and boys may also be victims of gender-based violence in a particular historical and social context. On the other hand, ‘violence against women’ refers to the number of women and girls that experience violence. Even though this thesis recognises the differences between these two terms, it will follow the usage of the international bodies i.e. “gender-based violence” (and its equivalents) will be used interchangeably with “violence against women” (and its equivalents).

1. Gender –based Violence as a Human Rights Problem

The purpose of this chapter is to review the international standards and the States' responsibility regarding women's rights in the context of violence. First, this chapter analyses the scope of the problem; second, it identifies the international human rights treaties and the States' duties to protect women against violence. Finally, this chapter analyses the approach of the gender problem to the judges and the scope of the remedies and reparations in the case-law.

Violence against women as a form of discrimination has risen as a public problem in the last two decades, as has people's awareness of the issue. In some countries violence against women is still not criminalised because of justifications garnered through reference to social and cultural norms. Some circumstances also make women more vulnerable and exposed to violence, such as: poverty, forced displacement, migration and armed conflict.¹ Generally, States are responsible for their own actions or omissions performed through public agents. However, in the last decade, public international law has pushed States to exercise due diligence to promote, protect and fulfil human rights in cases where the violation is done by private persons. Principles of due diligence apply to all human rights violations, and most importantly when non-State actors perpetrate these violations. Therefore, this principle has been a critical tool to achieve accountability.² On the other hand, the feminist movement and human rights organizations worldwide have claimed the international responsibilities of States to

¹ C. Benninger-Budel. *Due Diligence and its Application to Protect Women from Violence*. Leiden: Brill, 2008, p. 28.

² Z. Abdul Aziz, J. Moussa, *Due Diligence Framework: State Accountability for Eliminating Violence Against Women*, International Human Rights Initiative, 2014, p. 1.

prevent and to protect women from all forms of violence and discrimination, especially because this phenomenon is disproportionately against women.³

Due to the differing cultural and political characteristics of human rights violations against women, there is not enough protection recognized under international treaties. There are two important elements that need to be analysed in order to guarantee justice for women: the approach to the gender problem and the scope of the remedies and reparations.

1.1. Scope of the problem

Violence against women takes many forms: physical, sexual, psychological and economic. The most common forms of violence include domestic and intimate partner violence, sexual violence, sexual harassment, sexual exploitation, sexual trafficking, and also harmful practices such as female genital mutilation/cutting (FGM/C), forced marriage and child marriage.⁴ Violence against women perpetuates sex-based inequality, this is the reason why domestic and international law have recognized the importance of eradicating these human rights violations.⁵

There are two questions that arise from understanding the different standards of protection for gender-based violence; first, why protect women against violence? Second, why do States have the responsibility to intervene against this violence? For instance, some scholars argue that men and women are victims of violence⁶

However, there is a quantitative and qualitative difference regarding violence and gender. According to the World Health Organization (WHO), there are many forms of

³ Secretary General of United Nations, Ending violence against women, from words to actions, study of the Secretary General, 2006, p. 32. Available from: <http://www.un.org/womenwatch/> [Accessed: November 14 2014].

⁴ Office of the Special Adviser on Gender Issues (OSAGI), Facilitator's Manual - Competence Development Programme On Gender Mainstreaming, United Nations, 2002, pp. 3-6.

⁵ J. Goldscheid, Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches. Thomas Jefferson Law Review, Vol. 28, 2006, p. 355, Available from SSRN: Library [Accessed November 14 2014].

⁶ Ibidem.

violence against women, but physical and sexual violence are the most common forms of violence. In 2013, a WHO report estimated that 35.6% of women worldwide have experienced sexual or physical violence by an intimate partner, non-partner, or both.⁷ The prevalence of violence against women is rooted in gendered social structures rather than individual and random acts; it cuts across age, socio-economic, educational and geographic boundaries and affects all societies.⁸

The prevalence of violence against women is also the key motivation to enhance each State's responsibility to protect women's rights. However, the legal approach to condemn and criminalise violence against women has been different in every domestic legislation around the world. In some countries there is legislation that addresses gender specifically. In this regard there are two different approaches: first, women are seen as weak, vulnerable, and therefore, in need of protection by the State. Second, women are seen as subjects of violence because of the gender and power relations between men and women, as well as the gender inequality, which occurs when men subordinate women. As a consequence, violence is a form of discrimination. Feminists stress that unless women are free from the risk of violence, they are powerless to obtain their other civil, political and social rights.⁹

1.2. International Human Rights Treaties and Protections against Gender-based Violence

The CEDAW was the first international treaty dealing with women's rights that tried to codify international legal standards for women and equality. It is the result of more than three decades of work by the United Nations Commission on the Status of Women,

⁷ World Health Organization - WHO, Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence, WHO Press, World Health Organization, 2013, p. 9.

⁸ Ibid, p. 10.

⁹ Op. cit. C. Benninger-Budel, p. 28.

a body established in 1946 to promote women's rights.¹⁰ The CEDAW has been ratified by 99 of 188 States (most of the States from Europe, South America and some African Countries). The Convention was enforced in 1981.¹¹

The CEDAW was born from international negotiations; various governmental officials who participated within the United Nations came to a working agreement on the issue. One of the primary bodies the officials participated in was the Commission on the Status of Women and the General Assembly.¹² The main objective of the CEDAW is to eradicate prejudices toward women so they enjoy the same rights as men. However, the Convention ignores violence as a women's rights violation. The initial convention is criticised by some authors as it negated to include one of the most important sources of gender discrimination: violence against women. This may have been because the issue had a lower public profile at the convention's inception.¹³ Some see this problematic as, for many years, gender based violence has been justified by cultural and social reasons or as a problem for the private sphere in which States have no competence. However, the situation is complex because other authors (primarily feminists) have discussed the problems that are commonly associated with using a rights based framework to tackle this issue.¹⁴

The optional protocol of the CEDAW is the instrument in which States recognise the competence of the CEDAW Committee. This is the body that monitors a State's compliance with the Convention, it receives and considers individual complaints and

¹⁰ Department of Economic and Social Affairs - Division for the Advancement of Women, Handbook for Legislation on Violence against Women, No. E.10.IV.2, 2009, p. 13.

¹¹ J. Riddle, Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process, *George Washington International Law Review*, 2002, p. 22.

¹² M. Sally-Engle; Gender Violence and the CEDAW Process. In: Merry, SE. *Human Rights & Gender Violence, Translating International Law into Local Justice*, Chicago University Press, 2006, p. 53.

¹³ *Ibid*, p. 60.

¹⁴ *Ibid*, p. 54.

inquires into grave and/or systematic violations¹⁵. The protocol offers women direct means to seek redress at an international level for human rights violations recognized under the CEDAW. The “optional protocol” entered into force in December 2000.¹⁶

The CEDAW Committee has interpreted violence as a type of discrimination, and has given several resolutions and general recommendations. For example, the CEDAW Committee in the General Recommendation No. 19 (1992) clarifies the definition of discrimination against women:

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.¹⁷

The CEDAW assumes that culture, traditions, or religion should not condone violations of human rights. Violence against girls and women cannot be justified by social conditions that usually take place; for example, in family issues such as domestic violence. The interpretation of State duties must integrate all of the convention in order to guarantee the rights of women due to the social, political and cultural context where the violations occur.

On the other hand, the most important political discussion on women rights begins in the 1990’s with international conferences of the United Nations on human rights,

¹⁵ The Protocol contains two procedures: “(1) A communications procedure allows individual women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee. The Protocol establishes that in order for individual communications to be admitted for consideration by the Committee, a number of criteria must be met, including those domestic remedies must have been exhausted. (2) The Protocol also creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women’s rights. In either case, States must be party to the Convention and the Protocol. The Protocol includes an “opt-out clause”, allowing States upon ratification or accession to declare that they do not accept the inquiry procedure. Article 17 of the Protocol explicitly provides that no reservations may be entered to its terms.”

¹⁶ Amnesty International, *Claiming Women's rights*, the Optional Protocol to the United Nations Women's Convention, 2001, p. 2.

¹⁷ Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, 1992, par 6.

especially with the World Conference on Human Rights in Vienna (1993), the International Conference on Population and Development in Cairo (1994) and the Fourth World Conference on Women in Beijing (1995). In all these conferences violence against women is condemned and States are urged to develop criminal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to victims. Similarly, the United Nations Declaration on the Elimination of Violence in 1993, mentions that “States should condemn violence against women and should exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons” (article 4). These international precedents are not binding, but they have a political and social impact regarding gender-based violence as a public problem. In the regional system, the European and Inter-American conventions on women rights recognize violence as a type of discrimination against women. However, these conventions have been developed from different approaches.

The first regional convention that dealt with women’s rights was the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (known as the Convention of *Belém do Pará*) in 1995. After this there was the Convention on preventing and combating violence against women and domestic violence, known as the Istanbul Convention. The Convention of *Belém do Pará* is the first binding regional instrument dealing with women’s rights that protected against violence. This Convention recognized that violence against women is a breach against human dignity and it is an expression of the historically unequal power relations between women and men. This Convention has been ratified by 27 of 32 State’s Parties and it entered into force in 1995.

This Convention defines violence against women in article 1:

Violence against women shall be understood 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 private sphere.¹⁸

This definition is very broad, but this provides two important aspects to protect women's rights. First, the convention held that violence against women must be "based on gender", which means that violence affects a woman because she is a woman or affects her disproportionately. For example, sexual violence affects women and girls in high proportion in relation to men from a quantitative and qualitative perspective. Second, the convention recognized that violence against women could occur in the public or the private sphere, especially in family relationships in which for many historical and social reasons, violence has been legal and justified.

In 2011 the European Council approved the Istanbul Convention. In August 2014 the Convention came into force since it was ratified by 28 of the 47 States. The Istanbul Convention has a definition of violence against women in article 4:

Violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.¹⁹

This definition is more specific and highlights a clear connection between violence, discrimination and inequality that affects women. The Istanbul Convention recognised four types of violence: physical, sexual, psychological and economic harm. Moreover, the Istanbul Convention recognises violation of women's rights that happens in the public or in the private domain.

¹⁸ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1995, Article 1.

¹⁹ Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 2011, Article 4.

1.3. Approaching the gender problem

International and regional human rights courts are not necessarily knowledgeable about gender-based violence because of various factors. For example, the European and the Inter-American courts were created to deal with other human rights violations. These courts (comprised mostly by men) usually make it more difficult to identify gender problems, the States' reasonably involved and to recognize the right remedies for women. However, in the last few decades, international courts have recognized the gendered approach. The former is to recognise a gendered perspective in identifying and recognizing the problems and violations that affect women's rights. The latter is a series of doctrines to identify State duties in cases of violence against women perpetrated by private actors.

The gendered approach recognises that the causes and consequences of the human rights violations against women affects them given their gender in a patriarchal society. In case-law, judges must identify whether violence is directed at women, or not, on basis of their gender. In this sense men can also be the targets of violence regarding their gender. The judicial system must decide between varying solutions designed to protect the target group that is disproportionally affected by violence perpetrated by private and public agents.²⁰

Sexual violence is a good example of the gender problem and the judicial perspective.²¹ For some national and international jurisdictions rape is a neutral problem, which means the causes and consequences of rape are similar for men and women. While from the gendered approach, rape is a crime that affects women disproportionally because of

²⁰ P. Cullet, *The Judicial System Must Decide towards Different Treatment to Protect Women Rights in Context of Violence*, 1998, p. 553.

²¹ T. Johnson, *Gender-based Violence*, Journal of Magistrates' and Judges' association, Vol 15 No 3, 2004, p. 22.

their gender conditions. For this reason, all of the cases of rape against women are discriminations based on gender.

From the procedural approach, courts have developed some doctrines of due diligence. Since 1992, the CEDAW Committee addressed the due diligence obligation of State's Parties in respect to violence against women in General Recommendation N19. Its views on communications have built important precedents in case-law of gender-based violence. Due diligence is the doctrine that has been used by the Inter-American Court, the CEDAW Committee and the European Court of Human Rights to analyse and deal with cases of violence based on gender.²² However, international jurisprudence has been more influenced by the European Court in the case of *Opuz v. Turkey* and the Inter-American Court in the 'Cotton Field Case' v. Mexico.²³

According to this doctrine the States have the responsibility to create a holistic and systemic mechanism to prevent, protect, and provide reparations for violence against women. In other words, the States have to act with due diligence to prevent violations of rights, investigate and punish such violations and provide remedies to the victims/survivors this particularly pertains to non-State actors.²⁴ For example, in the case of *M.C. v. Bulgaria*, the European Court found that the State did not meet this duty because it dismissed the case for lack of evidence without conducting a thorough investigation. The Court argued that the State had the positive duty to investigate cases of violence and human rights violations.²⁵

²² European Court on Human Rights, Case of *M.C. v. Bulgaria*, 2003; *Bevacqua and S. v. Bulgaria*, 2008; *Opuz v. Turkey*, 2009; *Rantsev v. Cyprus and Russia*, 2010; *A. v. Croatia*, 2011; and *D.J. v. Croatia*, 2012.

²³ R. Halperin-Kaddari, CEDAW General Recommendation on the Economic Consequences of Marriage, Family Relations and Their Dissolution. Speech delivered at CEDAW: 30 Years of Working for Women's Rights, Istanbul, 1-3 November 2012.

²⁴ P. Cullet, *The Judicial System Must Decide towards Different Treatment to Protect Women Rights in Context of Violence*, p. 553.

²⁵ European Court of Human Rights, case of *M.C. v. Bulgaria*, Application no. 39272/98, Judgment, Strasbourg, 2003, par 150.

1.4. Scope of the remedies and reparations

The United Nations' Declaration on Violence against Women, the CEDAW, the Convention of Belém do Pará and the Istanbul Convention call on States to provide victims and survivors of human rights violations with the right to access justice and remedies. Reparation implies that all forms of remedies are accessible to all female victims and survivors of gender based violence to address the harm or loss suffered by women. In general, reparative measures aim to eliminate or mitigate the consequences of any human rights violation committed. Depending on the international body, and the victim's claim in each case, the reparations could take different forms such as monetary compensation, public apology or symbolic measures.²⁶

Some international courts emphasise the victim's rights, while others settle reparations on the general problems or insufficiencies of domestic law, beyond the victim's rights. The CEDAW Committee and the Inter-American Court recognise direct and indirect remedies to the victims and the problem in general, while the European System of Human Rights recognizes remedies direct to the victim.

First at all, according to the CEDAW and the Option Protocol, the CEDAW Committee has recognized in case-law the different types of remedies due to the victims. The remedies could involve various reparative measures, such as public apologies, new laws, as well as guarantee of non-repetition. Nevertheless, the CEDAW Committee usually refers to the general measures that the State has to take.²⁷ For example, the Committee recommends compensation or rehabilitation for the victim, but does not cite the exact amount of money or the type of medical treatment needed for rehabilitation. In

²⁶ R. Manjoo; Annual Thematic Report of the United Nations Special Rapporteur on VAW, its causes and consequences, A/HRC/14/22, 2010, par12.

²⁷ A. Brynes, Human Rights Instruments Relating Specifically to Women, with particular emphasis on the Convention on the Elimination of All Forms of Discrimination Against Women" in Lum Bik, Andrew Brynes and Jane Connors (editors), *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation*. London: Commonwealth Secretariat, 1997, pp. 40-41.

some cases, the Committee recommends measures with a component of public interest, which include creating directives, guidelines or policies to prevent similar violations in the future. According to the optional protocol, the State has six months to take action in order to start the implementation of the remedies.²⁸

Second, under the Inter-American system the remedies aim to amend the situation that existed before the violation occurred. This is known as *restitution in integrum* (*integral reparation*).²⁹ In cases in which restitution is not possible, e.g. when women have died, been raped or tortured, there are other measures of reparation such as: satisfaction and guarantee of non-repetition.³⁰ The Inter-American Court has developed the concept of integral reparation beyond the economic remedies through at least three historical stages.³¹ In 1989 to 1996, the Inter-American Court developed a clear definition and scope of the reparations through the establishment of the first standards of the reparations toward pecuniary and non-pecuniary damages. In 1996 to 2003, the Court went into more detail and expanded new reparative elements such as a life plan, damages of family assets, and loss of assets. Finally, in the last decade the Court has developed some standards relative to gender violence and collective rights for indigenous communities. Another important characteristic of reparations is to make

²⁸ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 7.

²⁹ G. Donoso, Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach, Inter-American Human Rights Institute, N°. 49, 2009, pp. 29-68.

³⁰ In a qualitative study was carried in 2006, shows that in 45 remedies recommended in the Commission's final reports, 17 require reparations (38%), of which 12 are of an economic-monetary nature, 4 are non-monetary economic reparations and 1 is symbolic. Regarding the Court's rulings, of a total 257 remedies, 174 reparations were ordered (68%), of which 72 are symbolic reparations, 42 are monetary, 34 are non-monetary economic reparations, and 26 involve the agreed, 93 are reparations (58%), among which 32 are monetary, 22 are symbolic, 23 are non-monetary economic reparations, and 16 involve the restitution of rights. F. Basch, L. Filippini, A. Laya, M. Nino, F. Rossi and B. Schreiber; The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance With its Decisions, Sur - International Journal on Human Rights, No 12, 2011, p. 12.

them more specific in order to ensure greater monitoring, compliance and improved interpretation between the parties.³²

Third, the European Court of Human Rights has focused on economic compensation for victims. In fact, the European Court does not generally order *restitutio in integrum* or other specific non-monetary measures to remedy violations. Furthermore, the European Court does not recognise the individual right to reparation as part of justice.³³ In cases of violence against women, the European Court has recognised pecuniary compensation, even though in some cases the applicants have claimed other reparative measures. The European Court cannot enforce the judges to implement reparations; the competent authority is the Committee of Ministers of the Council of Europe, it monitors and supervises the international obligations by the member states. The Committee of Ministers could sanction with exclusion from the Council of Europe if the State does not want to cooperate and follow its judgments.³⁴ This type of sanction has never been used against noncompliant states. Notwithstanding this, most States comply to the European court's judgments; they fear reputational sanction in the international arena.³⁵

³² Inter- American Court on Human Rights, Case of Ticona Estrada et al. v. Bolivia, *supra*, para. 110, and Case of Suárez Peralta v. Ecuador, para.163.

³³ I. Nifosi-Sutton, The Power of the European Court of Human Rights to Order Specific Non-Monetary, Relief: a Critical Appraisal from a Right to Health Perspective, *Harvard Human Rights Journal* / Vol. 23, 2010, p. 52.

³⁴ Statute of the Council of Europe, 1949, Articles 3, 8, 87.

³⁵ S. Dothan, Judicial Tactis In The European Court Of Human Rights, The University of Chicago, The Law School, Public Law and Legal Theory Working Paper No 358, 2011, p. 119.

2. Gender-based Violence under the CEDAW Committee

Before beginning a jurisprudential analysis of the CEDAW Committee, it is important to understand the historical and political background of this international body. The CEDAW Committee is a quasi-judicial body that has jurisdiction over the States that became parties of the CEDAW and the Optional Protocol. Since 1986, the CEDAW Committee has contributed to developing a framework of essential content, and scope, of rights through the general recommendations and reports to specific State duties regarding violence and discrimination against women.³⁶

In 1992 the CEDAW Committee published General Recommendation N°19 on violence against women. This recommendation is crucial because it clarifies the scope of the CEDAW regarding violence. Indeed, the Committee recognized the standard of due diligence as applicable under the CEDAW, when it emphasized that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”³⁷ Moreover, according to the same Recommendation, States parties must provide “effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace.”³⁸

In December 2000, the Optional Protocol entered into force, this extended the Committee’s mandate to include the consideration of cases regarding women rights from individual complainants. The *Optional Protocol*’s communication process demands the CEDAW Committee to decide on communications submitted to it by

³⁶ CEDAW Committee, Access to Justice – Concept Note for Half Day General Discussion, 53rd Session, 2011.

³⁷ CEDAW Committee, General Recommendation No. 19, Violence against Women, eleventh session, 1992, par. 9.

³⁸ Ibid, par. 24.

individuals or groups (including those submitted on behalf of an individual or group) that claim a State is responsible for a human rights violation recognized under the CEDAW. The Committee receives, considers and examines all information provided by a complainant in closed meetings. Following this, it gives recommendations to the State's parties rather than binding decisions.³⁹ Despite the CEDAW Committee's lack of sanctions, for some authors it is part of an emerging global system of law because the high standards of protection it demands for women's rights.⁴⁰ The recommendations usually have individual and general measures that impact on the structural problem that was identified in the information gathering process. The CEDAW's jurisprudence is relatively new compared with the European and Inter-American human rights systems, yet it has laid strong international standards, especially on reproductive health and gender-based violence.⁴¹

2.1. CEDAW Committee jurisprudence and Violence against Women

The CEDAW Committee has decided on many cases of gender-based violence. There are three different types of violations it considers: domestic violence,⁴² forced sterilization,⁴³ and sexual violence.⁴⁴ In almost all communications on gender-based violence the Committee has addressed the standards of due diligence to prevent,

³⁹ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Articles 8-9.

⁴⁰ M. Sally Engle; *Gender Violence and the CEDAW Process*. In: Merry, SE. *Human Rights & Gender Violence: Translating International Law into Local Justice*. Chicago, IL: Chicago University Press; 2006, p. 52.

⁴¹ CEDAW Committee, Case of A.T. v. Hungary, 2005; Goekce v. Austria, 2007; Yildirim v. Austria, 2007; V.K. v. Bulgaria, 2011; Jallow v. Bulgaria, 2012; Kell v. Canada, 2012.

⁴² CEDAW Committee, Case of Goekce v. Austria, 2007; Yildirim v. Austria, 2007; V.K. v. Bulgaria, Abramova v. Belarus, Kell v. Canada, 2012.

⁴³ CEDAW Committee, Case of A.S. v. Hungary, 2005.

⁴⁴ European Court of Human Rights, Case of Tayag Vertido v. Philippines, 2010; S.V.P. v. Bulgaria, 2012.

investigate, punish as well as deliver remedial action to the victims or survivors.⁴⁵ In contrast, the Committee has declared all the cases where someone seeks asylum based on the threat of domestic violence inadmissible.⁴⁶

The CEDAW Committee had determined in several decisions the action and omission of States regarding gender-based violence: (i) the legal protection of women before judicial system; (ii) the modification of social and cultural patterns that claim the inferiority or superiority of either sex; (iii) to ensure equal access to health care services; and (iv) to ensure participation of women in matters relating to marriage and family relations, among others. In most of the cases, the CEDAW Committee has found violations of Articles 1, 2, 3, 5, as well as statements established in the General Recommendations No 18 and 19.⁴⁷

The CEDAW's perspective on discrimination against women moved away from the idea of discrimination used in many contemporary human rights mechanisms and treaties: both women and men need protection against discrimination. CEDAW moved toward recognising the particular practices, discriminations, and violence that affect women uniquely in the public and private domain.⁴⁸

Regardless, there are three controversial issues about the CEDAW Committee's views that could bear relevance with cases of violence against women in future jurisprudence:

(i) whether or not the CEDAW involves non-discrimination against women based upon sexual orientation and gender identity (lesbians, trans-women and their couples); (ii)

⁴⁵ S. Cusack, L. Pusey, *Cedaw and the rights to non-discrimination and equality* [online]. Melbourne Journal of International Law, Vol. 14, No. 1, June 2013: 54-92. Availability: <<http://search.informit.com.au/documentSummary;dn=523700846197845;res=IELHSS>> 8602. [Accessed 9 November14].

⁴⁶ CEDAW Committee, *Case of N.S.F. v. United Kingdom* (2007), *Zheng v. The Netherlands*, 2012; *Herrera Rivera v. Canada*, 2011.

⁴⁷ S. Cusack, R. Cook, *Combating Discrimination against Women*, in Catarina Krause & Martin Scheinin (eds.), *International Protection of Human Rights: A Textbook*, 2nd edition, Åbo Akademi University, Institute for Human Rights, 2012, pp. 211-215.

⁴⁸ M. Freeman, C. Chinkin And B. Rudolf, *The United Nations Convention on the Elimination of all forms of Discrimination against Women*, Oxford University Press, 2012, p. 16.

how the CEDAW decides the conflict between women's rights and religious and cultural issues (cultural relativisms); and finally, (iii) how CEDAW involves men, especially whether or not men are necessary to eradicate gender-based violence and discrimination.⁴⁹

2.2. Study of Case-law

This chapter analyses two cases: A.T. v Hungary and S.V.P. v. Bulgaria regarding domestic violence and rape respectively. A.T. v Hungary is the first in a line of cases in which the Committee has affirmed that gender-based violence against women is a form of discrimination. It is also the first of a number of cases in which the CEDAW Committee has clarified the content and meaning of the due-diligence standards through its application of the obligation to a specific set of facts involving domestic violence.⁵⁰

The second case is S.V.P. against Bulgaria which sets an important judicial precedent. This is because the CEDAW requires State Parties to prohibit and eradicate discrimination against women and girls and exercise due diligence to prevent, protect, punish and issue reparations in all acts of sexual violence by non-state actors.⁵¹ In both cases, the CEDAW Committee has constructed significant jurisprudential measures in relation to women's access to justice in the context of violence and it identifies the State's responsibilities during and after the judicial process in order to guarantee women's rights.

⁴⁹ Ibidem.

⁵⁰ Op. cit. S. Cusack, L. Pusey, pp. 54-92.

⁵¹ S. Cusack, Failure to Provide Effective Protection against Rape and Sexual Assault Violated CEDAW (V.P.P. V. Bulgaria), <http://opcedaw.wordpress.com/> [Accessed: 14 November 2014]

2.2.1. Case of A.T. v. Hungary

a) Facts

AT had suffered domestic violence and serious threats for several years by her partner LF. LF left their place of residence, but returned regularly to physically assault AT. AT initiated civil proceedings in order to prevent the entry of LF to the residence. However, Budapest Regional Court published a final decision, which authorized LF to return and use his apartment. The Court argued that AT had not proved that the violence LF constantly exerted over her so his property rights could not be restricted. They continued to share residence and LF continued assaulting her. Even though AT filed two criminal processes against LF because violence caused serious bodily injury and even hospitalization, LF was never arrested and the Hungarian authorities took no action to protect AT. AT requested assistance from the local authorities responsible for child protection, which was particularly required due to one of the children being disabled. The authorities felt they could not do anything to alleviate this problem.⁵²

AT submitted a claim to the CEDAW Committee because the Hungarian State violated articles 2 (a), (b), (e)⁵³, 5 (a)⁵⁴ and 16⁵⁵ of the CEDAW, as a result of the domestic violence against her. Additionally, the applicant argued that the judicial system did not protect her effectively and immediately; this goes against the Convention and the

⁵² Committee on the Elimination of Discrimination against Women, Communication No.: 2/2003, Ms. A. T. v. Hungary, 26 January 2005, Thirty-second Session, 2003, par. 1.2.

⁵³ Article 2. (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (...) (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

⁵⁴ Article 5. (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

⁵⁵ Article 16. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure there is a basis of equality for men and women.

General Recommendation No.19. AT requested interim measures of protection to avoid irreparable harm, that is, to safeguard her life and those of their children.⁵⁶

b) Gender approach to the problem

The case of *A.T. v. Hungary* deals with an example of domestic violence is particularly horrific as well as illuminating; this is due to the case acknowledging the background of domestic violence and the use of due diligence in securing rights for women. The first question that the Committee studied is whether or not the State party had fulfilled its obligations to address the grave risk to her health and life by providing meaningful protection.⁵⁷ In this regard, the CEDAW Committee concluded that the State is not yet ready to ensure the appropriate level of defence of the international standards that guarantee the rights of victims of domestic violence. It was deemed that the State not only failed under the judicial system, but also providing suitable measures of protection. Second, the Committee argued that situations where human rights conflict, the rights for women in a context of violence have near absolute priority (especially the right to life and the right to personal integrity). Third, the State was accused by the Committee of not putting adequate measures in place that would ensure that the applicant was not in danger of continued violence. Bearing this in mind, the Committee determined that the State's actions were a violation of her human rights mainly her right to security of person.⁵⁸

In respect of stereotypes and roles between men and women in this case, the CEDAW Committee identified that the applicant was a victim of violence from her husband and the civil or criminal proceedings were unsuccessful. Moreover, the applicant could not have access to protective aid. In fact, she was unable to find a shelter for her and her children. For all the above, the Committee concluded that the applicant's rights had

⁵⁶ Ibid, par. 3.1 -3.6.

⁵⁷ Ibid, par. 9.2.

⁵⁸ Ibid, par. 9.3.

been violated.⁵⁹ Finally, the CEDAW Committee followed-up by claiming that during all the judicial process on domestic violence, the States Parties acted with a lack of effective legal (and other measures) due to being prevented under domestic law; thus they violated the applicant's rights.⁶⁰

c) Remedies

The CEDAW Committee recommended some particular measures and some general measures to the States Parties for the benefit of AT and her family. The Committee suggested that the State take actions to guarantee physical and mental integrity; that it gives reparations that are appropriately weighted to the harm that was caused; that it gives a safe home in where her and her children can live without threat; and that it gives appropriate child support and legal assistance to AT and her family. The State party was permitted a large degree of flexibility in how it implemented the recommendations to the victim and her family. For instance, the Committee did not require a specific sum of money for the pecuniary damage or a particular program for rehabilitation. The suggested proportionate damages due should be down to the domestic legislation relative to damage. However, in practice this can put severe restrictions in accessing vital reparations for the victim and her family.

The CEDAW Committee suggested as part of the general measures: (a) to respect, protect, promote and fulfil women's human rights, in particular they should be free of domestic violence; (b) to guarantee victims of domestic violence are provided with the maximum protection of the law according to due diligence standards; (c) to ensure that there is national program for the prevention of violence and effective treatment of victims within the family; (d) to provide regular training on the CEDAW and the Optional Protocol to the judicial system and public officers; (e) to implement the

⁵⁹ Ibid, par. 9.4.

⁶⁰ Ibid, par. 95.

CEDAW Committee's concluding comments and recommendations from the report on Hungary regarding violence against women, in particular to create a specific law which prohibits domestic violence against women and provides protection, support services and shelters; (f) to investigate all allegations of domestic violence in accordance with international standards of human rights; (g) to provide access to justice for the victims of domestic violence, including free legal aid and adequate remedies; and (h) to provide programmes on non-violent conflict resolution procedures.⁶¹ Moreover, the States was requested to publish the Committee's views and recommendations as well as have them translated into the local language and broadly distributed over the country.⁶²

The CEDAW Committee gave more recommendations for the general problem rather than for the specific victim of domestic violence in the case. Therefore, their main idea is to impact and solve the structural problems that make women more vulnerable to gender-based violence. However, as this text mentioned before, the recommendations are not binding, the States have to put them in place as the implementation of individual and general measures rely on applicant advocacy, domestic structures, the current government as well as the media and the public opinion.⁶³

In 2012, the Hungarian Criminal Code (Act No 100, 2012) section 212/A introduced domestic violence as an offence. This Code entered into force July 1, 2013 and it states: “(1) Persons repeatedly committing violence against spouses, ex-spouses, ex-cohabitants, custodians, persons under custody, guardians or persons under guardianship cohabiting in the same household or the same property at the time of the crime or before that are liable for imprisonment [...] 2(a) of up to three years for bodily harm under section 164(2) of the Criminal Code, or up to three years for violating

⁶¹ Ibid, par. 9.6.

⁶² Ibid, par. 9.7.

⁶³ Open Society Foundation, *From the Rights to the Remedies, Structures and Strategies for Implementing, International Human Rights Decisions*, 2013, p. 23.

human dignity under section 227(2) of the Criminal Code; b) between one to five years for bodily harm under section 164(3)-(4) of the Criminal Code for duress or violating personal freedom under section 194(1) of the Criminal Code.”

The new Criminal Code is an important step for victims of domestic violence in Hungary. However, according to Human Rights Watch the legislation still has problems if women are to fully enjoy the rights they have. First, domestic violence offenses only apply after two incidents of violence. Second, the Code does not extend the protection to women when they do not cohabit, except if they have children with the abuser. Third, sexual violence is not included as a category classified as domestic violence. Consequently, it is not considered to be domestic violence under the law when her partner has raped a woman.⁶⁴

In Hungary, in practice, domestic violence is usually a crime that women delay in complaining about this is due to different factors and reasons: the control exercised by the perpetrator (husband or partner); the fear of retaliations from the perpetrator; the lack of information and confidence in the authorities especially the police officers; and the distress of possibly losing custody of their children.⁶⁵

2.2.2. Case of S.V.P. v. Bulgaria

For all of the above in Hungary, female victims of domestic violence and gender-based violence have better protection and there is more punishment for perpetrators than there was before the violations against AT occurred. There was a change after the CEDAW Committee recommendations were published, but still the legislation is not in line with the international standards of women's rights.

a) Facts

⁶⁴ Human Rights Watch, *Unless Blood Flows: Lack of Protection from Domestic Violence in Hungary*, 2013, p. 14.

⁶⁵ *Ibid*, pp. 30-34.

The applicant claims that her daughter, when she was 7-year-old, was a victim of sexual violence. As a consequence, her daughter has been diagnosed as mentally retarded and with an affective disorder: mania without psychotic disorder. The perpetrator of that sexual violence was B. G., who met her daughter nearby her house and convinced her to come to his apartment. Afterward, he undressed her and started kissing her face. He took her panties off and started licking her bottom. Next, he brought out his penis and made the girl kiss it. He told her to spread her legs, he then inserted his finger into the girl's anus, causing her pain. He tried to insert his penis into her vagina, which caused more pain, but he could not penetrate her. She pleaded with him to stop, he failed to penetrate her so, and finally, he stopped. He permitted her to go home and demanded that she not tell anything to her parents.⁶⁶

The applicant said that her daughter came and told her about the attempted rape. She filed a complaint with the authorities. For this reason, the perpetrator was eventually prosecuted for sexual molestation, which provides: "Whoever commits an act to arouse or satisfy sexual desire without copulation regarding a person under 14 years of age shall be punished by imprisonment for fornication [...]". In 2004, sexual molestation of minors was punishable by five years imprisonment; it was not considered a serious crime. Later, in 2006, sexual molestation of minors became punishable by imprisonment from one to six years, and it was considered a serious crime.

After almost two years from when the offence was committed, the Pleven District Court reviewed and approved a plea-bargaining agreement between the prosecutor and the accused. The perpetrator confessed that he was responsible of sexual molestation and received a three-year suspended sentence (Criminal Procedure Code provides, Article 55). The Bulgarian legislation in this regard provides that plea-bargaining can be

⁶⁶ CEDAW Committee, Communication No. 31/2011, UN Doc. CEDAW/C/53/D/31/2011, 2012, par.2.1-2.3.

allowed, since it was not a serious malicious crime at the time of the facts, therefore the agreement was approved.

The applicant argued that State party did not act with due diligence for the effective protection of the author's daughter against sexual violence and all the consequences of this crime. The State had failed to ensure compensation for the moral damage suffered, rehabilitation services and/or legal aid. Moreover, the applicant argued that the State Parties failed because there was not adequate legislative and public policy regarding the risk of further violence against her daughter; in fact, the perpetrator was back living close to her house. Additionally, the applicant submitted that there was no guarantee against her daughter being negatively perceived as a girl with disability who has been victim of sexual violence.⁶⁷

The applicant maintained that there was not legislation for equality between men and women; there is lack of explicit recognition of gender-based violence in Bulgaria. The absence of special measures to protect female victims of sexual violence had resulted in inequality in practice and a denial of proper enjoyment of their human rights.⁶⁸ For all of the above, the applicant claimed that her daughter was a victim of a violation of her rights under article 1;⁶⁹ article 2, paragraphs (a), (b), (c), (e), (f) and (g);⁷⁰ read in

⁶⁷ Ibid, par. 3.2.

⁶⁸ Ibid, par. 3.4.

⁶⁹ For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

⁷⁰ Article 2. (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (...) (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (...) (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.

conjunction with Articles 3,⁷¹ 5,⁷² 12,⁷³ and 15⁷⁴ of the Convention. During the process, Bulgaria did not answer to the admissibility of the S.V.P's communication, but the Committee did not find any motivation or legal argument to declare the communication inadmissible.

b) Gender approach to the problem

The CEDAW Committee addressed the root causes and consequences of the sexual violence against minors with disabilities in Bulgaria. To this end, the Committee recalls the definition of discrimination (article 1) as well as that States parties have an obligation to eliminate discrimination against women of all ages, including girls (article 2); the obligation to provide legal protection and to abolish or amend discriminatory laws and regulations as part of the policy of eliminating discrimination (art. 5); and they also evoked No. 19, the general recommendation to the effect that States Parties should take appropriate and effective measures to overcome all forms of gender-based violence. Using these articles the Committee analysed States Parties responsibilities on two main issues: (i) the legislative and other measures prohibiting all discrimination against women and promoting equality; (ii) the protection of women against sexual violence and gender-based violence.

In taking account of sexual violence, in this case, the Committee found that the States Parties did not explain why the act of sexual violence suffered by the girl was prosecuted as an act of molestation, rather than a rape or attempted rape. This is

⁷¹ Article 3. States Parties shall take in all fields, in particular, political, social, economic and cultural. All appropriate measures should be taken, including legislation to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

⁷² Article 5. (a) To modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices (be the customary or another practice) which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

⁷³ Article 12. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

⁷⁴ Article 15. 1. States Parties shall accord to women equality with men before the law.

perplexing because the present case reveals anal penetration of a sexual nature by a bodily part of the perpetrator as well as an attempted rape. The State's decision on the type of crime meant that the act committed was merely classified as sexual violence rather than rape. Crimes of sexual violence are not as serious as those of rape; the punishment given reflects this. Moreover, the victim did not receive adequate legal aid; monetary compensation for the damages; access to child protection programs; nor health care and rehabilitation for physical and mental suffering. With these points in mind the Committee found that Bulgaria failed to take positive measures, and did not adopt adequate criminal law provisions to effectively punish rape and sexual violence against women and girls.⁷⁵

The Committee also found that the legislation regarding sexual violence against women in Bulgaria is contrary to the CEDAW, and international standards; this is primarily due to the law not containing adequate mechanisms for protecting victims. The State cannot be said to provide adequate protection if, after an offender is released there are no legal mechanisms to safeguard the victim from suffering trauma through meeting their abuser, further abuse, loss of dignity, etc. There are not measures to prevent and eradicate sexual violence and to address the effects of such violence on their ability to enjoy their CEDAW rights. Moreover, the current criminal code is contrary to the CEDAW due to reflecting harmful stereotypes and prejudices against female victims of sexual violence.⁷⁶

Nevertheless, the Committee argued that there are many programmes to promote gender equality in Bulgaria; yet, problematically, there is no evidence showing how these

⁷⁵ Ibid, par. 9.6.

⁷⁶ Ibid, par. 9.6.

programmes aid in protecting the rights of victims of sexual violence, especially in cases such as the applicant's daughter.⁷⁷

c) Remedies

The CEDAW Committee made two types of recommendations to the States Parties: one type is particular to the case, and the second type is general in nature. As regards the former, the State should provide reparations to the applicant on behalf of her daughter, including appropriate monetary compensation, which must be proportionate with the seriousness of the violations. As for the latter, the CEDAW Committee recommended:

- a) To revise the Criminal Code (article 158) regarding acts of sexual violence against women and girls, especially rape, according to international standards of justice and taking into account the gravity of the crimes.
- (b) To modify the Legal Aid Act that provides assistance for the implementation of judgements awarding compensation to sexual violence victims.
- (c) To offer an instrument for establishing compensation for moral damages and financial compensation to victims of sexual violence.
- (d) To amend the criminal law to guarantee protection from violence especially after the perpetrators are released from detention.
- e) To ensure the application of public policies, e.g., health-care protocols and hospital procedures regarding sexual violence victims.⁷⁸

All the elements of the general measures the CEDAW Committee recommended are important to break the cycle of gender-based violence. For this reason, the CEDAW Committee recommended further measures that show specifically how the legal system

⁷⁷ Ibid, par. 9.6.

⁷⁸ Ibid, par. 9.6.

should be targeted. This helps guarantee access to justice for victims of sexual violence e.g. through medical and judicial protocols.

The individual and the general measures in this communication concerning rape are coherent; they show a high degree of consistency between the Committee's interpretative practice and its application of the rights to non-discrimination and equality in individual communications regarding women and rights. Nonetheless, it is always difficult to measure the impact of gender-based violence on the victims and other women. Furthermore, a judicial view from an international body on a State that breaches due diligence standards, and positive obligations, does not automatically remedy the violation. This is particularly true in cases of women that are subject to cultural, political and social barriers to changing the practices of discrimination and violence.⁷⁹

The CEDAW Committee usually does not publish the implementation of its recommendations. Therefore, two years after the recommendations in the case of *S.V.P. v. Bulgaria* there is no information available to assess the effectiveness of the new measures to eradicate sexual violence against women. One thing that may hint at their effectiveness is that there have been two further cases against Bulgaria before the CEDAW Committee regarding domestic violence, in both the State was deemed responsible for violations of women's rights.

⁷⁹ B. Hepple, Positive Obligations to Ensure Equality, *INTERIGHTS Bulletin*, Volume 15, Issue 4: Positive Obligations of States and the Protection of Human Rights, Edited by S. Borelli and D. Geer, 2006, p. 114.

3. Violence against Women under the European Court of Human Rights

The European Court of Human Rights does not make many decisions on gender based-violence as a human rights violation and/or as a form of discrimination. However, in the last decade the European Court has recognized the responsibilities the State's Parties owe in cases of domestic violence. For clear analysis this text will have two parts. First, this chapter shows the general position of the European judgments in the most important cases about women's rights and violence. Even though this case study is not exhaustive, it shows the facts and issues that the Court found are violations of the Convention of rights. Second, this chapter studies two decisions from the European Court on Human Rights on the issue of gender based-violence: *M.C. v. Bulgaria*, and *Opuz v Turkey*. These cases are important due to the precedent for women's rights and the issues of domestic violence and rape. This text analyses the European Court's arguments to assess the measures of reparation and implementation of the judgments in each case.

3.1. European Jurisprudence and Violence against Women

The European Court has delivered about 17,000 judgments since it was established in 1959.⁸⁰ Nearly half of the judgments were concerned with fair trial and due process. However, in the last decade the Court has decided on specific cases relative to women's rights. Most of them are relative to domestic violence and rape (See Appendix No 2). In most of the cases about domestic violence the European Court had found violations of various articles: article 8 (right to private and family life); article 3 (torture or inhuman or degrading treatment); and in a few cases article 3 (right to life).

⁸⁰ Council of Europe, European Court of Human Rights Overview 1959 – 2013, 2014, p. 3.

For all of the above, the jurisprudence in Europe shows a clear connection between domestic violence and the violation of the right to private and family life. Hence, the perspectives on the causes and consequences of gender-based violence is still problematic. Since 2009, in the case of *Opuz v. Turkey*, the European Court had found violations of article 14 (non-discrimination) in all the cases relative to domestic violence.⁸¹ The Court's approach to the problem regarding domestic violence had changed and now it has new elements to require the States to take certain measures and use public policy to prevent and protect women's rights.

3.2. Case-Law Study

In this section, the text analyses two important decisions from the European Court. First, the case of *M.C. v. Bulgaria* is one of the first international precedents in a case of rape that clarifies the notion of force and physical resistance in cases of sexual violence.⁸² Second, the case of *Opuz v. Turkey* is the main precedent about domestic violence as a form of discrimination against women under the European regional system of human rights. In both cases, it is important to identify the gender perspective of the problem as well as the method and measures that the European Court uses to make decisions.

3.2.1. Case of *M.C. v. Bulgaria*

a) Facts

The applicant claimed that she had been raped twice, once on 31 July and once on 1 August 1995, she was 14 years old. The criminal investigation concluded there was insufficient proof of the applicant having been compelled to have sex. The applicant

⁸¹ European Court on Human Rights, *Eremia and Others v. the Republic of Moldova*, 2013; *B. v. the Republic of Moldova*, 2014; *Mudric v. the Republic of Moldova*, 2014.

⁸² P. Staible, K. Edison and L. Rosenblum; *Updates From The Regional Human Rights Systems*, Human Rights Brief, Volume 11, Issue 2, 2004, p. 27.

argued that the State did not provide effective protections and investigations under the criminal process; especially in cases where the victim of sexual violence had not resisted actively.⁸³ The applicant alleged a number of violations of the European Convention; specifically, article 3 (Prohibition of torture), article 8 (Right to respect for private and family life), and article 13 (Right to an effective remedy).

During the process before the European Court the applicant presented two reports about sexual violence and physical resistance to the violence in the context of sexual crimes. One of the reports was by the Bulgarian expert Dr. Svetlozar Vasilev (psychiatrist), and the other was by Mr. Valeri Ivanov (psychologist).⁸⁴ The experts argued that there are two common reactions from rape victims: “violent physical resistance” and “frozen fright” (also known as traumatic psychological infantilism syndrome). In “frozen fright” when a person is terrorized they sometimes adopt a “passive-response model of submission.”⁸⁵ Typically this is adopted in infancy, but is seen throughout all ages as a method of psychological dissociation from the traumatic episode. When this happens the person acts as if the traumatic experience is not happening to them.

The Government argued that, in rape crimes, evidence of physical resistance needs to be established.⁸⁶ In fact, in the applicant's case, after an effective and impartial investigation proof of physical resistance was not found to the level necessary to secure a criminal conviction. Moreover, the government said that the applicant had other options: compensation could be achieved through a civil action. However, she should demonstrate the guilt of the perpetrator; although, *men's rea* need not be proved.⁸⁷ On the other hand, Bulgarian law and practice guarantee rights regarding sexual violence

⁸³ European Court on Human Rights, Judgment, case of M.C. v. Bulgaria, Application no. 39272/98, 2003, par. 109.

⁸⁴ Ibid, par. 69.

⁸⁵ Ibid, par.70.

⁸⁶ Ibid, par. 121-122.

⁸⁷ Ibid, par. 124.

cases, and as a result this case did not break European Standards of positive obligation.⁸⁸

INTERIGHTS as a third party submitted an amicus to the European Court arguing reforms in rape law reflected an “historical approach” to the “equality approach” to the question of consent. Actually, women's autonomy was infringed in rape; the crucial factor being lack of consent. The main concern in rape law reforms had been to adapt them to the idea that showing that the accused overcomes the victim's physical resistance is not necessary in order to prove lack of consent.⁸⁹ That said, Interights assessed the relevant legislation about rape and consent from various countries; such as Belgium, Denmark, Ireland, the United Kingdom, the United States of America, Australia, Canada and South Africa. This comparative study concluded that lack of consent was the defining element of rape and sexual abuse in those countries; it need not be conclusively shown that the perpetrator executed physical force, neither was it required that the victim give evidence for physical resistance. Still, consent was the most controversial issue in the cases studied: finding evidence of significant physical resistance was an important part of the judicial process in cases of sexual violence and also to find the consensus in the majority of the European Countries. However, at that time most of the countries did not have special legislation to prevent and protect women against violence as a form of discrimination and inequality.⁹⁰

b) A gender approach to the problem

The European Court analyses the cases from two perspectives. First, the Court studied the positive obligation to punish rape regarding articles 3 and 8 of the European Convention; it concluded that “States have the obligation to enact criminal law provisions punishing rape and to apply them in practice through effective investigation

⁸⁸ Ibid, par. 121.

⁸⁹ Ibid, par. 127.

⁹⁰ Ibid, par. 115.

and prosecution”⁹¹. For instance, the Court did not mention the positive obligations due when violence is viewed as a form of discrimination against women; therefore, the Court assumed that the cases are a neutral gender problem even though this is against the Convention. They explained that these cases are not disproportional even though the victims are women.

Second, the Court studied contemporary notions of the elements of rape and their effect on the positive obligation to provide adequate protection, investigation and punishment in violent sexual crimes. It concluded that in most European States influenced by legal and common law systems from the continent the proof of “physical force” and “physical resistance” is no longer within the statutes. Indeed, some legislation clarified that it is incorrect to determine whether consent was given solely from the degree of resistance the victim gave; this is due to the unique way that each victim deals with such a traumatic event: there is not only one standard to classify resistance in such cases.⁹² In this regard, the Court refers to the Committee of Ministers of the Council of Europe; they “argued that penalising non-consensual sexual acts, including cases in which the victim did not show signs of resistance, is necessary for effective protection against gender-based violence.”⁹³ The Court stated that international law and practice had recognised that force is not a component of rape according with international standards of women’s rights and jurisprudence. As a result, the European Court concluded that according to modern standards, and according to the due diligence doctrine, States have positive obligations to guarantee effective prosecution and access to justice to any non-consensual sexual act, even in cases of absence of physical resistance by the victims, this is in line with Articles 3 and 8 of the European Convention.⁹⁴

⁹¹ Ibid, par. 166.

⁹² Ibidem

⁹³ Ibidem.

⁹⁴ Ibid, par. 154 - 166.

After the general approach to the problem, the Courts analysed the cases studied in order to find whether or not Bulgarian law and practice in these cases breach the respondent State's positive obligations under Articles 3 and 8 of the Convention. However, the Court considered that it is not necessary to study the complaint under Article 14 of the European Convention. This is due to there being no precedent in the European Court that recognized rape and sexual violence as a form of discrimination and violence that affects women more than men.

In terms of the principle of non-discrimination, sexual violence can be studied from dual perspectives. First, sexual violence can be seen as a problem that women suffer disproportionately as a group. Second, sexual violence is either a reflection of gender stereotypes or to treat women in a subordinate manner.⁹⁵ Nevertheless, the European Court did not use the gender perspective. Even though there is a lot of evidence from international jurisprudence on this issue, as well as the *amicus curie* that the Court received information about gender-based violence as type of discrimination against women.⁹⁶

c) Reparations

The applicant claimed pecuniary reparations, non-pecuniary damage, costs and expenses. Regarding non-pecuniary damages, it seems from the text of the decision that the Court did not use any specific guidelines to inform whether it would award damages (and to what degree); in such conditions it is difficult not to view the decision as anything but arbitrary. In actuality the menial non-pecuniary damages awarded bears no proportionality to the gravity of the crime. The applicant claimed 20,000 Euros (EUR) for non-pecuniary damage and indicated that she suffered psychological trauma for

⁹⁵ M. Eriksson, *Defining rape: emerging obligations for States under International Law*, Raoul Wallenberg Institute human rights library, V. 38, 2011, p. 6.

⁹⁶ CEDAW Committee, case of Karen Tayag Vertido v the Philippines, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008, 2010, par. 8.9.

many years because of the rape. The Government argued that the amount requested was excessive. As mentioned, the award did little to alleviate the trauma, but the situation gets worse: the Court's processes themselves can be seen to have caused further harm. This is due to the criminal investigation being inconsistent, and thus the continued questioning of the victim made her re-live her agonising crime over and over again throughout the course of many years; in sum, she was subject to re-victimisation. Finally, the Court partially recognized that the applicant had suffered trauma as a consequence of the case, but still only granted EUR 8,000.

Reparations are important for victims for many reasons, some material, some symbolic. Victims often have to wait for extended durations of time to hear conclusions regarding their case; the longer the wait the more the importance of the case grows for the victim. In this case, the applicant was raped in 1995, the complaint was submitted to the Court in 1998 and the final decision was published in 2004. The applicant waited for almost 10 years, which is a regular period of time for an international process.

On 9 June 2004, the Bulgarian Government paid non-pecuniary damage, costs and expenses to the applicant. Under the individual measures, the applicant, through her lawyer, informed the Court that she does not want to request the reopening of national proceedings in her case. Subsequently, there was no other individual measure to consider by the Committee of Ministers. As a general measure, the judgment in the case *M.C. v. Bulgaria* was published in four different places: on the website of the Ministry of Justice; in the journal *European Law and Integration* published by the Ministry of Justice; in the *Bulletin of the Ministry of Justice*; and, finally, the full text of the judgment was sent to the relevant investigating bodies in Bulgaria.⁹⁷

⁹⁷ Committee of Ministers of The Council de Europe, Execution of the Judgment, Case of *M.C. v. Bulgaria*, 2011, p. 1.

In executing this judgment, the Legislation Council at the Ministry of Justice deemed that it was not necessary to modify the Criminal Code of Bulgaria, since the expected results could be reached by drawing up instructions for investigatory bodies. For this reason, in 2005, the National Investigation Office in Bulgaria organized, and widely distributed, a rape investigations methodology to all regional investigating services. Additionally, the authorities distributed a letter which identified the obligations for investigators in cases of rape and sexual violence. This elucidated the evidence: it promoted the idea that the psychological state of victims was vital to the case and so the gathering of this information is essential; especially in cases involving children and teenagers.⁹⁸

For all of the above, the Bulgarian government argued that there are not any more individual or general measures they are required to achieve; hence, the case of *M C v Bulgaria* complied with its obligations under Article 46, paragraph 1, of the European Convention.

It is very difficult to know the practical impact on sexual violence investigations the methodological instructions or the distribution of the letter had. Both measures are very formal and the structural problem of gender discrimination is not easy to remove from society. This case did not help to challenge the main problems of sexual violence especially in the judicial system.⁹⁹

3.2.2. Case of *Opuz v Turkey*

a) Facts

⁹⁸ Ibidem.

⁹⁹ P. Asp. *M.C. v. Bulgaria* – a Swedish Perspective, *Scandinavian Studies In Law*, 2012, p. 202.

The applicant alleged that the state had failed to protect her and her mother from domestic violence; the applicant argued that the death of her mother and the applicant's own continuing ill health was the result of (at least) seven assaults they suffered. The applicant was unequivocal in the failings of the local measures: the applicant and her mother were clearly still at risk despite the State's actions. As for the Government's reliance on law, its instruments were not effective in upholding the law and protecting against domestic violence. Indeed, despite several criminal complaints, none of the protective measures in the legislation of that time were taken to guarantee their rights.¹⁰⁰ During the process, the European Court received quantity and quality reports about gender based violence in Turkey.¹⁰¹

The general conclusion from all the reports is that the violence against women in Turkey, especially domestic violence, is common and systematic. In fact, the applicant demonstrated (through reports, studies and data) that domestic violence predominately affected women, and the information available shows that the judicial system is acting passively in Turkey; this permits a context that is favourable to violence against women.¹⁰² For example, Interights submitted that the State's failure to safeguard against domestic violence would be equal to a violation of its duty to provide equal protection to everyone under the law. Furthermore, they noted that there was increasing global recognition (from both the United Nations and the Inter-American systems) that violence against women was a form of unlawful discrimination.

¹⁰⁰ European Court on Human Rights, Judgment, Case of M.C. v. Bulgaria, Application no. 39272/98, Strasbourg, 2003, par. 161.

¹⁰¹ The opinion of the Purple Roof Women's Shelter Foundation (Mor Çatı Kadın Sığınağı Vakfı) on the implementation of Law no. 4320, dated 7 July 2007; Research Report prepared by the Women's Rights Information and Implementation Centre of the Diyarbakır Bar Association (KA-MER) on the Implementation of Law no. 4320, dated 25 November 2005; Diyarbakır KA-MER Emergency helpline statistics regarding the period between 1 August 1997 and 30 June 2007; Amnesty International's 2004 Report entitled "Turkey: Women Confronting Family Violence"; Ibid, pars. 91 - 105.

¹⁰² R. McQuigg, What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence? School of Law, Queen's University Belfast, 2011.

Additionally, the applicant claimed there was no effective protection given for her mother's right to life (violation of article 2 of the European Convention). Second, the applicant argued she was a victim of violence, injury and death threats; even though they were given many opportunities, the authorities were negligent in protecting her rights. As a consequence she suffered pain and fear (violation of Article 3 of the Convention).¹⁰³ Third, the applicant argued that she and her mother had been victims of violence and discrimination because of their gender (violation of article 14, in conjunction with articles 2 and 3 of the European Convention).¹⁰⁴

b) A gender approach to the problem

The European Court studied whether the authorities demonstrated due diligence to prevent the killing of the applicant's mother. For this reason, the Court notes that there are at least 11 aspects that are important for the prosecution in practice:

- *The seriousness of the offence;*
- *Whether the victim's injuries are physical or psychological;*
- *If the defendant used a weapon;*
- *If the defendant has made any threats since the attack;*
- *If the defendant planned the attack;*
- *The effect (including psychological) on any children living in the household;*
- *The chances of the defendant offending again;*
- *The continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;*
- *The current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes;*
- The history of the relationship, particularly if there had been any other violence in the past; and*
- The defendant's criminal history, particularly any previous violence.*¹⁰⁵

The European Court also said that there must be a correlation in practice between the gravity of the offence and the legal consequences. In cases where there is a greater risk of further offences the prosecution must act in the public interest, even in circumstances

¹⁰³ Op. cit. par. 154.

¹⁰⁴ Ibid, par. 177.

¹⁰⁵ Ibid, par. 138.

where the victim removes her complaint.¹⁰⁶ On the other hand, the European Court argued that the State failed in its positive obligation to take preventive and protective measures for an individual whose life is at risk: the authorities merely took statements from the perpetrator and then released him. The authorities' actions remained passive for some time; as a result, the perpetrator killed the applicant's mother.¹⁰⁷ Therefore, the European Court determined that the national authorities did not follow due diligence duties. Indeed, the criminal and civil remedies were equally ineffective in the circumstances. The Turkish and the Bulgarian authorities failed in their positive obligation to protect the right to life according to Article 2 of the European Convention.¹⁰⁸ It can be seen that the authority's duties were gender neutral during the criminal process and investigation. In contrast, some International Courts have recognized and identified measures to prevent and protect victims and survivors of gender-based violence.¹⁰⁹

Additionally, the Court studied article 3 of the European convention guided by two main questions. First, was the State accountable for the harm to persons from agents that were not from the State?¹¹⁰ Second, did the State use all reasonable effort to prevent further attacks on the applicant?¹¹¹ Furthermore, the Court observed that the violence suffered by the applicant, in the form of physical injuries and psychological pressures were sufficiently serious to amount to ill-treatment according to Article 3 of the Convention.¹¹²

The European Court also considered the violation of article 14 of the European Convention in conjunction with articles 2 and 3 through three statements: (a) the

¹⁰⁶ Ibid, par. 139.

¹⁰⁷ Ibid, par. 147.

¹⁰⁸ Ibid, par. 149.

¹⁰⁹ Ibid, par. 157.

¹¹⁰ Ibid, par. 159.

¹¹¹ Ibid, par. 162.

¹¹² Ibid, par. 161.

meaning of discrimination in the context of domestic violence; (b) the approach to domestic violence in Turkey; (c) whether the applicant and her mother were discriminated against on account of the authority's failure to provide equal protection of law.¹¹³

First, the European Court took into account the background information from international-law about how to define discrimination against women and how to delimit its area of application, this was to work in tandem with the broader understanding that is applied via its case-law. In this sense, the European Court refers to the CEDAW definition of discrimination and includes domestic violence as a form of discrimination against women. Likewise, the Court makes reference to the union of gender-based violence and discrimination that was recognized by the United Nations Commission on Human Rights and the Inter-American Commission. The Court concluded that the "State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional".¹¹⁴ Second, the European Court observes that the Turkish legislation failed to differentiate between men's rights and women's rights. The laws need to change according to the international women right's standards. The European Court recognizes that:

The alleged discrimination at issue was not based on the legislation per se but rather resulted from the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims. The Court notes that the Turkish Government have already recognized these difficulties in practice when discussing the issue before the CEDAW Committee. (...) Furthermore, there appear to be serious problems in the implementation of Law no. 4320, which was relied on by the Government as one of the remedies for women facing domestic violence.¹¹⁵

The European Court identified other problems from the reports such as: (i) police do not investigate women's complaints, in contrast they assume the role of intermediary by

¹¹³ Ibid, par. 164.

¹¹⁴ Ibid, par. 185- 191.

¹¹⁵ Ibid, par. 191.

trying to convince the women to drop the complaints; (ii) there are arbitrary delays in issuing injunctions by the courts; (iii) the perpetrators in cases of domestic violence do not fully occur the relevant penalties since the courts usually reduce sentences based on custom, tradition or honour. Consequently, domestic violence has been tolerated by the State and the remedies do not function effectively for the female victims and survivors of violence. The Court concluded “that the applicant has been able to show, supported by unchallenged statistical information, the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence”.¹¹⁶

Third, the European Court analysed whether the applicant and her mother have been discriminated against because the public authorities failure to provide equal protection of law” and recognized that the criminal-law system in Turkey did not have an effective protection to the applicants’ mother¹¹⁷. Thus, the European Court considers that:

The violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence.¹¹⁸

Moreover, the European Court took note of the impotence of the attempts by the State to ensure into account the ineffectiveness of domestic remedies in providing protection in law of an egalitarian nature for the enjoyment of their rights. Furthermore it held that there were particular abnormalities of the situation, which excused the victim from having to exhaust domestic remedies. The Court determined that there is a violation of Article 14 in conjunction with Articles 2 and 3 of the European Convention. Finally, the

¹¹⁶ Ibid, par. 192- 198.

¹¹⁷ Ibid, par. 198.

¹¹⁸ Ibid, par. 199.

Courts held that the superfluous grievances under Articles 6 and 13 of the European Convention.

c) Remedies

The applicant claimed for pecuniary damages of approximately EUR 35,000 and for non-pecuniary damages to the sum of approximately EUR 125,000. However, the Court said:

“notes that the applicant has undoubtedly suffered anguish and distress on account of the killing of her mother and the authorities’ failure to undertake sufficient measures to prevent the domestic violence perpetrated by her husband and to give him deterrent punishment. Ruling on an equitable basis, the Court awards the applicant EUR 30,000 in respect of the damage sustained by her as a result of violations of Articles 2, 3 and 14 of the Convention”.¹¹⁹

For most scholars, the implementation mechanism under the European Convention can work successfully only where the Member States have laws that allow for the re-examination of individual cases in order to remedy the violations established by the European Court.¹²⁰ With the aim of appropriately dealing with domestic violence, beginning in 2011, the Ministry on Family and Social Policies has been working on “The Draft Law on the Protection of Women and Family Members from Violence”. The Law on the Protection of the Family, and its possible adjustments, are not to be taken lightly as the Human Rights Watch report ‘He Loves You, He Beats You’ from 11 of May 2011 unveiled the inadequate protection of women in Turkey who are subjected to violence; this echoes the ECHR’s *Opuz* decision of 2009.

In 2012, Turkey adopted new legislation on domestic violence (Law No. 62489). The new law was to protect and prevent violence against women, offer social services such as shelters, financial aid, and psychological and legal assistance to the victims. The law

¹¹⁹ Ibid, par. 209.

¹²⁰ M. Issaeva, I. Sergeeva, M. Suchkova; Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges, *Sur- International Journal on Human Rights*, V.8, N 15, English Edition, 2011, p. 67-69.

requests that *Violence Prevention and Monitoring Centres* are established to act as shelters for victims, and to collect and analyse statistics on preventive cautionary imprisonment and sentences. Police officers are now authorized to enforce protection as soon as the victim needs it, and without enduring lengthy court processes. Furthermore, protection is extended from “spouse” to any individuals who are considered as a family member, whether they live, or do not live, in the same house.¹²¹

The prevalence of domestic violence against women in Turkey is extremely high. In January 2009, a national study “found that 42% of women in Turkey aged 15-60, and 47% of women in rural areas, had experienced physical and/or sexual violence by their husbands or partners at some point in their lives”¹²². Furthermore, the study shows that despite of the prevalence of violence against women, they usually do not seek help because of the unequal status in society.¹²³

¹²¹ Human Rights Watch, Turkey: adopt strong domestic violence law. Press release, March 7, 2012.

¹²² Human Rights Watch, “He loves you, he beats you”: family violence in Turkey and Access to protection, 2011, p. 22.

¹²³ Ibidem.

4. Gender-based Violence under the Inter-American System on Human Rights

The Inter-American System on Human Rights has developed important standards to protect women's rights with reference to different types of violence and discrimination. This has an impact on domestic levels in Latin American countries; it has also helped to promote social and cultural awareness about the consequences of violence against women. For this reason, this chapter assesses jurisprudence tackling gender-based violence under the Inter-American System. Second, this chapter analyses two judgments of the Inter-American Court because of the high impact of these decisions, from the gender perspective, relative to violence as a type of discrimination and the associated reparations.

4.1. Precedents and jurisprudence about Gender –based Violence

The Inter-American Court delivered its first judgment in 1988 (*Velazquez Rodriguez v. Honduras*). Almost 20 years later it published the first case related to gender-based violence (see *Case of the Miguel Castro-Castro Prison v Peru*). In the last decade the inter-American system has developed the most progressive international jurisprudence on women's rights.¹²⁴ This is particularly evident because the gender approach to the problem as a human rights violation affects women disproportionately. Therefore the States must take special measures to guarantee access to justice and reparations according to women's needs and the social, political or legal context that maintain the structural problem. For this reason, the Inter-American Commission of Human Rights

¹²⁴ B. Laurence –Larsen, A. Úbeda de Torres; *The Inter-American Court of Human Rights: Case-Law and Commentary*, Oxford University Press, 2011, p. 435.

(IACHR), the Rapporteur on the Rights of Women¹²⁵, and the Inter-American Court have taken strong actions to protect women's rights and has ordered strong remedies and recommendations to the State's Parties. Some judgements have not been implemented yet, and there are still many challenges to end violence against women.

The first action that the Inter-American Commission took to show the problem in the region was through using human rights reports about violence and discrimination pertaining to a particular country,¹²⁶ or relative to a particular issue, such as access to justice.¹²⁷ Afterward, the IACHR started to set down cases and make recommendations to the State Parties. For example, some of the cases of women and violence had ended with friendly settlements according to the final report published by the IACHR. In 2001, *Maria Da Penha*¹²⁸ v Brazil became the first case about gender-based violence where the Commission applied the Convention of Belém do Pará, and recognised domestic violence as a form of discrimination against women. The IACHR ruled in a final report that the domestic violence suffered by the victim is part of a "general pattern of negligence and lack of effective action by the State."¹²⁹ The IACHR also found that this case shows "a structural problem about discrimination against women in the

¹²⁵ In 1994, the Inter- American Commission created the Rapporteur on the Rights of Women with the initial task of analysing protections and guarantees of women's rights. After many years, the Rapporteur also has worked in specific cases relative to precautionary measures and individual complaints, which has helped to develop jurisprudence to protect women against violence and discrimination.

¹²⁶ 1) The Situation of the Rights of Women in Ciudad Juarez, Mexico: The Right to be Free from Violence and Discrimination (2003); 2) Violence and Discrimination Against Women in the Armed Conflict in Colombia (2006); 3) The Right of Women in Haiti to Be Free from Violence and Discrimination (2009); 4) Access to Justice for Women Victims of Sexual Violence in Mesoamerica (2011).

¹²⁷ Inter-American Commission on Human Rights, Access to Justice for Women Victims of Violence in the Americas; 2007; Report on Justice for Women Victims of Sexual Violence: Education and Health, 2011.

¹²⁸ *Maria Da Penha* was a victim of domestic violence including attempted murder by her husband in 1983. Consequently, she suffered irreversible paraplegia and other physical and psychological trauma. After more than 15 years of criminal investigation into the attack, there is not a final decision from the judicial system. In 1998, the petitioners went before the Inter-American Commission to claim that the state has violated the American Convention; in particular, the obligation to respect rights, right to a fair trial, right to equal protection before the law, and judicial protection. The petitioners claimed that the case is not an isolated problem in Brazil.

¹²⁹ Inter-American Commission on Human Rights, Report No 54/01, Case 12.051 *Maria da Penha Maia Fernandes v Brazil*, 2001, par. 4 -7.

judicial system because the ineffectiveness and tolerance during the criminal process is general and often.”¹³⁰ Consequently, IACHR recommends Brazil gives compensation to the victim as well as other measures to guarantee non-repetition. This case had high impact on the media and on public opinion in Brazil and other countries in Latin America.

Despite this jurisprudential progress before the IACHR, the Inter-American Court had not found violations regarding gender-based violence in some cases. For example, in the case of *Loayza-Tamayo v. Peru*, the IACHR argued that the victim was raped and tortured by state agents. However, the Court claimed there is no evidence of rape. Thus, some scholars and activists have questioned whether there was a significant difference in the evidence for torture and rape during the process. According to Patricia Palacios Zuluaga, the answer is not, she said that “there was no more hard evidence of the other mistreatment suffered by Loayza Tamayo than there was of her rape”.¹³¹ The Court missed the opportunity to protect women’s rights against violence. Similarly, in the case of *Plan de Sánchez Massacre Case v Guatemala* (2004), in which the Inter-American Court, again, did not take into account gender violence as a specific human rights violation, despite the arguments from the Commission and the petitioners.¹³²

In the last decade, the IACHR has sent the Inter-American Court eight women’s rights cases, five of them are related to gender-based violence and three others are about sexual¹³³ and reproductive rights¹³⁴ and other rights¹³⁵ (see Appendix No 1). All of the cases are related to rape and torture; some of them are related to human rights violations

¹³⁰ Ibid, para 56.

¹³¹ K. Quintana Osuna, *Rights Recognition of Women's Rights Before the Inter-American Court of Human*, Harvard Human Rights Journal, 2008, p. 2.

¹³² Ibid, p. 3.

¹³³ Inter-American Court of Human Rights, *Case of Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs, 2012.

¹³⁴ Inter-American Court of Human Rights, *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*, 2012.

¹³⁵ Inter-American Court of Human Rights, *Case of Xákmok Kásek Indigenous Community v. Paraguay*, 2010.

such as forced disappearances and murder against women and girls in which the Court has recognized violence as a form of discrimination according to the American Convention and the Convention of Belém do Pará”.¹³⁶

4.1. Case-Law Study

The most important decisions from the Inter-American System about violence against women have been: *Miguel Castro-Castro Prison v. Peru*, and *Gonzalez et al. (“Cotton Field”) v. Mexico*. Both cases are very important precedents for the Inter-American System because the Court holds progressive advance to clarify State’s Parties responsibilities. This is to prevent violence and protect women from it. The precedent of Maria Do Pehna helped in assessing the problem about gender-based violence.

4.1.1. Case of Miguel Castro-Castro Prison v. Peru

Miguel Castro-Castro Prison case is very complex and extensive because there were many types of human rights violations at different times, in varying places and in assorted ways. Therefore, this text will focus on violence against women.

a) Facts

In 1992 the Peruvian government ran an operation called "Transfer 1" in order to transfer 90 women detained in the "Miguel Castro-Castro" prison to a female prison. The National Police demolished the pavilion's outer courtyard wall 1A using explosives. The police took command of prison's roof by opening gaps in it, from which shots were fired. Likewise, state, police and army officers used military weapons, tear gas, and stun emetic against inmates. As a result, around 135 women (along with about 450 male) were victims of attacks by public authorities. Some female inmates were subjected to further physical and psychological abuses. Many inmates were

¹³⁶ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará, 1994.

affected by distressing practices: solitary confinement; withholding of medical care; and they were not permitted to communicate with their loved ones and attorneys.¹³⁷

Peru partially acknowledged responsibility of the human rights violations that occurred between May 6 to 9 1992”, but it not after May 9 1992, when according to the IACHR and the petitioners there were also violations.¹³⁸ The Commission submitted the petition to let the Inter-American Court decide whether the State is responsible for the violation under the obligation established in article 1(1) of the American convention in detriment of women at the prison; The Commission did not argue any violations of the Convention of Belen do Pará occurred, but the petitioners did, so the Court was forced to rule on this issue as well.

The petitioners¹³⁹ argued that the violence in this case “was not limited to sexual rape, but instead the women were submitted to a more ample range of sexual violence that included acts that did not involve penetration or physical contact.”¹⁴⁰ At least in one case there is evidence that one survivor of the Castro-Castro massacre was sexually raped at the Police Hospital, and there are allegations of sexual violence using “tips of the bayonets”.¹⁴¹ Similarly, “the vaginal revision practiced on the survivors’ female visitors constituted violence against women”.¹⁴² Other forms of sexual violence “included threats of sexual acts, “touching”, sexual insults, forced nudity, beatings on their breasts, between their legs and buttocks, beatings to the wombs of pregnant

¹³⁷ Inter-American Court of Human Rights, Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs, 2006, par. 2-3.

¹³⁸ Ibidem.

¹³⁹ Mrs. Sabina Astete presented the petition before the IACHR, as a member of the Committee of Relatives of Political and War Prisoners NGO, which did have direct participation in the international process.

¹⁴⁰ Op. Cit. Inter-American Court of Human Rights, Case of the Miguel Castro Castro Prison v. Peru., par. 260

¹⁴¹ Ibidem.

¹⁴² Ibidem.

women, and other humiliating and damaging acts that were a form of sexual aggression”.¹⁴³

b) Gender approach to the problem

The Inter-American Court found four particular violations of human rights regarding gender-based violence:

Three inmates, at the time of the events, were 7, 8, and 5 months pregnant and that the State left the basic prenatal health needs of the first two unattended, as well as the pre and postnatal health needs of one of them.¹⁴⁴

One female inmate was submitted to an alleged finger vaginal “examination”, which constituted sexual rape.¹⁴⁵

Six female inmates were forced to remain naked at the hospital, while watched over by armed men, which constituted sexual violence.¹⁴⁶

Kin of the deceased inmates were the victims of violations to Articles 8(1) and 25 of the Convention, in relation to Article 1(1) of said treaty, in connection to Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.¹⁴⁷

The Inter-American Court sustained the scope of sexual violence and argument that “sexual violence consists of actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever.”¹⁴⁸ The Inter-American Court concluded that gender-based violence is a form of discrimination according to the recommendations of the CEDAW Committee. In addition, the Inter-American Court referred to the obligation to act with due diligence in cases of violence against women, set forth to determine the State’s responsibility for

¹⁴³ Ibid, par. 135 – 160.

¹⁴⁴ Ibid, par. 332

¹⁴⁵ Ibid, par. 312.

¹⁴⁶ Ibid, par. 308.

¹⁴⁷ Ibid, par. 309.

¹⁴⁸ Ibid, par.306.

violating the duty to investigate and punish, contained in Articles 8(1) and 25 of the American Convention and in Article 7 of the Convention of Belém do Pará.¹⁴⁹

c) Reparations

The Inter-American Court ordered four types of reparations to the victims including general measures to protect and prevent human rights violations in Peru:

i. Compensation: The Court ordered compensation for pecuniary damage,¹⁵⁰ non-pecuniary damage,¹⁵¹ non-pecuniary damage regarding the surviving victim's,¹⁵² additional compensation for sexual violence,¹⁵³ additional compensation for the victim's next of kin of inhumane treatment (especially for women),¹⁵⁴ and costs and expenses.

The Court recognized particular non-pecuniary damage (which was applied to a high standard) in the women's rights violations:

ii. Measures of satisfaction: The Court held that the State must publish the decision and publically acknowledge responsibility. The Court also ordered to add the names of the victims in the memorial "the eye that cries".¹⁵⁵

iii. Non-repetition guarantees: the Court ordered that the State must investigate the facts that caused the violations of the present case; furthermore, it must identify, prosecute and punish those who are responsible. The State is also required to build a human rights education program to train police members.¹⁵⁶

iv. Rehabilitation: medical and psychological assistance for the surviving victims and the next of kin of the victims.¹⁵⁷

This is a remarkable decision because it is the first time that the Inter-American Court decided that there were violations against women in the context of sexual violence.¹⁵⁸

¹⁴⁹ Ibid, par. 470.

¹⁵⁰ Pecuniary damage: US \$25,000 in benefit of surviving inmates, US \$10,000 for surviving inmates with partial permanent handicap US \$10,000 for the 41 deceased inmates.

¹⁵¹ Non-pecuniary damage: US \$50,000 for the 41 deceased victims identified; US \$10,000 in the case of the father, mother, spouse and children of the victims; US \$1,000 for brother or sister of the victims.

¹⁵² US\$ 20,000 for each of the victims with injuries incurring physical or mental illness resulting in a permanent handicap to work; US\$ 12,000 for each of the victims with injuries of physical or mental illnesses that imply a permanent partial handicap to work; US \$8,000 or each of the victims with permanent consequences due to injuries suffered that did not result in a complete or partial handicap.

¹⁵³ Additional compensation for sexual violence: US \$30,000 for the victim of sexual rape; US \$10,000 for the six victims of sexual violence.

¹⁵⁴ Additional compensation: US \$1,500 the next of kin of the victims of inhumane treatment (especially women).

¹⁵⁵ Ibid, par. 436.

¹⁵⁶ Ibid, par. 452.

¹⁵⁷ Ibid, par. 452.

Hence, the Court addressed the reparations taking into account those women who were exposed to gender-based violence faced more damages than those who did not.¹⁵⁹ For some scholars, the Court missed the opportunity to order measures of non-repetition relative to specific psychological, physical and legal support that female victims of violence might need.¹⁶⁰

Since 2001, Peru has legislated to implement international decisions, especially in those cases where there is pecuniary damage. However, in the Penal Castro - Castro case, despite the important compensatory measures benefitting the victims and survivors, the implementation of the Inter-American judgment has been challenging due to two main factors relevant to the judgments as well as the political context.¹⁶¹ First, the judgment was notified in 2007 and this caused controversy in Peru, because not all of the victims recognised by the Inter-American Court, were seen as victims by the Peruvian people. It was clear to them that those who were not guilty should be owed monetary compensation, but it was hard for them to see that those who had been condemned by anti-terrorism laws were also victims and, thus, were due compensation as well. Hence, the public were resistant to the idea of giving reparations to people who were part of a “terrorist group” who also had committed grave human rights violations. Second, the Court ordered to add the names of the victims to the memorial “the eye that cries”. This memorial was built for the victims of the armed conflict. For this reason, the government was consistent with public opinion and refused to mix the names of the

¹⁵⁸ R. Rubio-Marin, C. Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment*, 33 *Hum. Rts Q.* 2011, p. 1076.

¹⁵⁹ *Ibidem*.

¹⁶⁰ *Ibidem*.

¹⁶¹ Since 2001, Peru has a presidential decree that established a process to make the decisions of supranational courts effective. It requires either the payment of pecuniary damages or declaratory relief. Under its provisions, the Ministry of Foreign Affairs must transmit international decisions to the Supreme Court, which then transmits it to the jurisdictionally appropriate national court. If the decision requires the payment of a specific monetary amount, the national court judge referred to the case should order the Ministry to pay the amount within ten days. From *Rights to Remedies, Structures and Strategies for Implementing International Human Rights Decisions*, Open Society Justice Initiative, 2013, p. 42.

victims from Castro-Castro prison and victims of the armed conflict in the same memorial.

Additionally, the petitioners of the case are living in exile for security reasons. Therefore, the impact of the public opinion was assumed by non-governmental organizations that did not work directly on the cases, but they recall that even some members of the guerrillas were involved; they have human rights, which have to be protected by the State. Public opinion decrees that this case was related to the “Sendero Luminoso” in times of armed conflict, and this case is not about a gender issue.

Because of the above factors, seven years after this decision, the government has not fulfilled all the reparations, especially the ones related to the payment of the pecuniary and non-pecuniary damages; furthermore, the government has not implemented most of the non-repetition guarantees and measures of satisfaction.¹⁶² In September of 2013, the Court organised a private hearing to monitor compliance with the judgments and called on the Peruvian government to attend the obligation to give all the reparations to the victims. Compliance will be reviewed again in around a year or two. In general, Peru has refused to comply with the judgments relative to the Sendero Luminoso cases before the Inter-American System, despite the international responsibility of human rights violations.¹⁶³ Thus, from the gender perspective this judgement has had a lower impact.

4.1.2. Case of González et al. (“Cotton Field”) v. Mexico

The Case of Gonzalez (“Cotton Field”) v. Mexico is one of the most important cases because it occurred during a critical and systematic bout of violence against women in

¹⁶² Op. cit. Inter-American Court of Human Rights, Case of the Miguel Castro-Castro Prison V. Peru.

¹⁶³ Interview to Jorge Abrego, human rights activist from Peru, December 10, 2013.

Ciudad Juárez–Mexico. In fact, since 1993, many national and international nongovernmental organizations began contacting the IACHR and international bodies because of this situation. In 2003, the IACHR published a special report about Ciudad Juárez in which indicates that “at least 285 women and girls have been killed in Ciudad Juárez from the beginning of 1993 to late October of 2002”.¹⁶⁴ In this period homicide rates increased against women at twice the rate compared to men. Moreover, there was a “lack of response from the authorities to crimes against women, the lack of due diligence in the investigation of the homicides, as well as denials of justice and a lack of an adequate reparation for the victims”.¹⁶⁵ In this general context, the petitioners presented three particular cases before the IACHR in 2002 in order to determine international responsibility for the cases and the general phenomenon.

a) Facts

From September to October of 2001 three women disappeared in Ciudad Juárez–Mexico. At that time Laura Berenice Ramos was a student (17 years old); Claudia Ivette Gonzalez was a makeup artist working in business (20 years old); and Esmeralda Herrera Monreal was a high school student (15 years old). Their relatives filed the missing person reports; nevertheless, further investigations were initiated by the authorities. Eventually their final resting place was discovered on November 6, 2001: a cotton field in Ciudad Juárez.¹⁶⁶ The petitioners laid responsibility for the deed on the doorstep of the international community.¹⁶⁷ Also, they claimed that the murders against women were “femicide” because in Ciudad Juárez there is “a pattern of gender-related violence that had resulted in hundreds of women and girls murdered”.¹⁶⁸

¹⁶⁴ Ibid, par 67.

¹⁶⁵ Ibid, par. 68.

¹⁶⁶ Ibid, par.165-168.

¹⁶⁷ Ibidem.

¹⁶⁸ Ibidem.

The State “admitted the contextual facts concerning violence against women in Ciudad Juárez, particularly the murders that have been recorded since the beginning of the 1990s”.¹⁶⁹ The IACHR presented the petition to the Court in order to declare the state responsible for the following rights violations: the right to life, to humane treatment, to a fair trial, and the rights of the child. Furthermore, it was claimed that the right to judicial protection of the American Convention was also violated, in relation to the obligation to respect rights and domestic legal effects thereof, together with failure to comply with the obligations arising from article 7 of the Convention of Belen do Para.¹⁷⁰

b) Gender approach

The petitioners¹⁷¹ argued that “at the time that the victims disappeared, the Mexican authorities were aware that there was a real and immediate risk to their life,” In particular, “because the cases described here are part of the pattern of violence against women and girls, and the State did not exercise due diligence by taking the necessary measures to avoid it”.¹⁷² The petitioners claimed that the homicides against women have gender motivations and this particular crime or phenomenon is called “femicide”. The Court received thirteen amicus curiae briefs from civil society, national, regional and international NGO, university, experts in women rights and individuals. The amicus supported the petitioner’s arguments especially relative to “femicide”, lack of due diligence from the state, and the social need to stop violence against women as a structural problem in Ciudad Juarez. The Inter-American Commission did not define the crimes against women with this term. Indeed, the most controversial issue was to find a

¹⁶⁹ Ibid, par. 27.

¹⁷⁰ Op. Cit. Inter-American Court of Human Rights, Case of González v. Mexico, par.. 3.

¹⁷¹ The representatives of the alleged victims: the Asociación Nacional de Abogados Democráticos A. C., the Latin American and Caribbean Committee for the Defense of Women’s Rights, the Red Ciudadana de No Violencia y por la Dignidad Humana and the Centro para el Desarrollo Integral of the Mujer A. C.

¹⁷² Ibid, par. 250.

consensus about “feminicide”. For example, the state arguments about feminicide were inconsistent. First, Mexico “used the term feminicide during the public hearing to refer to the phenomenon that prevails in Juarez” and it also defined the term in several of its official reports presented as evidence”,¹⁷³ but the state objected to the use of the term feminicide in its response to the expert’s reports during the process. The Inter-American Court finally used the expression “gender-based murders of women”, also known as “feminicide”.¹⁷⁴

In the judgment the Inter-American Court gave four points with respect to women’s rights, and the connection with violence and discrimination. First, the Court explained the characteristics that define the pattern of violence against women in Ciudad Juarez. Second, the concept of gender-based violence that applies to this case. Third, the Court used the “due diligence doctrine” relative to access to justice and national remedies. Finally, the Court made an attempt to define feminicide. The Court “considered that the murders of the victims were gender-based and were perpetrated in an acknowledged context of violence against women in Ciudad Juárez”.¹⁷⁵

c) Reparations

During the process, the petitioners claimed the number of victims should be increased due to proper consideration of the phenomenon, but the Court decided not to expand the number of victims due to its disagreement with the American Convention. The Inter-American Court divided the reparations in four parts, and gave special emphasis to the guarantee of non-repetition in order to protect and prevent gender-based violence in Ciudad Juarez¹⁷⁶:

¹⁷³ Op. Cit. Red Mesa de Mujeres de Ciudad Juárez and other, 2010, p. 31.

¹⁷⁴ Ibid, par. 223.

¹⁷⁵ Ibid, par. 231.

¹⁷⁶ Op. Cit. Inter-American Court of Human Rights, Case of González v. Mexico, par. 596.

- i. Compensation: pecuniary damage,¹⁷⁷ loss of earnings,¹⁷⁸ moral damage¹⁷⁹ and costs and expenses.¹⁸⁰
- ii. Measures of satisfaction: the Court ordered there be a public act of accountability to publish the decision and to create a national day in memory of the victims.¹⁸¹
- iii. Guarantees of non- repetition: the Court ordered a number of things: to investigate and to punish those responsible for the human rights violations; to adopt domestic laws according to international standards of justice; to create programs to contribute to the reinsertion in the community of the indigenous women who were victims of rape; to ensure a protocol for the diligent investigation of acts of violence; training programs for officials should be initiated; permanent educational programs on human rights within the Armed Forces are required; codification needs to be done of the crime of torture in the Criminal Code of the state of Guerrero; and, finally, a campaign for the awareness of violence and discrimination against woman should begin.¹⁸²
- iv. Rehabilitation: the Court established to build health services, including medical and psychological care, for female sexual abuse victims.¹⁸³

In terms of gender-based violence, it is the first time that an international Court ruled on violence against women from the gender perspective. It is clear that the measures of reparation have a pointed affect on Ciudad Juárez, but the possibility of it affecting Mexico and the inter-American region should also be noted. For some human rights activists this case was a commendable decision, it was largely due to the strong women's rights activist Cecilia Medina Quiroga being the head of the Court.¹⁸⁴

In addition, the Inter-American Court found that the concept of "integral reparation" (restitutio in integrum) necessitates the return of the before-held conditions, a need to negate the resulting conditions of the violation, and monetary compensation, for the resulting damage, is due. Nevertheless, the Court emphasised that in the context of

¹⁷⁷ Pecuniary damage: US\$150 to Mrs. Monreal; US\$600 to Mrs. González; US\$1,050 to Mrs. Monárrez.

¹⁷⁸ Loss of earnings: US\$145,500 to Mrs. Monreal; US \$134,000 to Mrs. González; US \$140,500 to Mrs. Monárrez.

¹⁷⁹ Moral damage: US\$40,000 to Mrs. Monreal mother and next of kin; US\$38,000 to Mrs. González relatives; US\$40,000 to Mrs. Monárrez's relatives

¹⁸⁰ Cost and expenses: US\$45,000 to the mothers of Mrs. Herrera, Ramos and González, who shall each deliver the amount they deem adequate to their representatives, for costs and expenses

¹⁸¹ Op. Cit. Inter-American Court of Human Rights, Case of González v. Mexico. Preliminary Objection, par. 464.

¹⁸² Ibid, par. 474- 543.

¹⁸³ Ibid par. 544 - 549.

¹⁸⁴ Op. cit. Red Mesa de Mujeres de Ciudad Juárez A.C., and other, p. 26.

structural discrimination in this case; hence it would be odd if the reparations did not address this deep issue. This entails that their effect is not only of restitution, but also of rectification. However, the inter-American States have presented many complaints and criticisms about the remedies. To deal with this the Court clarified seven aspects about how it will assess the measures of redress:

- a) Mean directly to the violations asserted by the Court;
- b) The damage (pecuniary and non-pecuniary) is proportional
- c) Do not reach that the victims become richer or poorer;
- d) Re-establish the victims to their situation previous to the violation insofar as possible.
- e) Try to identify and eradicate the elements that cause discrimination;
- f) Are adopted from a gender perspective, according to the impact that violence has on men and on women.
- g) Wholly take into account the juridical acts and measures in the case; tend to fix the damage caused.¹⁸⁵

Regardless, the critics and the tensions for many with expertise on women have two keys components: “the concept of gender-sensitive and transformative reparations”,¹⁸⁶ these are clear in point five and six mentioned previously. The Court stabilised that reparations must be “designed to identify and eliminate the factors that cause discrimination” and “adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women”.¹⁸⁷ The reparations have a gender perspective, are not neutral, and also seek to identify roots and effects of the violence on the lives of women and girls.

The decision has been implemented in progress and in a very positive progress. The judgment had a high impact on the media in Mexico and Latin America because the Court recognized femicide and that all of the types of violence against women in Juarez

¹⁸⁵ Op. cit. Inter-American Court of Human Rights, Case of González et al. (“Cotton Field”) v. Mexico, para. 422.

¹⁸⁶ Op. cit. R. Rubio-Marín, C. Sandoval, p. 1083.

¹⁸⁷ Ibidem.

was a structural problem.¹⁸⁸ At the time the judgment was published, Ciudad Juárez faced the context of extreme social violence caused by militarization and drug-trafficking, and the authorities once again minimized and distorted the extent of femicide in Juárez.¹⁸⁹ In many countries in South America gender-based violence has increased, and since 2007 many countries have a special law to prevent and protect women against violence; some of them even recognized femicide as a crime with a high penalty and that victims deserved special treatment.¹⁹⁰

In May of 2013, the Inter-American Court gathered a private audience to show the implementation of this judgment. The state published the judgment in a newspaper of national and local circulation; made a public act of acknowledgment of international responsibility; made a monument in memory for the victims in Ciudad Juárez; worked to standardize all its protocols in investigating all offenses relating to the disappearance, sexual abuse and murder of women; created a website to be updated with all the necessary personal information of all women; implemented programs and permanent education courses about human rights and gender; started an education program aimed at the general population of state of Chihuahua in order to overcome this situation; and paid for compensation, compensation material, moral damages and reimbursement of costs and expenses.¹⁹¹ This shows that the state was compliant with most of the

¹⁸⁸ Interview to Santiago Medina, ex – attorney at Inter-American Court of Human Rights, December 14, 2013.

¹⁸⁹ Op. cit. Red Mesa de Mujeres de Ciudad Juárez A.C., and others. p. 90.

¹⁹⁰ Costa Rica: law criminalizing violence against women (2007) Guatemala: Law against Femicide and other forms of Violence against Women (2008) Argentina: Comprehensive Protection Act on the Prevention, Punishment and Eradication of Violence Against Women in the fields in developing their interpersonal relationships (2009), Mexico: General Law on Women's Access to a Life Free of Violence (2007), the Bolivarian Republic of Venezuela: Organic Law on the Right of Women to a Life Free of Violence (2007) Colombia: Law 1257 of Violence against Women (2008). L. Fries, V. Hurtad, Estudio de la información sobre la violencia contra la mujer en América Latina y el Caribe, CEPAL, United Nations, 2010, p. 17.

¹⁹¹ Inter-American Court of Human Rights, Case of Gonzalez (Cotton Field) v. Mexico, Monitoring compliance with judgment, 2013, par. 27.

atonement procedures relative to measures of non-repetition and satisfaction, but it is still missing most of the remedies regarding due diligence and access to justice.

5. Conclusions

International human rights law has progressed in the last decade regarding women's rights and gender-based violence; however, the approaches to cases about violence against women were inconsistent between jurisdictions and type of violence. There are four main reasons that this thesis studied the cases it did: first, there has been improvement in the last decade in access to justice as well as access to national and international tribunals for women (in cases of violence); second, private problems are human rights violations. Therefore, States have responsibility under international conditions; third, violence against women has been considered a type of discrimination; fourth, the measures of the remedies to the victims are effective: in some cases the general problem of violence against women in society and legislation is solved.

5.1. Access to justice and international tribunal for women worldwide

Often women do not have money to pay an attorney, or the process usually takes too long, so they prefer to desist. However, the cases on gender-based violence from the European Court, the Inter-American Court, and the CEDAW Committee show that women have had more access to justice in international tribunals especially for victims of sexual violence. In the last decade there has been more interest in strategic litigation for lawyers and organizations to support women's rights.¹⁹² Nonetheless, in cases of discrimination before the European Court in Europe, complaints from homosexuals (especially men) and transgender women are more common than those from women. These claims were for violations of the European Convention in cases of sexual orientation, gender identity or other types of discrimination. These applicants have

¹⁹² Interview to Andrea Coomber, she was Equality Lawyer and then Legal Director at INTERIGHTS between 2002 and 2013, March 24, 2014.

more access to lawyers, and more access to justice in European Countries.¹⁹³ Therefore, there is more jurisprudential discussion about their issues than there is for gender-based violence.

Most of the cases before the CEDAW Committee come from European countries rather than African, American or Asian States. One of the main reasons could be that the majority of the European countries are part of the Optional Protocol, and the Committee is seen as a high standard of protection for women's rights from the applicant's point of view. Another reason is that the Committee makes the decisions in around 3 or 4 years. This is in contrast to the regional system of human rights, which can take more than 10 years to decide on a particular complaint.

Under the Inter-American System most of the cases have been against Mexico and Peru. The process before the Commission and the Court usually takes around 15 years. Therefore, the victims and survivors cannot enjoy access to the rights and reparations for some time; moreover, they spend lot of money for the representation.

5.2. Violence against women as a public problem

It is not uncommon for the international Courts to recognise that domestic violence is in the public interest and requires appropriate provisions to be put in place by the State. In this way domestic violence is understood to not be a private or family matter.¹⁹⁴ Gender equality and human rights, if they are to be realized, must be respected, protected and fulfilled in both the public and the private realm. The distinction between the "public" and "private" divide in international human rights law has been criticized, and there have been efforts to shift towards recognition of responsibility and accountability for private action.

5.2.1. Gender based Violence as discrimination

¹⁹³ Ibidem.

¹⁹⁴ Op. Cit. Human Rights Watch, "He Loves you, He beats You", p.52.

The International Court's approach is different, for some tribunals argue that violence against women is a human rights problem and also a type of discrimination; while to other Courts it is not a discrimination problem. The European Court has never found a violation of Article 14 in cases of rape, sexual harassment or abuse; although there have been claims, the arguments have not been strong (few attorneys had received training for gender litigation). Overall the European Court has not recognised the gender problem in the region and women's rights are still weak (in approach and in scope).

Even though the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) establishes the following forms of violence against women (the Court has not decided on any case regarding this convention): psychological violence (Article 33); stalking (Article 34); physical violence (Article 35); sexual violence, including rape (Article 36); forced marriage (Article 37); female genital mutilation (Article 38); forced abortion and forced sterilisation (Article 39); and sexual harassment (Article 40). However, European jurisprudence regarding discrimination and violence against women is less developed than other types of discrimination (such as race, sexual orientation and gender identity). In practice, violence against women has been deemed due to discrimination of identity in only a few cases.

In contrast, the Inter-American Court and the CEDAW Committee has recognized that rape and domestic violence is a matter of discrimination against women and the violence has a disproportional effect against women. In this sense, this text studied four cases regarding this approach: *A.T. v Hungary*, *S.V.P. v. Bulgaria*, *Miguel Castro Castro v Peru*, and *Gonzalez v Mexico*. On many occasions the Inter-American Court and the CEDAW Committee have recalled to the State the obligation of investigating and sanctioning human rights violations. In *Gonzalez v Mexico*, the Court applied the

same standard, taking into account the discrimination against women and deeming that the State should take special measures to prevent and protect the rights of women and girls. Thus, in order to redress gender-based violence, the Inter-American Court has recalled the State's responsibility for actions committed by individuals in certain circumstances (such as domestic violence and sexual violence).

The Inter-American Court and the CEDAW Committee recognized that discrimination, violence against women and due diligence are not independent happenings devoid of interaction: states must adopt measures to change the social and cultural stereotypes between the sexes. This is also true relative to access to justice: the judicial remedies, for victims of violence and their loved ones, must be ensured and sufficiently potent.

5.2.2. Remedies for victims

The nature of reparations in the inter-American system and the CEDAW Committee are wider and more complex than the European system since the reparations are not settled based on defects, imperfections or insufficiencies in domestic law; rather, they are independent from it.¹⁹⁵ The right to reparation under the Inter-American System and CEDAW Committee obliges States to ensure that victims are able to obtain such reparations in law and in practice. The Inter-American Court has developed the concept of integral reparation through at least three historical stages. In 1989-1996, the Inter-American Court developed strong definitions and scope for reparations through establishing the first set of standards on the subject. In 1996 to 2003, the Court went into more detail and expanded new concepts such as life plan; damages of family assets; and the loss of assets.¹⁹⁶ Finally, in the last decade, the Court has settled on some standards in cases of structural problems and has ordered “*transformative*

¹⁹⁵ G. Donoso, Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach, Inter-American Human Rights Institute, N°. 49, 2009, pp. 29-68.

¹⁹⁶ F. Quintana, Conference: Reparations in the Inter-American System, a Comparative Approach, American University Law Review, p. 1389. [Vol. 56:6].

reparations”¹⁹⁷ especially relative to gender violence and collective rights for indigenous communities.¹⁹⁸

Reparations in the CEDAW Committee usually try to re-establish the situation that existed before the violation. This is known as restitution *in integrum*. In cases which restitution is not possible (for example, in cases where people have died or have been raped or tortured) there are other measures of reparation granted e.g. satisfaction and guarantee of non-repetition. The reparations under the CEDAW are in abstract, while the Inter-American Court has ensured reparative measures like gender-specific legislation and public policies like specialized police and prosecutorial units for women who are victims of violence.¹⁹⁹ Indeed, some countries have changed legalisation and created new programs to prevent and protect women’s rights taking gender standards from the Inter-American Court.

The European Court has not identified and recognised the importance of preventative measures in cases of violence against women. This is due to the effect and consequences for the lives of the victims. The European Court focuses on pecuniary damage, costs and expenses. Under the European System there are not general measures and remedies to solve the gender problem in the society or law. However, States are more likely to follow through with the implementation of the judgements. In contrast, the CEDAW Committee and the Inter-American Court (especially) have many challenges in relation to the implementation of the.

In the Inter-American System, even though there are some States (like Peru) that have special laws for the implementation of the international decisions, there are other factors that are important to fulfil the Inter-American Judgment. First, lack of legitimacy and

¹⁹⁷ This concept is in use in the transitional justice process, but also in cases relative to structural human rights reparations.

¹⁹⁸ Op. cit. Inter-America Court of Human Rights, Case of the Xákmok Kásek Indigenous Community. v. Paraguay, par. 300.

¹⁹⁹ Op. Cit. Department of Economic and Social Affairs, p. 15.

enforcement of the judgments. For example, in the case of Miguel Castro-Castro, the political context made it impossible to implement the Court's decision. Also, women's rights violations were not accounted for in public opinion, so the reparations are difficult to achieve, and female victims lost credibility in the Court. Second, there is a lack of institutional capacity from the State. Even though the internal mechanism is there to establish reparations, sometimes the measures depend on other branches (legislative or Judicial), so it is more difficult to coordinate and achieve goals on time. Fourth, there are tensions between victim's rights and public interest; for example, in the case of Peru and the memorial for the victims (see Castro-Castro Prison).

Appendixes

Appendix No 1		
Year	Case	Violations according with the CEDAW Committee
Domestic violence		
2005	A.T. v. Hungary	Rights under article 2 (a, b and e) and article 5 (a) in conjunction with article 16 of the CEDAW.
2007	Goekce v. Austria	Rights under article 2 (a, c and f), and article 3 of the CEDAW read in conjunction with article 1 of the Convention and general recommendation 19 of the CEDAW Committee.
2007	Yildirim v. Austria	Rights under article 2 (a and c through f) and article 3 of the CEDAW read in conjunction with article 1 and general recommendation 19 of the Committee.
2011	V.K. v. Bulgaria	Rights under article 2 (c, d, e and f), in conjunction with article 1, and article 5 (a), in conjunction with article 16, paragraph 1, of the CEDAW, as well as general recommendation No. 19 of the Committee.
2012	Jallow v. Bulgaria	Rights under article 2, (b, c, d, e and f), article 5, paragraph (a), and article 16, paragraphs (c, d and f), read in conjunction with articles 1 and 3, of the CEDAW.
2012	Kell v. Canada	Rights under articles 2 (d and e), and 16, (1 h), read in conjunction with article 1 of the CEDAW.
Sexual Violence		
2010	Tayag Vertido v. Philippines	Rights under article 2 (c and f), and article 5 (a) read in conjunction with article 1 of the CEDAW and general recommendation No. 19 of the CEDAW.
2011	S.V.P. v. Bulgaria	Rights under articles 2 (a, b, c, e f and g); read together with articles 1, 3 and 5 (a and b); article 12 and article 15 (1); of the CEDAW.
2011	Abramova v. Belarus	Rights under articles 2 (a, b, d, e and f), 3 and 5 (a), read in conjunction with article 1 of the Convention, and with general recommendation No. 19 of the Committee.
Forced sterilization		
2006	A.S. v. Hungar	Rights under articles 10 (h), 12 and 16, paragraph 1 (e) of the Convention.

Appendix No 2		
Gender –based violence under the Inter-American Court		
Year	Case	Violations
2006	Miguel Castro-Castro Prison v. Peru	Right to life enshrined in Article 4, right to humane treatment enshrined in Article 5(1 and 2), right to a fair trial and judicial protection enshrined in Articles 8(1) and 25 of the American Convention on Human Rights, in relation with Article 1(1) of the American Convention. Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.
2009	“Las Dos Erres” Massacre v. Guatemala	Right to a fair trial and judicial protection enshrined in Articles 8(1) and 25(1), in relation to Article 1(1) of the American Convention. Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and Article 7(b) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.
2009	González et al. (“Cotton Field”) v. Mexico.	Right to life enshrined in Article 4, right to humane treatment enshrined in Article 5(1 and 2), right to a fair trial and judicial protection enshrined in Articles 8(1) and 25 of the American Convention on Human Rights, in relation with Article 1(1) of the American Convention. Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.
2010	Rosendo-Cantú and other v. Mexico.	Right to life enshrined in Article 4, right to humane treatment enshrined in Article 5(1 and 2), right to a fair trial and judicial protection enshrined in Articles 8(1) and 25, in relation with Article 1(1) of the American Convention. Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.
2010	Fernández-Ortega et al. v. Mexico.	Right to life enshrined in Article 4, right to humane treatment enshrined in Article 5(1 and 2), right to a fair trial and judicial protection in Articles 8(1) and 25, in relation with Article 1(1) of the American Convention. Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

Appendix No 3		
Violence against women under the European Court ²⁰⁰		
Domestic violence		
2007	Kontrovà Slovakia- v.	Violation of Article 2 (right to life) of the European Convention on Human Rights, concerning the authorities' failure to protect the children's lives, and a violation of Article 13 (right to an effective remedy) of the Convention, concerning the impossibility for their mother to obtain compensation.
2008	Bevacqua and S. v. Bulgaria	Violation of Article 8 (right to respect for family life) of the Convention. The Court also stressed that considering the dispute to be a "private matter" was incompatible with the authorities' obligation to protect the applicants' family life.
2009	Branko Tomašić and Others v. Croatia	Violation of Article 2 (right to life) of the Convention concerning the deaths of the mother and child: the Croatian authorities had not followed the order for continued psychiatric treatment; the Government had failed to show that the husband had even received psychiatric treatment in prison; and, he did not undergo a psychiatric assessment prior to his release.
2009	Opuz v. Turkey	Violation of Article 2 (right to life) of the Convention concerning the murder of the husband's mother-in-law and a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention concerning the State's failure to protect his wife. The Court also found violations of Article 14 (prohibition of discrimination), in conjunction with Articles 2 and 3 of the Convention.
2009	E.S. and Others v. Slovakia	Violation of Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life) of the Convention.
2010	A. v. Croatia	Violation of Article 8 (right to respect for private and family life) of the Convention. The Court further declared inadmissible the applicant's complaint under Article 14 (prohibition of discrimination) of the Convention
2010	Hajduová Slovakia v.	Violation of Article 8 (right to respect for private and family life) of the Convention
2012	Kalucza Hungary- v.	Violation of Article 8 (right to respect for private life) of the Convention.
2013	Valiulienė Lithuania- v.	Violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention
2013	Eremia and Others v. the Republic of	Violation of Article 3 (prohibition of inhuman and degrading treatment) of the Convention in respect of the first applicant. Violation of Article 8 (right to respect for private and family

²⁰⁰ European Court of Human Rights, Press Unit, Factsheet - Violence against Women, July 2013. This factsheet is not exhaustive.

	Moldova	life) of the Convention in respect of her two daughters and a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 3.
2014	B. v. the Republic of Moldova	Violation of Article 8 (right to respect for private and family life) of the Convention in respect of her two daughters and a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 3.
2013	Mudric v. the Republic of Moldova	Violation of Article 3 (prohibition of inhuman or degrading treatment) and Article 14 of the Convention taken in conjunction with Article 3 in respect of the first applicant;
Sexual Violence		
1985	X and Y v. the Netherlands (no. 8978/80)-	Violation of Article 8 (right to respect for private and family life) of the Convention.
1997	Aydın v. Turkey	Violation of Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the Convention.
2003	M.C. v. Bulgaria	Violation of Article 3 (prohibition of degrading treatment) and Article 8 (right to respect for private life) of the Convention
2008	Maslova and Nalbandov v. Russia	Violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention. There had further been a violation of Article 3 of the Convention under its procedural limb, concerning the ineffective investigation.
2012	I.G. v. the Republic of Moldova	Violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention.
Other forms of violence		
2010	N. v. Sweden	Violation of Article 3 (prohibition of inhuman or degrading treatment or punishment) of the Convention.
2011	Yazgül Yılmaz v. Turkey-	Violation of Article 3 (prohibition of inhuman treatment) of the Convention concerning both the gynaecological examinations of the applicant while in police custody and the inadequate investigation concerning those responsible.
2012	B.S. v. Spain	Violation of Article 3 (prohibition of inhuman and degrading treatment) of the Convention
2013	İzci v. Turkey-	Violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention both in its substantive and procedural aspect, and a violation of Article 11 (freedom of assembly) of the Convention.
2011	Ebcin v. Turkey-	Violation of Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private life) of the Convention.

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