

Violence against Women by Private Actors: The Inter-American Court's Judgment in the Case of Gonzalez et al. ("Cotton Field") v. Mexico

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Violence against women continues to persist as one of the most heinous, systematic and prevalent human rights abuses in the world. It is a threat to all women, and an obstacle to all our efforts for development, peace and gender equality in all societies.¹

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* This article is dedicated to the women and girls of Ciudad Juárez.

¹ B. Ki-Moon, Messages of the Secretary-General, "Secretary-General Says Violence Against Women Should Be Accorded 'Deadly Seriousness', Not Just On International Day, 25 November, But Every Day", Press Release, SG/SM/11289, OBV/665, WOM/1660 of 20 November 2007.

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I. Introduction

On 16 November 2009 the Inter-American Court of Human Rights (IACtHR) delivered its judgment in the case *González et al. v. Mexico*.² The case is also known by the name “Cotton Field” or “Campo Algodonero” in Spanish, named after the location where the three victims were found in Ciudad Juárez.

The case decided by the Court constitutes an emblematic case of violence against women committed by private actors. Generally speaking it concerns the situation of women in the Mexican border city Ciudad Juárez, state of Chihuahua.

From the beginning of the 1990s Ciudad Juárez acquired notoriety due to the constant wave of violence against and homicide of women. Characteristically it was denominated: “Capital of Women’s Murders.”³ The situation was characterised by a sharp rise in the homicide rate of women, extreme brutality of the crimes and a deficient response of the public authorities leading to impunity of the perpetrators. Many of the killings are described as manifestations of violence based on gender.⁴ As

² IACtHR, *Case of González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C No. 205.

³ Die Presse, “Ciudad Juarez: ‘Welthauptstadt der Frauenmorde’”, of 11 October 2007, <<http://diepresse.com/home/panorama/welt/336126/index.do>> (translation with the author).

⁴ IACHR, “The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination”, OAS/Ser.L/V/II.117, Doc. 44 of 7 March 2003, paras 33, 43.

the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences Yakin Ertürk pointed out in her report on Mexico, gender-based violence in Mexico constitutes only the tip of an iceberg. Beneath the surface systemic and complex problems are lurking. These problems have to be seen and can “only be understood in the context of socially entrenched gender inequality on the one hand and a multilayered governance and legal system that does not effectively respond to violent crime, including gender-based violence, on the other hand.”⁵

In particular, the case deals with the disappearance, mistreatment and subsequent death of the three young women Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez. The Court declared Mexico responsible for violating the rights established in arts 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 19 (Rights of the Child) and 25 (Right to Judicial Protection) of the American Convention on Human Rights (hereinafter the American Convention or ACHR),⁶ in relation to the obligations established in arts 1 (1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) American Convention, together with a failure to comply with the obligations arising from article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Convention of Belém do Pará or CBdP).⁷

The decision is noteworthy because it strengthens the protection of women under the American Convention. In the following, the main issues of the judgment will be outlined. In order to establish a general context, the article starts with a brief introduction to the topic of violence against women (Part II.) and the inter-American system of human rights protection (Part III.). Then it enters into the discussion of the judgment, starting with a summary of the facts of the case (Part IV.),

⁵ Report of the Special Rapporteur Yakin Ertürk on Violence against Women, its Causes and Consequences, Mission to Mexico, “Integration of the Human Rights of Women and a Gender Perspective: Violence against Women”, Doc. E/CN.4/2006/61/Add.4 of 13 January 2006, para. 7.

⁶ American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978), UNTS Vol. 1144 No. 17955 (Pact of San José).

⁷ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995), *ILM* 33 (1994), 1534 et seq.

followed by the question of the applicability of the Convention of Belém do Pará (Part V.). The subsequent parts cover some substantive issues of the case, which are positive obligations of states in cases of violence against women⁸ (Part VI.), discrimination and violence against women (Part VII.) and violence against women as torture (Part VIII.). The article ends by pointing to the importance of the reparations in this case (Part IX.) and giving a general conclusion (Part X.).

II. Violence against Women

Women all around the world are affected by gender-based violence. Even though a woman may not be a victim herself, gender-based violence shapes all women's lives and affects their choices.⁹ The Convention of Belém do Pará defines violence against women "as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."¹⁰ Violence against women appears in various forms, it ranges from more subtle dimensions to unspeakable atrocities as witnessed in the case under discussion. Violence does not know cultural or national borders, age, economic status, ethnicity or political structures and can be found in a multitude of roots.¹¹ Discriminatory practices are based on the idea of female inferiority or male superiority and are often embedded in a culture, tradition and history of subjugation of women. Violence against women is one of the grossest and most common forms of female subjugation. Human rights are formulated in a gender-neutral way and theoretically are defined and applied as belonging to all persons, all human beings. Furthermore, the sex of a person is included within the prohibition of non-discrimination. However, reality is different. In practice human rights are imbedded in social contexts and in-

⁸ Gender-based violence and violence against women will be used interchangeably, although the former also could include violence against men.

⁹ C. Medina, "The Inter-American Commission on Human Rights and Women, with Particular Reference to Violence", in: M. Castermans/ F. van Hoof/ J. Smith (eds), *The Role of the Nation-State in the 21st Century*, 1998, 117 et seq. (118).

¹⁰ Article 1 Convention of Belém do Pará, see note 7.

¹¹ J.L. Ulrich, "Confronting Gender-Based Violence With International Instruments: Is a Solution to the Pandemic Within Reach?", *Ind. J. Global Legal Stud.* 7 (1999-2000), 629 et seq. (631).

teract with national laws, both of which are often gender-biased.¹² As a result, in order to deal with violence against women effectively, it is necessary not only to establish legal rules that prescribe the equality of men and women but to bring about a change within the cultural patterns and social structures that allow discrimination of women.¹³

Feminist legal scholars have long argued that one of the main problems for the advancement of women is the so called public-private divide. The theory is based on the assumption that men traditionally dominate the public sphere of a state, which is seen as area of power and authority. Women, on the other hand, are often relegated to the private realm (family and home).¹⁴ As a result, women more often suffer abuse at the hands of a private person than a public official. States, of course, do commit human rights violations against women. Nonetheless, the great majority of women endure violations of human rights in private settings.¹⁵ Traditionally international law does not regulate the private realm. The classic conception of human rights reflected the state-based nature of international law. The main focus was to restrict a state's power in order to protect the individual from abuses of his or her rights by the state.¹⁶ This focus confined the application of human rights to the public sphere and overlooked harms that most commonly affected women.¹⁷ Hence, it was argued that the public-private divide

¹² D.Q. Thomas/ M.E. Beasley, "Domestic Violence as a Human Rights Issue", *HRQ* 15 (1992), 36 et seq. (38-39).

¹³ C. Medina, "Derechos Humanos de la Mujer: ¿Dónde estamos ahora en las Américas?", 1 et seq. (10), see <http://www.cd.h.uchile.cl/Libros/18ensayos/Medina_DondeEstamos.pdf>, Spanish translation, original title: C. Medina, "Human Rights of Women: Where are we now in the Americas?", in: A. Manganas (ed.), *Essays in Honour of Alice Yotopoulos-Marangopoulos*, 2003, 907 et seq.; see also IACHR, "Report on the Situation of Human Rights in Mexico", OEA/Ser.L/V/II.100 Doc. 7 Rev. 1 of 24 September 1998, chapter IX.

¹⁴ B. Rudolf/ A. Eriksson, "Women's Rights under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence", *International Journal of Constitutional Law* 5 (2007), 507 et seq. (522).

¹⁵ Ulrich, see note 11, 636.

¹⁶ A. Edwards, "The 'Feminizing' of Torture under International Human Rights Law", *LJIL* 19 (2006), 349 et seq. (356).

¹⁷ H. Charlesworth, "What are 'Women's International Human Rights'?", in: R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, 1994, 58 et seq. (71).

systematically privileges the realities of men and disadvantages or marginalizes women.¹⁸

Yet a shift from the traditional understanding of human rights has taken and is taking place. The international responsibility of states has been widened. Actions perpetrated by non-state actors are increasingly falling within the scope of human rights due to developments with regard to the concept of positive obligations and the process of re-interpretation of human rights.¹⁹ Attention and consciousness to the specific problems of women has also gradually been raised. This can be attributed to mainstreaming gender perspectives and women's activism, but also to world wide media coverage of atrocities committed against women.²⁰ New mechanisms for the advancement of the status of women were established, such as the UN Commission on the Status of Women. Conferences dealing with women's problems were held,²¹ conventions especially dealing with women's concerns were adopted²² and the United Nations General Assembly even declared the UN Decade for Women between 1976 and 1985.²³ Moreover, international courts and tribunals have become increasingly responsive to women's issues

¹⁸ On the topic of the public-private divide, see: C. Romany, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law", in: Cook, see note 17, 85 et seq. (96); it has to be mentioned that the feminist theory of a public-private dichotomy was also criticised. It is argued that it is a western construct and itself based on stereotypes, see Charlesworth, see note 17, 69; Edwards, see note 16, 352-358.

¹⁹ J. Marshall, "Positive Obligations and Gender-based Violence: Judicial Developments", *International Community Law Review* 10 (2008), 143 et seq. (147).

²⁰ For example the atrocities committed against women in Rwanda and the Balkans.

²¹ Cf. e.g. World Conferences on Women held in Mexico 1975, Copenhagen 1980, Nairobi 1985 and Beijing 1995.

²² Cf. e.g. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), UNTS Vol. 1249 No. 20378; Convention of Belém do Pará, see note 7; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005), OAU Doc CAB/LEG/66.6, reprinted in: *African Human Rights Law Journal* 1 (2001), 53 et seq. (Maputo Protocol).

²³ Cf. World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace Report, 1986, Doc. A/CONF.116/28/Rev. 1; Thomas/ Beasley, see note 12, 44.

and have begun to recognise violence against women as human rights violation.²⁴ Nowadays, international law has established state obligations to prevent and punish violence perpetrated by private actors. The concept of positive obligations facilitates the crossing of the public-private divide. Cases brought before international tribunals and quasi-judicial bodies show that gender-bias can be overcome by recognising that states have positive obligations, i.e. are obliged to enforce protective measures.²⁵ However, although there has been a significant development concerning women's rights,²⁶ violence against women is still widespread and continues to persist. Unfortunately it remains widely accepted and is considered less severe than official state-inflicted violence.²⁷ There is still a significant amount of work to be done to achieve the ultimate goal of a life free of violence for women all over the world.

In the American context, the plight of women was not taken much account of for many years.²⁸ In the 1990s, following the general trend of gender-mainstreaming, the situation improved and the Inter-American Commission on Human Rights (hereinafter the Commission or IACHR) started to include the issue of abuses against women in its agenda.²⁹ The Commission began using its mandate to examine human

²⁴ Cf. Marshall, see note 19.

²⁵ See Rudolf/ Eriksson, see note 14, 522-523; such cases are for example: ECtHR, *Opuz v. Turkey*, Application no. 33401/02 of 9 June 2009; UN Committee on the Elimination of Discrimination against Women, "Views of the Committee on the Elimination of Discrimination against Women under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women", Communication No. 2/2003 *Ms AT v. Hungary* of 26 January 2005, GAOR 60th Sess. Suppl. 38, 80.

²⁶ For the purpose of this article, women's rights are understood as all rights that deal with particular disadvantages for women, see Charlesworth, see note 17, 66.

²⁷ R. Copelon, "Intimate Terror: Understanding Domestic Violence as Torture", in: Cook, see note 17, 116 et seq. (116).

²⁸ C. Grossman, "The Inter-American System: Opportunities for Women's Rights", *American University Law Review* 44 (1994-1995), 1305 et seq. (1305); Medina, see note 9, 117.

²⁹ The General Assembly of the Organization of American States requested the IACHR to revise the situation of women in the American continent via Resolution AG/RES.1112 (XXI-0/91), OEA, Fortalecimiento de la OEA en material de derechos humanos, AG/RES.1112 (XXI-0/91), in: OEA, *Actas y Documentos: Volumen I*, OEA/Ser. P/XXI.O.2 (79) of 20 August 1991.

rights situations in countries to protect the rights of women.³⁰ A Special Rapporteur on Women was appointed and the Commission started to include a special section on women in country and annual reports.³¹ Moreover, the Commission commenced to examine individual complaints relevant for human rights of women.³² However, the role of the Inter-American Court of Human Rights (hereinafter the Court or IACtHR) dealing with women's issues, especially gender-based violence may be described as "modest".³³ It is true that the Commission did not bring a lot of cases before the Court dealing especially with human rights of women.³⁴ However, most of the few cases that potentially could have had an impact on women's rights that the IACtHR was allowed to deal with, were not treated adequately.³⁵ Nevertheless, more recent cases, like the judgment of the IACtHR in the case *Miguel Castro-Castro Prison v. Peru*,³⁶ signalled a positive development regarding gender sensibility, although the cases were also criticised for having serious deficiencies in their reasoning.³⁷

³⁰ See Medina, see note 13, 5-7; for information on the work of the Commission with regard to women, see: E.A.H. Abi-Mershed, "El sistema interamericano de Derechos Humanos y los derechos de la mujer: avances y desafíos", in: C. Martín/ D. Rodríguez-Pinzón/ J.A. Guevara (eds), *Derecho Internacional de los Derechos Humanos*, 2004, 481 et seq.

³¹ See Medina, see note 9, 124-128.

³² For example: IACHR, *Maria Da Penha Maia Fernandes vs. Brasil*, Case 12.051, Report No. 54/01, Annual Report of the Inter-American Commission of Human Rights 2000, OEA/Ser.L/V/II.111 Doc. 20 Rev. of 16 April 2001; IACHR, *Raquel Martín de Mejía v. Peru*, Case 10.970, Report No. 5/96, Annual Report of the Inter-American Commission on Human Rights 1995, OEA/Ser.L/V/II.91 Doc. 7 Rev. of 28 February 1996.

³³ K.I. Quintana Osuna, "Recognition of Women's Rights before the Inter-American Court of Human Rights", *Harvard Human Rights Journal* 21 (2008), 301 et seq. (301).

³⁴ See Medina, see note 13, 5-7.

³⁵ P. Palacios Zuloaga, "The Path to Gender Justice in the Inter-American Court of Human Rights", *Texas Journal of Women and the Law* 17 (2007-2008), 227 et seq. (228).

³⁶ IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment of 25 November 2006, Series C No. 160.

³⁷ See Palacios Zuloaga, see note 35, 228-229; M.A. Cárdenas Cerón/ N.E. Lozada Pimiento, "Estrategias de litigio de la Convención de Belém do Pará ante la Corte Interamericana de Derechos Humanos", in: Departamento de Publicaciones de la Universidad Externado de Colombia (ed.), *Apuntes sobre el Sistema Interamericano*, 2008, 83 et seq. (footnote 31).

This article analyses the most recent judgment of the IACtHR, which specifically deals with gender issues. The judgement touches on various points of interest. At its heart lies the problem of gender-based violence as a human rights violation when committed by private individuals. The Court explicitly and extensively lays down positive obligations of states with regard to violence against women committed by private individuals. It is noteworthy that for the first time the court considers a case concerning violence against women as its main topic. Considerations based on gender-issues form a central part of the judgment. It is also worth mentioning that the Court takes into account and puts emphasis on the general situation of women in Ciudad Juárez. It establishes the existence of a culture of discrimination and observes that women in Ciudad Juárez suffer from collective violence. That leads the Court to the conclusion that gender-based violence constitutes a form of discrimination. The gender-sensitivity of the Court can also be noted in the comprehensive catalogue of reparations in the judgment. However, the judgment also leaves open some points of critique, for example the failure to qualify the actions perpetrated against the victims as torture. Furthermore, the application of the Convention of Belém do Pará can be seen in a critical way.

III. The Inter-American System for the Protection and Promotion of Human Rights

To begin with, a short introduction to the inter-American system for the protection and promotion of human rights shall be given.

The inter-American system comprises a combination of human rights norms and supervisory organs. Human rights norms are primarily derived from two different legal sources. One system is based on the 1948 Charter of the Organization of American States (hereinafter the OAS Charter)³⁸ and the American Declaration of the Rights and Duties of Man (hereinafter the American Declaration)³⁹ of the same year. The other system is built on the American Convention. The Charter-based

³⁸ Charter of the Organization of American States (signed 30 April 1948, entered into force 13 December 1951), UNTS Vol. 119 No. 1609.

³⁹ American Declaration of the Rights and Duties of Man (approved 10 December 1948), printed in: *AJIL* 43 (1949), 133 et seq.

system is binding for all Member States of the OAS,⁴⁰ i.e. for all independent American states. The OAS Charter itself only contains a few provisions referring to human rights.⁴¹ Therefore, the American Declaration is the standard against which all OAS states are measured. It was adopted as a conference resolution, a non-legally binding instrument. However, subsequently the status of the Declaration was interpreted differently by the Inter-American Commission on Human Rights.⁴² Nowadays it is seen as the interpretative instrument, which defines the term “fundamental rights of the individual” set out in article 3 (l) OAS Charter.⁴³ The American Convention, on the other hand, contains a le-

⁴⁰ The Organization of American States was established in 1948 and constitutes an international organization. The Member States are all sovereign states of the Americas; for an overview on the OAS, see J.M. Arrighi, “Organization of American States (OAS)”, in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, 2008, online edition, <www.mpepil.com>.

⁴¹ Article 3 para. 1 OAS Charter, see note 38, states:
“Article 3 OAS Charter,

The American States reaffirm the following principles: ...

l) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex;”

⁴² Cf. IACHR, “*Baby Boy*”, Resolution 23/81, Case 2141 (United States), OEA/Ser.L/V/II.54 Doc. 9 Rev. 1 of 16 October 1981, paras 16 and 17.

“16. As a consequence of articles 3 i, 16, 51 e, 112 and 150 of this Treaty [the OAS Charter], the provisions of other instruments and resolutions of the OAS on human rights, *acquired binding force*. Those instruments and resolutions approved with the vote of U.S. Government, are the following:

- *American Declaration of the Rights and Duties of Man* (Bogotá, 1948)
- Statute and Regulations of the IACHR 1960, as amended by resolution XXII of the Second Special Inter-American Conference (Rio de Janeiro, 1965)
- Statute and Regulations of IACHR of 1979-1980.

17. Both Statutes provide that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted with the competence to promote the observance and respect of human rights. For the purpose of the Statutes, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights (San José, 1969). (Articles 1 and 2 of 1960 Statute and article 1 of 1979 Statute).” (emphasis added).

⁴³ T. Buergenthal/ D. Shelton/ D.P. Stewart, *International Human Rights in a Nutshell*, 2009, 262; for a discussion on the normative character of the American Declaration, see also C.M. Cerna, “Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man”,

gally binding set of rules and obligations only for States Parties.⁴⁴ Ratification of the American Convention is not required for membership in the OAS.⁴⁵

The two main supervisory organs involved are the already mentioned Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. The Commission is an organ of both the OAS Charter and the American Convention. It was established in 1959 in order to promote observance and respect for human rights. It is composed of seven independent experts, who are selected by the OAS Council upon government nomination. The right to lodge complaints to the Commission is not limited to victims of human rights violations. Any person, group of persons or non-governmental entity may submit a petition containing a complaint of an alleged human rights violation. Additionally, the Commission can act *proprio motu*.⁴⁶ The Commission has a wide mandate in the field of human rights protection. Article 1 (1) Statute of the Commission⁴⁷ lays down that the Commission was “created to promote the observance and defense of human rights and to serve as a consultative organ of the Organization in this matter.” The functions and powers of the Commission include, *inter alia*, developing

Pennsylvania Journal of International Law 30 (2008-2009), 1211 et seq.; T. Buergenthal, “The American Human Rights Declaration: Random Reflections”, in: K. Hailbronner/ G. Ress/ T. Stein (eds), *Staat und Völkerrechtsordnung: Festschrift für Karl Doebring*, 1989, 133 et seq.; C.M. Grossmann, “American Declaration of the Rights and Duties of Man (1948)”, in: Wolfrum, see note 40; IACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of 14 July 1989, Series A No. 10.

⁴⁴ See Buergenthal/ Shelton/ Stewart, see note 43, 257-258.

⁴⁵ Unlike the European system, where membership in the Council of Europe requires adherence to the European Convention on Human Rights; Council of Europe, “Convention for the Protection of Human Rights and Fundamental Freedoms” (signed 4 November 1950, entered into force 3 September 1953), UNTS Vol. 213 No. 2889, (hereinafter the ECHR); see also Cerna, see note 43, 1213.

⁴⁶ Arts 23 and 24 Rules of Procedure of the Inter-American Commission on Human Rights (approved October/November 2009), see <<http://www.cidh.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm>>.

⁴⁷ Statute of the Inter-American Commission on Human Rights (approved October 1979) in: Inter-American Court of Human Rights (ed.), *Basic Documents Pertaining to Human Rights in the Inter-American System*, 2007, 163 et seq.

awareness of human rights, issuing recommendations to OAS Member States, preparing reports or asking governments to prepare reports on measures they adopted, responding to inquiries by Member States, submitting annual reports to the OAS General Assembly and acting on individual petitions and other communications.⁴⁸ There are some differences in procedure for cases against State Parties and non-State Parties to the American Convention.⁴⁹ However, in practice, the Commission processes applications under both procedures in a similar way. Yet one big difference has to be pointed out: the access to the IACtHR.⁵⁰ That option is limited to complaints under the American Convention. After the Commission establishes that a human rights violation occurred, it transmits a preliminary report including remedial recommendations to the state concerned. If the state does not comply with the recommendations set forth, the Commission or the state may then submit the case to the Court.⁵¹

The Court was created by the American Convention and constitutes an autonomous judicial organ.⁵² In addition to the ratification of the American Convention, states have to accept the compulsory jurisdiction of the Court. The Court is composed of seven judges, who have to be “jurists of the highest moral authority and of recognized competence in the field of human rights”⁵³ eligible to the highest judicial functions of their respective states.⁵⁴ The Court has advisory and contentious ju-

⁴⁸ Cf. arts 18-20 Statute of the IACHR, see note 47, and arts 41, 44-51 ACHR, see note 6; C. Cerna, “The Inter-American Commission on Human Rights: its Organization and Examination of Petitions and Communications”, in: D.J. Harris/ S. Livingstone (eds), *The Inter-American System of Human Rights*, 1998, 65 et seq. (74-75).

⁴⁹ Cf. also arts 51-52 Rules of Procedure of the Commission, see note 46.

⁵⁰ See Cerna, see note 48, 77.

⁵¹ Article 51 ACHR, see note 6; for an introduction to the Inter-American Commission on Human Rights and further references, see C.M. Grossman, “Inter-American Commission on Human Rights (IACCommHR)”, in: Wolfrum, see note 40.

⁵² A.A. Cañado Trindade, “The Operation of the Inter-American Court of Human Rights”, in: Harris/ Livingstone, see note 48, 133 et seq. (133).

⁵³ Article 52 ACHR, see note 6.

⁵⁴ At the time of the judgment the Court was composed of the following judges: C. Medina Quiroga (President), D. García-Sayán (Vice-President), S. García Ramírez, M.E. Ventura Robles, L.A. Franco, M. May Macaulay, R. Abreu Blondet. The judges García Ramírez and L.A. Franco did not participate in the judgment, the former because he notified his disqualifica-

jurisdiction. Furthermore, it can adopt provisional measures. Unlike the European system for the protection of human rights, some other Inter-American treaties confer jurisdiction on the Court.⁵⁵ An interesting procedural question of the present case concerned the direct applicability of the Convention of Belém do Pará, which was questioned by Mexico and will be discussed below.⁵⁶ It is important to note that individuals can only lodge petitions with the Commission, not directly with the Court. The Commission decides whether a claim is submitted to the Court, i.e. it controls the docket of the Court.⁵⁷ Once a case is presented, the Commission becomes a party during the Court proceedings representing the victims' side. Individuals can take part through a chosen representative. Judgments of the Court are binding for the states concerned and the American Convention grants wide powers to the Court with regard to reparations.⁵⁸

In the inter-American context, the Inter-American Commission of Women⁵⁹ should also be mentioned. It is a specialized organisation of the OAS. Its main objective is the advancement of the situation of women. The Inter-American Commission of Women is a forum to generate and endorse policies to promote and protect women's rights and to advance gender equality. Furthermore, it aims at assisting OAS Member States in their "efforts to ensure full exercise of civil, political, economic, social, and cultural rights that will make possible equal participation by women and men in all aspects of society, so that women and men will share, fully and equally, both the benefits of development and responsibility for the future."⁶⁰ The Inter-American Commission

tion and the latter because of *force majeure*. R.M. Álvarez González was appointed judge *ad hoc*.

⁵⁵ See Buergethal/ Shelton/ Stewart, see note 43, 321.

⁵⁶ See Part V.

⁵⁷ It should be mentioned that the procedure changed in 2001. Now the Commission refers cases to the Court, unless the absolute majority of the members of the Commission decide against such referral, article 45 para.1 Rules of Procedure of the Commission, see note 46.

⁵⁸ See Part IX.; for an introduction to the Inter-American Court of Human Rights and further references, see G.L. Neumann, "Inter-American Court of Human Rights (IACtHR)", in: Wolfrum, see note 40.

⁵⁹ According to its Spanish abbreviation: Comisión Interamericana de Mujeres.

⁶⁰ Article 2 Statute of the Inter-American Commission of Women, see <<http://portal.oas.org/LinkClick.aspx?fileticket=Ge7RZWJCibk%3d&tabid=1670&language=en-US>>.

of Women is noteworthy because it was already established in 1928 dealing especially with women's concerns. However, it does not possess any supervisory powers, unlike the IACHR.⁶¹

IV. Facts of the Case

In order to enter into the specific subject of the case, it is necessary to start with a short summary of the comprehensive facts of the case, dividing them into the context,⁶² the specific facts⁶³ and the partial acceptance of responsibility by the state.⁶⁴

The applicants – the mothers of the three victims – complained before the IACtHR of the failure of Mexico to fulfil its obligations to provide for protection and effective investigation of the abduction, mistreatment and subsequent murder of their daughters.

To begin with, the Court considered it necessary to analyse the context of violence against women in Ciudad Juárez surrounding the individual facts of the case. The Court considered topics such as the phenomenon of the increased rate of women's murders in Ciudad Juárez, gender-based violence, the common characteristics of the victims, the alleged femicide, the irregularities during the investigations of the crimes against women, the general discriminatory attitude of the authorities and the lack of clarification of the crimes. Thereby the Court concluded that a significant increase of women's homicides could be noted in Ciudad Juárez from 1993 onwards. Although the numbers provided were unreliable and the exact numbers could not be established, the Court accepted as proven that there were at least 264 victims up to 2001 and 379 up to 2005. In a substantial number of cases the victims showed similar characteristics – they were young women between 15 and 25 years, underprivileged and working in so called “maquilas” or they were students. However, the most decisive factor was the victim's sex.⁶⁵ Moreover, the method of the crimes showed similar characteristics and patterns. The extremely brutal circumstances of the killings, including rape and other kind of sexual abuse, torture and mutila-

⁶¹ See Medina, see note 9, 117.

⁶² See paras 113 et seq., *Case of González et al. (“Cotton Field”) v. Mexico*, see note 2.

⁶³ See paras 165 et seq., *ibid.*, see note 2.

⁶⁴ See paras 20 et seq., *ibid.*, see note 2.

⁶⁵ Para. 133, *ibid.*, see note 2.

tion, were considered especially worrying by the Court. The Court concluded that the crimes perpetrated in Ciudad Juárez from 1993 onwards have been influenced by a culture of discrimination against women, as accepted by Mexico itself. This eventually has generated a climate of impunity for the perpetrators.

The specific facts of the case refer to the disappearance, mistreatment and subsequent death of three young women – two of them under 18 –, Claudia Ivette González (20), Laura Berenice Ramos Monárrez (17) and Esmeralda Herrera Monreal (15). The dead bodies of the three young women were found on 6 November 2001 in an abandoned cotton field in Ciudad Juárez. The common characteristics of most women's murders indicated above also apply to the three victims: they were young, underprivileged and were workers or students. One day the young women left their respective homes, disappeared and eventually were found days or weeks after their disappearance with signs of sexual abuse and other mistreatment.

The Court established that all girls were held captive before their death. Due to the deficiencies in the initial stages of the investigation of the crime, the Court could only determine with certainty that Esmeralda Herrera Monreal “must have endured such cruelty that it had to have caused her severe physical and mental suffering before she died.”⁶⁶ With regard to Claudia Ivette González and Laura Berenice Ramos Monárrez the Court was unable to ascertain the exact abuse the young women were suffering due to the deficiencies in the state's investigation and the subsequent passing of time. However, the Court took into account that the two girls must have sustained at least severe psychological suffering during their captivity. By the way the victims were found, namely half naked, the Court further concluded a high possibility the girls also suffered from sexual violence or other sexual abuse. Additionally, the Court took into account the previously established context of a multiplicity of analogous cases, most of which showed signs of sexual violence. It was accepted as proven that the girls suffered severe physical ill-treatment before they died. Very probably the girls also suffered sexual abuse or violence.⁶⁷

In the days between the disappearance and the discovery of the dead bodies, the families of the victims sought help from the police and local authorities. The response of the authorities was markedly deficient. The

⁶⁶ Para. 219, *ibid.*, see note 2; *inter alia*, her lower body was exposed and her right breast was missing.

⁶⁷ Para. 230, *ibid.*, see note 2.

authorities reacted with indifference, trying to play down the situation. The families found themselves confronted with prejudice and stereotypes against women. No concrete actions to find the girls alive were taken.⁶⁸ The investigations both after the disappearance and the discovery of the bodies were deficient and ineffective, which is comprehensively analysed by the Court.

Finally, it should be mentioned that Mexico partially accepted international responsibility concerning some facts and allegations. In general terms, within the context of the crimes, Mexico admitted irregularities which happened in the so-called “first stage” of the investigations of the homicides between 2001 and 2003. The state also accepted that due to these irregularities the psychological integrity of the victims’ families suffered damage. It is noteworthy that Mexico further acknowledged that the murders were influenced by a culture of gender-based discrimination existent in Mexico.⁶⁹ Mexico also assumed its duty to repair the accepted violations. As a result the Court endorsed the recognition of Mexico’s responsibility and declared that the controversy over arts 5, 8 and 25 American Convention to the detriment of the victims’ families had ceased. However, the IACtHR clarified and pointed out that the state accepted its international responsibility in a very general way. Later arguments concerning specific facts of the case contradicted the general acknowledgement of some facts. Therefore, the controversy continued with regard to all other alleged violations.

V. The State’s Preliminary Objection: The Direct Application of the Convention of Belém do Pará

Before entering into the substantive matters of the judgment, the Court was confronted with a preliminary objection of the state. Mexico contended the jurisdiction *ratione materiae* of the Court to apply the Convention of Belém do Pará. The dispute centres on the ambivalent formulation of article 12 of the Convention. The provision reads as follows:

“Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the *Inter-American Commission on*

⁶⁸ Para. 278, *ibid.*, see note 2.

⁶⁹ Para. 129, *ibid.*, see note 2.

Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such *claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.*" (emphasis added)

As can be seen, the text solely mentions the Inter-American Commission on Human Rights as competent to accept petitions. Therefore, the principal question pertained to the requirement of an express reference of the Court in order to establish its jurisdiction.⁷⁰ In order to solve the issue the Court referred to the Vienna Convention on the Law of Treaties⁷¹ and its provisions on the interpretation of treaties.⁷²

A literal understanding of article 12 Convention of Belém do Pará, at first sight, seems to confer competence in contentious cases exclusively to the Commission. Neither the Court is mentioned nor its Statute and Rules of Procedure.⁷³ In addition to that, article 11 grants express competence to the Court to issue advisory opinions.⁷⁴ The two articles seem to provide for two different forms of jurisdiction: one for the Commission in contentious cases, the other one for the Court with regard to advisory opinions. However, article 12 does contain a refer-

⁷⁰ Article 62 ACHR, see note 6, lays down the requirement of an express jurisdiction. According to the provision there should exist either a special declaration or a special agreement by the state.

⁷¹ Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980), UNTS Vol. 1155 No. 18232.

⁷² The Court already resorted to arts 31 and 32 of the Vienna Convention on the Law of Treaties, see note 71, in various cases; IACtHR, *Case of Ivcher-Bronstein v. Peru*, Competence, Judgment of 24 September 1999, Series C No. 54, para. 38; IACtHR, *Case of Blake v. Guatemala*, Interpretation of the Judgment of Reparations and Costs, Judgment of 1 October 1999, Series C No. 57, para. 21.

⁷³ Organization of American States, "Statute of the Inter-American Court of Human Rights", General Assembly Resolution AG/Res 448 (IX-O/79) (La Paz 31 October 1979); Rules of Procedure of the Inter-American Court of Human Rights (approved November 2009), see <<http://www.cidh.oas.org/Basicos/English/RulesIACourtNov2009.pdf>>.

⁷⁴ Article 11 Convention of Belém do Pará, see note 7, reads as follows: "The States Parties to this Convention and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights advisory opinions on the interpretation of this Convention."

ence to the norms and procedures established by the ACHR and the Statute and Rules of Procedure of the Commission. The pertinent provisions are found in arts 44 to 51 American Convention, article 19 of the Commission's Statute and arts 26 to 50 of the Commission's Rules of Procedure.⁷⁵ These provisions lay down the possibility of the Commission to bring claims before the Court. The contentious issue, therefore, was whether the said reference constituted an express acceptance of the Court's jurisdiction by the state or not. According to the Court the literal meaning of the provision is clear and as a result the direct application of article 7 Convention of Belém do Pará is possible.⁷⁶

Furthermore, the Court established that the provision must be interpreted as a whole. Therefore, other criteria of interpretation laid down in article 31 Vienna Convention on the Law of Treaties, such as, *inter alia*, the object and purpose of a treaty, systematic and teleological arguments and the principle of effectiveness, must also be considered. The systematic interpretation basically contained two controversial issues. First it was argued by the state that there exist many human rights instruments that do not establish a mechanism for the submission of individual petitions to a court or tribunal. Sometimes protocols establishing *ad hoc* committees are adopted to deal with individual petitions. These committees display similar structures to the Commission, i.e. they are of a quasi-judicial nature. They do not constitute a court or tribunal. Hence, a judicialisation of the system is not a necessary requirement.

To answer that contention the Court made a comparison between different systems established in the inter-American system. It established that three different categories of treaties can be distinguished. The first does not make any reference to the possibility of individual petitions. The second contains such a reference but is restricted to certain rights *ratione materiae*. The Convention of Belém do Pará has to be examined within the third category of treaties that allow for individual petitions in general terms. The Inter-American Convention to Pre-

⁷⁵ Especially article 51 para. 1 American Convention, see note 6, article 19 paras b.) and c.) Statute of the Commission, see note 47, and article 44 para. 3 and article 45 Rules of Procedure of the Commission, see note 46, are decisive.

⁷⁶ Paras 35 et seq., *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

vent and Punish Torture⁷⁷ and the Inter-American Convention on Forced Disappearance of Persons⁷⁸ form part of this category.

Both conventions contain different references in respect of the admissibility of individual petitions and were already applied by the Court. The Inter-American Convention on Forced Disappearance of Persons does not make any reference to the Court but mentions the,

“procedures established in the American Convention on Human Rights and ... the Statute and Regulations of the Inter-American Commission on Human Rights and ... the *Statute and Rules of Procedure of the Inter-American Court of Human Rights*.” (emphasis added)⁷⁹

The Inter-American Convention to Prevent and Punish Torture provides in its article 8 that,

“... [a]fter all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the *international fora* whose competence has been recognized by that State.” (emphasis added)

The state argued that these Conventions provide for a different wording than the Convention of Belém do Pará and therefore, the criteria used by the Court to apply these Conventions are not applicable. The IACtHR was not of the same opinion. It held that article 8 of the Inter-American Convention to Prevent and Punish Torture was even less explicit than article 12 of the Convention of Belém do Pará.⁸⁰

The second issue concerned the extent of the reference in said article 12 to the American Convention. The state argued that it only comprises Section 4 of Chapter VII American Convention. These provisions lay down the procedure for individual petitions before the Commission, which according to the state should not be confused with the fact that the Commission may bring claims before the IACtHR. The Court did

⁷⁷ Inter-American Convention to Prevent and Punish Torture (done 9 December 1985, entered into force 28 February 1987), in: *ILM* 25 (1986), 519 et seq.

⁷⁸ Inter-American Convention on Forced Disappearance of Persons (done 9 June 1994, entered into force 28 March 1996), in: *ILM* 33(1994), 1529 et seq.

⁷⁹ Article XIII Inter-American Convention on Forced Disappearance of Persons, see note 78.

⁸⁰ Paras 43 et seq., *Case of González et al. (“Cotton Field”) v. Mexico*, see note 2.

not agree with the state's line of reasoning. It established that there were no indications for a partial application of article 51 American Convention.⁸¹

Further arguments concerned the purpose of the respective norm. Whereas the state acknowledged that the purpose of the Convention of Belém do Pará constitutes the total elimination of gender-based violence, it pointed out that this cannot be mistaken for the judicialisation of the system. The Court, on the other hand, held that the purpose of article 12 of the Convention of Belém do Pará was to enhance the right to an individual petition before an international institution and thus to establish the greatest judicial protection possible. Therefore, the purpose of the Convention of Belém do Pará also speaks for a direct application.⁸² The Court further considered the preparatory works of the Convention of Belém do Pará, which were deemed insufficient for changing the Court's opinion as they are only a subsidiary method of interpretation. Finally, the Court established that the application of the Convention of Belém do Pará in the case of Miguel Castro-Castro Prison, although without explication, can be seen as equivalent to declaring its jurisdiction.⁸³ Eventually, after carefully and comprehensively considering all arguments, the Court came to the "clear" conclusion that the Convention of Belém do Pará is applicable.

With regard to the application of the Convention of Belém do Pará an interesting situation emerged. Both lines of argumentation seem reasonable and possible. Both the Court and the state have valid arguments pro and contra its application. Neither interpretation seems to be obviously incorrect. Both interpretations have more and less convincing parts. Also in literature there have been different points of view.⁸⁴ Be

⁸¹ Paras 53 et seq., *ibid.*, see note 2; article 51 para. 1 American Convention, see note 6, lays down that "[i]f, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration."

⁸² Paras 59 et seq., *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

⁸³ Paras 74 et seq., *ibid.*, see note 2.

⁸⁴ Against an application, see Palacios Zuloaga, see note 35, 241-242; J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2003, 91-92; for an application, see Medina, see note 13, 4;

that as it may, in general the result of the Court must be endorsed. It had two possibilities to decide and chose the one more favourable for the victims. However, there might be one point of critique. There was one argument, which, in the view of the author, was perhaps dismissed too easily by the Court: the argument of the *travaux préparatoire*. It is arguable whether the result of the interpretation was as clear as the Court established it in the judgment.

Therefore, the *travaux préparatoire*, as a subsidiary method of interpretation in case of doubt, might give the decisive argument. The *travaux préparatoire* definitely speak in favour of the argument of non-application. The draft document done during the preparation of the Convention of Belém do Pará contained an article 15, which explicitly laid down the jurisdiction of the IACtHR.⁸⁵ Eventually the draft article was not accepted by the states and as a result is not contained in the final document. Apart from that point of critique, the interpretation of the Court is comprehensible and to be welcomed.

Yet, with regard to the direct application of the Convention of Belém do Pará, one could ask the question whether there is an added value to the direct application of the Convention. Could not the same result be achieved by simply using the Convention of Belém do Pará to interpret the rights in question of the American Convention? In other words: the application of the Convention may not be necessary since the American Convention already provides for the same protection. One has to bear in mind that article 7 Convention of Belém do Pará does not lay down new rights or obligations but prescribes state poli-

Cárdenas Cerón/ Lozada Pimiento, see note 37; C. Medina Quiroga/ C. Nash Rojas, *Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección*, 2007, 61.

⁸⁵ Article 15 Draft Text for the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women: "Any State Party may, at any time and in accordance with the norms and procedures stipulated in the American Convention on Human Rights, declare that it accepts as obligatory, automatically and without any special convention, the jurisdiction of the Inter-American Court of Human Rights over all the cases relating to the interpretation or application of the present Convention; Inter-American Commission of Women", VI. Extraordinary Assembly of Delegates, *Initial Preliminary Text and Last Version of the Draft Text for the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Item 1), OEA/Ser.L/II.3.6 CIM/Doc.9/94 of 13 April 1994, 16, cited from para. 69 *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

cies in order to prevent, punish and eradicate gender-based violence. It may be true that the same result could be achieved without directly applying the Convention of Belém do Pará. However, there are several reasons why a direct application of the Convention is beneficial and desirable.

First of all, the Convention of Belém do Pará is an expression of the latest tendencies concerning human rights of women. It establishes a gender approach to human rights which concentrates on the roots and conditions that prevent women from enjoying their human rights.⁸⁶ Moreover, it is one of the few human rights instruments that clearly apply to violations committed by non-state actors. The Convention establishes clear lines of obligations that a state has to assume, especially with the aim to produce structural changes within a state. Therefore, it helps to clarify the situation and makes it easier for women to complain. Human rights are often read without being conscious of specific implications that an interpretation might have for women.⁸⁷ Moreover, the political and symbolic weight of a condemnation of a state for violating its specific obligations to prevent, punish and eradicate gender-based violence also has to be taken into account. Last but not least, the violation of the Convention of Belém do Pará becomes part of the operative parts of a judgment if applied directly. This does give an application of the Convention of Belém do Pará a judicial weight. The importance of a legally binding and judicable instrument cannot be underestimated. Violence against women and gender-based discrimination unfortunately are still serious and widespread problems in the Americas. An effective application of the Convention of Belém do Pará in combination with the rights established in the American Convention, therefore, seems fundamental.

Finally, it should be mentioned that the victim's representatives further claimed the application of arts 8 and 9 Convention of Belém do Pará. This claim was correctly rejected by the IACtHR. It is clearly indicated by article 12 Convention of Belém do Pará that it exclusively applies to article 7 thereof.⁸⁸

⁸⁶ Cárdenas Cerón/ Lozada Pimiento, see note 37, 97.

⁸⁷ See Medina, see note 9, 131-132.

⁸⁸ Paras 78-79, *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

VI. Positive Obligations in Case of Violence against Women Committed by Private Actors

The main topic of the judgment concerned positive obligations of a state in case of violence against women committed by a private actor. Principally the conduct of a private person not acting on behalf of the state cannot be considered as an act of state and therefore, responsibility cannot be imputed to the state. The idea behind positive obligations is that a state may be held responsible for precisely such actions in response to private acts. Although a state is not the purveyor of violence against women, it may become complicit by non-action.⁸⁹ Developments with regard to the concept of positive obligations are not restricted to gender issues. Nevertheless, creative interpretation of human rights is a useful tool for gender-based violence issues. The American Convention is formulated as gender neutral. Therefore it is necessary to use the concepts of positive obligations and gender-sensitive interpretation in the light of modern developments. Thereby the principle of due diligence is essential to define the conditions under which a state may be obliged to prevent or react to acts of private perpetrators.⁹⁰ As mentioned above, international courts and quasi-judicial bodies have already dealt with cases involving violence against women by non-state actors. They have already made steps in the right direction.⁹¹

One of the leading cases on the topic of positive state obligations was established by the IACtHR itself. In the case of *Velasquez Rodríguez v. Honduras*,⁹² already decided in 1988, the Court laid down the basis to hold states responsible for acts by private individuals. The findings of the case were upheld on various occasions by the Court.⁹³ Bas-

⁸⁹ See Thomas/ Beasley, see note 12, 41.

⁹⁰ E.A.H. Abi-Mershed, "Due Diligence and the Fight against Gender-Based Violence in the Inter-American System", in: C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence*, 2008, 127 et seq. (128).

⁹¹ See above under Part II. above.

⁹² IACtHR, *Case of Velasquez-Rodríguez v. Honduras*, Merits, Judgment of 29 July 1988, Series C No. 4, paras 166, 174-175.

⁹³ IACtHR, *Case of Anzualdo-Castro v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 22 September 2009, Series C No. 202, para. 62; IACtHR, *Case of Kawas-Fernández v. Honduras*, Merits, Reparations and Costs, Judgment of 3 April 2009, Series C No. 196, para. 76; IACtHR, *Case of Perozo et al. v. Venezuela*, Preliminary Objections, Mer-

ing its decision on the precedent set in *Velasquez Rodriguez*, the Court started by looking at the different obligations of states.

According to article 1 (1) American Convention the first obligation of states is the duty to respect human rights, i.e. to abstain from committing human rights violations themselves. Both the Commission and the victims' representatives alleged the direct participation of state agents in the crimes. Due to the lack of evidence provided, the Court, however, was not able to establish a direct involvement of the state in the acts perpetrated.⁹⁴ Continuing, the Court reiterates that pursuant to the obligations assumed by the States Parties under article 1 (1) American Convention a state not only has the duty to respect human rights but also has to ensure their full enjoyment (duty to guarantee). The duty may be fulfilled in various ways dependent on the right concerned. It constitutes an obligation of means, not of result. The duty to guarantee comprises the organisation of a state's governmental apparatus as well as all structures of public power. Furthermore, four specific duties may be inferred from the duty to guarantee: the obligation to prevent human rights violations, investigate them, punish those responsible and compensate the victims.⁹⁵

First the Court examined whether the state took reasonable measures to prevent the crimes against the three victims. To establish the measures which have to be adopted by a state the Court looked at various relevant international instruments dealing with gender-based violence.⁹⁶ It came to the conclusion that a comprehensive set of measures has to be adopted to comply with the requirement of due diligence. These comprise the establishment of an appropriate legal framework, including an effective enforcement mechanism and the adoption of

its, Reparations, and Costs, Judgment of 28 January 2009, Series C No. 195, para. 298.

⁹⁴ Para. 242, *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

⁹⁵ IACtHR, *Case of Velasquez-Rodríguez v. Honduras*, see note 92, para. 166.

⁹⁶ These, *inter alia*, comprise: the Convention of Belém do Pará, see note 7; Convention on the Elimination of All Forms of Discrimination against Women, see note 22; A/RES/48/104 of 20 December 1993, Declaration on the Elimination of Violence against Women; IACHR, *Maria Da Penha Maia Fernandes*, see note 32; UN Commission on Human Rights Special Rapporteur Radhika Coomaraswamy, *Violence against women in the family: Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, submitted in accordance with the Commission on Human Rights resolution 1995/85, Doc. E/CN.4/1999/68 of 10 March 1999.

comprehensive and effective prevention policies and practices in order to respond adequately to complaints. The prevention strategy should not only thwart the risk factors, the state should also provide for preventive measures to adequately react to specific cases.⁹⁷ Applying the previously established criteria to the facts of the case, the Court noted that, although Mexico adopted some necessary and important measures, they were insufficient and ineffective to prevent the crimes. Mexico therefore failed to prevent the disappearance, abuse and death of the three victims. Nevertheless, the Court also clarified that a state does not have unlimited obligations with regard to acts committed by private individuals. In order to attribute responsibility to the state for the failure to prevent the crime three additional requirements have to be fulfilled:

- 1.) the awareness of a situation of real and imminent danger;
- 2.) for a specific individual or group of individuals; and
- 3.) the reasonable possibility of preventing or avoiding that danger.⁹⁸

Attention should be drawn to the way the Court applied the requirements to the facts of the case and solved the issue.

It divided the facts into two crucial periods of time: the time prior to the report of the girls' disappearance and the time before the discovery of their dead bodies. With regard to the former, the Court did not attribute responsibility to the state. Even though the state was conscious of the general situation of risk for women in Ciudad Juárez, it could not be established that the state was aware of the real and immediate danger for the victims in the specific case. The Court noted the greater responsibility of the state to protect women in Ciudad Juárez and criticized the absence of a general policy to fight the violence against women⁹⁹

⁹⁷ Para. 258, *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

⁹⁸ Para. 280, *ibid.*, see note 2; this has already been established in a variety of cases before the IACtHR: IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 31 January 2006, Series C No. 140, para. 123; IACtHR, *Case of Valle-Jaramillo et al. v. Colombia*, Merits, Reparations and Costs, Judgment of 27 November 2008, Series C No. 192, para. 78; see also the following cases before the European Court of Human Rights: ECtHR, *Kiliç v. Turkey*, Application no. 22492/93 of 28 March 2000, paras 62-63; ECtHR, *Osman v. United Kingdom*, Application no. 23452/94 of 28 October 1998, paras 115-116.

⁹⁹ The policy could already have been implemented in 1998 when the Mexican National Human Rights Commission warned of the pattern of violence against women, para. 282 *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

but it was not able to attribute international responsibility to these failures. However, the situation is different with regard to the latter period of time. After the report of the girls' disappearance and due to the context in Ciudad Juárez, the state was aware of a real and imminent danger for the victims. Yet the state did not provide for an immediate and effective reaction and investigation of the disappearances. The failure to comply with its due diligence obligation was found to be particularly serious taking into account the context of extreme violence in Ciudad Juárez.¹⁰⁰ Therefore, the Court found that the state had violated the rights to life, personal integrity and personal liberty of the three victims by failing to prevent the crimes.

In the following the Court continued with an in-depth analysis of the procedural obligation to investigate the crimes and punish those responsible. Again the Court started by laying down the criteria for the state to fulfill its duty. The obligations must be complied with due diligence to avoid impunity and repetition of the acts. As soon as state authorities are aware of the facts, they are under the obligation to initiate an investigation without delay. Additionally, an investigation has to be *ex officio*, serious, impartial and effective, which includes the use of all legal means at its disposal. It has to aim at establishing the truth and capturing, prosecuting and eventually punishing those responsible. It is noteworthy that the Court recognized the necessity of a wider scope of standards when dealing with violence against women within a general context of such violence.¹⁰¹ The Court, *inter alia*, consulted jurisprudence and adopted the reasoning of the European Court of Human Rights (hereinafter the ECtHR) with regard to the importance of a vigorous and impartial investigation in case of racially motivated crimes. According to the ECtHR, it is of special importance that a society continuously reasserts its condemnation of racism to "maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence."¹⁰²

According to the IACtHR the same reasoning can be applied in the case of violence against women. The Court went on to establish whether the state complied with the criteria laid down by the Court. It examined the different measures taken by Mexico to investigate the

¹⁰⁰ Paras 283 et seq., *ibid.*, see note 2.

¹⁰¹ Paras 287 et seq., *ibid.*, see note 2.

¹⁰² ECtHR, *Angelova and Iliev v. Bulgaria*, Application no. 55523/00 of 26 July 2007, paras 293-294.

crimes, solve the case and punish those responsible.¹⁰³ The Court concluded that the state had not adopted necessary measures or that measures were not implemented or were insufficient.

With regard to the first stage of investigations, it should be repeated that Mexico already accepted its international responsibility for irregularities committed. It could be speculated whether the state, by generally accepting state responsibility with regard to the first stage of investigation, tried to avoid the detailed analysis and presentation of the facts by the Court. A judgment does have more weight and visibility if the facts are established well. However, the Court found that the irregularities during the second stage of investigations were not completely corrected as argued by the state and a wide variety of deficiencies were established. They concerned, *inter alia*, irregularities with regard to the handling of evidence, the false accusation and fabrication of culprits, the delay in the investigations and the absence of investigations against public officials for alleged serious negligence. The Court made clear that such deficiencies encourage an environment of impunity for the perpetrators fuelling the perpetuation of such crimes. Thereby a message that gender-based violence is tolerated by the state is sent.¹⁰⁴ Therefore, Mexico also failed to comply with its duty to investigate.

In general, one can note that the Court takes time to thoroughly analyse the measures (allegedly) taken by the state. Yet the Court sometimes hints at problems establishing the facts of the case due to insufficient proof or argumentation by the Commission or the representatives.¹⁰⁵ Apart from that, it lays down clear obligations for the state having special regard to gender-specific impacts of measures. Thereby the Court refers to and bases its decision on a wide variety of different sources. By interpreting the American Convention in the light of other specific international instruments dealing with women's rights, binding or non-binding, as well as applying the standards set by the Convention

¹⁰³ This included the disputes with regard to the: "custody of the crime scene, collection and handling of evidence, autopsies, and identification and return of the victims' remains; (2) actions taken against those presumed to be responsible and alleged 'fabrication' of suspects; (3) unjustified delay and absence of substantial progress in the investigations; (4) fragmentation of the investigations; (5) failure to sanction public officials involved in the irregularities, and (6) denial of access to the case file and delays or refusal of copies of this file", para. 295, *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

¹⁰⁴ Para. 388, *ibid.*, see note 2.

¹⁰⁵ Cf. paras 357, 359, 389, *ibid.*, see note 2.

of Belém do Pará, the IACtHR ensured awareness of gender-violence issues. It is essential to interpret human rights in light of the different needs of women and men in order to render them equally effective for both. The importance of the judgment, therefore, lies in the standard it sets for future cases that opens the door for further progress.

VII. Discrimination and Violence against Women

Another very important conclusion of the Court is that the three girls were victims of violence against women according to the American Convention and the Convention of Belém do Pará.¹⁰⁶ Yet, even more importantly, the IACtHR does not stop at this conclusion. For the first time it declares that violence against women constitutes a form of discrimination.¹⁰⁷ Next to establishing the obligations to respect human rights and freedoms and to ensure their free and full exercise article 1 (1) American Convention points out that these obligations have to be fulfilled without discrimination, *inter alia*, of sex.

Traditional interpretations of human rights instruments have often failed to identify the connection and interplay between gender-based violence and gender-discrimination. On the one hand, gender-discrimination facilitates gender-based violence. On the other hand, gender discrimination is reinforced by gender-based violence.¹⁰⁸ It has to be taken into account that the prohibition of discrimination has two aspects. Gender-based violence impairs or nullifies basic human liberties of women, including the rights to life, liberty, and to be free from

¹⁰⁶ Para. 231, *ibid.*, see note 2; see the definition of violence according to article 2 Convention of Belém do Pará above under Part II.

¹⁰⁷ Para. 402, *Case of González et al. ("Cotton Field") v. Mexico*, see note 2; it should be noted that in the case IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, see note 36, para. 303, the Court generally mentions the UN Committee on the Elimination of Discrimination against Women and "General Recommendation No 19: Violence against Women" of 30 January 1992, GAOR 47th Sess. Suppl. 38, 1, which lays down that discrimination includes gender-based violence. However, the Court does not enter into an extensive study on the context to link gender-based violence and discrimination as in the present case.

¹⁰⁸ A.P. Ewing, "Establishing State Responsibility for Private Acts of Violence against Women under the American Convention on Human Rights", *Colum. Hum. Rts L. Rev.* 26 (1994-1995), 751 et seq. (754).

mistreatment and torture.¹⁰⁹ Hence, the prohibition of discrimination, firstly, ensures that gender does not affect a women's ability to enjoy human rights and fundamental freedoms. Additionally, it is not enough to extend only human rights to women. This approach does not challenge the underlying social, political and economic structures that are the roots of gender inequality. Hence, the prohibition of discrimination, secondly, aims at changing institutions and processes that inhibit women's equality in all spheres of life.¹¹⁰

The Convention of Belém do Pará expressly recognises the relation between violence against women and gender-discrimination. It further points to the historical component of traditional unequal power relations between men and women.¹¹¹ It establishes that the right to be free from violence includes not only the right to be free from all forms of discrimination but also "to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination."¹¹² The IACtHR also considers the Convention on the Elimination of all Forms of Discrimination against Women, which defines discrimination against women as,

"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."¹¹³

The Convention on the Elimination of all Forms of Discrimination against Women itself does not mention violence against women as a form of discrimination. However, the UN Committee on the Elimination of Discrimination against Women makes clear in its General Recommendation No. 19 that regardless whether violence against women is

¹⁰⁹ See Ulrich, see note 11, 646.

¹¹⁰ C. Ainetter Brautigam, "International Human Rights Law: The Relevance of Gender", in: W. Benedek/ E.M. Kisaakye/ G. Oberleitner (eds), *Human Rights of Women: International Instruments and African Experiences*, 2002, 3 et seq. (26).

¹¹¹ Preamble Convention of Belém do Pará, see note 7.

¹¹² Article 6 Convention of Belém do Pará, see note 7.

¹¹³ Article 1 Convention on the Elimination of all Forms of Discrimination against Women, see note 22.

expressly mentioned, it is included within the definition of discrimination.¹¹⁴

In its reasoning the IACtHR is further following the findings of the Inter-American Commission on Human Rights and the ECtHR. Both institutions already established the link between discrimination and violence against women. The existence of a general pattern of state tolerance and an ineffective judiciary towards cases of domestic violence was considered discriminatory practice.¹¹⁵

The IACtHR takes into account all the previously mentioned instruments and makes some important findings: indifference of state authorities towards gender-based violence reproduces violence. This results in the perpetuation of the crimes. Impunity of those responsible sends the message that gender-based violence is tolerated. Women find themselves in a situation where they are not protected and do not feel safe anymore. Moreover, the subordination of women is based on gender stereotypes, which refer to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women. Stereotypes are reflected in policies and practices, as well as the acts and the language of state authorities. As a result, they become one of the causes and consequences of violence against women.¹¹⁶

In previous cases the Court did establish that there was violence against women. However, it did not distinguish between general situations of violence and violence in a discriminatory context which is directed against a historically marginalized group.¹¹⁷ In the present case the Court expressly recognises this link and condemns Mexico for violating its duty of non-discrimination. Within this context it is important to recognise that violence against women constitutes discrimination. This recognition is more far-reaching than just to argue that violence affects women disproportionately or that laws against such violence are

¹¹⁴ Para. 6 UN Committee on the Elimination of Discrimination against Women “General Recommendation No 19: Violence against Women”, see note 107.

¹¹⁵ Cf. ECtHR, *Opuz v. Turkey*, see note 25; IACHR, *Maria Da Penha Maia Fernandes v. Brasil*, see note 32.

¹¹⁶ Paras 400-401, *Case of González et al. (“Cotton Field”) v. Mexico*, see note 2.

¹¹⁷ A.E. Dulitzky, “El Principio de Igualdad y No Discriminación: Clarescuros de la Jurisprudencia Interamericana”, *Anuario de Derechos Humanos* 8 (2007), 15 et seq. (28).

not imposed in the same manner as on men. Gender-based violence is discrimination *per se* and requires the adoption of positive measures regardless of how violence against men is handled.¹¹⁸

VIII. Torture

Before coming to the last point, the importance of the judgment with regard to reparations, it is worth having a short look at the question whether the acts perpetrated could have been qualified as torture. The Court, *inter alia*, declares the state responsible for violating article 5 (2) of the American Convention which contains the prohibition of torture or cruel, inhuman, or degrading punishment or treatment. In general this decision is to be welcomed. Nevertheless, it can be criticized that, although the Court declares a violation of article 5 (2) of the Convention, it does not discuss the topic of torture or other forms of ill-treatment at all. It seems to be a non-issue for the Court how to classify the acts committed, i.e. it does not distinguish between torture or cruel, inhuman, or degrading punishment or treatment.¹¹⁹ Only the concurring opinion of Judge Cecilia Medina Quiroga sheds some light on the topic.¹²⁰ The judge maintains that the only reason for the Court to refrain from classifying the acts as torture is the fact that they have not been committed in official capacity. According to the judge it appears that the Court shied away from explicitly finding that torture can be committed by private actors.

The requirement of official participation or acquiescence as an element of torture is disputed in international law.¹²¹ Various instruments show different approaches. The Inter-American Convention to Prevent and Punish Torture and the Convention against Torture and Other

¹¹⁸ See Copelon, see note 27, 134.

¹¹⁹ In comparison, when referring to the violation of the personal integrity of the victims' families, the Court refers to degrading treatment, para. 424, *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.

¹²⁰ Concurring Opinion of Judge Cecilia Medina Quiroga in Relation to the Judgment of the Inter-American Court of Human Rights in the *Case of Gonzalez et al. ("Cotton Field") v. Mexico*, see note 2.

¹²¹ D. Kretzmer, "Torture, Prohibition of", in: Wolfrum, see note 40, paras 8 et seq.; ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Judgment, IT-96-23-T & IT-96-23/1-T of 22 February 2001, para. 484.

Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) require “consent or acquiescence of a public official or other person acting in an official capacity” in their definition of torture.¹²² Similar to other human rights treaties, the American Convention itself prohibits torture but does not contain a definition of torture.¹²³ In the case *Bueno Alves v. Argentina*, the IACtHR established the elements for an ill-treatment to be considered torture,

- 1.) an intentional act;
- 2.) which causes severe physical or mental suffering,
- 3.) committed with a given purpose or aim.¹²⁴

In her concurring opinion, Cecilia Medina Quiroga established that the difference between torture and other forms of ill-treatment, according to the Court itself, seems to lie in the severity of the act.¹²⁵ Furthermore, she points to new developments in international law¹²⁶ and analyses the findings of various international bodies, such as *inter alia* the jurisprudence of the ECtHR and the General Comment of the United Nations Human Rights Committee, which do not require the

¹²² Article 1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force 26 June 1987), UNTS Vol. 1465 No. 24841; cf. article 3 IACPPT, see note 77, which reads as follows: “Article 3 IACPPT, The following shall be held guilty of the crime of torture:

- a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.”

¹²³ Cf. article 3 ECHR, see note 45; article 7 International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976), UNTS Vol. 999 No. 14668.

¹²⁴ IACtHR, *Case of Bueno-Alves v. Argentina*, Merits, Reparations and Costs, Judgment of 11 May 2007, Series C No. 164, para. 79.

¹²⁵ She argues that the elements of “intention” and “purpose” or “aim” may also exist in cruel, inhuman or degrading types of treatment; Concurring Opinion of Judge Cecilia Medina Quiroga, see note 120, para. 3.

¹²⁶ On the topic, see also Edwards, see note 16; J. Marshall, “Torture Committed by Non-State Actors: The Developing Jurisprudence from the *Ad Hoc* Tribunals”, *Non-State Actors and International Law* 5 (2005), 171 et seq.; M.D. Evans, “Getting to Grips with Torture”, *ICLQ* 51 (2002), 365 et seq.

official participation for an act to be considered torture.¹²⁷ From the facts of the case, she establishes that the severity threshold for torture could have been established. The Court, for example, speaks of “such cruelty that it had to have caused her severe physical and mental suffering.”¹²⁸ As a result the judge concludes that the Court is independent in the definition of torture and does not have to rely on the definitions contained in the Inter-American Convention to Prevent and Punish Torture and CAT. The findings of Judge Cecilia Medina Quiroga can only be agreed with.

In general, the distinction between torture and other forms of ill-treatment has no legal implications. Both end in a condemnation of the state due to a violation of article 5 of the American Convention. Yet the Court did make the distinction in other cases¹²⁹ and therefore, it is important to determine the various levels of human rights abuses. The severity of a situation and the extent of a victim’s suffering should be acknowledged. Torture is one of the most heinous crimes that can be committed. A special stigma is attached to the finding of torturer.¹³⁰ Considering the special gravity of torture, another question can be asked: is violence less grave, less atrocious solely because the same act was not perpetrated by a state official?¹³¹ The definition of torture in the CAT has been heavily criticised by feminist scholars as a “male”

¹²⁷ ECtHR, *Opuz v. Turkey*, see note 25, para. 159; ECtHR, *Mahmut Kaya v. Turkey*, Application no. 22535/93 of 28 March 2000, paras 115-116; ECtHR, *H.L.R. v. France*, Application no. 24573/94 of 29 April 1997, para. 40; ECtHR, *M.C. v. Bulgaria*, Application no. 39272/98 of 4 December 2003, para. 151; nevertheless, it has to be pointed out that the ECtHR is not consistent in its jurisprudence. In the case ECtHR, *Selmouni v. France*, Application no. 25803/94 of 28 July 1999, para. 97, the ECtHR refers to the definition of torture under the CAT, see note 122; United Nations Human Rights Commission “General Comment No. 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)” (3 April 1992) GAOR 47th Sess. Suppl. 40, 193, para. 2.

¹²⁸ Para. 219, *Case of González et al. (“Cotton Field”) v. Mexico*, see note 2.

¹²⁹ IACtHR, *Case of Loayza-Tamayo v. Peru*, Merits, Judgment of 17 September 1997, Series C No. 33, para. 57.

¹³⁰ J. Lantrip, “Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights”, *ILSA Journal of International & Comparative Law* 5 (1998-1999), 551 et seq. (559-560); ECtHR, *Ireland v. United Kingdom*, Application no. 5310/71 of 18 January 1978, para. 167.

¹³¹ See Copelon, see note 27, 135.

right against torture.¹³² With regard to this point, the IACtHR failed to incorporate the realities of women's lives in the jurisprudence of the Court.

IX. Reparations

Lastly, it should be turned to the relevance of the judgment with regard to reparations. It is a basic principle of international law that in case of a breach of an international obligation a state must provide adequate compensation.¹³³ In general reparations have two purposes: they ensure that the state observes certain standards of law and repair, as far as possible, injuries made.¹³⁴ State Parties to the American Convention have not only accepted the duties to respect and ensure human rights, they also undertake to provide reparations to the injured parties. Article 63 (1) of the Convention lays down that,

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

Article 63 (1) authorises the IACtHR to a broad array of reparatory measures.¹³⁵ Reparations are seen by the IACtHR as the generic term for the different reparatory measures that may be imposed on a state after the Court found a violation of the human rights obligations laid down in the American Convention. It distinguishes between restitu-

¹³² See Edwards, see note 16, 368, see also under Part II. and the public/private dichotomy of international law.

¹³³ *Factory at Chorzów (Germany v. Poland) (Judgment)*, PCIJ Series A No. 9, 21, IACtHR, *Case of Velasquez-Rodríguez v. Honduras*, Reparations and Costs, Judgment of 21 July 1989, Series C No. 7, para. 25; IACtHR, *Case of Anzualdo-Castro v. Peru*, see note 93, para. 170.

¹³⁴ J.M. Pasqualucci, “Victim Reparation in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure”, *Mich. J. Int'l L.* 18 (1996-1997), 1 et seq. (3).

¹³⁵ Compare article 50 ECHR, see note 45, which authorizes the ECtHR to afford just satisfaction.

tion, compensation (indemnization), satisfaction, rehabilitation and guarantees of non-repetition.¹³⁶

The starting point for reparations *prima facie* is to re-establish the victim to the situation before the human rights violation occurred (restitution).¹³⁷ If *restitutio in integrum* is not possible, compensation or indemnization is granted for pecuniary and non-pecuniary damages, as well as the reimbursement of costs and expenses. The compensation of victims is the form of reparation most often applied by the IACtHR.¹³⁸ Satisfaction entails symbolic or non-monetary means that provide satisfaction that redresses a moral injury that cannot be redressed by restitution or compensation. It encompasses, for example, the verification and public disclosure of the truth, commemorations of the victims, issuance of official statements accepting responsibility or apologising and the construction of monuments. Rehabilitation refers to measures that intend to help the victims recover from the harm and traumas they suffered due to violations of their human rights. This includes, *inter alia*, medical and psychological care and legal and social services. Last but not least, guarantees of non-repetition make sure that an illicit act will not recur.¹³⁹

The importance of reparations in the present case lies in the fact that the IACtHR takes on the topic of mainstreaming gender in reparations, i.e. the difference that gender should make when discussing reparations. It was the first time that the Court extensively considered a gender dimension for the reparations and additionally linked measures to the situation or context of systematic violence against women. In order to understand the significance of the reparations in this case, two basic ideas have to be considered.

First of all, for the question on “how to repair” it is essential to search for the true causes and consequences of the human rights violation or the context in which the violation is framed. One has to recog-

¹³⁶ A.J. Carrillo, “Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past”, in: P. de Greiff (ed.), *The Handbook of Reparations*, 2006, 504 et seq. (512).

¹³⁷ J. Guillerot, *Reparaciones con Perspectiva de Género*, 2009, 25.

¹³⁸ See Carrillo, see note 136, 512-513.

¹³⁹ Cf. UN Commission on Human Rights “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (19 April 2005) ESCOR 61st Sess. Suppl. 3, 136; Guillerot, see note 137, 26.

nise that violations of human rights stem from situations of inequality, discrimination and injustice. Having this in mind, it is important to always consider that violence may produce a different impact for men and women. The different needs of men and women have to be analysed. Accordingly, reparations then have to respond to all these considerations.¹⁴⁰ Secondly, reparations should have an additional, transformative effect. As mentioned above, reparations primarily aim to restore the victim to his or her previous situation, i.e. the situation before the human rights violation occurred. However, one has to take into account that the original situation is to be found within a context of discrimination and violence. As a result, it is necessary to bring about a change to this situation.¹⁴¹

Notably, the Court takes up these considerations. It points out that within,

“the context of structural discrimination in which the facts of this case occurred, ... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.”¹⁴²

Moreover, the Court lays down a few parameters which state policies should encompass in order to constitute reparations with a gender perspective,

- (i) State policies have to question and to be “able to modify, the *status quo* that causes and maintains violence against women and gender-based murders”;
- (ii) they have to lead to “progress in overcoming the unjustified legal, political, social, formal and factual inequalities that cause, promote or reproduce the factors of gender-based discrimination”, and

¹⁴⁰ See Guillerot, see note 137, 100; the inclusion of a gender perspective is especially important with regard to the right to have access to justice. Women face a variety of problems to have access to judicial remedies and subsequently, to defend their rights. Therefore, it is crucial that the judicial process itself and its actors, from the attention at the police station to the deliberation of the judges, display sufficient gender sensitivity.

¹⁴¹ See Guillerot, see note 137, 106 et seq.

¹⁴² Para. 450, *Case of González et al. (“Cotton Field”) v. Mexico*, see note 2.

- (iii) they have to “raise the awareness of public officials and society on the impact of the issue of discrimination against women in the public and private spheres.”¹⁴³

Having this in mind, it is all the more unfortunate that it seems that, due to the lack of sufficient argumentation by the Inter-American Commission and the victims’ representatives, the IACtHR was unable to decide whether the public policies implemented by Mexico constitute a sufficient guarantee of non-repetition.¹⁴⁴ The same happened to a range of other issues.¹⁴⁵ Apart from that, one can conclude that the Court was aware of gender issues when laying down the reparations of the case. In a variety of ways one can notice that the Court was sensitive to the specific harm that the women were exposed to.¹⁴⁶ It acknowledged the necessity of special attention for the measures to repair the harm done. An example is the continuation and extension of training programs with a gender perspective for public officials. The Court points out that such training not only involves “learning about laws and regulations, but also developing the capacity to recognize the discrimination that women suffer in their daily life.”¹⁴⁷ Public officials should acquire the capacity to recognise the effects stereotyped ideas and values have on women. Furthermore, the IACtHR ordered the creation of a program of education for the general public aiming at surmounting the problem of discrimination against women.¹⁴⁸

X. Conclusion

To conclude, one can ascertain that the judgment constitutes important progress in the protection of women against violence, rape and murder in the Americas. The IACtHR showed sensitivity towards the vulnerability of women in certain situations and awareness of special threats and harm to women. It questioned the fundamental roots of violence against women and the decision acknowledges that gender-based violence is a serious societal problem.

¹⁴³ Para. 495, *ibid.*, see note 2.

¹⁴⁴ Paras 493 and 495, *ibid.*, see note 2.

¹⁴⁵ Cf. paras 520, 525 and 530, *ibid.*, see note 2.

¹⁴⁶ Cf. paras 502, 506, 512, 549, 584 and 585, *ibid.*, see note 2.

¹⁴⁷ Para. 540, cf. also paras 541-542, *ibid.*, see note 2.

¹⁴⁸ Para. 543, *ibid.*, see note 2.

The judgment contributes to the IACtHR's jurisprudence in various ways. First of all, the Court explicitly and clearly lays down parameters for the state with regard to its positive obligations in case of violence against women committed by private actors. The concept of positive obligations is not new for the Court. However, it is an advance that the Court for the first time comprehensively links positive state obligations with the topic of violence against women. Moreover, it puts these obligations within the context of structural discrimination. Thereby, the Court pays tribute to various sources and information. The IACtHR consistently cites and refers to relevant decisions of other human rights bodies, which strengthens its reasoning. Furthermore, it also sets new standards with regard to reparations.

Nevertheless, the judgment contains some parts which are open to debate. It is also unfortunate that the Court waited until 2009 to comprehensively touch upon the topic of gender issues. Moreover, for this to happen, a case with such unspeakable atrocities as the present case was necessary. There still lies much work ahead to eventually achieve the ultimate goal of a continent free from violence against women. The next challenge is to achieve the same gender sensitivity with other, subtler, less obvious violations of women's rights.

Yet, the decision is a good starting point for further progress. Hopefully, the decision serves as a wake-up call for the whole region: protection of women against violence by private actors is not outside state responsibility! The judgment not only constitutes an important tool for the families of the victims who have spent years seeking justice. It also serves as a precedent for other women in the region. The same reasoning can be adopted in other cases. However, considering the protection of human rights is primarily the duty of states, more importantly, the judgment offers guidelines for states which obligations have to be fulfilled. Finally, it remains to be seen how Mexico is implementing the tasks imposed by the IACtHR which aim at structural changes. Mexico faces a difficult challenge, especially considering the current situation in Ciudad Juárez which shows a rise in general violence caused by the increase of drug trafficking. It is also clear that a "culture of discrimination" cannot be changed overnight. The challenge ahead needs a strong commitment. The judgment of the IACtHR provides the incentive that Mexico continues working towards the objective of an environment free from gender-based violence.