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THE COTTON FIELD CASE: GENDER PERSPECTIVE AND FEMINIST THEORIES IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS JURISPRUDENCE*

EL CASO DEL CAMPO ALGODONERO: PERSPECTIVA DE GÉNERO Y TEORÍAS FEMINISTAS EN LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS

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ABSTRACT

In 2009, the Inter-American Court of Human Rights decided the case of three murdered women, whose bodies were found in a cotton field in Ciudad Juárez, Mexico on November 6, 2001, in the context of widespread violence against women. The importance of this case is undisputable as it embraces a gender perspective. The paper critically addresses the gender perspective in the jurisprudence of the Inter-American Court of Human Rights, focusing on the *Case of González et al. ("Cotton Field") vs. Mexico* of 2009. It shows that although the approach of the Court is symbolically important, there are still several unanswered questions and challenges regarding the correct and proper application of this perspective in the decision. Additionally, the paper shows how the Court embraced some feminist theoretical approaches and problematizes this perspective with the role of the victims in the case. Finally, it suggests some recommendations to balance the challenging tension between the political battle of feminist movements and the interests of human rights' victims. Part I of the paper briefly presents a synopsis of the facts of the *Cotton Field case* and a summary of the judicial decision. Part II describes the most relevant gender approaches of the case and presents some critiques to the Court's decision. Part III illustrates the tension between the feminist movement and the role of the victims of the case and develops possible alternatives to solve this particular issue.

Key words author: Intermerican Court of Human Rights, feminism, crimes against women, violence against women.
Key words plus: American Court of Human Rights, victims, feminism, crimes against women, violence against women.

RESUMEN

En 2009, la Corte Interamericana de Derechos Humanos decidió el caso de tres mujeres asesinadas, cuyos cuerpos fueron encontrados en un campo algodonero en Ciudad Juárez, México, el 6 de noviembre de 2001, en el contexto de la violencia generalizada contra las mujeres. La importancia de este caso es indiscutible. El presente artículo se refiere a la perspectiva de género en la jurisprudencia de la Corte Interamericana de Derechos Humanos, centrándose en el caso de González et ál. (Campo Algodonero) contra México de 2009. La autora pretende demostrar que, si bien el enfoque de la Corte es simbólicamente importante, aún hay varias preguntas sin respuesta y varios desafíos relativos a la aplicación correcta y adecuada de la perspectiva de género en la decisión.

Además, el artículo muestra cómo la Corte adoptó algunos enfoques teóricos feministas en el caso y problematiza este enfoque en relación con el papel de las víctimas. Por último, se sugieren algunas recomendaciones para equilibrar la tensión entre el reto del litigio estratégico de los movimientos feministas y de los intereses de las víctimas de derechos humanos. Para desarrollar los argumentos, la primera parte presenta un resumen de los hechos del caso Campo Algodonero y un resumen de la decisión judicial. La segunda parte describe los enfoques de género más relevantes del caso y presenta algunas críticas a la decisión de la Corte. La tercera parte ilustra la tensión entre el movimiento feminista y el papel de las víctimas del caso y desarrolla alternativas posibles para resolver este tema en particular.

Palabras clave autor: *Corte Interamericana de Derechos Humanos, feminismo, delitos contra la mujer, violencia contra la mujer.*

Palabras clave descriptor: *Corte Interamericana de Derechos Humanos, víctimas, aspectos sociales, feminismo, delitos contra la mujer, violencia contra la mujer.*

Numerous women have disappeared and been murdered in Ciudad Juárez since 1993. The Inter-American System of Human Rights has been following these terrible crimes through general and special reports and individual petitions. Following years of litigation, in 2009, the Inter-American Court of Human Rights decided the case of three murdered women, Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monárrez, whose bodies were found in a cotton field in Ciudad Juárez on November 6, 2001.

This paper has three purposes. First, it argues that while the recognition of a gender perspective in the case is symbolically important, there are still several unanswered questions and challenges regarding the correct and proper application of a gender perspective in the decision. Second, it argues that while the feminist movement influences the Court to implicitly embrace some feminist theoretical approaches, the role that the victims are playing in this political battle is at least problematic. Third, it suggests some recommendations to balance this challenging tension.

To develop my arguments, this paper will be addressed in three parts. Part I briefly presents a synopsis of the facts of the *Cotton Field case* and a summary of the judicial decision. Part II develops the first purpose of the paper, describing the most relevant gender approaches of the case and presents some critiques to the Court's decision. Part III develops the second and third purposes of the paper, illustrating the tension between the feminist movement and the role of the victims of the case and develops possible alternatives to balance this tension.

I. THE COTTON FIELD JUDICIAL DECISION: OVERVIEW

On December 10, 2009, the Inter-American Court of Human Rights[1] ("IACHR") enacted a judicial decision in the *Cotton*

1 The Inter-American Court of Human Rights is an autonomous judicial institution of the Organization of American States and was established in 1979. Its objective is the application and interpretation of the American Convention on Human Rights and other

Field case. I will briefly present the relevant facts of the case and a summary of the judicial decision.

A. Relevant facts[2]

Ciudad Juárez is located in the northern part of the state of Chihuahua, on the border with El Paso, Texas. It is an industrial city where the *maquiladora* industry (manufacturing and/or assembly plants) has been a place of transit for Mexican and foreign migrants. Ciudad Juárez is also a very violent city. Various types of organized crime such as drug trafficking, people trafficking and money laundering converge, creating high levels of insecurity and violence.

The bodies of three women, Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monárrez ("the victims"), were found in a cotton field in Ciudad Juárez, Mexico, on November 6, 2001. These were not isolated incidents. Since 1990, the number of disappearances and murders of women and girls has been alarming. The victims are young women aged 15 to 25 years, students or workers in the *maquiladora* industries or in other local businesses, some of whom had only lived in Ciudad Juárez for a very short period of time. A large number of the crimes are characterized by the following common factors: "the women were abducted and kept in captivity, their next of kin reported their disappearance and, after days or months, their bodies were found on empty lots with signs of violence, including rape and other types of sexual abuse, torture and mutilation… of certain parts of the body, including the absence of breasts or genitalia".[3] Approximately 113 women, including the victims of this case, had been killed according to this pattern prior to the date of the judicial decision.[4]

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treaties concerning this same matter. It is based in San José de Costa Rica.

2 All relevant facts were summarized from the decision,González et al.Mexico ("Cotton Field"),Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. (ser. C) 205, ¶113-136 (Nov. 16, 2009).

3 Id. ¶ 125.

4 Id. ¶ 127.

Both the State and the representatives of the victims have recognized that these criminal patterns are influenced by a culture of gender-based discrimination. The State has affirmed that in Ciudad Juárez, the *maquiladora* industry was established in 1965 and expanded in 1993 with the North American Free Trade Agreement. It indicated that by giving preference to hiring women, the *maquiladora* industries caused changes to women's working lives that also had an impact on their family lives because traditional roles began to change, with women becoming household providers.[5] Various reports agree that although there are different motives for the murders in Ciudad Juárez and different perpetrators, many cases relate to gender violence that occurs in a context of systematic discrimination against women.[6]

While the State created a special unit to investigate the crimes, there has been evidence of negligence in the criminal investigations and discrimination of women within the criminal proceedings. The domestic authorities have not yet made conclusions regarding the particular circumstances of the crimes of the three victims in the *Cotton Field case* or who was responsible for them.

B. The Court's decision

The Court declared that the Mexican State was internationally responsible for the disappearance and subsequent death of the three victims. The State partially acknowledged its international responsibility. Particularly, the State admitted to the contextual facts concerning violence against women in Ciudad Juárez, mainly relating to the murders that have been recorded since the beginning of the 1990s. It also acknowledged that irregularities occurred during the investigations, but afterwards, they were fully rectified, and due to the irregularities of the criminal investigations, the personal integrity of the next of kin of the victims were affected. However, the State claimed that it

5 Id. ¶ 129.
6 Id. ¶ 133.

had not violated the rights to life of the victims (article 4 of the American Convention on Human Rights - ACHR[7]) to physical integrity or humane treatment (article 5 ACHR), or to dignity or personal liberty (article 7 ACHR), considering that the State agents did not participate in any of the three murders. Therefore, the State acknowledged responsibility only for violations of the right to a fair trial (article 8 ACHR), the right to judicial protection (article 25 ACHR), and the right to physical integrity and humane treatment (article 5 ACHR –exclusively regarding the next of kin).

The Court embraced and valued the partial acknowledgment of responsibility of the State of Mexico but rejected the State's arguments regarding its lack of responsibility on the other claims, despite the fact that there was no evidence of the State's direct participation in any of the three murders. The Court declared that the State was internationally responsible for the following reasons: (i) not having taken measures to protect the victims, two of whom were minor children; (ii) the lack of prevention of these crimes, despite full awareness of the existence of a pattern of gender-related violence that had resulted in hundreds of women and girls murdered; (iii) the lack of response of the authorities to the disappearances; (iv) the lack of due diligence in the investigation of the homicides, as well as the denial of justice; and (v) the lack of an adequate reparation. The Court also declared the State responsible for the violation of the human rights of the mothers and next of kin of the victims.

II. The gender perspective in the Cotton Field case: a critique

The *Cotton Field case* has been widely regarded as the most progressive decision regarding the recognition and application of a gender-perspective analysis in the Inter-American human

7 Organization of American States. American Convention on Human Rights. Nov. 22, 1969. OASTS. 36, 1144 UNTS 123.

rights jurisprudence.[8] Previous cases had either ignored this possible approach or addressed it in a marginal way.[9] I do believe that if ever there was a case that required a gender perspective (although perhaps not *only* a gender perspective), the *Cotton Field* was undoubtedly that case. Although it would be very difficult to reveal the actual subjective motives of the perpetrators, it can logically be inferred that the pattern of conduct in the crimes was at least partially motivated by gender discrimination.

The above-described position is also held by the IACHR. Accordingly, the decision reveals four general and relevant gender-perspective approaches. Firstly, the Court expressly recognized the justiciability of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Belem do Para Convention - BdoPC"). Secondly, it declared the international responsibility of the State for failing to prevent the disappearances and murders in a gender-based pattern of violence. Thirdly, it discussed the concept of *femicide* in the case. Finally, it ordered reparations explicitly designed according to a gender perspective. In this section, I will briefly discuss these four approaches and present some critiques in the application of these criteria.

A. The Court expressly recognizes the justiciability of the Belem do Pará Convention

Despite the partial acknowledgment of international responsibility, the State of Mexico alleged that the Court did not have jurisdiction to "determine violations" of the Belem do Para Convention. The general rule regarding jurisdiction of the IACHR for treaties other than the American Convention on Human

8 Elizabeth Abi-Mershed. . Inter-Am. Comm'n H.R Working paper. Available at: http://www2.ohchr.org/english/issues/women/rapporteur/docs/side_event_june2010/ElizabethAbiMershed.pdf (May 18, 2011)

9 Although the Court applied some gender approaches in the implications for the reparation orders were not even close to those in the ruling in the case. For a very thorough analysis of the gender perspective in the Iachr history prior to see Patricia Palacios Zuloaga. . 17 Tex. J. Women & L. (2008). At. 227, 229. Available at:http://www.utexas.edu/law/centers/humanrights/get_involved/writing-prize07-zuloaga.pdf

Rights ("ACHR") is that each Inter-American treaty requires a specific declaration granting jurisdiction to the Court. Article 12 of the BdoPC affirms that,

> *Any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization, may lodge petitions with the* ***Inter-American Commission on 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 Statute and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions (emphasis added)*

Thus, in principle (from a textual reading of the provision), only the Inter-American Commission[10] and not the Inter-American Court has jurisdiction to analyze petitions regarding eventual violations of article 7 (duties of the States)[11] of the BdoPC. In an earlier case, *Miguel Castro Castro vs. Peru,*[12] the

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10 Quasi-judicial organ of the Organization of American States. It is the only authorized organ to submit a case before the Inter-American Court.

11 Article 7 affirms that "the States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to (a) refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation; (b) apply due diligence to prevent, investigate and impose penalties for violence against women; (c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary; (d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property; (c) take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; (f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures; (g) establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and (h) adopt such legislative or other measures as may be necessary to give effect to this Convention."

12 This case refers to the execution of "Operative Transfer 1" within the Miguel Castro Castro Prison, whereby the Peruvian State caused the death of at least 42 inmates, injured 175 inmates, and submitted another 322 inmates to cruel, inhumane, and degrading treatment. The facts also refer to the alleged cruel, inhumane, and degrading treatment experienced by the alleged victims after "Operative Transfer 1", especially the pregnant women. See Case of the Miguel Castro-Castro Prison vs. Peru Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 160 (Nov. 25, 2006).

Court declared a violation of the BdoPC. However, the Court did not actually discuss this legal issue, but rather presumed its jurisdiction, as it was not raised directly by the parties.[13]

In a progressive approach, in the *Cotton Field* case, the Court declared that despite the apparent exclusion of the jurisdiction of the IACHR from the text of article 12, it had jurisdiction to consider petitions under article 7 of the BdoPC. To do so, the Court combined systematic and teleological interpretations and applied the principle of effectiveness. First, the Court read the provision systematically, as not excluding any of the ACHR proceedings (which includes the submission of the case before the Court by the Commission[14]), interpreting the proceedings as a whole. More importantly, the Court argued that the purpose of the provision (teleological argument) confirmed its jurisdiction. The Court affirmed that,

> *The purpose of the petition system embodied in Article 12 of the Convention of Belem do Pará is to enhance the right of international individual petition, based on certain clarifications concerning the scope of the gender approach. The adoption of this Convention reflects a uniform concern throughout the hemisphere about the severity of the problem of violence against women, its relationship to the discrimination traditionally suffered by women, and the need to adopt comprehensive strategies to prevent, punish and eliminate it. Consequently, the purpose of the existence of a system of individual petitions within a convention of this type is to achieve the greatest right to judicial protection possible in those States that have accepted judicial control by the Court.*
>
> *At this point, it is essential to recall the specificity of human rights treaties and the effects of their interpretation and application. On the one hand, their objective and purpose is the protection of the human rights of individuals; on the other hand, they signify the creation of a legal order in which States assume obligations, not in relation to other States, but towards the individuals subject to their jurisdiction. In addition, these treaties are applied in keeping with the concept of a collective guarantee.*

13 Cf. González et al. vs. Mexico ("Cotton Field") Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. (ser. C) 205, ¶75-77 (Nov. 16, 2009).

14 American Convention on Human Rights supra note 7, art. 51.

In addition, the Court recalled that the inherent purpose of all treaties is to be effective.[15] This is applicable to the American Convention provisions related to the authority of the Commission to submit cases to the Court as one of the normative effective provisions referred to by the BdoPC. Finally, the Court relied on the legislative history of the BdoPC (which was silent on the point) to reaffirm its position.

The Court explained that in the case of *Miguel Castro Castro*, it had declared that the BdoPC had been violated, which is equivalent to declaring its jurisdiction over that Convention, even if the legal issue was not discussed in detail (which was found unnecessary due to the absence of a dispute between the parties regarding this particular issue).

Despite the fact that the BdoPC has been criticized for its lack of real contributions to the Inter-American System and for being poorly constructed,[16] this jurisdictional interpretation has a very powerful symbolic function. Although it is only an express recognition of the previous decision of *Miguel Castro Castro,* it closes the debate regarding the application of the specialized treaty by the Court, which is very important for the recognition and protection of violence against women, particularly considering that, among others, this Convention recognizes a special duty of States to prevent violence in the private sphere. Thus, it may be very useful in the consideration of a future domestic violence case. Therefore, I consider this jurisdictional approach, although not entirely new, to be one of the jurisprudential developments of the Court through this case.

B. The existence of a pattern of gender-related violence and the application of the Belem do Pará Convention

The general rule is that the BdoPC is applicable only in those cases in which it has been proven that the attacks are "especially

15 Case of Velásquez-Rodríguez vs. Honduras, Preliminary Objections, Judgment, Inter. Am. Ct. H.R. (ser. C) 1, ¶ 30 (Jun. 26, 1987).

16 Patricia Palacios, supra note 9, at 21, 40.

addressed against women or were based on their condition of being women."[17] In the *Cotton Field* case, the Court found that the violations were especially addressed against women. This conclusion was drawn from the following elements: (i) the existence of a gender-related pattern of violence, (ii) the characteristics of the victims, and (iii) the *modus operandi* of the crimes. Although I agree with the conclusion of the Court, there may have been *additional* factors that motivated the crimes, as I will explain in Part III.

As described above (section "*I.a. Relevant facts*"), Ciudad Juárez has developed "different types of organized crime, such as drug-trafficking, people trafficking, arms smuggling and money-laundering, which have increased the levels of insecurity and violence."[18] Since 1993, the number of disappearances and murders of women and girls in Ciudad Juárez has increased significantly. Although the sources do not agree on the number of women who have been killed or disappeared, the IACHR observed that the number was alarming.[19]

The victims were young women (15 to 25 years), students or workers in the *maquiladora* industries or in local businesses and mostly underprivileged or migrants. Evidence in certain cases also suggested links to prostitution or trafficking for sexual exploitation.[20] There were evident signs of sexual violence in many of the murders. In fact, some of the murders and disappearances have revealed patterns of conduct: women were abducted and kept in captivity, they did not know the attacker, and after days or months their bodies were found on empty lots with signs of violence, rape, sexual abuse, mutilation and torture. According

17 Case of Ríos et al. vs. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) 194, ¶ 194 (Jan. 28, 2009); Case of Perozo et al. vs. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) 195, ¶ 295-296 (Jan. 28, 2009).

18 Cotton Field, Inter-Am. Ct. H.R. (ser. C) 205 ¶ 113.

19 Reports quote figures ranging from 260 to 370 women murdered from 1993 to 2003, increasing to 379 in 2005. The Office of the Special Prosecutor for Crimes related to the Murders of Women in the Municipality of Juárez established that from 1993 to 2005, 4,456 women were reported to have disappeared. See Id. ¶ 118.

20 Id. ¶ 136.

to the IACHR, the Committee on the Elimination of Discrimination against Women (CEDAW) and Amnesty International's reports concur that approximately one-third of the murders had a component of sexual violence or similar characteristics.

Although the State mentioned other factors of violence and marginalization, it recognized that the situation in Ciudad Juárez is influenced by a culture of gender discrimination "based on the erroneous idea that women are inferior."[21]

> *According to the State, one of the structural factors that has led to situations of violence against women in Ciudad Juárez is the change in family roles, as a result of women working. The State explained that in Ciudad Juárez, the maquiladora industry was established in 1965 and expanded in 1993 with the North American Free Trade Agreement. It indicated that by giving preference to hiring women, the maquiladora industries caused changes in women's working lives that also had an impact on their family lives because "traditional roles began to change, with women becoming the household provider." This, according to the State, led to conflicts within the family because women began to be portrayed as more competitive and financially independent. In addition, the State cited the CEDAW report, indicating that '[t]his social change in women's roles has not been accompanied by a change in traditionally patriarchal attitudes and mentalities, and thus the stereotyped view of men's and women's social roles has been perpetuated.'*

The IACHR relied on several international reports to affirm the existence of a context of systematic discrimination against women.

> *According to Amnesty International, the characteristics shared by many of the cases reveal that the victim's gender appears to have been a significant factor in the crime, 'influencing both the motive and the context of the crime, and also the type of violence to which the women were subjected.' The report of the IACHR Rapporteur indicates that the violence against women in Ciudad Juárez 'has its roots in concepts of the inferiority and subordination of women.' In turn, CEDAW stressed that gender-based violence, including the murders, kidnappings, disappearances, and the domestic violence 'are not isolated, sporadic or episodic cases of violence; rather they represent a structural situation and a social and cultural phenomenon deeply rooted*

21 Id. ¶ 398.

> *in customs and mindsets' and that these situations of violence are founded 'in a culture of violence and discrimination.'*
> *The United Nations Rapporteur on violence against women explained that the violence against women in Mexico can only be understood in the context of 'socially entrenched gender inequality.'*

This context of gender discrimination and inequality allowed the Court to shape the international responsibility of Mexico, relying not on State action (considering that the Court did not find evidence of agents participating in the crimes) but rather on the lack of prevention of the disappearances and murders in the context of a gender-related pattern of violence. Due to the imminent risk, the IAHRC combined the *created risk doctrine*[22] with a *reinforced* due diligence prevention duty[23] (two categories of State responsibility in human rights developed by the IACHR) and applied them for the first time to a gender-based pattern of violence involving violence by non-state actors. The IAHRC affirmed that:

> *The State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence …. In cases of violence against women, the States also have the general obligation established in the American Convention, an obligation* ***reinforced*** *since the Convention of Belem do Pará came into force (emphasis added).*

As explained in the concurring opinion of Judge Diego Garcia Sayan to the *Cotton Field* case, the Court was only applying the doctrine developed in the *Pueblo Bello Massacre vs. Colombia* case and in the cases of *Sawhoyamaxa Indigenous Community*

22 The regional tribunal has offered an intermediate theory of international State responsibility for those cases in which: (i) the violations were committed by non-state actors; (ii) there is no evidence to show that the State was directly involved in the violations; (ii) there is no direct connection between agents of the State and non-state actors; and (iii) there is no strong evidence of the lack of due diligence to prevent the specific events. In these cases, the IAHRC applies a qualified understanding of the duty of protection. If there is evidence of public actions, policies or practices that have that afterward allowed the human rights violations, the State is required to protect the population against the risk it created and has a particular duty to deactivate such risk or else be subject to an aggravated international responsibility. This doctrine of State responsibility has been called the Victor Abramovich, , 6 Anuario de derechos Humanos, 167 (2010). Available at: http://www.revistas.uchile.cl/index.php/ADH/article/viewFile/11491/11852

23 Id.

vs. Paraguay[24] and *Valle Jaramillo et al. vs. Colombia*.[25] In those cases, the Court acknowledged that:

> *[A] State cannot be responsible for all the human rights violations committed between individuals within its jurisdiction. Indeed, the nature erga omnes of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the* ***awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger****. In other words, even though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, this is not automatically attributable to the State, because the specific circumstances of the case and the execution of these guarantee obligations must be considered (emphasis added).*

Thus, relying on these precedents, the IACHR concluded that "the absence of a general policy that should have been initiated in 1998 is a failure of the State to comply with its obligation to prevent"[26] and that the State of Mexico "did not prove that it had adopted reasonable measures, according to with the circumstances surrounding these cases, to find the victims alive".[27]

Although the IACHR was only repeating previous case law regarding the prevention duty, this was the first instance of the Court applying this theory to a gender-based pattern of violence. Although it is not an original jurisprudence theory, it is important for at least two reasons. First, symbolically, it is significant that the Court acknowledges the relevance of this gender pattern and that it attributes specific legal consequences for States in the scope of international State responsibility. Second, the Court is signaling that States should adopt not only general public policies of crime prevention but also public policies particularly directed

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24 Case of Sawhoyamaxa Indigenous Community vs. Paraguay, Merits, Reparations and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) 146, ¶ 155 (Mar. 29, 2006).

25 Case of Valle Jaramillo et al. vs. Colombia, Merits, Reparations and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) 192, ¶ 78 (November 27, 2008).

26 Inter-Am. Ct. H.R. (ser. C) 205¶ 11 (García-Sayan, D., concurring).

27 Id. ¶ 284 (majority opinion).

toward preventing gender-based crimes. This perspective will be reflected in the reparations, for instance, in the requirement to consider a gender perspective in criminal investigations.

Thus, when an international Court declares that a State is responsible not only for the *acts* of its agents but also for the *lack of prevention* of crimes, and in this case of gender-based crimes, it creates an entire new range of obligations for the States that are not obvious from the text of international treaties. This result implies that States will need to re-structure their public policies to avoid international responsibility. This theory is also relevant for the prevention of domestic violence, which is traditionally viewed as a private and not a public concern, considering that States might be internationally responsible for the lack of prevention of this type of violence.[28]

C. The trend in the concept of femicide

The Inter-American Commission and particularly the representatives of the victims before the IACHR were seeking a decision that explicitly recognized the concept of "femicide" in the context of gender-based violence in Ciudad Juárez (they presented several expert witnesses to explain this issue, and some non-governmental organizations filed *amicus curiae* to support the proposition). In general, one might infer that they wanted the IACHR to (i) embrace a broader concept of *femicide* (not only restricted to the murder of women), (ii) order the State of Mexico to consider *femicide* as a legal criminal conduct, and (iii) develop the concept of *femicide* for possible application in future cases before the Court.

Nonetheless, the IACHR designated only two paragraphs to decide this issue. The Court responded to the allegations of the parties, affirming only that,

28 The Inter-American Commission has already decided one domestic violence case: Maria da Penha Maia Fernandes vs. Brasil, Case 12.051, Inter-Am. Comm' H.R., Report 54/01, OEA/Ser.L/V/II.111 Doc. 20 (2000).

> *[I]n the instant case the Court will use the expression 'gender-based murders of women,' also known as femicide [in the Spanish judicial decision the Court uses the word feminicide].*
> *In the instant case, the Tribunal finds that, bearing in mind the evidence and the arguments about the evidence in the case file, it is not necessary or possible to make a final ruling on which murders of women in Ciudad Juárez constitute gender-based murders of women,* ***other than the murders of the three victims in this case.*** *Consequently, it will refer to the Ciudad Juárez cases as murders of women, even though it understands that some or many of them may have been committed for reasons of gender and that most of them took place within a context of violence against women (emphasis added).*

Thus, it seems that the Court rejected and may have ignored, as legal issues, the three petitions of the Inter-American Commission and the representatives. First, the Court restricted the concept of *femicide* to the *murder* of women, without explaining their rationale. Second, the Court did not assume a position regarding the *criminal* conduct. Third, the Court embraced the concept only for the purposes of this particular case. It is as of yet unknown whether this concept will be embraced by the Court in future cases.

Although it is true that the Court did not answer the majority of the arguments of the victims' representatives concerning this particular issue, one cannot entirely blame the Court for this limited approach. From my perspective, there was a lack of a litigation strategy on the part of the representatives and the Inter-American Commission of Human Rights to illustrate to the Court the supposed importance of the development of this particular concept in the regional system case law.

The reading of the file before the IACHR illustrates a lack of an organized strategy on the part of the Inter-American Commission and the representatives regarding this issue. First, as the Court affirms, "the Commission did not classify the facts that occurred in Ciudad Juárez as femicide"[29], but it did offer an expert witness that largely developed this issue, as I will explain below. Second, the representatives did not present an *explicit*

29 Cotton Field,Inter-Am. Ct. H.R. (ser. C) 205 ¶ 137.

petition to the Court regarding the concept of *femicide,* nor did they explain to the Court what they meant by this concept and why it was important for the Court to embrace it.

In their brief,[30] the representatives addressed the topic, differentiating between the concept of *femicide* and the concept of *feminicide*[31]. According to the representatives, the concept of *feminicide* is broader because it embraces not only the murder of women but also the whole context of a "gross and systematic violence pattern against women and girls and the lack of an adequate response of the State to prevent, eradicate and sanction those violations."[32] However, the representatives explicitly stated that they did not aim to "reach a conclusion regarding this conceptual debate"[33] but rather to recall that the violent death of women *because they were women* "happens as a consequence of the historical inequality in the power relations between men and women […] supporting an order of gender relations of …. dominance, inequality, discrimination and violence".[34] As previously stated, the representatives did not present any specific petition for the Court regarding this analysis.

Expert witnesses added more confusion to this already very confusing approach. For example, expert witness Pineda Jaimes, offered by the Inter-American Commission,[35] referred to the concept of *sexual systemic feminicide,* describing it as a crime with the following aggregative characteristics: kidnapping of the victim, sexual violation, mutilation and/or torture, murder,

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30 Article 25 of the Rules of Procedure of the ICHR says "Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings." See Organization of American States, Rules of Procedure of the Inter-American Court on Human Rights, art. 25, Nov. 13, 2009.

31 "Feminicidio" in Spanish.

32 Brief of the representatives of the victims, at 18, González et al.Mexico ("Cotton Field"),Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 205, (Nov. 16, 2009) (hereinafter) (free translation from Spanish),

33 Id. at 158.

34 Id.

35 It is surprising that the Commission offers this expert witness and, at the same time, does not embrace the concept of femicide in their lawsuit. Once might question whether this was simply negligence or a lack of strategy.

abandonment of the body in isolated places and a lack of criminal evidence.[36] As explained in Part I, this set of characteristics was the *modus operandi* in the Ciudad Juárez cases. It seems as though he was creating a specific feminicide concept for the crimes in Ciudad Juárez. He also argued that there is a need to draft specific language on a type of criminal conduct in the Mexican domestic jurisdiction called "feminicide,"[37] and even that domestic jurisdictions should embrace in their legislation at least five different types of feminicide.[38] In addition, he characterized the feminicide in Ciudad Juárez as a *State crime,* considering the climate of impunity surrounding criminal investigations.[39] Although the Inter-American Commission offered this expert witness, there is no reference to his opinion in the lawsuit that the Commission submitted to the Court.

On the other hand, expert witness Lagarde, offered by the representatives, defined the concept of feminicide according to the work of Diana Russell and Jill Radford[40] but complicated that concept, adding that it is genocide against women, a State crime, and that feminicide exists when there is a pattern of silence, omission, and negligence of state officials.[41]

In sum, the approach of the Commission and the representatives was evidently confusing and did not provide the Court with a clear and feasible alternative to address the concept of *femicide* or *feminicide* within a framework of international human rights law and international state responsibility.

On the other hand, the State of Mexico recognized *femicide* as a phenomenon, although it is unclear from the state's position what can or should be the legal effects of this recognition,

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36 Campo Algodonero, , at 3, www.campoalgodonero.org.mx, Apr. 21, 2009(hereinafter) (free translation from Spanish), (last visited May 14, 2009).

37 Id. at 7.

38 According to the expert witness, those would be (i) intimate feminicide, (ii) infantile feminicide, (iii) familiar feminicide, (iv) stigmatized occupations feminicide and (v) sexual systemic feminicide. Id. at 6.

39 Id. at 20.

40 Femicide. The Politics of Woman Killing (Jil Radford & Diana E.H. Russell eds., Twayne Publishers, 1992). They describe femicide as "misogynous killing of women by men."

41 Cf., Feminicidios del Campo Algodonero, Apr. 20, 2009, (Last visited May 14, 2011).

except for an explicit request to the Court not to embrace it "as the definition of a type of crime, when this does not exist in domestic law or in the binding instruments of the Inter-American human rights system."[42]

One might question whether the Court had the responsibility to enact a more comprehensive decision regarding this issue, despite the poor litigation debate around it. While I think that the Court did not have the responsibility to deeply study every argument, I do think that in some respects, the Court could have been more eloquent. For example, the Court should have taken a position on the State's argument that the concept of *femicide* is not a human rights concept. I agree with this position argued by Mexico. The concept of *femicide* has not yet been discussed and approved in any international treaty and is not part of customary international law. However, the Court equaled the "gender-based murders" with the concept of *femicide,* adding very little to the debate, closing the possibilities for a broader concept and embracing the concept in human rights language without further explaining why it might be under this jurisdiction.

Additionally, it would have been informative for the Court to analyze whether domestic legislation, according to a human rights perspective, requires the designation of a crime called "femicide." Other cases of the Court have required certain States to enact criminal legislation designating certain criminal conduct, such as "forced disappearances."[43] Was this a case that required this type of order from the Court? From my point of view, there is no need to designate such a specific conduct, particularly when its definition is still under discussion and when the punishment for homicide is aggravated by designation as a gender-based crime in Mexico's criminal legislation.

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42 González et al.Mexico ("Cotton Field"),Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 205 ¶ 139 (Nov. 16, 2009).

43 See e.g. Gelman vs. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R (ser. C) 221 (Feb. 24, 2011); Goiburú et al. v Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 153 ¶ 92 (Sep. 1, 2010) Ibsen-Cárdenas e Ibsen Peña Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 217 ¶ 66 (Sep. 1, 2010) Gomes Lund et al.() vs. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 219 ¶ 109 (Nov. 24, 2010).

In conclusion, we have yet to observe whether the discussion regarding the concept of *femicide* will again be brought to the Court and whether the Court will further develop this issue. In any case, it seems that the *Cotton Field* case is not going to be very helpful in future approaches.

D. Gender perspective in reparations

In the *Cotton Field* case, the IACHR decided to order reparations for the victims and their next of kin, from a gender perspective. This case was the first in which the Court expressly applied this gender perspective to reparations. According to Abi-Mershed, this occasion was the first time in which the Court ordered *transformative reparations* to remedy a structural discrimination against women.[44] The Court affirmed that,

> *Bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State, the reparations must be designed* ***to change this situation,*** *so that their effect is not only of restitution, but also of rectification*
>
> *[…]*
>
> *In accordance with the foregoing, the Court will assess the measures of reparation requested by the Commission and the representatives to ensure that they, (i) refer directly to the violations declared by the Tribunal; (ii) repair the pecuniary and non-pecuniary damage proportionately; (iii) do not make the beneficiaries richer or poorer; (iv) restore the victims to their situation prior to the violation insofar as possible, to the extent that it does not interfere with the obligation not to discriminate; (v)* ***are designed to identify and eliminate the factors that cause discrimination; (vi) are adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women;*** *and (vii) take into account all of the juridical acts and actions in the case file which, according to the State, tend to repair the damage caused (emphasis added).*

However, although the Court explicitly affirmed that reparations were going to be designed from a gender perspective, a closer reading of the judicial decision reveals that this perspective

44 Aby-Mershed, note 8, at 8.

is hardly recognizable, except for very few exceptions and the attention of the Court in ordering the incorporation of a gender perspective in the prosecution of the crimes. Thus, despite the fact that the representatives asked for several reparations explicitly designed to address violence against women[45], the Court did not embrace these particular reparation measures.

In this case, there are only three reparation orders designed from a gender perspective. The first one is a satisfaction measure, called "commemoration of the victims of gender-based murder." Describing this measure, the Court affirmed the following:

> *The Tribunal considers that, in the instant case, it is pertinent for the State to erect a monument to commemorate the women victims of gender-based murder in Ciudad Juárez, who include the victims in this case, as a way of dignifying them and as a reminder of the context of violence they experienced, which the State undertakes to prevent in the future. The monument shall be unveiled at the ceremony during which the State publicly acknowledges its international responsibility and shall be built in the cotton field in which the victims of this case were found.*

This is not the first time the Court ordered the erection of monuments as a means of dignifying human rights victims[46]. The only difference in this case is that the monument must demonstrate that the women were victims of "gender-based violence." However, one might question whether this is an application of a gender-perspective analysis or merely an additional recognition of the specific violations in the case, as in all the other cases before the Court in which satisfaction measures are ordered.

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45 For instance, the representative of the victims asked the Court to order Mexico, among others, to enact a particular law regarding financial assistance to female victims of violence and the creation of a special international committee to evaluate the policies and attention models to victims of gender-based violence. See Representatives Brief, note 39.

46 The Court has ordered the erection of monuments at least in the following cases: Mapiripan Massacre Colombia Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 134 (Sep. 15, 2005); 19 Tradesman vs. Colombia Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 109 (Jul. 5, 2005); Pueblo Bello Massacre Colombia Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 140 (Jan. 31, 2006).

A gender-based approach was also considered by ordering to the State an appropriate medical, psychological or psychiatric treatment, as follows:

> *Consequently, as a measure of rehabilitation, the Court orders the State to provide appropriate and effective medical, psychological or psychiatric treatment, immediately and free of charge, through specialized state health institutions to all the next of kin considered victims by this Tribunal in the case* ***sub judice****, if they so wish. The State shall ensure that the professionals of the specialized health care institutions who are assigned to treat the victims assess the psychological and physical conditions of each victim, and have sufficient training and experience to treat both the problems of physical health suffered by the next of kin, and also the psychological* ***trauma as a result of the gender-based violence****, the absence of a State response, and the impunity. In addition, the treatment must be provided for all the time necessary and include the supply of any medication that may be required (emphasis added).*

Although this is not the first case in which the Court ordered this type of medical and psychological treatment,[47] it is the first time in which the Court considered this treatment to directly attack the *trauma* as a result of the gender-based violence.

The other gender-reparation approach was the order for the State to apply a gender perspective in the criminal investigation. The Court ordered the following:

> *The investigation shall include a gender perspective; undertake specific lines of inquiry concerning sexual assault, which must involve lines of inquiry into the corresponding patterns in the area; be conducted in accordance with protocols and manuals that comply with the directives set out in this judgment; provide the victims' next of kin with information on progress in the investigation regularly, and give them full access to the case files, and the investigation shall be carried out by officials who are highly trained in similar cases and in dealing with victims of discrimination and gender-based violence.*

47 See, e.g.Kawas-Fernández vs. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 196 ¶ 209 (Apr. 3, 2009); Anzualdo-Castro vs. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 202 ¶ 203 (Sep. 22, 2009).

In this case, the Court paid close attention when ordering specific details or "directives" for the criminal prosecution. This trend permeates throughout the most recent judicial decisions of the Court, beginning with the case under study. Although there were previous cases in which the Court ordered some specific directives for the criminal prosecutions[48], this detail is only found in later decisions.[49] Moreover, this case is the first to require a gender-perspective approach in the criminal investigation.

The Court ordered (i) that the investigation must consider lines of inquiry regarding sexual assault into the corresponding patterns in the area, and (ii) that the investigation must be addressed by officials that are highly trained to respond to victims of discrimination of gender based-violence. Although this last order is novel and useful, it raises some concerns because in practice, it might be an obstacle rather than a vehicle for achieving justice for several reasons. First, because there is no guidance from the Court on the meaning of the expression, "training in gender-based violence," prosecutors might use this issue as an argument to discard such difficult investigations, considering that they are not trained in this subject. Perhaps, ordering and following the training of the officials now in charge of the investigations might have been more useful. The second reason is that, considering the precarious situation in Ciudad Juárez, it is highly improbable that a sufficient number of prosecutors are specifically trained in these areas of law. Finally, the effectiveness of this measure may be threatened by the debate on the content of "a proper training in gender-based violence" that might occur

48 See reparation measures in Carpio Nicolle et al. vs. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 117 ¶ 135 (Nov. 22, 2004); Servellón García y otros vs. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 152 (Sep. 21, 2006); Miguel Castro Castro vs. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 160 ¶ (Nov. 25, 2006); Ticona Estrada et al. V. Bolivia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 191 (Nov. 27, 2008); Anzualdo Castro vs. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 202 (Sep. 22, 2009).

49 Case of Manuel Cepeda-Vargas vs. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) 213 ¶ 216 (May 26, 2010) (the Court also ordered very specific directives for the investigation).

between the State and the representatives of the victims when implementing this reparation measure.

To illustrate my point, I would like to recall the case of *Mapiripan Massacre vs. Colombia,* where in the IACHR ordered "the appointment of a special Public Prosecutor, within the Human Rights Unit of the Office of the Attorney General, *exclusively in charge of the investigation* and furthering of the ongoing criminal proceeding" *(emphasis added).* This order generated serious problems within the judicial system in Colombia. In a country dealing with massive human rights violations, it would be almost irresponsible to designate an exclusive prosecutor for the case, considering that, unfortunately, this case is only one of multiple massacres that have occurred in Colombia and that there is an evident lack of resources in the Prosecutor's office. After a long debate with the representatives on how to comply with this order, the Court reconsidered this reparation measure. The IACHR summarized the discussion and its reconsideration as follows:

> *The State considers that, at present, it is impossible and inconvenient to appoint an exclusive prosecutor to the case, inasmuch as there are more than 100 prosecutors working at the Human Rights Unit, who are in charge of more than 4800 active proceedings; therefore, such an appointment would imply reassigning the workload among other prosecutors. Moreover, it considers that making such an appointment, in a hallmark case, could become a negative example in the other cases of alleged massive human rights violations under the charge of the Attorney General's Office.*
> *That the Commission considered that such appointment would contribute to make a material progress in the compliance with the pending judicial obligations.*
> *That the Court deemed in the Judgment that the appointment of a special public prosecutor, within the Human Rights Unit of the Office of the Attorney General, who would be exclusively in charge of the investigation and the furthering of the ongoing criminal proceeding, would contribute to the compliance with the obligation to investigate.* ***Nevertheless, such appointment does not constitute the only way to meet such objectives and therefore, it falls upon the State the duty to order the necessary measures to guarantee some progress in the investigation, as fast and effectively as possible***[50] *(emphasis added).*

50 Mapiripan Massacre Colombia Monitoring Compliance with Judgment, Inter-Am. Ct.

This quote exemplifies that reparation measures are sometimes ordered by the IACHR without careful consideration of the context and feasibility in accordance with the countries' conditions. I think that this situation is problematic, considering that reparation measures generate high expectations for the victims and their next of kin. Although the IACHR has not yet enacted the first resolution to monitor the compliance of the *Cotton Field* case, it is highly probable that this measure will be one of the most debated in the process of implementation. The success of the gender perspective in prosecutions is yet to be observed.

In sum, while this would be the first time that the Court has widely embraced an explicitly gender-based perspective in its case law, many unanswered questions remain regarding the Court's understanding of this approach and the debates that will ensue regarding this topic upon implementation of the reparation measures. Still, at least symbolically, the judicial decision is very important for the protection of women's rights in gender-based violence patterns. However, whether this symbolic approach is related to any feminist theory and whether it is appropriate for the representatives to require the Court to embrace a feminist theory in its judgments (or even to require the victims to align to a feminist perspective) remain unaddressed. What are the benefits and risks to the Court resulting from embracing and supporting the feminist movement? The next chapter presents some insights regarding these difficult issues.

III. THE TENSION BETWEEN THE POLITICAL FEMINIST MOVEMENT AND THE VICTIMS

The recent gender-related judicial decisions in the Inter-American Court, particularly the *Miguel Castro Castro* case and the *Cotton Field* case, manifest a *relative* success of the feminist movement. The Court implicitly embraces doctrines from *sexual*

H.R. ¶ 34-36 (Jul. 8, 2009).

dominance feminism[51] and *cultural feminism*[52]. This success is generally evidenced in international law. This success emerges from the drafting of international treaties focused on women's rights[53] and is further reflected in international criminal law judicial decisions[54] and international human rights judicial decisions and doctrine.[55]

I will use Halley's perspective of the essential elements of feminism to illustrate my point. For Halley, the two essential elements of feminism are (i) the distinction between male and female and (ii) the assumption that some kind of subordination exists between male and female, in which the female is the disadvantaged or subordinate element.[56] Both elements are evidently present in the *Cotton Field* case, as the reader may infer from Parts I and II of this paper.

In recent cases, this feminist approach has been exemplified by the observance of rape as the paradigm or exemplary event in male/female relations.[57] For example, in the *Miguel Castro Castro* case, the IAHRC found that,

- Several women in the prison were subject to sexual violence because they were "naked and covered only with a sheet, while armed men who apparently were members of the State police force surrounded them."[58] The Court

51 The major proponent of this is Catharine MacKinnon. She emphasizes sexuality as the key attribute of subordination of women.

52 Two major proponents of cultural feminism are Robin West and Suzanna Sherry. They responded to formal equality by emphasizing the differences between men and women.

53 See, e.g.Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

54 the Prosecutor vs. Akayesu, Case ICTR- 96-4-T, Judgement (Sep. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf

55 See, María Mamerita Chavez vs. Peru, Case 12.191, Inter-Am. Comm'n H..R., Report 71/03, OEA/Ser./L/V/II.118 Doc. 70 rev. 2 at 668 (2003); Maria da Penha vs. Brazil, Case 12.051, Inter-Am. Comm'n H..R., Report 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

56 Brenda Cossman et al., , 12 Colum. J. Gender & L. 601, 604 (2003).

57 Id. at 612

58 Case of the Miguel Castro-Castro Prison vs. Peru Merits, Reparations and Costs, Judgment, Inter-Am. Ct.. H.R (ser. C) 160 ¶ 306 (Nov. 25, 2006).

explained that what classifies this treatment as sexual violence is that "men constantly observed the women."[59]

- One woman suffered sexual rape because she was subject to an abrupt vaginal inspection. The Court defined sexual rape in a broad way, as an "act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects, as well as oral penetration with the virile member."[60]
- Rape is an "extremely traumatic experience that may have serious consequences and it causes great physical and psychological damage that leaves the victim "physically and emotionally humiliated," a situation difficult to overcome with time, contrary to what happens with other traumatic experiences."[61]
- Due to its effects, the sexual violence in the case constituted torture.[62]

This same approach regarding rape has been observed in other recent cases of the IACHR and reflects not only a *sexual dominance* approach to feminism (recall that Catharine MacKinnon states that the crime of rape cannot be confined to penetration[63]) but also a *cultural feminism* approach that argues that "women suffer more than men"[64] and that there should be an acceptance of their differences.[65] Finally, it is interesting to note that the Court also embraces the "feminist discourse of trauma around women's bodies and sexuality"[66] by differentiating the rape trauma experience from other trauma experiences.

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59 Id. ¶ 306.
60 Id. ¶ 310
61 Id. ¶ 311
62 Id. ¶ 312
63 Catherine A. MacKinnon, Feminism Unmodified. Discourses on life and Law 89 (Harvard University Press, 1988).
64 West, Robin, The difference in women's hedonic lives: a phenomenological critique of feminist legal theory, 15 Wis. Women's L.J. 149 (2000).
65 Id. at 212, (citing Christine Littleton)
66 See also Suk, Jeannie, 4, 17 (Harvard Public Law Working Paper 10-22) ("[S]ince 1970s, professional psychiatry, the veterans' movement and feminism converged to generate a close association between men´s experience of war, women´s experience of sexuality, and trauma").

Although neither the Court nor the representatives or expert witnesses cite the work of Catharine MacKinnon,[67] ideas central to her work are noted in the briefs of the parties and in the judicial decision. For instance, expert witness Lagarde affirms that violence against women is simply a "dimension of the gender domination forms of men over women."[68] The *amicus curiae* of Women's Link Worldwide sustains that the BdoPC recognizes that "gender violence is a manifestation of the historically unequal power relationships between men and women,"[69] that "traditional attitudes [...] according to which women is observed as subordinate [...] might justify violence against women as a form of [...] domination"[70], and that "[t]he captivity is the ultimate degradation of women through torture, mutilation, sexual aggression, and other acts of violence that can only occur in the female body"[71]. The representatives in the case described the femicide as "an extreme form of violence against women, the murder of girls and women merely because of their gender *in a society that subordinates them*"[72] *(emphasis added).*

In its analysis of the context of a gender-based pattern of violence and the concept of *femicide*, the Court heavily relied on the concept of subordination of women in Ciudad Juárez, implicitly embracing a *sexual dominance feminism* approach. However, as explained above, the Court also adopted reparations, "bearing in mind the different impact that violence has on men and on women" and embracing a *cultural feminism* approach as well.[73]

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67 MacKinnon suggests that gender is constructed by sexuality, that sexuality is the social process, which creates, organizes, expresses and directs desire, creating the social beings we know as women and men, and their relations create society. Sexuality is therefore the pinning for women's subordination and rape, battery and sexual harassment are a form of a pattern: the power of men over women in society. See, e.g. Mackinnon note 74; Catharine Mackinnon, , 7 Signs 515-544 (1982).

68 Brief of Expert Witness, note 43, at 31.

69 Amicus curiae of Women's Link Worlwide brief, at 6, González et al.Mexico ("Cotton Field"),Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 205, (Nov. 16, 2009) (hereinafter) (free translation from Spanish),

70 Id. at 7 (citing the General Observation 19 of the CEDAW Committee)

71 Id. at 12

72 González et al.Mexico ("Cotton Field"),Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 205, ¶ 138 (Nov. 16, 2009).

73 As Halley suggests, according to dominance feminism, the relationship of subordination is one of power, whereas according to a cultural feminism approach, the relationship of

This approach has several benefits and risks. The benefits from a women's rights perspective are, among others, that violence against women is recognized as an unacceptable conduct; the IACHR urges the State to investigate if the motive behind the crimes is gender-related; reparations are designed to end and transform the pattern of gender violence; States are called to design public policies explicitly to prevent gender-based violence to avoid international responsibility; and the Court has jurisdiction to declare that a State is internationally responsible for violating the CBdoP. We have yet to observe whether these benefits will be evidenced by appropriate domestic implementation, but even if they were only symbolic, they would have significance.

However, this feminist approach also has risks. I argue that the most significant risk is that it undermines the tension between the political feminist movement and the victims of the cases. Perhaps, this tension is not recognizable by the Court, perhaps not even by the victims or the well-intentioned representatives, but it is present in the implicit and ongoing dialogue between those who represent the victims before the Inter-American System, the international organs, and the victims themselves.

For instance, in the litigation of the *Cotton Field case*, the feminist movement approach characterized the victims as *women.* Was it relevant that they were young, immigrants, poor or emergent workers in the *maquiladora* industry? No. None of these additional characteristics mattered for the strategic litigation. The feminist approach completely undermined *intersectionality* in the case, as did the IACHR. As recognized by all of the parties to the case and by the IACHR, the victims in the *Cotton Field case* were young, poor (they lived in a precarious economic situation), had low levels of education, and were emerging workers (domestic workers and *maquiladora* workers). However, it seems that the feminist approach subsumed all of the other possible causes of discrimination and that these additional characteristics were only used to reinforce gender discrimina-

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subordination is one of ethical ranking. See Cossman, note 67.

tion rather than to consider other types of discrimination as autonomous violations. The *amicus curiae* of Women Links Worldwide, for instance, used these other categories to signify "multiple discriminations,"[74] but always with a strong link to gender violence. As we explained above, the Court ordered the Prosecutor's Office to address lines of inquiry regarding sexual violence and not other specific lines of inquiry regarding *working-class discrimination* or *immigrant* discrimination.

The recognition that not *all* women are the same and especially that the victims in the case were not the same as the broad category of *women* embraced by the feminist movement is not considered in the analysis. Accordingly, it seems that the Court was unable to address *intersectionality*.[75] There seems to be an implicit universal voice[76] of feminism behind the case, although it is highly probable that the Court was unaware of it. In fact, the Court does not *explicitly* uphold any feminist theory, and the IACHR is far from thinking directly in terms of feminist theories. The influence of the movement, nonetheless, is patent.

Do these crimes fall under the umbrella of gender crimes? Yes! However, they were not *only* gender crimes. Were the victims aware that they were going to be characterized *only as women* when they were killed? Was this feminist movement fight their fight? Furthermore, the tension between the victims and the movement is problematic when we consider the victims as part of the audience of this judicial decision. For instance, was it necessary for the Court to say that the trauma of rape is so difficult to overcome, considering that this is perhaps the only judicial decision that the women in Ciudad Juárez are going to read in their entire lives? Some authors argue, although controversially, that the feminist discourse of trauma around women's bodies and sexuality might at the very least be problematic, considering its possible paternalistic implications.[77] Furthermore, one

74 Amicus curiae brief, note 80, at 8.
75 This critique is embraced by authors such as Crenshaw who analyzes Supreme Court cases in the United States. Crenshaw, 339-343 (David Kayris ed., Pantheon, 2nd ed., 1990).
76 Id. at 204.
77 See Suk, note 77.

might question whether this issue was a necessary *rationale* in the decision, considering that the same result and even the same reparation measures of medical and psychological treatment could have been ordered without that statement.

Despite her palpable good intentions, Lagarde's expert witness document might be useful to illustrate my concern. At the end of her document, she states that she met with the victim's mothers and civil organizations and "shared with them the gender perspective elements to understand the situation and to think about the solutions to the problem."[78] An excerpt of her statement to the victims' mothers, as explained in her document, follows:

> *You have changed Ciudad Juárez, Chihuahua, and you have transformed us all [...] you are part of a global world [...] the civil movement to eliminate the feminicide has broken the patriarchal political dialectic: it has not sought revenge, it has not been degraded [...] what you have done is create Juárez and Chihuahua a site of innovation, the Aleph of the world where we all want to live [...] You enounce the new relationships between women and men founded in equity and respect.*[79]

I profoundly admire the work of civil organizations and human rights defenders regarding the protection of women's rights, and I also consider that *awareness* of women's rights is very important. The level of that understanding must be carefully measured. It is important to be aware of the right not to be subject to violence and the causes and contexts related to this violence, which I believe should not be reduced to the condition of the victims as women. The supposedly historical duty to fight against a patriarchal society and the condition of the victims as gender *heroes might* be problematic.

Regarding the two reasons given by Lagarde to justify the approach to the case from a feminist perspective–to *understand* the situation and to reach better *solutions*–I would respond with two questions. I would first question whether understanding the situation from a patriarchal perspective really helps to end the

78 Brief of expert witness, note 43, at 58.
79 Id. at 58-59.

situation. This situation is not likely in the short run, particularly with all of the convergent violence patterns in Ciudad Juárez. It is certainly true that we need to understand the situation and prosecutors need to contextualize the situation. However, is it sufficient for them to understand it from only a feminist perspective? Is patriarchal society a cause or a consequence of violence? In very complex situations, it may be beneficial to analyze the gender perspective as a part of that context, not as the whole context.

Second, I would question whether better solutions really depend on the success of these particular feminist theories. I think that nearly the entire decision of the Court in the *Cotton Field* case would have survived without embracing any feminist theory. However, as previously stated, there are benefits to embracing feminist theories: it improves the analysis as long as the balance between the movement and the victims is preserved.

How should the tension between the political feminist movement and the victims be balanced? Moreover, who has the responsibility to protect that balance? In my opinion, all of the dialogue participants have this responsibility. First, the representatives of the victims must be aware and explicitly recognize that they are furthering political goals that might not be the same goals of the victims that they are representing. They should be transparent with the victims about this issue, explain to the victims their goals and perceptions of the significance of their motives, and allow the victims to decide whether they want to be included in this broader process. It is not my intention to suggest that the representatives in the *Cotton Field* case did not offer such explanations. I have no evidence of the subject of their dialogue. This perspective, however, is useful for any representative, in any particular case.

Second, the Inter-American Commission should ensure that this transparent dialogue occurs between the victims and their representatives. The Inter-American Commission plays the con-

ventional role of protecting the victims,[80] but in practice, it has a closer relationship with the representatives and only coordinates the litigation strategy with the representatives. I believe that the Commission, who is present from the beginning of the proceedings and who is allowed to hear witnesses and analyze all types of evidence, should be a guarantor of this healthy balance. It should intervene in the process before the Court to balance the equation, whenever necessary.

Finally, the Court plays a role in maintaining and preserving this balance throughout the proceedings and in the final judicial decision. The Court has the opportunity to hear the victims and ask them questions. The Court can identify whether the representatives and the Commission have adequately addressed this tension. From my point of view, the balance should ultimately be measured in favor of the particular victims of the case. This balance can be reflected not only in the *rationale* of the decision but also in the reparations. For instance, the Court might order the State to discuss the implementation of the reparation orders directly with the victims and not with the representatives, under the supervision of the Inter-American Commission.

Thus, while I think that progressive approaches regarding gender-sensitive cases require the participation of academics, civil society, non-governmental organizations and, certainly, representatives from the feminist movement, the risks and benefits of translating those theories into the jurisprudence of the Court must be considered and balanced to reach the best possible decision in a particular case and for particular victims.

80 This can be seen throughout the American Convention of Human Rights.

IV. Conclusions

The *Cotton Field* case is an important gender-sensitive decision that represents at least symbolic progress toward the protection of women's rights. It is indisputable that the crimes against Claudia, Esmeralda, and Laura were gender-based crimes, although not *only* gender-based crimes. Thus, the Court had to apply a gender perspective in the case, although at times this perspective might have benefited from more useful guidance.

While I appreciate the Court's contribution to an ongoing debate regarding the appropriate perspective for the best protection of women's rights, I think that some of the approaches of the litigation strategy and some statements of the judgment could have been more carefully analyzed to preserve the balance between political ideologies and the perspective of the victims. After all, the Court was created to protect the human rights of the people (including women) and not to become a part of any academic or political movement.

Nevertheless, this argument does not preclude the right of the Court to contribute to the feminist movement or argue that the feminist movement is responsible for creating an evil. However, the Court has a responsibility to carefully measure all of the involved factors to reach a reasonable judgment and to repair the damage. Each case is different, and each group of victims is different. As I affirmed above, if there ever was a case of gender-based violence, the *Cotton Field* is indisputably that case. However, other factors were involved and possibly undermined. The responsibility for showing these additional elements is not only that of the Court but also the Inter-American Commission and the representatives of the victims. The victims, after all, are only part of the audience in a legal debate. We should care for the victims, above all.

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