



A University of Sussex PhD thesis

Available online via Sussex Research Online:

<http://sro.sussex.ac.uk/>

This thesis is protected by copyright which belongs to the author.

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the Author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the Author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Please visit Sussex Research Online for more information and further details

**WOMEN'S REPRODUCTIVE RIGHTS:
REPAIRING GENDER-BASED HARM IN THE
INTER-AMERICAN SYSTEM OF HUMAN RIGHTS**

CIARA O'CONNELL

THESIS SUBMITTED FOR THE DEGREE OF PhD

UNIVERSITY OF SUSSEX
SCHOOL OF LAW, POLITICS AND SOCIOLOGY

MARCH 2017

ACKNOWLEDGMENTS

A decade ago I never imagined I would finish my undergraduate degree, and here I am submitting a doctoral thesis. It still doesn't feel real. And, I know the only reason it *is* real is because of the support and encouragement I received along the way. So, here go the thank yous:

Thank you to my family, chosen and biological, for always rooting for me.

Thank you to my dear friends in California, Seattle, Ireland, New York, England, Australia and Latin America who helped me find my identity and who taught me the value of friendship, community and transnational sisterhood.

Thank you to the amazing women and men who participated in the interviews I conducted for this research. Many of you have become my friends, and I look forward to years of smashing the patriarchy with you.

Gracias a los increíbles mujeres y hombres que participaron en las entrevistas que realicé para esta investigación. Muchos de ustedes se han convertido en mis amigxs, y espero con interés a los años de romper el patriarcado con ustedes.

Thank you Paola, Beatriz, Ana Cristina, Lucia, Viviana, Tati, Muriel and Carolina for your help with this research, and more importantly, for your friendship. Te mando muchos abrazos.

Thank you to the International Institute for the Sociology of Law in Oñati for hosting me as a visiting scholar in the early stages of this research.

Thank you to Hilary Charlesworth for inviting me to join your 'Rights, Regulation and Ritualism' project as a visiting scholar in Australia and as a workshop participant in Spain. It was a great privilege to learn from and be inspired by you.

Thank you to Alex Huneus for hosting me as a visiting scholar at the University of Wisconsin Madison Global Legal Studies Center, and for welcoming me into the law school community.

Thank you to the United Kingdom Society for Latin American Studies for providing me with a travel grant to help fund my field research travel.

Thank you, in advance, to the examiners who reviewed this thesis. I sincerely appreciate your time.

Thank you to my wonderful supervisors, Jo Bridgeman and Charlotte Skeet, for knowing when to push and when to let me roam free, and for seeing things I couldn't always see and then being gentle in showing me the way. This journey has been both rewarding and empowering because of you.

Finally, I would not have been able to begin, let alone finish this thesis without the support of my partner in love and life, Johnny. Your encouragement drives me, your laughter grounds me and your smile is my home. Thank you for showing me how to love hard and dream big.

ABSTRACT

This thesis examines women's reproductive rights litigation before the Inter-American System of Human Rights and determines how the Inter-American System can more effectively take account of, and repair, harms specific to women in reproductive rights cases. The research conducted in this thesis builds upon a growing body of literature on women's rights in the Inter-American System, and provides an original contribution by employing feminist socio-legal methodologies to identify the structural obstacles which cause violations of women's reproductive rights, and to challenge the gap between gender-based rhetoric and reparation in women's reproductive rights cases. The thesis centres around three specific women's reproductive rights cases, which are critically examined using the Holistic Gender Approach to Reparations developed by Ruth Rubio-Marín and Clara Sandoval. In applying this Approach to the case studies, it is possible to determine how, to what extent and to what effect, each reproductive rights case incorporates gendered harm in its reparation design.

This research utilizes doctrinal and empirical research methods to draw conclusions about how the Inter-American System and members of civil society such as women's rights organizations and litigators can expand upon and improve the Inter-American System's approach to repairing and eliminating violations of women's reproductive rights. Through information gathered from interviews with actors familiar with the case studies and the Inter-American System, this thesis determines a number of strategies to improve the transformative potential of reparations issued by the Inter-American Commission and Court. These strategies, when combined with the Holistic Gender Approach to Reparations, establish the foundation on which to develop a "gender reparations tradition" within reproductive rights litigation before the Inter-American System of Human Rights.

TABLE OF CONTENTS

Declaration	1
Acknowledgments	2
Abstract	3
Table of Contents	4
1. Introduction.....	6
1.1 Methods and Methodology	10
1.1.1 Methodology: Feminism and the Law.....	10
1.1.2 Method: Incorporating Empirical Research	20
1.2 Thesis Structure.....	23
2. Women’s Reproductive Rights and Reparation	26
2.1 Reproductive Rights and Human Rights Law	26
2.1.1 The Right to Reproductive Health.....	27
2.1.2 Developing a Multi-Faceted Rights Approach.....	33
2.2 Gendering Harm.....	36
2.2.1 Law and Gendered Harm	36
2.2.2 Gendered Harm is Patriarchal and Invasive	38
2.2.3 Gendered Harm is Social.....	41
2.3 Engendering Reparations in International Law	43
2.3.1 What are Reparations?.....	44
2.3.2 Repairing Gender-Based Harm	49
3. The Inter-American System of (Women’s) Human Rights	52
3.1 The Inter-American System of Human Rights	53
3.1.1 The Relevant Conventions	55
3.1.2 The Commission and the Court.....	61
3.1.3 Reparations in the Inter-American System	66
3.2 Establishing a Women’s Rights Agenda.....	70
3.2.1 Institutionalizing Feminism: The Role of Civil Society	71
3.2.2 Developing Alternative Women’s Rights Concepts	75
3.2.3 Laying the Groundwork for a Gender Approach to Reparations	78
3.3 Engendering Reparations in Women’s Rights Cases.....	86
4. María Mamerita Mestanza Chávez v. Peru	95
4.1 The Case: María Maméríta Mestanza Chávez v. Peru	96
4.2 Context: Setting the Stage for Women’s Reproductive Rights in Peru?.....	101
4.2.1 Talking Rights Talk: Family Planning in Peru.....	104
4.2.2 Family Planning or Something Else?	105
4.3 Repairing Gendered Harm: Determining Transformative Potential.....	108
4.3.1 Justice	109
4.3.2 Compensation	112
4.3.3 Guarantees of Non-Repetition.....	114
4.4 Conclusions and Lessons Learned	117
5. Paulina del Carmen Ramírez Jacinto v. Mexico.....	121
5.1 The Case: Paulina del Carmen Ramírez Jacinto v. Mexico	122
5.2 Abortion in Context: The “Good” and the “Bad”	129
5.2.1 Gender, Violence and Discrimination in Mexico.....	131
5.2.2 Medical Power and Abortion Stigma	133

5.3 Repairing Gendered Harm: Determining Transformative Potential.....	136
5.3.1 Legislative Reform in Baja California	137
5.3.2 Training	138
5.3.3 National Efforts to Reform Legislation and Disseminate Information	139
5.4 Conclusions and Lessons Learned	144
6. Artavia Murillo et al. v. Costa Rica	148
6.1 Context: Women as Mothers in the Non-Secular State	150
6.1.1 The Role of Religion	151
6.1.2 Gender Stereotyping.....	153
6.2 The Case: Artavia Murillo et al. v. Costa Rica	156
6.2.1 Designing the IVF Case: The Initial Stages	157
6.2.2 Reproductive Rights and the Inter-American Court.....	161
6.2.3 Fulfilling the Preconditions	167
6.3 Repairing Gendered Harm: Determining Transformative Potential.....	170
6.3.1 Compensation.....	172
6.3.2 Legislative Reform.....	173
6.3.3 Judicial Training.....	174
6.4 Conclusions and Lessons Learned	176
7. Conclusion	181
7.1 Building a Gender Reparations Tradition: Strategies for the Future.....	185
7.2 What's Next for Women's Reproductive Rights: Speculating on <i>IV v. Bolivia</i>	192
References.....	202
Appendices.....	215
Appendix A: Case Study Selection Criteria	216
Appendix B: Ethical Approval Certificate	217
Appendix C: Interview Participation Information Form	218
Appendix D: Interview Consent Form	225
Appendix E: Interview Information	229
Appendix F: Fieldwork Findings Report.....	237
Appendix G: Amicus Brief.....	261

CHAPTER ONE

INTRODUCTION

The project of including a gender perspective within international human rights law is one that has been purposefully undertaken by the international human rights community for more than three decades.¹ While it is undeniable that much progress has been made through advocacy and litigation efforts to protect, promote and fulfil women's human rights, there remain significant shortcomings in the application of international human rights law as it is employed to address and challenge structural conditions of gender-based discrimination and inequality. This thesis examines women's reproductive rights within the Inter-American System of Human Rights, and is founded on the following question: how can human rights law, as it is enshrined within the Inter-American System of Human Rights, be transformed to effectively take account of and repair harms specific to women in reproductive rights cases?

The Inter-American System of Human Rights has increasingly become a forum for the advancement of women's reproductive rights. As a judicial venue, the Inter-American System is limited in its ability to transform the lives of women, but it is also in a unique position to apply regional and international human rights law to women's experiences with discrimination, inequality and violence. As Cabal, Roa and Sepúlveda asserted, "despite limitations at both the national and international levels, the courts can provide excellent venues for bringing about change, especially when a disconnect exists between international, constitutional, or legislative norms and the reality of women's lives".² The progress made in the realm of women's reproductive rights is not solely a litigation project, it is also very much connected to national level activism, as well as transnational efforts to demand women's autonomy and reproductive health rights. However, this thesis argues that the Inter-American System of Human Rights is presently ineffective in how it interprets, addresses and subsequently redresses, gender-based harm. While the Inter-American System has made advancements towards developing a body of women's rights litigation that seeks to challenge gender-based violence and discrimination, this thesis focuses particularly on women's *reproductive* rights in order to develop a coherent and substantive link between the violence against women rights framework and violations of women's reproductive health rights. Although there are a number of gender-sensitive procedures and

¹ The first binding women's rights treaty was the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) GA Res. 34/180 (1979).

² Luisa Cabal, Monica Roa, and Lilian Sepulveda-Oliva, 'What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?' (2003) 7:1 Health and Human Rights 51.

instruments currently existent within the operations of the Inter-American System, this thesis seeks to reconceptualise the role and utility of reparations in order to make them work better for women; that is, to make them gender-based. The focus in this thesis on gender-based reparations directly responds to the Inter-American Court's determination that reparations must be designed to address structural discrimination in cases of women's rights violations.³

This thesis examines reproductive rights case law emerging from the Inter-American System of Human Rights, and relies on doctrinal and empirical research to draw conclusions around how the Inter-American System can expand upon and improve its approach to repairing and eliminating violations of women's reproductive rights. The objectives of this thesis are three-fold: (i) to provide critical analyses of women's reproductive rights cases emerging from the Inter-American System of Human Rights in order to highlight the relationship between gender-based harm, reproductive rights violations and violence against women; (ii) to examine the role of reparations in reproductive rights cases before the Inter-American System, which includes identifying how the Inter-American System employs, or fails to employ, its (limited) powers; and (iii) to promote the development of an effective and consistent "gender reparations tradition" within the Inter-American System of Human Rights. While the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights engage in activities other than developing jurisprudence, the research presented here is primarily concerned with strengthening litigation processes before the Inter-American Commission and Court. Impact and implementation are also discussed through the case study analyses, but the primary intent of this thesis is to strengthen the Inter-American System's approach to reparations in women's reproductive rights cases so that they effectively take into account gendered harm and have the potential to transform the lives of women.

This thesis contributes an original approach to the study of women's rights and reparations by advocating the development of a "gender reparations tradition" within the work of the Inter-American System of Human Rights. Such a tradition elaborates upon the "Holistic Gender Approach to Reparations",⁴ developed by Ruth Rubio-Marín and Clara Sandoval by suggesting a number of strategies for advancing gender-based reparations in women's

³ *González et al. ('Cotton Field') v. Mexico* [2009] Inter-American Court of Human Rights (ser. C) No. 205, Preliminary Objection, Merits, Reparations, and Costs.

⁴ Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the 'Cotton Field' Judgment' (2011) 33:4 Human Rights Quarterly 1062-1091.

reproductive rights cases. While Rubio-Marín and Sandoval also examined women's rights and reparations within the context of the Inter-American System, this thesis takes a different approach: (i) it examines women's *reproductive* rights cases and does so by incorporating information obtained from interviews with actors directly involved in the cases, as well as representatives from women's rights organizations and the Inter-American System of Human Rights; (ii) it explores how and why women experience violations of their reproductive rights by providing a contextual background for each case analysis; (iii) the analysis of case law conducted throughout this research is developed through the lens of gender-based harm, which contributes a distinctly feminist approach to critiquing women's reproductive rights protections, and also strengthens feminist arguments about the duty to prevent gender-based harm; and (iv) this thesis develops practical strategies for actors to employ when developing women's reproductive rights cases, that when combined with Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations, advance a "gender reparations tradition" before the Inter-American System of Human Rights.

The cases selected for this research project are emblematic in nature, and represent violations of women's reproductive rights on a massive scale.⁵ The first case study examines *María Mamerita Mestanza Chávez v. Peru*,⁶ which was a Friendly Settlement Agreement. This case remains open before the Inter-American Commission on Human Rights, and was selected because it addressed the coercive sterilization of thousands of Peruvian women, and because the Agreement included an analysis, albeit limited, of sociocultural discrimination as a cause of women's reproductive rights violations. The second case, *Paulina del Carmen Jacinto Ramírez v. Mexico*,⁷ was also a Friendly Settlement Agreement, but in this case the State and the victim reached an agreement before the Inter-American Commission on Human Rights formally admitted the case. The case was an abortion rights case that highlights the restrictions women and girls face when attempting to access their legal rights to abortion services. The Inter-American Commission closed this case, despite the fact that the State of Mexico failed to comply with all of the measures of the Friendly Settlement Agreement. The analysis conducted of each of these Agreements highlights the potential of the Friendly Settlement Agreement mechanism to transform the reproductive lives of women through gender-based reparations. The final case

⁵ See, Appendix A for case study selection information.

⁶ *María Mamerita Mestanza Chávez v. Peru* [2003] Inter-American Commission on Human Rights, Case 12.191, No. 71/03 Friendly Settlement Agreement.

⁷ *Paulina del Carmen Jacinto Ramírez v. Mexico* [2007] Inter-American Commission on Human Rights, Petition 161–02, Report 21/07 Friendly Settlement Agreement.

study, *Artavia Murillo et al. v. Costa Rica*,⁸ was selected for analysis because it is, at this point, the Inter-American System's only binding reproductive rights judgment, and as such, it is the first glimpse into the Inter-American Court's approach to repairing gender-based harm in a reproductive rights case. This case examined the right to in vitro fertilization for heterosexual married couples in Costa Rica, and is especially significant because the Inter-American Court expanded the definition of reproductive health, and included an analysis of the disproportionate impact of gender stereotyping on the lives of women.

Through the analyses conducted of the aforementioned reproductive rights cases, this thesis puts forth potential strategies, that when combined with Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations, establish a foundation for the development of a "gender reparations tradition" within women's reproductive rights litigation before the Inter-American System of Human Rights. The strategies identified throughout this thesis respond to missed opportunities derived from each of the case studies. First, the case study analyses reveal the benefit of applying alternative rights concepts, such as the concepts of *proyecto de vida* (life project) and *vida digna* (dignified life), to women's reproductive rights litigation. These themes are introduced in section 3.2.2, and are discussed in each case study conclusion. Second, the analysis conducted of the *Paulina del Carmen Jacinto Ramírez v. Mexico* case highlights the potential for enhancing the role of civil society within the design of reparations issued by the Inter-American Commission and Court. The current role of civil society is discussed in section 3.2.1. The third suggested strategy is the development of a multi-faceted approach to rights in reproductive rights cases, which requires a conceptualisation of rights as they are indivisible and complementary. This approach is introduced in section 2.1.2, and is a strategy derived from the analysis of the *María Mamerita Mestanza Chávez v. Peru* case in chapter four. The final strategy builds upon the multi-faceted approach to rights to articulate the necessity of developing the structural context of women's reproductive rights violations and gendered harm through the violence against women framework; the Convention of Belém do Pará.⁹ This strategy was identified through analysis of the *Artavia Murillo et al. v. Costa Rica* case, and is introduced in section 2.1.2, as well as in relation to the principle of due diligence in section 3.1.1. While acknowledging that there are certainly a number of other strategies available for establishing a "gender reparations tradition" within women's reproductive rights

⁸ *Artavia Murillo et al. ('In vitro fertilization') v. Costa Rica* [2012] Inter-American Court of Human Rights (ser. C) No. 257 Preliminary Objections, Merits, Reparations and Costs.

⁹ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará') OASTS (1994).

litigation before the Inter-American System, the strategies identified through this research correspond to lessons learned from analysis of the selected women's reproductive rights case studies. In order to provide the foundation on which this research was built, the remaining sections of this introductory chapter present the methodology and methods employed throughout this thesis. The final section of this chapter introduces the thesis structure and outlines the objectives of each of the chapters.

1.1 Methods and Methodology

The research conducted for this thesis used feminist socio-legal research methods, which entail a coupling of social research methods and feminist legal theory. According to Samia Bano, feminist social research, "seeks to understand the relationship between the experiences of women as complex, multiple and dynamic, and which can only be understood in interaction with other identities and social structures".¹⁰ The aims of feminist legal theory coincide with those of feminist social research, that is, as Martha Fineman suggested, feminist legal theory has "the objective of raising questions about women's relationships to law and legal institutions".¹¹ Feminist socio-legal research methods were employed throughout this research in order to raise questions about the relationship between women's rights and the Inter-American System of Human Rights, with specific regard to repairing gendered harm in reproductive rights cases. This section introduces the feminist methodology and research methods that inform the research conducted within this thesis. The first part on methodology examines feminist socio-legal theory as a lens to explore the power of law in women's lives, and introduces feminist methodologies suggested by Hilary Charlesworth which are employed throughout this thesis: *searching for silences* and *world travelling*. The discussion of methodology also positions the researcher within the greater research project. The second part of this section presents the methods used to conduct this research.

1.1.1 Methodology: Feminism and the Law

Feminist social research and feminist legal theory are both concerned with unpacking and reconceptualising relationships between women and institutions. The relationship between women and the law is contentious because, as Hilary Charlesworth contended, law was

¹⁰ Samia Bano, "Standpoint', 'Difference' and Feminist Research' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 91.

¹¹ Martha Albertson Fineman, 'Introduction' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) xi.

“built on the silence of women”,¹² and is therefore deaf to the needs of women. As Fineman explained, because the law is an institution that ignores women, it “can and should be the *object* of feminist inquiry, [but] to position law and law reform as the *objective* of such theorizing is to risk having incompletely developed feminist innovations distorted and appropriated by the historically institutionalized and inextractable dictates of the ‘Law’”.¹³ This means that while there is certainly great benefit and utility in developing a theoretical response to the restrictions of law, particularly in regards to women and gender, feminist researchers face the risk of assimilating to fit within the confines of the (white male) legal institution. As Carol Smart warned, “law is so deaf to core concerns of feminism that feminists should be extremely cautious of how and whether they resort to law”.¹⁴ Feminist methods and methodology work to alleviate the risk associated with entering into the quagmire of critiquing the experience of women within the institution of law.

Feminist socio-legal methodology combines the study of women’s lives (socio) with the study of women’s lived experience with the law (legal). Martha Fineman provided an overview of the benefits of adopting and applying feminist methodology to research on women and the law, the following of which are most relevant to this research: (i) feminist methodology is informed by women’s experiences and is often critical of paradigms that have historically excluded women from legal thought; (ii) feminist work critically evaluates the “fundamental concepts, values and assumptions embedded in legal thought”; (iii) feminist methodology aims “to present alternatives to an existing order”; and (iv) feminism is evolutionary in nature; “at its best (feminism) represents a contribution to a series of ongoing debates and discussions which take as a given that ‘truth’ changes over time as circumstances change”.¹⁵ This thesis applies the above aspects of feminist methodology in a number of ways. First, the research conducted for this thesis relies on women’s experiences (reproductive rights cases) before a legal institution (the Inter-American Human Rights System) to determine how, why and to what extent human rights law excludes women’s reproductive rights from legal thought before the Inter-American Commission and Court. Second, by analysing the application of human rights law to violations of women’s reproductive rights, this thesis critically evaluates and confronts assumptions embedded in legal thought that reify rather than challenge gender stereotypes about women and their roles in society. Third, this thesis argues for a reconceptualization of how the “existing

¹² Hilary Charlesworth, “What are “Women’s International Human Rights?”” in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspective* (University of Pennsylvania Press 1994) 60.

¹³ Fineman, *Boundaries of Law* (n 11) xv.

¹⁴ Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 2.

¹⁵ Fineman (n 11) xiv-xv.

order” repairs gendered harm in women’s reproductive rights cases, and calls for the development of a “gender reparations tradition” within the work of the Inter-American System. Finally, this thesis relies on the evolutionary nature of feminism in order to make claims about how to change current practices within women’s reproductive rights law litigation. This thesis is itself a contribution to “ongoing debates and discussions” about how to insert feminism into human rights law.

Feminist interpretations of the law, and international human rights law more specifically, are concerned with the perceived neutrality and power of the law as it impacts women’s lives. Feminist legal theorists argue that law is gendered; that is, law is inherently male, and contend that the inherent masculinity of law makes it nearly impossible for the application of law to be gender-sensitive.¹⁶ However, the project of analysing law from a feminist perspective has significant benefit in terms of challenging the inherent masculine power of law,¹⁷ and perhaps even reforming the way law is made/enforced/understood. While feminist legal theorists such as Fineman and Smart were sceptical about the potential of feminism to reform law, especially because the law is limited in its potential to be transformative, or even to initiate social change,¹⁸ the project of questioning and exposing law’s claim to objectivity requires that gender become a universal category of legal analysis.¹⁹ In order to challenge the objectivity of human rights law as it is applied to women’s reproductive rights in the Inter-American System of Human Rights, this thesis employs two feminist methodologies: *searching for silences* and *world travelling*. The following section introduces these feminist methodologies.

Methodologies: Searching for Silences & World Travelling

In her work, *Feminist Methods in International Law*, Hilary Charlesworth suggested two feminist methodologies that allow feminist researchers to question the objectivity of law (*searching for silences*) and respond to the many differences among women (*world travelling*).²⁰ It is necessary to introduce each of these methodological approaches because they are deployed through the analysis this thesis provides of the Inter-American System’s interpretation of reproductive rights law, as well as in discussions of *why* women experience

¹⁶ Robin West, *Caring for Justice* (New York University Press 1997) 97, and Catharine A. MacKinnon, *Women’s Lives, Men’s Laws* (Belknap Press of Harvard University Press 2005) 32.

¹⁷ Smart (n 14) 2.

¹⁸ Fineman (n 11) xv, and Smart (n 14) 2.

¹⁹ Hilary Charlesworth, ‘Feminist Methods in International Law’ (2004) 36 *Studies in Transnational Legal Policy* 159.

²⁰ Ibid 162-168. These concepts first originated in Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 49-52, but were elaborated upon in ‘Feminist Methods in International Law.’

violations of their reproductive rights. The first methodological concept, *searching for silences*, begins with the premise that “all systems of knowledge depend on deeming certain issues as irrelevant or of little significance”.²¹ Within the construction of international law it is apparent that the absence, or rather the silence of women, permeates all of law’s rules, structures and norms. While human rights law has made space for women over time, Charlesworth argued, “by and large, when women enter into focus at all in international law, they are viewed in a very limited way, often as victims, particularly as mothers, or potential mothers, in need of protection”.²² This assertion holds true when applied to women’s rights litigation before the Inter-American System because there exists a tendency to stereotype women as mothers when determining violations of their reproductive rights. As human rights institutions increasingly make space for women’s rights issues, it is essential that feminist researchers *search for silences* hidden within what appears to be gender-based reasoning, rhetoric and reparation. Charlesworth explained one of the techniques for identifying and decoding the silences of international law is to “pay attention to the way that various dichotomies are used within its structure”.²³ She claimed that international legal discourse is based on a series of distinctions: “objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/ passivity, public/private, protector/ protected, independence/ dependence”,²⁴ where the first term in each of these dualisms reflects “male” characteristics, and the second term is “female”. Charlesworth noted that much like most systems of knowledge, international law values the first half of each of these dualisms more than its counterpart.

The public/private divide is especially useful for identifying silences in international human rights law because it highlights how international law is not neutral or objective in its design or application. In dividing the public and private spheres there are inherent consequences for women because the law has historically neglected to address issues that disproportionately impact women in the private arena, such as gender-based violence and discrimination. The law is silent to women’s violations occurring in the private sphere because this is an area that is understood to be self-regulated; however, social and cultural

²¹ Ibid 162.

²² Ibid 163.

²³ Ibid 163.

²⁴ Ibid 163. The following dichotomies can also be included within the analysis of “male” and “female” dualisms/characteristics: state/ civil society, market/family, self/other. See, Genevieve Lloyd, *The Man of Reason: ‘Male’ and ‘Female’ in Western Philosophy* (Methuen Young Books 1984) 56, and Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998) 78.

norms are in fact their own form of regulation.²⁵ When the law has been silent to women's rights violations in the private sphere it effectively "blots out the experiences of [...] women" and ultimately silence their voices within law.²⁶ While the public/private divide silences women's voices and experiences within the law, the argument can also be made that there is value in the dualistic distinctions made between men and women and the public and private spheres. For example, Karen Engle explained that the private sphere is not inherently bad for women, and that perhaps because women's lives are ignored in the private, a space may be created to accommodate private decision-making.²⁷ She asserted, "women should [...] (use) the protection and the promise of the public and private, depending on their particular perceived needs".²⁸ Engle's destabilising of the public/private divide requires an interpretation of the "public" as existing in the form of public provisions that enable women to exercise their private decisions. This articulation of the public/private divide is the foundation for claims made throughout this thesis that suggest the public/private distinction should no longer exist in the litigation of women's reproductive rights. This is because states not only have a duty to *prevent* violations of women's reproductive rights, but there also exists an obligation to provide public services and provisions for women to enact their reproductive health rights. This claim is one supported by the Inter-American Court's determination in the *Artavia Murillo et al. v. Costa Rica* case, that a violation of the right to private life requires the state to provide reproductive health services.²⁹

The *searching for silences* methodology emphasises the need to conduct feminist research that has as its objective the task of challenging and dismantling the (white, Western) male foundation on which law is built. However, in order to undertake this enterprise, it is necessary to determine how the law, as it is a social construct, operates in societies that are both gendered and hierarchical based on the many differences amongst women. In order to respond to these differences Charlesworth borrowed Isabelle Gunning's concept of *world travelling*, which requires that researchers engaged in feminist research include "multicultural dialogue and a shared search for areas of overlap, shared concerns, and

²⁵ Ciara O'Connell, 'What a "Private Life" Means for Women' in Yves Haeck, Clara Burbano-Herrera, and Oswaldo Ruiz-Chiriboga (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 635; referencing Nicola Lacey (n 24) 73-78.

²⁶ Charlesworth, 'Feminist Methods in International Law' (n 19) 164.

²⁷ Karen Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights' (1993) 25 *Studies in Transnational Legal Policy* 148.

²⁸ *Ibid* 151.

²⁹ *Infra* section 6.2.2.1.

values”.³⁰ The concept of *world travelling* responds to critiques made of Western feminist theory’s tendency to erase the differences amongst women.³¹ Postcolonial and critical race feminist theorists have raised concerns with feminist analyses that neglect to address the various intersecting characteristics that define women, such as race, class, geographic location, socioeconomic status, (dis)ability, citizenship and sexuality.³² In her articulation of *world travelling*, Charlesworth referred to the work of Chandra Mohanty to unpack some of the challenges that come with applying “universal” western feminism to the complex lives of *all* women. Mohanty asserted, “women are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not ‘women’ - a coherent group - solely on the basis of a particular economic system or policy”.³³ Mohanty uses the concept of “imagined community” to articulate an idea similar to *world travelling*.³⁴ In “imagined community”, the term “imagined” counters the idea of “boundary”, as “boundary” is based on race, nation, colour, sexuality, etc. The term “community” refers to the idea of “horizontal comradeship”, rather than self, or individual. The concept of “imagined community” enables critique in chapter four about the reasons why certain *types* of Peruvian women were targeted for sterilization.

Although Charlesworth limited her discussion on *world travelling* to Gunning and Mohanty, there are a number of other concepts that fall within this methodological umbrella. This thesis employs Nira Yuval-Davis’ “transversal politics” and Kimberlé Crenshaw’s concept of “intersectionality” to determine how and why certain women experience violations of their reproductive health rights.³⁵ Yuval-Davis’ “transversal politics” seeks to dismantle social hierarchies and substitute them with “notions of difference (that) encompass, rather than replace, notions of equality”.³⁶ Yuval-Davis asserted that notions of difference should not be hierarchical, and they should assume a

³⁰ Isabelle Gunning, 'Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' (1992) 23 Columbia Human Rights Law Review 191.

³¹ For discussion on erasing differences amongst women, see Chandra Talpade Mohanty, *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003), and Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Routledge 2005).

³² For discussion on intersectionality, see, Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza* (2nd edn, Aunt Lute Books 1999); Norma Alarcón 'The Theoretical Subject(s) of This Bridge Called My Back and Anglo-American Feminism' in Héctor Calderón and José David Saldivar (eds), *Criticism in the Borderlands: Studies in Chicano Literature, Culture, and Ideology* (Duke University Press 1991) 28-42; and Audre Lorde, 'Age, Race, Class, and Sex: Women Redefining Difference' in Beverly Guy-Sheftal (ed), *Words of Fire: An Anthology of African American Feminist Thought* (The New Press 1995) 284-291.

³³ Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourse', *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003) 30.

³⁴ Ibid. See also, Benedict Anderson first elaborated the idea of “imagined community” in Benedict O’G R. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).

³⁵ Nira Yuval-Davis, 'What is “Transversal Politics?”' (1999) 12 Soundings 94-98, and Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43:6 Stanford Law Review 1241-1299.

³⁶ Ibid 95.

respect for and acknowledgment of difference based on social, economic and political power. “Transversal politics” examines “conceptual and political differences based on positioning, identity and values”.³⁷ This means that people who identify themselves as belonging to a particular group can be “positioned” differently based on other determinants, such as class, gender, ability and sexuality. Yuval-Davis argued that the different positioning of women requires that they engage in dialogue across and amongst “positions” in order to find a common “truth”.³⁸ The different standpoints of women, if not recognised and addressed, results in “unfinished” truth or knowledge.³⁹ The “positioning” of women is a theme examined in the discussion of “good” and “bad” abortion in the analysis conducted of the *Paulina del Carmen Jacinto Ramírez v. Mexico* case in section 5.2. Additionally, the analysis of the *María Mamerita Mestanza Chávez v. Peru* case elucidates how women from different “positionings” experienced family planning policies differently based on determinants such as economic condition, race and culture. The concept of “transversal politics”, implies the need to dismantle problematic hierarchies based on gender, race, class, and other different “positionings”, which requires that women’s reproductive rights be applied equally to all women, regardless of their “position”.

Crenshaw’s concept of intersectionality adds a further dimension to addressing the differences among women in that it challenges the value of feminist theory as it applies to women of colour, particularly black women, because it “evolves from a white racial context” that is often not acknowledged or even identified.⁴⁰ Crenshaw explained,

Many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the women race or gender dimensions of those experiences separately.⁴¹

While Crenshaw applied the concept of intersectionality to Black women, it can be also applied to women of colour more broadly. The concept incorporates an analysis of the compounded impact of discrimination across multiple variables and dimensions of women’s lives, such as class, age, sexuality and gender identity. In her analysis of intersectionality, Crenshaw noted that a focus on the most privileged members of a group marginalizes those who are burdened on multiple levels, and ultimately obscures discriminatory claims that are

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 154.

⁴¹ Crenshaw, 'Mapping the Margins' (n 35).

based on more than one level of discrimination. She warned against the “authoritative universal voice”, and advocated for an end to the “top down” approach to addressing discrimination.⁴² Crenshaw contended that, “placing those who currently are marginalized in the center (of feminist theorizing and political action) is the most effective way to resist efforts to compartmentalize experiences and undermine potential collective action”.⁴³ Crenshaw’s concept of “intersectionality” informs the analysis conducted of gendered harm in chapters six and seven, and enables critique in chapter four of the compound levels of discrimination indigenous and poor women experienced as a result of being coercively sterilized. In addition, Crenshaw’s assertion that marginalized women be at the centre of any effort to advance women’s rights, drives claims made in sections 2.3.3 and 3.3.1 about the need to develop reparations that take into account the needs of the most disenfranchised women.

The *world travelling* methodology requires that feminist researchers engaged in critique of the law determine how the law applies to different women differently. Each of the case study analyses conducted in this thesis argue for the need to conceptualise violations of women’s reproductive rights as they impact women in different ways based on their “position” in society. The above *world travelling* methodology concepts enable critique of the social context relevant to each case study by providing a lens through which it is possible to determine how and why certain “types” of women are afforded reproductive rights protections, while other “types” experience violations of their reproductive rights. In order to unearth the different ways in which human rights law silences women’s voices (*searching for silences*) and ignores the differences amongst women (*world travelling*), this thesis applies a variety of feminist theories and concepts. First, the concept of gendered harm introduced in chapter two informs critiques of how social and gendered harm effect women differently. In addition, gendered harm is the concept central to analyses of harm conducted through the “Holistic Gender Approach to Reparations” in each of the case studies. Second, chapter two provides a discussion of the public/private divide in order to argue that human rights law can no longer silence women through an arbitrary division of human rights provisions. Third, in order to reconceptualise the “existing order” of human rights law as it applies to women, chapter three introduces an alternative rights strategy which includes the concepts of *proyecto de vida* (life project) and *vida digna* (dignified life). Finally, each of the case study chapters apply feminist theory through a lens specific

⁴² Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’ (n 40) 138.

⁴³ Ibid 167.

to the reproductive rights violation concerned: intersectionality enables critique of the forced sterilization case in chapter four; the concepts of “good” abortion and medical power provide a contextual background of the right to abortion in chapter five; and gender stereotyping informs analysis of the IVF ban in chapter six.

The last part of this section serves to locate the researcher within this research project. This exercise requires that feminist researchers question how they produce and contextualise knowledge and power.⁴⁴ The feminist researcher must ask herself, “who am I as a researcher?” “Where did I come from?” And, “how does where I come from, and who I am, impact how I conduct research?” These questions are necessary to identify the researcher’s worldview and to determine underlying bias in how the researcher shares knowledge.

Locating the Researcher

When I reflect upon the moments in my life that led to this research topic, I am pulled back to my second year of high school, and the day I saw a pregnant student. She was walking across a field towards a building specifically designated for the instruction of pregnant students. I was stretching during track practice alongside a hundred other students; all of us watching her slowly walk toward the “pregnant building”. This building was far removed from the high school itself, and was located next to the pigs and chicken corrals, where farming students diligently raised and prepared animals for slaughter. I thought to myself, “wow, they’re literally putting her out to pasture”. She was soon followed by several other heavily pregnant girls, all Latina, some with other children in tow. This experience had an immediate impact on me - a white girl, an immigrant, from the poor side of town, but also, loaded with an innate privilege that I would only later in life come to understand.

I was raised in a neighbourhood of predominantly Mexican immigrants in a conservative Southern Californian city that can best be described as ridiculously divided along lines of race, class, and income. Spanglish was a language I picked up at a relatively young age, and I referred to my best friend’s mom as “mama”. My childhood friends and I were immigrants, but I would later learn there was a difference between a *legal* and an *illegal* immigrant. I was raised in an Irish Catholic household, and my Mom once called me a slut when I confessed to her that I was on birth control. I’ve been on birth control since I was a young teenager, I have never had an abortion, and I am not a mother. There are many

⁴⁴ Caroline Ramazanoğlu and Janet Holland, *Feminist Methodology: Challenges and Choices* (Sage Publications 2002) 119.

characteristics and experiences that define me, and ultimately inform this research, but the ones I mention here have combined to create the desire to conduct this research.

The knowledge I produce as a researcher is directly informed and biased by the information I've shared above, and in many other ways that I have not yet been able to ascertain or understand. In researching women's reproductive rights in the Inter-American System of Human Rights, I am conscious that I am not capable of providing a truth that is applicable to, or representative of women living in Latin America. I can familiarize myself with literature on gender in Latin America, speak with Latin American women and rights activists, and review the facts of women's rights cases, but I am not a Latin American woman, and have no place trying to present a narrative of "the" Latin American woman. While religion has played an instrumental role in my life, and is perhaps one of the driving forces behind the impetus for this research, there are very few other direct ways in which I can claim to have been affected by restrictions placed on reproductive health services. In fact, up until this point in my life I am fortunate to have been in "control" of every decision ever made about my body. I know nothing about being selected for sterilization based on the colour of my skin, where I live, or the size of my bank account. I have never been pregnant, so I do not know the pain of miscarriage or abortion, or the potential joy of becoming a mother. I grew up playing in the homes of my Mexican friends, but I know nothing of the institutionalized racism they experience(d) in our socioeconomically stratified city. I have no idea what it would feel like to be pregnant in high school, to be judged by my peers as I walk across the field to the pregnant building.

As a researcher working on women's reproductive rights in the Inter-American System of Human Rights, I am an outsider.⁴⁵ While being an outsider certainly does have its disadvantages, such as challenges in achieving credibility for purposes of networking and conducting interviews, it also comes with surprising benefits. For example, when I first began conducting interviews with feminists in Peru, Mexico and Costa Rica, I was nervous that the women who I saw as fierce feminist warriors would either decline to speak to me, or treat me as an outsider – I was so very wrong. Everyone I interviewed welcomed me, and took the time to explain their thoughts and ideas in ways that I could understand. Being an outsider gave me a significant amount of space to look in and see *how* people and institutions operate. Because I was unfamiliar, I came with no-strings-attached; just a

⁴⁵ Sandra Acker, 'In/out/side: Positioning the Researcher in Feminist Qualitative Research' (2000) 28:1/2 Resources for Feminist Research 189-208.

“güerita” (white girl) researcher from the United Kingdom who wanted to understand more about women’s reproductive rights in Latin America. Being an outsider to the Inter-American System and Latin America necessitated the development of research methods that would help bring me “inside”.

1.1.2 Method: Incorporating Empirical Research

Feminist research methods emphasize the uncovering of how institutions work in order to determine strategies to deconstruct, and then reconstruct, that institution “in a way that (does) not support or reinforce the domination of women by men”.⁴⁶ In that the goal of this research is to reconceptualise how women’s reproductive rights are addressed (and redressed) within the Inter-American Human Rights System, it was necessary to first determine how the Inter-American System works. While there is certainly much utility in examining women’s rights case law and reports emerging from the Inter-American System, this activity alone does not provide the in-depth understanding required to argue for a new way of doing women’s rights within that institution. In order to develop a nuanced and comprehensive understanding of women’s reproductive rights in the Inter-American System of Human Rights, this research incorporates qualitative social science research methods in the form of semi-structured interviews with actors involved in and around women’s (reproductive) rights and the Inter-American System of Human Rights.

Prior to commencing the fieldwork element of this research, I successfully obtained ethical approval from the University of Sussex (ER/CO213/1),⁴⁷ and completed training on social research theory and practice at the International Institute for the Sociology of Law⁴⁸ and health rights litigation training at Harvard University’s FXB Centre for Health and Human Rights.⁴⁹ As part of the ethical approval process I developed interview participant information and consent forms, which provided respondents with information about the research project as well as outlined their rights as participants.⁵⁰ These forms were provided to potential participants via email in advance of the scheduled interviews, and also in-person.

⁴⁶ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 61.

⁴⁷ See, Ethical Approval Form (Appendix B).

⁴⁸ International Institute for the Sociology of Law, “Socio-Legal Research Theory and Practice: Qualitative Methods,” Oñati, Spain, 25 November - 5 December 2013.

⁴⁹ Harvard FXB Center for Health and Human Rights, Global School on Socioeconomics, Health Rights Litigation, Boston, MA, USA, 16 - 20 September 2013.

⁵⁰ See, Participant Information Form (Appendix C) and Participant Consent Form (Appendix D).

In the summer of 2014 I travelled to Lima, Peru; Mexico City, Mexico; and San Jose, Costa Rica; each country representing one of the case studies selected for this research.⁵¹ I also travelled to Washington DC to conduct interviews with representatives from the Inter-American Commission on Human Rights. The fieldwork was structured in such a way that interviews with representatives from the Inter-American Court and Commission were conducted after the interviews with state-level actors. I conducted over 40 interviews in the span of ten weeks, most of which were conducted in-person either in the participant's place of employment or at public locations such as restaurants and coffee shops. A small number of the interviews were conducted via Skype, especially for participants who were not currently located in the case study countries. The individuals selected for this research came from a number of sectors related to women's rights, human rights, and health institutions: the participants included sixteen state representatives (some representing the state, some representing their own opinions); fifteen representatives from women's and health rights organizations; five representatives from the Inter-American System of Human Rights; three lawyers (two of which represented victims in the cases selected for this research); and four medical doctors working primarily on women's reproductive health.⁵² The objective of conducting these interviews was two-fold: first, I sought to understand how each of the cases developed and to identify missed opportunities in how the cases engaged with gender and reparations; and second, I wanted to learn from the experience of actors involved in these cases in order to suggest strategies for improving the utility of the Inter-American System as it is one of several avenues for protecting, promoting and fulfilling women's reproductive rights.

Upon completion of the interviews I drafted and distributed a fieldwork findings report entitled "Women's Reproductive Rights in the Inter-American System of Human Rights: Conclusions from the Field, June - September 2014".⁵³ This report served the purpose of sharing recurring themes that emerged from the interviews, and was a way to engage in knowledge exchange across two levels: (i) between the researcher and the interview participant, and (ii) among the interview participants as a collaborative group. In that many of these actors do not have the opportunity to participate in open dialogue with other actors involved in and around women's rights litigation, this report provided a glimpse, albeit

⁵¹ *María Mamerita Mestanza Chávez v. Peru*: Lima, Peru, 21 June - 11 July 2014; *Paulina del Carmen Jacinto Ramírez*: Mexico City, Mexico, 12 July - 1 August 2014; *Artavia Murillo et al. v. Costa Rica* and Inter-American Court of Human Rights: San Jose, Costa Rica, 2 August - 22 August 2014; and Inter-American Commission on Human Rights, Washington DC, USA: 23 - 29 August 2014.

⁵² See, List of interview participants and their organization affiliations (Appendix E).

⁵³ See, Fieldwork Report (Appendix F). Spanish version at <https://ilg2.org/2015/05/18/reproductive-rights-the-inter-american-system-fieldwork-report/>.

limited, into the work and minds of other actors involved in women's (reproductive) rights and the Inter-American System.

It is important to personally reflect here on some of the benefits and challenges I encountered as an "outsider" conducting research in Latin America. First, as noted above, being an "outsider" provided me with a certain autonomy and independence that I would perhaps not have achieved as easily if I was recognized as an internal actor. However, being an "outsider" also made it difficult to secure interviews with high-level actors. In fact, most of the interviews I conducted were scheduled through word of mouth and referrals from other participants, a practice referred to in social research methods as "snowballing".⁵⁴ Perhaps the greatest challenge I faced during the interview process was communication; while I can read and write in Spanish, my speaking ability is not at the level to conduct free flowing conversation. To overcome this obstacle, I partnered with local interpreters, all of whom were women actively involved in women's rights issues in their countries.⁵⁵ These women provided an essential link in terms of ensuring effective communication before and during the interview process, as well as provided assistance when necessary during transcription and translation of interviews. In addition, the benefit of their friendship cannot be underestimated; each of these women welcomed me into their lives and shared an insight with me for which I cannot adequately express my gratitude. Finally, while I feared that my limited Spanish-speaking ability may concern the interview participants, I quickly learned that the participants were more than willing to either speak in English (or Spanglish), or work with the interpreter to make sure their thoughts and ideas were effectively conveyed. While I acknowledge that this process may have been frustrating, and may have limited the content of the interviews, it also built a sense of comradery during the interview process where we managed to laugh through miscommunications and took the time to check in with each other to ensure our thoughts were being expressed correctly.

Perhaps the most significant, and slightly unexpected benefit of conducting interviews was the degree to which the information I received through the interviews shifted the objectives and analysis of this thesis. Prior to conducting the interviews, the focus of this research had been on implementation of women's reproductive rights decisions emerging from the Inter-American System. However, following conversations with actors involved in litigation and with members of civil society, I realized that the implementation question was a non-starter

⁵⁴ Bruce Tranter, 'Sampling,' in Maggie Walters (ed), *Social Research Methods* (3rd edn, Oxford University Press (2013) 111.

⁵⁵ Interpreters: Viviana Tipiani (Peru); Carolina Corral (Mexico), Muriel Vargas and Tatiana Saprissa (Costa Rica).

without first examining *how* the Inter-American System falls short in its understanding of gendered harm and reparation. Thus, the experience of fieldwork revealed the core theme of this thesis: the identification of strategies for advancing the Inter-American System's approach to repairing gender-based harm in women's reproductive rights cases.

1.2 Thesis Structure

The structure of this thesis is designed to follow the trajectory of women's reproductive rights in the Inter-American System of Human Rights. Case studies form the basis of this research because the analysis they allow has the potential to be both tangible and practical; that is, through the case studies it is possible to insert feminist critiques of the law with the goal of identifying practical strategies for advancing women's reproductive rights and redressing gendered harm. In order to effectively examine reproductive rights cases emerging from the Inter-American System it is necessary to first provide a foundation for such an analysis. This introductory chapter has served to introduce the methodological underpinnings of this research as well as to establish the research question that is at the foundation of this thesis. The overall objective of this thesis is to identify new and innovative strategies for repairing gender-based harm in women's reproductive rights cases before the Inter-American System of Human Rights.

The second chapter of this thesis, *Women's Reproductive Rights and Reparation*, argues for the development of a "gender reparations tradition" that acknowledges the utility of human rights law as an instrument to repair gender-based harm and address the social nature of harm. The themes introduced and examined throughout this chapter are the right to reproductive health, gendered harm and reparations. In examining the right to reproductive health, section 2.1.1 first defines reproductive health as it is an aspect of the right to health, and is subsequently indivisible in nature from civil and political rights. Section 2.1.2 argues for the application of a multi-faceted approach to reproductive rights that is based on the inherent connections between rights such as the right to life and the right to health and the right to humane treatment and the right to access legal abortions. The second part of this chapter, section 2.2, examines the concept of harm as it is understood before the law, and argues for a reconceptualization of harm as it is both gendered and social. The final part of chapter two, section 2.3, defines reparations and argues for the design of reparations that take into consideration the different and specific forms of harm women experience, with a particular focus on confronting pre-existing conditions that cause harm, such as discrimination and violence against women.

The third chapter, *The Inter-American System of (Women's) Human Rights*, introduces the Inter-American System of Human Rights with the objective of identifying strategies for injecting a gender-based approach to rights and reparations within the work of the Inter-American System. The first section, section 3.1, provides an overview of the Inter-American System. It introduces the regional human rights conventions directly relevant to this thesis: the American Convention on Human Rights⁵⁶ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, or the “Convention of Belém do Pará”,⁵⁷ with an emphasis on the rights provisions enshrined within these treaties and their potential for application to violations of women’s (reproductive) rights. This section also introduces the Inter-American System of Human Rights’ treaty monitoring bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Section 3.2 explores the role and evolution of (feminist) civil society before the Inter-American System and discusses alternative rights concepts for litigating women’s reproductive rights cases. The final part of section 3.2 reviews women’s rights cases from the Inter-American Court in order to provide a basis on which to argue for the development of gender-based reparations in women’s *reproductive* rights cases. The final part of chapter three, section 3.3, entitled “Engendering Reparations in Women’s Rights Cases”, introduces Ruth Rubio-Marín and Clara Sandoval’s “Holistic Gender Approach to Reparations” as the framework used throughout this research to critically analyse case design and reparations issued in the women’s reproductive rights cases studies. It is also in this final section that the concept of a “gender reparations tradition” is introduced.

Chapters four, five and six critically examine a selection of women’s reproductive rights cases emerging from the Inter-American System of Human Rights: *María Mamerita Mestanza Chávez v. Peru* (chapter four); *Paulina del Carmen Jacinto Ramírez v. Mexico* (chapter five); and *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica* (chapter six). Each of these chapters represents a different aspect of reproductive rights and illustrates different litigation approaches before the Inter-American Commission and Inter-American Court. The objective of examining these cases studies is three-fold: (i) to understand how each of these cases developed, including how the actors involved approached litigation before the Inter-American System, and to ultimately understand how the Inter-American System approaches women’s reproductive rights issues; (ii) to

⁵⁶ American Convention on Human Rights (ACHR), OASTS No. 36 (1969).

⁵⁷ Convention of Belém do Pará (n 9).

determine strategies for advancing women's reproductive rights through the Inter-American System, specifically focusing on the potential to develop gender-based reparations designed to redress gendered harm; and (iii) to provide practical steps for different actors involved in women's reproductive rights cases before the Inter-American System to reconceptualise how the law is formed and applied in the context of women's reproductive health rights. The case study chapters follow a similar analysis rubric which consists of the following: (i) an introduction to the women's reproductive rights case and an analysis of the preconditions for developing gender-based reparations as identified in Ruth Rubio-Marín and Clara Sandoval's Holistic Gender Approach to Reparations; (ii) an examination of the context in which the reproductive rights violation occurred; (iii) a critical analysis of the case to determine its transformative potential using the Holistic Gender Approach to Reparations as a framework for analysis; and (iv) an exploration of the lessons learned in each case in regards to repairing structural gender-based harm and developing strategies for use in future women's reproductive rights cases. The critique conducted of each of these cases is grounded in feminist theory and is informed by case documentation and information obtained from interviews conducted with actors directly involved with the cases and the topic of women's (reproductive) rights more generally. These cases provide insightful lessons, and ultimately form the basis for developing more effective strategies for repairing gender-based harm in future women's reproductive rights cases.

The concluding chapter draws upon the lessons learned through case study analysis and reviews thematic findings in order to develop strategies for advancing a "gender reparations tradition" within women's reproductive rights litigation. The proposed strategies are as follows: (i) applying alternative rights concepts to reproductive rights litigation; (ii) enhancing the role of civil society in the design of reparations; (iii) developing a multi-faceted approach to rights; and (iv) putting reproductive rights in context. Finally, the concluding section of this thesis speculates on the Inter-American Court's current reproductive rights case, *IV v. Bolivia*.⁵⁸ This case review applies both the Holistic Gender Approach to Reparations and the strategies derived from the case study analyses in order to determine the combined utility and benefit of these approaches in developing a "gender reparations tradition" that has the objective of advancing the application and efficacy of reparations designed to redress gendered harm in women's reproductive rights cases.

⁵⁸ *IV v. Bolivia* [2014] Inter-American Commission on Human Rights Report No. 72/14, Case 12.655 Merits.

CHAPTER TWO

WOMEN'S REPRODUCTIVE RIGHTS AND REPARATION

In order to conduct an examination of women's reproductive rights as they are protected, promoted and fulfilled within the Inter-American System of Human Rights, it is first necessary to lay the groundwork on which to build the context for such an analysis. This chapter introduces key themes that provide the foundation for the forthcoming case analyses in chapters four, five and six. Section 2.1 defines the right to reproductive health as it is indivisible from other human rights and is enshrined within international human rights law. This section introduces Ronli Sifris' multi-faceted approach to alleging women's reproductive rights violations,¹ and argues that such an approach is essential in order to develop gender-based reparations. Section 2.2 examines gender-based harm to the extent that it is acknowledged through law, and explores aspects of gendered harm such as "harms of invasion", "patriarchal harm" and social harm. By examining harm, as it is both gendered and social, the objective of this section is to provide the theoretical underpinning for analysing harm in the reproductive rights case studies. This discussion is necessary to provide the basis for defining and examining the concept of gendered harm as it is an element of the Holistic Gender Approach to Reparations, which is an analysis framework applied in each of the case study chapters. Section 2.3 introduces the concept and practice of reparations and more specifically of gender-based reparations within the context of international law. This section argues for the development of reparations in women's (reproductive) rights cases that are designed using a multi-faceted approach to rights that not only incorporates an analysis of rights provisions enshrined in universal human rights conventions, but also articulates women's reproductive rights violations through conventions designed to specifically address women's rights and violence against women.²

2.1 Reproductive Rights and Human Rights Law

The right to health, which includes the right to reproductive health, is enshrined in numerous international human rights treaties.³ It is a right that exists through the protection of economic, social and cultural rights, however it has also been interpreted through civil

¹ Ronli Sifris, 'Restrictive Regulation of Abortion and the Right to Health' (2010) 18 Medical Law Review 185-212.

² Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará') OASTS (1994); Convention on Preventing and Combating Violence against Women and Domestic Violence ('Istanbul Convention') Council of Europe (2011); International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), GA Res. 34/180 (1979); and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol') 2003.

³ International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res. 2200A (XXI) (1966) Article 12; CEDAW (n 2) Article 14; Convention on the Rights of the Child (CRC), GA Res. 44/25 (1989) Article 24; Convention on the Rights of Persons with Disabilities (CRPD), GA Res. 61/106 (2006) Article 25.

and political rights. As human rights law evolved, the justiciability of the right to health, as well as other economic, social, and cultural rights, has become recognized as indivisible in nature from the more justiciable civil and political rights. In practice, this means that litigators and human rights courts have increasingly recognised the interconnected nature of rights, and have begun to use civil and political rights as conduits to enable violations of economic, social and cultural rights. Mónica Feria Tinta illustrated this point clearly when she noted, “justiciability is no longer a matter of perfectly dissecting and distinguishing the inseparable: ‘here is the right to life and the right to health’ or ‘here is freedom from torture’ and here ‘the right not to be starved’”.⁴

This section examines the indivisible and multifaceted nature of human rights as they are interpreted and applied to violations of women’s reproductive health rights. The first part of this section provides an overview of the right to reproductive health as it has been advanced through international human rights law. This part is intended to locate the right to reproductive health within the international human rights law framework. The second part of this section examines the indivisible nature of human rights and argues for a multi-faceted approach to litigating women’s reproductive health rights. This part reflects upon Ronli Sifris’ work on the interrelated nature of reproductive health rights.⁵ However, while Sifris argued for reproductive rights to be interpreted through civil and political rights, this thesis posits that a multi-faceted approach also requires that reproductive rights be examined through the violence against women framework.

2.1.1 The Right to Reproductive Health

Reproductive health rights exist within the right to health, and have also been interpreted through numerous other human rights provisions, such as the right to life and the right to privacy. In order to firmly establish the right to reproductive health within the international human rights legal framework, this section examines the right to reproductive health as it has been defined and interpreted through international human rights law. The analysis of the right to reproductive health conducted in this section reveals a disconnect between interpretations of reproductive health established by treaty monitoring bodies in recommendations and comments, and the application of human rights provisions in reproductive rights litigation. The overall intention of this section is to provide a contextual background for the right to

⁴ Mónica Feria Tinta, 'Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29:2 Human Rights Quarterly 435.

⁵ Sifris (n 1).

reproductive health so that it is then possible to argue for a multifaceted approach to reproductive rights litigation in section 2.1.2.

The right to reproductive health is a principle element of the right to health, which is an argument supported by former United Nations Special Rapporteur on the Right to Health, Paul Hunt: “reproductive health is an integral element of the right to health and will have to be incorporated in any strategy reflective of the right to health”.⁶ An expansive definition of the right to reproductive health emerged from the 1994 International Conference on Population and Development (ICPD), which defined reproductive health as

A state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.⁷

This definition emphasised both the negative and positive state obligations required to effectively protect, promote and fulfil women’s reproductive health rights. For example, this definition of reproductive health not only required that states guarantee access to information, a right enshrined within civil and political rights, but also determined that states have an obligation to provide provisions and services for women to enact their decision-making rights.

The right to reproductive health is also enshrined within the provisions of the Convention on the Elimination of Discrimination Against Women (CEDAW), which explicitly guarantees women equal rights in deciding “freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.⁸ This Convention specifies that women’s rights to education includes “access to specific educational information to help to ensure the health

⁶ Paul Hunt, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (UN Doc. E/CN.4/2003/58 2003) ¶50.

⁷ International Conference on Population and Development (ICPD), 'Report of the International Conference on Population and Development' (UN Doc. No. A/CONF.171/13 1994).

⁸ CEDAW (n 2) Article 16.

and well-being of families, including information and advice on family planning”.⁹ The CEDAW Committee also issued a General Recommendation on the right to health, where it asserted that “it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women”.¹⁰ Further to CEDAW’s interpretation of reproductive health, the Committee on Economic, Social, and Cultural Rights’ General Comment 14, suggested that a reduction in infant mortality requires, “measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information”.¹¹ In March 2016, the Committee on Economic, Social and Cultural Rights issued General Comment 22 on the right to sexual and reproductive health. In this General Comment, the Committee determined,

The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, over matters concerning one’s body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health.¹²

Reproductive rights violations have also been interpreted as being inherently connected to violence and inhuman treatment. For example, former United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy noted, “forced abortions, forced contraception, coerced pregnancy and unsafe abortions each constitute violations of a woman’s physical integrity and security of person [...] (and) may amount to torture and cruel, inhuman and degrading treatment”.¹³

Interpretations of the right to reproductive health cross a wide spectrum of human rights, but such an approach is not applied to reproductive rights litigation. In reproductive rights litigation, the primary focus is on violations of civil and political rights. The reason for interpreting reproductive health rights through rights such as information, privacy, life, and cruel and inhuman treatment is because these rights have long been considered to be “first

⁹ Ibid Article 10. CEDAW did not originally mention the phrase “reproductive health” within its women and health provision (Article 12). However, it did elaborate upon Article 12 with General Recommendation No. 24: Women and Health, General Recommendation [1999].

¹⁰ CEDAW General Recommendation No. 24 on the Right to Health (Article 12): Women and Health, General Recommendation [1999].

¹¹ Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health’ (UN Doc. E/C.12/2000/4 August 2000).

¹² Committee on Economic, Social and Cultural Rights, ‘General Comment No. 22: The Right to Sexual and Reproductive Health’ (E/C.12/GC/22 4 March 2016) ¶5.

¹³ Radhika Coomaraswamy, ‘Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Integration of the Human Rights of Women and the Gender Perspective (E/CN.4/1999/68/Add.4 1999) ¶45.

generation rights”. Before examining the development of reproductive rights through jurisprudence emerging from international human rights law treaty monitoring bodies, it is necessary to discuss why violations of reproductive health rights have not been interpreted in litigation through rights provisions belonging to the “second generation rights”, economic, social and cultural rights.

International human rights provisions have historically been divided into “generations of rights”,¹⁴ where the right to health has been understood as a “second generation right;” a right that is to be “progressively realized”,¹⁵ rather than immediately implemented. This division in human rights provisions is not only an outdated classification of rights, but it also creates a problematic hierarchy of rights. This hierarchy/division which can be attributed to the splitting of the Universal Declarations of Human Rights into two distinct human rights treaties: the International Covenant on Civil and Political Rights (ICCPR)¹⁶ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁷ As a result of the separations of rights, the application and enforcement of rights belonging to the economic, social and cultural arena have been regarded as “more private: social, not political, and often not readily enforceable or implementable in the usual form rights take”.¹⁸ This means that rights enshrined within the “public” arena of civil and political rights (“first generation rights”) are regulated and enforced by international law, and “private” economic, social and cultural rights are essentially ignored. Feminist legal theorists, such as Catharine MacKinnon, argued that the division of human rights into two distinct generations corresponds to the public/private divide as it plays out in the application and interpretation of human rights law.¹⁹ That is, the private sphere is associated with rights such as the right to health, housing and freedom from violence, and the public sphere is associated with rights such as the rights to life, fair trial, and the right to vote. While the right to reproductive health clearly exists amongst and across both the first and second generation of rights, it is also a right that requires a disruption of the public/private distinction. This means, in terms of reproductive rights protections, that states must refrain from interfering in the private decision-making rights of women, and must also provide public services and provisions in order to enable women’s decision-making rights. This is

¹⁴ Hilary Charlesworth, ‘What are “Women’s International Human Rights?”’ in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspective* (University of Pennsylvania Press 1994) 58-59.

¹⁵ ICESCR (n 3).

¹⁶ International Covenant on Civil and Political Rights (ICCPR) GA Res. 2200A (XXI) 1966.

¹⁷ ICESCR (n 3).

¹⁸ Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Belknap Press of Harvard University Press 2007) 5.

¹⁹ Ibid.

an argument provided above in section 1.1.1, which referred to Engle to articulate the benefits of the private realm for advancing women's access to reproductive health services.²⁰ While it can be argued that the division in rights no longer exists,²¹ reproductive rights litigation, particularly in the Inter-American System of Human Rights, has failed to interpret violations of reproductive rights through human rights provisions enshrined within the second generation of rights.

There also exists what can be referred to as a "third generation of rights," which Vasak described as "solidarity rights".²² This third generation of rights is concerned with, *inter alia*, minority rights, the right to self-determination and the right to development. Women's rights belong to this generation of rights, where J. Olaka-Onyango and Sylvia Tamale argued, "women's human rights, more clearly than any other phenomenon, illustrate the interconnectedness of all categories of rights".²³ Women's rights conventions such as CEDAW, the Istanbul Convention and the Convention of Belém do Pará,²⁴ challenge the androcentric application of human rights law and the corresponding public/private and positive/negative dualistic rights distinctions. These women's rights conventions incorporate first and second generation rights, and effectively disrupt the hierarchy of rights. The following overview of women's reproductive rights jurisprudence focuses on cases emerging from the Human Rights Committee, which interprets the International Covenant on Civil and Political Rights, and the Committee on the Elimination of Discrimination Against Women, which interprets the Convention on the Elimination of Discrimination Against Women (CEDAW), and elucidates the benefits of examining women's reproductive rights violations through the "third generation of rights".

Reproductive rights jurisprudence emerging from the Human Rights Committee illustrates the tendency in reproductive rights litigation to develop and interpret reproductive rights through civil and political rights rather than economic, social and cultural rights. For example, in *Mellett v. Ireland*,²⁵ the Human Rights Committee recently determined that the State's restrictions on the right to abortion amounted to cruel, inhuman and degrading treatment, and violated the rights to privacy and freedom from discrimination. However, while the Committee recognised the right to abortion under international human rights

²⁰ Engle, *supra* section 1.1.1 (n 27-28).

²¹ Tinta (n 4).

²² Karel Vasak, 'A 30 Year Struggle', UNESCO Courier, November 1977, 29.

²³ J. Olaka-Onyango and Sylvia Tamale, "The Personal is Political," or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17:4 Human Rights Quarterly 711.

²⁴ Women's rights conventions (n 2).

²⁵ *Mellett v. Ireland* [2016] United Nations Human Rights Committee (UN Doc CCPR/C/116/D/2324/2013).

law,²⁶ it did not draw any relation between the right to abortion and the right to health. The Human Rights Committee reached a similar conclusion in *KL v. Peru*,²⁷ where it determined that restrictions on access to therapeutic abortion constituted cruel, inhuman and degrading treatment and violated the right to privacy and the rights of the child, but did not make reference to the interrelated nature between these rights and the right to health.

The CEDAW Committee has also examined violations of women's reproductive rights in cases such as *AS v. Hungary*,²⁸ *LC v. Peru*²⁹ and *Alyne da Silva Pimentel v. Brazil*.³⁰ In that the Convention on the Elimination of Discrimination Against Women is a treaty body that encompasses rights enshrined within the purview of civil and political and economic, social, and cultural rights, the CEDAW Committee has been more successful than the Human Rights Committee in interpreting violations of reproductive rights through a multi-dimensional approach to rights. For example, in *AS v. Hungary*, a case that examined informed consent and sterilization, the CEDAW Committee determined that the state discriminated against women in relation to the right to education and the right to healthcare by failing to provide advice and information on family planning.³¹ In *LC v. Peru*, an abortion rights case, the CEDAW Committee determined, *inter alia*, that the state had a responsibility to eliminate discrimination in the field of healthcare and to modify social and cultural patterns that discriminate against women.³² The CEDAW Committee's approach to interpreting violations of women's reproductive rights differs from that of the Human Rights Committee because the Convention on the Elimination of Discrimination Against Women was designed to address rights using a collective perception of human rights.

Without a doubt, the right to reproductive health, and the right to health more generally, underpin gender equality, and ultimately impact all aspects of women's lives. Or, put more succinctly, according to Rebecca Cook et al., "a woman is not a womb, but has a womb. Health for women is more than reproductive health".³³ The following section builds on the legal framework provided above to argue for the development of a multi-faceted rights approach to reproductive health. This approach requires that reproductive health rights

²⁶ 'Amanda Jane Mellet v. Ireland – The Key Points,' Human Rights in Ireland (2016) <<http://humanrights.ie/uncategorized/amanda-jane-mellet-v-ireland-the-key-points/>>.

²⁷ *KL v. Peru* [2005] United Nations Human Rights Committee (UN Doc CCPR/C/85/D/1153/2003) ¶7.

²⁸ *AS v. Hungary* [2006] Committee on the Elimination of Discrimination against Women (CEDAW/C/36/D/4/2004).

²⁹ *LC v. Peru* [2011] Committee on the Elimination of Discrimination against Women (CEDAW/C/50/D/22/2009).

³⁰ *Alyne da Silva Pimentel v. Brazil* [2011] Committee on the Elimination of Discrimination Against Women (CEDAW/C/49/D/17/2008).

³¹ *Ibid* ¶11.2 and 11.3.

³² *LC v. Peru* [2011] (n 29) ¶9.

³³ Rebecca Cook, Bernard Dickens, and Mahmoud Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford University Press 2010) 17.

violations be examined through the violence against women framework, while simultaneously rejecting the hierarchical division of human rights.

2.1.2 Developing a Multi-Faceted Rights Approach

The above introduction to reproductive health rights argued the necessity to develop reproductive health rights as they include human rights provisions across a varied and wide spectrum of civil and political and economic, social and cultural rights. This means, for instance, that while the right to access safe and legal abortion services is certainly a health right specific to women, it is also indivisible from the rights to life, family, privacy, information, freedom from discrimination and possibly even torture. In determining the basis for reproductive health rights, it is not beneficial to reinforce a hierarchy of rights, but rather it is essential that actors involved in litigation emphasise the indivisibility of rights. As Rosalind Petchesky asserted, “when we look at specific reproductive and sexual rights and the ways in which they cluster together with other rights in women’s everyday lives [...] deciding whether to classify such rights as ‘social,’ ‘economic,’ ‘cultural,’ or also ‘civil and political’ is very difficult”.³⁴ For Petchesky, all rights are indivisible and interconnected, and are “grounded in basic needs.” Ronli Sifris maintained a similar position, and concluded, “only a multi-faceted approach can adequately take account of the numerous ways in which women who are denied access to abortion (or other reproductive health rights) may suffer”.³⁵ Using this argument as a foundational premise, this section argues that a multi-faceted approach to reproductive rights works to further dismantle the “generations of rights”, and also interprets violations of women’s reproductive rights through conventions dedicated to the protection of women’s rights and eradication of violence against women.

Developing a multi-faceted approach to reproductive health rights requires an understanding of rights as they are completely indivisible and reliant upon one another. Sifris offered numerous examples of how the right to abortion, as it is both a reproductive right and an economic, social, and cultural right, is directly related to the right to life, the right to be free from gender-based discrimination, and the right to be free from torture. Sifris explained, “the relationship between unsafe abortions and high rates of maternal mortality form the basis for the argument that restrictions on abortion violate the right to life”.³⁶ Additionally, she argued that a “woman’s right to decide matters relating to her own

³⁴ Rosalind Petchesky, *Global Prescriptions: Gendering Health and Human Rights* (Zed Book 2003) 18.

³⁵ Sifris (n 1) 190.

³⁶ Ibid 188.

body [...] form a part of the right to privacy, autonomy, right to liberty, right to physical integrity, and the right to decide the number and spacing of one's children".³⁷ In determining the relationship between the right to be free from gender-based discrimination and reproductive health, Sifris explained,

The view that laws restricting access to abortion are frequently informed by discriminatory assumptions about women, and that the effect of such laws is to further entrench women's unequal status in society and increase discrimination against women, forms the basis for the argument that laws restricting abortion violate a women's right to be free from gender-based discrimination.³⁸

Sifris connected restrictions on reproductive rights, namely abortion rights, to torture or cruel or inhumane or degrading treatment, by explaining that the "suffering experienced by a woman who is denied access to abortion services or who accesses unsafe abortion services", is reminiscent of forms of torture (a most extreme manifestation of violence against women). Although Sifris unpacked each of these rights as they are indivisibly related to abortion (reproductive health) she asserted that in fact, many of the above-mentioned rights are interrelated. For instance, the rights to life and autonomy are related to the right to health in that "restricting a woman's right to bodily autonomy clearly has the potential to damage a woman's health and wellbeing".³⁹ For Sifris, it is ineffective to approach reproductive health rights through a singular rights perspective. She contended, "it is inadequate to only consider restrictions on (reproductive health) through the lens of one particular fundamental right as such, a one-dimensional approach invariably results in an oversimplification of the ways in which women experience denial of (reproductive health services)".⁴⁰ By focusing on the advancement of reproductive health rights through a singular lens, litigators may miss out on opportunities to expand upon and dissect the "deep-lying imbalances of power and social structures and practices of subordination that characterize relations between women and men in most societies".⁴¹

Developing a multi-faceted rights approach to reproductive health necessitates a reconceptualization of international human rights law as it applies to women. Such a process requires more than recognising the interconnected and indivisible nature of rights. It requires a complete rejection of the outdated "generations of rights" framework, because this characterization of rights is divisive, hierarchical and "built on typically male life

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid 189.

⁴⁰ Ibid.

⁴¹ Petchesky (n 34) 11.

experiences and [...] (does) not respond to the most pressing risks women face”.⁴² In dismantling the “generations of rights” it is possible to articulate rights protections as they are enshrined across and amongst collective groups, such as women’s rights, indigenous rights, disability rights, etc. In terms of reproductive rights specifically, a multi-faceted rights approach also requires that violations of reproductive rights be examined in the context of violence against women in order to develop an understanding of how and why women are denied these rights.

As this thesis elucidates, violations of women’s reproductive health rights have not been sufficiently explored nor examined as they are inherently related to the violence against women framework. This is problematic because violations of women’s reproductive rights are inherently linked to violence against women. The concept of violence, as it is rooted in discrimination, violence and poverty relates not only to sexual and domestic violence, but also to violence as it is perpetuated by the state through the denial of reproductive health rights and services for women. Alaka Basu contended that violence is a problem intrinsic to violations of reproductive health, and as such any approach designed to address this form of violence “must transmit not merely the treatment of physical outcomes of such violence, but the methods of preventing it in the first place”.⁴³ Structural violence permeates all aspects of women’s lives, and is, as Betsy Hartmann asserted, a way of keeping women “in their place”.⁴⁴ Violence is about patriarchal power and for women violence plays a key role in maintaining their subordinate status to men, which is reinforced by the state’s refusal to allow women control over their own bodies. The disconnect between reproductive health rights and violence against women within human rights law and litigation represents one of the ways in which the law is silent on women’s rights issues. This silence can be attributed to both the contentious nature of reproductive health issues, and also the failure on the part of actors engaged in human rights litigation to develop a truly multi-faceted approach to understanding how women experience violations of their reproductive rights. Perhaps the first step in the project of advancing women’s reproductive rights through the violence against women framework is to effectively incorporate the concept of gender-based harm into human rights law.

⁴² Charlesworth, 'What are “Women’s International Human Rights?”' (n 14) 59.

⁴³ Alaka Basu, 'Situating Reproductive Health Within the Academy' in Laura Reichenbach and Mindy Jane Roseman (eds), *Reproductive Health and Human Rights: The Way Forward* (University of Pennsylvania Press 2009) 188.

⁴⁴ Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population and Control* (South End Press 1995) 47.

2.2 Gendering Harm

Harm is both social and gendered. It exists in the individual and social realms of our lives, and the way we experience harm is largely dependent on gender. This section examines the concept of gendered harm and particularly focuses on *how* harm is gendered and the extent to which the law responds to the gendered nature of harm. This section argues that it is necessary for the law (in this case, regional human rights law) to consider the gendered nature of harm in order to be able to provide gender-based reparation that effectively takes into account both the experience of harm, as well as the gender of harm. Section 2.2.1 explores the law's 'gender-blind' approach to harm, and discusses why the law has thus far been reluctant to respond to the gendered nature of harm. Section 2.2.2 examines "gendered harm" through Robin West's analysis of "harms of invasion" and "patriarchal harm," and section 2.2.3 discusses the social aspects of gendered harm. The social and gendered characteristics of harm underpin violations of women's reproductive rights, and as a result, they provide a context through which to examine how and why women experience violations of their reproductive rights.

2.2.1 Law and Gendered Harm

The legal response to gender-based harm has been problematic in part because, as Conaghan suggested, there is much more effort being put into the "business of deploying law as an *instrument* for the redress of harm than [there is] to more fundamental questions of what precisely harm entails and how we know and recognise its occurrence".⁴⁵ For example, even in situations where judicial venues, that is courts and tribunals, attempt to explore the impact of harm as it pertains to violations of women's reproductive autonomy, the analysis is often stereotypically gendered in itself: the woman is viewed as a mother, or a victim, rather than as an autonomous rights-holder.⁴⁶ The law's androcentric foundation makes the challenge of effectively developing the concept of gendered harm (and redress) *almost* insurmountable. Catharine MacKinnon suggested, "law sees and treats women the way men see and treat women".⁴⁷ Conaghan asserted that because the law is gendered in this way "women *must* challenge that view".⁴⁸ Conaghan argued that it is not justifiable to refrain from using the law because of its male-centric foundation and approach, but that instead the struggle to challenge the male treatment of women within the law must "take

⁴⁵ Joanne Conaghan, 'Law, Harm and Redress: A Feminist Perspective' (2002) *Legal Studies* 321.

⁴⁶ Hilary Charlesworth, 'Feminist Methods in International Law' (2004) 36 *Studies in Transnational Legal Policy* 159.

⁴⁷ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 161-162.

⁴⁸ Joanne Conaghan, 'Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment' (1996) 16:3 *Oxford Journal of Legal Studies* 431.

place both within law and outside it, both through it and beyond it”.⁴⁹ For Conaghan, legal system reform in respect to reconceptualising how legal systems interpret and redress harms specific to women, “is neither the starting point nor the end result of the feminist project but, as an inevitable part of that project, [the law] must be addressed”.⁵⁰ Accordingly, it is necessary to work within the institution of international human rights law to reconceptualise how judicial venues define and examine harm. The objective of such an exercise is to engender the experience of social harm and reparations emerging from judicial venues.

Leslie Bender contended that, “the meaning of responsibility in law would include a commitment, *in advance of harm*, to protecting and caring about the health and safety of other people. In the untoward event of harm, it would mean taking care of those harmed - that is, personally and interpersonally responding to the needs of harmed people”.⁵¹ While Bender discussed the notion of harm specifically within the confines of tort law, the implications for human rights law are clear: law should respond to the needs of harmed people, as well as *prevent and protect people from harm*. States must respond to harm in such a way that the underlying causes of harm are considered in efforts to provide redress to both the individual victim and the society that is at risk of experiencing the same causes and effects of gendered harm. Bender’s analysis of tort law and harm relates to the international law principle of due diligence, or indirect horizontal application. The due diligence standard is used to impose on states the responsibility for “violations of human rights emanating from non-state actors”,⁵² which includes “*preventing*, investigating and imposing penalties for violence against women”.⁵³ The due diligence standard is discussed in further detail in relation to the Inter-American System of Human Rights in section 3.1.1.

Identifying and redressing gender-based harm requires a “harm-based expansion” of the notion of victim, ultimately taking it beyond the individual rights holder to society-at-large.⁵⁴ It also requires recognition and prioritization of the interrelated nature of harms and the ways in which the widespread impact of harm affects women specifically. Rubio-Marín explained that the compound effect of “violence, discrimination, and exploitation that women and girls are subject to (the so-called ‘violence continuum’) becomes most vivid

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Leslie Bender, 'Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities' (1990) 1990:4 Duke Law Journal 896. [emphasis added]

⁵² Carin Benninger-Budel, 'Introduction' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Nijhoff Brill Publishing 2008) 1.

⁵³ Convention of Belém do Pará (n 2) Article 7(b).

⁵⁴ Ruth Rubio-Marín, 'The Gender of Reparations: Setting the Agenda' in Ruth Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (Social Science Research Council 2006) 31.

when we examine the gendered nature of harms that women endure and the short and long-term effects on their lives”.⁵⁵

2.2.2 Gendered Harm is Patriarchal and Invasive

Feminists argue that women suffer particular harms as women *because* they are women. That is, as Robin West concluded, “women suffer in ways which men do not, and the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture”.⁵⁶ Joanne Conaghan echoed this sentiment, and explained that women’s “experience of pain is distinguishable, to a large extent, from the experience of men”.⁵⁷ In her discussion of the dimensions of gendered harm, Conaghan suggested that gendered harm includes “risks which women are more likely to incur than men – the risk of rape, incest, sexual harassment, spousal abuse or, more contentiously, the risk of harmful medical intervention”.⁵⁸ This section examines the concept of gendered harm as it is both invasive and patriarchal.

Robin West’s concept of “harms of invasion”⁵⁹ demonstrates how women experience harm as it is an invasion on their bodies; whereas “patriarchal harm” is concerned with the harm women sustain because they live as “political inferiors, or subordinates, within a patriarchal culture”.⁶⁰ While West explored harm in other forms, such as “harms of separation” and “private altruism”, “harm of invasion” and “patriarchal harm” are representative of the harm experienced by the women in the case studies selected for this thesis. The intention of discussing “harms of invasion” and “patriarchal harm” is to illustrate the types of harm international human rights law has thus far failed to address, especially pertaining to the social and gendered dimensions of harm and human rights law’s failure to locate reproductive rights violations within these forms of harm/violence.

Robin West defined “harms of invasion” as those harms “occasioned upon women’s physical bodies”.⁶¹ One of the ways women’s physical bodies are different from men’s is that they can become pregnant, and as a consequence, can experience the harm of unwanted pregnancy. West suggested that the experience of unwanted pregnancy is not only

⁵⁵ Ruth Rubio-Marín, ‘The Gender of Reparations in Transitional Societies’ in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 91.

⁵⁶ Robin West, ‘The Difference in Women’s Hedonic Lives’ in Marta Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) 116.

⁵⁷ Conaghan, ‘Gendered Harms and the Law of Tort’ (n 48) 407.

⁵⁸ Ibid.

⁵⁹ Robin West, *Caring for Justice* (New York University Press 1997) 100.

⁶⁰ Ibid 132.

⁶¹ Ibid 100.

gendered, but also carries the potential for distinctive gender-based harm. She provided several arguments to support this claim, including the physical harm women experience when forced to carry an unwanted pregnancy, and the harm to self-identity that women experience as a result of unwanted pregnancy.⁶² In discussing the physical harm related to unwanted pregnancy, West argued that this harm is a “physical invasion of the body, occasioned by a pregnancy, like the physical invasion of the body by sexual penetration, when unwanted, is itself a harm”.⁶³ Here, West provided a correlative between women’s experience with rape and unwanted pregnancy that illustrates a natural connection between violence against women as it is commonly understood and violence against women as it is manifested through restrictions on women’s rights to reproductive health.

Significantly, West also argued that women who experience an unwanted pregnancy find themselves in an “involuntary nurturant” position. The physical pain women endure in this position is suffered in order to ensure the nurturing of the fetus, and while in the experience of voluntary (wanted) pregnancy the woman may want to engage in this act of altruism, the experience of unwanted pregnancy is different. West described the experience of nurturing as an unwanted experience: “The woman who is pregnant but does not wish to be is doing nurturant work *which she does not wish to do*. [...] She becomes a nurturant but *unchoosing* creature”.⁶⁴ This experience of losing autonomy and the ability to make decisions as an individual, threatens and ultimately harms women’s selfhood and their identity. The physical invasion of unwanted pregnancy is in many ways subtle and insidious, as West articulated: “The self is not simply assaulted, or threatened, or endangered, but more exhaustively, is *redefined* as a self who gives, nurtures, pleases, or acts *for others*, rather than on the basis of one’s physical pleasures, desires, and passions, or one’s freely altruistic or moral decisions”.⁶⁵ In losing so much of her self-identity, the woman who experiences the harm of unwanted pregnancy experiences the death of her subjectivity. Ultimately, West suggested that the harm of invasion, and in this case, the specific experience and resulting harm of unwanted pregnancy, is an invasive terror that causes the “cessation of selfhood”.⁶⁶

West’s concept of “patriarchal harm” relies on the following definition of patriarchy: “the social system in which men’s interests trump women’s whenever they conflict”.⁶⁷ West

⁶² Ibid 105.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid 107.

⁶⁶ Ibid 109.

⁶⁷ Ibid 132.

argued that patriarchy is enforced through ‘extralegal’ forces; legal and illegal private violence and the promulgation of a distinctly patriarchal *culture*. Patriarchal culture consists of “norms that determine the way we behave by influencing the ways we think of ourselves and of our fate”.⁶⁸ For instance, norms that enforce heterosexual families and motherhood as essential aspects of a woman’s life are interwoven into the patriarchal culture in which women live. West argued that patriarchal control is ultimately manifested in two ways, it has a “terrorizing side” and an “ideological and cultural side”. She suggested that the “two ‘faces’ of patriarchal control harm women in different and distinctive ways. The “violent, terrorizing side of patriarchal control” is largely hidden: “It consists of violence in the *privacy* of the home, whispered threats of coercive sexual physicality on the street, and the ever-present and unspoken possibility of rape.” The other side, the ideological and cultural side of patriarchal control, “is *relentlessly* public and visible”.⁶⁹ In fact, it is so omnipotent, that it is inseparable from us. West provided examples such as childhood toys, pornography, romance novels and heterosexual normalcy as tools used to maintain patriarchal control over women throughout their lives. The harm resulting from the terrorizing side of patriarchal control is two-fold; not only does the harm consist of physical violence, but also “women sustain harm by virtue of the knowledge that these violent [...] acts are largely unregulated by the state”.⁷⁰ The harm caused by the cultural side of patriarchal control differs from the terrorizing side because it is a “harm done to our sense of our own potential, entitlements, and self-worth by virtue of a damaging set of beliefs about the necessity and justice of our fate”.⁷¹ This means that patriarchal harm manifests itself in the ways that women see themselves, and their roles in society. “It is a harm to the richness of inner life and the potentialities of public life occasioned by the belief [...] that one’s nature dictates a life of relative drudgery serving the bodily needs of others”.⁷²

In that “patriarchal harm” exists through a social system, it is inherently a social form of harm. While the harm women experience through unwanted sex and/or pregnancy and rape are forms of harm done largely to women by men, in the interest of men, the *beliefs* that women are not autonomous sexual subjects and that women should be passive and sexually vulnerable are a very different sort of harm. These *beliefs* attack the very identity, or selfhood of women, and the harm they cause makes it impossible to view oneself as a victim of a patriarchal and unjust social system. As West suggested, patriarchal harm makes

⁶⁸ Ibid 132-133.

⁶⁹ Ibid 136.

⁷⁰ Ibid 137.

⁷¹ Ibid.

⁷² Ibid.

it “difficult or impossible to view oneself as sharing with other similarly situated women a common interest in creating a new reality”.⁷³

2.2.3 Gendered Harm is Social

Social harm, or social injury, refers to the “pain caused by ‘hidden injuries’ of all gender-orientated societies - that lived, internalized experience of lower gender status as personal failure”.⁷⁴ Joanne Conaghan argued that harm is social in a number of ways:

Harm is social in the sense that social location plays a role in determining the incidence and distribution of particular harms: women are more likely than men to be raped [...] Second, harm is social in the sense that our understanding of harm is a product of social relations and the meanings they generate [...] The notion of harm implies some element of *social recognition*; as such, it is fluid and contentious, shifting and changing over time.⁷⁵

The social nature of harm also implies that the harm experienced by an individual has an impact on greater society, especially for members of groups who share particular characteristics with victims of harm. For example, a woman who is raped experiences that harm as both an individual and as part of a larger group of women who are at risk of experiencing that same harm simply *because* they are women. Adrian Howe argued that women’s self-identity is inherently injured because of their lower gendered status, and that this injury is “not a privatized personal injury, but a *social* one”.⁷⁶ Maureen Cain and Adrian Howe contended

Harms to women [...] might be better understood if they were conceptualized as social injuries – as injuries endured by the virtue of membership of a minority status group [...] Harms to women *as* women are not sporadic, experienced by injury-prone individuals adept in the art of victim-precipitation; they are endemic.⁷⁷

Similarly, Catharine MacKinnon, in her work on the harm related to pornography, rejected the idea that harm is singular and individually experienced; she claimed that privatizing injury fails to consider group-harm and group-effects.⁷⁸ Fionnuala Ni Aoláin continued this line of thinking by explaining that “the concept of harm can only be effectively harnessed to women’s experiences when it fully encompasses the social and group effects of certain acts, albeit that the effects may, in the particular instance, be directed at specific women”.⁷⁹ Ni Aoláin argued that the law has thus far been ineffective in completely understanding and

⁷³ Ibid.

⁷⁴ Adrian Howe, 'The Problem of Privatized Injuries' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) 149 note 1.

⁷⁵ Conaghan, 'Law, Harm and Redress' (n 45) 322.

⁷⁶ Howe (n 74) 149.

⁷⁷ Maureen Cain and Adrian Howe, 'Introduction: Women, Crime and Social Harm, Towards a Criminology for the Global Age' in Maureen Cain and Adrian Howe (eds), *Women, Crime and Social Harm, Towards a Criminology for the Global Age* (Hart Publishing 2008) 3.

⁷⁸ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 156.

⁷⁹ Fionnuala Ni Aolain, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 *Queens Law Journal* 224.

capturing the group nature and effect of gender-based harm, which would require a “dismantling and replacement [of] the legal doctrines that affirm narrow cause, limited effect and unsatisfactory remedies to women”.⁸⁰

In order for the concept of “social injury” to take hold in the legal realm, particularly as it applies to violations of women’s rights, the law must be applied in such a way that it diffuses the divide between the private and public spheres of women’s lives. Howe addressed this point directly:

We need to demonstrate that the injuries we feel at the private, intimate level are socially-created (indeed, social) injuries before we demand that they become public issues. [A]nalytically privileging social injury in a feminist legal framework will provide a necessary step in the deconstruction of the public/private dichotomy.⁸¹

Critical feminist legal analyses of the harm experienced by women on the individual and private level, must also examine structural harm that is public, social and gendered. Or, as Ní Aoláin contended, “a narrow focus on bodily violation can obscure the wider social context in which abuse occurs”.⁸²

In determining that the law is inherently ill equipped to address the gendered nature of harm, it is necessary to identify avenues through which it may be possible to reform the law’s “natural” approach; its androcentric approach to interpreting harm. The strategy identified in this thesis as a means of advancing the feminist project within human rights law is the development of gender-based reparations, as they are defined and implemented through international human rights law mechanisms. The gendered harm concepts of harms of invasion, patriarchal harm and social harm are central to the case analyses conducted in chapters four, five and six. Each case study analysis includes a section on *identifying the harm* within the case, and it is in these sections that the concept of gendered harm is used to determine how, and to what extent, gendered harm is interpreted and applied in respect to violations of women’s reproductive rights. Chapter four, the forced sterilization case, employs harms of invasion and social harm to articulate the experience of harm as it effected the physical bodies and individual identities of women who were coercively sterilised. Chapter five applies patriarchal harm, social harm and harms of invasion to examine the impact of harm on women and girls who were denied their legal right to abortion. Finally, the analysis in chapter six examines the Costa Rican IVF ban through the concept of social harm. Gendered harm is also referred to throughout the critique of

⁸⁰ Ibid 225.

⁸¹ Howe (n 74) 163.

⁸² Ní Aoláin (n 79) 240.

reparations issued in each of the case studies, as well as in the contextual analysis of intersectional discrimination in *María Mamerita Mestanza Chávez v. Peru*,⁸³ “good/bad” abortion and medical power in *Paulina del Carmen Jacinto Ramírez v. Mexico*⁸⁴ and gender stereotyping in the examination of the *Artavia Murillo et al. v. Costa Rica*.⁸⁵ The following section on gender and reparations in international law introduces the concept of reparation and also discusses the concept of gendered harm in relation to reparations in order to establish the foundation on which to later argue for the development of a “gender reparations tradition” within women’s reproductive rights litigation.

2.3 Engendering Reparations in International Law

The project of engendering reparations has been one primarily undertaken within the context of transitional justice mechanisms, where reparations programs are developed in the aftermath of conflict with the objective of repairing collective forms of harm and violence.⁸⁶ While reparations are often understood in the context of transitional justice, they are also employed within international law through judicial venues, where they have a tendency to be more focused on individual, rather than community reparation.⁸⁷ One of the more recent and ever-increasing critiques of reparation programs and reparations, has been the failure on the part of transitional justice mechanisms and judicial venues to incorporate a gender-based approach to designing reparations. Ruth Rubio-Marín, the foremost researcher on gender and reparations, urged researchers and advocates working on reparations in judicial venues to apply critiques made of reparation programs in transitional justice. She said, “the challenge of avoiding gender bias is just as present when reparations are decided in courts or compensation tribunals, and the hope is that whatever insight is gained (from her work) can contribute to understanding reparations through the lens of gender, broadly speaking”.⁸⁸ This section first introduces the concept of reparation as it is understood and applied in international law through judicial venues. Reparations are defined and also critiqued in their capacity to be “transformative.” The section then examines gender in reparation programs in order to determine best practices for designing gender-based reparations in international judicial venues.

⁸³ *Infra* section 4.2.

⁸⁴ *Infra* section 5.2.

⁸⁵ *Infra* section 6.1.

⁸⁶ See, Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Taylor & Francis 2010) 163-181; Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2008) 451-476; and Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press 2006).

⁸⁷ Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2008) 453.

⁸⁸ Rubio-Marín 'The Gender of Reparations: Setting the Agenda' (n 54) 28.

2.3.1 What are Reparations?

The Universal Declaration of Human Rights states, “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him (or her) by the constitution or by law”.⁸⁹ The concept of remedy includes that of reparation, which, according to Theo Van Boven, was first determined in the *Chorzow Factory*⁹⁰ case before the Permanent Court of International Justice: “the principle in international law that the breach of an engagement involves an obligation to make a reparation in an adequate form”.⁹¹ In international law, this fundamental principle underpins all reparations: “the violation of a right is a pre-condition for the right to reparation.”⁹² This means that in order for a judicial venue to issue reparation, there must be a corresponding violation alleged and proven through the course of litigation.⁹³ The concept of reparation has been defined through declarations and guidelines such as the 2007 Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (Nairobi Declaration) and the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles).⁹⁴ The Basic Principles outline state obligations in relation to reparations, and include reparatory measures such as access to justice and legislative and administrative actions to prevent violations and prompt investigation of rights violations.⁹⁵ The Basic Principles also delineate a number of reparations intended to redress harm, such as rehabilitation, measures of satisfaction, restitution, compensation and guarantees of non-repetition.⁹⁶ The Nairobi Declaration,

⁸⁹ Universal Declaration of Human Rights (UDHR) GA Res. 217(III)A (1948) Article 8.

⁹⁰ *Chorzow Factory* [1927] Permanent Court of International Justice (ser. A), No.9 at 21 Judgment.

⁹¹ Theo Van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Nijhoff 2009) 20-21.

⁹² Ruth Rubio-Marín and Pablo de Greiff, 'Women and Reparations' (2007) 1 International Journal of Transitional Justice 328.

⁹³ Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 13.

⁹⁴ Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (2007) Available at <www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> (Nairobi Declaration); 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', GA Res 60/147 (United Nations 2005). Also, International Covenant on Civil and Political Rights (Article 2); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14); the Convention on the Rights of the Child (Article 39); Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Article 25); Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV) (Article 3); the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (Article 91); and the Rome Statute of the International Criminal Court (Articles 68 and 75).

⁹⁵ Ibid Basic Principles.

⁹⁶ Ibid IX.

which builds upon the *Basic Principles*,⁹⁷ establishes a guideline for engendering reparations in the context of post-conflict societies, and determines that

(W)omen and girls have a right to a remedy and reparation under international law. They have a right to benefit from reparation programs designed to directly benefit the victims, by providing restitution, compensation, reintegration, and other key measures and initiatives under transitional justice that, if crafted with gender-aware forethought and care, could have reparative effects, namely reinsertion, satisfaction and the guarantee of non-recurrence.⁹⁸

Of the reparations noted in the *Basic Principles* and the *Nairobi Declaration*, guarantees of non-repetition (also referred to as “guarantees of non-recurrence”) hold significant importance in terms of redressing violations of both civil and political and economic, social and cultural rights. That is, this type of reparation is intended to protect against the recurrence of violations across a spectrum of rights ranging from the right to life to the right to health. For instance, the United Nations Human Rights Committee determined that the rights protections enshrined within the International Covenant on Civil and Political Rights

would be defeated without an obligation [...] to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee [...] to include [...] the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question.⁹⁹

In Pablo De Greiff’s examination of “guarantees of non-recurrence”, he explained that the vague nature of this form of reparations allows judicial venues to apply a broad interpretation of possible “institutional interventions”.¹⁰⁰ For example, De Greiff included legal identity and security as necessary “gateway” protections for ensuring non-recurrence of human rights violations. Also included within the purview of “guarantees of non-reparation” are legal, judicial and constitutional reforms, as well social reforms as existing such as legal empowerment through community programming and training, promotion of a strong civil society by creating “enabling environments” and the facilitation of interventions in the educational, psychological and cultural spheres.¹⁰¹ The legal framework for developing “guarantees of non-repetition” in judicial venues has largely been established by the Inter-American Commission and Court; however implementation of these reparations remains a challenge. In the following chapter, section 3.1.3 provides a more in-depth

⁹⁷ Valerie Couillard, ‘The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence’ (2007) 1 International Journal of Transitional Justice 2.

⁹⁸ Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (n 92) 3A.

⁹⁹ Human Rights Committee, ‘General Comment No. 31: General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/21/Rev.1/Add.13 [2004] ¶17.

¹⁰⁰ Pablo De Greiff, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence on Guarantees of Non-recurrence (A/HRC/30/42, September 2015.).

¹⁰¹ Ibid 10-22.

analysis of how, and to what extent, the different types of reparations are employed through the Inter-American System of Human Rights.

Reparations, as they are defined and applied in international law through judicial venues, have until recently been both limited and limiting in terms of repairing harm that impacts a collective group, rather than the individual rights holder. As Rubio-Marín and Sandoval described, human rights judicial venues must “depart from a narrowly conceived role of administering justice in individual cases and [...] enter the domain of institutional reform and policy-making by requiring states to address structural shortcomings in the protection of human rights”. Increasingly, especially in litigation that attempts to redress violations of economic, social and cultural rights, reparations have evolved to take into account the structural, or emblematic, nature of rights violations that result from, and have an impact on, society as a whole. This shift, although admittedly inconsistent in application,¹⁰² challenges preconceived notions about the transformative potential of reparations in international law. Pablo de Greiff contended that reparations issued in judicial venues are “narrowly conceived” because international law, and human rights treaties themselves, have been designed in an individualized fashion.¹⁰³ However, it can be argued that in certain human rights forums, such as the Inter-American System of Human Rights, the notion of reparation as it applies to the individual victim has in some situations evolved to include the collective notion of the victim. That is, the isolated human rights violation is not isolated at all. Rather, it can be representative of systematic and massive rights violations, an emblematic case. Manuel Ventura Robles, a judge at the Inter-American Court of Human Rights, described the objective of reparations as being to “provide victims and their next of kin with *restitutio in integrum* for the harm caused”.¹⁰⁴ In situations where a human rights violation represents a structural problem, or where there is a collective pool of victims, it is no longer appropriate to return victims to the *status quo ante*. Instead, reparations should be designed to transform the situation in which the rights violations originally occurred.¹⁰⁵ However, as Thomas Antkowiak asserted, the efficacy and implementation of reparations relies on the development of reparation orders

(that) must be clear enough to be understood and followed by frequently unenthusiastic bureaucrats, as well as concrete enough to be verifiable by the Court

¹⁰² Thomas Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court and Beyond' (2008) 46:2 Columbia Journal of Transnational Law 383.

¹⁰³ De Greiff, 'Justice and Reparations' (n 87) 454.

¹⁰⁴ Manuel E. Ventura Robles, 'Impact of the Reparations Ordered by the Inter-American Court of Human Rights and Contributions to the Justiciable Nature of Economic, Social and Cultural Rights,' in Yves Haeck, Clara Burbano-Herrera, and Oswaldo Ruiz-Chiriboga (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 278.

¹⁰⁵ Rubio-Marín and de Greiff, 'Women and Reparations' (97) 325.

(in his example, the Inter-American Court of Human Rights) in the supervisory process. [...] They should be sufficiently flexible to allow the sovereign state some discretion, since an international tribunal cannot anticipate all of the country specific complications that might arise in the course of implementation.¹⁰⁶

Emblematic human rights cases that come before international judicial venues represent massive rights violations that require reparation to redress the structural (social) nature of rights violations. The reparations issued in these cases may have a ripple effect at the national level. For example, as de Greiff explained,

Reparations litigation before both national and regional jurisdictions such as the Inter-American Court or the European Court can play a tremendously important role in massive reparations. First, such litigation can act as a catalyst for the adoption of reparation programs [...] Second, [...] this criterion may be used by victims and their representatives to establish reparation programs in the first place, this leverage becomes particularly important.¹⁰⁷

Alicia Ely Yamin posited a similar claim when she stated that, “litigation, in conjunction with other social action, can play a role in creating new expectations among people who are not direct beneficiaries of judgments”.¹⁰⁸ In addition, Alexandra Huneus noted, “even if a state fails to comply with the particular demands of a court ruling, there may be ways in which that ruling alters its behaviour. Court rulings can also have significant effects on non-state actors beyond the litigant”.¹⁰⁹

In order for reparations to be transformative, that is to affect social change in some way, reparations must be developed from a perspective of structural litigation; litigation that emphasizes the emblematic, or collective, nature of a singular individual’s rights violation.¹¹⁰ In terms of reparation, the aim of structural litigation is to argue for reparations that address the public interest or collective nature of rights violations, and ultimately transform the status quo.¹¹¹ The concept of “transformative potential” as it applies to reparation is one that originated in the context of transitional justice, which Ruth Rubio-Marín described as “the extent to which a reparations program has the capacity to subvert

¹⁰⁶ Antkowiak, ‘Remedial Approaches’ (n 102) 384

¹⁰⁷ De Greiff ‘Justice and Reparations’ (n 87) 451.

¹⁰⁸ Alicia Ely Yamin ‘Power, Suffering, and Courts: Reflections on Promoting Health Rights through Judicialization,’ in Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice Health?* (Harvard University Press 2011) 365.

¹⁰⁹ Alexandra Huneus, ‘Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights’ (2011) 44 Cornell International Law Journal 505.

¹¹⁰ For discussion on structural litigation, see Alexandra Huneus, ‘Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts’ (2015) 40:1 Yale Journal of International Law 2-40.

¹¹¹ Mindy Roseman and Siri Gloppen, ‘Litigating the Right to Health: Are Transnational Actors Backseat Driving?’ in Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice Health?* (Harvard University Press 2011) 247-248.

instead of reinforce, pre-existing structural inequalities”.¹¹² When applied to reparation programs developed in the context of transitional justice, the concept and practice of transformative reparation has received much critique. For instance, Margaret Urban Walker argued that a skewed focus on collective repair runs the risk of “bypass(ing) or displac(ing) reparative justice as a distinct and distinctly victim-centered ideal in favor of a different kind of justice agenda.”¹¹³ Rodrigo Uprimny also raised concern with the emphasis on transformative reparation programmes in societies and countries where resources are scarce and reparation programmes may in fact detract from rather than enhance the social and economic condition of a community or population.¹¹⁴ In the context of international law, the critique raised by Walker is not equally applicable because in human rights judicial venues the challenge lies in the need to expand the victim-centred approach to reparations so that it includes a collective or structural depiction of rights violations and results in structural reform. However, Uprimny’s warning about resource distribution rings true when applied to reparations issued through transitional justice programmes or judicial venues. For instance, the forthcoming case study in chapter seven examines the Costa Rican State’s obligation to provide in vitro fertilization through its social healthcare program, where it can be argued that the resources necessary to establish such a programme could be better spent on maternal healthcare, education, and access to basic health services in rural parts of the country.¹¹⁵

Reparations intended to repair and/or address structural inequality must be designed to tackle core causes of discrimination manifested by both the state and society itself. While the transformative potential of gender-based reparations is indeed limited, failure to emphasise the gender-based causes and implications of human rights violations makes it near impossible to address the pre-existing conditions that originally allowed for the rights violation. While de Greiff raised concerns with the limited transformative potential of reparations in judicial venues due to their narrow individualistic approach, Rubio-Marín and Sandoval responded by suggesting that judicial venues depart from the individual and embrace the structural nature of human rights protections, particularly by focusing on the transformative potential of reparation measures designed to guarantee non-repetition of

¹¹² Ruth Rubio-Marín 'Introduction: A Gender and Reparations Taxonomy' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 7.

¹¹³ Margaret Urban Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 *International Journal of Transitional Justice* 110.

¹¹⁴ Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice,' (2009) 65 *Netherlands Human Rights Quarterly* 635.

¹¹⁵ Interview with Jorge Oviedo, Deputy Attorney, General Prosecutor of the Republic of Costa Rica/State Representative in *Artavia Murillo et al. v. Costa Rica*, San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G).

rights violations. Although certainly limited in their transformative potential, reparations, especially guarantees of non-repetition, are a resource that has not been fully utilized within the context of international human rights law.

2.3.2 Reparations and Gender-Based Harm

According to Rubio-Marín, the process of engendering harm in reparations requires a conceptualization of reparations that comprehends how “the same (rights) violation may harm men and women differently”.¹¹⁶ This articulation of gendered harm echoes that provided by West and Conaghan, in that both were concerned with the experience of harm as it impacts women and men differently based on their gender.¹¹⁷ Margaret Urban Walker expanded on this claim by explaining that reparations intended to acknowledge the realities of violence inflicted upon women must observe and analyse “how gender creates differences between the experiences of men and women as victims, and how differences among women and among men mean differences in the impacts as well as the injuries they suffer”.¹¹⁸ Walker determined that the differences between the violence experienced by women and men can be attributed to several factors.¹¹⁹ First, the domination of women is so widely accepted (normative) that it “has been difficult historically for many men and women to ‘see’ violence toward women, much less subordination of women”.¹²⁰ Second, the mandate of male control is such that it encourages men to perceive women in terms of what they may offer men. Third, violence committed by men against women can function as a way to confirm masculinity amongst men. In order to challenge these factors through reparation measures, Rubio-Marín explained that the objective of reparations must be to subvert the deep-seated and connected nature of gender-based subordination, violence and discrimination.¹²¹ This requires that reparations,

First, avoid formal gender discrimination in the design and implementation of [...] programs; second, look for ways of ensuring that patriarchal norms and sexist standards and systems of values do not leak into reparations; and third, explore ways to optimize (admittedly modest) transformative potential of reparations programs so that they serve to advance toward the ideal of a society altogether free of subordination.¹²²

¹¹⁶ Rubio-Marín, 'The Gender of Reparations in Transitional Societies' (n 55) 97.

¹¹⁷ West, 'Hedonic Lives' at (n 56), and Conaghan, 'Gendered Harms and the Law of Tort' at (n 48).

¹¹⁸ Margaret Urban Walker, 'Gender and Violence in Focus: A Background for Gender Justice in Reparations,' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 62.

¹¹⁹ Ibid 24-28.

¹²⁰ Ibid 26-27.

¹²¹ Rubio-Marín 'Introduction: A Gender and Reparations Taxonomy' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 6, and Rubio-Marín, 'The Gender of Reparations in Transitional Societies' (n 55) 102.

¹²² Rubio-Marín, 'Introduction: A Gender and Reparations Taxonomy' (n 112) 7.

Rubio-Marín and de Greiff, in their work on women and reparations, noted that the conceptualization of the notion of harm applies “not only (to the) persons whose rights are violated but also other individuals affected by the violation, such as their close family members and dependents”.¹²³ In the context of international law and women’s reproductive rights cases, it can also be argued that the notion of harm applies to all women who are impacted by laws, policies and sociocultural norms and values perpetuated by a patriarchal culture that violates women’s reproductive health rights. The notion of gendered harm, as articulated by Rubio-Marín and de Greiff, figures into a conception of reparations as rights-based because “what is important in the end for a system of rights is not the protection of the integrity of norms but the protection of the integrity of persons”.¹²⁴ With this reasoning in mind, it is possible to determine that reparations intended to do justice for women must take into account the notion of harm and the impact of violence as it is social and applies to all women, and not only the singular victim.¹²⁵ Rubio-Marín and Sandoval argued,

Whenever possible, the specific design of reparations benefits should aim to subvert, even if in a modest way, [...] pre-existing conditions [...] (such as) discrimination, violence and poverty - which (are) often at the root of the violence (against women) and which account for the specific and compounded form of harm that women experience.¹²⁶

This argument relates to Crenshaw’s assertion that placing the most marginalized women at the centre of an action, in this case design of reparations, is the most effective way to “resist efforts to compartmentalize (women’s) experiences”.¹²⁷ When designing reparations with the most marginalized, or harmed women as the target beneficiaries of the reparations, all other women benefit from the action. This is especially important when referring to reparations designed within judicial venues, where the emphasis can sway towards individual action, rather than a structural, compound and comprehensive understanding of discrimination and violence as it applies to all women.

The challenge of engendering reparations in women’s reproductive rights cases can partly be attributed to the difficulties of litigating reproductive rights cases using a “violence against women” perspective. In the introduction to her edited collection, *What Happened to the Women?*, Rubio-Marín noted that a number of the authors in the book

¹²³ Rubio-Marín and de Greiff ‘Women and Reparations’ (n 97) 328.

¹²⁴ Ibid 329.

¹²⁵ Cain and Howe (n 77).

¹²⁶ Ruth Rubio-Marín and Clara Sandoval, ‘Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the ‘Cotton Field’ Judgment’ (2011) 33:4 Human Rights Quarterly) 1070.

¹²⁷ Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) University of Chicago Legal Forum 167, *supra* section 1.1.1 (n 43).

Regret(ed) that many forms of violence that target or affect women's reproductive function or capacity have not been adequately conceptualized in the reparations debates because they have either been left out or lumped together under the common banner of sexual violence, even if the offense is not strictly the same and the ensuing harms for the victim are not necessarily the same either.¹²⁸

Regina Graycar and Jenny Morgan expressed a similar sentiment by claiming that the legal system has not adequately identified violence against women: "That is, violence can be present in legal disputes that do not directly involve violence - the violence is not the reason for the litigation - but is an underlying factor in the case. In these circumstances, the violence is often ignored, even though it should be central to the resolution of the case".¹²⁹ This thesis argues that the interrelated nature of reproductive health violations and violence against women is not only valid and undeniable, but that developing this argument in women's reproductive health rights litigation creates opportunities for judicial venues to redress harm as it results from violence. A failure to draw a clear connection between violence and reproductive rights violations has the potential to neutralize, or perhaps "de-gender" reproductive rights violations, which is a critique raised in the case study analyses conducted in this research.

The above discussion of women's (reproductive) rights (section 2.1), gendered harm (section 2.2) and reparations (section 2.3) provides the basis for the forthcoming analysis of women's reproductive rights case law emerging from the Inter-American System of Human Rights. This chapter presented two central arguments: (i) the right to reproductive health is intrinsically connected to a number of human rights, and litigation efforts around the right to reproductive health must incorporate a multi-faceted rights approach in order to fully encapsulate the many ways in which women experience violations of their reproductive rights; and (ii) gender-based harm and violence must be acknowledged and addressed through human rights law and reparations emerging from judicial venues; the process of engendering reparations requires a thorough examination of the root causes of discrimination and violence against women, as well as litigation that distinctly connects gendered harm with violations of women's (reproductive) rights. The next chapter examines the Inter-American System of Human Rights in relation to the advancement of women's rights over the past decade, and provides precedent upon which to develop the proposed "gender reparations tradition" in women's reproductive rights litigation before the Inter-American System.

¹²⁸ Rubio-Marín 'The Gender of Reparations: Setting the Agenda' (n 54) 31.

¹²⁹ Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd edn, The Federation Press 2002) 314-315.

CHAPTER THREE

THE INTER-AMERICAN SYSTEM OF (WOMEN'S) HUMAN RIGHTS

The Inter-American System of Human Rights has increasingly been recognized as a forum for the advancement of women's human rights. Over the past two decades, the Inter-American Commission on Human Rights has issued precautionary measures, made recommendations in women's rights cases and published numerous reports on women's rights issues.¹ The Inter-American Court of Human Rights has ordered judgments in cases concerning femicide (*feminicidio*) and reproductive health and has issued provisional measures to protect the lives of women.² There is a noted increase in women's rights petitions being submitted to the Inter-American Commission over the past ten years, however, advancing a gender-perspective in the work of the Inter-American System has been slow.³ As more women's rights cases come before the Inter-American Commission and Court, there exists a greater opportunity to develop and expand upon women's rights protections in the Inter-American region. This thesis argues that one such way to strengthen women's rights, including women's *reproductive* rights, through the Inter-American System of Human Rights is to develop a "gender reparations tradition".

The process of developing such a "gender reparations tradition" requires a reconceptualization of how the Inter-American Systems' conventions and treaty-monitoring bodies are *normally* used to redress women's (reproductive) rights violations. In order to examine how the Inter-American System of Human Rights currently approaches violations

¹ Rapporteurship on the Rights of Women, Inter-American Commission on Human Rights <www.oas.org/en/iachr/women/default.asp> 'Access to Information on Reproductive Health from a Human Rights Perspective' (Inter-American Commission on Human Rights 2011) <www.cidh.oas.org/pdf%20files/womenaccessinformationreproductivehealth.pdf>, and 'Access to Maternal Health Services from a Human Rights Perspective' (Inter-American Commission on Human Rights 2010) <[www.oas.org/en/iachr/women/docs/pdf/saludmater naeng.pdf](http://www.oas.org/en/iachr/women/docs/pdf/saludmater%20naeng.pdf)>.

² Women's rights cases submitted to the Inter-American Court of Human Rights, as listed on website of Inter-American Commission on Human Rights' Women's Rights Special Rapporteur website: *Artavia Murillo et al. (in vitro fertilization) v. Costa Rica* [2012] Inter-American Court of Human Rights (ser. C) No. 257, Preliminary Objections, Merits, Reparations and Costs; *Atala Riffo and Daughters v. Chile* [2012] Inter-American Court of Human Rights (ser. C) No. 239, Merits, Reparations and Costs; *Rosendo-Cantú and other v. Mexico* [2010] Inter-American Court of Human Rights (ser. C) No. 216, Preliminary Objection, Merits, Reparations and Costs; *Fernández-Ortega et al. v. Mexico* [2010] Inter-American Court of Human Rights (ser. C) No. 215, Preliminary Objection, Merits, Reparations and Costs; *Xákmok Kásek Indigenous Community v. Paraguay* [2010] Inter-American Court of Human Rights (ser. C) No. 215, Preliminary Objection, Merits, Reparations and Costs; *González et al. ('Cotton Field') v. Mexico* [2009] Inter-American Court of Human Rights (ser. C) No. 205, Preliminary Objection, Merits, Reparations, and Costs; *"Las Dos Erres" Massacre v. Guatemala*, [2009] Inter-American Court of Human Rights (ser. C) No. 211, Preliminary Objection, Merits, Reparations and Costs; *Miguel Castro-Castro Prison v. Peru* (2006) Inter-American Court of Human Rights (ser. C) No. 160, Merits, Reparations and Costs; and Provisional Measure in the case of 'B', Resolution of the Inter-American Court of Human Rights of 29 May 2013, <www.corteidh.or.cr/docs/medidas/B_se_02.pdf>.

³ Interview with Rosa Celorio, Attorney, Women's Rights Desk, Inter-American Commission on Human Rights (Washington DC, USA 28 August 2014).

of women's reproductive rights, this chapter provides an introduction to the Inter-American System's treaties and judicial bodies in section 3.1, and then illustrates how the Inter-American Court has increasingly adopted a gender-sensitive approach to women's rights cases in section 3.2. The final section of this chapter, section 3.3, provides an overview of Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations,⁴ as this is the framework used throughout the case study chapters to determine the transformative potential of reparations in women's reproductive rights cases. Finally, this chapter introduces the concept of a "gender reparations tradition," which is the primary original contribution this thesis provides through the case study analyses.

3.1 The Inter-American System of Human Rights

Regional human rights systems are treaty-based entities that serve an adjudicatory and advisory purpose, and also have the power to receive individual complaints of human rights violations.⁵ Regional human rights systems share a complex yet complementary relationship with universal human rights monitoring bodies.⁶ Vasak and Alston suggested that in its initial perception of regional human rights, the United Nations viewed regional arrangements as a "breakaway movement" that sought to undermine the universal framework and institutions of the United Nations system.⁷ However, the UN General Assembly later altered its opinion of regional human rights mechanisms by instead encouraging States to establish regional arrangements in order to promote and protect human rights in their regions.⁸ Although concerns about how regional systems would interpret global human rights law, as well as cooperate with each other and the United Nations were not unfounded, regional systems utilize a more heterogeneous approach to enforcing human rights, which provides a practical opportunity for universal human rights to find their application at regional and domestic levels. Dinah Shelton, former Commissioner at the Inter-American Commission of Human Rights (2010-2013), argued that regional human rights systems have evolved into highly progressive institutions,

⁴ Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the 'Cotton Field' Judgment' (2011) 33:4 Human Rights Quarterly 1062-1091.

⁵ There are currently three active regional human rights systems: Inter-American Human Rights System; European Human Rights System; and the African Human Rights System. The Arab Human Rights System and the Asian Human Rights System are inactive. For an introduction to each of the regional human rights systems see, Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (2nd edn, Oxford University Press 2000) 925.

⁶ Charter of the United Nations (1945) Chapter VIII: Regional Arrangements, Article 52. Provisions for regional arrangements that relate "to the maintenance of international peace and security," provided that the activities of regional mechanisms are "consistent with the Purpose and Principles of the United Nations. OAS Charter Art. 1: OAS is a "regional arrangement" under Chapter VIII of the UN Charter.

⁷ Karal Vasak and Philip Alston, *The International Dimensions of Human Rights* (Greenwood Press 1982) 451. For overview of each regional system, see Thomas Buergenthal, Dinah Shelton and David P. Stewart, *International Human Rights in a Nutshell* (4th edn, West Publishing 2009).

⁸ 'Regional Arrangements for the Promotion and Protection of Human Rights', GA Res 32/127 [16 December 1977].

especially in regards to their normative development and institutional reform.⁹ Additionally, James Cavallaro and Stephanie Brewer noted that “a disproportionate focus on (regional) institutions’ existence in isolation may lead us to overlook the actual degree of success that such tribunals have had in the countries subject to their jurisdiction”.¹⁰ Regional systems operate by defining their own jurisdiction, within the context of their respective human rights conventions, and by amending their Rules of Procedure to reflect the demands and requirements of their regions. Not only do the regional systems reference one another’s experiences, but they also utilize other regional systems’ jurisprudence to develop and reinforce their case law.¹¹ As regional human rights systems progress in their work as forums for the advancement of human rights, Cavarallo and Brewer warn that regional tribunals “face the challenge of advancing human rights in states that may resist supranational decisions and that suffer from large-scale, endemic human rights violations”.¹²

The Inter-American System of Human Rights exists within the Organization of American States, and is the regional human rights system dedicated to the purposes of advancing democracy, human rights, security and development in the Americas.¹³ The Inter-American System of Human Rights entrusts two treaty-monitoring bodies with protecting, promoting and fulfilling human rights in the American hemisphere, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The two bodies share the mission of advancing human rights in the region, but their duties, responsibilities, jurisdiction and powers of enforcement vary significantly. Each body operates using a Rules of Procedure¹⁴ that outlines the Inter-American Commission and Inter-American Court’s working relationship, precautionary and provisional measure and advisory opinion activities, and also the procedures for hearing cases and enforcing the implementation of decisions and judgments. The Inter-American Commission and Inter-American Court were created by the American Convention on Human Rights, which was drafted in 1959, and

⁹ Dinah Shelton, 'The Promise of Regional Human Rights Systems' in Burns H. Weston and Stephen P. Marks (eds), *The Future of International Human Rights* (Martinus Nijhoff 1999) 356.

¹⁰ James Cavallaro and Stephanie Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102:4 *The American Journal of International Law* 769.

¹¹ Dinah Shelton 'Promise of Regional Systems' (n 9) 356.

¹² Cavarallo and Brewer 'Reevaluating Regional Human Rights Litigation' (n 10) 769.

¹³ Organization of American States, 'What We Do' <www.oas.org/en/about/what_we_do.asp> accessed 14 June 2014. Current OAS Member States: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (inactive), Dominica, Dominican Republic, Ecuador, El Salvador, Haiti, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, Venezuela.

¹⁴ Rules of Procedure of the Inter-American Commission on Human Rights [approved 2009, entered into force 1 August 2013], and Rules of Procedure of the Inter-American Court of Human Rights [approved 2009, entered into force January 2010].

became the Inter-American region's principal human rights treaty in 1969.¹⁵ The Organization of American States has adopted a significant number of human rights treaties,¹⁶ but the most relevant to the critiques raised in this thesis are the American Convention on Human Rights and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará).¹⁷ These conventions are examined in this section because they are integral to the development of case law that promotes and transforms women's (reproductive) rights in the Inter-American System of Human Rights. In addition, this section discusses the roles of the Inter-American Commission and Court, and examines the function and capacity of reparations within the Inter-American System.

3.1.1 The Relevant Conventions

The American Convention on Human Rights (American Convention) entered into force in 1978. As of July 2016, 23 OAS Member States are States Parties to the American Convention.¹⁸ The rights enshrined within the American Convention have been referred to as "first generation" rights, such as the right to life (Article 4); the right to humane treatment (Article 5); the right to privacy (Article 11); freedom of religion (Article 12); rights of the family (Article 17); and the right to fair trial (Article 8) and judicial protection (Article 25). Additionally, the American Convention provides for the rights of the child and the right to form a family, as well as freedoms of thought, religion, expression, residence and movement.¹⁹ The American Convention endows the Inter-American System's human rights treaty monitoring bodies - the Inter-American Commission on Human Rights ("Inter-American Commission") and the Inter-American Court of Human Rights ("Inter-American Court") - with the responsibility of ensuring State compliance with the human rights

¹⁵ American Convention on Human Rights (ACHR) OASTS No. 36 (1969) Article 33.

¹⁶ American Declaration on the Rights and Duties of Man OEA/Ser.L/V/II 71, at 71 (1948); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OASTS 73 (1990); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ('Protocol of San Salvador'), OASTS 69 (1988); Inter-American Convention of the Forced Disappearance of Persons, OASTS A-60 (1994); Inter-American Convention to Prevent and Punish Torture, OASTS 67 (1985); Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, OASTS (1999).

¹⁷ The Protocol of San Salvador is also relevant to this research, but because the Inter-American Court has not sufficiently developed its application of this Protocol, it is not examined here. It is important to note however, that only the right to unionize (Article 8(1)(a)) and the right to education (Article 13) are rights that may give rise to an individual petition before the Inter-American Commission or the Inter-American Court. It wasn't until September of 2015 that the Inter-American Court of Human Rights found a violation of the right to education as it is enshrined in the Protocol, in the case of *Lluy and Others v. Ecuador* [2015] Inter-American Court of Human Rights (ser. C) No. 298, Preliminary Exceptions, Merits, Reparations and Costs.

¹⁸ Active OAS member states that have not ratified the American Convention: Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, United States. Trinidad and Tobago denounced the American Convention in 1998, effective May 1999, and Venezuela denounced in 2012, effective 2013. <www.oas.org/dil/treaties_B32_American_Convention_on_Human_Rights_sign.htm>.

¹⁹ ACHR (n 15) Part I, Ch. I & II.

delineated within American Convention and other related OAS human rights treaties.²⁰ The American Convention details the composition, functions and competence of the Inter-American Commission and Inter-American Court, and also determines the procedures and jurisdiction for each organ.²¹ In addition, the American Convention includes an individual petition mechanism for filing complaints,²² as well as mechanisms for monitoring human rights situations in the Inter-American region, regardless of whether or not a case was brought before the Commission or Court.²³ While the American Convention clearly defines the functions of the human rights monitoring bodies, it lacks the establishment of a permanent implementation-monitoring device that exclusively ensures compliance with the judgments, decisions and agreements emerging from the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (hereinafter “Convention of Belém do Pará”)²⁴ can be understood as an elaboration of the American Convention on Human Rights, and is the first regional binding human rights instrument to be developed with the objective of eradicating gender based violence. The Convention of Belém do Pará entered into force in March 1995, just nine months after it opened for signature deposits.²⁵ It is the most ratified treaty in the Inter-American System, with only the United States, Canada and Cuba withholding their ratification deposits. 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 private sphere”.²⁶ Feminist discourse permeates the Convention of Belém do Pará text; for example, the Preamble states, “violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between men and women”.²⁷ The Convention of Belém do Pará emphasises violence against women in both the private and

²⁰ Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 3.

²¹ ACHR (n 15).

²² Ibid: “Any group or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”

²³ Ibid: Article 41(c) “to prepare such studies or reports as it considers advisable in the performance in its duties.”

²⁴ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (‘Convention of Belém do Pará’) OASTS (1994).

²⁵ Ibid. States Parties: <www.oas.org/juridico/english/signs/a-61.html>.

²⁶ Ibid Chapter I.

²⁷ Ibid Preamble.

public spheres and demands that violations of women's rights be justiciable before the Inter-American Commission and Inter-American Court.²⁸

Although the Convention of Belém do Pará represents a positive advancement for women's human rights within the Inter-American System, at this point in its application, only Article 7 falls under the jurisdiction of the Inter-American Commission and Inter-American Court, as indicated in the Convention of Belém do Pará Article 12.²⁹ Article 7 of the Convention of Belém do Pará³⁰ requires that

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;
- (e) 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 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.

Article 7(b) is the most widely used provision under Article 7 of the Convention of Belém do Pará, and while it is limited in its application, it also provides an opportunity to develop specific measures that address and seek to prevent socio-cultural practices that perpetuate

²⁸ Ibid Articles 1 and 3.

²⁹ Ibid Article 12: '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 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.'

³⁰ Ibid Article 7.

violence against women; *the principle of due diligence*. Elizabeth A.H. Abi-Mershed explained the concept of due diligence as it is enshrined in Article 7(b) of the Convention of Belém do Pará:

The Convention of Belém do Pará requires that states parties ensure that their agents refrain from acts of violence against women, and further requires that these states apply due diligence to prevent, investigate and punish such violence when perpetrated by non-state actors in the home, community or wherever it may occur. States parties undertake to ensure that these obligations are given practical effect and that women at risk for [sic] or subjected to violence have access to effective judicial protection and guarantees.³¹

Abi-Mershed argued that the due diligence standard serves the Inter-American System as a “flexible way of understanding what state obligation and responsibility mean in theory, and more importantly, in practice”.³² Further to this, Paulina García-Del Moral and Megan Alexandra Dersnah noted that the application of Article 7(b) in violence against women cases allows feminists to “strategically challenge the gendered politics of the public/private divide underlying the historical depoliticization of violence against women that, until recently, had shielded the state and international human rights law”.³³ Liz Melendez, the Executive Director of Peruvian feminist NGO, Flora Tristan, echoed this analysis by claiming that the obligation for states to prevent reproductive rights violations effectively requires states to *prevent* structural violence and discrimination.³⁴ She argued that the most practical and effective strategy in women’s rights litigation is to locate women’s reproductive health rights within civil and political, or “universal” rights, such as due diligence. The power of the due diligence provision should not be underestimated, especially because this provision politicizes violence occurring in the private sphere, and therefore disrupts traditional notions surrounding negative and positive state responsibility in preventing, protecting and fulfilling human rights.

The Inter-American Commission and Court may only apply Article 7 of the Convention of Belém do Pará because of the limitations the Convention imposes on the application of its own provisions. Article 12 of the Convention of Belém do Pará states that petitioners “may (only) 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

³¹ Elizabeth A. H. Abi-Mershed, 'Due Diligence and the Fight against Gender-Based Violence in the Inter-American System' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Nijhoff Brill Publishing 2009) 131.

³² Ibid 127.

³³ Paulina García-Del Moral and Megan Alexandra Dersnah, 'A Feminist Challenge to the Gendered Politics of the Public/Private Divide: On Due Diligence, Domestic Violence, and Citizenship' (2014) 18:6-7 *Citizenship Studies* 661.

³⁴ Interview with Liz Meléndez, Director, Flora Tristan, Lima, Peru 14 July 2014 (Ref Code: IP, P, N).

Party”.³⁵ However, as will be discussed later in this chapter, the Inter-American Court has determined that both Articles 8 and 9 of the Convention of Belém do Pará “may be used to interpret (Article 7) and other pertinent Inter-American instruments”.³⁶

For purposes of this research, the Convention of Belém do Pará Article 8 is fundamental to the eradication of violence against women and the promotion of women’s human rights. Article 8 of the Convention of Belém do Pará states:

The States Parties agree to undertake progressively specific measures, including programs:

- (a) to promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected;
- (b) to modify social and cultural patterns of conduct of men and women; including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of inferiority or superiority of either of the sexes or on the stereotypes roles for men and women which legitimize or exacerbate violence against women;
- (c) to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women;
- (d) to provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, counselling services for all family members where appropriate, and care and custody of the affected children;
- (e) to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women;
- (f) to provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life;
- (g) to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women;
- (h) to ensure research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes; and
- (i) to foster international cooperation for the exchange of ideas and experiences and the execution of programs aimed at protecting women who are subjected to violence.³⁷

³⁵ Convention of Belém do Pará (n 24) Article 12.

³⁶ *González et al. ('Cotton Field') v. Mexico* [2009] Inter-American Court of Human Rights (ser. C) No. 205, Preliminary Objection, Merits, Reparations, and Costs ¶79.

Although the Inter-American Court has determined it does not have jurisdiction over Article 8 of the Convention of Belém do Pará, Article 7 cannot be fully understood, nor implemented, if not interpreted through the Article 8 provisions. Article 9 of the Convention of Belém do Pará provides a fundamental and overarching understanding of the situation within which Articles 7 and 8 exist:

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.³⁸

By designating and defining women's position as vulnerable, Article 9 demands that provisions outlined in Article 7 be implemented with a view to protecting women's rights despite the challenges women face in accessing their rights due to their socially and culturally defined status as unequal to men. Article 9 also relates back to Crenshaw's claims concerning intersectionality and marginalized women by taking into account the varying intersectional determinants of discrimination.

In order to follow up on State implementation of the provisions enshrined within the Convention of Belém do Pará, the Organization of American States established "a system of consensus-based and independent peer evaluation to assess the progress made by States Party in their fulfilment of the objectives of the Belém do Pará Convention", known as The Committee of Experts of the Follow-up Mechanism to the Belém do Pará Convention, or MESECVI.³⁹ The role of this body is mostly political, and its objective is to "follow through with the commitments undertaken by the States Party to the Convention, to help accomplish its stated purposes, and to facilitate technical cooperation among the States Party".⁴⁰ While MESECVI is an OAS entity designed to work alongside the Inter-American Commission and Court, thus far there is no clear collaboration being forged between the three bodies.⁴¹

The Conventions explored above provide a human rights framework in which women may

³⁷ Convention of Belém do Pará (n 24) Article 8.

³⁸ Ibid Article 9.

³⁹ Follow-Up Mechanism to the Convention of Belém do Pará (MESECVI) Organization of American States <www.oas.org/en/mesecvi/>.

⁴⁰ MESECVI Second Hemispheric Report on the Implementation of the Belém do Pará Convention, Organization of American States (April 2012) <www.oas.org/en/mesecvi/docs/MESECVI-SegundoInformeHemisferico-EN.pdf>.

⁴¹ Interview with Luz Patricia Mejía, Technical Expert and Coordinator, MESECVI (Follow-up Mechanism to the Belém do Pará Convention) and former Commissioner and Rapporteur on Women's Rights at the Inter-American Commission on Human Rights, Skype 26 September 2014 (Ref Code: Sk, Cm, S).

raise petitions against their governments for failing to protect, promote, and fulfil international human rights obligations. The following section explains the roles and responsibilities of the Inter-American Commission and Court, with a particular emphasis on their activities, working relationship and the design and implementation of reparations.

3.1.2 The Commission and the Court

The Inter-American Commission on Human Rights (“Commission”) was established in a Meeting of Ministers of Foreign Affairs in 1959 and was formally established in 1960 when the Permanent Council of the Organization of American States approved its Statute.⁴² The Commission has the duty to “promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters”.⁴³ The Inter-American Commission’s work is concerned in part with addressing problems of gross and systematic human rights violations, where an individual petition may be emblematic of violations occurring on a wider scale.⁴⁴ The Inter-American Commission is located in Washington DC, where it meets to convene regular and special sessions several times a year. The Inter-American Commission’s work consists of three elements: (i) an individual petition system (litigation); (ii) mechanisms by which to monitor human rights situations in Member States; and (iii) reporting instruments that give particular attention to priority thematic areas.⁴⁵ The Inter-American Commission receives individual petitions from victims, family members of victims and any person, group of persons, or nongovernmental body that is based in an OAS Member State.⁴⁶ This broad standing is of significant importance because it allows for representation of victims who belong to vulnerable groups and might otherwise not have the available resources to bring a case to the Inter-American Commission. A State can be held responsible for human rights violations in three instances: (i) an action on behalf of the State where human rights are violated by the State; (ii) State acquiescence or implicit consent in the violation of human rights; and (iii) by omission, where the State fails to take action to prevent and/or punish human rights violations.⁴⁷ The Inter-American Commission

⁴² Inter-American Commission on Human Rights, Organization of American States (1959) <www.oas.org/en/about/commission_human_rights.asp>.

⁴³ Charter of the Organization of American States, OASTS NOS. 1-C AND 61 (1948) Article 106.

⁴⁴ Rules of Procedure of the Inter-American Commission on Human Rights (n 14) Article 29(2)(d)(i). *See also*, Cecilia Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture' (1990) 12:4 Human Rights Quarterly 439.

⁴⁵ 'What is the IACHR?' Inter-American Commission on Human Rights <www.oas.org/en/iachr/mandate/what.asp> accessed 20 May 2014.

⁴⁶ Rules of Procedure of the Inter-American Commission on Human Rights (n 14) Article 23. *See also*, Lisa J. Reinsberg, 'Advocacy before the Inter-American System: A Manual for Attorneys and Advocates' International Justice Resource Center 15 <<http://ijrcenter.org/wp-content/uploads/2014/03/Manual-Advocacy-before-the-Inter-American-System-2014.pdf>>.

⁴⁷ 'Petition and Case System Informational Brochure', Inter-American Commission on Human Rights (2010) <www.oas.org/es/cidh/docs/folleto/CIDHFolleto_eng.pdf> accessed 20 May 2014.

determines admissibility of a petition,⁴⁸ and then attempts to promote a Friendly Settlement Agreement between the State and the petitioner. In the event that a Friendly Settlement Agreement cannot be reached between the parties, the Commission issues a Merits Decision. It is when a state fails to uphold the conditions of a Friendly Settlement Agreement or Merits Decision, that the Inter-American Commission may refer the case to the Inter-American Court of Human Rights.⁴⁹ The reparations agreed upon before or issued by the Inter-American Commission are not binding on States, which implies that states may choose not to fulfil the requirements of a Commission agreement or decision, but should then in turn expect a referral to the Inter-American Court.

In that two of the women's reproductive rights cases selected for analysis in this thesis resulted in Friendly Settlement Agreements, it is necessary to discuss the functions and benefits of this mechanism. The American Convention indicated, "the Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention".⁵⁰ As Pasqualucci explained, "the friendly settlement process facilitates negotiations without judicial intervention",⁵¹ and is beneficial to the petitioner in that it "provides an expedited opportunity to obtain a remedy".⁵² Pasqualucci argued that the Friendly Settlement mechanism also has benefits for "non-parties to the case who have suffered similar human rights violations in that the State may agree to adopt legislation and procedures that also will assist them".⁵³ The forthcoming analyses of *María Mamerita Mestanza Chávez v. Peru*⁵⁴ and *Paulina del Carmen Jacinto Ramírez v. Mexico*⁵⁵ highlight such a situation, where the States agreed to reform legislation as reparation agreed upon in the Friendly Settlement Agreement. The Inter-American Commission's role in the development of Friendly Settlement Agreements is limited in that it does not mediate the agreement, but rather reviews the final Agreement to identify any measures which run

⁴⁸ The requirements for admissibility of an individual petition: (1) petitioner must have exhausted domestic remedies or be able to show that domestic laws do not provide due process, the victim has not been allowed to access judicial remedies or that the State has not provided representation for those petitioners who sought out legal remedies; (2) the petition must be submitted to the IACHR within six months of the date of final judicial action at the domestic level; and (3) only rights protected by the Inter-American treaties can be reviewed by the IACHR. See, Medina (n 44) 445.

⁴⁹ Rules of Procedure of the Inter-American Commission on Human Rights (n 14).

⁵⁰ ACHR (n 15) Article 48(1)(f).

⁵¹ Pasqualucci (n 20) 106.

⁵² Ibid, referencing *Velásquez-Rodríguez v. Honduras* [1998] Inter-American Court of Human Rights (ser. C) No. 4, Merits ¶60.

⁵³ Ibid 107, referencing Diego Rodríguez Pinzón, "The Inter-American System and Transitional Processes: in *Transitional Jurisprudence – The ECHR and Other Regional Human Rights Approaches to Transition* (Michael Hamilton, and Antoine Buyse eds) Cambridge University Press 2011.

⁵⁴ *María Mamerita Mestanza Chávez v. Peru* [2003] Inter-American Commission on Human Rights, Case 12.191, No. 71/03 Friendly Settlement Agreement IV ¶14(11).

⁵⁵ *Paulina del Carmen Jacinto Ramírez v. Mexico* [2007] Inter-American Commission on Human Rights, Petition 161–02, Report 21/07 Friendly Settlement Agreement ¶15, ¶11 and ¶12(2).

counter to the objectives of the American Convention.⁵⁶ In the event that a Friendly Settlement is reached, the Inter-American Commission adopts a report that includes a statement of facts and the solution, including the list of agreed upon reparations. An analysis of State compliance with reparations shows that State efforts to implement reparation provisions delineated in Friendly Settlement Agreements exceed efforts made when the Commission issues a Merits Decision.⁵⁷ However, as Monica Arango Olaya of the Center for Reproductive Rights explained, there are many challenges to working with states in order to come to an agreement and subsequently implement reparations:

Governments are changing and maybe what you sign at some point with somebody (won't apply) when the government changes three years later, and you still have not gotten that implementation. Also, there are many strategies governments use... some governments prefer to go into Friendly Settlement, and they don't comply with any of what happened, which is of course bad faith.⁵⁸

Between 1997 and 2015, the Inter-American Commission released 119 friendly settlement reports.⁵⁹ The Inter-American Commission is tasked with monitoring state compliance with the reparation measures agreed upon in each Settlement, and it may continue to request follow-up information through reports and public hearings in order to determine implementation.⁶⁰ The most recent Annual Report disseminated by the Inter-American Commission on Human Rights revealed that the Commission is currently monitoring compliance with 197 friendly settlement agreements, of which the Commission has determined total compliance in 45 cases, partial compliance in 127 cases and pending compliance in 25 cases. However, as is argued in chapter five, the Inter-American Commission's determination of total state compliance does not necessarily reflect "total" compliance with each reparation.

The Inter-American Court of Human Rights was established in 1979, and is located in San Jose, Costa Rica. The Inter-American Court's primary functions are adjudicatory and advisory, where the Court hears cases referred to it by the Inter-American Commission and also issues opinions to member states of the Organization of the American States and the

⁵⁶ 'Frequently Asked Questions on Friendly Settlements', Inter-American Commission on Human Rights [2011] <www.oas.org/en/iachr/friendly_settlements/faq.asp#acc4>.

⁵⁷ Fernando Basch et al., 'The Effectiveness of the Inter-American System for the Protection of Human Rights: Quantitative Approach on the System's Operation and the Compliance with its Decisions' (2010) 7:12 *Sur International Journal of Human Rights* 20. [Referred to as ADC Study (Asociación por los Derechos Civiles)].

⁵⁸ Interview with Monica Arango Olaya, Regional Director for Latin America and the Caribbean, Center for Reproductive Rights, Skype 11 July 2014 (Ref Code: Sk, N, S).

⁵⁹ Annual Report 2015 (OEA/Ser.L/V/II. Doc. 48/15, Inter-American Commission on Human Rights, 31 December 2015).

⁶⁰ Pasqualucci (n 20) 108.

Inter-American System's human rights organs.⁶¹ States parties that have accepted the Inter-American Court's contentious jurisdiction are bound by its judgments, but only those states that have accepted the Court's jurisdiction participate in the Court's proceedings.⁶² For the first seven years, the Court's work focused primarily on its advisory opinion and provisional measure functions.⁶³

As Marie-Bénédicte Dembour noted, one of the defining aspects of the Inter-American Court is its “resolutely *pro-homine* orientation”.⁶⁴ This “pro-human” approach is inherent to the activities of the Inter-American Court, and means that the Court implements a bias towards the human being through its jurisprudence and advisory mechanisms. According to Dembour, the Inter-American Court's orientation as *pro-homine*, directly correlates with the historical origins of the Court where judges seek to “find every way possible through which they [may] manage to offer redress to the victims of human rights violations”.⁶⁵ This “pro-human” approach was apparent in the Inter-American Court's first case, *Velásquez-Rodríguez v. Honduras*,⁶⁶ where the Court determined that the State has a duty to punish individuals who violate provisions enshrined within the American Convention, and that the Inter-American Court has the legal capacity to place direct horizontal duties on states that fail to bring to justice all private actors who violate human rights provisions.⁶⁷ This case introduced and defined the due diligence standard⁶⁸ as it is understood in the Inter-American System:

The State has a legal duty to take reasonable steps to *prevent* human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

This *duty to prevent* includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.⁶⁹

⁶¹ ACHR (n 15) Articles 61 and 64. The Inter-American Court of Human Rights was established by Article 33 of the American Convention of Human Rights.

⁶² Currently 21 OAS Member States have accepted the Court's jurisdiction: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Suriname, Uruguay and Venezuela.
<www.corteidh.or.cr/index.php/en/mapa-interactivo>.

⁶³ Pasqualucci (n 20) 11.

⁶⁴ Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 7.

⁶⁵ Ibid.

⁶⁶ *Velásquez-Rodríguez v. Honduras* [1988] (n 52) ¶172.

⁶⁷ On “horizontal” responsibility in human rights law, see John H. Knox, 'Horizontal Human Rights Law' (2008) 102:1 American Society of International Law 1–47.

⁶⁸ Abi-Mershed (n 31) 129.

⁶⁹ *Velásquez-Rodríguez v. Honduras* (n 52) [1988] ¶174-175. [emphasis added]

The Inter-American Court's "pro-human" approach has allowed actors and litigants before the Inter-American System to build cases that incorporate the structural causes of human rights violations. However, the Court's reputation as being "pro-human," or "activist," is also a contributing factor to State Parties' reluctance to engage in the activities of the Court, or to respond in full to the reparation measures issued in its cases. In fact, some States have renounced the Court's jurisdiction after judgment.⁷⁰ In order to combat the state's disdain for the Court's "pro-human" approach, Alexandra Huneeus contended that the Inter-American Court must make a greater effort to understand the inner-workings of state entities, particularly national justice systems, in order to partner with these systems, rather than outright challenge them.⁷¹ In addition, Cavallaro and Brewer suggested that the Court consider the interests and strategies of civil society engaged in the work of human rights to "trigger concrete benefits on the ground when governmental authorities are resistant to judgment".⁷²

The Inter-American Commission and Court function using their own Rules of Procedure that they draft and amend in an effort to strengthen and enhance the inner-workings of the Inter-American System.⁷³ These Rules of Procedure also serve to outline the relationship the two bodies share by clarifying the role of the Commission before the Court and also the Commission's procedures for referring a case to the Court.⁷⁴ The Commission lacks a formal compliance-monitoring instrument, but does receive communications from State Parties, local organizations and petitioners in order to follow up on the State's compliance efforts. Communications from participants and interested organizations assist the Commission in determining how far the State has come in terms of compliance with its recommendations. In the event that the Commission refers a contentious case to the Court, its function is to represent and defend the "Inter-American public order of human rights".⁷⁵ As of 2013, the Inter-American Court operates a formal compliance-monitoring mechanism, which compartmentalizes implementation assessment by state rather than case in order to effectively monitor reparations from different cases within the same national context.⁷⁶

⁷⁰ Pasqualucci (n 20) 143-145. *See*, <www.corteidh.or.cr/index.php/en/mapa-interactivo>.

⁷¹ Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 531-532.

⁷² Cavallaro and Brewer (n 10) 788.

⁷³ Rules of Procedure of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (n 14).

⁷⁴ Rules of Procedure of the Inter-American Commission on Human Rights (n 14) Article 45.

⁷⁵ *Ibid* Article 35(1)(f) & Article 52(3).

⁷⁶ Interview with Alexandra Sandoval, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica 12 August 2014 (Ref Code: Ip, Ct, S).

While the Inter-American Commission and the Inter-American Court operate autonomously, their work is fundamentally intertwined in that the Court is reliant upon the Commission's referrals to exercise its adjudicatory authority.⁷⁷ The Inter-American Commission determines the Inter-American Court's docket by selecting which cases it will refer to the Court.⁷⁸ This means that the Commission determines what *kinds* of cases the Court receives, and therefore plays a significant role in developing opportunities for the Court to make binding judgments on women's human rights violations. While the Inter-American Court does rely on the Commission to determine its caseload, once the Court has jurisdiction of a case, it is free to interpret the Inter-American Conventions differently than the Inter-American Commission requests. For example, the Inter-American Commission referred the *Xákmok, Kásek Indigenous Community v. Paraguay*⁷⁹ case to the Inter-American Court with little mention of the rights of women. However, in its judgment the Inter-American Court made reference to the necessity of adequate medical care for pregnant women and women who have recently given birth.⁸⁰

The Inter-American System of Human Rights "pro-human" approach to addressing and redressing violations of human rights has fostered an emphasis on the development of reparations in human rights cases. In that most of the cases that come before the Inter-American Commission and Court are emblematic, that is they represent structural rights violations, the function of reparations has evolved to require that they attempt to transform pre-existing problems that inhibit and directly challenge human rights values and provisions. The following section introduces the role of reparations before the Inter-American System, and argues that while the Inter-American Commission and Inter-American Court have developed a reparations ritual, it is inherently flawed in that reparations do not adequately account for structural and gender-based harm.

3.1.3 Reparations in the Inter-American System

The Inter-American System of Human Rights is entrusted with the power to issue reparations by Article 63 of the American Convention on Human Rights:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the

⁷⁷ ACHR (n 15) Article 61.

⁷⁸ Rules of Procedure of the Inter-American Court of Human Rights (n 14) Article 45.

⁷⁹ *Xákmok, Kásek Indigenous Community v. Paraguay* [2010] Inter-American Court of Human Rights (ser. C), No. 214 Preliminary Objection, Merits, Reparations, and Costs.

⁸⁰ *Ibid* ¶233 and 301.

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.⁸¹

As Arturo Carillo explained, states that violate human rights obligations enshrined within the Inter-American System human rights conventions are “responsible for the wrongful act and all its harmful effects, (and the) state is consequently under a duty to repair”.⁸² Before detailing the types of reparations issued by the treaty-monitoring bodies of the Inter-American System, it is important to recall that reparations ordered by the Inter-American Court are binding on those states that have accepted its jurisdiction, whereas reparations issued through the Inter-American Commission’s Merits Decisions and Friendly Settlement Agreements are non-binding mechanisms. Ultimately, state compliance with reparations recommended or ordered by the Inter-American Commission and Court is both sporadic and unreliable. Depending on the state, the rights violation, and the type of reparation, state implementation of reparations varies widely.

The Open Society Justice Initiative conducted an analysis of reparations issued by the Inter-American Commission and Court entitled *Judgment to Justice: Implementing International and Regional Human Rights Decisions*.⁸³ The report, which referred to findings developed by the Association for Civil Rights (ADC Study) conducted by F. Basch et al., designated three categories of reparation: (i) individual reparations that include pecuniary and non-pecuniary damages; (ii) orders to investigate human rights violations and punishment of perpetrators; and (iii) reparations which aim to guarantee non-repetition of rights violations.⁸⁴ In reviewing implementation of reparations from the Commission and Court between 2001 and 2006, the study found that the greatest levels of State implementation were in the form of individual monetary reparations, with a rate of 58% full implementation.⁸⁵ Symbolic reparations, which were those intended to commemorate the victims of human rights abuses, were ordered in 21% of Commission and Court reparations, and implemented 52% of the time.⁸⁶ Investigation of abuse and punishment of perpetrators at the national level represented 13% of the reparations ordered by the Commission and Court, however it was estimated that only 10-14% of these reparations were fully

⁸¹ ACHR (n 15) Article 63.1.

⁸² Arturo Carillo, 'Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 510.

⁸³ David C. Baluarte and Christian De Vos, 'Judgment to Justice: Implementing International and Regional Human Rights Decisions' (Open Society Justice Initiative 2010) 19 <www.opensocietyfoundations.org/reports/judgment-justiceimplementing-international-and-regional-human-rights-decisions> accessed February 2013. See also, Doug Cassel 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights' in Koen De Feyter and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2006) 191-223.

⁸⁴ ADC Study (n 57) 9-35.

⁸⁵ Ibid 18.

⁸⁶ Ibid 15 and 18.

implemented.⁸⁷ Legislative reform, which is reparation designed to guarantee non-repetition, accounted for 9% of the reparations issued by the Commission and Court, where states made no effort to implement these reparations in approximately 75% of the cases. Other guarantees of non-repetition, such as training and education of public officials achieved greater success in implementation, with 42% of reparations being fully implemented, yet the Commission and Court only issued these types of reparations in an estimated three percent of cases.⁸⁸ Finally, reparations that aimed to promote social awareness were ordered in only two percent of cases, but were implemented at a rate of 43%.⁸⁹ Reparations ordered by the Inter-American Court reached total compliance 29% of the time, whereas reparations agreed upon in Friendly Settlement Agreements saw 54% compliance, and reparations issued in Merits Decisions only received 11% total compliance. These compliance rates illustrate the potential of Friendly Settlement Agreements to transform State implementation of human rights provisions. However, it is important to note that the above compliance rates reflect the Inter-American Commission and Court's determination of compliance, which, it can be argued, is applied differently based on the type of reparation. For instance, a reparation designed to address legislative reform would require significant State action, yet a training reparation may be considered fulfilled if the State runs one temporary training session.

When a State fails to comply with reparations recommended by the Inter-American Commission or ordered by the Inter-American Court, the Commission and Court then face the task of defining what kind of implementation is enough for a State to be compliant. The most detectable reparations in terms of monitoring compliance are those that call for monetary compensation, judicial measures and legislative reform, compliance that is easy to see.⁹⁰ Reparations that call upon States to implement non-repetition measures that address less tangible causes of human rights violations, such as discrimination and inequality, often escape compliance-monitoring because they are more difficult to assess. For example, transformative reparations designed to eradicate social norms that reinforce discrimination are far more difficult to measure than monetary payments made to an individual victim.

While the Inter-American Commission and Court certainly have a role to play in the development of reparations, that role is limited by the Rules of Procedure that designate the

⁸⁷ Ibid 15, and 'Judgment to Justice' (n 83) note 10, drawing upon conclusions from the ADC Study.

⁸⁸ Ibid 15 and 18.

⁸⁹ Ibid.

⁹⁰ Ciara O'Connell, 'Litigating Reproductive Health Rights in the Inter-American System: What Does a Winning Case Look Like' (2014) 16:2 Health and Human Rights 116–128.

responsibility of developing and requesting reparations to the petitioner (victim's representative).⁹¹ According to Alexandra Sandoval, the Inter-American Court very rarely expands upon reparations requested by petitioners.⁹² Instead, the Inter-American Court relies on the Commission and the petitioner to identify rights violations and determine reparations that address the alleged violations. However, as Karla Quintana-Osuna argued, the Inter-American Court may elect to exercise the principle of *iura novit curia* (the court knows the law), which would allow it to apply existing law in order to expand upon the violations alleged by the petitioner and Commission.⁹³ In doing so, the Court can then invoke its *motu proprio* (on its own initiative or impulse) capacity to develop reparations that address the "new" violations. The principle of *motu proprio* entitles the Inter-American Court to grant additional reparation measures if it deems the requested reparations as insufficient or incomplete. In fact, the Inter-American Court did employ the *motu proprio* principle in *Rochela Massacre v. Colombia*,⁹⁴ where it found it necessary to include additional guarantees of non-repetition. However, as will become evident in the analysis of *Artavia Murillo et al. v. Costa Rica*, the Court may neglect to invoke *motu proprio*, where it can be argued that such an expansion of reparations may have increased the transformative potential of the case.

There is undeniably a problem with reparations in the Inter-American System of Human Rights. While state compliance is a significant challenge, there are also obvious shortcomings in how actors engaged in litigation before the Inter-American System approach the task of developing adequate and effective reparations. First, petitioners (victim's representatives) and civil society organizations may fail to develop cases using a multi-faceted perspective as to how human rights are interrelated and indivisible. Second, according to María Alejandra Cardenas, an attorney formerly with the Inter-American Commission who currently works as Regional Legal Director at Women's Link Worldwide, most actors engaged in the work of the Inter-American System do not have a "tradition to be thinking about reparations".⁹⁵ While the impact of cases emerging from the Inter-American System is not necessarily tied to implementation of "perfect" reparations, the

⁹¹ Rules of Procedure of the Inter-American Court of Human Rights (n 14) Article 40.

⁹² Interview with Alexandra Sandoval, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica 12 August 2014 (Ref Code: Ip, Ct, S).

⁹³ Karla Quintana-Osuna, 'Recognition of Women's Rights Before the Inter-American Court of Human Rights' (2008) 21 Harvard Human Rights Journal 311.

⁹⁴ *Rochela Massacre v. Colombia* [2007] Inter-American Court of Human Rights (ser. C), No. 163 Merits, Reparations, and Costs ¶286-303. Referenced in, Rubio-Marin and Sandoval (n 4) 1091.

⁹⁵ Interview with María Alejandra Cardenas, Regional Legal Director, Women's Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

failure to fully utilize the reparations procedure is a significant disadvantage in how the Inter-American System attempts to protect human rights. Finally, the Inter-American Court, perhaps in an effort to appear restrained rather than activist, rarely invokes its *iura novit curia* and *motu proprio* powers to expand upon alleged violations and reparations, despite having done so in previous cases. If the Court were to actively engage in the design of reparations that aim to guarantee non-repetition of rights violations on a more consistent basis, perhaps that activity would become more normalized and expected; a “tradition”. The objective of reparations in women’s (reproductive) rights cases should be rooted in the need to eliminate gender-based discrimination and harm, or as Executive Secretary of the Peruvian Ministry of Justice and Human Rights, Roger Rodriguez explained, “we need to eliminate the idea that women are an object of power... the idea that women have a natural role, the idea that women are not equal in relation with men, *institutionally*”.⁹⁶

3.2 Establishing a Women’s Rights Agenda

The protection of women’s human rights in the Inter-American System faces a myriad of obstacles, many of which find their origin in patriarchal, violent and discriminatory sociocultural practices, norms and values that are perpetuated and reinforced in both the public and private spheres of women’s lives. Women’s human rights, and specifically women’s enjoyment of their reproductive rights, are greatly assisted by a regional human rights system that works for women. The first part of this section, 3.2.1, introduces the role of civil society within the Inter-American System, and particularly discusses how Latin American women’s rights organizations adopted an institutional (legal) approach to advocating the advancement of women’s rights. This part provides insight as to why the Inter-American System has increasingly adopted women’s rights within its agenda, and also establishes a basis for claims made in chapter five and the conclusion of this thesis that suggest an increase in civil society presence in the development of reparations would be of benefit to women’s reproductive rights cases. The second section, 3.2.2, considers the challenge of working within human rights law as an institution, and introduces alternative strategies for reconceptualising women’s rights. This section discusses the concepts of *proyecto de vida* (life plan) and *vida digna* (dignified life), with the intention of highlighting their potential utility in women’s reproductive rights cases. While there are a number of women’s rights cases that have come before the Inter-American System,⁹⁷ the

⁹⁶ Interview with Roger Rafael Rodriguez Santander, Director, Executive Secretary of the National Council of Human Rights, Lima, Peru 10 July 2014 (Ref Code: Ip, P, G).

⁹⁷ *González et al. (“Cotton Field”) v. Mexico* [2009] (n 36); *Fernández Ortega and Others v. Mexico* [2010] Inter-American Court of Human Rights (ser. C), No. 215 Preliminary Objection, Merits, Reparations and Costs); *Rosendo-*

third and final part of this section introduces developments made specifically in application of the Convention of Belém do Pará with particular reference to Inter American Court cases: *Miguel Castro Castro Prison v. Peru*,⁹⁸ *González et al (“Cotton Field”) v. Mexico*,⁹⁹ and *Velásquez Paiz et al. v. Guatemala*.¹⁰⁰ The advancements made in these cases in regards to the Convention of Belém do Pará set the foundation on which it is possible to argue for a reconceptualization of reparations in women’s *reproductive* rights cases.

3.2.1 Institutionalizing Feminism: The Role of Civil Society

The 1999 Guidelines for Participation of Civil Society Organizations in Organization of American State (OAS) Activities define civil society organizations as “any national or international institution, organization, or entity made up of natural or juridical persons of a nongovernmental nature”.¹⁰¹ The Guidelines articulate the value of the

Tradition of OAS cooperation with civil society organizations (that) is based on the significant contributions these organizations can make to OAS work, since they can contribute knowledge and additional information to decision-making processes, raise new issues and concerns that will subsequently be addressed by the OAS, lend expert advice in their areas of expertise, and contribute to consensus-building in many spheres.¹⁰²

The Inter-American System and civil society organizations share a mutually supportive relationship. As Cavallaro and Schaffer explained, “civil society may seek enforcement of individual rights through recourse to Inter-American human rights protection mechanisms; yet the system depends on the support of civil society for its legitimacy”.¹⁰³ In that the standing before the Inter-American Commission and Court allows victims to be represented by civil society organizations,¹⁰⁴ it is often beneficial for national and international organizations to partner in order to bring a case before the Inter-American System.¹⁰⁵ For example, the Costa Rican women’s rights organization, *La Colectiva*, recently partnered with the Center for Reproductive Rights, an international non-governmental organization, to

Cantú and other v. Mexico [2010] Inter-American Court of Human Rights (ser. C), No. 216 Preliminary Objection, Merits, Reparations, and Costs.

⁹⁸ *Miguel Castro Castro Prison v. Peru* [2008] Inter-American Court of Human Rights (ser. C), No. 160, Merits, Reparations and Costs.

⁹⁹ *González et al. (“Cotton Field”) v. Mexico* [2009] (n 36).

¹⁰⁰ *Velásquez Paiz et al. v. Guatemala* [2016] Inter-American Court of Human Rights (ser. C), No. 307 Preliminary Objection, Merits, Reparations and Costs.

¹⁰¹ ‘Guidelines for Participation of Civil Society Organizations in OAS Activities’, Organization of American States [1999] <www.oas.org/consejo/resolutions/res759.asp>.

¹⁰² Ibid.

¹⁰³ James Cavallaro and Emily J. Schaffer, ‘Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas’ (2004) 56:2 *Hastings Law Journal* 220.

¹⁰⁴ Reinsberg (n 46).

¹⁰⁵ Interview with Monica Arango Olaya, Regional Director for Latin America and the Caribbean, Center for Reproductive Rights, Skype 11 July 2014 (Ref Code: Sk, N, S).

submit an abortion rights cases to the Inter-American Commission.¹⁰⁶ Civil society contributes to the activities of the Inter-American System by providing information through thematic hearings and human rights reporting, as well as in the follow up compliance stages of Friendly Settlements, Merits Decisions and Inter-American Court judgments.¹⁰⁷ The Commission and Court incorporate contextual information given by civil society organizations within their work. However, the place for civil society to enter the discussion during the reparations stage of a case is limited to compliance monitoring. In situations where the petitioner is a women's rights organization, rather than an individual lawyer, there is perhaps a stronger likelihood that the requested reparations will include a gender-approach. The analysis of women's reproductive rights cases conducted in this thesis supports this hypothesis; the Friendly Settlement Agreements were negotiated by women's rights organizations, and individual lawyers litigated the case before the Inter-American Court.¹⁰⁸ In order to understand how women's rights organizations became integral to the work of the Inter-American System, it is beneficial to examine the evolution of the Latin American women's rights movement as it shifted from prioritizing citizenship and democracy to incorporating a rights-based agenda that includes participation in international human rights institutions.

Feminist activism in Latin America has historically focused on the development of meaningful citizenship as a part of the struggle for democracy.¹⁰⁹ According to Nikki Craske, the term "citizenship" is "fundamentally about inviolable rights, which also entail responsibilities, across a polity: each citizen has the same rights which are legally recognized".¹¹⁰ When applied to women, citizenship includes rights that have "tended to focus on welfare and quality of life issues, such as access to housing, education and work".¹¹¹ Feminist efforts to expand women's citizenship were based on the idea that the

¹⁰⁶ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S). *See also*, 'Despite Country's Own Laws, Costa Rica Continues to Deny Women Legal Abortion', (Center for Reproductive Rights 2013) <www.reproductiverights.org/press-room/despite-country%E2%80%99s-own-laws-costa-rica-continues-to-deny-women-legal-abortion> accessed 24 March 2016.

¹⁰⁷ Interviews with Ivania Solano Jiménez, Attorney, Women's Department, Office of the Ombudsman [Defensoría de los Habitantes], San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G, S) and Carolina Garcés Peralta Rights of Women, Office of the Ombudsman, Republic of Peru, Lima, Peru July 2014 (Ref Code: Ip, P, G).

¹⁰⁸ Friendly Settlement Agreements: *María Mamerita Mestanza Chávez v. Peru* petition lodged by Defense of Women's Rights (DEMUS), the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), and the *Asociación Pro Derechos Humanos* [Association for Human Rights] (APRODEH), also accredited as co-petitioners the Center for Reproductive Law and Policy (CRLP) and the Center for Justice and International Law (CEJIL); *Paulina del Carmen Ramírez Jacinto v. Mexico* petition was lodged by the Center for Reproductive Rights (Centro de Derechos Reproductivos) and Alaide Foppa A.C., also accredited GIRE, "Reproductive Choice Information Group" (Grupo de Información en Reproducción Elegida). as a joint petitioner.

¹⁰⁹ Interview with Rocio Pilar Puente Tolentino, Coordinator, Sexual and Reproductive Rights Program, Manuela Ramos, Lima, Peru 30 June 2014 (Ref Code: Ip, P, N).

¹¹⁰ Nikki Craske, *Women and Politics in Latin America* (Rutgers University Press 1999) 21.

¹¹¹ *Ibid* 21.

concept of the citizen is not gender neutral; instead it “rests on a distinctly masculine conception of the person as an independent, self-interested, economic being”.¹¹² Challenging perceptions of the rights of the citizen as they were designed particularly to protect men requires that women claim their citizenship in the public sphere; they must be empowered to exit the confines of the private. This process of empowerment is central to the development of effective citizenship. Empowerment cannot only be understood in terms of formalities such as the right to vote or the right to information, but rather empowerment “requires change in the personal perception of the empowered subject”.¹¹³ The empowerment of women is necessary in order to challenge patriarchal culture, and the resulting impact of patriarchal harm.

Advancing women’s citizenship through empowerment was, and is, one of the primary tasks of Latin American women’s rights organizations. However, as these organizations have evolved, they have expanded their approach, resulting in the institutionalization of feminist organizations throughout the region. Since the 1980s and 1990s, Latin American women have become particularly active and influential throughout international human rights arenas. Nikki Craske and Maxine Molyneux claimed that this increase in activity was evident in at least three ways: (i) activists began to make full use of international networks and institutional arenas to give (social) movements additional organizational capacity, to coordinate campaign strategies and to harness resources; (ii) feminist and women’s rights movements began to use international human rights instruments in education campaigns to inform women and men about their rights, as well as to debate how rights may be interpreted; and (iii) actors began using international agreements in order to hold governments accountable, and to push for national policy and legislative reform.¹¹⁴ In the 1990s, a human rights agenda came to the fore, where the “focus shifted to questions of how rights can be incorporated into general questioning of women’s place in their own societies”.¹¹⁵ Virginia Vargas noted that during the 1990s,

Feminists began to establish a presence in spaces that were opening up at regional and global levels. In this way, they aimed to influence an international agenda that was addressing a range of situations of exclusion and subordination (affecting girls,

¹¹² Mary G. Dietz, 'Context Is All: Feminism and Theories of Citizenship' (1987) 116:4 *Daedalus: Journal of the American Academy of Arts and Sciences* 10.

¹¹³ Craske (n 110) 23.

¹¹⁴ Nikki Craske and Maxine Molyneux, 'The Local, the Regional and the Global: Transforming the Politics of Rights' in Nikki Craske and Maxine Molyneux (eds), *Gender and the Politics of Rights and Democracy in Latin America* (Palgrave MacMillan 2002) 8.

¹¹⁵ *Ibid* 10.

women, the poor) and was redefining the great problems of our era: human rights, the environment, population, and development [...].¹¹⁶

Significantly, the 1990s saw the beginning of the “institutionalization of feminism” across Latin America, a process which is ongoing as more organizations familiarize themselves with and utilize international human rights law mechanisms in order to inform women and men about their rights, as well as challenge states that fail to prevent, protect and fulfil rights.

In certain aspects, this evolution is a welcome one, especially as the knowledge and expertise developed by these organizations can benefit women’s rights progress nationally, regionally, and internationally. For example, the historical Peruvian women’s rights organization, Manuela Ramos, has focused on women’s citizenship, empowerment and education for more than thirty years, but recently incorporated a legal department in order to contribute to and benefit from women’s rights advancements made through formal legal institutions. Rocío Pilar Puente Tolentino explained, “while we do understand our niche (economic and political autonomy, as well as political participation of women) our behaviour in the future will be around policies, national public policies, international public policies [...] that’s probably our focus now”.¹¹⁷ However, as women’s rights organizations become more focused on institutional agendas, there is a risk that they will move away from their own agenda setting which emphasised increased visibility of women’s rights through national level activism and collective movements. The institutionalization of feminism across Latin America has resulted in tensions among feminist actors who disagree on the transformative potential of a rights discourse, especially as it applies to women’s citizenship and empowerment. For example, Guilia Tamayo, a renowned Peruvian feminist, warned against “the extreme turn being taken by feminist activism in its attempt to influence government policies and mechanisms [...] which neglects the strengthening of citizenship and is especially problematic in the case of governments that are trying to appear democratic when in fact they are not”.¹¹⁸ Virginia Vargas echoed this claim by stating that “the most problematic effect of the rights-based approach is [...] the disappearance of the feminist movement’s own agenda”.¹¹⁹

¹¹⁶ Virginia Vargas, 'The Struggle by Latin American Feminisms for Rights and Autonomy' in Nikki Craske and Maxine Molyneux (eds), *Gender and the Politics of Rights and Democracy in Latin America* (Palgrave MacMillan 2002) 202.

¹¹⁷ Interview with Rocío Pilar Puente Tolentino, Coordinator, Sexual and Reproductive Rights Program, Manuela Ramos, Lima, Peru 30 June 2014 (Ref Code: Ip, P, N).

¹¹⁸ Guilia Tamayo, 'The State Machine: Can It Bring Change for Women?' ['La Maquinara Estatal: Puede suscitar cambios a favor de las mujeres?'] Pull-out section from *Socialismo y Participación*, No. 79, CEDEP, Lima, Peru. Referenced in Vargas (n 116) 208.

¹¹⁹ Vargas (n 116) 211.

The challenges raised above by Tamayo and Vargas reflect the concerns this thesis raised earlier in relation to Martha Fineman and Carol Smart's claims that there is a risk inherent to working within the confines of law.¹²⁰ Perhaps intentionally or as an organic response, actors working within the Inter-American System have identified strategies to avoid the risks of disappearing within the human rights legal institution. These alternative strategies work both inside and outside the confines of human rights law, and the Inter-American System of Human Rights, and when applied to women's rights cases, have the potential to challenge the gendered structure of the public/private divide and the polarization of civil and political and economic, social and cultural rights.

3.2.2 Developing Alternative Women's Rights Concepts

The concepts of *proyecto de vida* (life plan) and *vida digna* (dignified life) exist within the Inter-American System of Human Rights and have been applied by the Inter-American Court of Human Rights in cases that address violations of rights such as forced disappearance, children's rights, and indigenous rights.¹²¹ These concepts are aspects of the right to personal integrity, and have been alleged before and applied by the Inter-American Court of Human Rights. The purpose of sharing these principles here is to highlight some alternative tools for advancing women's rights in the Inter-American region. However, it is important to note that although these principles have been applied in the past, their application is not guaranteed.

According to Fernández Sassergo, who originally developed the concept, *proyecto de vida*, it is founded on the guarantee of freedom, because freedom is what allows us "to decide, to choose from among many different possibilities or life choices, to elaborate a "life project" or "life plan", a "vital plan" or an "existential project".¹²² He argued, "the 'life project' represents what the human being has decided to *be* and to *do* in life, or better still what the person does in order to be".¹²³ Dinah Shelton described *proyecto de vida* as being "linked to

¹²⁰ Martha Albertson Fineman, 'Introduction' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) xv, *supra* section 1.1.1 (n 13), and Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 2, *supra* section 1.1.1 (n 14).

¹²¹ *Loayza Tamayo v. Peru* [1998] Inter-American Court of Human Rights (ser. C), No. 42 Reparations and Costs ¶117; *Gutiérrez-Soler v. Colombia* [2005] Inter-American Court of Human Rights (ser. C), No. 132 Merits, Reparations and Costs ¶87-89; *Cantoral-Benavides v. Peru* [2001] Inter-American Court of Human Rights (ser. C), No. 88 Reparations and Costs ¶60; *'Street Children' (Villagrán-Morales et al.) v. Guatemala* [2001] Inter-American Court of Human Rights (ser. C), No. 77 Reparations and Costs ¶89.

¹²² Fernández Sassergo, "Apuntes para una distinción entre el dano al proyecto de vida y el dano psíquico," *Themis Revista de Derecho*, No. 32 (Pontificia Universidad Católica del Perú, Lima 1995). Referenced from Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) 230.

¹²³ Fernández Sassergo, "Deslinde conceptual entre dano a la persona, dano al proyecto de vida y dano moral," *Foro Jurídico*, Year 1, No. 2, Lima, July 2003. Referenced from Burgorgue-Larsen and Úbeda de Torres (n 122) 230.

the notion of freedom as the right that each person has to choose his or her own destiny”.¹²⁴ She explained, “damage to *proyecto de vida* threatens the goal of and value of life itself, harming the core of what it is to be a human being and affecting the spiritual sense of life”.¹²⁵ Laurence Burgorgue-Larsen contended that the Inter-American Court’s inclusion of the concept of *proyecto de vida* provides new possibilities for how the Court issues reparations in cases where the principle is applied. She explained that *proyecto de vida* “is without a doubt one of the most original and innovative elements of the Inter-American Court’s case law and is a testimony to its creativity”.¹²⁶

The concept of *proyecto de vida* has great potential for application in women’s reproductive rights cases. This concept requires an analysis of damage inflicted on an individual life, which in turn necessitates an examination of the context in which the harm occurred. This means that damage to *proyecto de vida* might require the Inter-American Court to examine gendered harm, structural inequality, discrimination and violence as these are underlying factors in violations of women’s reproductive health rights. The application of *proyecto de vida* in women’s reproductive rights cases would perhaps create space for the Inter-American Commission and Court to issue reparation that guarantee non-repetition of disruptions to the life projects of women.

The principle of *vida digna* has been applied in several cases before the Inter-American Court of Human Rights,¹²⁷ and was defined by the Court in the case of *Villagrán Morales et al. v. Guatemala*.¹²⁸ The Court determined,

The fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that *guarantee a dignified existence*. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.¹²⁹

In this specific case, which had to do with rights of street children, the Court concluded that “every child has the right to harbor a project of life that should be tended and encouraged by the public authorities so that it may develop this project for its personal benefit and that

¹²⁴ Dinah Shelton, *Remedies in International Law* (2nd edn, Oxford University Press 2005) 230.

¹²⁵ *Ibid.*

¹²⁶ Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011) 229.

¹²⁷ ‘Street Children’ (*Villagrán-Morales et al.*) v. *Guatemala* (n 121); *Xákmok Kásek Indigenous Community v. Paraguay* (n 78); and *Juvenile Reeducation Institute v. Paraguay*, [2004] Inter-American Court of Human Rights (ser. C), No. 112 Preliminary Objections, Merits, Reparations and Costs ¶69.

¹²⁸ ‘Street Children’ (*Villagrán-Morales et al.*) v. *Guatemala* [2001] (n 121).

¹²⁹ *Ibid.* ¶144.

of the society to which it belongs”.¹³⁰ The Inter-American Court articulated the right to a dignified life, *vida digna*, through Articles four and five of the American Convention, and has used this right to recognise the rights to health, education, food, access to clean water and cultural identity.¹³¹

Alexandra Sandoval, a senior attorney at the Inter-American Court, contended that the application of the concept of *vida digna* has enormous potential, especially in relation to violations of economic, social, and cultural rights and reproductive rights such as maternal health.¹³² She interpreted *vida digna* as a link between negative and positive state obligations, and explained “the concept of *vida digna* appears then, to be a legal framework within the Inter-American Court, which is an amplification of the state’s positive obligations, because not only must the state guarantee the right to life, in its simplest sense, but it also must provide the minimum conditions that allow its citizens access to a decent life”.¹³³ The concept of *vida digna* is similar to the concept of *proyecto de vida* in that both require the Inter American Court take a deeper look at the causes of human rights violations. In the specific situation of violations of women’s reproductive rights, *vida digna* can apply to a woman’s right to life, private life, autonomy, personal liberty and integrity. Sandoval noted that there is certainly space for the Court to elaborate upon the principle of *vida digna*, especially in cases where the Court determines a violation of life and integrity, but that in those cases it is the responsibility of the petitioner to pursue a *vida digna* violation.¹³⁴ *Vida digna* is also useful as a concept to bridge economic, social and cultural rights and gender-based discrimination. As Adriana Maroto explained, “the discourse of gender in the legal arena is very fragile [...] so, when we try to construct the concept of health, or of *vida digna* we’re doing it from the point of view of gender. We have to do it from the other side... there is a gender discourse that supports these arguments, but they have their foundation in the health aspects”.¹³⁵ The concept of *vida digna* can be used to stealthily insert gender into the discussion of rights violations such as the right to life and

¹³⁰ Ibid ¶191.

¹³¹ Thomas Antkowiak, ‘The Inter-American Court at a Crossroads,’ in Yves Haeck, Clara Burbano-Herrera, and Oswaldo Ruiz-Chiriboga (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 272.

¹³² Alexandra Sandoval, ‘Vida Digna’ (Third Latin American Congress on Reproductive Rights, Mexico, October 2013) 2 <http://tercer.congresoderechosreproductivos.com/materiales/dia1/conferencia%20magistral_vida%20digna/Vida%20Digna_Alejandra%20Sandoval.pdf>.

¹³³ Ibid.

¹³⁴ Interview with Alexandra Sandoval, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica 12 August 2014 (Ref Code: Ip, Ct, S).

¹³⁵ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S).

the right to health because in order to examine violations of *vida digna* it is necessary to unpack the reasons why a rights violation occurred.

The above overview of the principles of *proyecto de vida* and *vida digna* highlights some of the strategies developed by human rights litigators and feminists to build relationships between violations of civil and political rights and economic, social and cultural rights. Ultimately, these strategies obscure the public/private divide by developing a conceptualisation of rights that requires states to provide public services and provisions for women to fulfil their life plan and to live a life of dignity. However, in employing these alternative rights concepts, there is a risk that litigators and the Inter-American System treaty monitoring bodies may resort to a stereotyped notion of women as (potential) mothers in order to articulate damage to a woman's *proyecto de vida* and *vida digna*. It is imperative that in developing and applying these strategies to women's reproductive rights cases that actors frame violations of these principles through reproductive autonomy, rather than reproductive capacity (and destiny). The forthcoming case study analyses conducted in chapters four, five and six examine the utility of these strategies as they have potential for application in women's reproductive rights cases, and ultimately determine that the principles of *proyecto de vida* and *vida digna* provide a strong platform through which it is possible to repair gender-based harm in women's reproductive rights cases.

3.2.3 Laying the Groundwork for a Gender Approach to Reparations

The general failure by states to respect human rights as they are intended to be "universal" has resulted in the need to develop a body of rights specific to women. According to Rebecca Cook, the failure to enforce women's rights varies by country, and includes a "lack of understanding of the systemic nature of the subordination of women, failure to recognize the need to characterize the subordination of women as a human rights violation, and lack of state practice to condemn discrimination against women".¹³⁶ While women's international human rights can be understood as those rights enshrined within women's rights conventions and treaties, Hilary Charlesworth argued that such an understanding runs the risk of actually marginalizing women's rights".¹³⁷ In order to effectively employ "universal" human rights and women's rights conventions, the two must be cohesively examined and applied in women's rights cases. Although the Convention of Belém do Pará

¹³⁶ Rebecca Cook, 'Women's International Human Rights Law: The Way Forward' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 3.

¹³⁷ Hilary Charlesworth, 'What are "Women's International Human Rights?"' in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspective* (University of Pennsylvania Press 1994) 59.

came into force in 1995, it wasn't until the year 2000 that the Inter-American Commission applied the Convention to a women's rights case: *María da Penha v. Brazil*.¹³⁸ The Inter-American Court did not apply the Convention of Belém do Pará until 2008, in the case of *Miguel Castro Castro Prison v. Peru*, and it wasn't until 2009, in the *Gonzalez et al. ("Cotton Field") v. Mexico* case that the Court formally developed its jurisdiction over Article 7 of the Convention of Belém do Pará. This section follows the trajectory of the Convention of Belém do Pará as it was applied in a number of Inter-American Court cases, and does so to establish both the potential and limitations of the Convention of Belém do Pará in its application. The cases selected for analysis here directly relate to claims and suggestions posited in this thesis that argue for allegations of reproductive rights violations to be interpreted through the violence against women framework.

*Miguel Castro Castro Prison v. Peru*¹³⁹

The case of *Miguel Castro Castro Prison v. Peru* represents the first time the Inter-American Court applied the Convention of Belém do Pará. However, this was not the first case that allowed for the application of the Convention. As Rubio-Marín and Sandoval noted, there were certainly previous cases in which the rights of women were violated where the Inter-American Court could have determined violations of the Convention of Belém do Pará, as well as issued reparations to "acknowledge the relevance of the specific harm that women suffer".¹⁴⁰ *Miguel Castro Castro Prison v. Peru* was a case concerned with a State operation that carried out the torture and killing of inmates at a prison who had been accused of being members of the terrorist group. In the aftermath of the initial stages of the operation, the state agents made men and pregnant women lie face down on the floor for days, and forced women inmates in hospitals to remain naked in front of the male security guards, and undergo vaginal inspections.¹⁴¹ Both the Commission and the petitioner (victims' representative) emphasized the particular harm women suffered at the hands of the state, which resulted in the Inter-American Court addressing gender-based violations through the Convention of Belém do Pará for the first time. Although the petitioner alleged a violation of Articles 1, 6, 7, 8 and 9 of the Convention of Belém do Pará,¹⁴² the Court determined the State had violated only Article 7 of the Convention of Belém do Pará. In its reasoning for applying Article 7 the Court did not provide support in relation to its jurisdiction over the Convention of Belém do Pará, but Peru did not object to its

¹³⁸ *Maria da Penha v. Brazil* [2001] Inter-American Commission on Human Rights, Merits.

¹³⁹ *Miguel Castro Castro Prison v. Peru* [2006] (n 98).

¹⁴⁰ Rubio-Marín and Sandoval (n 4) 1071-1073.

¹⁴¹ *Miguel Castro Castro Prison v. Peru* [2006] (n 98) ¶197(57), 197(49) and 197(50).

¹⁴² *Ibid* ¶260.

jurisdiction.¹⁴³ Additionally the Court found a violation of the right to humane treatment under Article 5 of the American Convention, and took the opportunity to explain how violence against women relates to inhumane treatment. The Inter-American Court stated that “pregnant women who lived through the attack (experienced) an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings of anguish, despair, and fear for the lives of their children”.¹⁴⁴ The Court also noted, “severe solitary confinement had specific effects on the inmates that were mothers [...] the impossibility to communicate with their children caused an additional psychological suffering in the inmates that were mothers”.¹⁴⁵

The reparations issued by the Court in this case included, among others, human rights education programs to be addressed to members of the police force¹⁴⁶ and monetary compensation.¹⁴⁷ The women victims in this case were compensated at a higher amount than the men. The pregnant women received an additional \$5000, the woman who was raped received an additional \$30,000 and the six women who were forced to be naked in front of male guards were awarded an additional \$10,000. While the Court did elect to compensate the women victims at a higher rate than the male victims, this case missed an opportunity to effectively engender reparation measures that had the objective of preventing repetition of gender based harm, which thereby severely limited the transformative potential of this case. For instance, while the Inter-American Court made an effort to redress the invasive harm inflicted on women involved in this case, it neglected to address the nature of patriarchal harm as it reinforces norms that essentialize women as mothers. In relation to this claim, it is important to note Patricia Palacios Zuloaga’s astute observation that this case relied on a stereotyped notion of women in order to find violations of rights specific to women. Zuloaga pointed out that the Court’s determination that women victims did not have time to become mothers because of their search for truth and justice, as well as its reliance on women’s “experience of maternity”¹⁴⁸ to defend its reasoning, relied heavily on social stereotypes of women as mothers. According to Zuloaga, the Court’s “positive shift to gender justice [...] fails to extend gendered logic to reparations and (relied) on stereotypes of women in order to find violations”.¹⁴⁹

¹⁴³ Rubio-Marín and Sandoval (n 4) 1075.

¹⁴⁴ *Miguel Castro Castro Prison v. Peru* [2006] (n 98) ¶292.

¹⁴⁵ *Ibid* ¶330.

¹⁴⁶ *Ibid* ¶470(15).

¹⁴⁷ *Ibid* ¶433(c).

¹⁴⁸ *Miguel Castro Castro Prison v. Peru* [2006] ¶64; See, Patricia Palacios Zuloaga, 'The Path to Gender Justice in the Inter-American Court of Human Rights' (2008) 17:2 *Texas Journal of Women and Law* 229.

¹⁴⁹ *Ibid*.

*González et al. ("Cotton Field") v. Mexico*¹⁵⁰

The "Cotton Field" case is of significant importance in terms of women's rights and reparations before the Inter-American Court of Human Rights. In this case, the Inter-American Court ruled that the state of Mexico had violated both the American Convention¹⁵¹ and the Convention of Belém do Pará when it failed to prevent and investigate the disappearance and murder of three poor migrant women. The Court emphasized that these murders were representative of hundreds of other disappearances, rapes and murders that were poorly investigated by the State of Mexico. For the first time, the Inter-American Court determined that states have a positive obligation to respond to violence against women resulting from the action of private actors, and that those violations are justiciable under Article 7 of the Convention of Belém do Pará. The "Cotton Field" case is of particular relevance to this thesis for a number of reasons: (i) the Court provided legal reasoning for its competence over Article 7 of the Convention of Belém do Pará, and determined that both Articles 8 and 9 can be used to inform allegations of Article 7 violations;¹⁵² (ii) the Court established the need to do justice for women through reparations, and specified that reparations have a duty to transform pre-existing situations which are discriminatory in nature;¹⁵³ and (iii) this case provided a thorough explanation of the obligation of due diligence and took into account the compound effects of violence against women.¹⁵⁴

The Inter-American Court provided a thorough legal argument to locate its jurisdiction over Article 7 of the Convention of Belém do Pará, despite the fact that it had previously applied the Convention in *Miguel Castro Castro Prison v. Peru*.¹⁵⁵ Not only did the Court determine competence over Article 7, but it also declared that Articles 8 and 9 may be applied to inform violations of Article 7.¹⁵⁶ The Court's expansion of the capacity of Article 7 directly related to Rhonda Copelon's expert witness testimony before the Inter-American Court in this case, where she argued that "Articles 7-9 of Belém do Pará provide a thorough and gender sensitive outline of both immediate and progressive initiatives for the effective implementation of reparations".¹⁵⁷ While the Court took steps to incorporate Articles 8 and

¹⁵⁰ *González et al. ("Cotton Field") v. Mexico* [2009] (n 36).

¹⁵¹ *Ibid.* ACHR (n 15): right to life (Article 4); right to humane treatment (Article 5); right to personal liberty (Article 7); right to a fair trial (Article 8); rights of the child (Article 19); and right to judicial protection (Article 25).

¹⁵² *González et al. ("Cotton Field") v. Mexico* [2009] (n 36) ¶79.

¹⁵³ *Ibid.* ¶450.

¹⁵⁴ *Ibid.* ¶602(22).

¹⁵⁵ *Miguel Castro Castro Prison v. Peru* [2006] (n 98).

¹⁵⁶ *González et al. ("Cotton Field") v. Mexico* [2009] (n 36) ¶79.

¹⁵⁷ Rhonda Copelon, 'Expert Testimony before the Inter-American Court of Human Rights in the Case of 'Cotton Field'' (Inter-American Court of Human Rights, April 2009) ¶33.

9 of the Convention of Belém do Pará within its purview, it did not explicitly refer to these Articles in its analysis of femicide in the “Cotton Field” case.

In regards to reparations, the Inter-American Court stated,

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 the situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable.¹⁵⁸

The Court then outlined a set of criteria for reparations, which was succinctly summarized by Rubio-Marín and Sandoval:

- 1) reparations should have a direct connection with the violations found by the Court;
- 2) they should repair in a proportional manner pecuniary and non-pecuniary damages;
- 3) they cannot be a source of enrichment or impoverishment;
- 4) reparations must aim at restitution to, ‘restore the victims to their situation prior to the violation insofar as possible, [but only] to the extent that this does not interfere with the obligation not to discriminate’;
- 5) reparations should be ‘designed to identify and eliminate the factors that cause discrimination’;
- 6) they should take into account a gender perspective, ‘bearing in mind the different impact that violence has on men and on women’; and
- 7) they should take into account all the measures alleged by the state to have been taken to repair the harm.¹⁵⁹

The reparations ordered by the Court in this case took gender into account as it was a determining characteristic of the additional harm inflicted on women. First, the mothers of the victims were awarded additional compensation because they were the primary complainants in the case and because they had been harassed and threatened in the aftermath of their daughters’ deaths.¹⁶⁰ In relation to measures of satisfaction, the Court ordered the State to provide psychological and psychiatric care to the next of kin, paying special regard to the effects of gender-based violence. In terms of guarantees of non-repetition, both the Commission and the petitioner requested that the Court order the State to create a public policy that would guarantee the prevention and investigation of further acts of violence against women. However, the State contended that it already had such a policy in place, and the Court determined that the Commission and petitioner had not provided sufficient evidence to prove the current policy was ineffective. The Court declined

¹⁵⁸ *González et al. (“Cotton Field”) v. Mexico* [2009] (n 36) ¶450.

¹⁵⁹ Rubio-Marín and Sandoval (n 4) 1084.

¹⁶⁰ *Ibid* 1086.

to order such reparation. In addition, the Inter-American Court ordered additional guarantees of non-repetition which were designed to specifically engender the principle of due diligence. The Court articulated the criteria for the implementation of effective investigation responses when a woman or girl disappears. For example, the criteria required that the State of Mexico “implement searches *ex officio* and without delay in cases of disappearances as a measure to protect the life, personal liberty and personal integrity of the disappeared person”.¹⁶¹ The Court also ordered the State to “continue implementing permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective to ensure due diligence in conducting preliminary inquiries and judicial proceedings concerning gender-based discrimination, abuse and murder of women, and to overcome stereotyping about the role of women in society”.¹⁶² This reparation addressed the social nature of gendered harm that underpins violence against women by seeking to confront harmful stereotypes manifested and perpetuated throughout society. Finally, the Court ordered the State to establish a national database that would contain information about missing women, including their genetic information.¹⁶³

The “*Cotton Field*” case marked a significant change in the Inter-American System’s approach to women’s rights, especially in regards to application of the principle of due diligence and engendering reparations. Alongside these developments, this case influenced the State of Mexico in its approach to gender justice on a wider scale.¹⁶⁴ In the aftermath of a string of women’s rights cases before the Inter-American Court, the Mexican Supreme Court adopted the 2013 Protocol for Judging with a Gender Perspective.¹⁶⁵ The Protocol specifically noted the Inter-American Court cases within its first few pages, and stated that the goal of the Protocol was to:

Address and remedy certain problems identified by the Inter-American Court of Human Rights in three recent cases against Mexico [...] In those cases, the Inter-American Court made clear that Mexican courts must apply, as binding law, the international human rights treaties to which Mexico is a party. This Protocol responds to that exhortation by explaining how to implement international human rights treaty law as binding law. It also outlines methods by which adjudicators can

¹⁶¹ *González et al. (“Cotton Field”) v. Mexico* [2009] (n 36) ¶602(19)(1).

¹⁶² *Ibid* ¶602(22).

¹⁶³ *Ibid* ¶512.

¹⁶⁴ Interview with Gender Justice Expert and Trainer at the Mexican Supreme Court, *Anonymous*, Mexico City, Mexico 30 July 2014) Ref Code: Ip, M, G, S).

¹⁶⁵ ‘Judicial Decision Making with a Gender Perspective: A Protocol - Making Equal Rights Real’, (National Supreme Court of Justice [Suprema Corte de Justicia de la Nación] 2013) <www.sitios.scjn.gob.mx/codhap/ProtocolGenderPerspective>. Mexican women’s rights cases: *González et al. (“Cotton Field”) v. Mexico* [2009] (n 36), *Fernández Ortega and Others v. Mexico* [2010] (n 97) and *Rosendo-Cantú and other v. Mexico* [2010] (n 97).

improve their awareness of women's rights under the law and can build their capacity to employ a gender perspective when deciding cases.¹⁶⁶

The adoption of this Protocol signified the importance of developing gendered reasoning alongside reparations in women's rights cases before the Inter-American Court. Not only did this Protocol indicate the willingness of the State to work on its approach to gender justice, but it may also have provided the Inter-American Court with ideas for reparation measures in future cases.

*Velásquez Paiz et al. v. Guatemala*¹⁶⁷

The *Velásquez Paiz et al. v. Guatemala* case included an in-depth analysis of the impact of gender stereotyping on violence against women, which resulted in expansive and transformative reparation measures. This case included a violation of Article 7 of the Convention of Belém do Pará, with specific emphasis on the state's obligation to provide due diligence to victims, that is the State's obligation to address and eradicate patriarchal harm. While this case was decided by the Inter-American Court three years after the most recent case study included in this thesis, the developments made in this case elucidate how the Inter-American System has evolved in its approach to women's rights violations.

In this case, Claudia Velásquez Paiz, a young law student, was murdered and the Guatemalan State failed to adequately investigate the crime. In their petition, the petitioner asserted that the murder of women in Guatemala was not random, and was "founded on a patriarchal construct of a woman's sexual body being men's property".¹⁶⁸ The petitioner determined that "the system of oppression is built through violence against (women's) bodies and sexuality".¹⁶⁹ The impact of gender stereotyping as it affects violence perpetrated against women was explored exhaustively in the Court judgment. For example, in examining violations of Articles 1 and 24 of the American Convention, which deal with principles of equality and non-discrimination, the Court determined that the subordination of women is based on gender stereotypes, and that "their creation and use becomes one of the causes and consequences of gender violence against women".¹⁷⁰ The Court went so far as to note that violence against women is aggravated "when reflected, implicitly or explicitly, in policy and practice, particularly in the reasoning and language of state

¹⁶⁶ Ibid 7-8.

¹⁶⁷ *Velásquez Paiz et al. v. Guatemala* [2016] (n 100).

¹⁶⁸ *Claudina Isabel Velásquez Paiz et al. v. Guatemala* [2013] Inter-American Commission on Human Rights Report No. 53/1, Case 12.777 Merits ¶20.

¹⁶⁹ Ibid.

¹⁷⁰ *Velásquez Paiz et al. v. Guatemala* [2016] (n 100) ¶180.

authorities”.¹⁷¹ In regards to the Convention of Belém do Pará, the Court examined Articles 7(b) and 7(c) to determine that the State of Guatemala had failed in its obligation to provide due diligence to the victim, and to women in general.¹⁷²

Finally, the reparations issued in this case have significant potential in their capacity to transform the lives of women and girls in Guatemala. Notably, the Inter-American Court included the following guarantee of non-repetition:

The Court orders the State, within a reasonable time, to incorporate within the National Education System curriculum, at all levels, a permanent education program on the need to eradicate gender-based discrimination, gender stereotypes and violence against women in Guatemala, in light of the international standards on these matters and the jurisprudence of this Court.¹⁷³

The Court also included training and education programs for the Guatemalan judiciary and police force. The reparations issued in this case set a standard for future women’s rights cases, where, as noted previously, the goal of reparations should be to subvert pre-existing social and cultural conditions that subordinate women.

The cases outlined above encapsulate the development of women’s rights litigation before the Inter-American Court and provide a brief introduction to where women’s rights currently stand before the Inter-American System. The Inter-American Court’s emphasis on the obligation to provide due diligence through Article 7 of the Convention of Belém do Pará is an instrumental development in the Inter-American System, as is the progress made in developing gender-sensitive reparations designed to address gendered harm and the root causes of gender stereotyping and discrimination. The cases analysed in chapters four, five and six elucidate further developments and shortcomings in the Inter-American System’s approach to women’s rights, but differ in that they are focused on reproductive health rights. This distinction between women’s rights and women’s reproductive health rights reveals inconsistencies in the extent to which the Inter-American System seeks to protect women’s lives. For instance, the link between violence against women and violations of women’s reproductive health rights has not been clearly articulated in the jurisprudence of the Inter-American Court. The fourth and final section of this chapter provides an introduction to Rubio-Marín and Sandoval’s “Holistic Gender Approach to Reparations”, which is employed throughout the analysis of the case study chapters of this thesis.

¹⁷¹ Ibid.

¹⁷² Ibid ¶133.

¹⁷³ Ibid IX ¶13.

3.3 Engendering Reparations in Women's Rights Cases

The process of engendering reparations within the work of the Inter-American Commission and the Court is a significant challenge. Not only are many actors engaged with the work of the Inter-American System unfamiliar with the varying and intersecting levels of harm women experience in their lives, but also as bears repeating, there is no “tradition to be thinking about reparations”.¹⁷⁴ This means that at an institutional level, the Inter-American System is unprepared to initiate an effective and sustainable approach to engendering reparations in cases that come before both the Inter-American Commission and Court.

The Holistic Gender Approach to Reparations¹⁷⁵ developed by Rubio-Marín and Sandoval serves as the foundational framework for the forthcoming analysis of women's reproductive rights cases emerging from the Inter-American System. While Rubio-Marín and Sandoval designed the Holistic Gender Approach to Reparations in order to examine reparations in cases before the Inter-American Court, this research expands their Approach to apply it to Friendly Settlement Agreements emerging from the Inter-American Commission.¹⁷⁶ This Approach specifically responds to the Inter-American Court's determination in *Gonzalez et al. (“Cotton Field”) v. Mexico*,¹⁷⁷ that there is a “need to provide reparations that do justice for women”.¹⁷⁸ According to Rubio-Marín and Sandoval, it was in the “Cotton Field” judgment that the Inter-American Court

Suggested a significant redefinition of the Court's concept of adequate reparations by highlighting that, when the violations occur in a context of structural discrimination, reparations cannot simply return victims to the situation they were in before the violation took place (one of discrimination); instead, reparations should aim to transform or change the pre-existing situation.¹⁷⁹

This thesis employs the Holistic Gender Approach to Reparations as a three-step framework: (i) fulfilling the preconditions; (ii) applying the test; and (iii) determining transformative potential. Each of these steps is applied within the following reproductive rights case study chapters in order to provide a consistent analysis of the cases and their reparations. The first step, *fulfilling the preconditions*, contains three elements: (a)

¹⁷⁴ Interview with María Alejandra Cardenas, Regional Legal Director, Women's Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

¹⁷⁵ Rubio-Marín and Sandoval (n 4).

¹⁷⁶ This thesis applies the Holistic Gender Approach to Reparations to Friendly Settlement Agreements and Inter-American Court judgments because the case studies selected for this research involve both of these mechanisms. However, the Approach can also be applied to Merits Decision reparations emerging from the Inter-American Commission.

¹⁷⁷ *González et al. (“Cotton Field”) v. Mexico* [2009] (n 36).

¹⁷⁸ Rubio-Marín and Sandoval (n 4) 1063.

¹⁷⁹ Ibid 1064, and *González et al. (“Cotton Field”) v. Mexico* [2009] (n 36) ¶450.

establishing the relevant facts; (b) properly identifying the alleged violations and victims; and (c) properly identifying the harm and those harmed by the violations. Rubio-Marín and Sandoval assert that it is only once these pre-conditions have been met that gender-sensitive reparations may be effectively incorporated within a women's rights case.¹⁸⁰ The second step, *applying the test*, pertains to an assessment of reparations specific to a case, where an analysis of the reparations is conducted to determine how the failure to fulfil the preconditions impacts the development of gender-sensitive reparations that have *transformative potential* (the third step).¹⁸¹ In order to introduce the Holistic Gender Approach to Reparations, the remainder of this section provides an overview of step one, *fulfilling the preconditions*, which will then be applied in the case study chapters of this thesis. The second and third steps of the Approach are applied within the analysis of reparations issued within a case, which is a task undertaken in the forthcoming case study chapter sections entitled, "Repairing Harm: Determining Transformative Potential".

The Holistic Gender Approach to Reparations suggests three preconditions for "redressing the differential impact of human rights violations on women".¹⁸² The first of these preconditions is, *establishing the relevant facts*, which is identified as the starting point in determining a case's potential for developing gender-sensitive reparations. In Friendly Settlement Agreements, the facts of the case are determined through the Agreement process, where the state and the victims or their representatives (petitioner) reach a consensus on the accepted facts. There are disadvantages and advantages to this procedure; facts may be omitted in order to ensure the completion of an Agreement, or facts may include a depiction of structural harm, which can then be further explored should the Agreement be referred to the Inter-American Court. One of the most challenging aspects of establishing the relevant facts during a Friendly Settlement Agreement procedure is relating the facts to alleged violations, where it may be difficult for the petitioner to convince the State to agree to facts which would in turn require substantive and transformative reparations. However, the Friendly Settlement Agreement process also allows space for facts to be included which don't at first appear to require much action from the State, but that then result in campaigns, advocacy, and compliance-monitoring that emphasizes those facts.¹⁸³

¹⁸⁰ Rubio-Marín and Sandoval (n 4) 1064.

¹⁸¹ See, 'transformative potential,' *supra* section 2.3.1 (n 109-115).

¹⁸² Rubio-Marín and Sandoval (n 4) 1064.

¹⁸³ Interview with Vanessa Coria, Advocacy and Program Manager, Women's Global Network for Reproductive Rights (WGNRR), formerly with Center for Justice and International Law (CEJIL), Mexico City, Mexico 18 July 2014 (Ref Code: Ip, M, N, S).

In order to *establish the relevant facts* within Inter-American Court cases, the Court first relies on information provided by the Inter-American Commission when it refers a case to the Court.¹⁸⁴ The Court's Rules of the Procedure, as enshrined in Article 35, indicate that the Commission's referral report to the Court should contain "all the facts that allegedly give rise to a violation and identify the alleged victims".¹⁸⁵ The materials submitted by the alleged victims (petitioners), should include:

- a. description of the facts within the factual framework established in the presentation of the case by the Commission;
- b. the evidence offered, properly organized, with an indication of the alleged facts and arguments that it relates to;
- c. the identities of declarants and the object of their statements. Expert witnesses must also submit their curricula vitae and contact information;
- d. all claims, including those relating to reparations and costs.¹⁸⁶

The State is also required to respond with its information (version) about the facts of the case.¹⁸⁷ Of particular importance is the provision within the Rules of Procedure that determines the "Court may consider those facts that have not been expressly denied and those claims that have not been expressly controverted as accepted".¹⁸⁸ This means that in the circumstance that the State's response to the allegations raised by the petitioner fails to address those allegations, the Inter-American Court accepts those facts to be true. Following acceptance of the State and petitioner materials, the Court has the discretion to clarify and confirm the facts established by both parties, as well as gather further evidence if it determines that such an activity is necessary.¹⁸⁹ Determining the facts of a women's rights case requires that the petitioners, the Commission and/or the State, include a gendered analysis of the alleged harm. For example, in the "Cotton Field" case the facts of the case concluded that there was a pattern of violence and discrimination against women in a particular region of Mexico.¹⁹⁰ In that the facts of this case established that women were being targeted based on their gender, the Inter-American Court was able to determine violations of the Convention of Belém do Pará, as well as order reparations designed to transform, or dismantle, the patriarchal culture which allowed for extreme levels of violence against women in Mexico.

¹⁸⁴ ACHR (n 15) Article 51: "2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined."

¹⁸⁵ Rules of Procedure of the Inter-American Court of Human Rights (n 14) Article 35.

¹⁸⁶ Rules of Procedure of the Inter-American Court of Human Rights (n 14) Article 40(2).

¹⁸⁷ Ibid Article 41(1).

¹⁸⁸ Ibid Article 41(2).

¹⁸⁹ Ibid Article 58.

¹⁹⁰ Rubio-Marín and Sandoval (n 4) 1080, and *Gonzalez et al. ("Cotton Field") v. Mexico* [2009] (n 36) ¶121.

The second pre-condition for engendering reparations in cases before the Inter-American System of Human rights is, *properly identifying the alleged violations and victims*. Rubio-Marín and Sandoval asserted that it is necessary to correctly identify the alleged victims and violations in a case after the facts have been established.¹⁹¹ The responsibility for determining the alleged violations and victims is initially that of the petitioners, and in the situation where a case is referred to the Inter-American Court, the Inter-American Commission is also responsible for presenting the alleged violations and victims. However, as noted above the Court does have the power to invoke the principle of *iura nova curia* in order to expand upon the violations alleged by the petitioner and/or the Commission.

The Inter-American Court's Rules of Procedure identifies alleged victims as "person(s) whose rights under the Convention or another treaty of the Inter-American System have allegedly been violated", and "victims" as person(s) whose rights have been violated, according to a judgment emitted by the Court".¹⁹² However, determining the identification of victims in human rights cases before the Inter-American Commission and Court can prove to be a challenge, especially in situations where the victims may have suffered social rather than direct individual harm. The Commission and Court have determined that a victim, for purposes of reparation, can also be a next of kin or a dependent of the direct victim in circumstances where the immediate victim was killed as a result of a rights violation. While the definition of victim is expansive in that it includes family members of victims directly harmed, it is also important to note that individual victims in cases before the Inter-American Commission and Court may be representative of rights violations experienced by members of a society on a much larger scale than the immediate victim or their family. This argument harkens back to the discussion of the social nature of gendered harm, which was described by Howe as the "pain caused by 'hidden injuries' of all gender-orientated societies - that lived, internalized experience of lower gender status as personal failure" in section 2.2.¹⁹³ In that many of the Inter-American System cases are emblematic, it is necessary for women's rights cases to reflect upon and redress the structural and collective components of rights violations as they have a far-reaching impact.

The challenge of determining alleged violations in a case directly relates to the fulfilment of pre-condition one, *establishing the relevant facts*. The facts serve as "proof" of a violation,

¹⁹¹ Ibid 1065.

¹⁹² Rules of Procedure of the Inter-American Court of Human Rights (n 14) Article 2.

¹⁹³ Adrian Howe, 'The Problem of Privatized Injuries' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) 149 note 1; *supra* section 2.2.3 (n 74).

where Rubio-Marín and Sandoval referred to Juliane Kokott's work on determining violations of the law, to point out that the Inter-American Court has "made obvious the 'intimate relationship between the effective protection of substantive rights and the allocation and standard of proof.'" ¹⁹⁴ In cases concerned with violations of rights based on gender, challenges arise when it comes to meeting the standard of proof. Rubio-Marín and Sandoval asserted, "cases on gender violence, given the existence of cultural or religious factors [...] may render proving that a certain violation took place particularly difficult". ¹⁹⁵ Rubio-Marín and Sandoval explained that in order to properly fulfil the second pre-condition, *properly identify the alleged violations and victims*, two principles must be applied: (i) "the alleged victim should not be required to prove the impossible or else his or her rights would become meaningless"; and (ii) "general rules of evidence should include mechanisms to balance the rigidity of the burden and standard of proof". ¹⁹⁶ In order for a Friendly Settlement Agreement or Inter-American Court judgment to include a violation of a right, the facts must provide enough evidence to support the claim of an alleged violation. With specific regard to cases that respond to gender based harm and violations of women's rights, it is imperative that the victim (petitioner) and/or the Commission interpret the facts of the case in such a way that it is possible to allege a violation of Article 7 of the Convention of Belém do Pará. ¹⁹⁷ In that Article 7 of the Convention of Belém do Pará essentially protects rights already enshrined within the American Convention of Human Rights, the task of conducting a gender-based analysis of rights violations should be undertaken in any case related to gender-based harm and/or violence against women. Once the petitioners allege an Article 7 violation, it is then possible for the petitioners and the Commission to refer to Article 8 and Article 9 as lenses through which the Article 7 violation may be examined. ¹⁹⁸

The third and final pre-condition, *properly identifying the harm and those harmed by the violations*, is "crucial to determin(ing) adequate reparations", according to Rubio-Marín and Sandoval. ¹⁹⁹ Although Friendly Settlement Agreements and Court judgments determine reparations through different procedures, the intention of each mechanism is the same: to prevent and repair harm. Rubio-Marín and Sandoval explained that the "notion of harm is a

¹⁹⁴ Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Brill Nijhoff 1998) 141. Referenced in Rubio Marín and Sandoval (n 4) 1066.

¹⁹⁵ Rubio-Marín and Sandoval (n 4) 1067.

¹⁹⁶ Ibid.

¹⁹⁷ Convention of Belém do Pará (n 24) Articles 7, 8 and 9.

¹⁹⁸ *González et al. ("Cotton Field") v. Mexico* (n 36) ¶79.

¹⁹⁹ Rubio-Marín and Sandoval (n 4) 1067.

necessary part of an agenda that seeks to render reparations gender-sensitive in at least two important ways”.²⁰⁰ First, “the notion of harm links the violations to the set of affected individuals, allowing the proper identification of the circle of beneficiaries”.²⁰¹ Second, “giving adequate relevance to the notion of harm allows for understanding that different harms may ensue from the same violations and that one of the determining factors may be the gender of the victim”.²⁰² For Rubio-Marín and Sandoval it is crucial that harm experienced by women be understood in a context of the “pre-existing structures of subordination that account for (the) compounded nature (of gendered harm)”.²⁰³ The task of incorporating the concept of gendered harm into the facts or alleged violations of a case is a challenge, especially because, as Rubio-Marín and Sandoval contended, “poor litigation of cases and lack of awareness of the many ways in which women can be affected, even by those violations that target men, will translate into the incapacity of the system to acknowledge women as victims of violations under the Convention”.²⁰⁴ This challenge is especially evident in the forthcoming analysis of gendered harm in the *Artavia Murillo et al. v. Costa Rica* case. In determining fulfilment of the pre-conditions in the forthcoming case analyses, the interpretation of harm relates back to the discussion of gendered harm in section 2.2.

Finally, in proving harm, the Court may invoke its *motu proprio* capacity in order to connect human rights violations with harm, and then subsequently issue reparation to address both the violation and the harm that caused the rights violation. This means, with particular regard to women’s rights cases, that in the event that the Commission and the petitioner fail to link gendered harm to alleged rights violations and subsequent reparations, the Inter-American Court may take on the duty of linking violation, to harm, to reparation. However, as will be discussed in the analysis of the *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica* case,²⁰⁵ even in a situation where the Court actively attempts to analyse harm as it is gendered and results in violations of women’s rights, reparations issued in a reproductive rights judgment do not necessarily reflect the Court’s activist approach to determining harm. Instead reparations can be heavily reliant on the facts established in the case, as well as the violations alleged by the petitioners and the Commission.

²⁰⁰ Ibid 1068.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid 1069.

²⁰⁵ *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica* [2012] Inter-American Court of Human Rights (ser. C) No. 257 Preliminary Objections, Merits, Reparations and Costs.

Why a “Gender Reparations Tradition”?

While this thesis employs the Holistic Gender Approach to Reparations as a framework to consistently analyze reparations issued in each of the forthcoming case study chapters, the thesis also advocates the development of a “gender reparations tradition” in the Inter-American System of Human Rights. Where the Holistic Approach is reflective in design, meaning it is intended to look back at litigation processes to determine how and to what extent gender was incorporated in women’s rights cases, the concept of a “gender reparations tradition” requires that women’s (reproductive) rights cases be designed from the outset using a gendered understanding of harm, violence, and discrimination. The requirements for advancing a “gender reparations tradition” within the Inter-American System of Human Rights are not fixed, but the analysis of reproductive rights case studies conducted in this thesis reveals strategies that if consistently employed in women’s rights litigation may contribute to a sustainable approach to engendering reparations.

The notion of “tradition” used in this thesis originated in two ways. First, María Alejandra Cardenas, a former attorney at the Inter-American Commission on Human Rights and also with the Center for Reproductive Rights, explained in an interview that there is “no current “tradition (or practice) to be thinking about reparations” in the process of human rights litigation before the Inter-American System of Human Rights.”²⁰⁶ Cardenas’ use of the word “tradition” appealed to me because it is not a procedural or technical term yet it implies the need to “mainstream” or “institutionalize” gender through the Inter-American System. Second, as part of the research conducted for this thesis, I was invited to join Hilary Charlesworth’s “Strengthening the International Human Rights System: Rights, Regulation and Ritualism” project as a visiting scholar with Australian National University.²⁰⁷ At an accompanying workshop held in Spain, I was tasked with presenting my research as it relates to the practice of “ritual”, which in this context referred to how States engage with or reject human rights norms, values and practices through involvement with supranational human rights conventions and monitoring bodies.²⁰⁸ For my presentation, I likened the

²⁰⁶ Interview with María Alejandra Cardenas, Regional Legal Director, Women’s Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

²⁰⁷ ‘Strengthening the International Human Rights System: Rights, Regulation and Ritualism’ PI: Professor Hilary Charlesworth, Centre for International Governance and Justice, Regulatory Institutions Network, Australian national University; Visiting Scholar (23 October - 4 December 2014). Available at: http://regnet.anu.edu.au/research/research-projects/details/535/strengthening-international-human-rights-system-rights#action-tabs-link--qt-research_project_odetails_qtab-ui-tabs1.

²⁰⁸ Hilary Charlesworth, ‘Introduction to the Workshop and the concepts of regulation, rituals and ritualism’ Rights, Regulation and Ritualism Workshop’ International Institute for the Sociology of Law, Onati, Spain (1-4 September 2015).

concept of “ritual” to that of “tradition” in order to highlight the problematic nature of ineffective procedural norms that impede implementation of human rights law. I argued, much like I do through this thesis, that a “gender reparations tradition” should be understood as a form of ritual; one where states and actors engaged in litigation, as well as the Inter-American System itself must advance a recurring practice of engendering reparations in order to ensure its ongoing existence, development and improvement.

The “gender reparations tradition” I propose is based on strategies derived from the cases studies selected for analysis in this thesis. That being said, there are undoubtedly other strategies that may be compiled from different critiques of these same cases, or from other reproductive rights cases in the coming months and years. To summarize, the strategies developed in this thesis to advance a “gender reparations tradition” are as follows: (i) employ alternative rights concepts in reproductive rights litigation; (ii) enhance the role of civil society in the design of reparations; (iii) apply a multi-faceted approach to interpreting reproductive rights; and (iv) acknowledge and claim violations of reproductive rights through the violence against women framework. Each of these strategies corresponds with critique of the case study chapters insofar as they accomplish or fail to achieve an understanding of gendered harm through the litigation and reparation processes. By advocating the development of a “gender reparations tradition” in women’s reproductive rights cases, this thesis provides a new way of framing and analysing gender and reparations in judicial venues. As is discussed in more detail in the concluding chapter, chapter seven, the proposed “gender reparations tradition” requires that reparations be brought forward in the process of case design, so that alleged violations be asserted and defined in conjunction with reparations, rather than treat reparations as a superfluous secondary aspect of women’s rights litigation. The overall objective of introducing these preliminary strategies for advancing a “gender reparations tradition” is to lay the groundwork for reparation design that lends itself to reparation implementation; that is, the “gender reparations tradition” is in itself a first step to ensuring state compliance with human rights norms as they are intended to protect, promote and fulfil the rights of women.

Chapter three provided the groundwork for developing a “gender reparations tradition” within the work of the Inter-American System of Human Rights. By building on the concepts of gendered harm and reparation in chapter two, chapter three identified and examined several approaches to integrating gender within women’s rights cases. These approaches include application of the Convention of Belém do Pará Article 7 protections,

specifically due diligence; promotion of an increased civil society role in the development of gender-based reparations; and the creation of alternative litigation strategies that challenge the “maleness” of law. The themes addressed within this chapter combined with those from chapter two provide the contextual and analytical premise by which to conduct critical analyses of reproductive rights cases in chapters four through six. While the above chapters highlighted potential pathways for promoting a “gender reparations tradition” in the Inter-American System, the following case studies reveal the practical challenges inherent to reconceiving and advancing the transformative potential of reparations in women’s reproductive rights cases. The following case study chapters, which are introduced in chronological order, have the following objectives: (i) to understand how each of these cases developed and how the Inter-American System *works* on women’s reproductive rights issues; (ii) to determine strategies for advancing women’s reproductive rights through the Inter-American System, specifically the development of gender-based reparations designed to redress structural gender-based harm; and (iii) to provide practical tools for designing gender-based reparations cases in women’s reproductive rights cases.

CHAPTER FOUR

MARÍA MAMERITA MESTANZA CHÁVEZ V. PERU

Of the three cases selected for analysis in this research, *María Mamerita Mestanza Chávez v. Peru*¹ is significant in that it was one of the first cases before the Inter-American Commission to connect women's reproductive health rights violations to underlying causes of discrimination.² It was also the first forced sterilization case to be admitted by the Inter-American Commission where the State accepted responsibility for a violation of the Convention of Belém do Pará in a reproductive rights case that resulted in a Friendly Settlement Agreement.³ The case was selected for this research not only because it was the first of its kind in the Inter-American System, but also because the Agreement reached by the parties is over ten years old, allowing time to analyse the case in its aftermath and to reflect on lessons learned related to the design of gender-based reparations. The analysis conducted here provides a critique of the María Mestanza Chávez Friendly Settlement Agreement in order to determine the potential for this case to transform the reproductive lives of women through the development of gender-based reparations, and to identify strategies for gendering reparations in future women's reproductive rights cases.

This chapter explains and critiques the context in which Peruvian women experience(d) gender-based harm through violations of their reproductive rights, and draws conclusions from the María Mamerita Mestanza Chávez case in order to examine the potential of the Inter-American System to protect, promote and fulfil women's reproductive rights. The first section of this chapter introduces and examines the *María Mamerita Mestanza Chávez* case through the facts established by the petitioner and the State of Peru in the Friendly Settlement Agreement. This section employs the Holistic Gender Approach to Reparations to determine fulfilment of the gender reparations pre-conditions, *establish the relevant facts, identify the alleged violations and victims* and *identify the harm and those harmed by the violations*. The second section explores the wider context in which this case exists, and focuses on the implications of social and gender based harm as it impacts women's lives and reproductive health rights. The third section critically reviews the reparations agreed

¹ *María María Mamerita Mestanza Chávez v. Peru* [2003] Inter-American Commission on Human Rights, Case 12.191, No. 71/03 Friendly Settlement Agreement.

² *Ibid* ¶14(11): "The Peruvian State pledges to change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women's autonomy." The first reproductive rights case before the Inter-American Commission was *Monica Carabantes Galleguillos v. Chile* [2002] Inter-American Commission on Human Rights Report 33/02, Friendly Settlement Agreement.

³ Other forced sterilization cases: *IV v. Bolivia* [2014] Inter-American Commission on Human Rights Report No. 72/14, Case 12.655 Merits, and *FS v. Chile* [2014] Inter-American Commission on Human Rights Petition 112-09, Report No. 52/14 Admissibility.

upon in the *María Chávez* case, also referred to as *applying the test*, in order to determine their *transformative potential* for improving the lives of Peruvian women. The concluding section of this chapter identifies strategies derived from the *María Chávez* case to strengthen gender-based reparations in the Inter-American Systems.

4.1 The Case: *María Mamérita Mestanza Chávez v. Peru*

Women's enjoyment of their reproductive rights has a contentious and storied past in Peru. In many ways, Peruvian women's experiences with reproductive rights advancements and violations mirror the experiences of women throughout the Latin American region. However, in the Peruvian context, an amalgamation of internal armed conflict, duplicitous population control policies, an international agenda which promoted women's reproductive autonomy, neoliberal healthcare reform, and institutionalized discrimination based on race, gender and class, *combined* to create an environment of violence for a certain type of Peruvian woman; the poor, rural, uneducated, dark-skinned, indigenous woman. This chapter explores the case of *María Mamerita Mestanza Chávez v. Peru*,⁴ a woman whose identity fits within the above characteristics, and whose case is representative of reproductive rights violations for approximately 300,000 Peruvian women.

María Mamérita Mestanza Chávez (hereinafter referred to as María Chávez) was an indigenous woman and mother living in poverty in the Encañada District of Peru. She had seven children and was approximately 33 years old. In 1996, personnel from the public health centre of Encañada pressured María Chávez to commit to a tubal ligation procedure, also known as sterilization. She and her husband, Jacinto Suárez, were told that if she were to refuse the sterilization procedure, she would be required to pay a fine and may be taken to prison for violating a (non-existent) Peruvian law that made it illegal to have more than five children.⁵ As a result of harassment and coercion over a period of almost two years, María Chávez underwent a tubal ligation procedure on March 27th 1998. The operation was performed without prior medical examination, and María Chávez was not given a medical consent form to sign until the day after the procedure. The following day, María Chávez was discharged from the Encañada public health centre despite complaints of pain and stomach irritation. Her complications intensified over the following days, and in spite of Jacinto Suárez's repeated attempts to request medical assistance for his wife, the health

⁴ *María Mamerita Mestanza Chávez v. Peru* [2003] (n 1). Peru ratified the American Convention on Human Rights in 1978 and the Convention of Belém do Pará in 1996. It accepted the Inter-American Court of Human Rights' jurisdiction in 1981.

⁵ *Ibid* ¶10.

centre denied the family follow-up care. María Chávez died at home on April 5th 1998, eight days after her sterilization operation. The death was ruled to have been a direct result of the procedure. Shortly after María Chávez's death, a physician from the Encañada health centre attempted to offer Jacinto Suárez a sum of money to forget the issue.⁶ On April 15th 1998, Jacinto Suárez implicated the chief of Encañada health centre in the death of María Chávez, and filed formal criminal charges before a Provincial Judge on May 15th 1998. On June 4th, the Judge declared "there were no grounds for opening an investigation", and in July of that year the Specialized Chamber for Criminal Matters concurred with the Provincial Judge's decision.⁷ The María Chávez case was formally closed in Peru on December 16th 1998.

On June 15th, 1999, a number of NGOs⁸ (hereinafter, "the petitioner" or "victims' representatives") filed a petition before the Inter-American Commission on Human Rights on behalf of María Chávez and her family.⁹ They alleged that the State of Peru had violated the following human rights: the right to life (Article 4), right to personal integrity (Article 5), and the rights to equality and non-discrimination (Articles 1 and 24) under the American Convention on Human Rights;¹⁰ the right to be free from violence in the public and private spheres (Article 3), right to respect for freedom and security, including decision-making (Article 4), right to due diligence (Article 7), the state obligation to enact programs which combat sociocultural patterns that contribute to violence and discrimination (Article 8) and the state's duty to consider the circumstance of vulnerability in which women live (Article 9) enshrined within the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará);¹¹ the right to non-discrimination (Article 3), right to health (Article 10) in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador);¹² and the right to health (Article 12) and state duty to undertake non-discrimination measures (Article 14(2)) as protected in the United Nations

⁶ Ibid ¶6.

⁷ *María Mamérita Mestanza Chávez v. Peru* [2000] Inter-American Commission on Human Rights Case 12.191, Report No 66/00 Admissibility ¶7.

⁸ Office for the Defense of Women's Rights (DEMUS), the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), and the Asociación por Derechos Humanos [Association for Human Rights] (APRODEH), the Center for Reproductive Law and Policy (CRLP) and the Center for Justice and International Law (CEJIL).

⁹ *María Mamérita Mestanza Chávez v. Peru* [2000] Admissibility (n 7).

¹⁰ American Convention on Human Rights (ACHR), OASTS No. 36 (1969).

¹¹ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará') OASTS (1994). It is worth noting that the Convention of Belém do Pará does not clearly delineate its rights provisions, which makes it difficult to succinctly and easily refer to provision violations.

¹² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ('Protocol of San Salvador'), OASTS 69 (1988).

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW).¹³ This list of human rights violations is multi-faceted and takes into account the relationship between reproductive rights violations and violence against women. By claiming violations of the right to non-discrimination, the right to be free from violence and the right to health, as well as recognising the State's failure to address sociocultural patterns that cause women's rights violations, the petitioners employed a multi-faceted approach to rights in an attempt to connect the structural inequality and discrimination facing rural, poor and indigenous women across Peru to the specific case of María Chávez. After hearing from the State of Peru in response to the allegations, the Inter-American Commission on Human Rights admitted *María Mamerita Mestanza Chávez v. Peru* on October 3rd 2000.¹⁴ Despite the petitioner's efforts to illustrate an all-encompassing and multi-faceted picture of the structural components of Maria Chavez's forced sterilization, the Inter-American Commission admitted the case based only on the following rights violations: Articles 1, 4, 5, and 24 (obligation to respect rights, right to life, personal integrity, and equality, respectively) of the American Convention, and Article 7 (due diligence) of the Convention of Belém do Pará.¹⁵ Of particular significance here is the Commission's failure to determine an Article 7 violation in collaboration with Articles 8 and 9 of the Convention of Belém do Pará. This effectively limited the petitioner's capacity to demand reparations that reflected upon the structural components of the violations. This disconnect is clear in the Friendly Settlement Agreement, which does not include an effective analysis of the relationship between social and gendered harm and forced sterilization.

Upon concluding the Admissibility proceedings before the Inter-American Commission, the State of Peru and the petitioners entered into Friendly Settlement Agreement proceedings. The victims' representative and the State agreed to define the victims in this case as María Chávez, her husband, Jacinto Suarez, and their seven children.¹⁶ The victims outlined in the Agreement were those designated as beneficiaries for restitution. However, the case also connected the forced sterilization of María Chávez to a wider systemic problem by declaring that María Chávez was "one more among a large number of cases of women

¹³ International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), GA Res. 34/180 (1979).

¹⁴ *María Mamérta Mestanza Chávez v. Peru* [2000] (n 7).

¹⁵ The Convention of Belém do Pará does not contain an article granting the Inter-American Commission and Court contentious jurisdiction. However, both the Commission and Court have expanded their *advisory* jurisdiction over this Convention by finding violations of due diligence (Article 7). See, *Maria da Penha v. Brazil* [2001] Inter-American Commission on Human Rights, Merits; *Miguel Castro Castro Prison v. Peru* [2008] Inter-American Court of Human Rights (ser. C), No. 160, Merits, Reparations and Costs; and *González et al. ('Cotton Field') v. Mexico* [2009] Inter-American Court of Human Rights (ser. C) No. 205, Preliminary Objection, Merits, Reparations, and Costs.

¹⁶ *María Mamérta Mestanza Chávez v. Peru* [2003] (n 1) ¶14.

affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behaviour of the population, especially poor, Indian, and rural women”.¹⁷ The Agreement did not provide an analysis of *why* these women were targeted. It also neglected to mention the estimated 25,000 men who were also sterilized,¹⁸ therefore making invisible discrimination on the grounds of class and ethnicity. The State and the petitioners reached a final Agreement on August 26th 2003, and then submitted the report to the Inter-American Commission, where it was subsequently approved and then published. The Agreement did not refer to the term “forced sterilization”, but as is examined in section 4.3, the Agreement did attempt to repair gender-based discrimination as a central contributing factor to the violation of María Chávez’s reproductive health rights.

Fulfilling the Preconditions

The above introduction to the facts established within the María Chávez Friendly Settlement Agreement provides the foundation for determining the extent to which this case fulfilled the gender reparations preconditions identified within Rubio-Marín and Sandoval’s Holistic Gender Approach to Reparations. The fulfilment of these preconditions is considered by Rubio-Marín and Sandoval to be a key component in the project of developing gender-based reparations in the Inter-American System of Human Rights.¹⁹ This section reflects on the María Chávez Friendly Settlement Agreement in order to determine the extent to which it *established the relevant facts, properly identified the alleged victims and violations and properly identified the harm and those harmed*.

First, the María Chávez Friendly Settlement Agreement did not effectively take account of the context in which María Chávez was forcibly sterilized. While the Agreement was progressive in that it recognised that “poor, Indian, and rural women” were disproportionately sterilized, it did not include a thorough examination of intersectional discrimination as it allowed for the targeting of a specific “type” of Peruvian women; there was no recognition of *why* women from a particular demographic were sterilized. As a result, the first pre-condition, *establish the relevant facts*, was not entirely fulfilled through the Friendly Settlement Agreement. Second, the Agreement did not include violations of

¹⁷ Ibid ¶9.

¹⁸ 'Perú Reopens Criminal Investigation Into Mass Forced Sterilizations' (Center for Reproductive Rights, 13 May 2015) <www.reproductiverights.org/press-room/peru-reopens-criminal-investigation-into-mass-forced-sterilizations> accessed 20 May 2015.

¹⁹ Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the 'Cotton Field' Judgment' (2011) 33:4 Human Rights Quarterly 1062-1091, *supra* section 3.3 (n 180).

Articles 8 and 9 of the Convention of Belém do Pará, and also neglected to include rights provisions enshrined within the Protocol of San Salvador, such as the right to health. The Inter-American Commission did not include these rights provisions in its statement of admissibility, despite the petitioner's claim that the forced sterilization of María Chávez constituted a violation of these rights. If the Inter-American Commission had admitted the María Chávez case on the basis of these additional violations, there may have been the opportunity in the Agreement proceedings to develop a more nuanced and comprehensive depiction of the structural nature of reproductive rights violations as they are rights that exist across a spectrum of human rights. In that the Agreement did not include a comprehensive determination of the applicable rights provisions, this analysis determined that the Agreement partially fulfilled the *identify the violations* precondition. Finally, despite the petitioner's efforts to locate forced sterilization as a violation under the Convention of Belém do Pará, the Friendly Settlement Agreement did not include a thorough analysis of the gendered and social nature of harm. While the facts of the Agreement established that the María Chávez case represented the rights violations of a number of Peruvian women, there was no examination of the social injury inflicted on a large group of people who were specifically targeted for sterilization. The harm experienced by women (and men) who were sterilized was gendered, racist and classist; it was a form of social harm based on intersectional discrimination. The gendered harm experienced by the thousands of women who were coercively sterilized was a form of invasive harm in that the State purposefully invaded women's bodies to strip them of their reproductive capacity, and ultimately denied them their reproductive autonomy and identity. In that the Friendly Settlement Agreement neglected to examine the gendered and social nature of harm inflicted through forced sterilization, the María Chávez Friendly Settlement Agreement did not fulfil the *identify the harm* precondition.

By examining the María Chávez Friendly Settlement Agreement through the gender reparations preconditions determined in Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations,²⁰ it is clear that the María Chávez Agreement was ineffective in developing the emblematic nature of the rights violated in this case. As Oscar Parra Vera, former senior attorney at the Inter-American Court asserted, it is important to create a "structural picture about a specific problem" in human rights litigation.²¹ While the María Chávez Agreement made reference to the widespread problem of forced sterilization, it

²⁰ Ibid.

²¹ Interview with Oscar Parra Vera, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica 7 August 2014 (Ref Code: Ip, Ct, S).

failed to recognize and examine the underlying intersectional root causes of forced sterilization, which ultimately limited the transformative potential of this case. The following section develops the “structural picture” of forced sterilization in Peru, and is intended to provide the context missing in the María Chávez Friendly Settlement Agreement.

4.2 Context: Setting the Stage for Women’s Reproductive Rights in Peru?

In Peru, as in many other parts of the world, structural inequality is manifested through a myriad of characteristics, including gender, ethnicity, race, language, income, religion, citizenship, disability and sexuality. For women in Peru, the intersection of these characteristics often indicates how women experience harm, discrimination and violence in their lifetimes. Poor Quechua-speaking indigenous Peruvian women experience discrimination across at least four characteristics: gender, race/ethnicity, language and income combine to contribute to women’s unequal status in society. These women are subjected to violence in the public and private spheres, where patriarchal culture permeates home and public life.²² The violence women experienced when targeted for sterilization was a result of intersectional discrimination, where women’s characteristics became grounds for their subordinate position in society. Crenshaw described these multiple indivisible levels of discrimination as “structural intersectionality”.²³ She explained that “intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with pre-existing vulnerabilities to create yet another dimension of disempowerment”.²⁴ In Peru, women experience discrimination based on their gender, which can be understood as a “pre-existing vulnerability”, and rural, poor, indigenous woman experience additional “dimensions of disempowerment”. The concept of intersectionality is particularly useful to use as a foundation in analysing how and why a certain type of Peruvian woman became a tool in Peru’s struggle to control population growth, eliminate poverty and modernize in the 1980s and 1990s. Crenshaw’s emphasis on pre-existing vulnerabilities applies here, where a culture of racism and sexism permeate Peruvian society and in many ways, determine who is an eligible rights holder *and* who is not.

²² Sylvia Chant and Nikki Craske, *Gender in Latin America* (Latin American Bureau 2003) 9.

²³ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43:6 Stanford Law Review 1249.

²⁴ Ibid.

According to Jelke Boesten, in Peru the concept of race plays out based on height, skin, hair and eye colour combined with other determinants such as socioeconomic position, geographical origin, education, dress, and language.²⁵ Women in Peru are perceived to be lower on the social ranking than their male counterparts in the same social group.²⁶ Peru's hierarchical social ladder manifests and reinforces itself in both the intimate space of private life and in the public sphere. This is especially true in how familial power relations play out; in matters related to the formation of families, patriarchal understandings of decision-making in the household determine how women experience autonomy. For its part, the Peruvian State perpetuates rather than challenges gender, race, and class hierarchies. According to the Center for Reproductive Rights, this practice was evident in the State's population control program in the 1990s and is still visible today in the State's ongoing failure to prosecute individuals responsible for women's reproductive rights violations.²⁷ In the 1980s and 1990s structural inequality and discrimination against women, especially poor women living in the highlands, amplified exponentially. According to Ernesto Vasquez del Aguila, it was during this time that an internal armed conflict raged throughout the country, and simultaneously, a population control policy went into effect under the guise of reproductive autonomy and access to family planning.²⁸ These two forces compounded to add a new level of vulnerability for poor (indigenous, rural) women in Peru; they became tools in a war as well as in state efforts to control population growth.

The Peruvian internal conflict, which began in 1980, instilled a deep-seated sense of collective terror throughout society, where concepts like truth, justice and rights became almost alien, and resulted in a public distaste for impunity.²⁹ During this conflict women experienced violence on a widespread scale, yet the violence they experienced was not always visible or quantifiable. Human rights violations such as rape, forced disappearance and death disproportionately affected women, especially poor, indigenous, Quechua-

²⁵ Jelke Boesten, 'The State and Violence Against Women in Peru: Intersecting Inequalities and Patriarchal Rule' (2012) 19:3 *Social Politics: International Studies in Gender, State & Society* 366.

²⁶ *Ibid.*

²⁷ 'Perú Ends Criminal Investigation into Mass Forced Sterilizations', (Center for Reproductive Rights, 29 January 2014) <<http://reproductiverights.org/press-room/Peru-Ends-Criminal-Investigation-into-Mass-Forced-Sterilizations>> accessed 17 February 2015.

²⁸ Ernesto Vasquez del Aguila, 'Invisible Women: Forced Sterilization, Reproductive Rights, and Structural Inequalities in Peru of Fujimori and Toledo' (2002) 6 *Estudios e Pesquisas em Psicologia* 111.

²⁹ 'Peruvian Truth and Reconciliation Commission Final Report' (2003) <www.cverdad.org.pe/ingles/ifinal/index.php> accessed 4 June 2013.

speaking women living in the Peruvian highlands.³⁰ The Truth and Reconciliation Commission established in the aftermath of the conflict determined that,

The women most effected (were) part of the Andean culture and (were) Quechua-speaking, [...] what was happening to them, *las campesinas* [the peasant women], was not part of the national concern. They were ‘those’ who were there in the highlands, from the mountains, away from progress and civilization. Peruvian society was not interested in these crimes.³¹

The “otherness” of the women and men most affected by the conflict is a mind-set that continues today in Peru. Cristina Alcalde explained there is a strong awareness of race and class in Peru, where the wealthy in Lima use terms like *indio* and *cholo*³² to signify backwardness or inferiority, and euphemisms such as *educados* (educated) and *gente decente* (decent people) to refer to white limeños (fair-skinned, often wealthy Peruvians living in Lima).³³

Ewig noted that women who live in the highland regions of Peru are perceived by those living in the urban regions of Peru, to be “backward”, not modern, and a hindrance to the process of Peruvian development.³⁴ Women who live in Lima are educated and modern, and are quick to disassociate with indigenous, or *india*, backgrounds.³⁵ This disconnect amongst Peruvian women harkens back to West’s assertion that it is difficult for women to view themselves as sharing common interests with other women in terms of advancing social change.³⁶ Diana Portal, a Peruvian human rights lawyer, echoed this sentiment, “people are not conscious that the situation (referring to forced sterilization campaigns in the highlands) could have been for them. They cannot see themselves in that farmer, or the Andean and Quechua-speaking woman”.³⁷ The violence women experienced during the conflict, and during the population control policies of the 1990s, was a result of underlying and intersecting discrimination, where the victim’s lives were ultimately invisible to the *educated* and *decent* members of Peruvian society. While a conflict raged in the highlands and eventually seeped into the outskirts of Lima, the situation for women affected by the

³⁰ Julie Guillerot, 'Linking Gender and Reparations in Peru: A Failed Opportunity' in Ruth Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (Social Science Research Council 2006) 141.

³¹ 'Peruvian Truth and Reconciliation Commission Final Report' (n 29) Chapter 2 - Differential Impact of Violence: Gender' <www.derechos.org/nizkor/peru/libros/cv/viii/21.pdf> accessed 4 June 2013.

³² M. Cristina Alcalde, *The Woman in the Violence: Gender, Poverty, and Resistance in Peru* (Vanderbilt University Press 2010) 52, 54 and 86. The term *cholo* is used to refer to someone who is in the process of transition from indigenous to mestizo, where mestizo implies a shift to “modernity,” for example wearing urban clothing.

³³ Ibid 51.

³⁴ Christina Ewig, 'Hijacking Global Feminism: Feminists, the Catholic Church, and the Family Planning Debacle in Peru' (2006) 32:3 *Feminist Studies* 633.

³⁵ Interview with Cecilia Olea, Women’s Rights Researcher and Advocate, Flora Tristan, Lima, Peru 9 July 2014 (Ref Code: Ip, P, N).

³⁶ Robin West, *Caring for Justice* (New York University Press 1997) 97, *supra* section 2.2.2 (n 73).

³⁷ Interview with Diana Portal Farfán, Attorney, Office of the Ombudsman, Women Department, Lima, Peru 2 July 2014 (Ref Code: Ip, P, G, S).

conflict was not a central focus for society in Lima, as highlighted above in the Truth and Reconciliation Commission final report.³⁸ Structural inequality based on discrimination, racism, sexism and classism carried over to impact 300,000 women (and 25,000 men) from the rural, poor, indigenous communities of Peru who were forcibly sterilized in an effort to “modernize” the country.

4.2.1 Talking Rights Talk: Family Planning in Peru

In the mid-1990s, women’s human rights came to the fore in the international arena. The 1994 International Conference on Population and Development (ICPD) culminated in a Programme of Action that established as goals, among numerous others, universal access to family planning and reproductive health rights and services, gender equality and empowerment of women, and education for girls.³⁹ The following year, in 1995, the United Nations Fourth World Conference on Women in Beijing reiterated elements of the ICPD call for action, placing emphasis on women’s empowerment and equality.⁴⁰ It was at this conference that former president of Peru (1990-2000), Alberto Fujimori, discussed strategies for family planning, and declared,

My government has decided to carry out, as part of a policy of social development and the fight against poverty, an integral strategy of family planning that confronts, openly - for the first time in the history of our country - the serious lack of information and services available on this matter. Thus, women can have at their disposal with full autonomy and freedom, the tools necessary to make decisions about their own lives.⁴¹

Fujimori placed an emphasis on free choice and information, especially for women living in poverty, and forthrightly challenged the Church.⁴² He continued,

We are not going to stop our effort to carry out a vast national campaign to actively make public all these family planning methods that modern science has placed at our disposal. This is not going to be done to instate some kind of sinister power, but to light torches of hope to advance in to a new millennium that must highlight a new era of dignity for all human beings.⁴³

At the time, Fujimori’s speech seemed revolutionary. He demanded the rights of women to autonomy and freedom, and related family planning to dignity, and above all, he made this statement before an international forum, where the world was listening and watching.

³⁸ 'Peruvian Truth and Reconciliation Commission Final Report' (n 29) 72.

³⁹ International Conference on Population and Development (ICPD), 'Report of the International Conference on Population and Development' (UN Doc. No. A/CONF.171/13 1994).

⁴⁰ 'Platform for Action United Nations Fourth World Conference on Women' (1995) <www.un.org/womenwatch/daw/beijing/platform/plat1.htm#concern>.

⁴¹ Alberto Fujimori, 'Speech Given by the President of the Republic of Peru before the IV World Conference on Women, Beijing, China' (1995) <www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950915131946.txt>.

⁴² Ewig (n 34) 642.

⁴³ Fujimori (n 41).

Despite the seeming advances in access to family planning services, the reality of the situation on the ground vastly differed to the rhetoric in Fujimori's speech. Superficially, Fujimori's women's rights-based discourse and emphasis on family planning appeared to benefit women's enjoyment of their reproductive rights, but upon closer inspection it became apparent that national legislation on population control provided the impetus to implement a coercive sterilization program, where the goal was not the protection of women's reproductive rights but rather, population control and subsequent poverty reduction.⁴⁴ President Fujimori's thinking was in-line with the international community's desire to reduce population growth, and modernize/"Westernize" developing countries.⁴⁵ The rationale "that poverty was caused by overpopulation (instead of overpopulation being a symptom of poverty), and that reducing the population was a condition for development"⁴⁶ underscored the global community's perception of family planning. Fujimori's plan to stop poor people from producing more poor people targeted Peruvians living in the highlands who were perceived as "backwards" and not modern. Ultimately "family planning" in Peru was designed to exploit and curtail the rights of those individuals deemed responsible for causing the overpopulation/poverty problem: poor, rural, indigenous women.

4.2.2 Family Planning or Something Else?

Following Fujimori's speech, the international aid community applauded the work being done on women's reproductive health in Peru, and began funding family planning projects in the country.⁴⁷ In 1995, with the assistance of funds from international aid groups such as USAID,⁴⁸ Fujimori's government implemented the "Voluntary Surgical Contraception" program (Anticoncepción Quirúrgica Voluntaria), which was originally developed in 1990. Implementation of the Voluntary Surgical Contraception program resulted in an intensive sterilization campaign in the rural regions of Peru. The program embodied a Malthusian

⁴⁴ Giulia Tamayo, 'Nothing Personal: Human Rights Report on the Application of Sterilization in Peru, 1996-1998, [Nada Personal. Reporte de Derechos Humanos sobre la Aplicación de la Anticoncepción Quirúrgica en el Perú 1996-1998], (CLADEM (Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer) 1999) <https://1996pnsrpf2000.files.wordpress.com/2011/07/cladem_nada-personal.pdf>.

⁴⁵ Stephanie Rousseau, 'The Politics of Reproductive Health in Peru: Gender and Social Policy in the Global South' (2007) 14:1 *Social Politics: International Studies in Gender, State & Society* 104.

⁴⁶ Jelke Boesten, *Intersecting Inequalities: Women and Social Policy in Peru, 1990-2000* (Pennsylvania State University Press 2010) 76.

⁴⁷ Ibid 81. USAID contributed "a yearly sum of approximately \$14 million plus several tons of foodstuffs."

⁴⁸ Note that aid from US government entities, such as USAID, requires that all NGOs receiving US federal funding refrain from performing or promoting abortion services as a method of family planning. See, 'USAID'S Family Planning Guiding Principles and U.S. Legislative and Policy Requirements', (USAID, 11 June 2014) <www.usaid.gov/what-we-do/global-health/family-planning/usaids-family-planning-guiding-principles-and-us> accessed 17 February 2015.

approach to population control,⁴⁹ where the fear that population was growing at too fast a rate to be sustainable led to the institution of “positive and preventive checks” in order to quell population growth.⁵⁰ It is estimated that from 1995-2000, approximately 300,000 women were forcibly sterilized as part of the Voluntary Surgical Contraception program.⁵¹ Giulia Tamayo, a prominent feminist in Peru, along with women’s rights NGOs Flora Tristan and CLADEM, discovered that the health centres had set obligatory quotas, which obliged program employees to sterilize a set number of women (and men) in order to remain employed and receive promotions and monetary compensation. The evidence compiled by Tamayo revealed that only ten percent of the women sterilized under the Voluntary Surgical Contraception program underwent the procedure with “real consent”.⁵² In many cases, those women who did not give “real consent” for the procedure were provided with information forms about the procedure that were written in Spanish, and not the Quechua language that most indigenous women spoke, and many women were not asked to complete consent forms until after their procedure.⁵³ The program also utilized propaganda in health clinics and throughout rural communities to convey the idea of a small family as being necessary for happiness and modernity.⁵⁴

In that the Voluntary Surgical Contraception program targeted a specific type of woman, not *all* Peruvian women were at risk of coercion. The criteria selectively targeted poor indigenous women.⁵⁵ The tactics employed by health personnel responsible for sterilizing the women elucidate discriminatory practices and attitudes that contributed to the manipulation and sterilization of thousands of women. Jelke Boesten, in her discussion on women and the healthcare system in Peru, provided an analysis of underlying forms of discrimination that permeate(d) the health sector. She explained, “the relationship between women and medical personnel [...] is grounded in sociocultural misunderstandings that are entrenched in racism and sexism toward rural indigenous women”.⁵⁶ Boesten argued that this racist/sexist relationship allowed for the state to implement an aggressive population control program through medical personnel. Underlying racism and sexism in Peruvian

⁴⁹ Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population and Control* (South End Press 1995) 14-15.

⁵⁰ T. R. Malthus, *An Essay on the Principle of Population* (W. Pickering 1986)

⁵¹ 'Peru Reopens Criminal Investigation into Mass Forced Sterilizations' (n 18).

⁵² Bernard M. Dickens and Rebecca J. Cook, 'Types of Consent in Reproductive Health Care' (2015) 128:2 *International Journal of Gynecology & Obstetrics* 182. For this research, “real consent” is “informed consent” that has the purpose of “informing, not to persuade the patient to consent, but to serve the patient’s choice or autonomy, allowing choice to decide according to the patient’s own assessment of competing interests and values.”

⁵³ Giulia Tamayo ‘Nothing Personal’ (n 44).

⁵⁴ Ewig (n 34) 644-645.

⁵⁵ *Ibid* 644.

⁵⁶ Boesten, *Intersecting Equalities* (n 46) 83.

society combined with the State's plan to limit population; medical personnel saw their role as instrumental in bringing those "backward" people in-line with the modern Peru. Luis Távara, a Peruvian medical doctor and expert in sexual and reproductive health confirmed Boesten's claims about the relationship between women and medical personnel in Peru. He said,

People who lack resources [...] they don't have the power to decide with autonomy the specific measures about their health. They become the victims of decisions made by other people, which in this case are the health personnel who do the deciding for them. So these women are discriminated against because they have a different language, they speak Quechua or Aymara, [...] they are people who may have other religious beliefs, ones that differ from those of the staff at the health center. Or, they are just poor people, so they are just not respected.⁵⁷

The above analysis of women's reproductive rights and family planning in Peru revealed that Peruvian women experienced protection of their rights to varying degrees depending on their race/ethnicity, income, geographic location, and class. Discrimination based on these characteristics is representative of claims made by Walker, where she explained "women of oppressed racial or economic groups may be perceived as economically or sexually more exploitable, or exploitable in different ways and with greater impunity."⁵⁸ The women sterilized as part of the Voluntary Surgical Contraception program in the María Chávez case were targeted because they belonged to groups already perceived to be "economically or sexually exploitable"; their rights meant less because society had normalised their discrimination. These social hierarchies exist in part because it is difficult for women who belong to poor, racially stigmatized groups to find solidarity with men in their same group, or with women who belong to different groups. For example, men in the same social group as marginalised women, and women with social privilege cannot afford to "jeopardize their status by reporting or condemning gender-based violence" because their own social status is precarious.⁵⁹ The concepts of "transversal politics" and "imagined community," when applied to the context of the María Chávez case, reveal the challenge of confronting social hierarchies. By applying Yuval-Davis' "transversal politics" to the context of the María Chávez case it is clear that the different "positionings" of women across Peruvian society shaped and distorted "knowledge," and ultimately established a skewed perception of the "truth".⁶⁰ The María Chávez Friendly Settlement Agreement failed to engage in "truth-

⁵⁷ Interview with Dr. Luis Távara, Executive Director of the Latin American Federation of Societies, Obstetrics and Gynecology, Lima, Peru 8 July 2014 (Ref Code: Ip, P, S, Rx).

⁵⁸ Margaret Urban Walker, 'Gender and Violence in Focus: A Background for Gender Justice in Reparations,' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 25. For more on social groups and interacting forms of oppression, see Iris Marion Young, *Justice and the Equality of Difference* (Princeton University Press 1990).

⁵⁹ Ibid 26.

⁶⁰ Yuval-Davis N, 'What is 'Transversal Politics?'' (1999) 12 Soundings 95, *supra* section 1.1.1 (n 38).

making/telling” in that it did not address the reasons *why* particular groups of women were sterilised. Additionally, Mohanty’s “imagined communities”⁶¹ provides the concept of “boundaries” to interpret the lines along which Peruvian women experienced protections of their rights. *India* women and *limeña* woman were separated by a “boundary” built on a racist and patriarchal social hierarchy that made it difficult for women to see each other as belonging to the same oppressed group.

The harm inflicted upon María Chávez, and hundreds of thousands of other Peruvian women, can be understood as both gendered and social harm. These women experienced “harms of invasion” in that their bodies were stripped of their childbearing function through medical intervention. They were also robbed of their reproductive autonomy and choice to become mothers. The social element of the reproductive rights violations involved in María Chávez cannot be ignored, especially because certain types of women (and men) were targeted for sterilization, and the impact on their communities is specific to a collective of people who were poor, indigenous and living in rural areas. In that the context in which María Chávez was sterilized is one shared by thousands of other women and men, there was a need to repair social and gendered harm at a structural level in order to address not only the invasive and physical nature of gendered harm, but also the “hidden injuries” still being experienced by those women and men who were sterilized, as well as their families and communities.

4.3 Repairing Gendered Harm: Determining Transformative Potential

The above sections introduced the *María Mamerita Mestanza Chávez v. Peru* case, and the context in which the case existed. Where section 4.1 determined the partial fulfilment of the Holistic Gender Approach to Reparations pre-conditions in the María Chávez Friendly Settlement Agreement, section 4.2 provided a comprehensive assessment of how and why forced sterilization was imposed on a certain “type” of Peruvian woman. The reparations agreed upon within the María Chávez Friendly Settlement Agreement reveal a significant gap between the individual María Chávez case and the context in which over 300,000 Peruvians were robbed of their reproductive autonomy. This section examines a selection of reparations agreed upon in the Friendly Settlement Agreement, and does so with two objectives: (i) to explore the transformative potential of the reparations included in the

⁶¹ Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourse', *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003) 30, *supra* section 1.1.1 (n 34).

Agreement, and (ii) to identify missed opportunities in the development of structural gender-based reparations.

The María Chávez Friendly Settlement Agreement contains numerous reparation measures.⁶² However, the following reparations have been selected for analysis because of their potential to transform the *status quo ante* in which massive forced sterilization took place in Peru, and because of their failure to take account of the gendered and social aspects of this case. These reparation measures are:

1. The Peruvian State promises to conduct a “thorough investigation of the facts and apply legal punishments to any person determined to have participated in them, as either planner, perpetrator, accessory, or in other capacity, even if they be civilian or military officials or employees of the government” (*justice reparation*);
2. Monetary compensation in the form of moral damages, corollary damages, medical payments, education payments and an additional payment to purchase land (*compensation reparation*);
3. “The Peruvian State pledges to change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women’s autonomy” (*guarantee of non-repetition reparation*).

4.3.1 Justice

Perhaps one of the most significant reparation provisions established in this Agreement was the Peruvian State’s pledge “to carry out administrative and criminal investigations [...] and to punish:

- a. Those responsible for the acts of pressuring the consent of Ms. María Mámerita Mestanza Chávez to submit to tubal ligation;
- b. The health personnel who ignored the need for urgent care for Ms. Mestanza after her surgery;
- c. The doctors who gave money to the spouse of the deceased woman in an attempt to cover up the circumstances of her demise; and
- d. The Investigative Commission... which questionably exonerated the health personnel from responsibility for Ms. Mestanza’s death”.⁶³

Because the State agreed to the facts of this case, which included a structural problem of discrimination and violence against women, this provision not only aimed to investigate and punish those individuals directly and indirectly responsible for María Chávez’s rights violations, but also any individual who could be linked to the facts established within the

⁶² Other reparations include a \$20,000USD payment to Jacinto Suarez to purchase land/housing and compensation to each identified victim in the form of moral damages.

⁶³ *María Mamérta Mestanza Chávez v. Peru* [2003] (n 1).

Agreement. This justice-based reparation continues to be of great importance in Peruvian society, where impunity is a lasting concern following years of internal armed conflict.⁶⁴

As discussed in section 3.1.3, reparations that aim to deliver justice in the form of individual criminal accountability have not seen significant success in implementation.⁶⁵ The situation in Peru is reflective of this gap in compliance, where impunity continues for thousands of women (and men) who were sterilized as part of the Voluntary Surgical Contraception program.⁶⁶ However, the Ombuds Office in Peru continues to receive complaints and follow-up enquiries from women affected by the Voluntary Surgical Contraception program.⁶⁷ If one of the challenges for compliance with justice-based reparations is lack of public engagement, this is not the case in Peru. Milena Justo, a lawyer with Manuela Ramos, one of the first feminist NGOs in Peru, explained, “(this) is probably one of the main issues in our country [...] there is a (public) perception of impunity”.⁶⁸ In fact, more than ten years after the María Chávez case, the Peruvian people remain outraged at the lack of justice.⁶⁹

The justice reparation agreed upon in the María Chávez Friendly Settlement Agreement did not take into account the gendered nature of reproductive rights violations. Diana Portal Farfán, an attorney in the Women’s Division of the Peruvian Ombudsman Office, argued

⁶⁴ The first investigation was closed because the Prosecutor determined that the Statute of Limitations had expired, and the second investigation was closed because the Prosecutor denied the argument that the sterilizations were a crime against humanity. See, Dan Collins, “Peruvian Women Intent on Bringing State to Book over Forced Sterilisations,” *The Guardian* (12 March 2014). <www.theguardian.com/global-development/2014/mar/14/peru-women-forced-sterilisation-justice>. (accessed 23 February 2015).

⁶⁵ David C. Baluarte and Christian De Vos, ‘Judgment to Justice: Implementing International and Regional Human Rights Decisions’ (Open Society Justice Initiative 2010) 68, *supra* section 3.1.3 (n 83).

⁶⁶ ‘Perú Ends Criminal Investigation into Mass Forced Sterilizations’ (n 27), and Carlos Hinojosa, *Diario 16*, “Justice Done! Prosecutor Reopens Forced Sterilization Case during Fujimori” [¡ Se Hizo Justicia! Ministerio Público Reabre el Caso de Esterilizaciones Forzadas Durante el Fujimorismo] 10 May 2015. <<http://diario16.pe/noticia/60031-se-hizo-justicia-ministerio-publico-reabre-caso-esterilizaciones-forzadas-durante-fujimorismo>> (accessed 11 May 2015).

⁶⁷ Interview with Carla Villareal Lopez, Women’s Division of the Ombudsman Office, Lima, Peru 2 July 2014 (Ref Code: Ip, P, G).

⁶⁸ Interview with Milena Justo, Attorney, Manuel Ramos, Lima, Peru 30 June 2014 (Ref Code: Ip, P, N).

⁶⁹ Mona Lisa Diéguez, ‘We Demand Justice in the Case of Forced Sterilization in Peru’, *Alianza por Solidaridad* [Solidarity Alliance] Peru ApS (February 2014) <www.alianzaporlasolidaridad.org/en/reflexiones/caso-de-esterilizaciones-forzadas-en-peru> (accessed 18 November 2014), and ‘Women Victims of Sterilization Ask for Reparations,’ [Mujeres víctimas de esterilizaciones piden reparación al Estado], *El Comercio Perú*, (12 December 2015) <<http://elcomercio.pe/peru/pais/mujeres-victimas-esterilizacion-es-piden-reparacion-al-estado-noticia-1863145>> (accessed 15 December 2015). In July 2016, the Peruvian prosecutor determined that the sterilization of thousands of women was not an intentional violation of human rights, but was just part of a state policy. As a result, the Prosecutor decided to punish individual doctors who failed to obtain informed consent, and will not examine the structural nature of the human rights violations. See, ‘Denunciation of Forced Sterilizations was Filed by the Prosecution’ [‘Denuncia de Esterilizaciones Forzadas fue Archivada por la Fiscalía’] *La Republica* (27 July 2016) <<http://larepublica.pe/sociedad/789156-denuncia-de-esterilizaciones-forzadas-fue-archivada-por-la-fiscalia>>. On August 13th 2016, over 50,000 Peruvian women and men protested gender based violence, with a contingency specifically focused on justice for the thousands of women who were forcibly sterilized under Fujimori. See, Aramis Castro, ‘Peruvians say “No!” to Violence Against Women’ *IPS News* 16 August 2016) <www.ipsnews.net/2016/08/peruvians-say-no-to-violence-against-women/> accessed 17 August 2016.

that the role of gender was not adequately incorporated into an analysis of forced sterilization in Peru because

The violation is not seen as a gender issue in our country, because there is not a social gender perspective. We do not have that perspective. I think personally that it is because of discrimination. Who were the victims of forced sterilization? Who the victim is determines the response from the state, and the consciousness of the other [...] So, I think it is important to see how the gender perspective crosses with the discrimination context, and then how to include these issues in reparations.⁷⁰

The point made here by Farfán Portal is important because it reflects back on one of the original causes of María Chavez's sterilization and death, discrimination across intersecting characteristics based on gender, race and class. While it appears that this justice-based reparation was composed with the intent of holding perpetrators accountable for committing women's reproductive rights violations, the actual transformative potential is minimal because the reparation was designed using a "gender free" understanding of the rights violation. For example, in calling for the investigation and prosecution of "those responsible for the acts of pressuring the consent", there is no analysis of the reasons *why* certain women (and men) were coerced into giving consent for sterilization procedures; a point that relates back to a failure to fulfil the Gender Reparations Approach preconditions. In addition, this reparation ignored underlying racism and sexism in the healthcare sector.

As mentioned earlier, the María Chávez Friendly Settlement Agreement did not fulfil the *identify the violation* precondition because of the Inter-American Commission's failure to determine a violation of Articles 8 and 9 of the Convention of Belém do Pará. While the Friendly Settlement Agreement did include a violation of Article 7 of the Convention of Belém do Pará, which requires that the State investigate and prevent violations of women's rights, the State was not required to provide *gender* justice, per se. The incomplete fulfilment of this precondition resulted in the development of a justice reparation that was gender free, rather than gender-based; that is, the justice reparation was designed using an androcentric vision of human rights.⁷¹ In addition, because the Agreement did not establish a comprehensive depiction of the impact of intersectional discrimination (*establish the*

⁷⁰ Interview with Diana Portal Farfán, Attorney, Office of the Ombudsman, Women Department, Lima, Peru 2 July 2014 (Ref Code: Ip, P, G, S). It can be argued that forced sterilization is increasingly being understood as a gender issue in Peruvian society. The recent gender violence march (n 68) and the #niunamenos (#notoneless) campaign are evidence of a shift in how Peruvian society approaches gender and violence against women. See, Jacqueline Fowks, 'The "Not One Less" Movement Gains Strength in Peru' [El movimiento 'Ni una menos' toma fuerza en Perú] El País (26 July 2016) <http://internacional.elpais.com/internacional/2016/07/26/america/1469488408_366821.html> accessed 17 August 2016, and Gabriela Wiener, 'The Day Peruvian Women Rebelled,' New York Times (23 August 2016) accessed 23 August 2016 <www.nytimes.com/2016/08/24/opinion/the-day-peruvian-women-rebelled.html?_r=0>.

⁷¹ Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Belknap Press of Harvard University Press 2007) 5.

relevant facts) and did not take into account the social aspect of harm in this case (*properly identify the harm*), it rendered invisible the over 25,000 involuntarily sterilized men, and also reinforced the invisible social harm that many women and their families live with to this day as a result of involuntary sterilization. As of September 2016, the State of Peru has not implemented this justice reparation. Following several attempts to investigate the forced sterilization of thousands of Peruvian women, the Peruvian public prosecutor determined in July 2016 that the state sterilization policy was not in itself a violation of human rights. The prosecutor determined that former President Fujimori and his health ministers are not liable for charges, and that only a small number of doctors will be held accountable.⁷²

4.3.2 Compensation

It is common practice for the Inter-American Commission and the Inter-American Court to issue monetary compensation as part of an attempt to repair harm caused by human rights violations. For many victims, this form of reparation plays a fundamental role in how a victim begins a new life following years of turmoil in their quest for justice. In this case, the Inter-American Commission determined that María Chavez's family had been victimized by her sterilization and death, and that they fulfilled the beneficiary criteria for compensation.⁷³ The Agreement included the following compensation: \$80,000 for moral damages, \$2,000 for María Chavez's burial, \$7,000 for psychological care as well as health insurance for María Chavez's immediate family, free education through the university level for María Chavez's children, and \$20,000 for Jacinto Suárez to purchase land.⁷⁴ The Peruvian State complied with these reparations. However, in failing to also incorporate a community-based/collective approach to reparations, the petitioner and the Peruvian State missed a significant opportunity to acknowledge the far-reaching effect of social harm in this case.

When reflecting on the approach to reparations in the María Chávez case, Jeannette Llaja, former Director of DEMUS, a Peruvian legal feminist NGO who represented the victims in this case, said,

I feel that if we negotiated the case today we would do it differently [...] We would work on the individual remedy, but also for the community, because Jacinto belonged to a community and Maria's death affected him and the whole

⁷² Dan Collins, 'Women Vow to Fight on in Peru after Alberto Fujimori Absolved over Forced Sterilisations,' The Guardian (3 August 2016) < <https://www.theguardian.com/global-development/2016/aug/03/women-vow-to-fight-on-in-peru-after-fujimori-absolved-over-forced-sterilisations> > accessed 17 August 2016.

⁷³ *María Mamérta Mestanza Chávez v. Peru* [2003] (n 1) ¶14.

⁷⁴ Ibid. (Amounts are in US Dollars)

community, and that agreement did not have a community approach [...] In rural areas life is not seen individually, but as a community.⁷⁵

As Llaja pointed out, the model for monetary reparations in this case was flawed in that it was not developed to adequately address the collective/social harm experienced by Maria Chavez's immediate community, as well as the hundreds of thousands of surviving victims and their families. This case fell into the trap of serving as a sort of lottery for victims.

Rubio-Marín and de Greiff explained that in "situations of deep scarcity, individual reparations may be socially divisive".⁷⁶ Accordingly, in the aftermath of the María Chavez case, Jacinto Suarez returned to his community with a sum of money for himself and his family. Although his wife's sterilization and subsequent death represented the situation for thousands of women (and men), the result of the compensation reparation impacted only one man and his family. Although it is not realistic to expect the State to monetarily compensate all women and men who were directly and indirectly victimised by forced sterilization, the development of a reparation designed to repair social harm which would benefit entire communities would have held great potential for healing. In addition to the compensation awarded to Maria Chavez's family, the Agreement could have also included for example, the building of new schools and healthcare clinics in the highlands regions of Peru, especially in areas most affected by the sterilization program. A formal apology could have been issued to the communities, with the State accepting responsibility for the sterilization of thousands of women and men and also pledging to bring the perpetrators of forced sterilization to justice. The shortcomings detected in this reparation directly correlate with incomplete fulfilment of the second and third pre-conditions, *identify the alleged violations and victims* and *identify the harm and those harmed by the violations*. A limited picture of *who* the victims were, and the harm they experienced resulted in compensation reparation that failed to address collective harm, or social injury, experienced by a particular group of people. This reparation transformed the lives of the immediate victims identified in the María Chávez case, but in no way transformed the lives of the thousands of other families impacted by the coercive sterilization programme.

⁷⁵ Interview with Jeannette Llaja, Former Director of DEMUS (Office for the Defense of Women's Rights) [Estudio para la Defensa de los Derechos de la Mujer], Lima, Peru 3 July 2014 (Ref Code: Ip, P, S). DEMUS collaborated with several other NGOs to represent the victims: Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM); Association for Human Rights [Asociacion Pro Derechos Humanos]; Center for Reproductive Law and Policy (CRLP); and Center for Justice and International Law (CEJIL).

⁷⁶ Rubio-Marín and Sandoval (n 19) 336.

4.3.3 Guarantees of Non-Repetition

The eleventh reparation, “Changes in Laws and Public Policies on Reproductive Health and Family Planning”,⁷⁷ outlines the following provisions:

The Peruvian State pledges to change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women’s autonomy. The Peruvian State also promises to adopt and implement recommendations made by the Ombudsman concerning public policies on reproductive health and family planning, among which are the following:

a. Penalties for human rights violators and reparation for victims

1) Conduct a judicial review of all criminal cases on violations of human rights committed in the execution of the National Program of Reproductive Health and Family Planning, break out and duly punish the perpetrators, requiring them to pay the appropriate civil damages, including the State if it is determined to have some responsibility for the acts that gave rise to the criminal cases.

2) Review the administrative proceedings initiated by the victims and/or their family members, linked to the cases in the previous paragraph, which are pending or have concluded concerning denunciations of human rights violations.

b. Methods for monitoring and guaranteeing respect for human rights of health service clients

1) Adopt drastic measures against those responsible for the deficient pre-surgery evaluation of women who undergo sterilization, including health professionals in some of the country’s health centers. Although the rules of the Family Planning Program require this evaluation, it is not being done.

2) Continuously conduct training courses for health personnel in reproductive rights, violence against women, domestic violence, human rights, and gender equity, in coordination with civil society organizations that specialize in these topics.

3) Adopt the necessary administrative measures so that the rules established for ensuring respect for the right of informed consent are scrupulously followed by health personnel.

4) Guarantee that the centers that offer sterilization surgery have proper conditions required by standards of the Family Planning Program.

5) Take strict measures to ensure that the compulsory reflection period of 72 hours is faithfully and universally honored.

6) Take drastic action against those responsible for forced sterilization without consent.

7) Implement a mechanism or channels for efficient and expeditious receipt and processing of denunciations of violation of human rights in the health establishments, in order to prevent or redress injury caused.

There were several elements of this provision that had the capacity to affect change, that is, they had transformative potential: (i) providing a mechanism for processing of human rights violations claims; (ii) amending laws and policies on reproductive health and family planning; and (iii) implementing training programs for health personnel. The other elements

⁷⁷ *María Mamérta Mestanza Chávez v. Peru* [2003] (n 1) ¶14.

of this provision mirror the requirements outlined under the justice-based reparation: to bring the perpetrators of forced sterilization to justice.

Section b (7) of this reparation provided a mechanism for women and men to denounce rights violations occurring within the healthcare sector. The Ombuds office currently serves in this capacity; women who were victims of forced sterilization continue to submit and follow-up on previous complaints.⁷⁸ In establishing this mechanism the State signalled to society that women have rights when accessing healthcare, and that the Peruvian State intended to challenge and rectify violations of those rights. This mechanism has proven to be a valuable resource in compiling the names and experiences of victims of forced sterilization. However, in terms of reparations designed to guarantee non-repetition of gendered based harm, the most encouraging sections of this reparation provision were training courses for health personnel and the adoption and amendment of laws and policies. The intention of these reparations was to eradicate racism and sexism in the healthcare sector and society as a whole. However, implementation of these reparations remains a challenge.

The reparation requiring training and education programs for medical personnel in topics ranging from reproductive rights to gender equity was essential in order to alter current discriminatory practices in the healthcare sector. While the María Chávez Agreement included training of health personnel in its reparation provisions, questions remain regarding implementation, such as: who will receive the training, who will develop the curriculum, and how is the training sustainable? Nevertheless, the training provision required that training programs be developed in cooperation with civil society organizations that specialize in the themes identified for training. Concerning this aspect of the reparation, the petitioners indicated in follow-up reports requested by the Inter-American Commission from 2006 through 2013, “that they [did] not have information as to whether the State [was] actually carrying out these trainings”, which implies that the State had not in fact engaged with civil society in order to fulfil this requirement of the Agreement.⁷⁹ The State’s follow-up communication also identified training programs on gender-based violence, training of police personnel and the establishment of a diploma program on violence. Despite these seemingly positive efforts on behalf of the State to fulfil the requirements of section b(2),

⁷⁸ Interview with Carla Villareal Lopez, Women’s Division of the Ombudsman Office, Lima, Peru 2 July 2014 (Ref Code: Ip, P, G).

⁷⁹ Annual Report 2011 (OEA/Ser.L/V/II. Doc. 69, Inter-American Commission on Human Rights 2011) Case 12.191, Report No. 71/03.

the petitioners remained sceptical of the State's actual efforts to comply with this reparation, particularly because civil society had not been involved in the development or delivery of the training programs.

For the Inter-American Commission's part, in its Annual Report mechanism it did not request that the State prove it had implemented these programs. The State was not required to share information about the design of the curriculum, how participants were enrolled in training, and to what extent the participation was mandatory or voluntary. The enrolment numbers shared by the State were extremely low; that only five nurses were trained in reproductive health care as a direct result of this Agreement is disheartening in itself. Furthermore, the Inter-American Commission made no comment on the seeming lack of collaboration between the State and civil society in developing training programs, although this activity was clearly part of the provision. It is also important to note the type of training agreed upon in the Agreement, training for health personnel. This reparation was intended to directly address the racist and sexist nature of the healthcare sector in Peru. This reparation fulfilled the criteria of a gender-based reparation, despite the Inter-American Commission's failure to effectively monitor its compliance.

The María Chávez Agreement included within its reparations provisions, the adoption and amendment of laws and policies on reproductive health and family planning, with the goal of eliminating discrimination and respecting women's autonomy. While the Agreement included this provision, it is challenging to draw direct connections between advancements in national legislation and those reparation measures agreed upon before supranational human rights bodies; this is especially the situation in Peru. Monica Arango Olaya explained "that has really been the fight with Peru [...] they won't do anything under the name and implementation of those cases because they don't acknowledge those decisions as binding".⁸⁰ Regardless of whether or not Peru's legislative advancements in terms of women's rights can be specifically attributed to cases such as María Chávez, or cases before the CEDAW Committee or the Human Rights Committee, the standards established by these cases are undoubtedly entrenched in civil society's push for legislative reform.⁸¹ For instance, there is a clear connection between the María Chávez case and the National Health Strategy for Sexual and Reproductive Health because the State references the Strategy in its

⁸⁰ Interview with Monica Arango Olaya, Regional Director for Latin America and the Caribbean, Center for Reproductive Rights, Skype 11 July 2014 (Ref Code: Sk, N, S).

⁸¹ Interview with Beatriz Ramirez, Advisor, Ministry of Women, Republic of Peru, Lima, Peru 22 June 2014 (Ref Code: Ip, P, S).

compliance report to the Inter-American Commission.⁸² This reparation also fulfilled the criteria of a gender-based reparation.

The analysis conducted in this chapter of the reparation measures agreed upon in the María Chávez Friendly Settlement Agreement reveals the challenges inherent to developing reparations that effectively consider the compound effects of social and gender-based harm. Not only do these reparations fail to incorporate a community-based approach to repairing harm, but they also fall short in addressing the multiple intersecting levels of structural discrimination, inequality and violence that women in Peru experience. It is clear that a failure to fulfil the pre-conditions for engendering reparations corresponds to the reasons why the reparations agreed upon in the Friendly Settlement Agreement fell short in encompassing a more nuanced approach to protecting women's rights and preventing future violations. However, while these reparations may be limited(ing), they are some of the most progressive reparations issued in a women's reproductive rights case, as will become evident in the analysis of the two other cases selected for this research.

4.4 Conclusions and Lessons Learned

The María Chávez Agreement serves as a stepping-stone for future reproductive rights cases emerging from the Inter-American System of Human Rights. While the Agreement could have adopted a more effective approach to examining intersectional discrimination and repairing social and gender-based harm, it remains a victory in the fight for women's reproductive rights in Latin America. The sentiment amongst actors engaged with this case and involved with women's rights activism in Peru is that the María Chávez case has reached its potential in terms of advancing women's rights in the country.⁸³ Civil society continues to demand that the State comply with justice reparations, but there is no activity around the State's failure to comply with guarantees of non-repetition. This concluding section derives from the above analysis of the María Chávez Friendly Settlement Agreement two strategies for more effectively repairing gender-based harm in women's reproductive rights cases. First, the concepts of *vida digna* and *proyecto de vida* are examined below as they can be employed in forced sterilization cases to uncover the harmful impact of gender-based discrimination. Second, the analysis of María Chávez Friendly Settlement Agreement elucidated the benefits of applying a multi-faceted rights

⁸² National Health Strategy for Sexual and Reproductive Health, Republic of Peru (2011) [Estrategia Nacional de Salud Sexual y Reproductiva, Ministerio de Sanidad, Política Social e Igualdad].

⁸³ Interview with Beatriz Ramirez, Advisor, Ministry of Women, Republic of Peru, Lima, Peru 22 June 2014 (Ref Code: Ip, P, S) and interview with Jeannette Llaja, Former Director of DEMUS (Office for the Defense of Women's Rights) [Estudio para la Defensa de los Derechos de la Mujer], Lima, Peru 3 July 2014 (Ref Code: Ip, P, S).

approach in claiming and interpreting women's reproductive rights violations. These strategies contribute to the "gender reparations tradition" framework introduced above in section 3.3 and are examined in more detail in section 7.1.

While the María Chávez Friendly Settlement Agreement was progressive in its attempts to address and redress structural gender-based discrimination and harm, it missed an opportunity to examine the intersectional nature of discrimination across determinants such as class, race/ethnicity, geographic location and gender. As noted by Alexandra Sandoval, it is the duty of the petitioner to assert violations of *proyecto de vida* and *vida digna* in cases before the Inter-American Commission and Court. If asserted and applied in the María Chávez case, these concepts would have provided a foundation on which to develop a comprehensive examination of the relationship between intersectional discrimination and violations of reproductive rights.

As noted above in section 3.2.2, alternative rights concepts, such as *vida digna* and *proyecto de vida*, provide space for litigators and the Inter-American System Commission and Court to examine the structural context in which a reproductive rights violation occurred. For instance, application of the *proyecto de vida* concept in the María Chávez case would have elucidated the direct connection between damage to María Chávez's life project and the life she led. María Chávez was poor, a mother to five children and lived in the rural highlands of Peru, and it was because of the life she led that she was targeted for sterilization; she was sterilized because of what she "decided to *be* and to *do* in life".⁸⁴ Not only was María Chávez discriminated against based on her gender, but her life project was interrupted because she was a member of a group of people who were deemed to be "less than" in Peruvian society. If the petitioners had included within the María Chávez Friendly Settlement Agreement proceedings an examination of damage to *proyecto de vida*, there would have been the opportunity to unpack the grounds on which María Chávez and thousands of other women and men had been targeted for sterilization. Similarly, the concept of *vida digna*, if claimed by the petitioners as a component of the violation of the right to life in the Friendly Settlement Agreement, would have required the petitioners and the State to engage in discussions about the factors that contributed to violations of María Chávez's right to dignity. As mentioned above, the concept of *vida digna* is useful as a conduit to insert gender into discussions of rights violations because it requires that actors

⁸⁴ Fernández Sassarego, "Deslinde conceptual entre dano a la persona, dano al proyecto de vida y dano moral," *Foro Jurídico*, Year 1, No. 2, Lima, July 2003.

engaged in women's reproductive rights litigation examine what dignity means in the context of reproductive health. In the situation of forced sterilization, *vida digna* can be interpreted to mean that States have an obligation to respect women's reproductive autonomy, right to be free from discrimination, and also the right to informed consent practices in healthcare services. Applying alternative rights concepts in forced sterilization cases creates an opportunity to delve deeper into the causes of reproductive rights violations and also creates the grounds on which to examine rights violations from various angles; the right to lead a dignified life requires states to protect and fulfil rights such as the right to life, health and freedom from discrimination, for example.

Second, the María Chávez Friendly Settlement Agreement affirmed the benefits of employing a multi-faceted approach in women's reproductive rights litigation. The petitioners in this case claimed violations of María Chávez's reproductive rights across a number of human rights conventions, and successfully located forced sterilization within the violence against women framework by claiming violations of the Convention of Belém do Pará. In that the Inter-American Commission accepted the petitioner's claim of Article 7 of the Convention of Belém do Pará, the reparations agreed upon by the petitioners and the State of Peru addressed the gendered nature of human rights violations.

Applying a multi-faceted approach to rights in the María Chávez case allowed for the development of reparations that addressed and incorporated both the positive/negative and public/private characteristics of human rights. The reparations required the State undertake positive actions such as development of training programs and legislative reform, as well as refrain from interfering in women's lives, a negative obligation. By examining the forced sterilization of María Chávez through the lens of civil and political, economic, social and cultural *and* women's rights violations, the petitioners involved in this Agreement developed an articulation of women's reproductive rights that recognised the interrelated nature of human rights. While there was an opportunity to develop a more comprehensive analysis of the intersectional nature of discrimination in this case, the reparations issued in this case are the most advanced to date in a women's reproductive rights case before the Inter-American System of Human Rights. I argue that the basis for the inclusion of gender-based reparations in the María Chávez Friendly Settlement Agreement is directly linked to the petitioner's efforts to litigate this case using a multi-faceted approach to rights that incorporates the Convention of Belém do Pará.

The following chapter builds upon the lessons learned through the analysis of the *María Mamerita Mestanza Chávez v. Peru* case by examining the *Paulina Jacinto Ramirez v. Mexico*.⁸⁵ This is the only abortion rights cases to have been processed through the Inter-American System. However, because the State and the petitioner entered into Friendly Settlement Agreement proceedings before the case was formally admitted by the Inter-American Commission on Human Rights, this case does not provide insight into the Inter-American Commission's perspective on the right to abortion. Rather, the Inter-American Commission's approach to monitoring the reparations in this case reveals some of the challenges actors such as civil society organizations face when working within the Inter-American System to address contentious rights issues.

⁸⁵ *Paulina del Carmen Jacinto Ramirez v. Mexico* [2007] Inter-American Commission on Human Rights, Petition 161–02, Report 21/07 Friendly Settlement Agreement ¶IV (14)2.

CHAPTER FIVE

PAULINA DEL CARMEN RAMÍREZ JACINTO V. MEXICO

*Paulina del Carmen Ramírez Jacinto v. Mexico*¹ was an abortion rights case that resulted in a Friendly Settlement Agreement before the Inter-American Commission on Human Rights. This case was selected for analysis because it highlights a number of issues related to the right to abortion and also represents the challenges many Latin American women and girls face when attempting to access their legal abortion rights. The Paulina Ramírez case provided the Inter-American Commission with its first opportunity to monitor compliance with reparations agreed upon in an abortion rights case. This case is also significant because it provides lessons and strategies for actors involved in abortion rights cases currently awaiting admission before the Inter-American Commission on Human Rights.²

Much like the analysis conducted in the previous chapter, the critique of the *Paulina del Carmen Ramírez Jacinto v. Mexico* case conducted here has the intention of identifying effective strategies for developing gender-based reparations in women's reproductive rights cases. The first section introduces the right to abortion in Mexico and the *Paulina Ramírez v. Mexico* case, as well as determines fulfilment of the Holistic Gender Approach to Reparations preconditions.³ The second section of this chapter places the right to abortion in context, and begins with a discussion on the concepts of “good” and “bad” abortion to argue that a woman's “positioning” determines her level of access to reproductive health rights. In order to develop the context in which the Paulina Ramírez case emerged, the second section also provides a general overview of Mexican women's experiences with violence and discrimination and examines the role of medical power and abortion stigma as they harm women. The third section examines the reparation measures agreed upon by the petitioner and the Mexican State in order to determine their transformative potential, and concludes

¹ *Paulina del Carmen Jacinto Ramírez v. Mexico* [2007] Inter-American Commission on Human Rights, Petition 161–02, Report 21/07 Friendly Settlement Agreement. Mexico ratified the American Convention on Human Rights in 1981 and the Convention of Belém do Pará in 1998. It accepted the Inter-American Court of Human Rights' jurisdiction in 1981.

² Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S). There are currently two abortion rights cases pending admission before the Inter-American Commission: *AN v. Costa Rica* and *Aurora v. Costa Rica*. These cases deal with women being denied their legal right to abortion due to severe malformation of the fetus, which is one of the criteria under which abortion is legal in Costa Rica. See, ‘Unspeakable Cruelty’ Center for Reproductive Rights (2013) <www.reproductiverights.org/feature/unspeakable-cruelty-in-costa-rica> accessed 20 July 2014, and ‘A.N. v. Costa Rica: Access to Legal Abortion Services [Acceso a servicios de aborto legal]’ Center for Reproductive Rights (2011) <www.reproductiverights.org/document/an-v-costa-rica-acceso-a-servicios-de-aborto-legal>.

³ Ruth Rubio-Marín and Clara Sandoval, ‘Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the ‘Cotton Field’ Judgment’ (2011) 33:4 Human Rights Quarterly 1062-1091, *supra* section 3.3 (n 180).

that a failure to fulfil the gender-based reparation pre-conditions outlined in the Holistic Gender Approach to Reparations negatively impacted the design of gender-reparations in the Paulina Ramírez Friendly Settlement Agreement. The concluding section examines the role of civil society in developing and monitoring reparations, and argues that the task of engendering reparations is one in which the role of civil society could be significantly expanded. The conclusion also discusses the potential for applying alternative rights concepts in this case.

5.1 The Case: Paulina del Carmen Ramírez Jacinto v. Mexico

The reproductive right to abortion is perhaps the most contentious of those rights encapsulated within the reproductive health rights framework. While there are an undeterminable number of reasons why a woman may elect to seek an abortion, most Latin American states place severe restrictions on women's ability to access their abortion rights.⁴ Looking at Mexico specifically, the total number of authorized and unauthorized abortions carried out each year ranges from 850,000 to over 1 million.⁵ A significant number of these abortions are carried out under unsafe conditions, and as a result, complications arising from unsafe abortions account for an estimated 7% of maternal mortality in Mexico.⁶ Before introducing and critiquing the Paulina Ramírez Friendly Settlement Agreement, it is necessary to provide a brief overview of the political structure in which the right to abortion exists across Mexico.

Mexico is comprised of 31 states and one federal district, Mexico City. The right to abortion is regulated at the state-level as an aspect of the "general health" of the country,⁷ where depending on geographical location and socio-economic status, a Mexican woman is restricted in her right to access abortion at varying degrees. Although abortion is regulated by each federal state, the Federal Penal Code defines abortion as a crime.⁸ However, in April 2007, the Mexico City Legislative Assembly amended the Mexico City Penal Code in order to legalize first-trimester elective abortion (up to 12 weeks), which allows any

⁴ 'World Abortion Laws' Center for Reproductive Rights < <http://worldabortionlaws.com/>>.

⁵ Martha Silva and others, 'Physicians' Agreement with and Willingness to Provide Abortion Services in the Case of Pregnancy from Rape in Mexico' (2009) 79:1 Contraception 56.

⁶ Ibid.

⁷ Constitution of Mexico (1917) Article 73: "The Congress has the power: To enact laws in regard to nationality, the legal status of foreigners, citizenship, naturalization, colonization, emigration and immigration, and the *general health* of the country."

⁸ 'Omission and Indifference: Reproductive Rights in Mexico', Information Group on Reproductive Choice – GIRE [Grupo de Información en Reproducción Elegida] (2013) 18.

woman, regardless of her state of residence, to access abortion services in Mexico City.⁹ Although Mexico City successfully decriminalized first-trimester abortion, the response/backlash from 18 Mexican states was to amend their constitutions in order to protect life from conception.¹⁰ These reforms created a further divide in how women exercise their reproductive rights to abortion.

Each of the 31 Mexican states' penal codes contain different restrictions and criteria for abortion, all of which are restrictive and/or ineffective in their implementation. Regardless of the state, abortion of a pregnancy resulting from rape is legal across the whole of Mexico, and has been since 1931.¹¹ However, as revealed by GIRE, "women's effective access to legal indications for abortion in Mexican states is precarious or null, representing a major gap between the law and the effective exercise of this right."¹² It is outside the parameters of this chapter to examine each Mexican state's penal code in regards to abortion, but in order to fully examine the Paulina Ramírez case it is necessary to discuss the Penal (Criminal) Code in Baja California in more detail; Paulina Ramírez lived in Baja when she was raped and subsequently became pregnant.

Article 136 of the Baja California Criminal Code states the following:

Abortion shall not be punishable: I. [...], II. [...], When the pregnancy is caused by rape [...], provided that the abortion is carried out within the first ninety days of gestation and the incident was duly reported, in which case it may be performed on the sole condition that the incident is verified by the Public Prosecution Service.¹³

Article 136 requires that women who have been raped follow a strict set of guidelines in order to be "eligible" for an abortion. Under these guidelines there is a significant burden placed on women victims (survivors) of rape to follow a procedure that is not only time-restrictive, but that also assumes public officials, such as public prosecutors, police and medical personnel, are capable of being unbiased in their approach to determining if (i) a woman has been raped, and (ii) that a pregnancy is a result of rape.¹⁴ Unfortunately, the

⁹ Mexican Federal District Penal Code (2002) section 5, Article 144: "Abortion in the termination of pregnancy after the twelfth week of gestation." While the inclusion of legal abortion in Mexico City's Penal Code is cause for celebration, in the aftermath of the reform many Mexican States responded by amending their penal codes to emphasize the right to life of a fetus from the moment of conception.

¹⁰ Jennifer Paine, Regina Tamés Noriega, and Alma Luz Beltrán y Puga, 'Using Litigation to Defend Women Prosecuted for Abortion in Mexico: Challenging State Laws and the Implications of Recent Court Judgments' (2014) 22:44 Reproductive Health Matters 61, and David Agren, 'Abortion Banned by Controversial Mexican State Governor' Guardian (28 July 2016) <www.theguardian.com/world/2016/jul/29/abortion-banned-controversial-mexican-state-governor-veracruz?CMP=tw_t_gu> accessed 29 July 2016.

¹¹ 'Omission and Indifference' (n 8) 17.

¹² Ibid.

¹³ *Paulina del Carmen Ramírez Jacinto v. Mexico* [2007] (n 1) ¶10.

¹⁴ 'Mexico: The Second Assault - Obstructing Access to Legal Abortion after Rape in Mexico', (Human Rights Watch 2006) <www.hrw.org/sites/default/files/reports/mexico0306webwcover.pdf> accessed 3 May 2015.

procedure established in the Penal Code does not reflect or take into consideration the reasons why a woman may not choose to report her rape to the Public Prosecutor's office. For example, according to Madigan and Gamble, women may fear reprisal from their rapist if they report the rape, they may feel a deep sense of shame or that they were at fault for the rape, or they may not trust the public officials or the legal process.¹⁵ As will be shown in the analysis of the Paulina Ramírez Friendly Settlement Agreement, even if a woman or girl manages to fulfil all of the criteria outlined above, there is no guarantee that she will then be allowed to access her right to abortion.

Paulina del Carmen Ramírez Jacinto (hereinafter referred to as Paulina or Paulina Ramírez) was a thirteen-year old girl from Mexicali in the State of Baja California, Mexico.¹⁶ On July 31st 1999 an intruder entered Paulina's family home and raped her; a month later Paulina went to see a doctor and discovered she was pregnant.¹⁷ The doctor explained that Paulina had a right to an abortion, and that she would be willing to perform the abortion once Paulina received legal authorization.¹⁸ On September 3rd 1999, Paulina's mother requested authorization for an abortion from the State Prosecutor, which was subsequently approved with the requirement that the abortion be performed at Mexicali General Hospital.¹⁹ On October 1st 1999 Paulina Ramírez went to Mexicali General Hospital to undergo an abortion procedure but was discharged from the hospital after waiting for the procedure for seven days. During that time the hospital staff made a "series of excuses (as to) why the procedure could not be performed" and informed Paulina that her case was being submitted to a review committee.²⁰ Paulina was readmitted to the hospital on October 13th, and the next day two women claiming to be from the government's Comprehensive Family Development Agency (Desarrollo Integral para la Familia, DIF) visited Paulina without her mother being present and tried to persuade her not to carry out the abortion. The women returned and continued their tactics, such as showing violent videos of abortion procedures, in the presence of Paulina's mother.²¹ On the evening of October 14th, moments before the abortion procedure was to be carried out, Paulina's mother was told that if the abortion was performed her daughter could die or become sterile. Upon hearing this news Paulina's

¹⁵ Lee Madigan and Nancy Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* (Jossey-Bass Inc. 1991).

¹⁶ *Paulina del Carmen Ramírez Jacinto v. Mexico* (n 1). Note: The FSA puts Paulina Ramírez's age at the time of her rape at 14, but other documents put her at 13 years of age.

¹⁷ Rocío Taracena, 'Paulina: In the Name of the Law' (GIRE – Information Group on Reproductive Choice [Grupo de Información en Reproducción Elegida] 2000) 9.

¹⁸ *Ibid* 9.

¹⁹ *Ibid*.

²⁰ *Paulina del Carmen Ramírez Jacinto v. Mexico* (n 1) ¶11.

²¹ *Ibid* ¶12.

mother refused the procedure. On October 15th, Paulina Ramírez and her mother appeared before the State prosecutor to declare they did *not* want to interrupt the pregnancy. Later, in a document drawn up by the State Prosecutor, Paulina's mother stated,

They forced me to waive my daughter's right to abortion. They did not care that they gave me manipulative, partial or fatalistic information violating my right and my daughter's right to information, and to her right to choose to reproduce in a free, responsible and informed manner. They did not take into consideration the consequences that my daughter and her baby will suffer for the rest of their lives.²²

On October 25th 1999, representatives from Alaíde Foppa, a Mexican NGO focused on the promotion of minority rights, filed a complaint with the State's Law Office for Human Rights and Citizen Protection, where they argued that the group, "Pro-Life," had violated Paulina's right to confidentiality and the right to respect for her decision.²³ Paulina's mother provided a declaration which indicated that the "State Attorney General [...] told Paulina that she should have her baby, that there were people who would adopt it and insisted that she waive her right to an abortion and personally took her to see a priest, who also tried to convince her not have an abortion".²⁴ In March 2000 the Director of the State's Law Office for Human Rights and Citizen Protection issued recommendations in favour of Paulina, however when the recommendations were sent for approval to the office of the Governor of Baja California they were rejected. On April 13th 2000, Paulina Ramírez gave birth to a baby she named Isaac. In an interview with the Mexicali newspaper, *Mayor*, Paulina asserted,

Those who say I gave up my right to an abortion lie. We accepted it only when they scared us, when they told me I might die of a hemorrhage. Everyone, including the bishop, is lying because I never stopped trying. We only accepted it when the Director of the Hospital told me that if I suffered a hemorrhage I might die. This is why my mother and I agreed not to have the abortion. I didn't think it up myself, I didn't give up just by myself. It was the fear that they put in us that made me give up.²⁵

Almost two years later, on March 8th 2002, Alaíde Foppa filed a petition with the Inter-American Commission on Human Rights on behalf of Paulina Ramírez.²⁶ The victim's representatives (Alaíde Foppa and GIRE) alleged that the State of Mexico was responsible for violating the following human rights: the state obligation to protect rights (Article 1), the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right

²² Taracena, 'Paulina: In the Name of the Law' (n 17) 12.

²³ The complaint, number PDH/MXLI/1219/99/2, was registered under "Violation of the Right of Minors to Protection of Their Integrity, Torture, Insufficient Protection of Persons, Undue Exercise of Public Responsibilities, Violation of the Right to Privacy and Illegal Disclosure of Information."

²⁴ Taracena, 'Paulina: In the Name of the Law' (n 17) 16.

²⁵ Ibid 19.

²⁶ *Paulina del Carmen Ramírez Jacinto v. Mexico* (n 1) ¶1.

to a fair trial (Article 8), the right to privacy (Article 11), the right to freedom of conscience and religion (Article 12), rights of the child (Article 19), and the right to judicial protection (Article 25) under the American Convention on Human Rights;²⁷ the right to respect for freedom and security, including decision-making (Article 4), the right to due diligence (Article 7), and the duty for the state to pay attention to the circumstance of vulnerability in which women live (Article 9) enshrined within the Convention of Belém do Pará;²⁸ the right to health within both the Protocol of San Salvador²⁹ and the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);³⁰ the right to liberty and security of person (Article 9), the right to privacy and family life (Article 17) and the rights of the child (Article 24) under the International Covenant on Civil and Political Rights;³¹ the rights to life, liberty and security (Article 3) and right to privacy and family life (Article 12) within the Universal Declaration of Human Rights;³² and the right to be free from physical or mental violence (Article 19), the right to be free from torture or other cruel, inhumane or degrading treatment or punishment (Article 37), and the duty on the state to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victims (Article 39) under the Convention on the Rights of the Child.³³ The human rights violations delineated in the petition submitted to the Inter-American Commission were not only extensive, but they also highlighted the interrelated and multi-faceted nature of human rights, and specifically noted the indivisible relationship between violations of the reproductive right to abortion and the violence against women framework. However, unlike the María Chávez case proceedings before the Inter-American Commission, the Paulina Ramírez case was not formally admitted by the Commission. This was because the State of Mexico and the petitioners agreed to begin Friendly Settlement proceedings prior to the Commission's decision to admit the case.³⁴ The State of Mexico and the petitioners reached a Friendly Settlement Agreement on March 8th 2006, nearly seven years after Paulina Ramírez was raped and six years after she gave birth to her son.

The State's decision to enter into an Agreement indicated that not only was the Mexican

²⁷ American Convention on Human Rights (ACHR) OASTS 36 (1969).

²⁸ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará') OASTS (1994). The petition also includes Articles 1 and 2, which define violence against women in both the public and private spheres.

²⁹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ('Protocol of San Salvador'), OASTS 69 (1988) Article 10.

³⁰ International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), GA Res. 34/180 (1979) Article 12.

³¹ International Covenant on Civil and Political Rights (ICCPR) GA Res. 2200A (XXI) 1966.

³² Universal Declaration of Human Rights (UDHR) GA Res. 217(III)A (1948)

³³ Convention on the Rights of the Child (CRC), GA Res. 44/25 (1989).

³⁴ *Paulina del Carmen Ramírez Jacinto v. Mexico* (n 1) ¶4-6.

government willing to repair the harm caused to Paulina Ramírez, but that the State recognized *all* of the rights violations outlined in the petition submitted by the victim's representatives. When reflecting on this case, María Alejandra Cardenas asserted that when the Paulina case was filed the petitioners did not think the Commission would admit the case.³⁵ One can speculate that the State's willingness to engage in the Friendly Settlement Agreement proceedings was in part influenced by the impact the Paulina case had throughout the nation and the world. The international media followed the case closely, and framed the situation as a failure on the part of the State of Mexico to protect the rights of an innocent young girl who needed an abortion after suffering a violent infringement of her rights.³⁶

Fulfilling the Preconditions

The above introduction to the Paulina Ramírez Friendly Settlement Agreement establishes a foundation to examine the terms of the Agreement through Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations. This section critically examines the Paulina Ramírez Agreement in order to determine the extent to which it fulfilled the gender-based reparations preconditions delineated within the Holistic Gender Approach to Reparations. As a reminder, the preconditions established by Rubio-Marín and Sandoval are, *establish the relevant facts, properly identify the alleged victims and violations and properly identify the harm and those harmed*.

First, while the *facts established* in the Paulina Ramírez Friendly Settlement Agreement emphasised the discrimination and violence Paulina experienced while attempting to obtain an abortion, the Agreement did not adequately explore the relationship dynamics between medical "power" and women's rights. For example, the facts established in the Agreement in no way examined the problematic nature of conscientious objection and the effects of patriarchal harm (paternalistic control) in the medical sector. In that the Agreement failed to include direct recognition of the flaws within the medical system, there was no firm basis on which to design a reparation that would effectively address gender-based harm and discrimination in the healthcare sector. As a result, the Paulina Ramírez Friendly Settlement Agreement only partially fulfilled the first gender-based reparation pre-condition: *establish the relevant facts*.

³⁵ Interview with María Alejandra Cardenas, Regional Legal Director, Women's Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

³⁶ Rocio Taracena, 'Social Actors and Discourse on Abortion in the Mexican Press: The Paulina Case' (2002) 10:19 Reproductive Health Matters 104-105.

Second, analysis of the Paulina Ramirez Friendly Settlement Agreement reveals that it was not successful in fulfilling both elements of the second pre-condition: *identify the alleged violations and victims*. The Agreement correctly identified the victims as both Paulina and her son,³⁷ and also noted that Paulina Ramírez’s case was “indicative of those of a countless number of girls and women forced into motherhood after being raped and after being prevented by state authorities from exercising a legitimate right enshrined in Mexican law”.³⁸ By recognizing the emblematic nature of this case, the petitioners successfully established grounds on which to articulate the effect of social harm and to potentially design collective gender-based reparations that would address structural rights violations. However, because the Inter-American Commission did not formally admit this case, and subsequently did not determine which conventions and articles had been violated, it is not clear which rights provision were violated in this case. In that the petitioner’s complaint recognizes violations of all of the above listed conventions,³⁹ and the State agreed to the Settlement, it is plausible to conclude that the State accepted responsibility for violating provisions of each of the conventions. While there are certainly benefits to interpreting this Agreement as encompassing provisions from each of the above conventions, such as applying a multi-faceted approach to standard setting on abortion rights, there are also disadvantages. In that the violations are ambiguous, it is unclear how the development of reparations in this Agreement could be designed to address specific human rights violations. Additionally, in terms of legal norm advancement, there is no room for an interpretation of how certain rights are applied to the abortion rights debate. This is a significant drawback because without a legal framework in which to ground the right to abortion, it is difficult for future abortion rights cases to refer to precedent and develop further argumentation.

Finally, in regards to the third precondition, *identify the harm and those harmed*, the Paulina Ramírez Friendly Settlement Agreement did not address the invasive nature of harm as it relates to unwanted pregnancy; “harm of invasion”. It also neglected to examine gendered harm as it was perpetuated by the medical community on behalf of the State, which is a theme explored in the forthcoming section 5.2.2. Paulina Ramírez experienced harm before, during, and well after her attempts to access a legal abortion. As an adolescent girl who was raped by an intruder in her home, she was harmed by a society that promotes a culture of violence against women and girls, also referred to as social and patriarchal

³⁷ Paulina’s son was established as a beneficiary in this case through a determination in the reparations that he should receive health and education benefits. *Paulina del Carmen Ramírez Jacinto v. Mexico* (n 1) ¶16.

³⁸ *Paulina del Carmen Ramírez Jacinto v. Mexico* (n 1) ¶14.

³⁹ Human rights provisions claimed in the Paulina Ramírez Friendly Settlement Agreement (n 27-33).

harm.⁴⁰ That is, as West suggested, “women sustain harm by virtue of the knowledge that these violent [...] acts go unregulated by the state”.⁴¹ In that the State of Mexico failed to prevent patriarchal harm, it violated the obligation to provide due diligence, as protected by Article 7(b) of the Convention of Belém do Pará. Not only was Paulina Ramírez raped, but she experienced an attack on her self-identity and her *proyecto de vida*. In that Paulina was *forced* to carry her pregnancy to term and give birth, her future as a poor young woman was determined for her by the medical community and the State. In other words, Paulina experienced a “cessation of her selfhood” in that she was forced to undergo the experience and resulting harm of unwanted pregnancy.⁴²

Upon examination of the Paulina Ramírez Friendly Settlement Agreement in regards to fulfilment of the gender-based reparations pre-conditions identified by Rubio-Marin and Sandoval, it is evident that the Agreement did not sufficiently *establish the relevant facts*, *identify the alleged violations*, and *identify the harm* experienced by Paulina Ramírez. Because these pre-conditions were not adequately met, the reparations agreed upon in the Settlement are not expansive in their capacity to address and tackle pre-existing patriarchal norms that originally caused violations of Paulina’s reproductive rights. The following section addresses the missing components of the Holistic Gender Approach to Reparations preconditions in the Paulina Ramírez Friendly Settlement Agreement by exploring the right to abortion in context. The following section focuses particularly on gendered violence and discrimination and the influence of medical power and abortion stigma on women’s enjoyment of their reproductive health rights.

5.2 Abortion in Context: The “Good” and the “Bad”

In her book, *Decoding Abortion Rhetoric*, Celeste Michelle Condit introduced the idea of “goodness” when explaining the rhetorical analysis of abortion. While Condit focused specifically on the American context, her thoughts about how rhetoric perpetuates and reinforces the concept of the “good” woman who is forced to acquire an abortion are relevant in the Latin American context as well. She explained that “good” abortions require “a broad public to feel sorry for the agent and angry with the forces that bring her suffering, the character depicted must be ‘good,’ or at least, unable to control her destiny”.⁴³ The

⁴⁰ Maureen Cain and Adrian Howe, ‘Introduction: Women, Crime and Social Harm, Towards a Criminology for the Global Age’ in Maureen Cain and Adrian Howe (eds), *Women, Crime and Social Harm, Towards a Criminology for the Global Age* (Hart Publishing 2008) 3, *supra* section 2.2.3 (n 77).

⁴¹ Robin West, *Caring for Justice* (New York University Press 1997) 137, *supra* section 2.2.2 (n 70).

⁴² Ibid 109, *supra* section 2.2.2 (n 66).

⁴³ Celeste M. Condit, *Decoding Abortion Rhetoric: Communicating Social Change* (University of Illinois Press 1994) 25.

rhetoric designed to advocate for “good” abortions depicts images such as the married woman or young girl who has been raped and subsequently impregnated. Condit asserted that it is possible for the public to support a woman in her attempt to access an abortion if she can show that she is “making a choice not *against* motherhood but against situations which themselves violated the idealized image of motherhood”.⁴⁴ Using this concept of “good” abortion reasoning, it is possible to deduce the converse, that there are “bad” reasons for women to decide to have an abortion. A woman who is not interested in motherhood, who may be more concerned with her career than raising children, or who would like to postpone motherhood, and therefore chooses, rather than is forced, to have an abortion, would be making that choice based on “bad” reasons. The binary of “good” and “bad” abortion also reflects the different “positioning” of women who attempt to access their rights to abortion.⁴⁵ For instance, a woman whose “position” is that of poor and uneducated will perhaps face greater challenges in demanding her right to abortion because her “position” is “bad”, and so any claim she makes for an abortion, regardless of the context, is also “bad”. Conversely, women in good “positions”, such as wealthy and “white” women, may experience less challenges when demanding their abortion rights.

Activist and litigation strategies around the right to abortion in Latin America have focused primarily on the right to abortion as it exists within three criteria, which are (i) the woman’s life or health (physical and/or mental) is at risk; (ii) the fetus is not viable outside of the womb; and (iii) the pregnancy is a result of rape and/or incest. When reflecting on Condit’s concept of “good” reasons for a woman to have an abortion, each of the legal abortion criteria fit within Condit’s perception of “good” characteristics. The woman who is allowed an abortion under the above criteria is not overtly challenging her gender role as a mother or demanding to exercise her decision-making autonomy. Instead, the perception is that she is not in control of her ability to become a mother, and therefore deserves protection because of the risk to her potential motherhood. These criteria are designed based on “good” reasons to have an abortion, and in turn, activists and litigators focus on passing and implementing laws which guarantee at least these conditions under which a woman can obtain an abortion. However, in working within these confines, it becomes difficult to focus on the right to abortion as it is connected to the rights to integrity, equality, and freedom from discrimination. The division between “good” and “bad” plays out in many facets of society, and sometimes in spaces where such a rift is not expected, such as in feminist activism and

⁴⁴ Ibid 26.

⁴⁵ Yuval-Davis N, 'What is 'Transversal Politics?'' (1999) 12 Soundings 97, *supra* section 1.1.1 (n 37).

litigation strategy. Ultimately, the separation of the right to abortion into two separate factions, good versus bad, creates a space where women and women's rights activists and litigators become perhaps too complacent with operating within the confines of "good" abortion reasoning. That is, they use the tools afforded to them, but don't necessarily push hard enough to disrupt the paradigm of good versus bad women.⁴⁶ The following sections provide a general overview of the sociocultural context in which Mexican women live, and also examine the role of the medical community in perpetuating abortion stigma and reinforcing concepts of "good" and "bad" abortion.

5.2.1 Gender, Violence and Discrimination in Mexico

For more than a decade the international human rights community, especially the United Nations and the Inter-American System of Human Rights, have closely scrutinized violence and discrimination against women in Mexico.⁴⁷ An examination of the sociocultural context in which women live in Mexico has been explored within thematic and country reports, public hearings with members of civil society and women's rights cases, which all reveal a culture of violence, inequality and discrimination that serves to subordinate women, and ultimately deny them their rights. In a report entitled "Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women", former United Nations Special Rapporteur on Violence Against Women, Yakin Erturk, explained,

High levels of violence against women in Mexico are both consequence and symptom of widespread gender discrimination and inequality. Additional layers of discrimination on the basis of national origin, ethnicity or socio-economic status coupled with a lack of equal access to State protection intersect with gender discrimination and make some groups of women - namely migrant, poor and indigenous women - particularly vulnerable to violence.⁴⁸

In this report, Erturk attributed violence and discrimination against women to Mexico's machista culture, which "relegates women to a subordinate role in their family and community".⁴⁹ Significantly, Erturk also noted that attempts to empower women to overcome structural discrimination, especially economic discrimination, may in fact

⁴⁶ Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *Sister Outsider: Essays and Speeches* (Crossing Press 2007) 110–114.

⁴⁷ For example, United Nations: Asma Jahangir, Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Report of her visit to Mexico (U.N. Doc. E/CN.4/2000/3/Add.3 25 November 1999); CEDAW: under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico (U.N. Doc. CEDAW/C/2005/OP.8/Mexico 27 January 2005). Organization of American States: Marta Altolaguirre, Special Rapporteur on the Rights of Women, Inter American Commission on Human Rights, The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination (OEA/Ser.L/V/II.117.Doc.44 7 March 2003).

⁴⁸ Yakin Erturk, 'Report of the Special Rapporteur on Violence Against Women, Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women: Mission to Mexico' (E/CN.4/2006/61/Add.4., 2006) 2.

⁴⁹ Ibid 5.

challenge the very basis of machismo, which in turn reveals men's inability to fulfil their machista role as the family provider. She explained this can lead to,

Family abandonment, unstable relationships or alcoholism, which in turn may increase the risk of violence. Even cases of rape and murder, may be understood as desperate attempts to uphold discriminatory norms that are outpaced by changing socio-economic conditions and the advance of human rights.⁵⁰

The threat of disruption to the machista social paradigm contributes to the violence women experience in their lives; the act of violence becomes an exertion of power, where men can regain their macho⁵¹ role in society.

In contrast to the male concept of machista, is the gendered equivalent of marianismo. According to Jezzini et al., marianismo is a "latina gender role phenomenon based on traditional cultural norms, and the values of Catholicism. (It) encompass(es) the concepts of self-sacrifice, passivity, caretaking, duty, honor, sexual morality, and the Latina's role as a mother".⁵² As a social construct, marianismo is intrinsically related to the martyrdom of the Virgin Mary.⁵³ Essentially, the social constructs of machismo and marianismo serve to divide gender into two separate classes, placing women in a subordinate position to men.⁵⁴ As a result of machismo and marianismo, women in Mexico face a great deal of pressure to become mothers. Marta Lamas explained that feminist efforts in Mexico to work within and simultaneously against the confines of machismo/marianismo resulted in an articulation of reproductive rights through the discourse of "voluntary motherhood".⁵⁵ The concept of "voluntary motherhood" challenges the social construct of marianismo by prioritising women's choice in regards to reproduction over their reproductive capacity and ascribed gender roles. Despite efforts to confront the machismo/marianismo paradigm, the power dynamics that place women in a subordinate position to men are perpetuated and reinforced through the medical profession. The following section examines the asymmetrical power relationship between women and physicians, as they are the "moral watchdogs" or gatekeepers in women's attempts to access their reproductive right to abortion.

⁵⁰ Ibid 6.

⁵¹ It is important to note that the term *macho* or *machismo*, has various meanings which are dependent on "contrasting urban and rural experiences, generational differences, class stratification, stages within individual's lives..." Additionally, the term *mandilon*, makes reference to the man who is "dominated by women." See, Matthew C. Guttman, *The Meanings of Macho: Being a Man in Mexico City* (University of California Press 2006) Chapter 9, "Machismo."

⁵² A. T. Jezzini, C. E., Guzmán, & L. Grayshield, 'Examining the gender role concept of *marianismo* and its relation to acculturation in Mexican-American college women,' March 2008.

⁵³ Rosa Maria Gil and Carmen Inoa Vasquez, *The Maria Paradox: How Latinas can Merge Old World Traditions with New World Self-Esteem* (Perigee Books 1997): *The Ten Commandments of Marianismo*.

⁵⁴ Patricia M. Hernandez, 'The Myth of Machismo: An Everyday Reality for Latin American Women' (2003) 15 St. Thomas Law Review 860.

⁵⁵ Marta Lamas, 'The Feminist Movement and the Development of Political Discourse on Voluntary Motherhood in Mexico' (1997) 5:10 Reproductive Health Matters 58.

5.2.2 Medical Power and Abortion Stigma

Medical power and abortion stigma are concepts very much related to the previous discussions on “good” and “bad” abortion reasoning and gender-based violence in Mexico. The stigma around abortion is related to machista norms that create an environment of gender-based discrimination, and the abortion procedure itself challenges men’s identities as powerful decision-makers who control the activities of family life. Abortion stigma is rooted in society’s concerns about what a woman *should be* and *shouldn’t be*. Kumar, et al. theorized that abortion stigma is based on three central concepts of femininity and the “essential nature” of women: motherhood, female sexuality as having the sole purpose of reproduction, and a nurturing instinct.⁵⁶ Abortion stigma is perpetuated and reinforced in various spheres, including the medical community. A medical doctor in Mexico, depending on their geographical location, is tasked with deciding if a woman’s life or health (including mental health) is *enough* at risk, if a woman has been raped, or if a fetus is viable, in order to determine if she is eligible for an abortion procedure. The responsibility afforded to members of the medical community in this undertaking is significant; it is loaded with power, and often leaves women in extremely vulnerable positions.

Foucault described medical doctors as “priests of the body”, meaning that the authority of the doctor in her/his ability to confront suffering and deny death is akin to the spiritual power typically afforded to priests.⁵⁷ This power intensifies with regard to female patients, especially those seeking an abortion, because a woman’s relationship with her doctor is ripe with gendered assumptions based on her role as a (potential) mother. Kathy Davis explained this power dynamic by using the concept of “paternalistic control”, in which the doctor is given the power to decide in the woman’s best interest, and the woman seeking an abortion is someone in need of being controlled.⁵⁸ When describing what paternalistic control might look like in application, Sally Sheldon provided the following examples: “Paternalistic control may involve influencing a woman to continue (or equally to terminate) a pregnancy. Equally, it may be failing to tell her about some of the alternatives open to her”.⁵⁹ While exercising “paternalistic control” is most obviously done by members of the medical community, it can be understood as a form of state intervention that “actively imposes the control of the woman as the doctor’s responsibility”.⁶⁰ As Sheldon explained, the state

⁵⁶ Anuradha Kumar, Leila Hessini, and Ellen M. H. Mitchell, 'Conceptualising Abortion Stigma' (2009) 11:6 Culture, Health & Sexuality 628.

⁵⁷ Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Routledge 2003) 32.

⁵⁸ Kathy Davis *Power Under the Microscope* (Foris 1989).

⁵⁹ Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto Press 1997) 66.

⁶⁰ *Ibid* 74.

cannot be seen as neutral in matters of reproductive health. However, the state can in effect distance itself from any negative connotations related to its attempts to regulate women's reproductive rights by relying on medical doctors to appear neutral while also "support(ing) the existing status quo and the power imbalance which characterizes it".⁶¹ Paternalistic control can be understood as a form of patriarchal harm, especially when applied to medical power and abortion rights, because power exerted by medical doctors to block abortion access in effect reinforces patriarchal norms that reify motherhood as an essential aspect of women's lives. In addition, paternalistic control contributes to the impact of "invasive harm" by forcing women to relinquish their selfhood in order to become involuntarily nurturant.⁶²

In that medical professionals play the role of gatekeepers in controlling women's access to safe abortion services, it is beneficial to explore doctors' attitudes and opinions in regards to abortion. In a study conducted with medical trainees in Mexico City, which was designed to determine trainee opinions on abortion access and restrictions, researchers found that only 15% of respondents were in agreement with abortion on demand, but that 91% of the trainees agreed with providing abortion services in situations of severe fetal malformation, where the fetus would die outside of the womb.⁶³ Interestingly, only 64% of the interview respondents were aware that abortion is legal in Mexico City.⁶⁴ Lastly, 15% percent of the interviewed trainees responded that there should be no circumstance in which a woman can have a legal abortion.⁶⁵ This last statistic is alarming, and raises the issue of conscientious objection.

In the medical community, the practice of conscientious objection is defined as "the refusal to participate in an activity that an individual considers incompatible with his/her religious, moral, philosophical, or ethical beliefs".⁶⁶ The regulation of conscientious objection varies in different geographical contexts, but in terms of rights, the debate is one between doctors' rights to freedom of conscience and religion versus women's rights to liberty, dignity, health and freedom from discrimination. Ana Cristina González Veléz, co-founder of Global Doctors for Choice and an expert on women's sexual and reproductive rights,

⁶¹ Ibid.

⁶² West (n 41), *supra* section 2.2.2 (n 64).

⁶³ Deyanira González de León Aguirre and Deborah L. Billings, 'Attitudes Towards Abortion among Medical Trainees in Mexico City Public Hospitals' (2001) 9:2 Gender & Development 90.

⁶⁴ Ibid 91.

⁶⁵ Ibid.

⁶⁶ Wendy Chavkin, Liddy Leitman, and Kate Polin, 'Conscientious Objection and Refusal to Provide Reproductive Healthcare: A White Paper Examining Prevalence, Health Consequences, and Policy Responses' (Global Doctors for Choice 2013) <<http://globaldoctorsforchoice.org/resources/white-papers/>>.

explained, “conscientious objection is an individual practice - it cannot be institutional, it cannot be an entire hospital who is an objector, it cannot be an entire region”.⁶⁷ She referred to the original intention of conscientious objection, which originated in military terms, and explained,

Conscientious objection is a very precious term when it comes to military service [...] and we have transported that debate to the health services without thinking that it's not the same thing. Because, when you refuse, when you express conscientious objection for the military service, that is an *individual action* where you are saying that *you* don't want to be part of that. But when you use conscientious objection at the health services, your decision is having consequences for the provision of the service for *others*.⁶⁸

The power exerted by medical doctors is not explicit, but rather, it is inferred. Both a doctor's medical knowledge and the technology afforded to her/him create a completely asymmetrical power dynamic. Women who engage in this dynamic are made to feel that they don't know enough about the technical processes to make informed decisions about their bodies. In that doctors create and in many ways, are complicit in perpetuating an unsafe and uncomfortable space for women who seek abortions, they play an instrumental role in denying women their rights to reproductive autonomy. The result is a situation where women's lives are dictated by doctors' individual beliefs and prejudices.

It is undeniable that conscientious objection practices, abortion stigma and “paternalistic control” are harmful to women. The combination of these harmful practices contributed to the context in which the Paulina Ramírez case originated. The objective of this section has been to examine the context and factors that contribute to the harm women (and girls) in Mexico experience when attempting to access their reproductive rights to abortion. The role of religion underpins all of the above discussion - *machismo* is rooted in religion, as is abortion stigma, conscientious objection, and the criminalization of abortion. The following section examines the transformative potential of the reparations agreed upon in this case. Once again, Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations is employed as the analytical framework in order to determine missed opportunities in how the Paulina Ramírez Agreement repaired gender-based harm in a women's reproductive rights case.

⁶⁷ Interview Ana Cristina González Velez, Sexual and Reproductive Health Expert, Skype 5 August 2014 (Ref Code: Sk, N, S, M).

⁶⁸ Ibid.

5.3 Repairing Gendered Harm: Determining Transformative Potential

The Inter-American Commission's role during the Paulina Ramirez Friendly Settlement procedure was limited to approval of the Agreement upon its completion, and compliance monitoring of the reparations delineated in the Agreement. The Agreement included numerous individual compensatory reparations for Paulina Ramirez and her son,⁶⁹ as well as non-repetition reparation measures in the form of legislative proposals; public acknowledgment of the violations; training courses to be conducted by the petitioners; a review of literature and materials to detect shortcomings in the way reproductive health information is delivered; and dissemination of a circular to the health sector in order to strengthen the commitment toward ending violations of the right of women to legal termination of pregnancies. The individual monetary reparations issued to Paulina and her son recognized the economic harm Paulina experienced by compensating for immediate legal costs as well as future living expenses. Design of monetary reparations was successful in this case because of the partial fulfilment of the second and third pre-conditions, *identify the alleged victims* and *identify those harmed by the violations*. It is important to note that the State did not comply with all of the monetary reparations. According to Vanessa Coria and Rebeca Ramos, who are both human rights attorneys working on women's reproductive rights in Mexico, the payment to Paulina's son was never fulfilled.⁷⁰ The Agreement did not include monetary compensation intended to address the social and gendered elements of Paulina's human rights violations, which may be attributed to inadequate fulfilment of the *identify the alleged violations* and *identify the harm* preconditions.

The reparations selected for in-depth analysis in this case are those that have the potential to subvert sociocultural norms which caused and contributed to the denial of women's rights to safe and legal abortions in Mexico, also referred to as "guarantees of non-repetition". Unlike the analysis of the María Chávez Friendly Settlement Agreement, which examined each of the agreed upon reparations, this analysis reviews only non-repetition measures. Such an approach is necessary in order to adequately determine advancements and

⁶⁹ The individual reparations developed to compensate Paulina Ramirez are: (1) monetary compensation for medical expenses and legal damages (60,000 pesos); (2) monetary assistance for school supply expenses (114,000 pesos); (3) monetary support for housing expenses (220,000 pesos); (4) Paulina and her son to be provided with health services; (5) psychological care for Paulina and her son; (6) school supplies and monetary support for Paulina's son (5,290 pesos/year) and free attendance at a public university; (7) a computer and a printer; (8) monetary compensation to help Paulina set up a business (20,000 pesos); and (9) a one-off payment for moral damages (265,000 pesos). The Agreement also contained a symbolic reparation in the form of a public acknowledgment for violations of Paulina's rights in Baja California newspapers.

⁷⁰ Interview with Vanessa Coria, Advocacy and Program Manager, Women's Global Network for Reproductive Rights (WGNRR), formerly with Center for Justice and International Law (CEJIL), Mexico City, Mexico 18 July 2014 (Ref Code: Ip, M, N, S) and Rebeca Ramos, Legal Researcher, Information Group on Reproductive Choice (GIRE) [Grupo de Información en Reproducción Elegida], Mexico City, Mexico 17 July 2014 (Ref Code: Ip, M, N).

inadequacies in the design of non-repetition measures, and to determine the transformative potential of the reparations agreed upon in this case.

5.3.1 Legislative Reform in Baja California

The State of Mexico's agreement to undertake legislative reform as part of the remedies in this case signalled to the federal states across Mexico that Agreements made at the federal level under the supervision of the Inter-American Commission have direct implications throughout all levels of government. The reparation stated, "The Government of Baja California shall 'submit to and promote before the State Congress the legislative proposals submitted by the petitioners and agreed on with the state government'".⁷¹ During the proceedings of the Friendly Settlement Agreement the state of Baja California amended Article 79 of the Regulations of the Organic Law of the Office of the Attorney General for Justice of the State of Baja California, which included the following statement,

As a result of the friendly settlement agreement, signed by the Mexican State and Paulina del Carmen Ramírez Jacinto, and in accordance with the terms of Article 48 of the American Convention [...] the Government of the State of Baja California [...] assumed the commitment of enacting an amendment to Article 79, [...] whereby women who are victims of the crime of rape are to receive information on the legal termination of pregnancy, in order to provide such persons as so request with mechanisms to enable them to decide freely and on an informed basis regarding the possibility of performing that procedure through mechanisms that ensure free access to the facilities of the health sector in the shortest delay possible.⁷²

The amendment included a detailed procedural outline for Public Prosecution Service agents,⁷³ but did not mention or elaborate upon the role and responsibilities of medical professionals in guaranteeing access to legal abortions. The acknowledgment of the Paulina Ramírez case in the amendment was significant because it directly recognized the legitimacy of the Inter-American Commission and the Friendly Settlement Agreement procedure. However, failure to recognize the role of the medical community in enacting women's rights to legal abortions in Mexico effectively rendered the amendment useless.

As was discussed previously, the state entrusts medical doctors with preserving and "support(ing) the existing status quo and the power imbalance which characterizes it".⁷⁴ Simply altering Article 79 to include the duties of the Public Prosecution Office in enforcing legal abortion did not address the harm inherent to medical control and abortion stigma. In fact, in Paulina Ramírez's case, it was the Public Prosecution Office that had

⁷¹ *Paulina del Carmen Ramírez Jacinto v. Mexico* [2007] (n 1) Annex 4.

⁷² Ibid. The amendment was publicized in *The Gazette* newspaper on 13 October 2006.

⁷³ Ibid.

⁷⁴ Sheldon (n 59) 74.

initially determined Paulina Ramírez's eligibility to undergo the abortion procedure.⁷⁵ The amendment to Article 79 upholds the relationship between the state and the medical community, in turn reinforcing existing norms that place decision-making power in the hands of doctors, and out of the hands of women. Additionally, the amendment did not examine the medical community's procedures for exercising conscientious objection. The amendment could have provided a guideline to require public hospitals to employ doctors who do not have objections to performing legal abortions. This reparation failed to refer to the various components of gendered harm experienced by Paulina Ramírez, especially in a sociocultural context in which doctors exercise their power over women patients. The reparation in no way recognized the patriarchal and invasive harm Paulina suffered as an adolescent girl who was manipulated by her doctors, members of religious factions and the State Attorney General. The shortcomings detected in this reparation directly correlate with incomplete fulfilment of the first and third gender reparation pre-conditions, *establishing the facts* and *identifying the harm*. Ultimately, legislative reform in Baja California failed as a transformative gender reparation because it did not sufficiently address the multiple forms of harm that women and girls experience when they are denied abortion services by members of the medical community.

5.3.2 Training

In the Paulina Ramírez Agreement, the State and the petitioner included the following training reparation: "The local government agrees to schedule the training courses to be conducted by the petitioners, as agreed on at the technical analysis meeting [...]".⁷⁶ The contents, quality, subject matter and audience were not identified in this reparation. In addition, upon review of the Inter-American Commission's follow-up reports on the Paulina Ramírez Settlement Agreement, it is clear that this reparation was agreed upon without a comprehensive implementation plan in mind. Again, a failure to examine the role of medical doctors as gatekeepers in women's health services correlated with the development of a weak reparation. In the follow-up reports issued by the Inter-American Commission, the State of Mexico explained that it was willing to "take initiatives with the appropriate offices to hold training courses, after receiving a proposal from the petitioners".⁷⁷ In response, the petitioners (GIRE) explained that they were not in communication with the

⁷⁵ Taracena, 'Paulina: In the Name of the Law' (n 17) 9.

⁷⁶ Researcher was not able to access notes from the content of the technical meeting held in October 2006. Interview respondents explained that the material is confidential and cannot be shared publically.

⁷⁷ Annual Report 2008 (OEA/Ser.L/V/II.134 Doc. 5, rev. 1, Inter-American Commission on Human Rights 25 February 2009) ¶606; Annual Report 2009 (OEA/Ser.L/V/II. Doc. 5, corr. 1, Inter-American Commission on Human Rights 30 December 2009) 670, and Annual Report 2010 (OEA/Ser.L/V/II. Doc. 5, rev. 1, Inter-American Commission on Human Rights 7 March 2011) ¶79.

State justice or health authorities because “the environment [...] was hardly propitious for carrying out trainings by the Executive”.⁷⁸ Despite initial complications, in 2011 the State and petitioners were able to collaborate in order to “develop a cycle of courses for health personnel during the first quarter of 2012”.⁷⁹ Implementation of this reparation is an important accomplishment, especially as it illustrates the State’s willingness to fulfil its obligations. However, both the petitioner and Commission fell short in their roles to design and monitor the training reparation. In the follow-up reports submitted to the Inter-American Commission there was no mention of the course content or the number of health and legal professionals who attended the courses.⁸⁰

The inclusion of training as a reparation is undeniably a necessary and important element of an effective reparations program. However, it is clear in the Paulina Ramírez Friendly Settlement Agreement that the content of this reparation was of limited importance to the Commission and civil society organizations (petitioners) during the follow-up sessions for this case. The shortcomings in this reparation represent each of the missing elements of the gender-based reparation pre-conditions: incomplete facts about the role of doctors in women’s health services resulted in a training reparation that did not outline the training content and the intended audience (*establish the facts*); ambiguous and unexamined rights violations concealed the relationship between denial of abortion services and women’s autonomy and health rights (*identify the alleged violations*); and a failure to comprehensively acknowledge and examine social and gendered harm in relation to abortion limited the analysis of the massive negative impact abortion restrictions have on women and girls (*identify the harm*). This reparation was ineffective in its transformative potential capacity.

5.3.3 National Efforts to Reform Legislation and Disseminate Information

The final non-repetition reparation agreed upon in the Paulina Ramírez Friendly Settlement Agreement contained provisions that had the potential to address the sociocultural factors that hindered implementation of women’s reproductive rights. Interviews with participants involved in the negotiation process of this Agreement identified the following provisions as essential to the transformative potential of the Paulina Ramírez case:

⁷⁸ Annual Report 2008 (n 77) ¶609.

⁷⁹ Annual Report 2011 (OEA/Ser.L/V/II. Doc. 69, Inter-American Commission on Human Rights 2011) Case 12.191, Report No. 71/03 ¶81 and ¶83.

⁸⁰ Annual Reports 2008-2010 (n 77).

Twelve: The Mexican State, through the Health Secretariat, agrees to:

(1) Conduct a national survey, involving state representation, to assess the enforcement of Official Mexican Standard NOM 190-SSA1-1999 regarding medical assistance in cases of domestic violence, and *to measure progress with the implementation of the National Program for the Prevention and Attention of Domestic, Sexual, and Violence against Women*.

(3) Draw up and deliver a circular from the federal Health Secretariat to the state health services and other sector agencies, in order to *strengthen their commitment toward ending violations of the right of women to the legal termination of a pregnancy*.⁸¹

This section analyses these reparation provisions with particular focus on the National Program for the Prevention and Attention of Domestic, Sexual, and Violence against Women (National Program), and the development and distribution of a circular to state health agencies and sectors. The second part of reparation 12(1) is of significant importance because the operational word “measure” implies that the State must report back to the Inter-American Commission and petitioner with evidence and information about how elements of the National Program have been implemented.

The National Program for the Prevention and Attention of Domestic, Sexual, and Violence against Women included the implementation of Official Mexican Standard NOM-046-SSA2-2005, “Criteria for the Protection and Care of Domestic and Sexual Violence Against Women for the National Health System”.⁸² Of the numerous provisions delineated within this legislation, section 6.8.1 affirmed a duty “to investigate conduct in public institutions, specifically in regards to domestic or sexual violence, to better enable the quantification and identification of its causes and underlying social, cultural and economic, associated factors, as well as their impact on individual and collective health”.⁸³ This reparation did indeed address the gendered aspects of healthcare services, and had as its objective the goal of identifying the underlying causes of violence against women in public institutions. However, information gathered from interviews revealed that this reparation was not necessarily designed with the Paulina Ramírez case in mind. Rather, the National Program was added to the Agreement in order to draw attention to the Program, which was an action

⁸¹ *Paulina del Carmen Ramírez Jacinto v. Mexico* [2007] (n 1) [emphasis added]. The other elements of this reparation are: (2) Update the aforesaid Official Standard, to expand its goals and scope and to expressly include sexual violence occurring outside the family context. To this end, the petitioners shall be given the preliminary draft of the amendments to the Standard, so they can present whatever comments they deem relevant [...] (4) Through the National Center for Gender Equity and Reproductive Health conduct a review of books, indexed scientific articles, postgraduate theses, and documented governmental and civil society reports dealing with abortion in Mexico in order to prepare an analysis of the information that exists and detect shortcomings in that information.

⁸² Mexican Official Standard NOM-046-SSA2-2005, Sexual and Domestic Violence Against Women, Criteria for Prevention and Attention, Federal Government, Secretary of Health [Norma Oficial Mexicana NOM 046-SSA2-2005, Violencia Familiar, Sexual y Contra Las Mujeres. Criterios para La Prevención y Atención, Gobierno Federal, Secretaría de Salud] 16 April 2009.

⁸³ Ibid.

suggested by Patricia Uribe Zuniga, former General Director of the National Centre for Gender and Reproductive Health.

Patricia Uribe Zuniga explained, “they (the Agreement and the National Program) both helped each other [...] it was the moment where both things came together and they helped each other along”.⁸⁴ This is interesting because although the gender reparation pre-conditions were not fulfilled in their entirety in this case, individual actors within the State played a significant role behind-the-scenes to include a provision within the Friendly Settlement Agreement that focused on the impact of violence against women in public institutions.⁸⁵ While this is a welcome advancement, it is in no way indicative of the State’s overall intention in regards to implementing this reparation. In fact, inclusion of this provision in the Agreement was highly disputed by conservative members of the Mexican government. Uribe Zuniga explained, “the authorities tried to discredit the Agreement because I was the one who participated, and supposedly I didn’t have the faculty to take part in these agreements [...] But, I had a signed document from the Secretary authorizing me to do it. Initially the conservatives didn’t know that and they tried discrediting the Agreement”.⁸⁶

Section 5.3 of the National Program stated that health institutions must “foster coordination with other institutions, agencies and organizations in the public, social and private sectors in order to incorporate individuals involved with domestic or sexual violence, so that a collaboration of their respective powers provides women with the best possible care”.⁸⁷ Unfortunately, civil society organizations did not actively monitor implementation of this reparation, and ultimately allowed for it to be ignored in subsequent follow-up meetings. In fact, petitioner comments on the National Program are only mentioned in follow-up reports on two occasions.⁸⁸ While this reparation was gender-based in design, its transformative potential was limited by the political climate in Mexico, and also by the petitioner and Commission’s decision to prioritize monetary compensation reparations over those reparations designed to address structural rights violations. The petitioner’s inactivity in monitoring implementation of this reparation, particularly the “measuring” component of

⁸⁴ Interview with Patricia Uribe Zuniga, Former General Director of the National Center for Gender and Reproductive Health, CENSIDA (Mexico City, Mexico 31 July 2014).

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Mexican Official Standard NOM-046-SSA2-2005 (n 82) part 5.3.

⁸⁸ Annual Report 2009 ¶681 and Annual Report 2010 ¶92 (n 77).

the reparation, influenced the Inter-American Commission's decision to determine that the State had reached compliance with this reparation.

The final reparation, which was the development and distribution of a circular to the “state health services and other sector agencies, in order to *strengthen their commitment toward ending violations of the right of women to the legal termination of a pregnancy*”,⁸⁹ directly addressed the need to inform and educate medical professionals, and essentially spoke to the heart of what this case was about. For its part, the State claimed that the circular had been “published in the entry halls of each of the areas, hospitals, and health centers of the Secretariat of Health in the state of Baja California”,⁹⁰ but it did not intend to publish the circular in the newspaper or on its website. María Alejandra Cardenas, who represented Paulina in the follow-up meetings before the Inter-American Commission, explained the significance of the State's failure to fully comply with this reparation:

The State had to publish it (the circular). They didn't make any effort to actually make sure that health care practitioners were going to know that it (the law that permits abortions when a woman has been raped) exists, and they actually have to follow it. So, we go back to the same thing, because what's the root of the problem there? That the healthcare practitioners didn't even know that the law existed, and that therefore there was an obligation to provide abortion in those cases. So, if you remain in the same legal vacuum, where they don't even know, and they don't know that there are rules that they have to follow in those cases when a woman has been raped and asks for an abortion [...] you go back to the same situation. [...] And then, what happens so many years later, there's still the same inseguridad juridical (legal uncertainty) because they didn't clarify what the law was, and they didn't make sure that the practitioners *knew* what the law was. So, what's the point? I think that was the only concrete point that would have made a change in the lives of many women.⁹¹

The distribution of the circular was the *only* reparation included in the Friendly Settlement Agreement that had the capacity to realistically transform the medical community's approach to providing abortion services. Despite the incomplete account of the facts in this case, this reparation was designed to educate doctors, to provide them with the knowledge that abortion procedures were legal in certain situations, and to impart on them a duty as medical professionals to provide women with abortion services. In that this reparation did indeed address women's rights violations within the health sector, it fulfilled the requirements of a gender-based reparation. However, there is a connection that can be made between the Mexican State's refusal to comprehensively implement this reparation and the

⁸⁹ *Paulina del Carmen Ramírez Jacinto v. Mexico* [2007] (n 1) ¶16. [emphasis added]

⁹⁰ Annual Report 2008 (n 77) ¶607.

⁹¹ Interview with María Alejandra Cardenas, Regional Legal Director, Women's Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

partial fulfilment of the *establish the facts* precondition; the Friendly Settlement Agreement did not recognize the role of the medical community within the facts of the case.

The analysis of reparations agreed upon in the Paulina Ramírez Friendly Settlement Agreement reveals challenges inherent to repairing harm in women's reproductive rights cases. Not only was the transformative potential of these reparations limited by the highly contentious nature of the right to abortion, but a failure to fulfil the Holistic Gender Approach to Reparations preconditions resulted in reparations that in no way subverted structural inequality or gender-based discrimination. However, the transformative potential of a case may not always be found *within* the case itself, rather it may be in how the existence of the case triggers a response from society. Rosario Taracena explained, "Paulina's case attracted a great deal of public attention and generated many articles in the media in 2000, giving abortion a "human face" in Mexico".⁹² The widespread outcry over Paulina's case was directly related to the way the media portrayed Paulina and her experience; she was a "'raped child' (who) was not allowed to abort".⁹³ In that the media framed Paulina's abortion within the confines of "good" abortion reasoning, Paulina's name became representative of all women at risk of not being allowed an abortion when pregnant as a result of rape. Taracena claimed that one of the greatest breakthroughs of the Paulina Ramírez case was that it modified the traditional view of abortion. Abortion was no longer morally reprehensible; it had shifted in discourse to be a necessary health service in extreme conditions. According to Taracena, "For the first time, a young girl's experience, instead of abortion in general, was the subject of discussion, and it has had a great influence on abortion laws and policy in Mexico".⁹⁴ Rebecca Ramos, a legal researcher with GIRE, echoed this sentiment:

The Friendly Settlement Agreement between Mexico and the victim has been an instrument for accessing abortion resulting from rape. This Agreement helped to create an official norm that guarantees women survivors of rape access to health services, including emergency contraception and legal interruption of pregnancy. This is now mandatory in all States [...] the Friendly Settlement Agreement helped to build pressure in creating this norm.⁹⁵

The Inter-American Commission closed the Paulina Ramírez case in 2012 after concluding that the State had complied with all of the reparations agreed upon in the Settlement. However, because the reparations agreed upon in the Paulina Ramírez Friendly Settlement Agreement did not address the underlying patriarchal culture prevalent within the medical

⁹² Taracena, 'Social Actors' (n 36) 104.

⁹³ Ibid 105.

⁹⁴ Ibid 104.

⁹⁵ Interview with Rebeca Ramos, Legal Researcher, Information Group on Reproductive Choice (GIRE) [Grupo de Información en Reproducción Elegida], Mexico City, Mexico 17 July 2014 (Ref Code: Ip, M, N).

community in relation to abortion access, it failed to challenge the patriarchal and paternalistic harm women and girls face when attempting to enjoy their reproductive health rights. The final section reflects on the analysis of the Paulina Ramírez Friendly Settlement Agreement in order to suggest strategies for improving and strengthening gender-based reparation design in Friendly Settlement Agreements.

5.4 Conclusions and Lessons Learned

The Paulina Ramírez Friendly Settlement Agreement was both a highlight and setback in the fulfilment of women's reproductive rights in the Inter-American region. The Agreement itself was extensive in its attempt to repair harm through monetary compensation and it was ground-breaking as a standard for State-compliance in regards to fulfilling the terms of a Friendly Settlement Agreement. It was also the first and only abortion rights case to be monitored by the Inter-American Commission, and the publicity surrounding the Agreement provided great impetus for sociocultural and legal shifts in discourse around abortion reasoning. However, the Agreement's reparations fell short in their potential to be transformative. This section reflects on the above critical analysis of the Paulina Ramírez Friendly Settlement Agreement in order to determine how application of alternative rights concepts may benefit litigation on abortion rights. This section also suggests that the role of civil society be expanded in the design of reparations, and relies on information obtained from interviews to argue that the Inter-American System needs to provide more support to civil society in order to strengthen the relationship between women's rights organizations and the Inter-American Commission and Court. Once again, the strategies derived from analysis of this case study contribute to the "gender reparations tradition" suggested in this thesis.

Alternative rights concepts such as *proyecto de vida* and *vida digna* have great value when applied to abortion rights cases. As suggested in the María Chávez case study analysis, alternative rights concepts, when employed in reproductive rights litigation, have the potential to uncover gender-based discrimination and violations of the rights to autonomy and integrity. When applied to the right to access legal abortion services, these concepts are also beneficial in that they provide a lens to connect gendered harm to restrictions on abortion. For example, the concept of *vida digna* requires that individuals not be prevented from accessing "the conditions that *guarantee a dignified existence*".⁹⁶ In that Paulina was denied access to her legal right to abortion in the situation that she was raped, the State

⁹⁶ Alexandra Sandoval, 'Vida Digna' (Third Latin American Congress on Reproductive Rights, Mexico, October 2013) 2, *supra* section 3.2.2 (n 132-133).

effectively prevented Paulina from accessing the conditions necessary to live a life of dignity. She was forced to become a mother, which was a violation of her reproductive autonomy, and as a result she became, as West described, an “involuntary nurturant”.⁹⁷

In addition, Paulina experienced a violation of her *proyecto de vida* in that her life path was changed without her consent. In order to apply the *proyecto de vida* concept in the Paulina Ramírez Friendly Settlement proceedings, the petitioners would have had to simultaneously rely on and reject essentialist and stereotypical portrayals of women as mothers. This means that, in the context of abortion, violations of *proyecto de vida* must be interpreted in such a way that disruption to a woman’s life plan is a result of the state’s refusal to respect women’s reproductive autonomy and choice, and not just because women are forced to become mothers when their reproductive rights are violated. The concepts of *proyecto de vida* and *vida digna* have great potential for application in abortion rights litigation because they force discussions about the gendered nature of harm when women are forced to forego their own rights in order to conform to sociocultural norms that subordinate and marginalize women.

Second, the above examination of the Paulina Ramírez Friendly Settlement Agreement uncovered the limited role of civil society in the design and development of reparations before the Inter-American System of Human Rights. In order to advance a “gender reparations tradition” within the Inter-American System, the relationship between the Inter-American Commission and civil society should be expanded in order to allow for the design of reparations that effectively take into account the gendered nature of harm in reproductive rights cases. The role of civil society before the Inter-American System is multi-dimensional: civil society organizations litigate human rights cases and monitor compliance with reparations. They can also be the driving force behind implementation of a case at the national level. As Tara Melish argued, “the challenge of implementation is always the same: to go beyond rhetorical or cosmetic changes in state policy to change the political culture that allows human rights abuses to recur [...] requires coordinated, intersecting (civil society) campaigns at domestic, regional, and international levels”.⁹⁸ While the Inter-Commission relies on civil society to develop cases and monitor reparations, the potential for civil society to engage in the design of reparations is non-existent.

⁹⁷ West, *Caring for Justice* (n 41) 105, *supra* section 2.2.2 (n 64).

⁹⁸ Tara Melish 'Rethinking the less as More Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas' (2006) 39 New York University Journal of International Law and Politics 342.

Vanessa Coria, a human rights lawyer who represented the petitioners in the follow-up stages of the Paulina Ramírez Agreement, raised two primary concerns with how the Inter-American Commission and civil society organizations engage with strategic litigation before the Inter-American System. First, she explained that civil society organizations are sometimes “too focused on organization objectives. [A petitioner’s] goal is to have a decision and not necessarily to build and strengthen civil society and a movement to follow up the decision”.⁹⁹ Second, Coria suggested the reason why petitioners fall short in monitoring implementation is in part due to limited resources, but can also be attributed to limited support coming from the Inter-American Commission. When discussing the Paulina Ramírez follow-up meetings Coria explained that the Commissioners were not supportive of her request for the State to complete the final payment to Paulina’s son. She said it seemed like “they were almost saying ‘why are you asking for more? Come on, this is the most complete agreement we have ever seen [...] Come on girls’”.¹⁰⁰ Coria’s criticisms of both the petitioners and the Inter-American Commission ring true when applied to the Paulina Ramírez Agreement’s reparation design and implementation. The petitioners in this case were civil society organizations that had their own objectives in the development of the Agreement, where it is obvious that reparation design and subsequent implementation and monitoring were not significant priorities in terms of resource allocation. The Inter-American Commission’s seemingly annoyed response to the petitioner’s request for complete fulfilment of monetary reparations highlighted the difficulties petitioners face in pushing the Inter-American Commission to demand State compliance. Coria concluded, “sometimes we lose the battle because we just don’t have the support from the Commission to do the follow-up. That’s the situation of the Paulina case”.¹⁰¹

The examination of the Paulina Ramírez case conducted in this chapter reveals a number of avenues through which civil society could be engaged in the process of reparation design in a more substantive and effective way. First, in order to strengthen the role of civil society in the design of reparations, the Friendly Settlement Agreement procedures should be amended to include a call for reparation suggestions from national and local level women’s organizations. Such an activity would have great utility in terms of compliance-monitoring because the primary supervisors of compliance and implementation *are* civil society organizations. Therefore, civil society organizations tasked with monitoring state

⁹⁹ Interview with Vanessa Coria, Advocacy and Program Manager, Women’s Global Network for Reproductive Rights (WGNRR), formerly with Center for Justice and International Law (CEJIL), Mexico City, Mexico 18 July 2014 (Ref Code: Ip, M, N, S).

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

compliance with reparations should also have a role in designing reparations. This exercise would likely allow for an increase in reparations that take into account the gendered and social aspects of harm because feminist civil society organizations have a level of expertise on women's rights issues that cannot be matched by the Inter-American Commission. Second, the Inter-American Commission must provide greater levels of support to civil society and petitioners in monitoring compliance with reparations. In doing so, the Commission must treat all reparations equally, and should consider civil society's expertise in determining the extent to which reparations has been implemented. This is especially important in regards to guarantees of non-repetition, where, as this case analysis revealed, the Inter-American Commission has not focused on effective and sustainable implementation of training and education programmes.

In that the past two cases reviewed reparations and women's rights violations that emerged from the Inter-American Commission on Human Rights, the analyses have been limited to critiques of reparations as they were developed by states and petitioners; the Inter-American Commission's role has been limited to that of administrator and compliance monitor. This means that in the above cases, the best way to determine the Inter-American Commission's approach to reproductive rights has been to examine its efforts to monitor compliance with the reparations agreed upon in the Friendly Settlements. In using the Holistic Gender Approach to Reparations to analyse and critique the reparations in *María Mamerita Mestanza Chávez v. Peru* and *Paulina del Carmen Ramírez v. Mexico*, it is apparent that the Inter-American Commission does not have a "gender reparations tradition".¹⁰² This is especially obvious in the *Paulina Ramírez* case, where the Inter-American Commission closed the case despite the State's failure to fully implement all of the reparation measures. The following case, *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, provides the only real insight thus far into the Inter-American Court of Human Rights' approach to women's reproductive rights violations. This case reveals advancements and misunderstandings in the Inter-American Court's analysis of gendered harm and gender stereotyping as applied to women's reproductive rights.

¹⁰² Interview with María Alejandra Cardenas, Regional Legal Director, Women's Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

CHAPTER SIX

ARTAVIA MURILLO ET AL. V. COSTA RICA

At the crux of women's reproductive rights is the fundamental understanding that reproductive rights empower women to make choices about if and when they would like to form a family. As the previous cases have illustrated, these rights include the right not to be coercively sterilized and the right to access safe and legal abortion services. In this chapter, the *Artavia Murillo et al. v. Costa Rica* case,¹ which deals with the reproductive right to access in vitro fertilization, adds a further dimension to the examination of gender-based harm and reproductive rights in the Inter-American System of Human Rights. In this case, the Inter-American Court of Human Rights determined that the Costa Rican Constitutional Court's ban on in vitro fertilization (IVF) violated the reproductive rights of women and men. While the reproductive right to access medically assisted reproduction techniques (ARTs) such as IVF² may seem removed from the more pressing reproductive rights issues of our time, the problem of infertility is directly related to norms and social values which dictate that women and couples should aim to create smaller families later in life. Family planning and population control programs emphasise voluntary motherhood, which is supported by technologies such as birth control, emergency contraception, and sterilization. As women and couples choose to postpone parenthood, they are faced with potential fertility problems, where, according to Rebecca Cook et al., it becomes "imperative that they should be helped to achieve a pregnancy when they so decide, in the more limited time they have available".³

The fulfilment of women's reproductive rights requires that states refrain from interfering with women's decision-making regarding their reproductive lives; negative state obligations. However, alongside the negative obligation to refrain from interfering in the lives of women, there exists an implication that states must only interfere in the lives of women in order to provide public provisions that allow women to enact those decisions they make about their bodies and lives; these are positive duties.⁴ The reproductive right to in

¹ *Artavia Murillo et al. ('In vitro fertilization') v. Costa Rica* [2012] Inter-American Court of Human Rights (ser. C) No. 257 Preliminary Objections, Merits, Reparations and Costs.

² For discussion on in vitro fertilization procedure, see Fernando Zegers-Hochschild, Bernard M. Dickens and Sandra Dughman-Manzur, 'Human Rights to In Vitro Fertilization' (2013) 123:1 International Journal of Gynecology and Obstetrics 86-89.

³ Rebecca Cook, Bernard Dickens, and Mahmoud Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford University Press 2010) 306.

⁴ Karen Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights' (1993) 25 Studies in Transnational Legal Policy 148, *supra* section 1.1.1 (n 27-28).

vitro fertilization tests this negative/positive relationship: a woman or couple wants to form a family (a private decision that requires no interference), but requires assistance from the state in the form of both legislative reform and public provisions, in this case, state-funded in vitro fertilization (IVF). This chapter critically analyses the *Artavia Murillo et al. v. Costa Rica* case, and works toward three objectives: (i) to identify how actors engaged in this case incorporated, or failed to incorporate gender within the case, and to determine the impact on reparations; (ii) to explore missed opportunities and advancements in case design; and (iii) to determine the usefulness of this case in future women's reproductive rights cases. The case study analysis of *Artavia Murillo et al. v. Costa Rica* is extensive because it is currently the most substantive insight into how the Inter-American Court interprets and applies women's reproductive health rights. The structure of the case analysis conducted here differs somewhat from the previous case studies because *Artavia Murillo et al. v. Costa Rica* was examined by both the Inter-American Commission and the Court. In order to effectively follow the trajectory of this case, and locate the case within its context, this first section steps back to examine the sociocultural environment in which Costa Rican women live their reproductive lives. A discussion of gender stereotyping and the role of religion in section 6.1 enables the analyses conducted of the *Artavia Murillo et al.* case before the Inter-American Commission and Court in section 6.2. The case study analysis follows the development of *Artavia Murillo et al. v. Costa Rica* from its inception in 2001 through to the release of the Inter-American Court of Human Rights' judgment in November 2012. The purpose of examining this case as it evolved through the Inter-American Commission and Inter-American Court is to determine missed opportunities in the design of the case, particularly in relation to the development of gender-based reparations. The third section focuses on the reparations issued in this case by the Inter-American Court, and again utilizes Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations⁵ to identify the transformative potential of reparations. The fourth and final section reflects on lessons learned in this case in order to articulate strategies for litigating women's reproductive health rights in future cases. This final section looks specifically at the beneficial utility of applying the Convention of Belém do Pará in women's reproductive rights cases and also discusses the capacity of the Inter-American Court to expand its activist approach to repairing gender-based harm through reparations.

⁵ Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the 'Cotton Field' Judgment' (2011) 33:4 Human Rights Quarterly 1062-1091.

6.1 Context: Women as Mothers in the Non-Secular State

Although Costa Rica is one of the most modern, democratic and “developed” countries in the Latin American region,⁶ the State is inconsistent and ineffective in its protection of women’s rights. Compared to other countries in the Inter-American region, women’s reproductive rights violations in Costa Rica have received little attention before international treaty-monitoring bodies.⁷ There are a few reasons why women’s reproductive rights violations have not received much scrutiny. Costa Rica is perceived as a human rights leader in the region. It is home to the Inter-American Court of Human Rights, and consistently ranks high on the United Nations Human Development Index when compared to other countries with similar income levels.⁸ In addition, Costa Rica has the lowest maternal mortality rate in Central America, and the second lowest in the whole of Latin America.⁹ Another reason women’s reproductive rights violations aren’t so visible in Costa Rica is because advocacy efforts have decreased due to massive defunding over the past decade.¹⁰ According to Ivania Solano, a representative from the Women’s Rights Department of the Costa Rican Ombuds Office, this has led to a feminist movement that is compartmentalized rather than unified.¹¹ As a result, advocacy campaigns concerning issues such as same-sex marriage and in vitro fertilization are individualized rather than interwoven aspects of the sexual and reproductive rights movement.

Despite Costa Rica’s status as a human rights leader, Costa Rican women experience violations of their reproductive rights. Not only is IVF banned in Costa Rica, but emergency contraception is also illegal and unavailable,¹² and the right to abortion is heavily restricted and difficult to access.¹³ Costa Rican women also experience additional challenges in accessing their reproductive rights because of Costa Rica’s status as a non-secular state.

⁶ Scott Mainwaring and Aníbal Pérez-Liñán, 'Cross-Currents in Latin America' (2015) 26:1 Journal of Democracy 114; UN Human Development Report 2011: Costa Rica ranked 68th in per capita GDP rates in the world, available at <http://hdr.undp.org/en/content/gdp-per-capita-2011-ppp>; and Human Development Index 2015: Costa Rica ranked 69th, fourth highest HDI score in Latin America (Chile = 42nd, 1st in Latin America; Honduras = 131st, lowest in Latin America).

⁷ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S) and Interview with Ivania Solano Jiménez, Attorney, Women’s Department, Office of the Ombudsman [Defensoría de los Habitantes], San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G, S).

⁸ Human Development Report 2010, ‘The Real Wealth of Nations: Pathways to Human Development,’ UNDP. <http://hdr.undp.org/en/media/HDR_2010_EN_Complete.pdf> 49.

⁹ ‘Trends in Maternal Mortality: 1990 to 2015’ WHO, UNICEF, UNFPA, The World Bank, and the United Nations Population Division (World Health Organization 2015).

<<http://data.worldbank.org/indicator/SH.STA.MMRT/countries/XJ?display=default>> (accessed 21 March 2016).

¹⁰ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S) and interview with Hilda Picado, Executive Director, Asociación Demográfica Costarricense (ADC) San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, N).

¹¹ Interview with Ivania Solano Jiménez, Attorney, Women’s Department, Office of the Ombudsman [Defensoría de los Habitantes], San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G, S).

¹² Anibal Faundes and others, 'Emergency Contraception under Attack in Latin America: Response of the Medical Establishment and Civil Society' (2007) 15:29 Reproductive Health Matters 132.

¹³ *AN v. Costa Rica and Aurora v. Costa Rica*, *supra* chapter 5 (n 2).

Catholic Church principles permeate all aspects of Costa Rican life, where not only does the State refer to Catholic teachings to inform law, but longstanding sociocultural norms and beliefs create a stereotyped ideal of women as mothers.¹⁴ This section establishes the context in which the *Artavia Murillo et al. v. Costa Rica* originated, and focuses on two relevant obstacles to Costa Rican women's enjoyment of their reproductive rights: (i) religious attitudes, norms and beliefs that discriminate against women, and (ii) gender stereotyping of women.

6.1.1 The Role of Religion

Costa Rica is not a secular state,¹⁵ and the Catholic religion permeates not only the social and cultural lives of all Costa Ricans, but also the political arena.¹⁶ Adriana Maroto, a Costa Rican academic and activist, explained,

With the topic of sexual and reproductive rights, we cannot talk about autonomy, because cultural and social mandates, and sins, always come into the picture [...] We don't have freedom of conscience, or religious freedom to make decisions. So, morals and religion are very important in this country, which makes reproductive rights a very hard topic to speak about in Costa Rica.¹⁷

Women's reproductive rights are at the forefront of conservative religious efforts to restrict women's autonomy. For example, Adriana Maroto provided the following anecdote about Costa Rica's National Institute for Women, which highlights the role of religion within State institutions:

INAMU (Instituto Nacional de la Mujeres, National Institute for Women) has a long history, there have been many feminists working there with a gender perspective, but in 2004 there was a scandal, and the president at that time was related to Opus Dei, even though she said she was not. In that moment they prohibited talking about sexual and reproductive rights. They asked people within INAMU to eliminate the word 'abortion' from any text in the building [...] any book or text that had the word 'abortion,' or 'sexual rights,' it couldn't be in the building. And then, they (the employees) found ash crosses on the doors of their offices. INAMU has very well trained employees who know about human rights, but the problem is that these are people that have been prosecuted and they have been threatened, and they are

¹⁴ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S) and interview with Hilda Picado, Executive Director, Asociación Demográfica Costarricense (ADC) San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, N).

¹⁵ Article 75 of the Costa Rican Constitution indicates that the Roman Catholic Apostolic Church is the religion of the State (Article 1, Law No. 5703, 6 June 1975).

¹⁶ Approximately 76% of Costa Ricans identify as Catholic and 13% identify as Evangelical. See, Susy Villegas, 'Adolescent Pregnancy in Costa Rica,' in A. Cherry and M. Dillon (eds) *International Handbook of Adolescent Pregnancy, Medical, Psychosocial, and Public Health Responses* (Springer 2014) 258.

¹⁷ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S).

afraid. So, the people have the knowledge, and the problem is the political environment.¹⁸

This anecdote illustrates the challenges activists and feminists face when attempting to cooperate with the Costa Rican State, or when working within the State to effect change. Hilda Picado, Director of the Costa Rican Demographic Association (ADC - Asociación Demográfica Costarricense) explained there have been significant challenges in implementing sexual and reproductive health education in Costa Rican high schools because of deep religious influence:

This is a moral and ethical matter. Because they (conservative religious groups) are stating that young people shouldn't be having intercourse [...] This is a constitutionally Catholic country - so, religion here is very very important. And, what the Catholic Church says is that if you're not married, then you cannot have intercourse. Even though (now) everyone understands that that is not the way it works.¹⁹

Costa Ricans do in fact engage in activities that are counter to religious teachings. For example, wealthy women living in Costa Rica face less difficulty accessing safe yet illegal abortions or illegal emergency contraception, than those poor women living in rural areas who do not experience the same level of reproductive freedom and autonomy.²⁰

In regards to the ban on IVF in Costa Rica, it has been argued that the Catholic Church heavily influenced the Costa Rican Constitutional Court's interpretation of the right to life as it applies to the embryo. The Center for Reproductive Rights claimed that the "Constitutional Court of Costa Rica (was) under pressure (to ban IVF) from powerful elements within the Catholic Church".²¹ Lynn Morgan and Elizabeth Roberts asserted that the Costa Rican Constitutional Court banned IVF "in an effort to appease the Catholic Church".²² However, Jorge Oviedo, a Costa Rican attorney who represented the State in *Artavia Murillo et al.* insisted that the Catholic Church was not "present" in the *Artavia Murillo et al.* case proceedings before the Inter-American Court. He said,

I have worked for the government ever since 2004, and never, never in my whole experience, neither in the solicitor general office, even with the IVF case, did I receive a call from the bishop [...] We would not answer the call. We never received a call from the bishop, never received an email from him [...] I want to

¹⁸ Ibid. In 2014, INAMU underwent a shift in leadership and is now run by Alejandra Mora Mora, a prominent Costa Rican feminist. This shift in leadership is promising for feminists in the region who would like to see INAMU become an effective women's rights state entity.

¹⁹ Interview with Hilda Picado, Executive Director, Asociación Demográfica Costarricense (ADC) San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, N).

²⁰ Ibid.

²¹ 'Costa Rica's IVF Ban and the Future of Reproductive Rights in Latin America', (Center for Reproductive Rights 2012) <<http://www.reproductiverights.org/feature/costa-rica-ivf-ban-personhood>> accessed 18 October 2014.

²² Lynn M. Morgan and Elizabeth F. S. Roberts, 'Reproductive Governance in Latin America' (2012) 19:2 Anthropology & Medicine 242.

underline this, it's the foreign department that is in charge to represent the country before the Inter-American System, but in this case, they took a political decision to delegate that task on us. And, we are the solicitor general office, we are not politicians, we are technical, we are like a bunker.²³

While religion is a fundamental part of culture, and the right to manifest one's religion is enshrined in numerous human rights treaties, including the American Convention, Costa Rica's religious government creates a hostile environment in which to advocate for the promotion of women's reproductive rights. Any argument to protect and fulfil reproductive rights raised on the grounds of the right to health or life, privacy, non-discrimination or equality, may be countered with religious rhetoric emphasising the rights of the unborn over the rights of women. In short, as explained by Solano, "they own our bodies, and they don't let us have any choices".²⁴

6.1.2 Gender Stereotyping

Gender stereotyping can be defined as the process of applying stereotypes to an individual or group based on the "social and cultural construction of men and women, due to their different physical, biological, sexual and social functions".²⁵ According to Cook and Cusack, gender stereotyping "becomes problematic when it operates to ignore individuals' characteristics, abilities, needs, wishes, and circumstances in ways that deny individuals their human rights and fundamental freedoms, and when it creates gender hierarchies".²⁶ The law embodies and contributes to women's gendered experiences of inequality. Of course, stereotypes affect both women and men, yet they often have a disproportionate impact on women. As Sandra Fredman explained,

A useful way of examining the continued disadvantage of women is to identify the assumptions and stereotypes which have been central to the perpetuation and legitimisation of women's legal and social subordination. Such assumptions have roots which stretch deep into the history of ideas, yet continue to influence the legal and social structure of modern society.²⁷

Cook and Cusack noted that "individual men and women may embrace gender stereotypes, and they may take steps to structure their lives, attitudes, and relationships accordingly".²⁸ However, the State must adhere to principles of equality and non-discrimination by refraining from relying on gender stereotypes in the adoption of laws and practices.

²³ Interview with Jorge Oviedo, Deputy Attorney, General Prosecutor of the Republic of Costa Rica/State Representative in *Artavia Murillo et al. v. Costa Rica*, San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G).

²⁴ Interview with Ivania Solano Jiménez, Attorney, Women's Department, Office of the Ombudsman [Defensoría de los Habitantes], San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G, S).

²⁵ Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2009) 20.

²⁶ Ibid.

²⁷ Sandra Fredman, *Women and the Law* (Clarendon Press 1997) 3.

²⁸ Cook and Cusack (n 25) 111.

Gender stereotyping of women often places emphasis on two intersecting ideas: (i) that women are not as intelligent as men, and can therefore not be relied upon to make decisions; and (ii) that women are particularly attune to the roles of mother, homemaker and caregiver. While gender stereotypes exist, and are certainly reinforced through culture and society, the State plays a key role in upholding and perpetuating gender stereotypes. For example, Adriana Maroto shared an anecdote about the Costa Rican National Institute for Women's (INAMU) activities on International Women's Day.

In those four years, for the 8th of March, International Women's Day, they had workshops to teach women how to put makeup on. They had free massages for women. They never talked about women's rights. They celebrated women in a traditional manner. Last year, they had an alliance with local shops, so on women's day they had a discount if they wanted to buy something at the shops. They never talked about the international day against women's violence.²⁹

In this example, a State agency relied on stereotypes of women that portray them as beautiful feminine consumers, and did not take any measures to disrupt the traditional understanding of women's roles in society.

Of particular relevance to the examination of the *Artavia Murillo et al.* case, is the role of motherhood as an element of womanhood, or femininity. Gender stereotypes that reinforce women's roles as primarily mothers or caretakers, can be perceived as either hostile or benevolent, where use of benevolent stereotypes may be perceived as "thoughtful" or "considerate", and hostile stereotypes may seem more forthrightly demeaning.³⁰ However, Williams and Segal asserted that "regardless of whether stereotyping is hostile or benevolent, it strips the decision-making power about how to interpret responsibilities of motherhood away from the mother herself, in favour of an assumption that she will (or should) follow traditionalist patterns".³¹ It is indeed possible for the State or society to rely on the illusion of benevolence while acting in a discriminatory and hostile manner. For example, a woman may be encouraged/forced to stay home after the birth of her child rather than returning to work. Frances Raday, a former member of the Committee on the Convention of the Elimination of All forms of Discrimination Against Women, provided an example of how the pervasive and persistent stereotype that women should be mothers, housewives and caretakers is in fact harmful to women. She explained,

The most globally pervasive of the harmful cultural practices [...] is the stereotyping of women exclusively as mothers and housewives in a way that limits

²⁹ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S).

³⁰ Cook and Cusack (n 25) 18 and 23.

³¹ Joan Williams and Nancy Segal, 'Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job' (2003) 26 Harvard Women's Law Journal 95.

their opportunities to participate in public life, [...] Stereotypical assignment of sole or major responsibility for childcare to women disadvantages women across cultures. The stereotypes that women should be mothers and homemakers, and therefore be ‘the center of home and family life’ have had a long history of use to justify women’s exclusion from public life.³²

The pervasive and persistent nature of stereotypes that relegate women to the role of caretakers serve to remove women from the public sphere in both a figurative and literal sense. That is, the stereotyping of women ultimately works to silence women before the law; women’s issues are to be understood as private, and quiet.³³ Raday’s concern that hostile stereotypes limit women’s access to public life reflects feminist challenges to the public/private divide, where women’s lives are regulated by the State most often in the public sphere, and largely ignored in the private. I explained further,

Motherhood, as it relates to the development of family life, is an experience specific to women that exists in the private sphere, that is both regulated and protected by law, but is done so by reinforcing stereotypes that assume motherhood is a fundamental element of a woman’s development. In the example of motherhood, the law has been comfortable with promoting in the public sphere the concept of women as mothers, [...] essentially remind(ing) women that their role is limited to the private, but is susceptible to arbitrary interference when it comes to issues surrounding motherhood, such as abortion, access to contraception and decision-making in terms of reproductive rights.³⁴

Not only is gender stereotyping harmful in that it reinforces a status quo that places women in positions of less power and inequality, but it is also provides a foundation on which to base discriminatory ideas and practices. In fact, according to Cook and Cusack, in attempting to eliminate gender stereotypes, one must “presuppose that an individual, a community, or state is conscious of that stereotype, and how it operates to the detriment of a woman or subgroup of women”.³⁵

Lastly, gender stereotyping is a form of gendered harm in that it perpetuates and reinforces a social system based on patriarchal hierarchies. The patriarchal culture that underlines gendered harm and stereotyping is based on norms and values that influence the way women see themselves, their roles in society and their destinies.³⁶ With specific reference to gendered harm and ARTs, in this case IVF, gender stereotyping creates a paradox in the ways in which human rights advocates advance and litigate women’s reproductive rights.

³² Frances Raday, “Culture, Religion and CEDAW’s Article 5(a),” in *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (Hanna Beate Schöpp-Schilling & Cees Flinterman, eds., Feminist Press at CUNY, 2007), 71.

³³ See, feminist methodologies, *Searching for Silences*, *supra* section 1.1.1.

³⁴ Ciara O’Connell, ‘What a “Private Life” Means for Women’ in Yves Haeck, Clara Burbano-Herrera, and Oswaldo Ruiz-Chiriboga (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 638.

³⁵ Cook and Cusack (n 25) 37.

³⁶ Robin West, *Caring for Justice* (New York University Press 1997) 132-133, *supra* section 2.2.2 (n 73).

On the one hand, restrictions on ARTs impede women's reproductive rights by denying them their right to make choices about when and if to form a family. However, in arguing for the right to access ARTs, there is a tendency to reify, or essentialize women, rather than to recognize and challenge the gender stereotyping of women in their potential to become mothers. In that women experience patriarchal harm that has at its core the objective of shaping the social and gendered lives of women as they are to be subordinate and subservient, gender stereotyping, as an aspect of patriarchal harm, cannot be compatible with claims made to advance women's reproductive health rights. This means that any attempt to find a violation of women's rights based on their reproductive capacity and their potential to become mothers reinforces rather than dismantles the patriarchal hierarchy. In every instance where "motherhood" has been the foundation on which to build demands for women's reproductive rights, there exists the option to instead develop those rights through the lens of reproductive autonomy, individuality and the right to choose.

The socio-political context in which the IVF ban emerged and subsequently gave rise to the *Artavia Murillo et al v. Costa Rica* case, was one that valued norms established by the Catholic Church over the reproductive rights of women and men in Costa Rica. For women in particular, gender stereotyping coupled with religious norms created a hostile environment in which to exercise reproductive autonomy and the right to make decisions about if and when to form a family. The following analysis of the *Artavia Murillo et al v. Costa Rica* case reveals the challenges of advancing women's reproductive rights through the Inter-American Court, particularly in regards to repairing gendered harm in women's reproductive rights cases.

6.2 The Case: *Artavia Murillo et al. v. Costa Rica*

The origins of *Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica* can be traced back to the year 2000, when the Costa Rican Constitutional Court overturned the 1995 Health Ministry Executive Decree on in vitro fertilization.³⁷ The Decree had authorised the in vitro fertilization (IVF)³⁸ procedure within the private healthcare system for married heterosexual couples in Costa Rica. When the IVF ban took effect in 2000, Costa Rica became the first country to actively deny its citizens the reproductive right to in vitro fertilization.³⁹ In the months following the Constitutional Court's ban on IVF in Costa Rica,

³⁷ Costa Rican Health Ministry Executive Decree No. 24029-S (February 3, 1995); authorized the technique of in vitro fertilization for married couples and regulated its practice.

³⁸ For more on in vitro fertilization procedure, see Zegers-Hochschild and others, 'Human Rights to In Vitro Fertilization' (n 2).

³⁹ Ibid.

a group of IVF patients and doctors brought a case before the Inter-American System of Human Rights in order to challenge the IVF ban and demand compensation for the nine couples (victims) immediately involved with the case.⁴⁰ The nine couples (petitioners) filed a petition before the Inter-American Commission on Human Rights on January 19th 2001.⁴¹

6.2.1 Designing the IVF Case: The Initial Stages

In their submission to the Inter-American Commission, the petitioners claimed that the Costa Rican Constitutional Court judgment violated rights enshrined within the American Convention on Human Rights, the Additional Protocol to the American Commission on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") and the Convention of Belém do Pará. The alleged rights violations were as follows: the obligation to respect rights (Article 1); the right to domestic legal effects (Article 2); the right to life (Article 4); the right to humane treatment (Article 5); the right to a fair trial (Article 8); the right to private life (Article 11.2); the rights of the family (Article 17); the right to equal protection (Article 24); the right to judicial protection (Article 25); the right to progressive development of economic, social and cultural rights (Article 26); and the duty to respect the rights of each person as they are limited by the rights of others (Article 32) under the American Convention on Human Rights;⁴² the obligation of non-discrimination (Article 3); the right to health (Article 10); and the right to the formation and protection of families (Article 15) enshrined within the Protocol of San Salvador;⁴³ and "violence against women shall be understood as any act, 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" (Article 1); and "States Parties [...] undertake to (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" (Article 7(h)) under the Convention of Belém do Pará.⁴⁴

The petitioners' broad interpretation of rights violations in this case was illustrative of a multi-faceted approach to rights in that not only did the petitioners locate the right to IVF within the context of the right to private life and health, but they also attempted to connect

⁴⁰ Interview with Dr. Delia Maria Ribas Valdés, IVF Doctor, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, S, Rx).

⁴¹ This petition was filed under *Ana Victoria Villalobos et al. v. Costa Rica* [2004] Inter-American Commission on Human Rights, Petition No. 12.361, No. 71/03 Admissibility.

⁴² American Convention on Human Rights (ACHR), OASTS No. 36 (1969).

⁴³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ('Protocol of San Salvador'), OASTS 69 (1988).

⁴⁴ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belém do Pará') OASTS (1994).

reproductive rights to the violence against women framework through the Convention of Belém do Pará. In their submission to the Inter-American Commission, the petitioners argued that the IVF ban implied a violation of the right to health, the right to private life and the right to form a family because it denied men and women who suffer from infertility or sterility the possibility of constituting a family.⁴⁵ With specific regard to the allegations lodged under the Convention of Belém do Pará, the petitioners argued that “the prohibition of in vitro fertilization in Costa Rica [...] caused severe pain and suffering to the presumed victims, and in particular to the women, [...] because] there is a very strong pressure, especially on women, to have children, and that the lack of treatment prolongs and exacerbates the emotional suffering caused by that pressure”.⁴⁶ The State responded to this allegation by declaring that the petitioners’ argument was “an extended interpretation of the letter of the Convention of Belém do Pará, and that is strays far from the spirit of that instrument. [The State maintained] that the petition in question does not refer to any act of violence against women, or any lack of due diligence that might provoke such violence”.⁴⁷

Despite the petitioners’ attempts to frame the IVF ban through a plethora of rights, including those enshrined within the Convention of Belém do Pará, the Inter-American Commission admitted the *Artavia Murillo et al.* case in respect to violations of Articles 1, 2, 11, 17 and 24 of the American Convention on Human Rights. In admitting the case, the Inter-American Commission elected not to include a violation of the Convention of Belém do Pará because it claimed the petitioners had failed to “provide a sufficient foundation to characterize violations of [...] Article 7 of the Convention of Belém do Pará”.⁴⁸ In refusing to include a violation of Article 7(h) of the Convention of Belém do Pará, the Inter-American Commission signalled to the petitioners that they had not sufficiently examined the gendered nature of the IVF ban. There are a number of reasons why the petitioners in this case failed to effectively examine gender-based harm and gender stereotyping before the Inter-American Commission on Human Rights. First, the initial argument and intention of this case was not designed to provide reproductive health services and rights protections for all Costa Rican men and women. Rather, the argument developed in the initial stages of the *Artavia Murillo et al. v. Costa Rica* case focused on infertility as a disease and reproductive disability, and sought specifically to repeal the IVF ban and compensate the victims involved in the case. There was very little focus on IVF as it is an aspect of

⁴⁵ *Ana Victoria Sanchez Villalobos et al. v. Costa Rica* [2004] (n 41) ¶22-24.

⁴⁶ *Ibid* ¶25.

⁴⁷ *Ibid* ¶40.

⁴⁸ *Ibid* ¶70.

women's reproductive health and autonomy. Huberth May, a lawyer who joined the case in its later stages, explained,

I think that if we had to begin again we would include the reproductive rights and use the trial as an opportunity to help Costa Rican society progress [...] I believe the trial was not planned to go in that direction [...] issues like abortion, contraception, and topics related to women's autonomy and the right to decide about procreation, sex, etc. [...] I believe we could have taken more advantage of this case.⁴⁹

It is clear from the argument provided by the petitioners to claim a violation of Article 7(h) of the Convention of Belém do Pará that this case was not designed to take into account and repair the gendered harm inherent to violations of women's reproductive rights on a broad scale. Rather, the petitioners argued that gender discrimination relevant to this case was related to the societal pressure women feel to become mothers.

Second, the lawyers⁵⁰ involved in the *Artavia Murillo et al.* case did not have a background in human rights litigation before the Inter-American System of Human Rights, and they had no expertise in women's rights or reproductive health.⁵¹ From the outset, Gerardo Trejos, the first lawyer involved in the case, resisted assistance from civil society organizations that had expertise in the area of reproductive health. Huberth May explained that this was because there were concerns about overcomplicating the case.⁵² However, María Alejandra Cardenas asserted, "people who litigate these cases are not necessarily the people who actually have *this* as a cause, and understand it".⁵³ Cardenas suggested that the lawyers involved with the *Artavia Murillo et al.* case were not interested in partnering with women's rights civil society organizations for a number of reasons: "it was two things, one is they didn't want to be associated with abortion at all, and two, it happens constantly, lawyers that take on cases don't want any help, because they want the fame and the glory".⁵⁴ For Adriana Maroto, an academic and activist with La Colectiva in Costa Rica, the lawyers' reluctance to collaborate was especially frustrating:

⁴⁹ Interview with Huberth May, Attorney, Victim's Representative in *Artavia Murillo et al. v. Costa Rica*, Legislative Assembly, San Jose, Costa Rica 18 August 2014 (Ref Code: Ip, CR, S).

⁵⁰ Before the case reached the Inter-American Court, the victims divided into two groups: one was represented by Huberth May, who replaced Gerardo Trejos after he passed away, and the other group was represented by Boris Molina.

⁵¹ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S); interview with Ivania Solano Jiménez, Attorney, Women's Department, Office of the Ombudsman [Defensoría de los Habitantes], San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G, S); and interview with Alexandra Sandoval, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica 12 August 2014 (Ref Code: Ip, Ct, S).

⁵² Interview with Huberth May, Attorney, Victim's Representative in *Artavia Murillo et al. v. Costa Rica*, Legislative Assembly, San Jose, Costa Rica 18 August 2014 (Ref Code: Ip, CR, S).

⁵³ Interview with María Alejandra Cardenas, Regional Legal Director, Women's Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

⁵⁴ Ibid.

The IVF case was done from the beginning to end by male lawyers that didn't have any knowledge about gender, human rights, nothing. Right? They had a huge opportunity to talk about human rights and reproductive rights here in San Jose, but the lawyers talked about the right to life from conception, but only to defend the in vitro case. Feminist organizations like La Colectiva offered help, but they didn't accept it, because they were worried about their professional image.⁵⁵

Cooperation with expert civil society organizations in this case did not take place until the late stages before the Inter-American Court, when Boris Molina, another lawyer who represented victims in this case, requested assistance from the Center for Reproductive Rights to develop arguments about the role of discrimination in the denial of reproductive rights. Cardenas explained, "So he basically asked for help - I helped him, and trained him for the hearing, and I drafted the last arguments that he submitted. So, I would say [...] that's how at the last minute, the argument about how this is a discrimination case came out".⁵⁶

Third, perhaps because the petitioners were not familiar with the Inter-American System of Human Rights, they failed to develop a strong argument to include reproductive rights violations within the violence against women framework; the Convention of Belém do Pará. Rather than claiming violations of Articles 1 and 7(h) of the Convention of Belém do Pará, it can be argued that the petitioners should have relied on the Inter-American Court's previous determination in the "Cotton Field" case that women's rights violations may be interpreted through Articles 8 and 9 when Article 7 is violated.⁵⁷ If the petitioners had provided a sufficient argument to connect gender discrimination and stereotyping through Article 8 to Article 7(b), they could have alleged that the IVF ban is discriminatory because it places women in a position where they are unable to exercise their reproductive autonomy. Subsequently, women denied their right to reproductive autonomy through the IVF ban are considered "incomplete" owing to a patriarchal culture that the Costa Rican State not only fails to *prevent*, but is complicit in perpetuating through the IVF ban. Such an analysis would have required that the petitioner unpack the interrelated nature of reproductive rights restrictions and violence against women, as both are premised on norms that subjugate women and serve to remove their individuality and autonomy.

⁵⁵ Interview with Adriana Maroto Vargas, Academic and Activist, La Colectiva, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, G, S).

⁵⁶ Interview with María Alejandra Cardenas, Regional Legal Director, Women's Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

⁵⁷ *González et al. ('Cotton Field') v. Mexico* [2009] Inter-American Court of Human Rights (ser. C) No. 205, Preliminary Objection, Merits, Reparations, and Costs, *supra* section 3.2.3 (n 151).

The Inter-American Commission on Human Rights referred the *Artavia Murillo et al. v. Costa Rica* case to the Inter-American Court of Human Rights on July 29th 2011.⁵⁸ In its letter of referral, the Inter-American Commission requested that the Inter-American Court find violations of Articles 11, 17 and 24 of the American Convention on Human Rights, in conjunction with Articles 1(1) and 2. It also requested that the Inter-American Court examine the disproportionate impact of the IVF ban on women, and suggested that the Inter-American Court issue reparations to require the Costa Rican State to lift the IVF ban and provide monetary compensation and satisfaction to the immediate victims. As is examined in the next section, the Inter-American Court of Human Rights conducted a thorough analysis of reproductive rights as they are enshrined within the American Convention on Human Rights. The Inter-American Court also unpacked the relationship between gender-based stereotyping and the IVF ban. However, in that the petitioner and the Inter-American Commission failed to develop a strong connection between gendered harm, stereotyping and reproductive rights in the initial stages of this case, the reparations ordered by the Inter-American Court missed an opportunity to confront gender stereotyping and its harmful impact on women.

6.2.2 Reproductive Rights and the Inter-American Court

The Inter-American Court of Human Rights issued its judgment in the *Artavia Murillo et al.* case in November 2012, more than a decade after IVF was banned in Costa Rica. In its judgment, the Inter-American Court ruled that the Costa Rican Constitutional Court's decision to overturn the Ministry of Health Executive Decree authorising IVF⁵⁹ violated the rights of couples in Costa Rica who wished to form a family.⁶⁰ This judgment was groundbreaking for a number of reasons. The Inter-American Court provided an in-depth discussion of the right to life as it applies to the unborn,⁶¹ and determined that such a right is not absolute.⁶² The Court asserted that the right to life as enshrined in Article 4(1) of the American Convention should not be considered absolute when its protections "justify the

⁵⁸ *Gretel Artavia Murillo et al. ('In Vitro Fertilization') v. Costa Rica* [2011] Inter-American Commission on Human Rights, Case No. 12.361, Letter of Submission.

⁵⁹ Constitutional Chamber of the Supreme Court of Justice, Costa Rica No. 2000-02306, Case No. 95-001734-007-CO (15 March 2000).

⁵⁹ Costa Rican Health Ministry Executive Decree (n 37). See, *Artavia Murillo et al. v. Costa Rica* [2012] (n 1) ¶142.

⁶⁰ *Artavia Murillo et al. v. Costa Rica* [2012] (n 1) ¶71-76.

⁶¹ *Ibid* ¶163-246. For discussion of this case in relation to the right to life, see Ligia DeJesus, 'Artavia Murillo v. Costa Rica: The Inter-American Court on Human Rights' Promotion of Non-Existent Human Rights Obligations to Authorize Artificial Reproductive Technologies' (2013) 18 *UCLA Journal of International Law and Foreign Affairs* 275-302; Ligia DeJesus, 'A Pro-Choice Reading of a Pro-Life Treaty: The Inter-American Court on Human Rights' Distorted Interpretation of the American Convention on Human Rights in *Artavia v. Costa Rica*' (2014) 32(2) *Wisconsin International Law Journal* 223-266; and Martin Hevia and Carlos Herrera Vacaflor, 'From Recognition to Regulation: Access to In Vitro Fertilization and the American Convention on Human Rights,' (2013) 25:3 *Florida Journal of International Law* 453-482.

⁶² *Ibid* ¶246.

total negation of other rights”.⁶³ The “other rights” referred to by the Inter-American Court in this instance were the rights to private life in relation to family life, personal integrity, personal autonomy, sexual and reproductive health, the right to enjoy the benefits of scientific and technological progress, and the principle of non-discrimination. Accordingly, the first part of this section discusses the rights to private life in relation to reproductive health as interpreted by the Inter-American Court, and has the objective of highlighting advancements and shortcomings in how the Inter-American Court established its definition of reproductive health rights in the *Artavia Murillo et al.* case. The second part of this section examines the Inter-American Court’s interpretation of the rights to equality and non-discrimination, with a particular emphasis on gender-based discrimination and stereotyping.

6.2.2.1 Defining Reproductive Health

The Inter-American Court of Human Rights went much further than the petitioners and the Inter-American Commission in its efforts to articulate and define the right to reproductive health. First, the Inter-American Court expanded the right to private life, as enshrined in Article 11 of the American Convention, by relating it to “(i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right”.⁶⁴ The Inter-American Court also linked the right to privacy to the right to personal integrity and determined that the two rights are “directly and immediately linked to health care”.⁶⁵ It then explained that a “lack of legal safeguards that take reproductive health into consideration can result in a serious impairment of the right to reproductive autonomy and freedom [...] (and that) there is a connection between personal autonomy, reproductive freedom, and physical and mental integrity”.⁶⁶ By connecting the right to private life to the rights to reproductive health and access to medical technology, the Inter-American Court drew a connection between the negative obligation for states to refrain from intrusion in the lives of women, and the positive duty to ensure women have access to services to enact their rights; the Court crossed the public/private divide. The Inter-American Court’s conceptualisation of the right to private life as it implies a positive duty speaks to the previously discussed argument developed by Engle, where she contended that the right to private life is not inherently bad

⁶³ *Artavia Murillo et al. v. Costa Rica* [2012] (n 1) ¶258.

⁶⁴ *Ibid* ¶146.

⁶⁵ *Ibid* ¶147.

⁶⁶ *Ibid*.

for women if it is used as a space to accommodate private decision-making that then requires the State to provide services.⁶⁷

In interpreting the scope of the protection of the right to private life, the Inter-American Court determined that private life encompasses “a series of factors associated with the dignity of the individual, including [...] the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships”.⁶⁸ In addition, the Inter-American Court determined that private life “includes the way an individual views himself and how he decides to project this view towards others, and is an essential condition for the free development of the personality”.⁶⁹ While the Inter-American Court made great strides in its expansion of the right to private life as it relates to reproductive health and personal identity, it then determined, “motherhood is an essential part of the free development of a woman’s personality”.⁷⁰ By relying on motherhood to develop its argument for establishing a violation of the right to private life, the Inter-American Court effectively reinforced and perpetuated stereotypes that women should be mothers in order to be complete, or to achieve their full development. That the Inter-American Court included this argumentation is perplexing and disheartening because not only does it raise concerns about the Court’s interpretation of women’s reproductive rights, but as is discussed in the next section, this reasoning was disconnected from the Inter-American Court’s analysis of gendered harm and discrimination and the impact of gender stereotyping. In addition to the analysis the Inter-American Court provided of the right to private life, it also examined the concept of proportionality in order to determine the severity of the state’s interference with the victims’ rights.⁷¹ The Inter-American Court’s analysis of proportionality applied its interpretation of the right to reproductive health to the individual victims’ lives and situations to determine that the IVF ban discriminated against the victims based on their financial condition, (dis)ability and gender.

6.2.2.2 Examining (Gender) Discrimination

Unlike the Inter-American Commission, which examined State interference with the right to private and family life alongside the right to equal protection (Article 24), the Inter-American Court determined that a more appropriate analysis of violations of the rights to

⁶⁷ Engle (n 4).

⁶⁸ *Artavia Murillo et al. v. Costa Rica* (n 1) ¶143.

⁶⁹ Ibid.

⁷⁰ Ibid. The Inter-American Court first developed this concept in *Gelman v. Uruguay* [2011] Inter-American Court of Human Rights (ser. C) No. 221 Merits and Reparations ¶97.

⁷¹ Ibid ¶162.

equality and non-discrimination would be through Articles 1(1) and 2 of the American Convention. The Inter-American Court shifted its analysis as a result of its determination that the State had a duty to “abstain from producing discriminatory regulations or those with discriminatory effects on the different groups of the population when exercising their rights”.⁷² In its analysis, the Inter-American Court considered that the “concept of disproportionate impact is related to that of indirect discrimination”, and therefore analysed the disproportionate impact (indirect discrimination) of the IVF ban in relation to disability, financial condition and gender.

As mentioned previously, the original design of this case focused on the concept of infertility as a form of disease and reproductive disability. The Inter-American Court relied on the social model of disability as provided by the UN Convention on the Rights of Persons with Disabilities,⁷³ as well as interpretations from expert witnesses, to conclude “that disability is not defined exclusively by the presence of a physical, mental, intellectual or sensorial impairment, but that it is interrelated to the barriers or limitations that exist in society for the individual to be able to exercise his rights effectively”.⁷⁴ In determining the disproportionate impact of the IVF ban on those persons suffering from infertility, as it is a form of reproductive disability, the Inter-American Court recalled that it is “not sufficient that States abstain from violating rights; rather it is essential that they adopt positive measures, to be determined based on [...] her personal condition or [...] the specific condition in which he finds himself, such as [...] disability”.⁷⁵ The Inter-American Court concluded that, “persons with infertility in Costa Rica, faced with the barriers created by the Constitutional Chamber’s decision, should consider that they are protected by the rights of persons with disabilities, which include the right to have access to the necessary techniques to resolve reproductive health problems”.⁷⁶ In determining that the State of Costa Rica’s ban on IVF had a disproportionate impact on those individuals suffering from infertility, the Inter-American Court concluded that the State has a duty to not only reverse the IVF ban, but that there also exists a positive obligation to provide the IVF service.

The Inter-American Court’s analysis of the disproportionate impact of the IVF ban on individuals with less financial means was brief, and relied on the testimony of individual

⁷² Ibid ¶286.

⁷³ Convention on the Rights of Persons with Disabilities (CRPD), GA Res. 61/106 (2006).

⁷⁴ *Artavia Murillo et al. v. Costa Rica* (n 1) ¶291.

⁷⁵ Ibid ¶292.

⁷⁶ Ibid ¶293.

victims to illustrate that the ban had a greater impact on people with less money. For example, Mr. Vargas, who was one of the victims involved in the case, stated,

The only alternative (for receiving IVF services) was to consider traveling to Spain or Colombia to undergo IVF; however, the corresponding costs had tripled for [them], and [they] simply felt defeated, discriminated against and punished by a court that had curtailed the possibility of having access to a medical treatment that was permitted in every other country in the world.⁷⁷

The Court determined that the ban on IVF had a disproportionate impact on those infertile couples who could not afford to undergo IVF abroad. While some of the victims involved in the case were in a financial position to be able to travel abroad in order to receive IVF treatment, approximately half of the victims did not have the financial resources.⁷⁸

The Inter-American Court's analysis of the disproportionate impact of the IVF ban as it relates to gender revealed the Inter-American Court's analysis of gender as it is a determinate of discrimination and inequality. The Court stated that the ban on IVF affected men and women, and that the impact of the ban had a disproportionate impact upon women "owing to the existence of stereotypes and prejudices in society".⁷⁹ Expert witness Paul Hunt discussed the role of women as the "creator" in their families, and explained, "in many societies infertility is attributed mainly and disproportionately to women owing to the persisting gender stereotype that defines a woman as the basic creator of the family".⁸⁰ The Inter-American Court then relied on observations from the World Health Organization to conclude, "while the role and status of women in society should not be defined solely by their reproductive capacity, femininity is often defined by motherhood".⁸¹ Additionally the Inter-American Court referred to the CEDAW Committee, and indicated, "when a decision to postpone 'surgery due to pregnancy is influenced by the stereotype that protection of the fetus should prevail over the health of the mother,' this is discriminatory".⁸² Perhaps the most relevant and insightful aspect of the *Artavia Murillo et al.* judgment in regards to gender-based reasoning came in the form of expert testimony provided by Alicia Neuberger. She explained,

The gender identity model is socially defined and molded by the culture; its subsequent naturalization responds to socioeconomic, political, cultural and historic determinants. According to these determinants, women are raised and socialized to be wives and mothers, to take care of and attend to the intimate world of affections.

⁷⁷ *Artavia Murillo et al. v. Costa Rica* (n 1) ¶304. Affidavit of Giovanni Vargas (file of annexes to the pleadings and motions briefs, volume IV, folio 5280).

⁷⁸ *Ibid* ¶303.

⁷⁹ *Ibid* ¶294.

⁸⁰ *Ibid* ¶295.

⁸¹ *Ibid* ¶296.

⁸² *LC V Peru* [2011] CEDAW Committee Communication No. 22/2009 ¶8.

The ideal for women, even nowadays, is embodied in sacrifice and dedication, and the culmination of these values is represented by motherhood and the ability to give birth [...] A woman's fertility is still considered by much of society to be something natural that admits no doubts. When a woman has fertility problems or is unable to become pregnant, the reaction of society tends to be scepticism, disgrace, and at times, even ill-treatment [...] The impact of infertility in women is usually greater than in men because [...] motherhood has been assigned to women as an essential part of their gender identity, transformed into their destiny.⁸³

The Court relied on the above testimony to conclude, "even though the ban on IVF is not expressly addressed at women, [...] it has a disproportionately negative impact on women".⁸⁴ The Court also explored the impact of the IVF ban on men, where one victim, Mr. Vargas, stated that "for years (he) felt diminished, (he) did not feel like a man, and thought that (his) inability to conceive a child was unmanly. Thus (he) punished himself in the silence of (his) own thoughts, in the pain of swallowing thousands of tears so nobody could see (him) cry".⁸⁵ Again, expert witness Alicia Neuburger provided insight, she explained, "fertile disability causes men to feel a strong sense of impotence and, consequently, a questioning of their gender identity. Concealing their fertile dysfunction socially is the usual defensive strategy because they fear being laughed at or questioned by other men".⁸⁶ The Inter-American Court concluded its discussion of indirect discrimination on the basis of gender as a result of the IVF ban by stating,

The Court emphasizes that gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them. The Court is not validating these stereotypes and only recognizes them and defines them in order to describe the disproportionate impact of the interference caused by the Constitutional Chamber's judgment.⁸⁷

Despite the Inter-American Court's assertion that gender stereotypes are incompatible with human rights law, it failed to apply its own perspectives on gender stereotyping to its examination of the right to private life. By using "motherhood" as the foundation on which to argue for women's reproductive rights within the right to private life, the Inter-American Court missed an opportunity to develop those rights through the lens of reproductive autonomy. As discussed above in section 6.1.2, gender stereotyping is an aspect of patriarchal harm, and is therefore incompatible with claims made to advance women's reproductive health rights. While the Inter-American Court sought to denounce essentialist portrayals of women (women should not be stereotyped based on their gender), it simultaneously adopted an essentialist perspective of women in order to determine

⁸³ *Artavia Murillo et al. v. Costa Rica* (n 1) ¶298.

⁸⁴ *Ibid* ¶299.

⁸⁵ *Ibid* ¶301.

⁸⁶ *Ibid* ¶301.

⁸⁷ *Ibid* ¶302.

violations of women's reproductive rights based on their gender role as mothers. This paradox is one that the Inter-American Court has struggled with in the past in relation to women's rights cases, and is seemingly one of the challenges the entire Inter-American System faces in its attempts to articulate and determine violations of women's rights.⁸⁸

6.2.3 Fulfilling the Preconditions

The above discussion of the *Artavia Murillo et al. v. Costa Rica* case examined the sociocultural context in which women attempt to access their reproductive rights in Costa Rica and also provided an analysis of the case as it evolved through the Inter-American Commission and Inter-American Court. This section once again employs Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations preconditions⁸⁹ in order to determine the extent to which this case was designed to effectively repair gender-based harm; once again, the preconditions are *establish the relevant facts, properly identify the alleged victims and violations* and *properly identify the harm and those harmed*. In an effort to streamline analysis of the fulfilment of the preconditions in the *Artavia Murillo et al.* case, this section focuses specifically on the Inter-American Court of Human Rights judgment, and only incorporates critique of the case before the Inter-American Commission in order to supplement determinations made about the fulfilment of the preconditions in the Court judgment.

The facts established in the Inter-American Court's judgment in *Artavia Murillo et al. v. Costa Rica* not only provided an extensive analysis of the right to life as it applies to the unborn, but also delivered an extensive and comprehensive articulation of reproductive health rights as they exist and are to be interpreted in the Inter-American System of Human Rights. The Inter-American Court expanded on the Inter-American Commission's articulation of gender-based discrimination in this case in order to determine that gender stereotyping is incompatible with international human rights law, which was a significant achievement for the women's (reproductive) rights movement on a global scale. However, the Inter-American Court was not entirely successful in linking the IVF ban to the larger sexual and reproductive rights and women's rights frameworks, which resulted in a failure to fully acknowledge the gendered aspects of harm in this case. The Court's negligence in this area can be attributed to the initial design of this case before the Inter-American Commission; this case was not designed as a women's reproductive rights case. While the

⁸⁸ Patricia Palacios Zuloaga, 'The Path to Gender Justice in the Inter-American Court of Human Rights' (2008) 17:2 Texas Journal of Women and Law 229, *supra* section 3.2.3 (n 148-149).

⁸⁹ Rubio-Marín and Sandoval (n 5), *supra* section 3.3 (n 180).

Inter-American Court made great strides in examining *Artavia Murillo et al.* through a gendered lens, the analysis of the case reveals that it did not fully *establish the relevant facts*.

The *Artavia Murillo et al. v. Costa Rica* judgment was successful in *identifying the alleged victims*. The Inter-American Court adequately determined the victims in this immediate case to be nine heterosexual married couples. Despite fulfilment of this element of the precondition, it is important to note that the Court made no effort to include in its determination of victims the larger population of individuals and couples who require access to IVF services in order to form a family, particularly single women and homosexual couples. The *Artavia Murillo et al.* judgment was not successful in fulfilling the second element of this precondition, *properly identify the alleged violations*; it did not identify and examine reproductive rights violations within the purview of the violence against women framework, the Convention of Belém do Pará. Both the petitioners and the Inter-American Court had an opportunity to incorporate Article 7(b) of the Convention of Belém do Pará, yet both neglected to do so. First, the petitioners were ineffective in their attempt to claim violations of the Convention of Belém do Pará because they failed to develop an Article 7(b) violation through the lens of due diligence and the duty to prevent gendered harm, which resulted in the Inter-American Commission's determination that the IVF ban did not trigger a violation of the Convention of Belém do Pará. The Inter-American Court also had the opportunity to apply the Convention of Belém do Pará in its determination of the rights violated in the *Artavia Murillo et al.* case. As mentioned above in section 3.1.3, the Inter-American Court has the power to determine violations of the Inter-American System's human rights conventions that were not identified in the Inter-American Commission's referral to the Court.⁹⁰ However, in this case, the Inter-American Court neglected to exercise the principle of *iura novit curia* in order to establish a violation of the Convention of Belém do Pará.

Determining fulfilment of the third precondition, *identify the harm and those harmed*, differs from the analysis in the previous two case study analyses because harm women experienced as a result of the IVF ban is less obvious than the harm resulting from restrictions on abortion and coercive sterilization; these reproductive rights violations are clearly identifiable as forms of social, patriarchal and invasive gendered harm. The ban on

⁹⁰ Karla Quintana-Osuna, 'Recognition of Women's Rights Before the Inter-American Court of Human Rights' (2008) 21 *Harvard Human Rights Journal* 311, *supra* section 3.1.3 (n 93).

IVF however, harms women in a more discrete way. In its judgment, the Inter-American Court examined and denounced gender stereotypes that reify women's role as mothers in order to confront the harmful impact of the IVF ban. The objective of the Court's analysis was to argue that the IVF ban alone was not distinctly discriminatory and harmful as it affects women, but rather the *impact* of the ban disproportionately harms women because of the prevalence of gender stereotyping throughout society. In developing this argument, the Inter-American Court successfully echoed Robin West's concept of "patriarchal harm".⁹¹ Patriarchal harm manifests itself in the way women see themselves and their roles in society, which means that the pressure women feel to become mothers is founded on existing stereotypes that do in fact cause harm to women. While the Inter-American Court successfully examined patriarchal harm through its analysis of gender stereotyping, it simultaneously engaged in patriarchal harm to articulate a violation of the right to private life. The Court relied on a stereotype of women as mothers when it asserted that motherhood is an aspect of women's development.

Despite its efforts to address gendered harm, the Inter-American Court neglected to analyse social harm as manifested through intersectional discrimination.⁹² The Court examined discrimination based on gender, (dis)ability and financial condition, but the analysis was compartmentalised and provided no interpretation of how women face greater discrimination when they are poor and (dis)abled. In addition, the Court did not provide an examination of the IVF ban as it harms single and/or gay men and women who may want to form a family. By failing to at least mention the various groups of people who are impacted by the IVF ban the Court missed an opportunity to link the ban on IVF to the larger sexual and reproductive rights framework/movement. While the Inter-American Court provided in its judgment an expansive analysis of the harm women experience as a result of harmful gender stereotypes, it failed to examine the intersectional determinants of discrimination through a lens of social harm. As a result, the Inter-American Court did not completely fulfil the *identify the harm and those harmed* precondition.

The above introduction to the *Artavia Murillo et al. v. Costa Rica* case and its fulfilment of the Holistic Gender Approach to Reparations preconditions reveals a number of shortcomings in the design and development of the Inter-American Court's first reproductive rights case. From its initial stages this case was limited in its ability to connect

⁹¹ Robin West, *Caring for Justice* (n 36), *supra* section 2.2.2 (n 67-73).

⁹² Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43:6 *Stanford Law Review* 1241-1299, *supra* section 1.1.1 (n 35, 41).

the ban on IVF to the greater women's reproductive rights and violence against women frameworks. Although the Inter-American Court made significant advancements in its attempt to dissect the gendered aspects of discrimination as they apply to women's reproductive lives, it was inconsistent in that it simultaneously condemned and reified stereotypes of women as (potential) mothers. As is substantiated in the following section, incomplete fulfilment of the Holistic Gender Approach to Reparations preconditions caused a gap between gender-based reasoning and reparations in the *Artavia Murillo et al. v. Costa Rica* case. Section 6.3 examines the reparations ordered in the *Artavia Murillo et al.* case in order to determine their capacity to repair gendered harm relevant to the ban on IVF.

6.3 Repairing Gendered Harm: Determining Transformative Potential

Despite the breadth of the *Artavia Murillo et al. v. Costa Rica* judgment, the reparations issued in this case are limited(ing), and ultimately reflect the petitioner's original objectives: compensation and reversal of the IVF ban. In determining the required reparations, the Inter-American Court "considered the need to award different measures of reparation in order to redress the damage comprehensively, so that, in addition to pecuniary compensation, measures of restitution and satisfaction and guarantees of non-repetition have special relevance for the damage caused".⁹³ The Inter-American Court stated that the reparations issued in the *Artavia Murillo et al.* case "must have a causal nexus to the facts of the case, the violations declared, the damage proved, and the measures requested to repair the respective damage".⁹⁴ This means, that the Inter-American Court intended to issue reparations based on the selection of reparation measures suggested by the petitioners and the Inter-American Commission, and that in doing so, it would rely on the facts determined in the case as well as the violations established by the Inter-American Court to determine the need for repair. The previous section on fulfilling the Holistic Gender Approach to Reparations indicated that the facts, violations and harm relevant to this case were not been properly established and identified in the Inter-American Court's judgment. Accordingly, the reparations ordered by the Inter-American Court in this case do not address and redress the gendered components of the reproductive rights violations in the *Artavia Murillo et al.* case. This section determines the gendered nature of the reparations issued by the Inter-American Court in the *Artavia Murillo et al.* case, and identifies missed opportunities in how the case developed before the Inter-American Commission in order to examine why the Inter-American Court failed to issue effective gender-based reparations in this case.

⁹³ *Artavia Murillo et al. v. Costa Rica* (n 1) ¶319.

⁹⁴ *Ibid* ¶320.

In the *Artavia Murillo et al. v. Costa Rica* judgment, the Inter-American Court of Human Rights ordered reparations designed to provide compensation, satisfaction and rehabilitation to the victims, and also issued guarantees of non-repetition in order to overturn the IVF ban.

The reparations are summarized below:

2. The State must adopt, as soon as possible, appropriate measures to annul the prohibition to practice IVF; (*legislative reparation*)
3. The State must regulate and establish systems of inspection and control to ensure implementation of IVF; (*legislative reparation*)
4. The State must include the availability of IVF within the infertility treatments and programs offered by its national health care services; (*legislative reparation*)
5. The State must provide the victims with free psychological treatment; (*rehabilitation*)
6. The State must publish a summary of the judgment in national periodicals and post the full judgment on the website of the judiciary; (*satisfaction*)
7. The State must implement permanent education and training programs and courses on human rights, reproductive rights and non-discrimination for judicial officials in all areas and at all echelons of the Judiciary; (*training and education*)
8. The State must pay the amounts established in [...] this Judgment, as compensation for pecuniary and non-pecuniary damage, and for reimbursement of costs and expenses;⁹⁵ (*compensation*)

Despite the petitioners' request, the Inter-American Court decided not to include reparations to establish an "international norm on the embryo" and to instruct "the Constitutional Chamber of the Supreme Court of justice [to carry out] a public act in order to apologize to the victims for the violation of their human rights and for the pain and suffering caused to them".⁹⁶ Additionally, the Inter-American Court did not require that the State "declare the Costa Rican Social Security Institute [...] establish a specialized IVF clinic named after Gerardo Trejos Salas".⁹⁷ The Court denied these reparations after determining that "the other measures of reparation requested [...] (were) sufficient and adequate to remedy the violations suffered by the victims".⁹⁸ From the list of reparations accepted and ordered by the Inter-American Court, only those focused on legislative reform, compensation and training had the potential, albeit extremely limited, to take account of gendered harm. However, as will be confirmed through the examination of each of these reparations, the Inter-American Court failed to extend its gendered analysis of reproductive rights and stereotyping to the reparations issued in this case.

⁹⁵ Ibid ¶381.

⁹⁶ Ibid ¶342.

⁹⁷ Ibid.

⁹⁸ Ibid ¶344.

6.3.1 Compensation

In requesting the compensation reparations in this case, one of the victims' lawyers, Boris Molina, requested that compensation for non-pecuniary damage take into account the gendered aspects of the rights violations in this case, especially as the ban on IVF damaged the victims' *proyecto de vida*. He explained that such reparation was necessary because the State "created a situation of lack of protection for those persons to the point of affecting them in their most intimate personal sphere, and re-victimizing them by not responding to their reproductive disability".⁹⁹ He argued, "it is essential to consider the damage to their life project (*proyecto de vida*) as part of the non-pecuniary damage because [...] these couples were seeking to found a family with biological children, and this road map they had prepared for their life was curtailed by the State's arbitrariness and inactivity".¹⁰⁰ Molina requested non-pecuniary damage based on several criteria, including loss of monthly temporary income, and in his calculation, made a determination of difference based on gender. He requested that the Inter-American Court compensate the women victims a sum of \$654,435 each, and \$466,651 for the male victims. However, the Inter-American Court judgment did not provide an explanation for this distinction. The Inter-American Court ultimately determined that each of the victims receive \$20,000 in order to compensate for non-pecuniary damages related to the victims' life projects.¹⁰¹ In determining the compensation amounts to be distributed to the victims, the Inter-American Court made no mention of the gender differentiations indicated by Molina. In fact, it is important to note that despite the Inter-American Court's insistence that the IVF ban had a disproportionate impact on women, the only mention of compensation designed to address the different situations of men and women originated with Molina. If there was an appropriate place to recognize and further compensate the disproportionate impact and discrimination women victims faced in this case, this was the Inter-American Court's opportunity. Although the Court awarded compensation to redress disruption of the victims' life project,¹⁰² it failed to reflect on its own determination that the women victims had suffered greater harm. This reparation was not a transformative gender-based reparation, which is attributable to incomplete fulfilment of precondition two, *identify the violations*. In that the Convention of Belém do Pará was not included in the Inter-American Court's examination of the rights violations in the *Artavia Murillo et al.* case, the Inter-American Court had no foundation to

⁹⁹ Ibid ¶357.

¹⁰⁰ Ibid.

¹⁰¹ Ibid ¶363. (Amounts are in US Dollars)

¹⁰² Ibid.

develop a compensation reparation designed to redress the gendered harm and the restrictions placed on women's reproductive autonomy.

6.3.2 Legislative Reform

The legislative reform reparations ordered by the Inter-American Court required that the Costa Rican State annul the IVF ban and include IVF services within Costa Rica's social security system (La Caja). The legislative reform reparations in no way addressed the other reproductive rights restrictions currently in place in Costa Rica, such as the ban on emergency contraception and limited access to legal abortion services, which are arguably more pressing reproductive rights issues than the instatement of state-funded IVF services.¹⁰³ In that the petitioners failed to connect the IVF ban to the reproductive rights framework, the Inter-American Court subsequently neglected to apply its interpretations of the right to reproductive health to the legislative reform reparations. In addition, although the Inter-American Court required that "the State must include the availability of IVF within the infertility treatments and programs offered by its health care services, in keeping with the obligation of guarantee in relation to the principle of non-discrimination", the Court, perhaps intentionally, did not address the wider question of *who* is entitled to receive IVF services through the public system. In failing to explore this question, the Inter-American Court created an ambiguous space in which it has proven difficult to argue for and subsequently overturn the IVF ban. While certainly the *Artavia Murillo et al.* case was never concerned with expanding, let alone identifying IVF rights for individuals who exist outside the heteronormative traditional understanding of family, the rights of these individuals is a point of contention. Dr. Ribas shared her thoughts on the current challenges facing the annulment of the IVF ban:

The problem I have, is the way that I feel in this country is that you must pick your battles. And, you can't fight ten of them at the same time. So, the (IVF) movement has been hindered by mixing things with same-sex couples. I am not homophobic, and I totally respect whatever sexual inclination or way of life that someone would choose to be, to live. But, if that is going to cloud people's judgments, then I can't stand by you, because I fought for patients. This is a disease. Infertility is a disease; it's a disabling disease. Homosexuality is not a disability; it is not a disease. We should not have chosen that route first – later *those* rights, but things have been clouded by mixing. So, then they walked *right into the trap!* Because then it's the abortion movement, it's the homosexual movement, it's the gays, it's everything - *no!* This was never the way it should have been brought about... we should have

¹⁰³ Interview with Jorge Oviedo, Deputy Attorney, General Prosecutor of the Republic of Costa Rica/State Representative in *Artavia Murillo et al. v. Costa Rica*, San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G).

stuck to the patient issues – get the technique into the country, and then ‘come on, - everybody else in the door!’ But, everybody tried to get in the door at once!¹⁰⁴

While some of Dr. Ribas’ concerns are valid, especially in that she expressed frustration with the IVF technique still not being available in Costa Rica, her argument, while pragmatic, essentially ignores the interrelated and multidimensional nature of sexual and reproductive rights. Her statement reveals the problems inherent to this case: as much as this *Artavia Murillo et al.* was not designed to be about the reproductive rights of women, it was also not designed to promote reproductive rights for anyone other than those individuals engaged in heterosexual marriages. The legislative reform reparations issued in this case had great potential to transform the lives of married heterosexual Costa Ricans. However, because the Inter-American Court did not reference the interconnected nature of reproductive rights (*establish the facts*), and also neglected to recognise the impact of the IVF ban on groups other than married heterosexual Costa Ricans (*identify the harm and those harmed*), the transformative potential of the legislative reform reparations ordered by the Inter-American Court was extremely limited.

6.3.3 Judicial Training

The training and education reparation included in the *Artavia Murillo et al.* judgment required that “the State implement permanent education and training programs and courses on human rights, reproductive rights and non-discrimination for judicial officials in all areas and at all echelons of the Judiciary”.¹⁰⁵ The Inter-American Court’s decision to include the training reparation for members of the judiciary was especially important in this case, because it was the singular reparation with the potential to disrupt or challenge stereotypical and discriminatory thinking in the Costa Rican judiciary. Despite this advancement, there are several clear missed opportunities in the development of this training reparation, namely, the content, duration and the audience of the training and education programs were not identified in the judgment. This was also the only reparation that did not set a period of time in which the State must report back about the status of compliance. While the Inter-American Court noted that the training and education programs must be permanent in nature, it did not require the State to submit ongoing compliance reports that would prove the sustainable nature of the training programs. Additionally, the Inter-American Court noted that the training and education programs should cover topics such as human rights, reproductive rights and non-discrimination, but in doing so it did not require the State to

¹⁰⁴ Interview with Dr. Delia Maria Ribas Valdés, IVF Doctor, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, S, Rx).

¹⁰⁵ *Artavia Murillo et al. v. Costa Rica* [2012] (n 1) ¶IX (7).

collaborate with civil society organizations or gender experts in the country or region who were best-suited to conduct this training.

While the Costa Rican State asserted that the Inter-American Court cannot “(determine)... the contents of campaigns on reproductive health”,¹⁰⁶ the Court could have taken significant steps, such as requiring the State to report back to the Court within set time periods in order to ensure the training programs implemented by the State addressed gender stereotyping and discrimination in Costa Rica. Lastly, this reparation was limited in that it applied only to the judiciary, and failed to address social and cultural norms that serve to stereotype and discriminate against women in other private and public arenas, such as healthcare and public education systems. Ultimately, this reparation fulfils the criteria of a gender-based reparation in that its objective was to educate members of the judiciary in human rights and reproductive health, but the design of the reparation limits its transformative potential.

The reparation measures ordered by the Inter-American Court have been partially fulfilled by the Costa Rican state. The ban on IVF remains, despite efforts made by the Costa Rican president to issue an Executive Decree that would supersede the Constitutional Court’s restriction on the procedure; the decree was appealed and declared unconstitutional by the Constitutional Court.¹⁰⁷ The compensation reparations were distributed to the victims within three months of the judgment.¹⁰⁸ In regards to judiciary training, the Inter-American Court deemed the State to be compliant as a result of its efforts to include gender and reproductive health training within the Costa Rican legal training institutions, as well as through voluntary workshops intended for public defenders and ministers.¹⁰⁹ However, in terms of challenging gender stereotypes and discrimination in Costa Rica, the transformative potential of the reparations issued in the *Artavia Murillo et al.* judgment is minimal. It is unfortunate that the reparations issued by the Inter-American Court in this case did not reflect the gender-based reasoning developed within the facts and merits of the case. The

¹⁰⁶ Ibid ¶340.

¹⁰⁷ *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica* [26 February 2016] Inter-American Court of Human Rights, Monitoring Compliance with Judgment 4-19. See also, Ligia De Jesús Castaldi and Maria Ines Franck “Inter-American Court Judgment against Costa Rica on In Vitro Fertilisation (IVF): A Challenge to the Court’s Enforcement Authority” (OxHRH Blog 28 April 2016) <<http://ohrh.law.ox.ac.uk/inter-american-court-judgment-against-costa-rica-on-in-vitro-fertilisation-ivf-a-challenge-to-the-courts-enforcement-authority/>>.

¹⁰⁸ *Artavia Murillo et al. v. Costa Rica* [26 February 2016] Monitoring Compliance with Judgment (n 108) 24-25; Interview with Dr. Delia Maria Ribas Valdés, IVF Doctor, San Jose, Costa Rica 14 August 2014 (Ref Code: Ip, CR, S, Rx) and interview with Jorge Oviedo, Deputy Attorney, General Prosecutor of the Republic of Costa Rica/State Representative in *Artavia Murillo et al. v. Costa Rica*, San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G).

¹⁰⁹ *Artavia Murillo et al. v. Costa Rica* [26 February 2016] (n 108) 22-24.

Inter-American Court determined that the stereotyping of women is incompatible with international human rights law, but then failed to issue reparation that at least calls attention to the patriarchal harm that underpins women's limited enjoyment of their reproductive rights. Ultimately, the disconnect between reasoning and reparation in the *Artavia Murillo et al.* case can be attributed to a failure to develop the case from within a violence against women framework, which would have required actors involved in the case to interpret women's reproductive rights violations as they result from harm inflicted upon women because they are women, and not necessarily because of their gendered roles as mothers.

6.4 Conclusions and Lessons Learned

Artavia Murillo et al. v. Costa Rica is an historic and ground-breaking case. The Inter-American Court of Human Rights made great advancements in its reasoning on gender throughout the judgment, which is undoubtedly beneficial for future litigation concerned with women's reproductive rights. However, the above analysis of *Artavia Murillo et al. v. Costa Rica* reveals a number of lessons to be applied in upcoming cases before the Inter-American System of Human Rights; namely, reproductive rights litigation must incorporate a gendered analysis of harm in order to effectively repair gendered harm. The concluding section of this chapter reflects on the analysis of *Artavia Murillo et al. v. Costa Rica* to highlight the benefit of employing alternative rights concepts in women's reproductive rights cases, and suggests that these concepts be employed in the earliest stages of litigation in order to strengthen gender-based reparations. In addition, this section argues that in order to develop emblematic reproductive rights cases and ensure a "gender reparations tradition" within the Inter-American System of Human Rights, petitioners involved in reproductive rights litigation must make concerted efforts to connect women's reproductive rights to gendered harm and the violence against women framework.

The alternative rights concepts identified in this thesis, *proyecto de vida* and *vida digna*, provide a conduit through which it is possible to uncover the gendered nature of women's reproductive rights violations in litigation before the Inter-American System of Human Rights. *Proyecto de vida* and *vida digna*, when employed in women's reproductive rights litigation, can be used to examine structural intersectional discrimination, and can also be used to analyse and interpret gendered harm. The *Artavia Murillo et al.* case analysis provides further lessons for employing alternative rights concepts in women's reproductive rights litigation. First, in determining a connection between the rights to life and private life and the right to dignity, the Inter-American Court established grounds to apply the concept

of *vida digna* in future women's reproductive rights cases. Second, the *Artavia Murillo et al.* case analysis revealed the importance of incorporating alternative rights concepts from the earliest stages of case design in order to strengthen the gendered analysis of reparations issued by the Inter-American Court.

The Inter-American Court of Human Rights determined in its analysis of the right to life that States have a responsibility to adopt the "necessary measures to create an adequate regulatory framework that deters any threat to the right to life and safeguards the right to have access to conditions that ensure a decent life (*vida digna*)".¹¹⁰ In addition, the Court examined the right to private life in connection with the right to dignity, and determined that "the protection of private life encompasses a series of factors associated with the dignity of the individual".¹¹¹ The Court described these factors as they include, "the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships".¹¹² Alexandra Sandoval noted, in her analysis of the *Artavia Murillo et al.* case and the concept of *vida digna*, that states have an obligation to "provide the minimum conditions that allow (their) citizens access to a decent life".¹¹³ According to the Inter-American Court, these conditions include access to reproductive health services and medical technologies.¹¹⁴ This means that the concept of *vida digna*, when applied to reproductive rights, requires that states refrain from interference in women's lives (a negative obligation), and in turn, provide women with the services they need to enact their rights (a positive obligation). By connecting the rights to life and private life to *vida digna* in the *Artavia Murillo et al.* case, the Inter-American Court established a foundation to apply *vida digna* in future reproductive health rights cases. For example, in cases involving abortion or emergency contraception, the Inter-American Court can rely on the precedent it established in *Artavia Murillo et al.* to conclude that states must provide technologies and services to enact these reproductive rights.

The *Artavia Murillo et al. v. Costa Rica* case also included *proyecto de vida*, although this concept was introduced in the final stages of the case before the Inter-American Court. One of the petitioners raised a claim of damage to *proyecto de vida* as grounds for compensation, and in doing so determined that women should be compensated at a higher

¹¹⁰ *Artavia Murillo et al. v. Costa Rica* [2012] (n 1) ¶ 172. The English version of the judgment uses the phrase "decent life," whereas the Spanish version uses "*vida digna*."

¹¹¹ *Artavia Murillo et al. v. Costa Rica* [2012] (n 1) ¶143.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Artavia Murillo et al. v. Costa Rica* [2012] (n 1) ¶146.

rate than men. However, the Inter-American Court did not consider gender as a determinant of discrimination in its interpretation of *proyecto de vida*. The above analysis of the Artavia Murillo et al. case revealed that the petitioner's failure to effectively identify gendered harm in the initial stages of this case resulted in gender neutral reparations. Had the petitioners introduced *proyecto de vida* in their claim of a right to private life violation in the initial stages of this case, there may have been an opportunity to more effectively incorporate gender-based discrimination in the development of reparations. In order to advance the likelihood that reparations address, and redress, gender-based discrimination, alternative rights concepts must be incorporated in the early stages of reproductive rights litigation.

The analysis of the *Artavia Murillo et al. v. Costa Rica* case conducted in this chapter exposed a disconnect between gender-based reasoning and reparation in the judgment issued by the Inter-American Court of Human Rights. Critical examination of this case revealed that the petitioner's initial objectives were not focused on improving women's reproductive rights in a general sense, but rather, the case was designed to benefit certain individuals. *Artavia Murillo et al. v. Costa Rica* was not designed to address structural gender-based discrimination and inequality. Despite the Inter-American Court's efforts to examine gender stereotyping and the impact of gendered harm in this case, the original intentions of the petitioners involved in this case limited the transformative potential of the reparations. The final part of this chapter reflects on the Artavia Murillo et al. case analysis to argue that reproductive rights violations must be put in context during litigation in order to ensure that reparations address the gendered nature of discrimination and harm.

Human rights cases that come before the Inter-American System are emblematic in nature, they represent structural conditions of inequality, discrimination and violence. The Inter-American Court has recognized that in situations where the status quo perpetuates norms and values that reinforce discrimination and inequality, those conditions must be altered in order to protect, promote and fulfil human rights. This means, with regards to human rights litigation before the Inter-American Court, that petitioners who litigate women's reproductive rights cases must critique the structural context in which the rights violations exist so that the Inter-American Court can consider these pre-existing conditions in its determination of the facts and reparations. Oscar Parra Vera, a former senior attorney at the Inter-American Court of Human Rights, explained,

Considering that the Inter-American Court is dealing with specific cases, it is important to develop specific narratives *for* specific cases. This is one obstacle for a structural approach, because sometimes if you don't have a structural picture about

a specific problem, it's difficult to issue orders that are open or general. Litigation (must) put in context every case [...] in the context of women's rights; the better case will provide better contextual proof.¹¹⁵

In order to develop a strategic women's reproductive rights case, especially one that incorporates structural reparations that guarantee non-repetition, litigators must design their cases as individual rights violations that represent and originate from harm that is social and gendered. It is only then that the petitioner can request reparations that have the objective of repairing the social and gendered aspects of structural harm. The above examination of *Artavia Murillo et al. v. Costa Rica* highlighted the importance of effectively examining the impact of gendered harm in women's reproductive rights cases. In that the petitioners were ineffective in claiming a violation of the Convention of Belém do Pará, the Inter-American Commission did not admit the case based on a violation of women's rights. Without a women's rights violation, there were no grounds for the Inter-American Court to issue a gender-based reparation. Alexandra Sandoval noted, in regards to the *Artavia Murillo et al.* case, "they (the petitioners) didn't ask for much. So, I think that was one of the problems. For example, when you look at 'Cotton Field' you can see the relationship between reparations and what the representatives said about gender, but that wasn't the case in *Artavia*".¹¹⁶

While the petitioners failed to properly identify gendered harm in the *Artavia Murillo et al.* case, the Inter-American Court made great progress in defining the right to reproductive health and examining gender stereotyping as it applies to restrictions on reproductive rights. However, the Inter-American Court missed an opportunity to envelop violations of reproductive health within the context of the violence against women framework. The Inter-American Court has the power to exercise the principles of *iura novit curia* and *motu proprio* in situations where the violations and reparations determined by the Inter-American Commission do not adequately address and/or redress certain aspects of a case. In *Artavia Murillo et al.* the Inter-American Court clearly identified structural problems that serve to discriminate against women in Costa Rica, but it neglected to exercise its power to find a human rights violation under the Convention of Belém do Pará. If the Court had elected to exercise *iura novit curia* to determine a violation of Article 7(b) of the Convention of Belém do Pará, it would have provided itself the grounds on which to exercise its *motu proprio* capacity and subsequently issue reparation that would address structural gender-

¹¹⁵ Interview with Oscar Parra Vera, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica 7 August 2014 (Ref Code: Ip, Ct, S).

¹¹⁶ Interview with Alexandra Sandoval, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica 12 August 2014 (Ref Code: Ip, Ct, S).

based harm. Rubio-Marín and Sandoval asserted that the Inter-American Court “should not shy away from the opportunity to trigger broader structural reform”,¹¹⁷ yet the above analysis of *Artavia Murillo et al.* revealed that the Court did indeed “shy away”, instead of electing to exercise its *iura novit curia* and *motu proprio* powers.¹¹⁸

The *Artavia Murillo et al. v. Costa Rica* case is the culmination of over a decade of litigation, and represents advancements made within the Inter-American System of Human Rights in regards to women’s reproductive rights, while also providing a foundation on which to build future women’s reproductive rights cases. While *Artavia Murillo et al.* is championed as a women’s rights case, the preceding analysis revealed that such a categorization is problematic. This chapter raised questions about the original intentions and design of this case, and determined that a failure to effectively include a gender approach from the initial stages of this case resulted in a disconnect between gender-based reasoning and reparation.

In chapters four, five and six, I employed the Holistic Gender Approach to Reparations to identify how each of the cases failed to fulfil the preconditions. Through the case study analyses, I determined that additional strategies beyond the Holistic Gender Approach to Reparations are required in order to ensure that gendered reparations are secured in women’s reproductive rights cases. The final chapter of this thesis identifies and explains these strategies and brings them together with the Holistic Gender Approach to Reparations to suggest a “gender reparations tradition” within reproductive rights litigation before the Inter-American System of Human Rights.

¹¹⁷ Rubio-Marín and Sandoval (n 3) 1090.

¹¹⁸ Quintana-Osuna (n 91), *supra* section 3.1.3 (n 93).

CHAPTER SEVEN

CONCLUSION

The relationship between women and the Inter-American System of Human Rights has long been contentious because the Inter-American System, as a legal and social institution, was “built on the silence of women”.¹ Feminist legal theorists, such as Carol Smart and Martha Fineman, have raised concerns about whether or not feminist researchers should delve into the legal realm because it has proven to be an historically inhospitable arena in which to challenge gender inequality and advance women’s rights.² While feminist researchers should indeed be wary of the inherent androcentric nature of human rights law, this is not an excuse to forego a feminist reconceptualization of how human rights institutions can be made to work for women. Human rights institutions, such as the Inter-American System of Human Rights, have increasingly acknowledged and responded to women’s rights activists and litigators who demand that the Inter-American Commission and Inter-American Court evolve to better address and redress women’s rights violations through the application of human rights law. Women’s rights advocates have sought out and applied numerous strategies for advancing women’s rights through the Inter-American System, including feminist appropriation of the principle of due diligence,³ disruption of the hierarchical generations of human rights⁴ and the development of concepts such as *proyecto de vida* and *vida digna*.⁵ Despite advancements made in examining and repairing violations of women’s rights,⁶ the Inter-American System of Human Rights has been largely ineffective in how it articulates and repairs violations of women’s *reproductive* rights. As the above case study analyses revealed, the Inter-American System, and actors involved in litigation, have either ignored or been unsuccessful in attempts to examine gendered harm as it underpins violations of women’s reproductive rights.

In this concluding chapter I suggest a reconceptualization of how gendered harm is identified and repaired in women’s reproductive rights cases before the Inter-American System of Human Rights. This chapter builds upon key themes emerging from the case

¹ Hilary Charlesworth, ‘What are “Women’s International Human Rights?”’ in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspective* (University of Pennsylvania Press 1994) 60, *supra* section 1.1.1 (n 12).

² Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 2 and Martha Fineman, Martha Fineman, ‘Introduction’ in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) xv, *supra* section 1.1.1 (n 13, 14).

³ *Supra* section 2.2.1 (n 52-53), and section 3.1.1 (n 31-33).

⁴ *Supra* section 2.1, and section 2.1.2 (n 42).

⁵ *Supra* section 3.2.2.

⁶ *Supra* section 3.2.3.

study analyses to propose a new way of developing reparations in women's reproductive rights cases. In the first part of this chapter I reflect on the feminist theories and methodologies employed throughout this thesis to draw together and reinforce lessons learned from the case studies. The second part of this conclusion derives from these lessons a number of strategies, that I argue should be combined with Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations⁷ in order to provide a foundational premise on which to develop a "gender reparations tradition" within reproductive rights litigation before the Inter-American System of Human Rights. In the final section of this conclusion I speculate on the Inter-American Court's current women's reproductive rights case, *IV v. Bolivia*.⁸ In analysing this case, my objective is to test the benefit and utility of the strategies I suggest when they are applied in conjunction with the Holistic Gender Approach to Reparations, and to determine the potential for the Inter-American Court to advance a "gender reparations tradition" through the *IV v. Bolivia* case.

Feminist methodologies and theories were applied in this thesis to raise questions about women's relationships to law,⁹ and to explore feminist assertions that gender must become a universal category of analysis in order to expose and question law's claim to objectivity.¹⁰ Throughout this thesis, I employed the *searching for silences* and *world travelling* methodologies as a theoretical framework to examine the structural context in which women experience(d) violations of their reproductive rights. *World travelling* concepts such as intersectionality and "positioning", when applied to examination of the case studies, enabled critique of how and why women experience(d) violations of their reproductive rights. These concepts were also used to determine how inadequate examination of the multidimensional experience of discrimination in women's reproductive rights cases results in reparations that are individualised and singular in dimension. This was the situation in the María Chávez and Artavia Murillo et al. cases, where a failure to examine the intersectional determinants of discrimination resulted in reparations that neglected to address, and redress, the causes and effects of social harm.¹¹ Crenshaw's "intersectionality",¹² Yuval-Davis' "transversal politics"¹³ and Mohanty's "imagined

⁷ Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the 'Cotton Field' Judgment' (2011) 33:4 Human Rights Quarterly 1091.

⁸ *IV v. Bolivia* [2014] Inter-American Commission on Human Rights Report No. 72/14, Case 12.655 Merits.

⁹ Martha Albertson Fineman, 'Introduction' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) xi.

¹⁰ Hilary Charlesworth, 'Feminist Methods in International Law' (2004) 36 Studies in Transnational Legal Policy 159.

¹¹ *Supra* section 4.3 and section 6.3.

¹² Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43:6 Stanford Law Review 1241–1299, *supra* section 1.1.1 (n 35, 41).

¹³ Nira Yuval-Davis, 'What is "Transversal Politics?"' (1999) 12 Soundings 94–98, *supra* section 1.1.1 (n 37).

communities”¹⁴ contributed to the analysis of why women are denied their reproductive rights in the case study analyses. In the examination of the María Chávez case in chapter four I applied each of the *world travelling* components in order to determine why a certain “type” of Peruvian woman was targeted for sterilization.¹⁵ In chapter five, the Paulina Ramírez case study, I applied the concept of “positioning”, as articulated by Yuval-Davis, in order to determine that a woman’s “position” is a contributing factor to perceptions made about her right to access legal abortion.¹⁶ Finally, in the analysis of the Artavia Murillo et al. case I incorporated Crenshaw’s concept of intersectionality to inform my critique of the Inter-American Court’s inadequate interpretation of discrimination across determinants such as class, race, (dis)ability and sexuality.¹⁷

The *searching for silences* methodology was applied throughout this thesis in order to examine efforts made by litigators and the Inter-American System to challenge the “existing order” of law. This methodology underpinned the analysis of gendered harm in each case, and also helped to determine how the public/private divide has been manipulated and obscured through women’s reproductive rights litigation. In employing the *searching for silences* methodology, I examined the extent to which the Inter-American Commission and Court understand and apply gender in their analysis of women’s reproductive health rights. For example, the *searching for silences* methodology contributed to my assessment of the Inter-American Court’s tendency to rely on gender stereotyped notions of women when interpreting violations of their reproductive health rights.¹⁸ In addition, I determined the Inter-American Commission and Court are inconsistent in their efforts to apply the Convention of Belém do Pará to violations of women’s reproductive health rights. It was also through applying the *searching for silences* methodology that I uncovered a disconnect between the Inter-American System’s interpretation of reproductive health rights as being simultaneously “positive” and “negative” rights, and its failure to issue reparation that corresponds to such an interpretation. While the *searching for silences* methodology was a useful framework for identifying areas where the Inter-American System has been ineffective in recognising and protecting women’s reproductive rights, this methodology was also beneficial as a framework for detecting advancements in the Inter-American

¹⁴ Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourse', *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003), *supra* section 1.1.1 (n 34).

¹⁵ *Supra* section 4.2 (n 22-38).

¹⁶ *Supra* section 5.2 (n 45).

¹⁷ *Supra* section 6.2.3 (n 92).

¹⁸ *Miguel Castro Castro Prison v. Peru* [2008] Inter-American Court of Human Rights (ser. C), No. 160, Merits, Reparations and Costs, and *Artavia Murillo et al. ('In vitro fertilization') v. Costa Rica* [2012] Inter-American Court of Human Rights (ser. C) No. 257 Preliminary Objections, Merits, Reparations and Costs.

System's approach to enforcing these rights. For example, in *Artavia Murillo et al. v. Costa Rica*, the Inter-American Court successfully traversed the public/private divide by defining reproductive health through the right to privacy.¹⁹

While the *searching for silences* and *world travelling* methodologies were employed throughout this thesis to uncover the structural context in which women experienced violations of their reproductive rights, I also referred to additional feminist theories and concepts to analyse each particular reproductive rights violation. In chapter four, I employed feminist critiques of family planning and population control to develop the context in which certain "types" of Peruvian women were forcibly sterilized.²⁰ In chapter five, I examined "good/bad" abortion²¹ and paternalistic control²² in the context of the Paulina Ramírez case. Lastly, in chapter six, I discussed the impact of gender stereotyping on women's lives in order to provide greater context for analysis of the *Artavia Murillo et al.* case.²³ In addition, through each of the case study chapters I applied the concept of gendered harm²⁴ to inform the contextual analysis of the reproductive rights violation, and to examine fulfilment of the Holistic Gender Approach to Reparations' *identify the harm* precondition.²⁵ The analysis conducted in chapter four revealed that inadequate recognition of social and invasive gendered harm within the María Chávez Friendly Settlement Agreement resulted in reparations that were individual rather than social, and also limited in their potential to transform the lives of women (and men) targeted for sterilization. In the examination of the Paulina Ramírez Friendly Settlement Agreement (chapter five), I determined that the reparations agreed upon in this case had no benefit for women attempting to exercise their legal right to abortion because the Agreement did not include an analysis of the impact of gendered harm perpetuated through the medical community.²⁶ My analysis of gendered harm in the *Artavia Murillo et al.* judgment (chapter six) exposed the Court's limited assessment of the intersectional and compound nature of social harm. While the Inter-American Court was successful in its examination of gender stereotyping, a form of patriarchal harm, my analysis of the case revealed a disconnect between the Court's

¹⁹ *Artavia Murillo et al. ('In vitro fertilization') v. Costa Rica* [2012] (n 18), *supra* section 6.2.2.1 (n 64-66).

²⁰ S. Chante and N. Craske, *supra* section 4.2 (n 22); C. Ewig, *supra* section 4.2 (n 34); J. Guillerot, *supra* section 4.2 (n 30); J. Boesten, *supra* section 4.2 (n 25, 46); M. Alcalde, *supra* section 4.2 (n 32); E. Vasquez del Aguila, *supra* section 4.2 (n 28); B. Hartmann, *supra* section 4.2.2 (n 49); S. Rousseau, *supra* section 4.2.2 (n 45); and G. Tamayo, *supra* section 4.2.2 (n 44).

²¹ Celeste Condit, *supra* section 5.2 (n 43).

²² Kathy Davis, *supra* section 5.2.2 (n 58) and Sally Sheldon *supra* section 5.2.2 (n 59-61).

²³ *Supra* section 6.1.2: Rebecca Cook and Simone Cusack (n 25); Joan Williams and Nancy Segal (n 31); Ciara O'Connell (n 34); and Frances Raday (n 32).

²⁴ *Supra* section 2.2.

²⁵ *Supra* section 4.1, 5.1 and section 6.2.3.

²⁶ *Supra* section 5.1, 5.2.2 and section 5.4.

interpretation of patriarchal harm and the largely gender-free reparations issued in this case.²⁷

By examining gendered harm through the above case studies, I determined that reproductive rights cases that neglect to include an analysis of gendered harm in the earliest stages of litigation will not successfully fulfil the Holistic Gender Approach to Reparations. As a result, it is unlikely that they will incorporate gender-based reparations. Or, put another way, in the event that gendered harm is not sufficiently examined in the context of women's reproductive rights violations (*properly identify the harm*), there is little likelihood that a women's reproductive rights case will include a violation of the Convention of Belém do Para (*properly identify the alleged violations*). It is for this reason that the Holistic Gender Approach to Reparations is a necessary and valuable instrument in developing a "gender reparations tradition"; it requires that women's reproductive rights violations be interpreted through the concept of gendered harm.

The case study analyses conducted in this thesis incorporated feminist methodologies, theories and concepts, and information obtained from interviews, to determine the context in which women experience violations of their reproductive rights, and to critique the Inter-American System in its efforts to repair gendered harm in women's reproductive rights cases. Through critical examination of the *María Mamerita Mestanza Chávez v. Peru*, *Paulina del Carmen Jacinto Ramírez v. Mexico* and *Artavia Murillo et al. v. Costa Rica* cases, I derived four strategies for repairing gender-based harm in women's reproductive rights cases. These strategies provide practical steps for more effectively incorporating a gendered analysis of harm in litigation that deals with violations of women's reproductive rights. The intention and design of these strategies is that they should be coupled with Rubio-Marín and Sandoval's Holistic Gender Approach to Reparations²⁸ in order to advance the feminist project of building a "gender reparations tradition" within women's reproductive rights litigation before the Inter-American System of Human Rights.

7.1 Building a Gender Reparations Tradition: Strategies for the Future

The primary objective of analysing women's reproductive rights case studies through the Holistic Gender Approach to Reparations in this thesis was to derive from the analysis a set of strategies, that when combined with the Holistic Gender Approach to Reparations, would enable the establishment of a "gender reparations tradition" in women's reproductive rights

²⁷ *Supra* section 6.3 and 6.4.

²⁸ Rubio-Marín and Sandoval (n 7), *supra* section 3.3.

litigation before the Inter-American System of Human Rights. While I acknowledge that there are a number of approaches available for addressing gender-based harm in women's reproductive rights litigation, I maintain that engendering reparations is a necessary step for confronting the patriarchal culture that perpetuates violence and discrimination imposed upon women. The strategies I suggest here were identified through critique of the *María Mamerita Mestanza Chávez v. Peru*, *Paulina del Carmen Jacinto Ramírez v. Mexico* and *Artavia Murillo et al. v. Costa Rica* cases. The strategies are as follows: (i) employ alternative rights concepts in reproductive rights litigation; (ii) enhance the role of civil society in the design of reparations; (iii) apply a multi-faceted approach to interpreting reproductive rights; and (iv) acknowledge and claim violations of reproductive rights through the violence against women framework. These strategies are to be employed by the Inter-American System and/or actors engaged in women's reproductive rights litigation. While acknowledging that these steps are simultaneously simple and difficult to implement, I argue that without these first strategic steps it will be near impossible to advance the project of protecting, promoting and fulfilling women's reproductive rights through the Inter-American System of Human Rights. This section introduces each of the strategies, as well as explains their benefit and utility when applied to reproductive rights cases.

Employ Alternative Rights Concepts in Reproductive Rights Litigation

In the concluding sections of each of the above case study analyses I examined the utility of applying alternative rights concepts to violations of women's reproductive rights. In section 3.2.2, I introduced the alternative rights concepts, *vida digna* and *proyecto de vida*, and then through critically examining the María Chávez, Paulina Ramírez and Artavia Murillo et al. cases, I determined the benefit of employing alternative rights concepts in women's reproductive rights litigation. First, alternative rights concepts provide a foundation to examine the structural (gendered) context in which women experience rights violations, and second, application of these concepts in reproductive rights cases challenges the "existing order" of human rights law by confronting and challenging the hierarchical division of rights and the public/private divide.

In order to effectively deploy this strategy, petitioners engaged in women's reproductive rights litigation must include an analysis of *proyecto de vida* and/or *vida digna* in initial claims brought before the Inter-American Commission on Human Rights. While the Inter-American Commission and Court are free to examine violations of *vida digna* and *proyecto de vida* on their own accord, the Artavia Murillo et al. case analysis revealed that this

exercise does not necessarily result in gender-based reparations. To increase the likelihood that women's reproductive rights cases include an analysis of gendered harm, and subsequently repair gendered harm, it is imperative that litigators establish the foundation for a gendered analysis of reproductive rights from the outset of a case. By including alternative rights concepts from the earliest stages of litigation, petitioners provide the Inter-American Commission and Court with a conduit through which it is possible to examine how and why women experience violations of *vida digna* and *proyecto de vida*. These concepts provide an indirect way of inserting a gendered analysis of harm into women's reproductive rights cases because in order to examine *vida digna* and/or *proyecto de vida*, petitioners and the Inter-American System of Human Rights must determine underlying factors that reinforce and perpetuate discrimination against women. In the event that a reproductive rights case does not include a violation of the women's rights convention (Convention of Belém do Pará), it is especially important that petitioners employ alternative rights concepts as a way of ensuring that gender is a category of analysis in reproductive rights cases.

Application of alternative rights concepts in reproductive rights cases also creates space for the Inter-American Commission and Court to interpret reproductive rights across the public/private divide and the "so-called" generations of rights. The Inter-American Court engaged in this exercise in *Artavia Murillo et al.* by recognising the inherent connection between the right to private life, the right to dignity and the right to reproductive health. In doing so, the Court engaged in the project of weakening and diffusing the public/private hierarchy of rights. In order for alternative rights concepts to be effectively employed in women's reproductive rights cases before the Inter-American System, litigators must make concerted efforts to engender the right to dignity (*vida digna*) and protection of the life project (*proyecto de vida*). However, in doing so, litigators must also take care to avoid gender stereotypes that reify women as mothers when applying alternative rights concepts to women's reproductive rights cases.

Enhance the Role of Civil Society in the Design of Reparations

In order to develop a "gender reparations tradition" in women's reproductive rights litigation, I argue that the role of civil society before the Inter-American System of Human Rights should be enhanced to include involvement in the design of reparation measures. This strategy is derived from interviews with representatives from civil society and national Ombud's Offices, as well as from the analysis conducted of the Paulina Ramírez case

proceedings and the reparations agreed upon in the María Chávez case. Vanessa Coria explained in the context of the Paulina Ramírez case that civil society organizations representing petitioners do not always receive support from the Inter-American System,²⁹ and in the analysis of the María Chávez case I determined that even in the situation where civil society organizations are invited to contribute to reparation design, the Inter-American Commission has not prioritized state compliance with those reparations.³⁰ As discussed in section 3.2.1, feminist civil society organizations have increasingly become involved in women's rights litigation, and as a result the Inter-American System relies on civil society to share its knowledge and technical expertise. While certain civil society organizations are involved in women's rights litigation before the Inter-American System, there are organizations that focus specifically on local and national level advocacy, legislative and policy reform, and sexual and reproductive health education. I argue that it is these 'peripheral' non-legal organizations, because of their expertise in issues directly relevant to structural gendered harm and discrimination, that should be able to contribute to the design of reparations in women's rights cases. This strategy, if implemented by the Inter-American Commission, would not only strengthen reparation design and compliance-monitoring in cases where civil society organizations represent petitioners, but it would also help safeguard against ineffective weak reparation design in cases where the petitioner is not aware of, or neglects to address, structural causes of rights violations.

In order to advance the project of establishing a "gender reparations tradition" in women's reproductive rights litigation, civil society organizations must be invited to participate in the design of reparations agreed upon in Friendly Settlements and issued by the Inter-American Commission in Merits Decisions. While the task of designing reparations is time-consuming and requires financial support, I argue that allowing civil society to engage in the design of reparations will streamline compliance monitoring and increase the transformative potential of gender-based reparations. This strategy involves civil society in two ways: first, civil society organizations, other than those directly involved in litigation, should be invited to submit reparation suggestions to their national Ombuds Offices, which would then present reparation recommendations to petitioners and states in cases before the Inter-American Commission. Interview respondents from the women's rights divisions of both the Peruvian and Costa Rican Ombuds' Offices stated that they would be interested in

²⁹ Interview with Vanessa Coria, Advocacy and Program Manager, Women's Global Network for Reproductive Rights (WGNRR), formerly with Center for Justice and International Law (CEJIL), Mexico City, Mexico 18 July 2014 (Ref Code: Ip, M, N, S), *supra* section 5.4 (n 99).

³⁰ *Supra* section 4.3.3.

participating in the development of reparations in women's rights cases, but only if they were invited by the Inter-American Commission or the State to do so.³¹ By including civil society participation through an "open call" for reparations, the Inter-American Commission would gain insight from women's right organizations about the structural context in which reproductive rights cases exist, and would also benefit from establishing partnerships with organizations more familiar with national level rights issues than the Inter-American System. Second, reparations should be designed so as to require that states collaborate with and receive input from civil society organizations in drafting and reforming legislative proposals, and in developing the content for training and education reparations. Indeed, this is an action that the Inter-American Court has recently adopted. According to Douglass Cassel, the Court has

begun to direct States to include non-governmental organizations and civil society in the implementation of reparations. [...] (For example,) When it (the Court) ordered Ecuador to develop a training program for prison, judicial and law enforcement personnel on the human rights of prisoners, it ordered that civil society should participate in the design and implementation of the program.³²

The inclusion of civil society in the design and implementation of reparations increases the likelihood that reparations will take account of the gendered nature of harm, and that compliance monitoring will be conducted in a more equitable and substantive way. In order to begin the process of creating a "gender reparations tradition" it is imperative that civil society organizations be given a greater role in the design of gender-based reparations.

Apply a Multi-Faceted Approach to Interpreting Reproductive Rights

This strategy is derived from analysis of the above reproductive rights cases, and is an elaboration of the multi-faceted approach to reproductive rights proposed by Ronli Sifris, which was discussed in section 2.1.2.³³ In Sifris' articulation of the multi-faceted approach to rights, she claimed that "only a multi-faceted approach can adequately take account of the numerous ways in which women who are denied access to abortion (or other reproductive health rights) may suffer".³⁴ When applying this approach as a strategy to advance a "gender reparations tradition" before the Inter-American System of Human Rights, the utility is two-fold; not only does a multi-faceted approach to reproductive rights

³¹ Interview with Ivania Solano Jiménez, Attorney, Women's Department, Office of the Ombudsman [Defensoría de los Habitantes], San Jose, Costa Rica 20 August 2014 (Ref Code: Ip, CR, G, S) and Carolina Garcés Peralta Rights of Women, Office of the Ombudsman, Republic of Peru, Lima, Peru July 2014 (Ref Code: Ip, P, G).

³² Douglass Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights' in M. Bossuyt, P. Lemmens, K. De Feyter, and S. Parmentier (eds), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia 2006). Available at www.corteidh.or.cr/tablas/r28153.pdf (accessed 20 February 2017).

³³ Ronli Sifris, 'Restrictive Regulation of Abortion and the Right to Health' (2010) 18 *Medical Law Review* 185-212, *supra* section 2.1.2 (n 35-40).

³⁴ *Ibid* 190.

enable a gendered interpretation of reproductive health rights violations, but also, such an approach is a necessary component for developing gender-based reparations. In each of the cases selected for analysis in this thesis, the petitioners employed a multi-faceted approach to rights in order to determine violations of reproductive rights across the generations of rights.³⁵ As a result, the Inter-American Commission and Inter-American Court interpreted women's reproductive rights as requiring positive and negative state action in order to be adequately protected and fulfilled. The *María Chávez and Artavia Murillo et al.* cases clearly exemplified application of this strategy in that the petitioners argued that states must implement reproductive health services (positive duty) through rights such as the right to private life³⁶ and the right to personal integrity³⁷ (negative rights), as enshrined in the American Convention on Human Rights.³⁸

In order to effectively apply a multi-faceted approach to rights before the Inter-American System of Human Rights, petitioners must identify and apply the indivisible nature of human rights to the rights claims they make before the Inter-American Commission on Human Rights. Then, in order to guarantee that gender is an integral analytical component of reparation design, petitioners must ensure that their analysis of rights provisions incorporates a thorough and effective gender perspective.

Reproductive Rights and Violence Against Women

This final strategy builds on the multi-faceted approach to rights to suggest that not only should reproductive health rights violations be established through civil and political rights, but they must also be interpreted through women's rights conventions in order to put reproductive rights violations in context. In litigation before the Inter-American System of Human Rights, this means that petitioners must not only claim violations of reproductive rights through the American Convention on Human Rights, but they must also incorporate rights enshrined within the Convention of Belém do Pará. As I determined above in section 3.1.1, Article 7(b), when interpreted through Articles 8 and 9 of the Convention of Belém do Pará, can be applied by the Inter-American Commission and Court to require that states *prevent* gender-based harm; the principle of due diligence.³⁹ In the context of reproductive rights, this means that states not only have a duty to protect women from arbitrary

³⁵ *Supra* sections 4.1, 5.1 and 6.2.1 and 6.2.2.

³⁶ *Artavia Murillo v. Costa Rica* [2012] (n 18), *supra* section 6.2.1 and 6.2.2.

³⁷ *María Mamerita Mestanza Chávez v. Peru*, *supra* section 4.1.

³⁸ American Convention on Human Rights (ACHR) OASTS No. 36 (1969).

³⁹ *Supra* section 3.1.1 (n 31-34).

interference in their private lives, but that states must also take steps to eradicate pre-existing conditions of gender inequality, discrimination and violence.

The responsibility of locating violations of reproductive rights within the violence against women framework in the Inter-American System of Human Rights is that of petitioners and the Inter-American Court of Human Rights. Based on the above analysis of the *Artavia Murillo et al. v. Costa Rica* case, I contend that it is not enough for petitioners to simply claim a violation of the Convention of Belém do Pará in reproductive rights cases, but rather, in order to ensure that the Inter-American Commission admits a case based on violations of this treaty, petitioners must conduct a thorough and comprehensive examination of the role and impact of gendered harm on women's reproductive lives. In the event that the petitioners fail to locate reproductive rights violations within the women's rights framework, as was the situation in the *Artavia Murillo et al.* case, it is then the responsibility of the Inter-American Court to invoke its *iura novit curia* and *motu proprio* powers in order to determine a violation of the Convention of Belém do Pará and subsequently issue reparation to address this violation. By examining gender-based harm through the Convention of Belém do Pará it is possible for the petitioners, and subsequently the Inter-American Commission and Court, to envelop reproductive health within the violence against women framework.⁴⁰ Such an exercise is necessary in order to trigger reparation that has as its objective the eradication of pre-existing social and cultural structures that reinforce and perpetuate violations of women's reproductive health rights.

The strategies I suggest here, when combined with the Holistic Gender Approach to Reparations, establish the foundation for developing a "gender reparations tradition" in the Inter-American System of Human Rights. In order to test the utility of these strategies, the final section of this thesis reviews and speculates upon the Inter-American Court's current and ongoing women's reproductive rights case, *IV v. Bolivia*.⁴¹ In this next section, I pull together themes explored throughout the case study analyses, such as intersectionality and the public/private divide, and combine them with the identified strategies and the Holistic Gender Approach to Reparations to determine the potential for the Inter-American Court to initiate the "gender reparations tradition" through its second reproductive rights case. Section 7.2 introduces *IV v. Bolivia* as it developed through the Inter-American Commission on Human Rights. In this section I apply the Holistic Gender Approach to

⁴⁰ Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd edn, The Federation Press 2002) 314-315, *supra* section 2.3.2 (n 126).

⁴¹ *IV v. Bolivia* [2014] (n 8).

Reparations to determine the gendered nature and transformative potential of reparations issued in the Merits Decision. Finally, the overall objective of analysing the development of this ‘live’ case before the Inter-American Court of Human Rights is to determine if and how the initial design of this case enables the development of gender based reparations in the forthcoming final judgment.

7.2 What’s Next for Women’s Reproductive Rights: Speculating on *IV v. Bolivia*

IV v Bolivia is a reproductive rights case concerned with the forced sterilization of a migrant immigrant woman. On July 1st 2000, IV underwent a caesarean section procedure to give birth to her third child. While IV was under anaesthesia, the doctor who performed the caesarean section also performed a tubal ligation, which had the effect of ending IV’s reproductive capacity.⁴² The following day, a medical intern informed IV that she had been sterilised during the procedure. When IV learned this information, she asked if her or the baby’s life had been at risk, and if that was the reason she had been sterilised. The intern responded that her life hadn’t been at risk but that future pregnancies would have been risky.⁴³ IV contended that she had not given her consent for such a procedure, despite claims made by the doctor who performed the sterilization that she consented verbally during her caesarean section. In the months following her sterilization, three audits were conducted in order to determine the facts of the situation. The first and second audits were inconclusive, but the third audit reached the conclusion: “(i) that no justification had existed for carrying out the bilateral tubal ligation [...], and (ii) that there had been no written consent signed by the patient prior to the operation”.⁴⁴ Following the audit, IV sought justice through the Bolivian legal system, and while the doctor was charged and sentenced on two occasions, he was released each time on appeal.

On March 7th 2007, IV and her representatives lodged a petition before the Inter-American Commission on Human Rights.⁴⁵ The *IV v. Bolivia* case is unique because IV is being represented by the State Ombuds office, which means that a Bolivian State entity brought a case against its own country. The violations alleged by the Ombuds office (petitioner) before the Inter-American Commission were as follows: American Convention on Human Rights: the right to humane treatment (Article 5), the right to fair trial (Article 8), the right to privacy (Article 11), freedom of thought and expression (Article 13), the rights of the

⁴² Ibid ¶29.

⁴³ Ibid ¶26.

⁴⁴ Ibid ¶37.

⁴⁵ *IV v. Bolivia* [2008] Inter-American Commission on Human Rights Report No. 40/08, Petition 270-07 Admissibility.

family (Article 17) and judicial protection (Article 25), and the Convention of Belém do Pará Article 7, all of which were accepted by the Inter-American Commission on Human Rights.⁴⁶ In order to establish its claim for a violation of the Convention of Belém do Pará, the petitioner claimed,

These violations of IV's human rights arise from gender-based discrimination. (The petitioner) maintain(ed) that the doctors decided to submit I.V. to a fallopian tube ligature without her consent because they had a discriminatory, paternalistic, and patriarchal attitude to exploiting a woman's vulnerability. (The petitioner) also maintained that IV's case is part of a widespread attitude of discrimination by Bolivian hospitals and health centers against women with regard to surgical contraception.⁴⁷

In the above claim, the petitioners successfully connected gendered (patriarchal) harm as it was manifested through widespread discrimination in the medical sector to the violence against women framework enshrined within the Convention of Belém do Pará. In doing so, the petitioners effectively contextualised reproductive rights within the violence against women framework.

The Inter-American Commission admitted the *IV v. Bolivia* case on July 23rd 2008. The petitioner decided not to participate in Friendly Settlement proceedings,⁴⁸ and the Inter-American Commission issued its Merits decision on August 15th 2014. In its Merits Decision, the Inter-American Commission examined the Bolivian State's obligation to respect and guarantee the human right to be free from discrimination,⁴⁹ and through its analysis of the right to personal integrity, the Commission determined that "guaranteeing the right to personal integrity has implications for women's equality, autonomy, privacy, and dignity".⁵⁰ In addition, the Inter-American Commission accepted the petitioner's alleged violation of the Convention of Belém do Pará, and explained,

The right to personal integrity and the non-discrimination principle are closely linked to the right of woman to be free from all forms of violence. Accordingly, [...] violence against women and the social discrimination promoting and validating it are serious human rights problems with negative repercussions for women and society at large. They constitute an obstacle to the recognition and enjoyment of all their human rights and threaten their physical, psychological and moral integrity.⁵¹

The Inter-American Commission also examined the role of gender stereotyping within its analysis of the right to information, and in doing so incorporated the concept of intersectionality to articulate how women experience discrimination across a number of

⁴⁶ *IV v. Bolivia* [2014] (n 8) ¶2 and ¶5.

⁴⁷ *IV v. Bolivia* [2008] (n 45) ¶28.

⁴⁸ *IV v. Bolivia* [2014] (n 8) ¶22.

⁴⁹ *Ibid* ¶96.

⁵⁰ *Ibid* ¶97.

⁵¹ *Ibid* ¶101, referencing 'Violence and Discrimination against Women in the Armed Conflict in Colombia (Inter-American Commission on Human Rights, OEA/Ser/L/V/II. 124/Doc.67 October 18 2006) ¶11.

determining characteristics, such as income level, ethnicity, citizenship status and geographical location.⁵² This development was a significant departure from the one-dimensional characterization of María Chávez in the *Maria Mamerita Mestanza Chavez v. Peru* Friendly Settlement Agreement, which failed to establish the intersecting dimensions in which women were targeted for sterilization.

The Merits Decision issued by the Inter-American Commission followed in the footsteps of *Artavia Murillo et al. v. Costa Rica* by including an analysis of gender stereotyping. The Decision also examined paternalistic control in the medical sector:

There are signs that the medical team that performed the surgery on IV was influenced by gender stereotypes on the inability of women to make autonomous decisions with respect to their own reproduction. [...] (This) reflects the notion that medical personnel are empowered to take better decisions than the woman concerned regarding control over reproduction.⁵³

In addition, the Inter-American Commission referred to *Artavia Murillo et al.* to determine violations of the right to privacy (Article 11.2) and family (Article 17.2). The Commission not only repeated the argument developed in *Artavia Murillo et al.* that reproductive autonomy is an aspect of the right to private life,⁵⁴ but went further to stress the “dual aspects of the right to family [...] which entails for the State both a positive obligation to protect and a ‘negative’ obligation to refrain from arbitrary or abusive interference in this sphere”.⁵⁵

Within its examination of the rights to privacy and family, the Inter-American Commission expressly stated, “non-consensual sterilization constitutes a form of violence against women in which [...] a series of human rights are infringed. The Convention of Belém do Pará [...] recognizes that all women’s rights to a life free from violence includes the right to be free from discrimination”.⁵⁶ Through its analysis of the Convention of Belém do Pará, the Inter-American Commission delved into the principle of due diligence as enshrined in Article 7(b) to recognise that the “problem of violence against women [...] links to the discrimination that women have historically suffered from, (and requires the State) to adopt comprehensive strategies to prevent, punish, and eliminate it”.⁵⁷ The Inter-American Commission also asserted, “performing a non-consensual sterilization causes the affected woman pain and suffering and constitutes a form of violence with ongoing physical and

⁵² Ibid ¶132, 160 and 161; Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’ *supra* section 1.1.1 (n 40).

⁵³ Ibid ¶162.

⁵⁴ *IV v. Bolivia* [2014] (n 8) ¶149.

⁵⁵ Ibid ¶150.

⁵⁶ Ibid ¶156.

⁵⁷ Ibid ¶175.

psychological consequences for those women's reproductive health".⁵⁸ Although the Commission did not explicitly note Articles 8 and 9 in its interpretation of the principle of due diligence, it is clear that these rights provisions empowered the analysis of Article 7.

On April 23rd 2015, after the Bolivian State failed to comply with the recommendations issued by the Inter-American Commission in the *IV v. Bolivia* Merits Decision, the Inter-American Commission referred the case to the Inter-American Court of Human Rights. In doing so, the Inter-American Commission requested that the Inter-American Court consider violations of both the American Convention of Human Rights (Articles 5.1, 8.1, 11.2 13.1 17.2 and 25.1) and the Convention of Belém do Pará Article 7 provisions (a) (b) (c) (f) and (g). The Inter-American Court accepted the case, and on May 2nd 2016 it held a public hearing.⁵⁹ The Inter-American Court will release the final judgment in *IV v. Bolivia* late in the year 2016.

The above introduction to *IV v. Bolivia* provides an analysis of this case as it developed from its earliest stages through to the Merits Decision issued by Inter-American Commission on Human Rights. This case, despite its pending status before the Inter-American Court, exemplifies the most prolific and comprehensive understanding of gender based harm in a women's reproductive rights case before the Inter-American System. However, the reparations recommended by the Inter-American Commission reflect many of the shortcomings determined in the above case study analyses. In this section I analyse the *IV v. Bolivia* Merits Decision to determine fulfilment of the Holistic Gender Approach to Reparations preconditions⁶⁰ and the gender-based nature of the reparations. In addition, I review the Merits Decision to establish if, how and to what extent, the petitioners and Inter-American Commission employed the strategies suggested in section 7.1. Through this case analysis I argue that complete fulfilment of the Holistic Gender Approach to Reparations preconditions does not necessarily ensure the design of gender-based reparations, but rather, reproductive rights cases must also incorporate the strategies determined in this thesis in order to foster a "gender reparations tradition".

The *IV v. Bolivia* case, as it was processed before the Inter-American Commission on Human Rights, fulfilled each of the Holistic Gender Approach to Reparations pre-

⁵⁸ Ibid ¶180.

⁵⁹ *IV v. Bolivia*, Public Hearing, Inter-American Court of Human Rights. <<http://livestream.com/corteidh/events/5246309>>.

⁶⁰ 'Fulfill the Preconditions,' *supra* section 3.3 (n 179).

conditions: *establish the facts, properly identify the victims and violations and properly identify the harm and those harmed*. First, the facts established by the Inter-American Commission indicated that the sterilization of IV was a result of intersectional discrimination based on gender, citizenship status and ethnicity. In addition, the Commission established that all women have the right to be free from violence, and, in doing so, effectively connected the IV case to the larger structural problem of violence against women. Second, because the facts took into consideration the intersectional discrimination and the social impact of violence against women, the petitioners and the Inter-American Commission successfully articulated a connection between reproductive rights and gender based discrimination, and therefore established that the forced sterilization of IV warranted a violation of both the American Convention on Human Rights and the Convention of Belém do Pará. This was the first time the Inter-American Commission applied the Convention of Belém do Pará to a women's reproductive rights case in the form of a Merits Decision. Finally, the Inter-American Commission was exemplary in its efforts to unpack the nature of patriarchal, invasive and social components of gendered harm. Not only did the Inter-American Commission acknowledge the power of medical personnel (paternalistic control), but it also reinforced the Inter-American Court's prior assertion that states have positive and negative obligations in enforcing the right to reproductive health.

While Rubio-Marín and Sandoval asserted that fulfilment of the Holistic Gender Approach to Reparations preconditions is necessary in order to ensure development of gender-based reparations,⁶¹ I contend that fulfilment of the preconditions does not necessarily guarantee that gender reparations will accompany a gendered analysis of a reproductive rights violation. This is because there is currently no reparations tradition in women's reproductive rights litigation before the Inter-American System of Human Rights.⁶² The *IV v. Bolivia* Merits Decision exemplifies the disconnect between gender reasoning and reparation; despite fulfilling the preconditions, the reparations issued in the Merits Decision did not adequately address gendered harm.

The reparations issued by the Inter-American Commission in the *IV v. Bolivia* case Merits Decision were as follows:

⁶¹ Rubio-Marín and Sandoval, *supra* section 3.3 (n 179).

⁶² Interview with María Alejandra Cardenas, Regional Legal Director, Women's Link Worldwide, Former Human Rights Attorney, Inter-American Commission on Human Rights and Center for Reproductive Rights, Washington DC, USA 27 August 2014 (Ref Code: Ip, Cm, S).

1. Compensation for the material harm and personal/emotional distress suffered by IV;
2. High quality medical care for IV;
3. Investigate the facts surrounding the sterilization of IV without her consent, and establish liabilities and punishments;
4. Take necessary steps to ensure similar acts are not committed again; review policies and practices applied in all hospitals with respect to obtaining informed consent of patients;
5. Adopt legislation, public policies, programs and directives to ensure the respect for the right of all individuals to be informed and counseled on health matters and not to be subjected to procedures or treatments without their informed consent. These measures should take special consideration of the particular needs of persons who are in a vulnerable situation due to the intersection of factors such as their sex, race, economic position, or condition as migrant, among others; and
6. Investigate the shortcomings in the practices of the Judiciary and its auxiliary organs that permit excessive delays in judicial procedures and adopt such measures as are needed to guarantee effective access to justice.⁶³

A review of these reparations reveals that the Inter-American Commission's emphasis on gender and violence against women in its Merits Decision did not result in clearly articulated and transformative gender-based reparations. Of the above reparations, only the fourth and fifth can be interpreted as encompassing an aspect, albeit limited, of the gendered notion of harm as it applied to the *IV v. Bolivia* case. Reparations four and five are guarantees of non-repetition, and although they are vague in their design, they can be interpreted to require that the Bolivian State take steps to eradicate patriarchal harm within the medical sector (reparation four), and adopt legislation and policies on informed consent based on an intersectional understanding of discrimination (reparation five). Despite the Inter-American Commission's determination that gender-based discrimination and violence underpin violations of women's reproductive rights, the reparations issued in the Merits Decision were lacking in their potential to repair gendered harm as it is manifested through violations of women's reproductive rights.

The above review of *IV v. Bolivia*, as it has progressed through the Inter-American Commission on Human Rights, revealed that despite complete fulfilment of the Holistic Gender Approach to Reparations preconditions, the reparations issued by the Commission did not effectively take account of and repair harm specific to women. As mentioned previously, this disconnect can be attributed to the lack of a gender reparations tradition within women's reproductive rights litigation before the Inter-American System of Human Rights. The strategies suggested in section 7.1 are intended to confront and connect the gap

⁶³ *IV v. Bolivia* [2014] (n 8) ¶187.

between gender reasoning and reparation in women's reproductive rights cases. This final section of the *IV v. Bolivia* case analysis determines the extent to which the Merits Decision incorporated these strategies, and identifies instances where the petitioner and Inter-American Commission missed an opportunity to employ certain components of the strategies. In examining the application and utility of the strategies, my objective is to speculate on the Inter-American Court of Human Rights' potential to initiate a "gender reparations tradition" within reproductive rights litigation.

The *IV v. Bolivia* Merits Decision incorporated two of the four strategies for advancing a "gender reparations tradition" in women's reproductive rights litigation. I conclude from the above examination of the Merits Decision that the petitioners and the Inter-American Commission successfully incorporated the third and fourth strategies: employ a multi-faceted approach to rights, and locate violations of women's reproductive rights within the violence against women framework. However, they did not implement the first and second strategies: apply alternative rights concepts, and enhance the role of civil society. In terms of applying a multi-faceted approach, the petitioners raised rights claims across a number of provisions enshrined within the American Convention.⁶⁴ In addition, the Inter-American Commission successfully connected women's autonomy and equality to the right to integrity, as it is an aspect of humane treatment,⁶⁵ and also interpreted the rights to private and family life in such a way that it directly emphasised the positive and negative obligations of these rights.⁶⁶ In regards to the fourth strategy, the petitioner claimed violations of women's reproductive rights through the violence against women framework, and in turn provided the Inter-American Commission with an effective gender-based argument to support a violation of the Convention of Belém do Pará. As a result, the Inter-American Commission provided an in-depth analysis of the principle of due diligence as it relates to reproductive rights violations,⁶⁷ and determined states have a duty to prevent violence and discrimination against women.

For all intents and purposes, the *IV v. Bolivia* Merits Decision was the most progressive reproductive rights case to emerge from the Inter-American System of Human Rights. However, I argue that because the Inter-American Commission underutilized civil society in the design of reparations, and the petitioners failed to employ alternative rights concepts

⁶⁴ *Supra* (n 45).

⁶⁵ *Supra* (n 49-50).

⁶⁶ *Supra* (n 55).

⁶⁷ *Supra* (n 57).

in the early stages of litigation, this case missed an opportunity to develop a strong foundation necessary for the Inter-American Court to order transformative gender-based reparations. First, the petitioners had an opportunity to incorporate alternative rights concepts in the *IV v. Bolivia* case through the claim that forced sterilization violated the right to personal integrity. Had they included *vida digna* or *proyecto de vida* in their interpretation of the rights violated in this case, the petitioners could have developed an additional layer of gender-based analysis to determine *how* dignity and integrity are integral aspects of reproductive health. In turn, an examination of these concepts may have contributed to the development of reparations designed to address factors that damage the life project of women and inhibit the right to a dignified life. Additionally, the Inter-American Court may elect to include alternative rights concepts in its articulation of the rights violated and reparations in its forthcoming judgment. However, as the above analysis of Artavia Murillo et al. determined, the potential impact of alternative rights concepts is greater when they are introduced in the initial stages of a reproductive rights case in order to ensure that their analysis is woven throughout the evolution of the case.

Second, there was a clear opportunity in the development of the *IV v. Bolivia* reparations to collaborate with civil society organizations. The enhance the role of civil society strategy is especially interesting when applied to *IV v. Bolivia* because the Ombud's Office represented the victim in this case. The role of the state Ombud's Office is to provide a link between civil society and the state, so there was a great opportunity in this case to consult with civil society in designing reparations. The Merits Decision made no mention of civil society in the design or implementation of reparations, despite the potential for collaboration with women's and human rights organizations in this case. While the petitioners and the Inter-American Commission neglected to develop reparations that acknowledge the importance and benefit of collaborating with civil society, the Inter-American Court of Human Rights has the opportunity to apply this strategy in the reparations it orders in the *IV v. Bolivia* judgment. In fact, an amicus curiae brief recently submitted to the Inter-American Court in the *IV v. Bolivia* case specifically recommended that the Court apply this strategy in the design of reparations in its upcoming judgment.⁶⁸ Given that the *IV v. Bolivia* case before the Inter-American Commission successfully fulfilled the preconditions of the Holistic Gender Approach to Reparation, and applied two of the four gender reparation strategies, the Inter-American Court has the opportunity to significantly expand upon the reparations

⁶⁸ See, Amicus Curiae submitted by Ciara O'Connell, Diana Guarnizo Peralta and César Rodríguez-Garavito (Appendix G).

issued by the Inter-American Commission. Not only can the Inter-American Court enhance the role of civil society in the design of reparations, but it can also elect to exercise its *motu proprio* power in order to more adequately repair violations of women's reproductive rights as they are protected through the Convention of Belém do Pará.

The *IV v. Bolivia* case review and analysis provides reason to be optimistic that the Inter-American Commission on Human Rights, and petitioners engaged in women's reproductive rights litigation, may be prepared, and perhaps willing, to participate in the project of repairing gender-based harm in women's reproductive rights cases. The forthcoming *IV v. Bolivia* judgment may be the first time the Inter-American Court of Human Rights applies its own declaration that in the "context of structural discrimination [...] reparations must be designed to change the situation [...] reestablishment of the same structural context of violence and discrimination is not acceptable".⁶⁹ If the Inter-American Court applies this reasoning to the *IV v. Bolivia* case, it will lay the groundwork on which to establish a "gender reparations tradition" within women's reproductive rights litigation before the Inter-American System of Human Rights.

Despite the potential for establishing a "gender reparations tradition" in reproductive rights litigation before the Inter-American System of Human Rights, the success of such an exercise is contingent on the practical capacity of the Inter-American System to engage in the work of engendering reproductive rights. This year the Inter-American Commission faced severe funding challenges, which not only threatened the Inter-American Commission's existence, but also affirmed states parties' disinterest when it comes to engaging with human rights issues before the Inter-American System.⁷⁰ This setback is especially worrying in terms of advancing women's reproductive rights through the Inter-American System because, as María Alejandra Cardenas asserted, "millions of women across the continent will lose the only means available to them to obtain justice and demand an end to discrimination and violence".⁷¹ While these challenges are cause for concern, they

⁶⁹ *González et al. ('Cotton Field') v. Mexico* [2009] Inter-American Court of Human Rights (ser. C) No. 205, Preliminary Objection, Merits, Reparations, and Costs ¶450.

⁷⁰ Nelson Camilo Sánchez León, 'The Silent Checkmate against the IACHR' (Dejusticia's Global Rights Blog, 23 May 2016) <<https://dejusticiablog.com/2016/05/23/the-silent-checkmate-against-the-iachr/>> accessed 23 May 2016. As of July 28th 2016, the Inter-American Commission has received enough funding to continue operations through the Fall of 2016, but the situation remains precarious, see www.oas.org/en/iachr/media_center/crisis-iachr.asp/.

⁷¹ María Alejandra Cardenas, 'Crisis de la CIDH: ¿por qué no podemos perder un espacio clave para los derechos de las mujeres?' [Crisis in the IACHR: Why We Can't Lose a Key Space for Women's Rights?] *El Espectador* (7 June 2016) <www.elespectador.com/opinion/crisis-de-cidh-no-podemos-perder-un-espacio-clave-los-d> accessed 7 June 2016.

also provide an opportunity for the Inter-American System of Human Rights to reflect on its purpose and objectives, and to determine its approach for the future.

In order to advance a “gender reparations tradition” in women’s reproductive rights litigation actors involved in reproductive rights litigation must make every effort possible to engage in the work of challenging the deep-seated and connected nature of gendered harm and violations of women’s reproductive health rights. To assist with, and perhaps expedite this task, I suggest through this thesis a set of strategies that if effectively employed in conjunction with Ruth Rubio-Marín and Clara Sandoval’s Holistic Gender Approach to Reparations, have the potential to engender and expand the transformative potential of reparations in women’s reproductive rights litigation. While I acknowledge the inherently limited potential for reparations to stimulate significant social change at the national level, I contend that failure to engender reparations in reproductive rights cases not only limits the utility of reproductive rights litigation, but also undermines efforts made within Friendly Settlement Agreements, Merits Decisions and Inter-American Court judgments to examine the impact of gender-based harm in women’s lives. The “gender reparations tradition” I propose in this thesis requires that the “existing order” of international human rights law, as it applies to women’s reproductive rights litigation before the Inter-American System of Human Rights, be reconceptualised in order to effectively take account of the gendered nature of harm; only then can the Inter-American System of Human Rights provide reparations that do justice for women.

REFERENCES

- Abi-Mershed EAH, 'Due Diligence and the Fight against Gender-Based Violence in the Inter-American System' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Brill Nijhoff Publishing 2009) 127–137.
- Acker S, 'In/out/side: Positioning the Researcher in Feminist Qualitative Research' (2000) 28:1/2 *Resources for Feminist Research* 189–208.
- Agren, D 'Abortion Banned by Controversial Mexican State Governor' *Guardian* (28 July 2016) <www.theguardian.com/world/2016/jul/29/abortion-banned-controversial-mexican-state-governor-veracruz?CMP=twit_gu> accessed 29 July 2016.
- Alarcón N, 'The Theoretical Subject(s) of This Bridge Called My Back and Anglo-American Feminism' in Héctor Calderone and José David Saldívar (eds), *Criticism in the Borderlands: Studies in Chicano Literature, Culture, and Ideology* (Duke University Press 1991) 28–42.
- Alcalde MC, *The Woman in the Violence: Gender, Poverty, and Resistance in Peru* (Vanderbilt University Press 2010).
- Altolaguirre M, Special Rapporteur on the Rights of Women, Inter American Commission on Human Rights, The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination (OEA/Ser.L/V/II.117.Doc. 44 7 March 2003).
- Anderson BOR, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).
- Antkowiak T, 'The Inter-American Court at a Crossroads,' in Yves Haeck, Clara Burbano- Herrera, and Oswaldo Ruiz-Chiriboga (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 259–276.
- , 'Remedial Approaches to Human Rights Violations: The Inter-American Court and Beyond' (2008) 46:2 *Columbia Journal of Transnational Law* 351–419.
- Anzaldúa G, *Borderlands/La Frontera: The New Mestiza* (2nd edn, Aunt Lute Books 1999).
- Baluarte DC and DeVos C, 'Judgment to Justice: Implementing International and Regional Human Rights Decisions' (Open Society Justice Initiative 2010) <www.opensocietyfoundations.org/reports/judgment-justice-implementing-international-and-regional-human-rights-decisions> accessed February 2013.
- Bano S, '“Standpoint”, ‘Difference’ and Feminist Research' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 91–111.
- Basch F and others, 'The Effectiveness of the Inter-American System for the Protection of Human Rights: Quantitative Approach on the System's Operation and the Compliance with its Decisions' (2010) 7:12 *Sur International Journal of Human Rights* 9–35.
- Basu A, 'Situating Reproductive Health Within the Academy' in Laura Reichenbach and Mindy Jane Roseman (eds), *Reproductive Health and Human Rights: The Way Forward* (University of Pennsylvania Press 2009) 182–195.
- Bender L, 'Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities' (1990) 4 *Duke Law Journal* 848–912.
- Benninger-Budel C, 'Introduction' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Brill Nijhoff Publishing 2008) 1–23.
- Boesten J, *Intersecting Inequalities: Women and Social Policy in Peru, 1990–2000* (Pennsylvania State University Press 2010).

- , 'The State and Violence Against Women in Peru: Intersecting Inequalities and Patriarchal Rule' (2012) 19:3 *Social Politics: International Studies in Gender, State & Society* 361–382.
- Buergenthal T, Shelton D and Stewart DP, *International Human Rights in a Nutshell* (4th edn, West Publishing 2009).
- Burgogue-Larsen L and Úbeda de Torres A, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2010).
- Cabal L, Lemaitre J, and Roa M, 'Bodies on Trial: Reproductive Rights in Latin American Courts' (Center for Reproductive Rights 2003).
- Cabal L, Roa M, and Sepulveda-Oliva L, 'What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?' (2003) 7:1 *Health and Human Rights* 50–88.
- Cain M and Howe A, 'Introduction: Women, Crime and Social Harm, Towards a Criminology for the Global Age' in Maureen Cain and Adrian Howe (eds), *Women, Crime and Social Harm, Towards a Criminology for the Global Age* (Hart Publishing 2008) 1–20.
- Carillo A, 'Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 504–538.
- Cassel D, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights' in Koen De Feyter and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2006) 191–223.
- Cavallaro J and Brewer S, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102:4 *The American Journal of International Law* 768–827.
- Cavallaro J and Schaffer EJ, 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas' (2004) 56:2 *Hastings Law Journal* 217–282.
- Charlesworth H, 'What are Women's International Human Rights?' in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspective* (University of Pennsylvania Press 1994) 58–84.
- , 'Feminist Methods in International Law' (2004) 36 *Studies in Transnational Legal Policy* 159–183.
- Charlesworth H and Chinkin C, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).
- Chavkin W, Leitman L, and Polin K, 'Conscientious Objection and Refusal to Provide Reproductive Healthcare: A White Paper Examining Prevalence, Health Consequences, and Policy Responses' (Global Doctors for Choice 2013) <<http://globaldoctorsforchoice.org/resources/white-papers/>> accessed 25 August 2014.
- Conaghan J, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16:3 *Oxford Journal of Legal Studies* 407–432.
- , 'Law, Harm and Redress: A Feminist Perspective' (2002) 22:3 *Legal Studies* 319–339.
- Condit CM, *Decoding Abortion Rhetoric: Communicating Social Change* (University of Illinois Press 1994).
- Constitution of Costa Rica (1949) <www.therealcostarica.com/government_costa_rica/constitution_costa_rica.html>.
- Constitutional Chamber of the Supreme Court of Justice, Costa Rica No. 2000-02306, Case No. 95-001734 -007-CO (15 March 2000).
- Constitution of Mexico (1917) www.oas.org/juridico/mla/en/mex/en_mexinttextconst.pdf.

- Cook R, 'Women's International Human Rights Law: The Way Forward' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 3–36.
- Cook R, Dickens B, and Fathalla M, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford University Press 2010).
- Cook R and Dickens BM, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25:1 *Human Rights Quarterly* 1–59.
- Cook R and Cusack S, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2009).
- Coomaraswamy R, 'Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Integration of the Human Rights of Women and the Gender Perspective' (E/CN.4/1999/68/Add.4 1999).
- Copelon R, 'Expert Testimony before the Inter-American Court of Human Rights in the Case of 'Cotton Field'' (Inter-American Court of Human Rights April 2009).
- Costa Rican Health Ministry Executive Decree No. 24029-S (February 3, 1995) <www.ministeriodesalud.go.cr/empresas/inicio/dm_inserto_resumen_sentencia_FI_V_2013.pdf>.
- Couillard, V, 'The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence' (2007) 1:3 *International Journal of Transitional Justice* 444–453.
- Craske N, *Women and Politics in Latin America* (Rutgers University Press 1999).
- Craske N and Molyneux M, 'The Local, the Regional and the Global: Transforming the Politics of Rights' in Nikki Craske and Maxine Molyneux (eds), *Gender and the Politics of Rights and Democracy in Latin* (Palgrave MacMillan 2002) 1–31.
- Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139–167.
- , 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43:6 *Stanford Law Review* 1241–1299.
- Davis AY, *Women, Race & Class* (Random House 1981).
- Davis K, *Power Under the Microscope* (Foris 1989).
- De Greiff P, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2008) 451–476.
- , 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence on Guarantees of Non-recurrence (A/HRC/30/42, September 2015).
- DeJesus L, 'Artavia Murillo v. Costa Rica: The Inter-American Court on Human Rights' Promotion of Non-Existent Human Rights Obligations to Authorize Artificial Reproductive Technologies' (2013) 18 *UCLA Journal of International Law and Foreign Affairs* 275–302.
- , 'A Pro-Choice Reading of a Pro-Life Treaty: The Inter-American Court on Human Rights' Distorted Interpretation of the American Convention on Human Rights in *Artavia v. Costa Rica*' (2014) 32(2) *Wisconsin International Law Journal* 223–266.
- Dembour M-B, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).
- Dickens BM and Cook RJ, 'Types of Consent in Reproductive Health Care' (2015) 128:2 *International Journal of Gynecology & Obstetrics* 181–184.
- Dietz MG, 'Context Is All: Feminism and Theories of Citizenship' (1987) 116:4 *Daedalus Journal of the American Academy of Arts and Sciences* 1–24.
- Engle K, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights' (1993) 25 *Studies in Transnational Legal Policy* 143–155.

- Erturk Y, 'Report of the Special Rapporteur on Violence Against Women, Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women: Mission to Mexico' (E/CN.4/2006/61/Add.4. 2006).
- Ewig C, 'Hijacking Global Feminism: Feminists, the Catholic Church, and the Family Planning Debacle in Peru' (2006) 32:3 *Feminist Studies* 632–659.
- Faundes A and others, 'Emergency Contraception under Attack in Latin America: Response of the Medical Establishment and Civil Society' (2007) 15:29 *Reproductive Health Matters* 130–138.
- Fineman MA, 'Introduction' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) xi–xvi.
- Foucault M, *The Birth of the Clinic* (Routledge 2003).
- Fredman S, *Women and the Law* (Clarendon Press 1997).
- Fujimori A, 'Speech Given by the President of the Republic of Peru before the IV World Conference on Women, Beijing, China' (1995).
- García-Del Moral P and Dersnah MA, 'A Feminist Challenge to the Gendered Politics of the Public/ Private Divide: On Due Diligence, Domestic Violence, and Citizenship' (2014) 18:6-7 *Citizenship Studies* 661–675.
- Gil RM and Vasquez CI, *The Maria Paradox: How Latinas can Merge Old World Traditions with New World Self-Esteem* (Perigee Books 1997).
- González de León Aguirre D and Billings DL, 'Attitudes Towards Abortion among Medical Trainees in Mexico City Public Hospitals' (2001) 9:2 *Gender & Development* 87–94.
- Graycar R and Morgan J, *The Hidden Gender of Law* (2nd edn, The Federation Press 2002).
- Guillerot J, 'Linking Gender and Reparations in Peru: A Failed Opportunity' in Ruth Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (Social Science Research Council 2006) 136–193.
- Gunning I, 'Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' (1992) 23 *Columbia Human Rights Law Review* 189–248.
- Guttman MC, *The Meanings of Macho: Being a Man in Mexico City* (University of California Press 2006).
- Hartmann B, *Reproductive Rights and Wrongs: The Global Politics of Population and Control* (South End Press 1995).
- Hayner PB, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Taylor & Francis 2010).
- Hernandez PM, 'The Myth of Machismo: An Everyday Reality for Latin American Women' (2003) 15:4 *St. Thomas Law Review* 859–882.
- Hevia M and Herrera Vacaflor C, 'From Recognition to Regulation: Access to In Vitro Fertilization and the American Convention on Human Rights,' (2013) 25:3 *Florida Journal of International Law* 453–482.
- Howe A, 'The Problem of Privatized Injuries' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) 148–167.
- Huneus A, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493–533.
- , 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40:1 *Yale International Law Journal* 2–40.
- Hunt P, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (UN Doc.E/CN.4/2003/58 2003).
- , 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (A/61/338 2006).

- Jahangir A, Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Report of her visit to Mexico (U.N. Doc. E/CN.4/2000/3/Add.3 25 November 1999).
- Jezzini AT, Guzmán CE and Grayshield L., 'Examining the Gender Role Concept of *Marianismo* and its Relation to Acculturation in Mexican-American College Women,' March 2008.
- 'Judicial Decision Making with a Gender Perspective: A Protocol - Making Equal Rights Real', (National Supreme Court of Justice [Suprema Corte de Justicia de la Nación] 2013) <www.sitios.scjn.gob.mx/codhap/ProtocolGenderPerspective>.
- 'Justice Undone', (Center for Reproductive Rights 2015) <www.reproductiverights.org/feature/justice-undone>accessed 13 April 2015.
- Kapur R, *Erotic Justice: Law and the New Politics of Postcolonialism* (Routledge 2005).
- Knox JH, 'Horizontal Human Rights Law' (2008) 102:1 American Society of International Law 1–47.
- Kokott J, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Brill Nijhoff 1998).
- Kumar A, Hessini L, and Mitchell EMH, 'Conceptualising Abortion Stigma' (2009) 11:6 Culture, Health & Sexuality 625–639.
- Lacey N, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998).
- Lamas M, 'The Feminist Movement and the Development of Political Discourse on Voluntary Motherhood in Mexico' (1997) 5:10 Reproductive Health Matters 58–67.
- Lloyd G, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (Methuen Young Books 1984).
- Lorde A, *The Master's Tools Will Never Dismantle the Master's House, Sister Outsider: Essays and Speeches* (Crossing Press 2007) 110–114.
- MacKinnon CA, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987).
- , *Toward a Feminist Theory of the State* (Harvard University Press 1989).
- , *Women's Lives, Men's Laws* (Belknap Press of Harvard University Press 2005).
- , *Are Women Human? And Other International Dialogues* (Belknap Press of Harvard University Press 2007).
- Madigan L and Gamble N, *The Second Rape: Society's Continued Betrayal of the Victim* (Jossey-Bass Inc., U.S. 1991).
- Mainwaring S and Pérez-Liñán A, 'Cross-Currents in Latin America' (2015) 26:1 Journal of Democracy 114–127.
- Malthus TR, *An Essay on the Principle of Population* (W. Pickering 1986).
- Medina C, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture' (1990) 12:4 Human Rights Quarterly 439–464.
- Melish T, 'Rethinking the less as More Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas' (2006) 39 New York University Journal of International Law and Politics, 1–159.
- Mexican Federal District Penal Code (2002) <www.fimevic.df.gob.mx/documentos/transparencia/codigo_local/CPDF.pdf> (accessed 3 May 2015).
- Mexican Official Standard NOM-046-SSA2-2005, Sexual and Domestic Violence Against Women, Criteria for Prevention and Attention, Federal Government, Secretary of Health [Norma Oficial Mexicana NOM 046-SSA2-2005, Violencia Familiar, Sexual y Contra Las Mujeres. Criterios para La Prevención y Atención, Gobierno Federal, Secretaría de Salud] (16 April 2009).
- Mohanty CT, *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003).

- Morgan LM and Roberts EFS, 'Reproductive Governance in Latin America' (2012) 19:2 *Anthropology & Medicine* 241–254.
- National Health Strategy for Sexual and Reproductive Health, Republic of Peru (2011) [Estrategia Nacional de Salud Sexual y Reproductiva, Ministerio de Sanidad, Política Social e Igualdad] <www.msssi.gob.es/organizacion/sns/planCalidadSNS/pdf/equidad/ENSSR.pdf>.
- Ní Aoláin F, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 *Queens Law Journal* 219–244.
- O'Connell C, 'Litigating Reproductive Health Rights in the Inter-American System: What Does a Winning Case Look Like' (2014) 16:2 *Health and Human Rights* 116–128.
- , 'What a 'Private Life' Means for Women' in Yves Haeck, Clara Burbano-Herrera, and Oswaldo Ruiz-Chiriboga (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 629–643.
- 'Omission and Indifference: Reproductive Rights in Mexico', GIRE - Grupo de Información en Reproducción Elegida (2013).
- Oloka-Onyango J and Tamale S, '"The Personal is Political," or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17:4 *Human Rights Quarterly* 691–731.
- Paine J, Noriega RT, and Beltran y Puga A, 'Using Litigation to Defend Women Prosecuted for Abortion in Mexico: Challenging State Laws and the Implications of Recent Court Judgments' (2014) 22:44 *Reproductive Health Matters* 61–69.
- Pasqualucci JM, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012).
- Paul A, 'Decision-Making Process of the Inter-American Court: An Analysis Prompted by the 'In Vitro Fertilization' Case' (2014) 2:1 *ILSA Journal of International & Comparative Law* 87–130.
- 'Peruvian Truth and Reconciliation Commission Final Report' (2003) <www.cverdad.org.pe/ingles/ifinal/index.php> accessed 4 June 2013.
- Petchesky R, *Global Prescriptions: Gendering Health and Human Rights* (Zed Book 2003).
- Quintana-Osuna K, 'Recognition of Women's Rights Before the Inter-American Court of Human Rights' (2008) 21 *Harvard Human Rights Journal* 301–312.
- Raday F, 'Culture, Religion and CEDAW's Article 5(a)' in Hannah-Beate Schöpp-Schilling and Cees Flinterman (eds), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (The Feminist Press at CUNY 2007) 68–85.
- Ramazanoğlu C and Holland J, *Feminist Methodology: Challenges and Choices* (Sage Publications 2002).
- Reinsberg, LJ, 'Advocacy before the Inter-American System: A Manual For Attorneys and Advocates' International Justice Resource Center 15 <<http://ijrcenter.org/wpcontent/uploads/2014/03/Manual-Advocacy-before-the-Inter-American-System-2014.pdf>>.
- Rodriguez Pinzon D, 'The Inter-American System and Transitional Processes' in Michael Hamilton and others (eds), *Transitional Jurisprudence-The ECHR and Other Regional Human Rights Approaches to Transition* (Cambridge University Press 2011).
- Roht-Arriaza N and Mariezcurrena J (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press 2006).
- Roseman M and Gloppen S, 'Litigating the Right to Health: Are Transnational Actors Backseat Driving?' in Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice Health?* (Harvard University Press 2011) 246–272.
- Rousseau S, 'The Politics of Reproductive Health in Peru: Gender and Social Policy in the Global South' (2007) 14:1 *Social Politics: International Studies in Gender, State & Society* 93–125.

- Rubio-Marín R, 'The Gender of Reparations: Setting the Agenda' in Ruth Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (Social Science Research Council 2006) 20–47.
- , 'Introduction: A Gender and Reparations Taxonomy' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 1–17.
- , 'The Gender of Reparations in Transitional Societies' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 63–120.
- Rubio-Marín R and de Greiff P, 'Women and Reparations' (2007) 1 *International Journal of Transitional Justice* 318–337.
- Rubio-Marín R and Sandoval C, 'Engendering the Reparations Jurisprudence of the Inter - American Court of Human Rights: The Promise of the 'Cotton Field' Judgment' (2011) 33:4 *Human Rights Quarterly* 1062–1091.
- Sandoval A, 'Vida Digna' (Third Latin American Congress on Reproductive Rights, Mexico October 2013).
- Sheldon S, *Beyond Control: Medical Power and Abortion Law* (Pluto Press 1997).
- Sassarego F, "Apuntes para una distinción entre el dano al proyecto de vida y el dano psíquico," *Themis Revista de Derecho*, No. 32 (Pontifica Universidad Católica del Peru, Lima 1995).
- , "Deslinde conceptual entre dano a la persona, dano al proyecto de vida y dano moral," *Foro Jurídico*, Year 1, No. 2, Lima, July 2003.
- Shelton D, 'The Promise of Regional Human Rights Systems' in Burns H. Weston and Stephen P. Marks (eds), *The Future of International Human Rights* (Martinus Nijhoff 1999).
- , *Remedies in International Law* (2nd edn, Oxford University Press 2005).
- , *Remedies in International Law* (3rd edn, Oxford University Press 2015).
- Sifris R, 'Restrictive Regulation of Abortion and the Right to Health' (2010) 18 *Medical Law Review* 185–212.
- Silva M and others, 'Physicians' Agreement With and Willingness to Provide Abortion Services in the Case of Pregnancy from Rape in Mexico' (2009) 79:1 *Contraception* 56–64.
- Smart C, *Feminism and the Power of Law* (Routledge 1989).
- Steiner HJ and Alston P, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (2nd edn, Oxford University Press 2000).
- Tamayo G, 'Nothing Personal: Human Rights Report on the Application of Sterilization in Peru, 1996 [Nada Personal] (CLADEM 1999).
- , 'The State Machine: Can It Bring Change for Women?' ['La Maquinara Estatal: Puede suscitar cambios a favor de las mujeres?'] Pull-out section from *Socialismo y Participación*, No 79, CEDEP, Lima, Peru.
- Taracena R, 'Paulina: In the Name of the Law,' GIRE – Information Group on Reproductive Choice [Grupo de Información en Reproducción Elegida] (2000).
- , 'Social Actors and Discourse on Abortion in the Mexican Press: The Paulina Case' (2002) 10:19 *Reproductive Health Matters* 103–110.
- Tinta MF, 'Justicability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29:2 *Human Rights Quarterly* 431–459.
- Tranter B, 'Sampling,' in Maggie Walters (ed), *Social Research Methods* (3rd edn, Oxford University Press (2013) 99–118.
- Uprimny Yepes, R, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27:4 *Netherlands Quarterly of Human Rights* 625–647.

- Urban Walker M 'Gender and Violence in Focus: A Background for Gender Justice in Reparations,' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 18-62.
- , 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 *International Journal of Transitional Justice* 108-125.
- Van Boven T, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Nijhoff 2009) 19-40.
- Vargas V, 'The Struggle by Latin American Feminisms for Rights and Autonomy' in Nikki Craske and Maxine Molyneux (eds), *Gender and the Politics of Rights and Democracy in Latin America* (Palgrave MacMillan 2002) 199-221.
- Vasak K and Alston P, *The International Dimensions of Human Rights* (Greenwood Press 1982).
- Vasak K, 'A 30 year struggle', UNESCO Courier, November 1977.
- Vasquez del Aguila E, 'Invisible Women: Forced Sterilization, Reproductive Rights, and Structural Inequalities in Peru of Fujimori and Toledo' (2002) 6 *Estudios e Pesquisas em Psicologia* 109-124.
- Ventura Robles ME, 'Impact of the Reparations Ordered by the Inter-American Court of Human Rights and Contributions to the Justiciable Nature of Economic, Social and Cultural Rights,' in Yves Haeck, Clara Burbano-Herrera, and Oswaldo Ruiz-Chiriboga (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015) 277-303.
- Villegas S 'Adolescent Pregnancy in Costa Rica,' in A. Cherry and M. Dillon (eds) *International Handbook of Adolescent Pregnancy, Medical, Psychosocial, and Public Health Responses* (Springer 2014) 257-279.
- West R, 'The Difference in Women's Hedonic Lives' in Marta Alberston Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991) 115-134.
- , *Caring for Justice* (New York University Press 1997).
- Williams J and Segal N, 'Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job' (2003) 26 *Harvard Women's Law Journal* 77-162.
- Yamin AE 'Power, Suffering, and Courts: Reflections on Promoting Health Rights through Judicialization,' in Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011) 333-372.
- Young, Iris Marion, *Justice and the Equality of Difference* (Princeton University Press 1990).
- Yuval-Davis N, 'What is 'Transversal Politics?'' (1999) 12 *Soundings* 94-98.
- Zegers-Hochschild F, Dickens BM and Dughman-Manzur S, 'Human Rights to In Vitro Fertilization' (2013) 123:1 *International Journal of Gynecology and Obstetrics* 86-89.
- Zuloaga PP, 'The Path to Gender Justice in the Inter-American Court of Human Rights' (2008) 17:2 *Texas Journal of Women and Law* 227-295.

Websites

- 'Amanda Jane Mellet v. Ireland – The Key Points,' Human Rights in Ireland <<http://humanrights.ie/uncategorized/amanda-jane-mellet-v-ireland-the-key-points/>>.
- 'A.N. v. Costa Rica: Access to Legal Abortion Services [Acceso a servicios de aborto legal]' Center for Reproductive Rights (2011) <www.reproductiverights.org/document/an-v-costa-rica-acceso-a-servicios-de-aborto-legal> accessed 20 August 2014.
- Camilo Sánchez León N, 'The Silent Checkmate against the IACHR' (Dejusticia's Global Rights Blog, 23 May 2016) <<https://dejusticiablog.com/2016/05/23/the-silent-checkmate-against-the-iachr/>> accessed 23 May 2016.
- Cardenas MA, 'Crisis de la CIDH: ¿por qué no podemos perder un espacio clave para los derechos de las mujeres? [Crisis in the IACHR: Why We Can't Lose a Key Space for Women's Rights?]' El Espectador (7 June 2016) <www.elespectador.com/opinion-crisis-de-cidh-no-podemos-perder-un-espacio-clave-los-d> accessed 7 June 2016.
- Castro A, 'Peruvians say "No!" to Violence Against Women' IPS News 16 August 2016) <www.ipsnews.net/2016/08/peruvians-say-no-to-violence-against-women/> accessed 17 August 2016.
- Collins D, 'Women Vow to Fight on in Peru after Alberto Fujimori Absolved over Forced Sterilisations,' The Guardian (3 August 2016) <<https://www.theguardian.com/globaldevelopment/2016/aug/03/women-vow-to-fight-on-in-peru-after-fujimori-absolved-over-forced-sterilisations>> accessed 17 August 2016.
- , 'Peruvian Women Intent on Bringing State to Book over Forced Sterilisations' The Guardian (12 March 2014) <www.theguardian.com/globaldevelopment/2014mar/14/peru-women-forced-sterilisation-justice> accessed 13 February 2015.
- 'Costa Rica's IVF Ban and the Future of Reproductive Rights in Latin America', (Center for Reproductive Rights 2012) <www.reproductiverights.org/feature/costa-rica-ivf-ban-personhood> accessed 18 October 2014.
- DeJesus Castaldi L and Maria Ines Franck "Inter-American Court Judgment against Costa Rica on In Vitro Fertilisation (IVF): A Challenge to the Court's Enforcement Authority" (OxHRH Blog 28 April 2016) <<http://ohrh.law.ox.ac.uk/inter-american-court-judgment-against-costa-rica-on-in-vitro-fertilisation-ivf-a-challenge-to-the-courts-enforcement-authority/>> accessed 20 March 2016.
- 'Denunciation of Forced Sterilizations was Filed by the Prosecution' ['Denuncia de Esterilizaciones Forzadas fue Archivada por la Fiscalía'] La Republica (27 July 2016) <<http://larepublica.pe/sociedad/789156-denuncia-de-esterilizaciones-forzadas-fue-archivada-por-la-fiscalia>>.
- 'Despite Country's Own Laws, Costa Rica Continues to Deny Women Legal Abortion', (Center for Reproductive Rights 2013) <www.reproductiverights.org/pressroom/despitecountry%E2%80%99s-own-laws-costa-rica-continues-to-deny-women-legal-abortion> accessed 24 March 2016.
- Diéguez ML, 'We Demand Justice in the Case of Forced Sterilization in Peru', Alianza por Solidaridad [Solidarity Alliance] (February 2014) <www.alianzaporlasolidaridad.org/en/reflexiones/caso-de-esterilizaciones-forzadas-en-peru> (accessed 18 November 2014).
- Fowks J, 'The "Not One Less" Movement Gains Strength in Peru' [El movimiento 'Ni una menos' toma fuerza en Perú] (26 July 2016) <http://internacional.elpais.com/internacional/2016/07/26/america/1469488408_366821.html> accessed 17 August 2016.
- 'Frequently Asked Questions on Friendly Settlements', Inter-American Commission on Human Rights (2011) <www.oas.org/en/iachr/friendly_settlements/faq.asp#acc4> accessed 10 August 2014.

- Hinostroza, C, 'Justice Done! Prosecutor Reopens Forced Sterilization Case during Fujimori' *Diario 16* (10 May 2015) [¿Se Hizo Justicia! Ministerio Público Reabre el Caso de Esterilizaciones Forzadas Durante el Fujimorismo] <<http://diario16.pe/noticia/60031-se-hizo-justicia-ministerio-publico-reabre-caso-esterilizaciones-forzadas-durante-fujimorismo>> (accessed 11 May 2015).
- Human Development Report 2010 'The Real Wealth of Nations: Pathways to Human Development', UNDP <https://web.archive.org/web/20101108160356/http://hdr.undp.org/en/media/HDR_2010_EN_Complete.pdf> accessed 10 November 2015.
- 'Impact of the Friendly Settlement Procedure', (OEA/Ser.L/V/II. doc. 45/13, Inter-American Commission on Human Rights 2013) <www.oas.org/en/iachr/friendly_settlements/docs/Report-FriendlySettlement.pdf> accessed 14 June 2014.
- 'Mexico: The Second Assault - Obstructing Access to Legal Abortion after Rape in Mexico', (Human Rights Watch 2006) <www.hrw.org/sites/default/files/reports/mexico0306webw_cover.pdf> accessed 3 May 2015.
- 'Perú Ends Criminal Investigation into Mass Forced Sterilizations', (Center for Reproductive Rights, 29 January 2014) <<http://reproductiverights.org/pressroom/Peru-Ends-Criminal-Investigation-into-Mass-Forced-Sterilizations>> accessed 17 February 2015.
- 'Perú Reopens Criminal Investigation into Mass Forced Sterilizations', (Center for Reproductive Rights, 13 May 2015) <www.reproductiverights.org/press-room/peru-reopens-criminalinvestigation-into-mass-forced-sterilizations> accessed 20 May 2015.
- 'Petition and Case System Informational Brochure', Inter-American Commission on Human Rights (2010) <www.oas.org/es/cidh/docs/folleto/CIDHFolleto_eng.pdf> accessed 20 May 2014.
- 'Trends in Maternal Mortality: 1990 to 2015', WHO, UNICEF, UNFPA, The World Bank, and the United Nations Population Division (Geneva, World Health Organization 2015). <<http://data.worldbank.org/indicator/SH.STA.MMRT/countries/XJ?display=default>> accessed 21 March 2016.
- 'Unspeakable Cruelty' Center for Reproductive Rights (2013) <www.reproductiverights.org/feature/unspeakable-cruelty-in-costa-rica> accessed 20 July 2014.
- 'USAID'S Family Planning Guiding Principles and U.S. Legislative and Policy Requirements', (USAID, 11 June 2014) <www.usaid.gov/what-we-do/globalhealth/family-planning/usaid-family-planning-guiding-principles-and-us> accessed 17 February 2015.
- Wiener G, 'The Day Peruvian Women Rebelled,' *New York Times* (23 August 2016) <www.nytimes.com/2016/08/24/opinion/the-day-peruvianwomenrebelled.html?mabReward=A3&action=click&pgtype=Homepage®ion=CC&column=CC&module=Recommendation&src=rchp&WT.nav=RecEngine&_r=0> accessed 23 August 2016.
- 'What is the IACHR?' Inter-American Commission on Human Rights <www.oas.org/en/iachr/mandate/what.asp> accessed 20 May 2014.
- 'What We Do' Organization of American States <www.oas.org/en/about/what_we_do.asp> accessed 14 June 2014.
- 'Women Victims of Sterilization Ask for Reparations,' [Mujeres víctimas de esterilizaciones piden reparación al Estado] *El Comercio Perú* (12 December 2015) <<http://elcomercio.pe/peru/pais/mujeres-victimas-esterilizaciones-piden-reparacion-al-estado-noticia-1863145>> accessed 15 December 2015.
- 'World Abortion Law' Center for Reproductive Rights <<http://worldabortionlaws.com/>> accessed 12 May 2016.

Inter-American System Sources

Cases

- ‘B’, Resolution of the Inter-American Court of Human Rights of 29 May 2013, Provisional Measure.
- Ana Victoria Sanchez Vilalobos et al. v. Costa Rica* [2004] Inter-American Commission on Human Rights, Petition 12.361, Report 25/04 Admissibility.
- Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica* [26 February 2016] Inter-American Court of Human Rights, Monitoring Compliance with Judgment.
- Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica* [2012] Inter-American Court of Human Rights (ser. C) No. 257 Preliminary Objections, Merits, Reparations and Costs.
- ‘B’, Resolution of the Inter-American Court of Human Rights of 29 May 2013, Provisional Measure [Resolución de la Corte Interamericana de Derechos Humanos, 29 de Mayo 2013, Asunto ‘B’] <www.corteidh.or.cr/docs/medidas/B_se_02.pdf>.
- Cantoral-Benavides v. Peru* [2001] Inter-American Court of Human Rights (ser. C), No. 88 Reparations and Costs.
- Claude Reyes et al. v. Chile* [2006] Inter-American Court of Human Rights (ser. C), No. 151 Reparations and Costs.
- Claudina Isabel Velásquez Pais et al. v. Guatemala* [2013] Inter-American Commission on Human Rights, Report No. 53/1, Case 12.777 Merits.
- Fernández Ortega and Others v. Mexico* [2010] Inter-American Court of Human Rights (ser. C) No. 215 Preliminary Objection, Merits, Reparations and Costs.
- FS v. Chile* [2014] Inter-American Commission on Human Rights Petition 112–09, Report No. 52/14 Admissibility.
- Gelman v. Uruguay* [2011] Inter-American Court of Human Rights (ser. C) No. 221 Merits and Reparations.
- Godínez-Cruz v. Honduras* [1989] Inter-American Court of Human Rights (ser. C) No. 5 Reparations and Costs.
- Gomez Murillo et al. v. Costa Rica* [2016] Inter-American Commission on Human Rights Report No. 1/15, Case. 12.798 Merits.
- González et al. (“Cotton Field”) v. Mexico* [2009] Inter-American Court of Human Rights (ser. C) No. 205, Preliminary Objection, Merits, Reparations, and Costs.
- Gretal Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica* [2010] Inter-American Commission on Human Rights Report No. 85/10, Case 12.361 Merits.
- Gutiérrez-Soler v. Colombia* [2005] Inter-American Court of Human Rights (ser. C) No. 132 Merits, Reparations and Costs.
- IV v. Bolivia* [2008] Inter-American Commission on Human Rights Case 270–07, Report No. 40/08 Admissibility.
- IV v. Bolivia* [2014] Inter-American Commission on Human Rights Report No. 72/14, Case 12.655 Merits.
- Juridical Condition and Plights of the Undocumented Migrants* [2013] Inter-American Court of Human Rights (ser. A), No. 18 Advisory Opinion OC-18/03.
- Juvenile Reeducation Institute v. Paraguay*, [2004] Inter-American Court of Human Rights (ser. C) No. 112 Preliminary Objections, Merits, Reparations and Costs.
- Lluy and Others v. Ecuador* [2015] Inter-American Court of Human Rights (ser. C) No. 298, Preliminary Exceptions, Merits, Reparations and Costs.
- Loayza Tamayo v. Peru* [1998] Inter-American Court of Human Rights (ser. C) No. 42 Reparations and Costs.
- Maria da Penha v. Brazil* [2001] Inter-American Commission on Human Rights, Merits.
- María Mamerita Mestanza Chávez v. Peru* [2003] Inter-American Commission on Human Rights Case 12.191, No. 71/03 Friendly Settlement Agreement.

- María Mamérita Mestanza Chávez v. Peru* [2000] Inter-American Commission on Human Rights Case 12.191, Report No 66/00 Admissibility.
- Miguel Castro Castro Prison v. Peru* [2008] Inter-American Court of Human Rights (ser. C) No. 160 Merits, Reparations and Costs.
- Monica Carabantes Galleguillos v. Chile*, [2002] Inter-American Commission on Human Rights Report 33/02, Friendly Settlement Agreement.
- Paulina del Carmen Jacinto Ramírez v. Mexico* [2007] Inter-American Commission on Human Rights Petition 161–02, Report 21/07 Friendly Settlement Agreement.
- Rochela Massacre v. Colombia* [2007] Inter-American Court of Human Rights (ser. C) No. 163 Merits, Reparations, and Costs.
- Rosendo-Cantú and other v. Mexico* [2010] Inter-American Court of Human Rights (ser. C) No. 216 Preliminary Objection, Merits, Reparations, and Costs.
- ‘Street Children’ (Villagrán-Morales et al.) v. Guatemala* [2001] Inter-American Court of Human Rights (ser. C) No. 77 Reparations and Costs.
- Velásquez Pais et al. v. Guatemala* [2016] Inter-American Court of Human Rights (ser. C) No. 307 Preliminary Objection, Merits, Reparations and Costs.
- Velásquez-Rodríguez v. Honduras* [1988] Inter-American Court of Human Rights (ser. C) No. 4 Merits.
- Xákmok, Kásek Indigenous Community v. Paraguay* [2010] Inter-American Court of Human Rights (ser. C) No. 214 Preliminary Objection, Merits, Reparations, and Costs.

Treaties

- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (‘Protocol of San Salvador’), Organization of American States [adopted 17 November 1988, entered into force 16 November 1999].
- American Convention on Human Rights (ACHR) Organization of American States [adopted 22 November 1969, entered into force in 1978].
- American Declaration on the Rights and Duties of Man OEA/Ser.L./V/II 71, at 71 (April 1948).
- Charter of the Organization of American States [adopted 30 April 1948, entered into force 13 December 1951].
- Declaration on Violence against Women, Girls and Adolescents and their Sexual and Reproductive Rights’, Follow-Up Mechanism to the Convention of Belém do Pará, Committee of Experts (MESECVI) (OEA/Ser.L./II.7.10, MESECVI/CEVI/DEC.4 /14, 19 September 2014).
- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, Organization of American States [adopted 7 June 1999, entered into force 14 September 2001].
- Inter-American Convention of the Forced Disappearance of Persons, Organization of American States [adopted 9 June 1994, entered into force 28 March 1996].
- Inter-American Convention to Prevent and Punish Torture, Organization of American States [adopted 9 December 1985, entered into force 28 February 1987].
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (‘Convention of Belém do Pará’) Organization of American States [adopted 9 June 1994, entered into force 5 March 1995].
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Organization of American States [adopted 8 June 1990, entered into force 28 August 1991].

Rules

‘Guidelines for Participation of Civil Society Organizations in OAS Activities’, Organization of American States (OEA/Ser.G, CP/RES. 759 (1217/99) corr.1 December 15 1999) <www.oas.org/consejo/resolutions/res759.asp>.

Rules of Procedure of the Inter-American Commission on Human Rights [approved 2009, modified 2011, entered into force 1 August 2013] <www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

Rules of Procedure of the Inter-American Court of Human Rights [approved 2009, entered into force January 2010] <www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf>

Reports

‘Access to Information on Reproductive Health from a Human Rights Perspective’, (Inter-American Commission on Human Rights 2011) <www.cidh.oas.org/pdf%20files/womenaccessinformationreproductivehealth.pdf>.

‘Access to Maternal Health Services from a Human Rights Perspective,’ (Inter-American Commission on Human Rights 2010) <www.oas.org/en/iachr/women/docs/pdf/saludmaternaeng.pdf>.

Annual Report 2008, (OEA/Ser.L/V/II.134 Doc. 5, rev. 1, Inter-American Commission on Human Rights 25 February 2009).

Annual Report 2009, (OEA/Ser.L/V/II. Doc. 5, corr. 1, Inter-American Commission on Human Rights 30 December 2009).

Annual Report 2010, (OEA/Ser.L/V/II. Doc. 5, rev. 1, Inter-American Commission on Human Rights 7 March 2011).

Annual Report 2011, (OEA/Ser.L/V/II. Doc. 69, Inter-American Commission on Human Rights, Case 12.191, Report No. 71/03) <www.oas.org/en/iachr/docs/annual/2011/TOC.asp>.

Annual Report 2015, (OEA/Ser.L/V/II. Doc. 48/15, Inter-American Commission on Human Rights, 31 December 2015) <www.oas.org/en/iachr/docs/annual/2015/TOC.asp>.

Rapporteurship on the Rights of Women, Inter-American Commission on Human Rights <www.oas.org/en/iachr/women/default.asp>.

‘Second Hemispheric Report’, Follow-Up Mechanism to the Convention of Belém do Pará (MESECVI) Organization of American States (2012) 9 <www.oas.org/en/mesecevi/docs/MESECVISegundoInformeHemisferico-EN.pdf>.

United Nations Sources

Cases

Alyne da Silva Pimentel v. Brazil [2011] Committee on the Elimination of Discrimination Against Women (CEDAW/C/49/D/17/2008).

AS v. Hungary [2006] Committee on the Elimination of Discrimination against Women (CEDAW/C/36/D/4/2004).

Chozrow Factory [1927] Permanent Court of International Justice (ser. A), No. 9 at 21 Judgment.

K.L. v. Peru [2005] United Nations Human Rights Committee (UN Doc. CCPR/C/85/D/1153/2003).

LC v. Peru [2011] United Nations Committee on Elimination of Discrimination against Women (Communication No. 22/2009).

Mellet v. Ireland [2006] United Nations Human Rights Committee (UN Doc. CCPR/C/116/D/2324/2013).

Treaties, Guidelines and Comments

- 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', GA Res 60/147 (United Nations 2005).
- Charter of the United Nations (1945).
- Universal Declaration of Human Rights (UDHR) GA Res. 217(III)A (1948).
- International Covenant on Economic, Social and Cultural Rights (ICESCR) United Nations [adopted 16 December 1966, entered into force 3 January 1976].
- International Covenant on Civil and Political Rights (ICCPR), United Nations [adopted 1966, entered into force 23 March 1976].
- Regional Arrangements for the Promotion and Protection of Human Rights, GA Res. 32/127 (1977).
- International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) GA Res. 34/180 [approved December 18th 1979, and entered into force September 3rd 1981].
- Convention on the Rights of the Child (CRC), United Nations [adopted 20 November 1989, entered into force 2 September 1990].
- Convention on the Rights of Persons with Disabilities (CRPD) United Nations [adopted 13 December 2006, entered into force 3 May 2008].
- International Conference on Population and Development (ICPD), 'Report of the International Conference on Population and Development' (UN Doc. No. A/CONF. 171/13, 1994).
- Platform for Action United Nations Fourth World Conference on Women (1995) <www.un.org/womenwatch/daw/beijing/platform/plat1.htm#concern>.
- General Recommendation 24: Women and Health, Committee on the Elimination of Racial Discrimination (UN Doc. A/54/38/Rev 1, 3–7 1999).
- General Comment No. 14: The Right to the Highest Attainable Standard of Health, Committee on Economic, Social and Cultural Rights (UN Doc. E/C.12/2000/4 2000).
- General Recommendation 25: Gender Related Dimensions of Racial Discrimination, Committee on the Elimination of Racial Discrimination (UN Doc. A/55/18, Annex V 2003).
- General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add.13 [2004] ¶17.
- Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (2007). Available at <www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf>.

Regional Conventions

- Convention on Preventing and Combating Violence against Women and Domestic Violence ('Istanbul Convention') Council of Europe [adopted 11 May 2011, entered into force 1 August 2014].
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol') African Union Commission [adopted 11 July 2003; entered into force 25 November 2005].

APPENDICES

Appendix A: Case Study Selection

This chart provides a summary of the reproductive rights cases processed through the Inter-American System. It also notes cases pending admission before the Inter-American Commission on Human Rights. The chart illustrates criteria that contributed to selection of the case studies for analysis in this thesis, which were: (i) type of violation; (ii) geographic location; (iii) forum/litigation process; and (iv) period of time since Friendly Settlement Agreement reached/judgment released greater than one year before Summer 2014. The cases highlighted in **BOLD** fulfilled the criteria and were therefore selected for analysis.

Reproductive Rights Case	Date	Forum / Lit. Process	Reproductive Rights Issue	Notes on IASHR Action	Decision to Examine
<i>María Mamerita Mestanza Chávez v. Peru</i>	Petition: 15/6/1999 Admitted: 3/10/2000 FSA: 22/10/2003	IACHR / Friendly Settlement Agreement	Forced sterilization (discrimination: indigenous)	IACHR admitted case; case remains open	YES - first case of its kind (forced sterilization); South America; admitted by IACHR; gender analysis
<i>Paulina del Carmen Jacinto Ramírez v. Mexico</i>	Petition: 8/3/2002 FSA: 9/3/2007	IACHR / Friendly Settlement Agreement	Denied legal abortion rights (discrimination: young girl)	IACHR did not formally admit case; case closed	YES - first abortion rights case; Mexico; not formally admitted; case closed
<i>FS v. Chile</i>	Petition: 3/2/2009; Admitted: 21/7/2014	IACHR / Admissibility	Forced sterilization (discrimination: HIV)	IACHR admitted case	NO - too early in litigation process, admitted by IACHR too late for analysis
<i>IV v. Bolivia</i>	Petition: 7/3/2007 Admitted: 23/7/2008 Merits: 15/8/2014 Sent to IACtHR: 23/4/2015 Judgment: 30/11/2016	IACHR / Merits; IACtHR Judgment	Forced sterilization (discrimination: migrant)	IACtHR public hearing May 2016	NO - Merits Report issued by IACHR after field research commenced; will use for analysis in concluding chapter; IACtHR judgment issued after viva
<i>Artavia Murillo et al. v. Costa Rica</i>	Petition: 19/1/2001 Merits: 14/7/2010 Sent to IACtHR: 29/7/2011 Judgment: 28/11/2012	IACHR / Merits; IACtHR judgment	Ban on In Vitro Fertilization (gender stereotyping)	IACHR issued Merits and sent case to IACtHR; IACtHR issues judgment; State not comply	YES - first reproductive rights case before IACtHR; Central America; gender stereotyping analysis
<i>“B” Provisional Measure</i> (Case also submitted to IACHR 4/2015)	Issued: 29/5/2013	IACtHR provisional measure	Denial of therapeutic abortion	IACtHR issues measure to protect life of “B.”	NO - provisional measure, not a case. Doesn’t address structural issues.
<i>Ana v. Costa Rica</i>	Petition submitted: 2008	Pending admission before IACHR	Denied legal abortion rights		NO - pending admission
<i>Aurora v. Costa Rica</i>	Petition submitted: 2012	Pending admission before IACHR	Denied legal abortion rights		NO - pending admission

Appendix B: Ethical Approval Certificate



Social Sciences & Arts Cross-School Research Ethics Committee CERTIFICATE OF APPROVAL	
Reference Number:	ER/CO213/1
School:	LPS
Title of Project	The Effective Implementation of Reproductive Rights Law in the Inter-American Human Rights System
Principal Investigator:	Ciara O'Connell (Skeet)
Expected Start Date:*	1/05/2014
<p>*NB. If the <u>actual</u> project start date is delayed beyond 12 months of the <u>expected</u> start date, this Certificate of Approval will lapse and the project will need to be reviewed again to take account of changed circumstances such as legislation, sponsor requirements and University procedures</p>	
<p>This project has been given ethical approval by the Social Sciences/Arts Research Ethics Committee (C-REC). Please note the following requirements for approved submissions:</p> <p>Amendments to research proposal - Any changes or amendments to the approved proposal, which have ethical implications, must be submitted to the committee for authorisation prior to implementation.</p> <p>Feedback regarding any adverse and unexpected events - Any adverse (undesirable and unintended) and unexpected events that occur during the implementation of the project must be reported to the Chair of the Social Sciences C-REC. In the event of a serious adverse event, research must be stopped immediately and the Chair alerted within 24 hours of the occurrence.</p>	
Authorised Signature	
Name of Authorised Signatory (C-REC Chair or nominated deputy)	Professor Stephen Shute 12/11/13

Appendix C: Interview Participation Information Form



PARTICIPANT INFORMATION SHEET

Study Title: The Effective Implementation of Reproductive Rights Law in the Inter-American Human Rights System

Researcher:

Ciara O'Connell

Faculty Supervisors:

Professor Jo Bridgeman (Healthcare Law and Feminist Ethics)
Dr. Charlotte Skeet (Women's Human Rights)

Your participation is requested in an interview for a research project that analyzes how women's reproductive rights in the Inter-American Human Rights System can be effectively implemented at the domestic level within the Inter-American region. The Inter-American System of Human Rights has increasingly incorporated a gender-perspective in its work, and as a result the underlying causes of women's human rights violations have become a fundamental part of the assessment of reproductive rights law implementation. The experiences of NGOs, local initiatives and social institutions that work to implement reproductive rights law domestically have the potential to play a significant role in how the Inter-American System of Human Rights develops reproductive rights law. This research will identify opportunities for further collaboration between the Inter-American Human Rights System and domestic women's reproductive rights organizations and initiatives in an effort to identify how the Inter-American System can further reproductive rights law implementation.

Interviews are particularly relevant to this research in order to understand the Inter-American System's potential for developing remedies that address gender inequality, and also to identify the role of domestic initiatives and social institutions, and local challenges in terms of reproductive rights law implementation. In addition to the researcher's dissertation, the findings from the interviews will be used to produce a short briefing paper, with the intention of providing the participants with the results of this research. Before you decide whether or not you would like to participate in this research, it is important for you to understand what this research encompasses and what your role will involve. Please take time to read the following information carefully.

What is the purpose of this research?

The purpose of this research is to assess the implementation efforts of the Inter-American Human Rights System's reproductive rights case law at the domestic level, with a view to identifying obstacles to implementation while also offering recommendations for greater implementation success. In this study, representatives from the Inter-American Human Rights System, members of women's rights

Effective Implementation of Reproductive Rights Law in the Inter-American Human Rights System

NGOs, judges and legislators at the domestic level as well as healthcare workers and members of local initiatives such as training and education programs, will be interviewed to gain an insight as to how reproductive rights law is perceived in the Inter-American regional human rights system and then on the ground in its implementation. The overall objective of this research is to determine how the work of the Inter-American System can be better informed by local activists' knowledge and experience of implementing reproductive rights in order to overcome boundaries that impede the full implementation of reproductive rights law domestically.

Why have I been invited to participate?

The researcher requests your time to participate in a discussion of a selection of the following topics: reproductive rights law, women's human rights in the Inter-American Human Rights System, domestic initiatives for the promotion of women's human rights and reproductive rights, practical implementation of reproductive rights law as a healthcare practitioner at the domestic level, as well as local reproductive rights legislation. You have been selected to participate in this research based on your background, experience and knowledge in these areas. The information gathered from these interviews will assist the researcher in developing a complete understanding of the gap that exists in the failure to fully implement reproductive rights law at the domestic level. Additionally, your participation will aide in determining the potential role for local initiatives in the work of the Inter-American System, in particular, reproductive rights.

What will my involvement entail?

If you agree to participate in an interview, the researcher will meet you at a time (within the provided timetable) and place that is convenient for you. The interview will take place for approximately one hour, during which time, with your consent, the interview will be recorded. In some instances, a translator may accompany the researcher in order to ensure effective communication during the interview.

Exercise your right to withdraw

Participation in an interview for this research is entirely voluntary. The researcher respects your right to withdraw at any time. If you do decide to withdraw, you'll be given the option to have any gathered data involving your participation in the project destroyed.

Will my information in this research be confidential?

Your identity as well as the information you provide in this research will *not* automatically be made confidential. However, please do let the interviewer know if you would like your identity, workplace or any other information to be kept confidential. You may change your mind at any point before, during or after the interview. Please note any confidentiality requirements on the attached Consent Form.

What will happen to the results of this research?

The results of this research will be used in a doctoral degree thesis. Additionally, this research may be used in publications in peer-reviewed journals and research reports, as well as in conference presentations. Any material that makes use of research acquired from these interviews will be made available to the interviewees.

Who is organizing and funding the research?

This research has been organized and funded by Ciara O'Connell, a PhD Candidate in Law Studies at the University of Sussex in the United Kingdom. Additionally, the United Kingdom Society for Latin American Studies has awarded a travel grant to the researcher. For more information about the researcher, see <http://www.sussex.ac.uk/profiles/303008>.

How to proceed if I want to participate

If you are willing to participate in this research, please email the researcher at c.oconnell@sussex.ac.uk, and attach the signed consent form. The researcher will contact you shortly thereafter to discuss a suitable time to conduct an in-person interview for the summer of 2014.

Who has approved this study?

This research has been approved under the University of Sussex research governance process <http://www.sussex.ac.uk/staff/research/spg/researchgovernance>.

Contact for further information

For further information please contact the Researcher:

Ciara O'Connell
Department of Law
Friston Building, Falmer Campus
University of Sussex, Brighton
BN1 9RH, United Kingdom
c.o-connell@sussex.ac.uk
+44 (0) 78572 54888

Or, if you have any concerns about the study, please contact the researcher's project supervisors at the University of Sussex.

Prof. Jo Bridgeman
Department of Law
Friston 239, Falmer Campus
University of Sussex, Brighton
BN1 9RH, United Kingdom
J.C.Bridgeman@sussex.ac.uk
+44 (0) 1273 678133

Dr. Charlotte Skeet
Department of Law
Friston 236, Falmer Campus
University of Sussex, Brighton
BN1 9RH, United Kingdom
C.H.Skeet@sussex.ac.uk
+44 (0) 1273 872919

Thank you for taking the time to read this information sheet.



Información para Participantes

Título del Estudio: Implementación Efectiva de la Ley de los Derechos Reproductivos en El Sistema Interamericano de Derechos Humanos

Investigador:
Ciara O'Connell

Supervisores de la Facultad:
Profesora Jo Bridgeman (Ley de Salud y Ética Feminista)
Dr. Charlotte Skeet (Derechos Humanos de Mujeres)

Se solicita su participación en una entrevista para un proyecto de investigación que analiza cómo los derechos reproductivos de mujeres en el Sistema Interamericano de Derechos Humanos se pueden implementar con eficacia a nivel nacional dentro de la región interamericana. El Sistema Interamericano de Derechos Humanos ha incorporado cada vez más una perspectiva de género en su trabajo, y como resultado las causas subyacentes de violaciones de derechos humanos de las mujeres se han convertido en una parte fundamental de la evaluación de la aplicación de ley de los derechos reproductivos. Las experiencias de las organizaciones no gubernamentales (ONG), las iniciativas locales y las instituciones sociales que trabajan para aplicar la ley de los derechos reproductivos en el país tienen el potencial de desempeñar un papel significativo en la forma en que el Sistema Interamericano de Derechos Humanos desarrolla la legislación sobre derechos reproductivos. Esta investigación permitirá identificar oportunidades para una mayor colaboración entre el Sistema Interamericano de Derechos Humanos y de las organizaciones de mujeres nacionales de los derechos reproductivos y las iniciativas en un esfuerzo por identificar cómo el Sistema Interamericano puede avanzar en la aplicación de la ley de derechos reproductivos.

Las entrevistas son particularmente relevantes para esta investigación a fin de comprender el potencial del sistema interamericano para el desarrollo de soluciones que aborden la desigualdad de género, y también para identificar el papel de las iniciativas nacionales y las instituciones sociales, y los retos locales en cuanto a la aplicación de ley de los derechos reproductivos. Además de la tesis del investigador, los resultados de las entrevistas se utilizarán para producir un breve documento informativo, con la intención de proporcionar a los participantes los resultados de esta investigación. Antes de decidir si desea participar en esta investigación, es importante que usted entienda lo que esta investigación abarca y cuál será su papel. Por favor tome su tiempo para leer cuidadosamente la siguiente información.

Cuál es el propósito de esta investigación?

El propósito de esta investigación es evaluar los esfuerzos de implementación de la jurisprudencia los derechos reproductivos del Sistema Interamericano de Derechos Humanos en el plano nacional, con miras a identificar los obstáculos a la aplicación, como así también ofrecer recomendaciones para un mayor éxito de la implementación. En este estudio, representantes del Sistema Interamericano de Derechos Humanos, miembros de ONG derechos de las mujeres ONG, jueces y legisladores a nivel nacional, así como los trabajadores de salud y miembros de las iniciativas locales, como programas de formación y educación, serán entrevistados para obtener una clarificación en cuanto a cómo se percibe el derecho de los derechos reproductivos en el sistema regional de derechos humanos interamericano y luego en el campo de su aplicación. El objetivo general de esta investigación es determinar cómo el trabajo del Sistema Interamericano puede ser mejor informado por el conocimiento y la experiencia de los activistas locales en la aplicación de los derechos reproductivos con el fin de superar las limitaciones que impiden la plena aplicación del derecho de los derechos reproductivos en el país.

¿Por qué he sido invitado a participar?

La investigadora solicita su tiempo para participar en una discusión de los siguientes temas: derecho de los derechos reproductivos, los derechos humanos de las mujeres en el Sistema Interamericano de Derechos Humanos, las iniciativas nacionales para la promoción de los derechos humanos de la mujer y los derechos reproductivos, la aplicación práctica de derecho de los derechos reproductivos por un profesional de la salud en el ámbito nacional, así como la legislación local de los derechos reproductivos. Usted ha sido seleccionado para participar en esta investigación sobre la base de sus antecedentes, experiencia y conocimiento en estas áreas. La información obtenida de estas entrevistas ayudará a la investigadora en el desarrollo de una comprensión completa de la brecha que existe en la falla de no aplicar plenamente la legislación sobre derechos reproductivos a nivel nacional. Además, su participación ayudará a determinar el papel potencial de las iniciativas locales en la labor del Sistema Interamericano, en particular, los derechos reproductivos.

¿Qué supondrá mi participación?

Si usted acepta participar en una entrevista, la investigadora se reunirá con usted en un momento (dentro de los plazos previstos) y lugar que sea conveniente para usted. La entrevista se llevará a cabo durante aproximadamente una hora, tiempo durante el cual, con su consentimiento, se grabará la entrevista. En algunos casos, un traductor puede acompañar a la investigadora con el fin de garantizar una comunicación eficaz durante la entrevista.

Ejercite su derecho a retirarse

La participación en una entrevista para esta investigación es completamente voluntaria. La investigadora respeta su derecho a retirarse en cualquier momento. Si decide retirarse, se le dará la opción de que los datos recogidos relacionados con su participación en el proyecto sean destruidos.

¿Mi información en esta investigación será confidencial?

Su identidad, así como la información que proporcione en esta investigación, no serán automáticamente confidenciales. Sin embargo, por favor, haga saber a la entrevistadora si desea que su identidad, lugar de trabajo o cualquier otra información sean de carácter confidencial. Usted puede cambiar de opinión en cualquier momento, antes, durante o después de la entrevista. Por favor tenga en cuenta los requisitos de confidencialidad en el Formulario de Consentimiento adjunto.

¿Qué pasará con los resultados de esta investigación?

Los resultados de esta investigación serán utilizados en una tesis de doctorado. Además, esta investigación podrá ser utilizada en publicaciones en revistas e informes de investigación, así como en presentaciones de conferencia. Todo el material de investigación adquirido de estas entrevistas se pondrá a disposición de los entrevistados.

¿Quién está organizando y financiando la investigación?

Esta investigación se ha organizado y financiado por Ciara O'Connell, candidata a doctorado en Estudios Jurídicos en la Universidad de Sussex en el Reino Unido. Adicionalmente, la Sociedad de Estudios Latinoamericanos en el Reino Unido ha otorgado la investigación junto con una bolsa de viaje para este proyecto. Para obtener más información sobre el investigador, consulte en <http://www.sussex.ac.uk/profiles/303008>.

Cómo proceder si quiero participar

Si usted está dispuesto a participar en esta investigación, por favor escriba la investigadora c.oconnell@sussex.ac.uk, y adjunte el formulario de consentimiento firmado. La investigadora se comunicará con usted poco después discutir un momento adecuado para llevar a cabo una entrevista en persona para el verano de 2014.

¿Quién ha aprobado este estudio?

Esta investigación ha sido aprobada en el marco del proceso de gobierno de la Universidad de Sussex en investigación, <http://www.sussex.ac.uk/staff/research/spg/researchgovernance>.

Contacto para más información

Para más información, póngase en contacto con la investigadora:

Ciara O'Connell
Department of Law
Friston Building, Falmer Campus
University of Sussex, Brighton
BN1 9RH, United Kingdom
c.o-connell@sussex.ac.uk
+44 (0) 78572 54888

O, si usted tiene alguna preocupación sobre el estudio, por favor póngase en contacto con los directores del investigador en la Universidad de Sussex.

Prof. Jo Bridgeman
Department of Law
Friston 239, Falmer Campus
University of Sussex, Brighton
BN1 9RH, United Kingdom
J.C.Bridgeman@sussex.ac.uk
+44 (0) 1273 678133

Dr. Charlotte Skeet
Department of Law
Friston 236, Falmer Campus
University of Sussex, Brighton
BN1 9RH, United Kingdom
C.H.Skeet@sussex.ac.uk
+44 (0) 1273 872919

Gracias por tomarse el tiempo de leer esta hoja de información.

Appendix D: Interview Consent Form



CONSENT FORM FOR INTERVIEW PARTICIPANTS

**Title: The Effective Implementation of
Reproductive Rights Law in the
Inter-American Human Rights System**

**Approval
Reference: ER/CO213/1**

I agree to take part in the above University of Sussex research project. I have had the project explained to me and I have read and understood the Information Sheet, which I may keep for my records. I understand that agreeing to take part means that I am willing to:

Be interviewed by the researcher:

- 1) I understand that my identity, as well as any information I provide in an interview, can be anonymized upon my request. If I do request that my identity be made confidential, the information I provide will be coded to prevent my identity from being made public.
- 2) I understand that I will be given a transcript of the interview for my approval before it is included in the research findings, and I agree that the information may be published in a doctoral thesis and other subsequent publications.
- 3) I understand a translator may accompany the researcher. In that case, if I am electing to anonymize my identity, the translator will sign a confidentiality agreement between the researcher, myself and the translator.

Allow the interview to be audio taped:

- 1) I consent to the audio recording of the interview, but should I request that my identity be kept confidential, the recording shall be done in such a way as to preserve my anonymity.

Please select one: (special conditions may be explained on the following page)

- ☐ I give approval for my identity, name and workplace to be used in this research and publications arising from it.
- ☐ I would like my identity made confidential, and any information I provide in an interview to be anonymized.

Special Requirements:

Initial

I understand that my participation is voluntary, that I can choose not to participate in part or all of the research project, and that I can withdraw at any stage of the project without being penalized or disadvantaged in any way.

I consent to the processing of my personal information for the purposes of this research study. I understand that such information will be treated as strictly confidential and handled in accordance with the Data Protection Act 1998.

Name: _____

Signature: _____

Date: _____



**FORMULARIO DE CONSENTIMIENTO
PARA PARTICIPANTES DE ENTREVISTA**

**Título: Implementación Efectiva de la Ley de los
Derechos Reproductivos en El Sistema
Interamericano de Derechos Humanos**

**Referencia de
Aprobación: ER/CO213/1**

Estoy de acuerdo en participar en el proyecto investigación de la Universidad de Sussex. El proyecto me ha sido explicado y he leído y comprendido la hoja de información, que guardaré para mis archivos. Entiendo que aceptar participar significa que estoy dispuesto a:

Sostener una entrevista con la investigadora:

- 1) Entiendo que mi identidad, así como cualquier información que proporcione en una entrevista, pueden ser anónimos a mi pedido. Si yo solicito que mi identidad sea confidencial, la información que proporcione será codificada para evitar que mi identidad sea hecha pública.
- 2) Entiendo que se me dará una transcripción de la entrevista para mi aprobación antes de que sea incluida en los resultados de la investigación, y estoy de acuerdo en que la información puede ser publicada en una tesis doctoral y otras publicaciones posteriores.
- 3) Entiendo que un traductor puede acompañar al investigador. En ese caso, si decido anonimizar mi identidad, el traductor va a firmar un acuerdo de confidencialidad entre la investigadora, yo y el traductor.

Permitir que la entrevista sea grabada:

- 1) Doy mi consentimiento para grabar el audio de la entrevista, pero debo pedir que mi identidad se mantenga confidencial para hacer el registro de tal manera de preservar mi anonimato.

Por favor selecciona uno: (condiciones especiales pueden ser explicadas abajo)

- ☐ Doy la aprobación de mi identidad, nombre y puesto de trabajo para ser utilizados en esta investigación y publicaciones derivadas de ella.
- ☐ Me gustaría que mi identidad sea confidencial, y toda la información que proporcione en una entrevista sea anónima.

Requisitos Especiales:

Iniciales

Entiendo que mi participación es voluntaria, que puedo elegir no participar en todo o parte del proyecto de investigación, y que puedo retirar en cualquier fase del proyecto sin ser penalizado o desfavorecido de ninguna manera.

Doy mi consentimiento para el tratamiento de mis datos personales para los fines de este estudio de investigación. Entiendo que esta información será tratada de forma estrictamente confidencial y de conformidad con la Ley de Protección de Datos de 1998.

Nombre: _____

Firma: _____

Fecha: _____

Appendix E: Interview Information

This research incorporates information obtained from a field research trip conducted in the summer of 2014. The research trip took place in Lima, Peru (June 21st to July 11th); Mexico City, Mexico (July 12th to August 1st); San Jose, Costa Rica (August 2nd to August 22nd); and Washington DC, USA (August 23rd to August 29th). The aim of this field research trip was to conduct interviews with actors involved directly with the case studies, and with women's rights and the Inter-American System of Human Rights more broadly. The overall objective of the interviews was to develop a comprehensive understanding of how the Inter-American System of Human Rights can advance as a forum to effectively take account of, and repair, gendered harm in women's (reproductive) rights cases.

This Appendix provides information about the research design and interview process and includes the following sections: (1) Interview Participants, *and* (2) Interview Design and Questions.

1. Interview Participants

The interview participants were selected based on their affiliation or background with one or more of four groups:

- (i) Participants working in the Inter-American System of Human Rights
- (ii) Participants working with the selected women's reproductive rights cases and representatives from women's rights NGOs more generally
- (iii) Government representatives in each of the case study countries
- (iv) Medical doctors involved in women's reproductive health services

These groups were selected in order to develop a bottom-up/top-down articulation of how women experience their reproductive rights, as well as violations of these rights. Medical doctors provided insight into how different women access reproductive healthcare differently based on geographic, racial, and economic barriers. Representatives from women's rights NGOs and actors who participated in the selected case studies were crucial to understanding how reproductive rights cases develop before the Inter-American System, and also for determining practical strategies for advancing a "gender reparations tradition" in the Inter-American System of Human Rights. Interviews with government officials highlighted the challenges supranational human rights organs face when attempting to implement international human rights standards at the national level. Finally, representatives from the Inter-American System provided information about the internal challenges the System faces when dealing with issues of gender and reproductive rights.

The interview participants were selected based on their group affiliation, and also based on their willingness to donate their time for an interview. The participants either responded to my interview-request email and committed to an interview time, or they were recommended by another participant, a process called "snowballing." I was unable to speak with a number of actors that I planned to interview for several reasons; some did not respond to my requests, others were unable to find time to schedule an interview, and one request was declined. The accompanying charts detail the names and affiliations of the interview participants, and also include a list of individuals who were contacted but did not participate in the research.

Interview Participants

Interviewee Name/ Affiliation	Date / Location	In- Person (IP)	Skype (Sk)	Peru (P)	Mexico (M)	Costa Rica (CR)	IACHR (Cm)	IACtHR (Ct)	Gov't (G)	NGO (N)	*Self (S)	Med (Rx)
Ysabel Marin Sandoval (Attorney, PROMSEX - Center for the Promotion and Defense of Sexual and Reproductive Rights)	Lima (9/7/2014)	X		X						X		
Daniel Aspícueta (Director, Peruvian Institute of Responsible Parenthood)	Lima (9/7/2014)	X		X						X		X
Cecilia Olea Mauleón (Researcher, Flora Tristán)	Lima (9/7/2014)	X		X						X		
Liz Meléndez (Executive Director, Flora Tristán)	Lima (9/7/2014)	X		X						X		
Rocío Pilar Puente Tolentino (Sexual & Reproductive Rights Program Coordinator Manuela Ramos)	Lima (30/6/2014)	X		X						X		
Milena Justo Nieto (Attorney, Manuela Ramos)	Lima (30/6/2014)	X		X						X		
Gladys Vía Huerta (Program Coordinator, Catholics for the Right to Decide)	Lima (1/7/2014)	X		X						X		
Carolina Garcés Peralta (Women's Rights Director, Ombuds Office)	Lima (2/7/2014)	X		X					X			
Diana Portal Farfán (Attorney, Women's Rights, Ombuds)	Lima (2/7/2014)	X		X					X		X	
Shelia Jacay (Attorney, Women's Rights, Ombuds Office)	Lima (2/7/2014)	X		X					X			
Carla Villareal López (Attorney, Women's Rights, Ombuds Office)	Lima (2/7/2014)	X		X					X			
Marcela Huaita Alegre (Vice Minister of Women, Ministry of Women and Vulnerable Populations)	Lima (10/7/2014)	X		X					X			
Gloria Marisela Mallqui Osorio (Executive Deputy, Vice Minister's Office, Ministry of Health)	Lima (8/7/2014)	X		X					X			

Interviewee Name/ Affiliation	Date / Location	In- Person (IP)	Skype (Sk)	Peru (P)	Mexico (M)	Costa Rica (CR)	IACHR (Cm)	IACtHR (Ct)	Gov't (G)	NGO (N)	*Self (S)	Med (Rx)
Roger Rafael Rodríguez Santander (Director, Executive Secretary of the National Council of Human Rights, Ministry of Justice and Human Rights)	Lima (10/7/2014)	X		X					X			
Jeannette Llaja (Former Director of DEMUS - Study for the Defense of Women's Rights)	Lima (3/7/2014)	X		X							X	
Beatriz Ramírez Huaroto (Advisor, Ministry of Women and Vulnerable Populations - formerly with PROMSEX)	Lima (22/6/2014)	X		X							X	
Luis Távara, MD (Sexual and Reproductive Health Consultant)	Lima (8/7/2014)	X		X							X	X
Rebeca Ramos (Legal Investigator, GIRE - Information Group on Reproductive Choice)	Mexico City (17/7/2014)	X			X					X		
Doroteo Mendoza (Manager of Evaluation, Investigation & Information Systems, Mexican Foundation for Family Planning, AC - MEXFAM)	Mexico City (24/7/2014)	X			X					X		
Maria Eugenia Romero Contreras (Director, Equidad de Género)	Mexico City (22/7/2014)	X			X					X		
Lucía Lagunes Huerta (General Director, Communication and Information for Women - CIMAC)	Mexico City (31/7/2014)	X			X					X		
Rufino Luna Gordillo (General Director, National Center for Gender Equality and Reproductive Health Center)	Mexico City (29/7/2014)	X			X				X			
Luis Jardon (Director of Human Rights Litigation, Department of Cases, Ministry of Foreign Affairs)	Mexico City (29/7/2014)	X			X				X			

Interviewee Name/ Affiliation	Date / Location	In- Person (IP)	Skype (Sk)	Peru (P)	Mexico (M)	Costa Rica (CR)	IACHR (Cm)	IACtHR (Ct)	Gov't (G)	NGO (N)	*Self (S)	Med (Rx)
José Guevara (Executive Director, Mexican Commission of Defense and Promotion of Human Rights)	Mexico City (25/7/2014)	X			X					X	X	
Marisol Aguilar (Impact Coordinator, EQUIS - Justice for Women)	Mexico City (28/7/2014)	X			X					X	X	
Patricia Uribe Zúñiga (Former Director of the National Center for Gender Equity and Reproductive Health, Under-Secretariat of Health Promotion and Prevention, Secretariat of Health)	Mexico City (31/7/2014)	X			X				X		X	
Vanessa Coria (Advocacy/Program Manager, WGNRR (Women's Global Network for Reproductive Rights), and formerly with CEJIL (Center for Justice and International Law)	Mexico City (18/7/2014)	X			X					X	X	
Anonymous (Expert in Gender and Women's Rights)	Mexico City (30/7/2014)	X			X				X		X	
Hilda Picado Granados (Executive Director, Asociación Demográfica Costarricense - ADC)	San Jose (14/8/2014)	X				X				X		
Ivania Solano Jiménez (Attorney, Department of the Protection of Women in the Office of the Ombudsman)	San Jose (20/8/2014)	X				X			X		X	
Adriana Maroto Vargas (Academic, La Colectiva, 'Collective for the Right to Decide)	San Jose (14/8/2014)	X				X				X	X	
Delia Maria Ribas Valdés, MD (IVF Doctor)	San Jose (14/8/2014)	X				X					X	X
Jorge Oviedo w/ Amanda Grosser (Deputy Attorney, General Prosecutor, State Rep. in <i>Artavia Murillo et al. v. Costa Rica</i>)	San Jose (20/8/2014)	X				X			X			

Interviewee Name/ Affiliation	Date / Location	In- Person (IP)	Skype (Sk)	Peru (P)	Mexico (M)	Costa Rica (CR)	IACHR (Cm)	IACtHR (Ct)	Gov't (G)	NGO (N)	*Self (S)	Med (Rx)
Huberth May Cantillano (Attorney, Victims' Representative in <i>Artavia Murillo et al. v. Costa Rica</i>)	San Jose (18/8/2014)	X				X					X	
Mónica Arango Olaya (Former Regional Director for Latin America and Caribbean, Center for Reproductive Rights)	Skype (11/7/2014)		X							X	X	
Ana Cristina González Veléz, MD (Reproductive Health Expert, Global Doctors for Choice)	Skype (4/8/2014)		X							X	X	X
María Daniela Rivero (Attorney, formerly Center for Reproductive Rights and IACtHR)	San Jose (6/8/2014)	X					X			X	X	
Oscar Parra Vera (Former Senior Attorney, IACtHR)	San Jose (7/8/2014)	X						X			X	
Alexandra Sandoval (Former Senior Attorney, IACtHR)	San Jose (12/8/2016)	X						X			X	
Rosa Celorio** (Attorney and Women's Rights Desk Specialist, IACHR)	Washington DC (28/8/2014)	X					X				X	
María Alejandra Cardenas (Regional Director, Women's Link Worldwide, former attorney at IACHR & Center for Reproductive Rights)	Washington DC (27/8/2014)	X					X			X	X	
Luz Patricia Mejía (Coordinator, Follow-up Mechanism to the Belém do Pará Convention MESECVI and Commissioner and Rapporteur on Women's Rights)	Skype (26/9/2014)		X				X				X	

* Self: These participants did not represent their organization or institution during the interview.

** This participant declined to have their interview audio recorded.

Potential Participants Contacted, No Reply (NR) / Unable to Schedule (US) / Declined (D)

Name, Role/Affiliation	Response
Susana Chávez, Director, PROMSEX, Peru	US
Marisabel Cedano, Director, DEMUS, Peru	NR
Rosy Salazar, Researcher, DEMUS, Peru	NR
Roxana Vásquez, Former Director, CLADEM	NR
Gloria Cano, Director, APRODEH, Peru	NR
Gabriela Filoni, CLADEM	US
Monica Roa, Women's Link Worldwide	US
Elizabeth Placido, CLADEM	NR
María de la Luz Estrada Mendoza, Catholics for the Right to Decide Mexico	NR
María Isabel Belausteguigoitia Rius, National Autonomous University of Mexico - Programa Universitario de Equidad de Género	NR
Paola Soto Maldonado / Maria del Carmen Juárez Toledo, INMUJERES	NR
Ana Gloria Robles Osollo, General Director Programs, Issues of Women and Equality between Women and Men, National Human Rights Center (CENADEH)	NR
Liliana Tojo, Program Director, CEJIL	US
Katya Nallely Vera Morales, Director of International Women's Affairs, Secretary of Foreign Affairs Mexico	NR
Marta Solano / Cristina Nogués, Agenda Política de Mujeres, Costa Rica	NR
Rose Mary Madden, American Institute of Human Rights, Costa Rica	NR
Alejandra Mora, Former Ombudsman, Director of INAMU, Costa Rica	US
Carolina Molina and Carla Sierra, Cancillería. Dept. of Human Rights, Costa Rica	US
José Carlos Jiménez Alpizar, Ministry of Foreign Affairs, Costa Rica	US
Boris Molina Acevedo, Attorney/Victims' Rep in Artavia Murillo	NR
Judge Diego García Sayán, Inter-American Court	NR
Judge Margaret May Macaulay, Inter-American Court / Inter-American Commission	US
Judge Manuel Ventura Robles (*Referred me to Maria Daniela Rivero)	US
Victor Abramovich, Former Special Rapporteur on Women's Rights, Inter-American Commission	US
Tracy Robinson, Current Special Rapporteur on Women's Rights, Inter-American Commission	US
James Cavallaro, Inter-American Commission (declined to participate b/c ongoing cases)	D
Larissa Arroyo Navarrete, Lawyer, member of the Collective for Free Choice	US

2. Interview Design and Questions

The process of interview participant selection was divided into two phases. The first group of participants was selected based on the case documentation from each of the case studies. From this documentation, I identified actors involved in each of the cases (NGOs, individual lawyers, Commissioners/Judges, amicus curiae submissions), and contacted them via email to conduct an interview either in-person or via Skype. Second, I collaborated with colleagues (Ana Cristina González Veléz; Paola Gomez; Beatriz Ramírez; and Adriana Maroto Vargas) working on human rights and women rights issues in the case study countries, and Latin American more generally, to determine relevant actors who represent government entities, women's and human rights nongovernmental organizations, and in some cases worked as women's healthcare advocates and providers. I met these colleagues during a Health Rights Litigation course at the Harvard University FXB Center for Health and Human Rights in September 2013.

In my first attempts to contact the interview participants I sent out cold emails based on the contact information I received from my colleagues. However, in most cases I was unable to establish and confirm interview appointments until I was physically in the country. I found that actors were more

likely to return an email if they were aware of my in-country location. A significant number of the interviews were scheduled as a result of referrals from other participants (“snowballing”), which helped to put me in touch with actors who had not responded to my interview requests.

To ensure effective communication during the interview process, I partnered with interpreters in each of the case study countries. These interpreters (Viviana Tipiani - Lima, Peru; Carolina Corral - Mexico City, Mexico; Muriel Vargas and Tatiana Saprissa - San Jose, Costa Rica) were paid an agreed-upon wage, and assisted with in-person interpretation which consisted of translating Spanish-spoken responses into a recorder and clarifying discussion points. The interpreters also helped coordinate interviews via email and phone, and were on-hand to review transcription accuracy. The interview format and design was semi-structured, where each interview participant was asked a few introductory questions which then opened up the dialogue to areas of particular significance/interest to the participant and their membership in one of the four participant groups. Below is a selection of sample questions.

Sample Questions

- All Participants
 1. What is your role in X organization? And, what are the key mission objectives for this organization?
 2. Do you want to speak on behalf of X organization, or do you want to speak in an individual capacity? Is it alright to audio-record this conversation?
 3. In your opinion, or if representing an organization, the organization’s position, what are the main obstacles to women’s equality in X country, or more broadly?
 4. What role, if any, do you think the IASHR should play in advancing the reproductive rights of women in the Latin American region?
- Group One: Participants working in the Inter-American System of Human Rights
 1. What are some of the main obstacles the Inter-American Commission and Court face when it comes to applying a gender-sensitive approach to examining rights violations?
 2. What strategies do you think the IASHR should employ to advance gender-based reparations through women’s rights litigation?
 3. What is your opinion on X case? Discuss.
 4. What tools/instruments do the Inter-American Commission and Court have at their disposal to ensure the effective design of gender reparations?
- Group Two: Participants working with the selected women’s reproductive rights cases and representatives from women’s rights NGOs more generally
 1. What was your involvement/experience with X case? Or implementation of the reparations in this case?
 2. Does your organization have a legal/monitoring program? If so, how does it operate?
 3. What do you think the role of civil society is/should be in litigating and monitoring reparations issued by supranational human rights bodies such as the Inter-American Court or Commission?
- Group Three: Government representatives in each of the case study countries
 1. What is the role of this office in implementing or litigating supranational human rights cases?
 2. What was/is the State’s position in X case?
 3. What are the challenges in implementing reparation measures?

4. How do different state entities coordinate and operate together to comply with supranational judgments?
 5. For Ombuds Offices: Do you think there is a role for civil society to play, in coordination with the Ombud Offices, to assist in the design of reparations?
- Group Four: Medical doctors involved in women's reproductive health services
 1. What obstacles do women and men face in accessing reproductive health care in X country?
 2. How, and to what extent if any, does the state coordinate with reproductive healthcare providers to develop education and training materials?
 3. How do different women experience their rights differently?
 4. Did you have any involvement in X case? What was your experience?

Appendix F: Fieldwork Findings Report (English version)

Women's Reproductive Rights in the Inter-American System of Human Rights

Conclusions from the Field, June - September 2014

Researcher: Ciara O'Connell, PhD Candidate, University of Sussex, United Kingdom

** Working paper, researcher can be contacted at c.o-connell@sussex.ac.uk.*

Executive Summary

The Inter-American System of Human Rights has proven to be a forum for the advancement of women's reproductive rights in the Inter-American region. However, the Inter-American System faces significant challenges in promoting structural transformative change that enables women's enjoyment of their reproductive health rights. This report examines three reproductive rights cases from the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: *María Mamerita Mestanza Chávez v. Peru*; *Paulina Ramírez Jacinto v. Mexico*; and *Artavia Murillo et al. v. Costa Rica*. In the summer of 2014, interviews were conducted with representatives in each of the case study countries, with the objective of the research being two-fold: (1) to understand how each of the cases developed, and the subsequent challenges and advancements; and (2) to learn from these cases in order to suggest recommendations for how actors can make better use of the Inter-American System as one of several avenues for protecting, promoting and fulfilling women's reproductive rights. The report first discusses challenges in implementing women's reproductive health rights, and then explores how the Inter-American System can strengthen its work on women's reproductive health rights.

Of the numerous challenges to the implementation and enjoyment of women's reproductive rights discussed in interviews, the following emerged as particularly significant: (1) limited understanding and institutionalization of 'gender'; (2) ineffective or nonexistent collaboration between actors; and (3) inadequate development, implementation, and compliance-monitoring of reparation measures. Interview respondents noted that the Inter-American Commission and Court face great difficulty in regards to institutionalizing gender throughout all of the System's work, where the concept of gender is often misunderstood, and the funding allocated to work in this area is minimal. At the state levels, national legislation on gender equality and non-discrimination has increased, yet there remains a significant gap in how these standards are implemented. Additionally, the concept of gender as it relates to reproductive health rights has not been successfully developed in litigation efforts before the Inter-American Commission and Court, which may indeed be strategic in certain situations, but can also be perceived as a missed opportunity. Collaboration between actors is discussed in the report by briefly reviewing four different relationships: (1) NGO collaboration with fellow NGOs; (2) NGO collaboration with state departments; (3) collaboration amongst state departments; and (4) collaboration between NGOs and the Inter-American System. Interviews revealed common themes such as competition amongst groups, limited funding and trust, and duplication of work as central impediments to successful collaboration. However, there are several examples of successful collaboration efforts, such as the work being done by the CLADEM network, which brings together women's rights NGOs from across the region in order to use the law as a tool for change. Finally, reparations remain a largely underutilized tool in litigation efforts before the Inter-American System. Interview respondents showed minimal concern for the design of reparations, and very few NGOs had effective reparation-monitoring functions. Civil society has a significant role to play in the design of effective, transformative and measurable reparations, yet there is a certain reluctance, based on funding and expertise, to engage in the work of formulating and monitoring reparations.

As more women's reproductive health rights cases come before the Inter-American Commission and Court, it is of the utmost importance to learn from the experiences of the case studies selected for this research, and to ask, *what's next?* In this report, suggestions for how to strengthen women's reproductive health rights are divided into two sections: national level, and Inter-American System of Human Rights. Several interview respondents agreed that the way forward in terms of advancing women's access to reproductive health rights at the national level is to reform how children and university students are educated in gender, sexuality, and reproductive health. One interview respondent noted that the goal of education should be to create an "equality culture," where concepts such as gender and autonomy are indivisible from reproductive health. Education also comes in the form of training, where medical doctors and members of the judiciary must be trained in gender and

substantive equality. The fairly recent Mexican protocol that requires gender training for federal judges is a promising advancement in this area. Implementing training and education programs in the medical and legal communities is not enough to tackle long-term sociocultural change; these efforts must also be coupled with youth education that emphasizes equality and autonomy.

In order to achieve a more effective Inter-American System of Human Rights in terms of dealing with women's reproductive rights, the following suggestions emerged: (1) creating a tradition of gender-based reparations; (2) using the Convention of Belém do Pará consistently and constantly in litigation efforts; and (3) institutionalizing gender training in the Inter-American System. Although the concept of gender has increasingly become relevant to the work of the Commission and the Court, there remains a resistance to expand upon this work when developing reparations. For example, this was the situation in *Artavia Murillo et al. ('In vitro fertilization') v. Costa Rica*, where the case was groundbreaking in its development of gender reasoning, but a failure to reflect upon this reasoning in the reparations stage of the judgment became a significant missed opportunity for the promotion of women's reproductive rights. The report suggests that future reproductive rights cases should be developed with gender-based reparations in mind from the initial stages of the case in order to effectively connect reparations to the causes of rights violations. The Convention of Belém do Pará has seen minimal use before the Commission and Court, and only one of its provisions is justiciable. However, the Convention has great potential in helping to illustrate the structural picture required to design effective reparations. Litigation efforts in forthcoming cases need to develop their arguments using the Convention of Belém do Pará, and should use all the tools afforded by the Inter-American Court's interpretation of its jurisdiction over the Convention, such as using non-justiciable provisions to interpret the sole justiciable provision (Article 7(b)). Lastly, the Inter-American System continues to operate a small women's rights department, where all of the work being done on gender in the Commission is relegated to a desk with one employee and two fellows. The work being done by this group is exceptional, but the task of incorporating a gendered analysis in women's rights cases is too great. Interview respondents agreed that the Commission and Court should institutionalize gender more effectively in their work, starting with a training initiative so that all employees are trained in gender and understand the gendered causes of human rights violations.

The above-mentioned challenges and recommendations highlight the thoughts and experiences of individuals working in and around the field of women's reproductive health rights in the Inter-American region. Because the Inter-American System of Human Rights will undoubtedly encounter reproductive rights cases in the future, it is essential for actors to engage in every opportunity to reflect on advancements and missed opportunities in order to develop new ways to protect, promote and fulfill women's reproductive rights in the future. The intention of this report is to play a small role in that process of reflection, where hopefully actors ranging from women's rights NGOs to academics to medical doctors, can take a moment to see how far women's reproductive rights have come, and how we can all better work to advance these rights in the future.

This report is a representation of the initial findings and conclusions from fieldwork research. The researcher welcomes and appreciates any comments, additional information, advice, and questions.

Table of Contents

I. Introduction	3
II. Challenges	6
A. Institutionalizing Gender	6
B. Collaboration	10
C. Reparations: Development, Implementation, and Compliance-monitoring	15
III. What Next?	16
A. At the National Level	17
B. In the Inter-American System	19
IV. Conclusion	22

I. Introduction

As universal human rights standards have become increasingly accepted across the Latin American region, the focus on how to implement, and subsequently monitor state compliance is the foremost challenge in human rights activism and scholarship. Women's reproductive rights in the Inter-American region, as well as in many other places around the world, have faced relentless attack, as conservative movements coupled with longstanding sociocultural norms challenge women's rights to autonomy, equality and non-discrimination. Cases emerging from human rights monitoring bodies, such as the Inter-American System of Human Rights, have noted the relationship that exists between gender, discrimination and women's inadequate enjoyment of their reproductive rights. However, at the national level, state practice is in many ways disconnected from the rhetoric and reasoning being developed within the international and regional human rights communities.

This research report, which is part of a larger doctoral thesis, is an initial examination of the advancements and challenges that exist in protecting, promoting and fulfilling women's reproductive rights in the Inter-American region. In the summer of 2014, over 40 interviews were conducted with representatives from NGOs, the medical and legal communities, and state departments in Peru, Mexico, and Costa Rica, as well as with representatives from the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The goal of the interviews was to determine the causes and consequences of the gap that exists between international/regional human rights law and its implementation at the national level, specifically focusing on women's reproductive rights. The research conclusions elucidate the difficulties that arise in developing reproductive rights cases, and also in coordinating efforts between different actors, such as governments and women's rights organizations. Additionally, the report suggests initial recommendations for strengthening the Inter-American System's approach to effectively implementing and monitoring women's reproductive rights in the region.

The foundation for this research is built upon three cases from the Inter-American System of Human Rights: *María Mamerita Mestanza Chávez v. Peru*; *Paulina Ramirez Jacinto v. Mexico*; and *Artavia Murillo et al. v. Costa Rica*. Each of these cases is a reproductive rights case, and was chosen for this project because of its individual topic, as well as its background, challenges/advancements, and lessons for the future. The objective of initiating the research through the lens of these cases is to determine the success each one has had in terms of its development, reasoning, and implementation. A brief summary of each of the cases introduces the context in which reproductive rights litigation plays out in the Inter-American System.

María Mamerita Mestanza Chávez v. Peru (2003)¹

This case was the first reproductive rights case to be admitted to the Inter-American Commission on Human Rights. The case involved the forced sterilization and subsequent death, of a rural indigenous Peruvian woman. María's forced sterilization was representative of the situation for thousands of rural, indigenous women living in poverty who were the target of a massive state-implemented population control policy. The case resulted in a Friendly Settlement Agreement between the petitioner (victim) and the State of Peru, and included several reparations, such as: justice measures to hold those individuals accountable for the forced sterilizations; amendment of laws and public policies on reproductive health and family planning, elimination of discriminatory approaches in healthcare, and respect for women's autonomy; implementation of training for healthcare personnel; and distribution of payments to the victim for medical, personal and education expenses. Perhaps the most noteworthy element of these reparations is the connection made between women's reproductive health and discrimination against women, and in this case, poor rural indigenous women. This Agreement has not been fully complied with by the State, and there remains a strong sense of impunity in the country as a result of the State's failure to investigate and prosecute the perpetrators of these crimes. Manuela Ramos, an historical feminist NGO in Peru, noted that this feeling of impunity is probably one of the main issues in the country. Although the Agreement highlights the indivisible relationship between reproductive rights and discrimination, the public sense of impunity in Peru is linked to justice issues surrounding the internal conflict that occurred around the same time as the population control effort, and not necessarily women's reproductive rights. And, despite the fact that the sterilizations occurred during the time of conflict, the Truth and Reconciliation Commission

¹ *María Mamerita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. Comm. H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 (2003).

created to address the human rights violations during this time failed to mention the sterilizations, which has also been a point of contention for organizations working in this area.²

Diana Portal, an attorney with the Ombudsman's Office Women's Department, noted that in Peruvian society, there is no recognition of this case as being related to discrimination based on gender, race or class. She said the following:

"There is not a social gender perspective, there are sectors, organizations, but as a society we do not have a gender perspective. We do not have that perspective. I think that it is because of discrimination. Who were the victims? For example, in the forced sterilization cases, who were the victims? The major victims of forced sterilization were Andean women, or women who live far from areas in Piura, Cusco, or even in Lima. ... So the same situation happens as during the internal armed conflict. Who the victim is determines the response from the state, and the consciousness of the other. People are not conscious that the situation could have been for them. They cannot see themselves in that farmer, or the Andean and Quechua-speaking woman."³

This argument about linking discrimination to the issue of impunity in Peru is especially important because it tackles one of the core issues for protecting, promoting and fulfilling women's reproductive rights in Latin America - the *type* of woman is directly related to the type of violation, type of discrimination, and type of recourse.

This case remains open before the Inter-American Commission, however a number of participants view this case as closed in terms of how much potential the case has in continuing to demand justice for women. Several participants agreed that a new forced sterilization case that utilizes the more recent developments made in reproductive rights in the region, with a different approach towards reparations, and more advanced level of reasoning and argumentation would significantly help to not only refresh the call for justice in the country, but to also draw stronger links between reproductive health rights violations, discrimination, and justice.⁴

Paulina Ramirez Jacinto v. Mexico (2007)⁵

Paulina was a young girl who was raped by a burglar in the State of Baja, Mexico. She subsequently became pregnant and sought an abortion, which was legal under the criteria for abortion in her state. Paulina and her mother were manipulated by health personnel who gave them biased information, with the result being that Paulina's mother elected for her not to have the abortion. Paulina's representatives claimed that Paulina's story is indicative of the situation for many other girls and women who are forced into motherhood after being raped. Unlike the *María Mamerita Mestanza Chávez* case, this case never reached the admissibility stage at the Inter-American Commission of Human Rights. Instead, Paulina and the State of Mexico reached a Friendly Settlement Agreement before the Commission reviewed the case, which included the following reparations: monetary compensation for education and school supplies; psychological treatment and health services for the victim; a public acknowledgment of responsibility by the government in the local newspapers; changes to legislature; an assessment of the enforcement of the National Program for the Prevention and Attention of Domestic, Sexual and Violence Against Women; the dissemination of a circular from the Health Secretariat to the state health services and other sectors that would serve to 'strengthen the commitment toward ending violations of the right of women to the legal termination of a pregnancy'; and a review of literature materials to detect shortcomings in information.

This case is closed according to the Inter-American Commission, yet nearly every NGO and individual interviewed did not agree with the Commission's decision to close the case. Vanessa Coria noted that the monetary payments were not made in full to Paulina's son, and for that reason alone the case

² Final Report from the Peruvian Truth and Reconciliation Commission, available at <http://www.cverdad.org.pe/ingles/pagina01.php>. This issue was also brought up in an interview with Milena Justo, Human Rights Attorney, Manuela Ramos, Lima, Peru, 30 June 2014.

³ Interview with Diana Portal Farfán, Attorney, Office of the Ombudsman, Rights of Women Department, Lima, Peru, 2 July 2014.

⁴ Interviews with Jeannette Llaja, Former Director, Study for the Defense of Women's Rights (DEMUS), Lima, Peru, July 3, 2014, and Beatriz Ramirez Huaroto, Advisor, Ministry of Women and Vulnerable Populations, Lima, Peru, 22 June 2014.

⁵ *Paulina del Carmen Ramirez Jacinto v. Mexico*, Case 161-02, Inter-Am. Comm. H.R., Report No. 21/07, OEA/Ser.LV/II.130, doc. 22, rev.1 (2007).

cannot be closed.⁶ Rebeca Ramos mentioned that although Paulina today is conscious of her rights, for her and her son, the primary concern "is the issue of monetary compensation, and those specific reparations."⁷ A formal assessment of the National Program for the Prevention and Attention of Domestic, Sexual and Violence Against Women was not conducted, despite the State's decision to include the National Program within the Agreement.⁸ Additionally, Alejandra Cardenas called attention to the fact that the reparation that required the Health Secretariat to distribute a circular to state health services was never completed.⁹ Cardenas asserted that this reparation was particularly important because it had potential to directly impact how members of the medical community understand women's abortion rights. Despite these considerable shortcomings in implementation of reparations, this case does illustrate an evolution in reproductive rights cases before the Inter-American System – even the fact that the State entered into an agreement before the case reached admissibility is an achievement.

Artavia Murillo et al. v. Costa Rica (2012)¹⁰

Perhaps the most significant of the cases examined in this study is *Artavia Murillo et al. v. Costa Rica*, which is a case that challenged Costa Rica's constitutional ban on invitro fertilization (IVF). In its judgment, the Inter-American Court of Human Rights determined that the ban on IVF is discriminatory, and called for its repeal. The Court then went further by examining the scientific and moral arguments around defining the moment of conception, and also by developing a thorough definition of the right to reproductive health. While this case was groundbreaking in its reasoning, it failed to draw clear parallels between reproductive rights, women's rights, and gender in its reparations. This disconnect can in part be attributed to litigation efforts made on behalf of the petitioners, where the focus was not necessarily on linking IVF to women's rights, but was rather on connecting IVF to reproductive disability and the right to form a family. This argument is apparent in the reparations, which are particularly general and do not adequately place the ban on IVF in its broader context as a women's reproductive rights violation. The reparations include the following: psychological treatment for those victims in the case that request it; publication of the judgment; annulment of the prohibition on IVF treatments and access to the service at healthcare facilities with infertility treatment centers; education and training programs in human and reproductive rights for all members of the judiciary (making mention of the judgment); and monetary compensation for the victims.

The implementation of this judgment's reparations has seen considerable success, however the ban on IVF remains. Jorge Oviedo, one of the State representatives in the case, noted that the monetary payments were made to the victims within three months of the judgment.¹¹ Dr. Ribas, an IVF doctor who originally participated in the case before the Costa Rican government, asserted that all of the reparations, except the lifting of the IVF ban, had been completed.¹² Finally, Huberth May, one of the attorneys who represented the victims, hopes that despite strong resistance from conservative, religious groups and the Constitutional Court, legislation to repeal the IVF ban will be passed before the end of the year (2014).¹³ Despite this relative success, Ivania Solano, an attorney at the Office of the Ombudsman in Costa Rica, said the IVF case has highlighted the Costa Rican State's shortcomings when dealing with the regional system. She indicated that although the Foreign Affairs

⁶ Interview with Vanessa Coria, Advocacy and Program Manager, WGNRR, Mexico DF, Mexico, 18 July 2014.

⁷ Interview with Rebeca Ramos, Legal Researcher, Information Group on Reproductive Choice (GIRE), 17 July 2014.

⁸ Interviews with Patricia Uribe, Former General Director of the National Center for Gender and Reproductive Health, 31 July 2014 and José Guevara, Executive Director, Mexican Commission of Defense and Promotion of Human Rights, Mexico DF, Mexico, 25 July 2014. Both participants described how the Ministry of Foreign Affairs and the National Center for Gender Equity and Reproductive Health, Secretariat of Health, collaborated to have the National Program for the Prevention and Attention of Domestic, Sexual and Violence Against Women included in the Friendly Settlement Agreement.

⁹ Interview with Alejandra Cardenas, Inter-American Commission on Human Rights, Washington DC, USA, 27 August 2014.

¹⁰ *Artavia Murillo et al. v. Costa Rica*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 257 (28 November 2012).

¹¹ Interview with Jorge Oviedo, Deputy Attorney, San Jose, Costa Rica, 20 August 2014.

¹² Interview with Dr. Delia Maria Ribas Valdés, IVF Doctor, San Jose, Costa Rica, 13 August 2014.

¹³ Interview with Huberth May Cantillano, Attorney, Victim Representative, San Jose, Costa Rica, 18 August 2014. As of January 2015, a law has not been passed to legalize IVF in Costa Rica.

Ministry recently began work on fulfilling obligations of treaty organs, there are “no rules related to the implementation of the resolutions - none at all.”¹⁴

It is important to note that in the reasoning developed by the Court in this case, the right to private life was directly linked to reproductive autonomy, reproductive freedom, and “the decision of whether or not to become a parent is part of the right to private life and includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense.”¹⁵ This reasoning has great potential for future cases that seek to challenge violations of reproductive health rights, where the right to private life enshrined in Article 11 of the American Convention, can potentially be used to protect women’s “rights to decide freely and responsibly on the number and spacing of their children...,” as protected internationally by the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).¹⁶

As a whole, these cases highlight the Inter-American Systems advancements and shortcomings in the case of women’s reproductive rights in the Inter-American region. Clearly, over time, reproductive rights have progressed within the system, with the IVF case representing a huge accomplishment in terms of its reasoning and potential for use in following cases. However, initial reflections from the information received during the interview stage of this research reveal the following concerns with the Inter-American System’s current approach to addressing women’s reproductive rights violations: inadequate institutionalizing of gender, limited collaboration between actors, and failure to develop and monitor effective reparations.

II. Challenges

One of the intentions of this report is to develop an understanding of the challenges various actors face in developing, implementing, and monitoring women’s reproductive rights. The research adopts a bottom-up approach, where the insight and perspectives of individuals and groups working on women’s reproductive rights at the local and national levels are seen as a great source of information and knowledge for state and regional/international actors. This section reviews the challenges the Inter-American System of Human Rights encounters in its work with reproductive rights, and does so by combining perspectives from representatives from national and international NGOs, representatives from state departments, and representatives from the Inter-American System. While the obstacles to achieving full enjoyment of women’s reproductive rights in the Inter-American region are innumerable, this report focuses on three specific challenges: (1) institutionalizing gender in all levels of work done by NGOs, States and the Inter-American System; (2) insufficient collaboration between actors, both horizontally and vertically; and (3) development, implementation of, and compliance with, reparation measures in the Inter-American System. These themes overlap and are inherently indivisible, but their individual analysis allows for deeper examination.

A. Institutionalizing Gender

“ We need to eliminate the idea that we look at women as if they are an object of power... the idea that women have a natural role, the idea that women are not equal in relation with men, institutionally.” – *Roger Rodriguez, Executive Secretary of the National Council of Human Rights, Ministry of Justice and Human Rights, Peru*¹⁷

Framing women’s reproductive rights as rights that are violated, in part, as a result of gender discrimination, is a significant challenge. In the Inter-American System’s work on women’s reproductive rights there has been notable progression in defining and understanding this connection,

¹⁴ Interview with Ivania Solano, Attorney, Ombudsman, Women’s Department, San Jose, Costa Rica, 20 August 2014.

¹⁵ *Artavia Murillo et al. v. Costa Rica* (2012), para. 143.

¹⁶ Convention on the Elimination of all Forms of Discrimination Against Women, CEDAW, Article 16 (1)(e).

¹⁷ Interview with Roger Rafael Rodriguez Santander, Director, Executive Secretary of the National Council of Human Rights, Lima, Peru, 10 July 2014.

especially in reporting mechanisms, thematic hearings and in the IVF case reasoning.¹⁸ For example, the Inter-American Commission report entitled, "Access to Maternal Health Services from a Human Rights Perspective," noted that "It is very important to bear in mind, in this regard, that women have historically been subject to various forms of discrimination and that the obligation to remedy that discrimination demands the integration of a gender perspective in the design and implementation of laws and public policies affecting women."¹⁹ The Commission has held thematic hearings on topics such as sexual and reproductive rights of women in Latin America and the Caribbean, reproductive health and emergency contraception, access to information about women's sexual and reproductive health, and reproductive health for women living with HIV and AIDS.²⁰ Expert testimony included in the IVF case highlights the role gender discrimination plays in women's enjoyment of their reproductive rights: "Women are raised and socialized to be wives and mothers, to take care of and attend to the intimate world of affections. The ideal for women, even nowadays, is embodied in sacrifice and dedication, and the culmination of these values is represented by motherhood and the ability to give birth."²¹

Additionally, the Follow up Mechanism to the Belém do Pará Convention (MESECVI), which was established in 2004, has taken significant steps to protect reproductive rights within the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention), and also within the American Convention on Human Rights. Recently, MESECVI issued a Declaration on Violence Against Women, Children and Adolescents and their Sexual and Reproductive Rights, where the declaration included the following:

"... sexual and reproductive rights are part of the catalog of human rights that protect and defend the Universal and Inter-American human rights system; and sexual and reproductive rights are based on other fundamental rights including the right to health, the right to freedom from discrimination, the right to privacy, the right to personal integrity and freedom from torture, cruel inhuman and degrading treatment, the right of all couples and individuals to decide freely and responsibly the number, spacing and timing of having children and to have the information and means to do it, and the right to make decisions about reproduction free of discrimination, coercion and violence and thus to be free from sexual violence."²²

Luz Patricia Mejía, former Commissioner and Rapporteur on Women's Rights, and current Technical Expert and Coordinator of MESECVI, explained that MESECVI's role is to place pressure on states to answer questions about progress made in gender and women's rights, which can be especially powerful because of the public nature of MESECVI's questionnaire and reporting mechanisms.²³ This mechanism is also effective as a tool to monitor how states incorporate a gender perspective in their legislation and public policies.

The correlation between reproductive health and gender discrimination is also increasingly being championed in campaigns by national women's rights groups, where movements such as "Déjala Decidir" promote activism around women's rights to decision-making and autonomy - "Because I want to be the one who decides my life plan."²⁴ Hilda Picado, Director of Asociación Demográfica Costarricense (ADC) [Costa Rican Demographic Association], explained that in her organization's prior work there was no connection between reproductive health and gender. However, she said, "since society has been changing, we have changed with society. So we have new handbooks, where we include topics like gender identity, sexual identity, gender violence, and sexual and reproductive

¹⁸ Gender discrimination has also been explored in several women's rights cases in the Inter-American System, for example: *Maria da Penha v. Brazil*, Inter-Am. Comm. H.R., Report No. 54/01, OEA/Ser.L/V/II.111, 16 April 2001; *Gonzalez et al. ("Cotton Field") v. Mexico*, Inter-Am. Ct. H.R., (Preliminary Objection, Merits, Reparations, and Costs) 16 November 2009; and *Atala Rizzo and Daughters v. Chile*, Inter-Am. Ct. H.R., (Merits, Reparations and Costs) 24 February 2012.

¹⁹ Access to Maternal Health Services from a Human Rights Perspective, OEA/Ser.L/V/II. Doc. 69, 7 June 2010, para. 29.

²⁰ List of women's rights thematic hearings, www.oas.org/es/cidh/audiencias/topicslist.aspx?lang=es&topic=15

²¹ *Artavia Murillo et al. v. Costa Rica* (2012), Expert witness testimony from Neuburger, para 298.

²² Declaration on Violence Against Women, Children and Adolescents and their Sexual and Reproductive Rights, Follow up Mechanism to the Belém do Pará Convention (MESECVI), MESECVI/CEVI/DEC.4/14, Eleventh Meeting of the Committee of Experts, 19 September 2014. (<http://www.oas.org/es/mesecvi/docs/CEVI11-Declaration-ES.pdf>)

²³ Interview with Luz Patricia Mejía, Technical Expert and Coordinator, MESECVI, Skype, 26 September 2014.

²⁴ Interview with Gladys Vía Huerta, Program Coordinator, Catholics for the Right to Decide, Lima, Peru, 31 July 2014. See <https://www.facebook.com/dejaladecidir/info>.

rights.”²⁵ Movements and efforts such as these, that frame reproductive rights as a gender issue, have great potential to not only affect change in the present, but to also generate social and cultural change in the long term.

However, a number of interview participants claim that framing reproductive rights within a gender discrimination context, while necessary, is not always effective in practice. For example, in many Latin American countries abortion is decriminalized under specific criteria, of which all are related to the health of women or the fetus, whether the health violation is physical or psychological.²⁶ In this situation, litigation efforts can rely on the women’s health argument in order to build a case. Adriana Maroto explained, “the discourse of gender in the legal arena is very fragile... so, when we try to construct the concept of health, or of *vida digna* [dignified life], we’re doing it from the point of view of gender. We have to do it from the other side... there is a gender discourse that supports these arguments, but they have their foundation in the health aspects.”²⁷

While framing reproductive rights as health rights is undeniably advantageous, especially because the right to health is inherently linked to the rights to life, privacy, personal integrity, and information, which are all rights protected by the American Convention of Human Rights, it is also necessary to include gender reasoning in order to provide a structural picture of the context in which the violation occurred, and can/will occur again. Developing an understanding of reproductive health as a gender, and/or gender discrimination issue, has numerous benefits, of which some are: (1) it forces policy-makers, state officials, and the Inter-American Commission and Court to examine and address sociocultural conditions that are both causes and symptoms of women’s reproductive rights violations; (2) it creates a discussion about varying forms of discrimination, and their intersections; and (3) it removes the burden on women to prove that their health is being affected, and places the emphasis instead on women’s autonomy, and their life project.

Rosa Celorio, the Women’s Rights Attorney at the Inter-American Commission, claimed that one of the most significant challenges to incorporating gender into the Commission’s work is an insufficient understanding of the concept of gender within the Commission.²⁸ One example of the inconsistency within the Commission as it relates to women’s rights and gender-related issues is illustrated by Dr. Ribas’ experience with the IVF case in Costa Rica. She said, “I got a lot of resistance from the lawyer who was in charge of Costa Rica (at the Commission)... so I talked to local friends, and got advice from other people, from the Center for Reproductive Rights and from CEJIL, they said, ‘try to get the case moved over to the women’s desk.’”²⁹ Dr. Ribas continued, “They were marvelous, and we got the case moved over to the women’s desk, which took about five years. But then things started to move... and then the whole process from that point took five years from the time they (the women’s desk) got the case. They were very expeditious.”

Both Celorio and Cardenas share the opinion that the institutionalization of gender within the Commission requires training, at all levels. However, training alone will not entirely shift the Commission’s approach to utilizing a gender perspective, there must also be efforts on behalf of petitioners to bring cases before the Commission that effectively incorporate gender in their reasoning, and that utilize an intersectional approach. For example, while the IVF case is undoubtedly an advancement in the fight for women’s reproductive rights in the Inter-American region, the shortcomings in the litigation arguments, as well as in the reparations, elucidate a disconnect between women’s reproductive rights and gender. Cardenas mentioned that this disconnect can in part be attributed to the fact that, “people who litigate cases are not necessarily the people who actually have this as a cause, and understand it.”³⁰ In the IVF case, the victim’s representatives had no background in women’s reproductive rights, and were also initially reluctant to collaborate with NGOs or

²⁵ Interview with Hilda Picado, Executive Director, Asociación Demografica Costarricense (ADC), San Jose, Costa, Rica, 14 August 2014.

²⁶ Worldwide abortion laws: <http://reproductiverights.org/en/document/the-worlds-abortion-laws-map>

²⁷ Interview with Adriana Maroto, The Collective for the Right to Decide (La Colectiva), San Jose, Costa Rica, 14 August 2014.

²⁸ Interview with Rosa Celorio, Attorney - Women’s Rights Desk, Inter-American Commission on Human Rights, Washington DC, USA, 29 August 2014.

²⁹ Interview with Dr. Delia Maria Ribas Valdés, IVF Doctor, San Jose, Costa Rica, 13 August 2014.

³⁰ Interview with Alejandra Cardenas, Attorney, Inter-American Commission on Human Rights, Washington DC, USA, 27 August 2014.

individuals who did have this type of experience. In the final stages of the case they coordinated with the Women's Office of the Ombudsman in Costa Rica and the Center for Reproductive Rights, but both La Colectiva and the Center for Reproductive Rights were not included in the development of the initial case, and were not invited to participate in the development of reparation measures. Huberth May, one of the victim's attorneys, recognized that the case could have benefitted from further collaboration with specialists in women's reproductive rights, and said, "I think that if we had to begin again we would include the reproductive rights and use the trial as an opportunity to help Costa Rican society progress... I believe the trial was not planned to go in that direction... issues like abortion, contraception, and topics related to women's autonomy and right to decide about procreation, sex, etc.... I believe we could have taken more advantage of this case."³¹ Perhaps the foremost missed opportunity in this case was the petitioner's decision to frame the argument on violations of reproductive disability discrimination and the right to form a family, and to not also draw connections between IVF and women's rights to decide. The end result of this case, in terms of the direct impact it has in Costa Rica, fulfills certain types of women's and couple's rights to form a family, yet the poor woman, the rural woman, and the woman who is not able to enjoy her right to decide, received no further reproductive rights protections.³²

In regards to the case study countries explored in this report, there have been significant developments in national legislation, policy and structure in incorporating a gender perspective within the state's work; this work is not specifically focused on the relations between gender and reproductive health. However, a brief exploration of recent developments sheds light on state reactions to the need to incorporate gender into equality and discrimination-based work. It is important to keep in mind though, that while a piece of legislation or policy may seem promising on the surface, implementation is an ongoing challenge.

In Peru, a restructuring of the State Ministries in 2012 allowed for the creation of the Ministry for Women and Vulnerable Populations, which released the National Plan for Gender Equality 2012-2017. This plan promises to be more effective than past efforts because the Ministry has established a special directorate office to deal with gender mainstreaming horizontally among the different sectors, and vertically within the different levels of government. Marcela Huaita Alegre, the Vice Minister in the Women's Ministry explained, "we try to make all ministries add the gender approach, to then make a reflection about their work, and to add a specific commission, so that this really is part of the work of the sector... the gender approach is not only from the Ministry of Women, we have to incorporate it in all other ministries."³³ Additionally, Peru is currently in the process of approving a National Plan on Education and Human Rights, where an element of that Plan is the National Program for Legal Education for Social Inclusion. According to Roger Rodriguez, if passed, this Plan has the "objective of training university students in the law faculties in human rights... oriented to the following: understanding that the basis of human rights is not necessarily human life, it's not life, it's not integrity, it's *autonomy*. It has a dignity approach that comes together with a gender approach, and an education and intercultural approach."³⁴

In Mexico, the 2013 implementation of a protocol entitled, "Judicial-Decision Making with a Gender Perspective," was partly the result of pressure from the Inter-American Court, where it found Mexico responsible in several cases involving violence against women.³⁵ The protocol focuses on gender training for federal judges, where judges are trained to identify and evaluate the following: (1)

³¹ Interview with Huberth May Cantillano, Attorney, Victim Representative, San Jose, Costa Rica, 18 August 2014.

³² It is important to note that the case did not address homosexual couples' rights to form a family, and that this issue is contentious in the current drafting of IVF legislation in Costa Rica.

³³ Interview with Marcela Huaita Alegre, Vice Minister of Women, Ministry of Women and Vulnerable Populations, Lima, Peru, 10 July 2014.

³⁴ Interview with Roger Rafael Rodriguez Santander, Director, Executive Secretary of the National Council of Human Rights, Lima, Peru, 10 July 2014.

³⁵ Judicial-Decision Making with a Gender Perspective: A Protocol - Making equal rights real, Gender Equality Unit of the National Supreme Court of Mexico (2013-2014), Available at: <http://www.sitios.scjn.gob.mx/codhap/ProtocolGenderPerspective>. Inter-American Court cases with a gender perspective referenced within the Protocol: Gonzalez et al. v Mexico ("Cotton Field" case), see paras. 502, 541, 521 (16 November 2009); Fernandez Ortega et al. v. Mexico, see paras. 236 and 260 (30 August 2010); and Rosendo Cantú et al. v. Mexico, see paras. 219, 246 (31 August 2010).

disparate impact of laws and norms; (2) when gender stereotypes inform the interpretation or application of laws or norms; (3) how binary constructions of sex and gender lead to the legal exclusion or disenfranchisement of certain persons; (4) how inequitable distributions of resources lead to unequal distributions of power; and (5) the legitimacy of using differentiated treatment in laws and judicial decisions.³⁶ The assessment element of this Protocol “tries to find how (judges) introduce gender reasoning and analysis into their argumentation... It is not only that they mention ‘discrimination’ or ‘inequality;’ we are really looking for an understanding of substantive equality.”³⁷ As of July 2014, an estimated 400 federal judges had completed long-term gender-based training. The focus on substantive equality in the Protocol’s training program has great transformative potential, especially because the final stage of the protocol is to monitor and assess the Judge’s work in cases following training. While this final monitoring stage seems obvious, in many gender education/training programs the challenge has been to evaluate the efficacy of the program – where funding and technical expertise to carry out such an activity is limited.

In Costa Rica, the inclusion of gender and women’s rights in national programs is especially challenging. For example, over the past four years on International Women’s Day the National Institute for Women (INAMU) has concerned itself with makeup tutorials, massages, and shopping discounts instead of focusing on issues such as violence against women and access to reproductive healthcare. Recently a shift in leadership in INAMU has been cause for optimism, as a well-known feminist, and former Director of the Women’s Department in the Ombudsman office, is now leading INAMU. Adriana Maroto is hopeful that this new leadership within INAMU will revitalize a sexual and reproductive rights agenda. However, the situation in Costa Rica in regards to women’s reproductive rights is highly unpredictable. Ivania Solano mentions that although she was able to speak about these issues in an interview in August 2014, the situation could change drastically when the new Ombudsman is appointed.³⁸ For Solano, regardless of the unstable climate in Costa Rica, one thing is certain, “*They own our bodies, and they don’t let us have any choices.*”

Institutionalizing, or mainstreaming gender, is a challenge at all levels of human rights application. Unfortunately the term ‘gender’ is often misunderstood to be synonymous with the word ‘woman,’ which limits the transformative potential of incorporating a gender approach in policies, legislation, and case law. The federal judge training program in Mexico is especially promising because of its expansive understanding of the role of gender. However, it is important to note that gender training at such a high level of the judiciary does not have much of an impact for women and men who cannot find legal recourse at the local level. In order to undertake the challenge of institutionalizing gender it is necessary to first understand what gender means, and then to develop programs and policies that work from the bottom-up, where the teacher, police officer, and clinic worker are all educated in gender training. To begin this work it is necessary for different actors to collaborate and share expertise. The following section explores some of the challenges and advancements in collaboration efforts between the following actor groups: (1) NGO collaboration with other NGOs; (2) Civil society collaboration with State organs; (3) State department collaboration; and (4) Inter-American System collaboration with civil society.

B. Collaboration

One of the most frequent topics discussed in interviews was the challenge of establishing cooperation efforts between and amongst actors. While there are several examples of successful collaboration efforts, there remains tension, distrust and a sense of competition that in many ways hinders the work being done on women’s reproductive rights. This section briefly introduces some of the collaboration opportunities explored in the interviews between civil society, states, and the Inter-American System of Human Rights.

³⁶ Judicial-Decision Making with a Gender Perspective: A Protocol - Making equal rights real, Gender Equality Unit of the National Supreme Court of Mexico, p. 8.

³⁷ <http://www.sitios.scjn.gob.mx/codhap/ProtocolGenderPerspective>.

³⁸ Interview with Expert in Gender and Women’s Rights, Anonymous, Mexico City, Mexico, 30 July 2014.

³⁸ Interview with Ivania Solano, Attorney, Ombudsman, Women’s Department, San Jose, Costa Rica, 20 August 2014.

NGO collaboration with other NGOs

In Peru, Mexico, and Costa Rica, every national NGO representative interviewed brought up the issue of limited funding as an obstacle to their work. Several participants explained that while in the past international aid programs were interested in reproductive rights in Latin America, the situation now is that funding is scarce, and difficult to secure. With less funding, comes more competition between NGOs to secure money for their activities. Also, this lack of resources has created situations where some NGOs have had to cease their work as an organization. An example of this is the deterioration of La Colectiva in Costa Rica, where individual members continue the work, but there is not enough funding to continue daily operations, or to afford an office.

In this time of limited funding it is important for national NGOs to pool their resources, especially in regards to activism, local training/education efforts, and compliance monitoring of national legislation and international recommendations/judgments. While it is understandable that a fight for funding has forced NGOs to differentiate their work from fellow NGOs working in this field, the result has been a fragmentation and duplication in work, where NGOs working in the area are not well enough informed about other NGO projects and campaigns. However, despite the challenge of funding, there have been successful collaboration efforts in the countries represented in this research.

CLADEM (Latin American and Caribbean Committee for the Defense of Women's Rights), is a great example of national NGOs networking across the region to use the law as a tool for change.³⁹ This network collaborates with international NGOs, and very importantly, creates a forum for national NGOs that do not necessarily work on the legal aspects of women's rights to be involved in the advocacy and monitoring processes of legal decisions. Also, perhaps because of their involvement with CLADEM, some women's rights NGOs that have historically worked on training and education for women, have started to shift their strategy to include a legal focus. For example, Manuela Ramos in Peru is undergoing an institutional change where they still understand their niche as an organization that works on promoting citizenship through education, but that now also sees space to work in the future on international and national public policies, and to work on "creating emblematic cases that can be used to propose improvements in health and education systems."⁴⁰

Collaboration between international and national NGOs has seen significant success in bringing reproductive rights cases before international and regional human rights organs. For example, the Center for Reproductive Rights has collaborated with CLADEM, DEMUS, La Colectiva, GIRE, etc., to lend technical assistance to NGOs that otherwise may not have significant experience before international human rights bodies. However, these relationships require trust between the NGOs because there are risks associated with joining an international organization. Mónica Arango explained, "one thing to understand, and I'm saying this because I've been in positions where I go in to negotiate implementation of a case with the government and they just tell me bluntly, you're a threat... you're violating our sovereignty. And it's a reality because we are a US-based organization and why is a US-based organization telling a country how to implement public policy? So there's a question of legitimacy."⁴¹ This point is important because it highlights the context within which international reproductive rights NGOs work, one where they have the expertise to assist with development of cases, but where their agenda is questioned, and often times, not considered valid.

Civil society collaboration with State departments

Opinions on NGO and State collaboration efforts differ based on the relationship each NGO has with a particular state department. For example, PROMSEX has a good relationship with the human rights department of the Ministry of Justice and Human Rights in Peru, where the office was instrumental in helping to pass the recent therapeutic abortion protocol. However, as Ysabel Marín explained, the relationship shared with the Ministry of Health is more complicated, "when we were talking about the pill, we were friends, but then about the (therapeutic abortion) protocol, we were fighting!"⁴² One

³⁹ CLADEM (Latin American and Caribbean Committee for the Defense of Women's Rights, Available at: <http://www.cladem.org/en/about-cladem>.

⁴⁰ Interview with Rocío Pilar Puente Tolentino, Coordinator of the Sexual and Reproductive Rights Program, Manuela Ramos, Lima, Peru, 30 June 2014.

⁴¹ Interview with Mónica Arango Olaya, Regional Director for Latin America and the Caribbean, Center for Reproductive Rights, Skype, 11 July 2014.

⁴² Interview with Ysabel Marín Sandoval, Human Rights Attorney, PROMSEX, Lima, Peru, 9 July 2014.

point raised by several NGO participants was that collaboration with the state depends entirely on the department, the topic, timing, and often the individual representatives in the office.

The role of the Women's Department of the Ombudsman's Office also varies in each of the countries, where in Peru and Costa Rica, the National Ombudsman is seen as having potential for collaboration, but in Mexico, NGOs are more wary of forming relationships with the National Commission on Human Rights. In Costa Rica, the Ombudsman's office played a role in convincing NGOs to join the discussion surrounding the IVF case, and in Peru, the Women's department of the Ombudsman's office has worked with NGOs such as Manuela Ramos on training sessions, and with DEMUS on their campaign, "Un Hombre No Viola" (A man does not rape).⁴³ However, although the Ombudsman office will in certain situations collaborate with NGOs, the role of the Ombudsman is to monitor the state in its human rights activities, where its relationship with NGOs is mainly to receive information that can then be used in reports.

Lastly, in Peru, both Luis Távara and Daniel Aspícueta expressed concern with the lack of collaboration between state departments and the medical community. Távara noted that there is not an institutional practice on behalf of the state to ask for assistance from medical experts who work in the area of reproductive rights. He explained that if this does happen, it's an isolated case and not a common practice.⁴⁴ This is unfortunate because individuals such as Luis Távara, who have participated in international discussions about women's health and reproductive rights and have worked with women in hospitals and clinics, are not seen as valuable sources of information at the national level. Daniel Aspícueta, the director of INPPARES, echoed this opinion by mentioning that the public and private sectors do not often collaborate because they don't share the same thinking about women's reproductive health.⁴⁵ With education being one of the most important elements in strengthening the medical community's understanding of gender, women's rights, and reproductive health, it is a significant missed opportunity that there is little to no collaboration between experts in this field and state-implemented training programs.

State department collaboration

Collaboration across different government departments is fundamental to the success of any national legislation or public policy. This is especially the case for policies that call for shifts in culture and society, such as policies that focus on gender equality or non-discrimination. Also, collaboration amongst state departments is necessary for the implementation of recommendations and judgments from supranational human rights bodies. Information from interviews with representatives of different state departments in Peru, Mexico and Costa Rica, as well as with civil society actors, underscored various instances where collaboration across departments was effective, and more often, where it was not.

In terms of implementation of supranational recommendations and judgments, each state has a different process for delegating tasks to the different departments or ministries. In Peru, the Ministry of Justice and Human Rights receives communications from the Inter-American System and then collaborates with the relevant ministries. In Mexico, the process is similar, however the Ministry of Foreign Affairs is the department charged with implementation of supranational treaties and judgments. Finally, in Costa Rica, there is no formal procedure for implementing decisions and judgments, as noted above by Ivania Solano.⁴⁶ During interviews most participants were unable to clearly discuss the path taken by international recommendations and judgments once the state received the order or signed the Agreement. The overall process lacks transparency, and as a result, is very difficult to track – which may be intentional.

One example of effective cross-department state collaboration can be seen in the Paulina Ramirez Friendly Settlement Agreement, where the Mexican Ministry of Foreign Affairs and the National

⁴³ Interview with Carolina Garcés Peralta, Ombudsman, Women's Division, Ombudsman Office, Lima, Peru, 2 July 2014.

⁴⁴ Interview with Luis Távara MD, Sexual and Reproductive Health Consultant, Lima, Peru, 8 July 2014.

⁴⁵ Interview with Daniel Aspícueta, Executive Director, Peruvian Institute of Responsible Parenthood (INPPARES), Lima, Peru, 9 July 2014.

⁴⁶ Ivania Solano does mention that about a year ago (2013), the Foreign Affairs Ministry established an organ to deal with treaty obligations.

Center for Gender Equity and Reproductive Health within the Secretariat of Health worked together to include a program on violence against women in the Agreement. Patricia Uribe, former Director of the Center, suggested the inclusion of a plan she had been working on, called the National Program for the Prevention and Attention of Domestic, Sexual, and Violence Against Women. Uribe explained that there was a “moment where both things came together and they helped each other,” meaning that the Program and the Agreement helped each other to achieve momentum at the national level. Uribe explained the challenges she faced in implementing the Program, as well as incorporating the Program within the Agreement: “At some point, the authorities even tried to discredit the agreement. Because I was the one who participated, and I supposedly didn’t have the faculty to take part in those agreements. But I had a signed document by the secretary where he authorized me to do it. Initially the conservatives didn’t know this and so they tried discrediting the Friendly Settlement Agreement to pull back the agreement, but they couldn’t.”⁴⁷ Despite efforts made to assist implementation of the National Program by including it in the Agreement, the actual impact of this Program has been minimal. In fact, Rebeca Ramos, a legal researcher with GIRE, said that a more powerful tool for protecting women’s rights in Mexico is the General Law of Victims (2013), which is a popular piece of legislation with origins based out of the Movement for Peace, and not necessarily the women’s rights movement.⁴⁸ While this collaboration effort was initially promising, and is notable still, the overall impact was not as impressive.

Dr. Luis Távara, a medical doctor working on sexual and reproductive health in Peru, provided an anecdote to illustrate inefficiency in collaboration between state departments in Peru. He said,

“I believe those sectors (health, women, justice, etc.) have all been part of isolated efforts to improve health, but there is no integration of those bodies. An example on violence - the Ministry of Health established a guideline for serving women who have suffered from sexual violence. They have identified, at least in Lima, which health services are prepared to provide a service. The Ministry of Women tried to do the same, to regulate the same thing. They have their own facilities, where apparently they are providing services in sexual violation cases. But when the issue is about a victim of sexual violence, their health is an emergency, a medical emergency, so if it is a medical emergency, it needs to be looked at in the appropriate place, the Health Ministry. That’s not a doubt about the good will of the Ministry of Women, but it doesn’t make sense that they have a competition against each other.”⁴⁹

The example provided by Dr. Távara highlights significant concerns in how state departments collaborate: failures to pool resources, limited intersectional approach, and ineffective competition between departments. While it is true that a victim of sexual assault needs medical care (both mental and physical), it is also true that the sociocultural context in which the violation occurred is necessary to understand in order to address it and hopefully take action to amend it. One could argue that the Ministry of Health is not the appropriate venue to establish a guideline for serving women who are victims of sexual violence as much as the Ministry of Women is not entirely appropriate; however, an appropriate solution would be a combination of the two, *with* input from civil society and the medical community.

The relationship between the national Ombudsman office and state departments is one worth exploring. The role of the Ombudsman is to monitor state activities, and to issue reports on human rights situations in specific contexts, for example women’s rights. In both Peru and Mexico, representatives from the Women’s Department of the National Ombudsman offices discussed their monitoring roles and also showed an interest in the activities of the state at the supranational level, such as before the Inter-American Commission. When asked about the potential to collaborate with state departments such as the Ministry of Foreign Affairs in the development of a Friendly Settlement Agreement, both offices stated they would be interested in such an activity if they were invited in that capacity. However, as Carolina Garcés Peralta explained, there is very limited precedent for the Ombudsman’s office to play a role at the international level. She said, “if there was a report or

⁴⁷ Interview with Patricia Uribe, Former General Director of the National Center for Gender and Reproductive Health, 31 July 2014. See http://www.inm.gob.mx/static/Autorizacion_Protocolos/SSA/Violencia_familiar_sexual_y_contra_las_mujeres_crit_eros_par.pdf.

⁴⁸ Interview with Rebeca Ramos, Legal Researcher, Information Group on Reproductive Choice (GIRE), 17 July 2014. Law of Victims January 2013 (Ley General de Víctimas, Nueva Ley publicada en el Diario Oficial de la Federación el 9 de enero de 2013), Final Reform DOF 03-05-2013.

⁴⁹ Interview with Luis Távara MD, Sexual and Reproductive Health Consultant, Lima, Peru, 8 July 2014.

statement from the System (asking for Ombudsman participation), that would be excellent... We have our hands tied because we cannot do anything beyond the law."⁵⁰ Garcés Peralta explained that in the past the Ombudsman office attempted to take Peru to the Inter-American Commission on Human Rights, but that significant backlash questioned how the Ombudsman could take on that role in the Inter-American System and also be part of the State.

While there are numerous other examples of state collaboration efforts, the ones highlighted here are illustrative of some of the current debates and challenges state organs face in designing effective practices and programs to implement women's human rights. In summary, the following challenges emerged from interviews: processes for complying with international recommendations and judgments varies by country, but with overall challenges stemming from ineffective guidelines and unregulated transparency procedures; collaboration across state departments does not necessarily ensure success of a policy or program, although the effort may be noteworthy; duplication of work done by different departments is not only inefficient, but also allows for gaps in an intersectional approach to implementing rights; and the limited role of the Ombudsman, where there is possible potential to expand its role as a critical collaborator before the Inter-American System.

Inter-American System collaboration with civil society

The relationship between civil society and the Inter-American System has expanded over the last decade. NGOs participate in numerous capacities before the Inter-American Commission and Court, with three activities being most influential: NGOs serving as victim's representatives in emblematic cases, NGOs participating in thematic public hearings before the Commission, and NGOs submitting amicus curiae reports as interested parties in cases. National and international NGOs have successfully formed partnerships in order to bring women's reproductive rights cases to the Inter-American Commission and Court. In the aftermath of a case, it is also NGOs that monitor compliance of state implementation of reparations, and then report back to the Commission and Court on the status of compliance. NGO participation in women's reproductive rights cases has been essential to the progress made in this area. In fact, the IVF case is illustrative of the impact NGOs have in developing case argumentation and reasoning, where it is often the situation that NGOs understand the structural sociocultural problems that cause women's right violations.

Through the Commission's thematic hearings mechanism, members of civil society share information with the Commission, which can then be used in cases, reports, and precautionary measures. NGOs may request these hearings, and the state can also choose to request a hearing. As mentioned above, in regards to women's reproductive rights the Commission has held thematic hearings on topics ranging from emergency contraception to reproductive health for women living with HIV and AIDS. NGOs also participate by submitting amicus curiae reports to the Commission and Court, where they attempt to highlight structural problems that are both cause and symptom of the rights violation. While the Inter-American Commission and Court do not directly refer to amicus curiae in case decisions and judgments, the reports undeniably assist with setting the stage for understanding the context within which a rights violation occurred. However, despite these activities, the relationship between the Inter-American System and civil society faces significant challenges.

The Commission and Court rely on civil society to report on human rights situations, bring emblematic cases, and to also monitor state compliance with recommendations and judgments. However, there is very little support coming from the System in terms of strengthening civil society. For example, in the aftermath of friendly settlement agreements and decisions, some interview participants expressed dissatisfaction with limited support from the Commission in the monitoring stages of a case. Vanessa Coria described a situation in one of the final follow-up hearings in the Paulina Ramirez case, where she was enquiring about the status of a payment for the victim's child. She noted that the overall feeling from the Commission was that she should have been satisfied with the State's compliance with the other reparations, and not push too hard for more. She said, "Sometimes we lose the battle because we don't have the support of the Commission to do the follow-up."⁵¹ Additionally, because

⁵⁰ Interview with Carolina Garcés Peralta, Ombudsman, Women's Division, Ombudsman Office, Lima, Peru, 2 July 2014. In this interview Garcés Peralta also indicates that the Peruvian Constitutional Court no longer allows the Ombudsman office to submit amicus curiae, so they have reformatted that mechanism. Limiting the Ombudsman powers is indicative of the State's attitude toward further participation on behalf of the Ombudsman.

⁵¹ Interview with Vanessa Coria, Advocacy and Program Manager, WGNRR, Mexico DF, Mexico, 18 July 2014.

the Commission does not operate a formal compliance-monitoring mechanism, there is a significant burden on civil society to monitor state compliance efforts. With limited funding this is a gargantuan task, that in order to be remotely successful requires not only the support of the Commission, but also reparations that are designed to be monitored.

C. Reparations: Development, Implementation, and Compliance-monitoring

At the conclusion of an agreement, decision or judgment, the Inter-American Commission and Court review reparation measures that are suggested by the petitioners (and the Commission) for the state to fulfill. In the case of a friendly settlement agreement, the petitioner and the state reach a compromise with the goals of developing a remedy for the victim and preventing the violation from occurring again. When the Commission issues a merits decision, or the Court orders a judgment, the reparations are selected based on the requests from the petitioner/Commission. The reparations stage of a case has the objective of compensating the victim for the state's violation of their rights, and also to put measures in place to prevent the violation from recurring; guarantees of non-repetition. This second element, non-repetition, is especially important because of the potential impact it has for society, and ultimately for the advancement of rights protections in the region. However, as Alejandra Cardenas stated, the Inter-American System does not 'have a strong tradition of thinking about remedies... they (the Commission) ask for three or four things that are very general, but there is never a lot of thought put into what a reparation would look like... and there's not a public policy point of view when they think about reparations.'⁵² This observation is evident in each of the cases studied for this research, where the reparation elements that have the strongest potential to affect long-term change are weak in design, and as a result, are not implemented at the national level.

Oscar Parra, a senior attorney at the Inter-American Court, indicated that part of the problem with developing effective reparations can be attributed to a failure to develop a structural approach in emblematic cases. While the victim is the central focus of the petitioner efforts, cases before the Inter-American System of Human Rights deal with structural human rights violations, where the focus of reparations should also be on a structural approach to guarantees of non-repetition. Parra explained, "every case, no matter what the topic is associated with, every case is a universal case, it's novel in itself. It could be the same country, the same topic, it could be Guatemala, it could be forced disappearances... it could be a totally different approach depending on the litigation. And I think that for the Inter-American Court, considering that the Court is dealing with specific cases, it could be an important reason to develop specific narratives for specific cases. This is one obstacle for a structural approach, because sometimes if you don't have a structural picture about a specific problem, it's difficult to issue orders that are very open."⁵³ Parra refers to Mexico's "Cotton Field" case as exemplary in this regard, where the concept of femicide was supported through a structural approach to argumentation, and where the reparations reflected the petitioner and the Court's concerns with discrimination of and violence against women.⁵⁴ With the specific topic of reproductive rights, designing a case with a structural approach is essential to setting the stage for effective non-repetition reparation measures.

Looking more specifically at the reparations in the IVF case, interviews conducted with representatives from the Court and the Commission, as well as with individuals involved in the case, highlighted a couple of factors that played a role in the development and effects of weak reparations in this case. First, the petitioners in this case could have asked for more specific and in-depth reparations that address IVF as it is a practice that enables women's decision-making and freedom of choice, but that was not the focus of the petitioners' argument, as was discussed previously by Huberth May.⁵⁵ Second, although the judgment itself includes reasoning around the stereotyping of women as mothers, and takes into consideration the role gender plays in this stereotype, there is no reparation that reflects this as an impediment to women's enjoyment of their rights. In other cases,

⁵² Interview with Alejandra Cardenas, Attorney, Inter-American Commission on Human Rights, Washington DC, USA, 27 August 2014.

⁵³ Interview with Oscar Parra Vera, Senior Attorney, Inter-American Court of Human Rights, 7 August 2014.

⁵⁴ Gonzalez et al. ("Cotton Field") v. Mexico. Inter-Am. Ct. H.R., (Preliminary Objection, Merits, Reparations, and Costs) 16 November 2009, is an example of reparations which reflect gender discrimination that contribute to violence against women: conduct an investigation into the violations using a gender perspective; create or update a national database of disappeared women and girls; and implement permanent education and training programs and courses for public officials on human rights and gender.

⁵⁵ See note 31, Huberth May Cantillano.

and also in Commission reports, the Inter-American System has recommended that states implement plans or programs to tackle the stereotyping and discrimination of women, but in this case the reparations do not effectively look at the causes of the rights violation. Lastly, because the judgment issued fairly general reparations, the State of Costa Rica faces significant difficulties when it comes to implementation. Jorge Oviedo explained that the Court does not have enough information about the context of the health system in Costa Rica to issue sweeping reparation measures such as, “the Costa Rica Social Security Institute must make IVF available within its health care infertility treatments and programs.”⁵⁶ He raised concerns about implementation of the IVF legislation, and noted that while there may be legislation implemented to repeal the ban, there are no guidelines on how to pay for the treatment, and how to decide who gets the treatment. Oviedo argued that the Inter-American System’s failure to adopt the margin of appreciation doctrine is detrimental to implementation of the judgment because the Court is not in a position to understand the inner-workings and practices of each State.

While most of the NGO representatives interviewed mentioned compliance-monitoring of case reparations as part of their activities, there was very little conversation around reparation design. This observation supports Cardenas’ claim that there is no tradition to be thinking about remedies, not only at the Commission level, but also at the level of civil society. Because it is the role of civil society to monitor state compliance with implementation of reparations, there must also be a push on the part of civil society to demand strong, detailed, educated and *measurable* reparations. In order to counter arguments such as those made by Jorge Oviedo about the Court’s lack of information about the inner-workings of the state, civil society must become better prepared to think about the context within which a human rights violation exists, and about how to affect long-term social change within that context. While it is indeed smart to consider state sovereignty arguments, and to refer to state discretion to design and implement policies that effectively prevent repetition of violations, there is also a responsibility for petitioners and civil society to provide the Commission and Court with an opportunity to issue effective structural reparations.

In the last year, the Inter-American Court added a formal compliance-monitoring unit to its mechanisms, which has led to a restructuring of how case reparations are monitored. As Alexandra Sandoval explained, in the previous model, the legal teams that developed and presented the cases were responsible for the case in its aftermath. This process allowed for lapses in monitoring, where the team wouldn’t have enough time or resources to adequately monitor state implementation of reparations. It also created duplication in work, where cases for a particular country may share reparation measures, but did not necessarily have the same legal team working on each of the cases. In the new model, compliance of reparation measures is monitored by grouping reparations from different cases together, which then allows for an analysis that is comprehensive, within the country’s context.⁵⁷ Although this development in the Court’s work is fairly recent, it is indeed promising in how it reflects the Court’s agenda for the future.

These challenges - gender institutionalization, collaboration efforts, and reparations - each carry with them significant hurdles in terms of their design and application. However, the intention of this report is not only to highlight these challenges (as well as advancements made in these areas), but to also share perspectives from various actors in regards to efforts to address these challenges. The final section of this report attempts to summarize ideas and opinions emerging from interviews which aim to develop new approaches for responding to the challenges discussed above.

III. What Next?

Over the course of the research interviews, participants were asked for their opinions on how to strengthen the Inter-American System in its approach to protecting, promoting and fulfilling women’s

⁵⁶ Interview with Jorge Oviedo, Deputy Attorney, San Jose, Costa Rica, 20 August 2014. *Artavia Murillo et al. v. Costa Rica* (2012), para. 338.

⁵⁷ Interview with Alexandra Sandoval, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica, 12 August 2014.

reproductive rights. This section is divided into two parts, suggestions for change at the national level, and suggestions for change in the Inter-American System of Human Rights. The intention of this section is to share ideas, whether they be specific or general, between individuals, organizations, and state departments working in different countries, in varying contexts, and with diverse agendas.

A. At the National Level

Linked directly to the challenges of institutionalizing gender and collaboration, is the need for education and training. For many respondents, education was noted as one of the key elements to achieving structural change. And, when asked about the types of reparation measures that would be most effective in promoting long-term social and cultural change, education and training were noted as having the greatest potential.

Diana Portal said, “one of the most important elements is education... how we are educating girls in our country, in the secondary level, and at the university. That is a pending issue in our country - to have a consciousness to integrate a gender perspective, an equality culture of non-discrimination, an education that promotes freedom from violence, which is then reflected in life, and in culture.”⁵⁸ When thinking about how to better promote an “equality culture,” Jeannette Llaja agreed that education is instrumental in promoting a shift in how society views women. She thinks it is important to start this process at an early age, so that “if a child is three years old and sees the dad talk down to the mom, s/he learns that what is happening privately at home is not always right.” Llaja added, “it is very easy to say (to the state), ‘implement programs for children in young age groups to start talking about equality, and then to measure those programs, and start showing what kinds of programs are being made, gather the statistics...’ but with the words gender and equality, it is important to add those terms.”⁵⁹

Ana Cristina González Vélez, a medical doctor and expert consultant in sexual and reproductive health and rights, concurs that education and training are fundamental components in fulfilling women’s reproductive health rights in the region. She noted that her organization, Global Doctors for Choice, is aware of the need to work at the university level, with medical students, in order to introduce notions of rights into medical training. She said, “(doctors) haven’t had the opportunity to see the relations between what they do, and the human rights framework. So, you have to put the actions or the activities that a doctor does, or the kinds of things that they deal with, in terms of human rights. So, how is the right to information different than giving complete and timely information? Do this all in a way that women can understand... these kinds of things doctors don’t understand as part of a right. They see rights issues as a general, an abstract thing, and their work is the real life...”⁶⁰

These perspectives illustrate the interconnection between youth education and training of medical personnel, where the goal is to create an all-encompassing rights culture. However, there are challenges with implementing education and training at the national and local levels. Hilda Picado, Director of ADC, highlights some of the challenges she faces with implementing sexual and reproductive rights education at public schools in Costa Rica. ADC instructs approximately 5,000 high school students a year with their program, but they face funding challenges which in turn impact the number of educators that can be trained and the quantity of materials to be developed. Also, measuring the success of the program requires funding that ADC does not have, which makes it difficult to prove the value of this type of education.⁶¹

Challenges also arise in training of medical personnel, where courses on sexual and reproductive rights are often electives, or they are taken by practicing doctors who have a particular interest in the material. Luis Távara emphasized the need for medical students and practicing doctors to understand they need to respect their patient’s beliefs, and to recognize that “in healthcare that are differences

⁵⁸ Interview with Diana Portal Farfán, Attorney, Office of the Ombudsman, Rights of Women Department, Lima, Peru, 2 July 2014.

⁵⁹ Interview with Jeannette Llaja, Former Director, Study for the Defense of Women’s Rights (DEMUS), Lima, Peru, 3 July 2014.

⁶⁰ Interview with Ana Cristina González Vélez, MD, Sexual and Reproductive Health Expert, Global Doctors for Choice, Skype, 5 August 2014.

⁶¹ Interview with Hilda Picado, Executive Director, Asociación Demografica Costarricense (ADC), San Jose, Costa, Rica, 14 August 2014.

based on gender, and on cultural ways.”⁶² But, without an institutional shift to include rights education in sexual and reproductive health training, the potential for rights violations in the medical sector is huge – as was the situation for Paulina Ramirez in Mexico.

Another component of training is at the judicial level, where members of the judiciary learn to adopt a gender perspective in their understanding and interpretation of the law. Mexico’s protocol to train federal judges to use a gender perspective is a promising development, but this program targets the highest level of judges, and has not evolved to include training for lower level judges, or those judges that women first encounter when denouncing the state.⁶³ Additionally, this program has not incorporated social awareness in its approach, so women in Mexico are not aware of the potential changes happening in the judiciary. Much like the situation with medical training, the protocol in Mexico does not require members of the judiciary to enroll in gender training. However, in anticipating possible reluctance to participate on behalf of the judges, the program has partnered with a national university to develop a masters program in the area, which has proven to be a great incentive.⁶⁴

The Inter-American System has the capacity to work in the fields identified above, and in some situations it has issued recommendations and reparations requiring the state to invest in training programs for medical personnel and members of the judiciary. However, of each of the reproductive rights cases examined in this research, not one includes a reparation that focuses on youth education as an important tool to eradicate gender discrimination. It is the role of petitioners and the Commission to design and request reparation measures, so collaboration efforts made with individuals and groups working on education has great potential for not only including these types of reparations in the System’s work, but also for ensuring their implementation.

Alongside the necessity for education and training, is the need for both civil society and the state to create structures to implement and monitor supranational recommendations and judgments. In the aftermath of any case emerging from the Inter-American System, compliance monitoring becomes the responsibility of civil society. However, with limited resources, and often general reparations that are not easily measured, this is a huge task. Because of these challenges, civil society organizations focus on measuring implementation of reparations that are easy to see: such as monetary compensation, or legislative reform.⁶⁵ Reparations which are more focused on structural change, such as implementation and assessment of the National Program for the Prevention and Attention of Domestic, Sexual and Violence Against Women in the Paulina Ramirez case, are not adequately monitored because the reparation itself is too broad. Cardenas explained, “I think this has been a learning curve for practitioners and NGOs, is that they realized that this is a contract (a Friendly Settlement Agreement)... so you really have to think about very concrete terms for these agreements. That you can actually monitor and follow up.”⁶⁶ While there are significant challenges civil society faces in regards to monitoring state implementation, the priority for reproductive rights cases must be two-fold: get the case to the Inter-American System, and then monitor *all* the reparations. But of course, in order to do this, petitioners need to work with the Commission and Court to develop effective reparations.

Lastly, one of the most surprising challenges revealed at the national level is the extent to which the state is unprepared to implement reparation measures. Luis Jardón, Director of Human Rights Litigation at the Ministry of Foreign Affairs in Mexico, explained that part of the challenge in fulfilling the monetary compensation reparation in the Paulina Ramirez case was that at the time there were no funds allocated in the budget for payments related to remedies ordered by international organs.⁶⁷

⁶² Interview with Luis Távora MD, Sexual and Reproductive Health Consultant, Lima, Peru, 8 July 2014.

⁶³ See note 36. Interview with Expert in Gender and Women’s Rights, Anonymous, Mexico City, 30 July 2014. Judicial-Decision Making with a Gender Perspective: A Protocol - Making Equal Rights Real, Gender Equality Unit of the National Supreme Court of Mexico, www.sitios.scjn.gob.mx/codhap/ProtocolGenderPerspective.

⁶⁴ Interview with Expert in Gender and Women’s Rights, Anonymous, Mexico City, 30 July 2014.

⁶⁵ For a further discussion of this argument, see “Litigating Reproductive Health Rights in the Inter-American System: What Does a Winning Case Look Like?” *Health and Human Rights: An International Journal*, FXB Center for Health & Human Rights, Harvard University Press, Volume 16 (2) December 2014, available at <http://www.hhrjournal.org/volume-16-issue-2/>.

⁶⁶ Interview with Alejandra Cardenas, Attorney, Inter-American Commission on Human Rights, Washington DC, USA, 27 August 2014.

⁶⁷ Interview with Luis Jardón, Director of Human Rights Litigation, Ministry of Foreign Affairs, Mexico DF, Mexico, 29 July 2014.

And, as Ivania Solano mentioned above, the state of Costa Rica does not have a system in place to formally implement and track compliance with reparations. One of the institutional priorities that the Inter-American System should look for in regards to state intentions of complying with reparations is a national mechanism dedicated to implementation.

B. In the Inter-American System

The following suggestions were discussed as possible strategies for strengthening the Inter-American System's approach to protecting, promoting, and fulfilling women's reproductive rights: (1) stronger reparations that focus on gender and discrimination; (2) an expansion of the Commission and Court's use of the Belém do Pará convention; and (3) institutional training using an intersectional approach within all levels of the Commission and Court.

Gender-Based Reparations

As mentioned above, there is a compelling need to incorporate gender and discrimination into argumentation and reparations before the Inter-American Commission and Court. As Oscar Parra explained, it is imperative that litigation efforts aim to frame cases using a structural approach to address a specific problem. In doing so, the Commission and Court are better equipped to understand how and why rights violations occurred, and are then able to place the violation in its larger context. Of the three cases highlighted in this report, the forced sterilization case, *Maria Mamerita Mestanza Chávez v. Peru*, goes the furthest in developing the structural picture in terms of women's rights. The agreed upon facts of the case state that María's experience is one "among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indian, and rural women."⁶⁸ Then, this structural picture is linked to a reparation that seeks to connect this specific case to the larger context: "The Peruvian state pledges to change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women's autonomy."⁶⁹ This reparation makes an effort to address forced sterilization as it was a discriminatory practice inflicted upon a certain type of woman in Peru. Although the Peruvian state rarely recognizes supranational cases and treaties as influential on its legislation and policy,⁷⁰ it is plausible to infer a connection between this reparation and the Ministry of Women's progress towards developing its National Plan for Equal Opportunities of Women and Men 2006-2010, and the National Plan for Gender Equality 2012-2017. In terms of measuring state compliance, it is necessary and beneficial to develop reparations that draw clear connections between the case and state action. Lastly, measuring the efficacy of a reparation designed to address inequality and gender discrimination is a challenge, because although the state may reform and pass legislation to that effect, putting paper into practice, and then assessing that practice, remains a significant hurdle.

In order to start developing more effective reparations that include a gender perspective, it will be necessary for petitioners, and the Commission and Court, to understand, and act upon, the interrelated nature of women's rights violations. For example, the underlying issues of *all* women's rights violations can be directly linked to discrimination against, and stereotyping of, women. While the "Cotton Field" v. Mexico case recognized gender discrimination as an obstacle to women's rights to life,⁷¹ the same argument is more difficult to assert in a reproductive rights case, largely because of its contentious subject matter. Even within the issue of reproductive health, there are certain 'safe' subjects, and others that are off-limits. For example, in the IVF case the Court clearly defined the right to reproductive health and linked it to the right to integrity, but a year later in its provisional measure for "B,"⁷² the Court did not even mention the word 'abortion,' let alone incorporate its own reasoning

⁶⁸ *Maria Mamerita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. Comm. H.R., Report No. 71/03, OEA/Ser.L/V/II.118, (2003), para. 9.

⁶⁹ *Maria Mamerita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. Comm. H.R., Report No. 71/03, OEA/Ser.L/V/II.118, (2003), 11th reparation.

⁷⁰ Interview with Mónica Arango Olaya, Regional Director for Latin America and the Caribbean, Center for Reproductive Rights, Skype, 11 July 2014.

⁷¹ Gonzalez et al. ("Cotton Field") v. Mexico. Inter-Am. Ct. H.R., (Preliminary Objection, Merits, Reparations, and Costs) 16 November 2009.

⁷² "B" Provisional Measure in Respect of El Salvador (29 May 2013), available at www.corteidh.or.cr/docs/medidas/B_se_01.pdf.

from the IVF case.⁷³ In order to begin developing gender-based reparations, those actors participating in the Inter-American System must start to approach women's violations with a gender-based perspective, where, for example, reproductive health violations and femicide originate from the same root cause; discrimination and violence against women.

Using Belém do Pará

The Convention of Belém do Pará is the only international convention specifically designed to address violence against women. Overall use of the Convention of Belém do Pará has been limited, with only a small selection of Commission Court cases referring to the Convention of Belém do Pará. However, the Commission's use of the Convention has shown significant progress over time, which is partly attributable to work being done by litigators and civil society that use the Convention to develop a structural picture of a specific problem in emblematic cases. While the Commission and Court's reluctance to incorporate Belém do Pará in decisions and judgments has lessened over time, there remains much work to be done in future cases in order to tap into the Convention's potential.

While the Convention in its entirety is a powerful instrument, the Inter-American Court has determined that only Article 7 falls within the jurisdiction of the Court.⁷⁴ The Commission has the capacity to find violations of the other provisions enshrined within the Convention, but the current practice enforces the Court's interpretation of the Convention. In brief, Article 7 provisions protect women's rights to due diligence, where states have a duty to prevent and punish any act or practice of violence against women. Liz Melendez explained that the utility of this Article is potentially quite expansive, where the duty to prevent violence covers the structural problems which ultimately cause women's rights violations.⁷⁵ While the scope of Article 7 is undeniable, the emphasis thus far has been on due diligence and domestic justice measures, where perpetrators of crimes are required to face accountability. When asked to expand upon its jurisdiction of the Convention of Belém do Pará to include Articles 8 and 9, the Court determined that these provisions could indeed be referred to in interpreting Article 7 violations, but that they did not have stand-alone enforceability powers. Article 8 includes provisions such as the progressive realization of measures designed "to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women."⁷⁶ Article 9 encapsulates the overall objective of the Convention of Belém do Pará: "States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom."⁷⁷ This distinction in enforceability is important to acknowledge because Article 7 is in many ways a duplication of rights already protected within the American Convention, and taken alone this provision has very little impact in developing a structural picture of women's rights violations. This concern relates back to Oscar Parra's ideas surrounding the need for petitioners to frame violations within their structural background in order to then ask for reparations that have transformative potential.⁷⁸ By limiting application of the Convention of Belém do Pará the Court signals to petitioners the need to develop arguments that use Articles 8 and 9 effectively in order to interpret Article 7; a challenge that petitioners must keep in mind when bringing future women's reproductive rights cases.

However, it is important to note that feminists working in this area are increasingly aware of the limitations and potential advancements that come with using the concept of due diligence in litigation

⁷³ The IVF (*Artavia Murillo et al. v. Costa Rica*) case includes an expansive definition of reproductive health, and links reproductive autonomy to integrity and privacy, but in the "B" provisional measure the focus is on the right to life and humane treatment, with no reference made to the interrelated nature of these rights with integrity.

⁷⁴ *Gonzalez et al. ("Cotton Field") v. Mexico*. Inter-Am. Ct. H.R., (Preliminary Objection, Merits, Reparations, and Costs) 16 November 2009, paras. 35-80.

⁷⁵ Interview with Liz Melendez, Executive Director, Flora Tristán, Lima, Peru, 9 July 2014.

⁷⁶ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belem do Para", Article 8(b).

⁷⁷ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belem do Para", Article 9.

⁷⁸ See O. Parra, note 53.

efforts.⁷⁹ In fact, the 'appropriation' of due diligence by feminists has allowed for a challenge of the historic public/private divide. This means that where at one time women's rights violations were relegated to self-regulation within the private sphere, the concept of diligence can be used to bring those violations into the public arena, where violations are seen publically, and demand a different, more accountable, form of regulation. In the Inter-American System there remains much to be seen in terms of how litigators and the Commission and Court expand upon Article 7 of the Convention of Belém do Pará, because it is partly the duty of the petitioner to develop arguments that allow for further interpretation of the Convention.

Gender Training in the IAS

Ultimately, the development of gender-based reparations and further use of the Convention of Belém do Pará are merely wishful thinking without implementation of gender-based training at all levels of the Inter-American System of Human Rights. This is because both the Convention and gender-based reparations remain an afterthought in case development as a result of the lack of knowledge about the role of gender within the Inter-American System. Indicative of this lapse in gender understanding is the current structure of the rapporteurships in the Commission. The women's rights desk is operated on a part-time basis, with one permanent member of staff and two temporary fellows.⁸⁰ And, interestingly, including gender-based issues in the Commission's work is more contentious than one might expect. Rosa Celorio explained the political side of women's rights work within the Commission, where the President of the Commission is currently also the rapporteur on women's rights; she must take care not to favor certain themes over others in her capacity as President.⁸¹

It is undeniable that there is a significant problem in the Commission in regards to incorporating a gendered analysis of human rights violations. Several interview respondents commented that training for all employees is essential if an effort is to be made to shift the current practice from reluctant to willing in terms of including gender-based perspectives in the Commission's work. Of course, the immediate reply to such a suggestion is the need for more funding to implement such a program. It can be argued however, that the current funding is put to little good use if the work done by the Commission is inherently flawed in its approach. It is also important to note that gender-based training is not the only training that would benefit women victims of human rights violations. Too often right violations are dissected and compartmentalized into separate (and not always equal) themes, when in fact the themes overlap and intersect. For example, in the first case mentioned in this report, *María Mamerita Mestanza Chávez v. Peru*, the victim experienced her rights violations as an indigenous, poor and rural woman, where each of these conditions combined to contribute to her discrimination. In establishing mandatory training programs at all levels of the Commission and Court which incorporate the interrelated nature of human rights violations, there is great reason to believe that cases will be better equipped with structural pictures of systemic problems that cause human rights violations.

However, it is essential to recognize that training programs within the Inter-American System are a limited solution to a far-reaching problem. The Inter-American Commission and Court are human rights bodies that serve as the last resort for recourse, where a gender approach to analyzing cases is indeed welcomed, but in reality comes much too late for the individual victim. Gender based training must also be implemented at the national and local levels, so that doctors, police officers, members of local, state and national judiciaries, educators at the primary, secondary and university levels, and members of families are given an opportunity to explore the gendered dynamics of life, and hopefully, subsequently challenge them.

⁷⁹ See article, Paulina García-Del Moral & Megan Alexandra Dersnah, "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship," *Citizenship Studies*, Vol. 18(6-7) 661-675 (2014).

⁸⁰ Interview with Rosa Celorio, Attorney - Women's Rights Desk, Inter-American Commission on Human Rights, Washington DC, USA, 29 August 2014.

⁸¹ Interview with Rosa Celorio, Attorney - Women's Rights Desk, Inter-American Commission on Human Rights, Washington DC, USA, 29 August 2014.

IV. Conclusion

The protection, promotion and fulfillment of women's reproductive health rights in the Inter-American region is a task best undertaken using a multifaceted "bottom-up" approach. While international human rights law certainly has a symbolic and regulatory function and carries with it a sense of legitimacy, on its own it lacks the power to effect structural and transformative change. As feminists and/or human rights advocates at the local and national levels become increasingly familiar with the human rights tools available to them at the regional and international levels, there is a significant opportunity to further include civil society in activities in these arenas. However, as this report has shown, the challenges that limit the advancement of women's reproductive rights through the Inter-American System are numerous. Certainly further collaboration between actors, more significant efforts to understand and institutionalize gender, and effective gender-based reparations are key to achieving progress in this area, but these recommendations are useless if not accompanied by local and national level activism that calls for social, cultural and political reform.

Perhaps the clearest concern emerging from interviews conducted during this research has been the social and cultural climate of gender discrimination in the Inter-American region, which is the root cause for women's reproductive rights violations. Interestingly though, this concern is not at the forefront of the work being done on reproductive rights in the Inter-American System. Although gender-based discrimination is discussed in reporting mechanisms and in cases if only minimally, gender-based discrimination is an afterthought for which argumentation and reparation design are extremely weak. While litigation efforts have proven to be relatively successful over time, there remains a significant gap in how petitioners use the Inter-American Commission and Court as tools in the struggle to achieve transformative social and cultural change. Furthermore, the Commission and Court have the Convention of Belém do Pará at their disposal, but have been reluctant to apply the Convention in reproductive rights cases.

Over the next decade the Inter-American System of Human Rights will certainly be confronted with women's reproductive rights cases.⁸² With each opportunity it will be important for civil society, victim's representatives and the Inter-American Commission and Court to learn from the lessons of the three cases highlighted in this report. Litigators must focus on developing a structural picture of women's rights violations (reproductive rights as well as violence against women), placing heavy emphasis on gender-discrimination. In part, this can be achieved by calling on the Commission and Court to review cases with Articles 8 and 9 of the Convention of Belém do Pará in mind. Based on the development of a structural argument, it will then be necessary for litigators and the Commission to use particular care in designing reparations that address gender-discrimination, and that can be defined and measured qualitatively and quantitatively. Ultimately, it will be the responsibility of civil society and victim's representatives to challenge the status quo and subsequently shift the Inter-American System's approach to women's rights violations. Hopefully this report will play a small role in the advancement of women's reproductive health rights within the Inter-American System of Human Rights.

⁸² Potential upcoming reproductive rights cases: *I.V. v. Bolivia*, Admissibility, Inter-Am. Comm. H.R., Report No. 40/08 (July 23, 2008), *FS v. Chile*, Admissibility, Inter-Am. Comm. H.R., Report No. 52/14 (July 21, 2014); *AN v. Costa Rica* (2008), *Beatriz v. El Salvador* (2013), and *Aurora v. Costa Rica* (2013).

Participants

** Individual names in bold represent individual perspectives, not necessarily those of the participant's organizations or affiliations.*

The findings outlined in this report reflect opinions, perspectives and information obtained through interviews conducted June through September of 2014, with representatives from women's rights NGOs, human rights NGOs, state departments, the medical community, the Inter-American Commission and the Inter-American Court, as well as human rights lawyers, and experts in gender and sexuality. A sincere thank you is most definitely in order to everyone who participated in this research - without the generous donation of your time and knowledge this project would not have been possible.

Peru

PROMSEX (Center of the Promotion and Defense of Sexual and Reproductive Rights) - Ysabel Marín Sandoval (Human Rights Attorney)

INPARRES (Peruvian Institute of Responsible Parenthood) - Daniel Aspícueta (Director)

Flora Tristán - Cecilia Olea Mauleón (Women's Rights Researcher) and Liz Meléndez (Executive Director)

Manuela Ramos - Rocío Pilar Puente Tolentino (Coordinator of the Sexual and Reproductive Rights Program) and Milena Justo Nieto (Human Rights Attorney)

Catholics for the Right to Decide - Gladys Vía Huerta (Program Coordinator)

Ombudsman, Rights of Women Department - Carolina Garcés Peralta (Women's Rights Ombudsman), with Diana Portal Farfán, Sheilah Jacay, and Carla Villareal López

Ministry of Women and Vulnerable Populations - Marcela Huaita Alegre (Vice Minister of Women)

Ministry of Health - Gloria Marisela Mallqui Osorio (Executive Deputy, Vice Minister's office)

Ministry of Justice and Human Rights - Roger Rafael Rodríguez Santander (Director, Executive Secretary of the National Council of Human Rights)

Jeannette Llaja - Former Director of DEMUS (Study for the Defense of Women's Rights)

Beatriz Ramírez Huaroto - Ministry of Women and Vulnerable Populations (Advisor to the Ministry of Women)

Luis Távara, MD - Sexual and Reproductive Health Consultant

Mexico

GIRE (Information Group on Reproductive Choice) - Rebecca Ramos (Legal Investigator)

MEXFAM (Mexican Foundation for Family Planning, A.C.) - Doroteo Mendoza (Manager of Evaluation, Investigation and Information Systems)

Equidad de Género (Gender Equality): Citizenship, Work and Family, A.C. - María Eugenia Romero Contreras (Director)

CIMAC (Communication and Information for Women, A.C.) - Lucía Lagunes Huerta (General Director)

National Center for Gender Equality and Reproductive Health Centro (Directorate General for Reproductive Health) - Rufino Luna Gordillo (General Director)

Ministry of Foreign Affairs, Department of Cases - Luis Jardón (Director, Human Rights Litigation)

José Guevara - Executive Director of the Mexican Commission of Defense and Promotion of Human Rights

Marisol Aguilar - Impact Coordinator, EQUIS - Justice for Women

Patricia Uribe Zúñiga - Former Director of the National Center for Gender Equity and Reproductive Health, Under-Secretariat of Health Promotion and Prevention, Secretariat of Health

Vanessa Coria - Advocacy and Program Manager, WGNRR (Women's Global Network for Reproductive Rights), formerly with CEJIL (Center for Justice and International Law)

Gender Expert - Anonymous

Costa Rica

ADC (Asociación Demográfica Costarricense) - Hilda Picado Granados (Executive Director)

Ombudsman, Women's Department - Ivania Solano Jiménez (Attorney for the Protection of Women from the Office of the Ombudsman)

Adriana Maroto Vargas - Academic, Member of The Collective for the Right to Decide (La Colectiva)

Dr. Delia Maria Ribas Valdés - Medical Doctor Specializing in Invitro Fertilization

Jorge Oviedo (Deputy Attorney) with Amanda Grosser - General Prosecutor of the Republic, Representative of the State, *Artavia Murillo et al. v. Costa Rica*

Huberth May Cantillano - Attorney, Victim Representative, *Artavia Murillo et al. v. Costa Rica*

International

Center for Reproductive Rights - Mónica Arango Olaya (Regional Director for Latin America and the Caribbean)

Ana Cristina González Vélez, MD - Sexual and Reproductive Health Expert, Global Doctors for Choice

Maria Daniela Rivero - Human Rights Attorney

Inter-American System of Human Rights

Oscar Parra Vera - Senior Attorney, Inter-American Court of Human Rights

Alexandra Sandoval - Senior Attorney, Inter-American Court of Human Rights

Rosa Celorio - Attorney and Specialist, Women's Rights Desk, Inter-American Commission on Human Rights

Alejandra Cardenas - Attorney, Inter-American Commission on Human Rights, formerly with CRR (Center for Reproductive Rights)

Luz Patricia Mejía - Technical Expert and Coordinator, MESECVI (Follow-up Mechanism to the Belém do Pará Convention) and former Commissioner and Rapporteur on Women's Rights at the Inter-American Commission on Human Rights

Many thanks to...

Ana Cristina González Vélez, Par Engstrom, Beatriz Ramirez Huaroto, Paola Gómez Espinosa, Adriana Maroto Vargas, Lucia Lapenta, Viviana Tipiani, Carolina Corral, Muriel Vargas, and Tatiana Saprissa.

Travel funding provided in part by the UK Society for Latin American Studies.

This report was written at the Centre for International Justice and Governance at the Australian National University, with a visiting grant awarded by Hilary Charlesworth's project, "Strengthening the International Human Rights System: Rights, regulation and ritualism" (2014).

* Information about the researcher can be found at: <http://www.sussex.ac.uk/profiles/303008>.

Appendix G: Amicus Brief

AMICUS CURIAE BRIEF PRESENTED TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS
BY CIARA O'CONNELL, UNIVERSITY OF SUSSEX; DIANA GUARNIZO-PERALTA AND CESAR
RODRIGUEZ-GARAVITO, DEJUSTICIA

**IN THE CASE OF
IV v. BOLIVIA**

SUBMITTED TO THE COURT IN MAY 2016

PUBLIC HEARING: MAY 2ND, 2016



CONTACT INFORMATION:

CIARA O'CONNELL
UNIVERSITY OF SUSSEX
BRIGHTON, UNITED KINGDOM
C.O-CONNELL@SUSSEX.AC.UK
+1 (862) 596-8427

DIANA GUARNIZO-PERALTA
DEJUSTICIA
BOGOTÁ, COLOMBIA
DGUARNIZO@DEJUSTICIA.ORG
+57 (1) 6083605

IV v. Bolivia, Amicus Curiae
Ciara O'Connell, Diana Guarnizo-Peralta and Cesar Rodriguez-Garavito(Dejusticia)

TABLE OF CONTENTS

I. INTRODUCTION	2
II. MEDICAL POWER AND WOMEN'S REPRODUCTIVE RIGHTS	3
III. GENDER STEREOTYPING AND THE INTER-AMERICAN COURT	4
IV. "IV" V. BOLIVIA: RISK OF REPETITION AND THE NEED FOR GENERAL REPAIR (GUARANTIES OF NON-REPETITION)	8
V. DEVELOPING GENDER-BASED REPARATIONS IN "IV" V. BOLIVIA	10

I. INTRODUCTION

1. These written comments are respectfully submitted to the Inter-American Court of Human Rights ("Inter-American Court") in support of the petition made by "IV" against the State of Bolivia before the Inter-Commission on Human Rights ("Inter-American Commission") on March 7th, 2007.

2. Ciara O'Connell is a member of the Inter-American Human Rights Network¹ and the Centre for Cultures of Reproduction, Technologies and Health.² She is also a PhD Candidate in the School of Law at the University of Sussex in the United Kingdom.³ Her research is on gender-based reparations and reproductive rights in the Inter-American Human Rights System. Diana Guarnizo-Peralta⁴ is a researcher with Dejusticia and currently leads the organization's work on economic, social and cultural rights. Cesar Rodriguez Garavito⁵ is the Director and legal representer of Dejusticia. Dejusticia⁶ works to strengthen the rule of law and promote human rights in Colombia and across the Global South. It is an NGO think/do tank that produces rigorous research that can contribute to action for social change. Dejusticia also carries out direct advocacy through campaigns, litigation, education and capacity-building.

¹ Inter-American Human Rights Network, University College London, <http://interamericanhumanrights.org/>.

² Centre for Cultures of Reproduction, Technologies and Health, <http://www.sussex.ac.uk/corth/>.

³ Ciara O'Connell, University of Sussex: <http://www.sussex.ac.uk/profiles/303008>.

⁴ Diana Guarnizo-Peralta, Dejusticia, <http://www.dejusticia.org/#!/investigador/186>

⁵ Cesar Rodriguez-Garavito, Dejusticia, <http://www.dejusticia.org/#!/investigador/8>

⁶ Dejusticia, <http://www.dejusticia.org/>.

IV v. Bolivia, Amicus Curiae
Ciara O'Connell, Diana Guarnizo-Peralta and Cesar Rodriguez-Garavito(Dejusticia)

3. This case concerns the sterilization of the petitioner, "IV," an immigrant migrant woman who was subjected to a tubal ligation procedure without her consent on July 1, 2000, in a public hospital in Bolivia. "IV" has not received justice through the Bolivian criminal court system. This case focuses on the violation of "IV's" reproductive health and autonomy, and is indicative of a medical environment in Bolivia that is discriminatory towards women. The Inter-American Commission has determined that gender stereotyping and discrimination are structural obstacles to women's enjoyment of their reproductive health rights, which is one of the foundational premises of this case.

II. MEDICAL POWER AND WOMEN'S REPRODUCTIVE RIGHTS

4. The responsibility afforded to members of the medical community in relation to women's reproductive health is significant; it is loaded with power, and often leaves women in extremely vulnerable positions. Michele Foucault described medical doctors as "priests of the body," meaning that the authority of the doctor in her/his ability to confront suffering and deny death is akin to the spiritual power typically afforded to priests.⁷ This power intensifies with regard to female patients because a woman's relationship with her doctor is ripe with gendered assumptions based on her role as a (potential) mother.

5. The power dynamic between medical professional and woman-patient is described by Kathy Davis as "paternalistic control." In the concept of "paternalistic control" the doctor is given the power to decide in the woman's best interest, and the woman is seen as someone in need of being controlled.⁸ When describing what paternalistic control might look like in application, Sally Sheldon provides the following examples: "Paternalistic control may involve influencing a woman to continue (or equally to terminate) a pregnancy. Equally, it may be failing to tell her about some of the alternatives open to her."⁹ While exercising "paternalistic control" is most obviously done by members of the medical community, it can also be understood as a form of state intervention that "actively imposes the control of the woman as the doctor's responsibility."¹⁰ As Sheldon explains, the state cannot be perceived as neutral in matters of reproductive health. However, the state can in effect distance itself from any negative connotations related to its attempts to regulate women's reproductive rights by relying on medical doctors to appear neutral while also "support(ing) the existing status quo and the power imbalance which characterizes it."¹¹

6. According to Rebecca Cook, "the role of health professionals is to give the individual decision-maker medical and other health-related information that contributes to the individual's power of choice and does not distort or unbalance that power."¹² In that women seeking health

⁷ Michele Foucault, *The Birth of the Clinic* (London and New York: Routledge: 1989), 32.

⁸ Kathy Davis, 'Paternalism Under the Microscope,' in Todd, A.D. and Fisher, S. (eds.) *Gender and Discourse: The Power of Talk* (New Jersey: Ablex Publishing, 1988) 23-4.

⁹ Sally Sheldon: *Medical Power and Abortion Law* (London: Pluto Press, 1997), 66.

¹⁰ *Ibid.*

¹¹ *Ibid.*, 74.

¹² Rebecca Cook, "Women's Health and Human Rights: The Promotion and Protection of Women's Health through

services may feel dependent on their health care-giver, they may feel obliged to agree with what is proposed to them, "particularly when those with the power of superior knowledge of medicine tell them that what is proposed is for their own good."¹³

7. The legal concept of informed consent, or the right to make informed choices for one's own future, requires that medical professionals refrain from exercising "paternalistic control," and instead provide women with information that is free from coercion and personal preference. The International Federation of Gynecological and Obstetrics' definition of informed consent contains the following:

"It is important to keep in mind that informed consent is not a signature, but a process of communication and interaction. [...] If physicians, for reason of their own religious or other beliefs, do not wish to fulfil [...] the criteria for informed consent because they do not want to give information on some alternatives, they have an ethical obligation, as a matter of respect for their patients' human rights, to disclose their objection, and to make appropriate referrals so that the patients may obtain the full information necessary to make valid choices."¹⁴

8. The asymmetrical power relationship between health care provider and woman-patient creates a potentially violent situation for women; her reproductive autonomy and dignity, her *proyecto de vida*, is at risk.

III. GENDER STEREOTYPING AND THE INTER-AMERICAN COURT

9. The Inter-American Court of Human Rights substantiated its jurisdiction over Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará") in the case of *Gonzalez et al. ("Cotton Field") v. Mexico*,¹⁵ and in doing so determined that "the different Articles of the Convention of Belém do Pará may be used to interpret it and other pertinent Inter-American instruments."¹⁶

10. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have developed the principle of due diligence as it applies to women through the Convention of Belém do Pará. The principle of due diligence is understood as including an obligation on the part of the state to *prevent* violations of women's rights.¹⁷ Elizabeth A.H. Abi-Mershed, current Assistant Executive Secretary of the IACHR, described the concept of due diligence as it is enshrined in Article 7(b) of the Convention of Belém do Para, as requiring that

International Human Rights Law," Chapter 4: International Human Rights to Improve Women's Health, 26. Available at: <http://info.worldbank.org/etools/docs/library/48440/m1s5cook.pdf>.

¹³ *Ibid.*, 27.

¹⁴ Ethical Issues in Obstetrics and Gynecology, FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health, October 2012, p.15. Available at: <http://www.figo.org/sites/default/files/uploads/wg-publications/ethics/English%20Ethical%20Issues%20in%20Obstetrics%20and%20Gynecology.pdf>

¹⁵ *González et al. ("Cotton Field") v. Mexico*, Inter-Am. Ct. H.R., (Preliminary Objection, Merits, Reparations, and Costs) 16 November 2009.

¹⁶ *Ibid.*, ¶79.

¹⁷ *"IV" v. Bolivia*, Inter-Am. Comm. H.R., Merits, Case No. 12.655, Report No. 72/14, 15 August 2014, note 169.

IV v. Bolivia, Amicus Curiae
Ciara O'Connell, Diana Guarnizo-Peralta and Cesar Rodriguez-Garavito(Dejusticia)

"(S)tates parties ensure that their agents refrain from acts of violence against women, and [...] that these states apply due diligence to prevent, investigate and punish such violence when perpetrated by non-state actors in the home, community or wherever it may occur. States parties undertake to ensure that these obligations are given practical effect and that women at risk for or subjected to violence have access to effective judicial protection and guarantees."¹⁸

11. Within the obligation to prevent violence against women, is the duty enshrined within Article 8 of the Convention of Belém do Pará:

"(T)o modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to *counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.*"¹⁹ [emphasis added]

12. The impact of stereotyping on women and women's lives is detrimental. Gender stereotypes "devalue (women's) attributes and characteristics," and perpetuate and reinforce "prejudices about women's inferiority [...] in all sectors of society."²⁰ Human rights legal institutions have a part to play in challenging both the cause and effect of gender-based stereotypes. According to Rebecca Cook and Simone J. Cusack, "legal and human rights analysis can be instrumental in diagnosing a stereotype, which is a necessary prerequisite to its elimination."²¹

13. The selection of case law summarized below introduces key developments in the Inter-American Court's approach to gender stereotyping. The objective of introducing these cases is two-fold:

(i) To draw attention to the use of stereotypical language in women's rights cases that effectively *essentializes* women as (potential) mothers,²² rather than challenges those gender-based stereotypes as they have been deemed "incompatible with international human rights law"²³ by the Inter-American Court of Human Rights.

(ii) To highlight the need to frame violations of women's reproductive rights within the larger violence against women framework (Convention of Belém do Pará), and therefore establish an argument to suggest that the Inter-American Court of Human Rights develop

¹⁸ Elizabeth A.H. Abi-Mershed, "Due Diligence and the Fight Against Gender-Based Violence in the Inter-American System," in *Due Diligence and Its Application to Protect Women from Violence*, Carin Benninger-Budel, ed., (Netherlands: Brill Nijhoff Law Specials, 2009) 131.

¹⁹ Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994, Article 8(b).

²⁰ Rebecca Cook and Simone J. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010) 1.

²¹ *Ibid.*, 37.

²² Linda Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory," *Signs*, Vol. 13(3), 1988, 405-436.

²³ *Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, Inter-Am. Ct. H.R., (Merits, Reparations, and Costs) 28 November 2012, ¶302.

IV v. Bolivia, Amicus Curiae
Ciara O'Connell, Diana Guarnizo-Peralta and Cesar Rodriguez-Garavito(Dejusticia)

reparations specifically designed to address the harm/violation alleged under Article 7(b) of the Convention of Belém do Pará in *IV v. Bolivia*.

14. *Miguel Castro Castro Prison v. Peru*²⁴

In this case the Inter-American Court examined how violence against women relates to inhumane treatment.²⁵ The Court stated that “the pregnant women who lived through the attack (experienced) an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings of anguish, despair, and fear for the lives of their children.”²⁶ The Court also noted “severe solitary confinement had specific effects on the inmates that were mothers [...] The impossibility to communicate with their children caused an additional psychological suffering in the inmates that were mothers.”²⁷

15. While this case is groundbreaking in that it was the first instance in which the Inter-American Court of Human Rights applied the Convention of Belém do Pará, the Court relied in-part on a stereotypical view of *women as mothers* to determine violations of their rights under the Convention of Belém do Pará. As Patricia Palacios Zuloaga points out, the Inter-American Court’s claim that women victims did not have time to become mothers because of their search for truth and justice, as well as its reliance on women’s “experience of maternity,”²⁸ relies heavily on social stereotypes of women as mothers. According to Zuloaga, the Court’s “positive shift to gender justice [...] fails to extend gendered logic to reparations and (relies) on stereotypes of women in order to find violations.”²⁹

16. *González et al. (“Cotton Field”) v. Mexico*³⁰

In regards to the role of gender stereotyping in this case, the Court indicated that

“(T)he subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.”³¹

17. Alongside a number of other reparations issued in *González et al. (“Cotton Field”) v. Mexico*, the Inter-American Court ordered the State of Mexico to

“(C)ontinue implementing permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective to *ensure due diligence* in conducting preliminary inquiries and judicial proceedings concerning

²⁴ *Miguel Castro Castro Prison v. Peru*, Inter-Am. Ct. H.R., (Merits, Reparations and Costs) 25 November 2006.

²⁵ *Ibid.*, ¶292.

²⁶ *Ibid.*

²⁷ *Ibid.*, ¶330.

²⁸ Patricia Palacios Zuloaga, “The Path to Gender Justice in the Inter-American Court of Human Rights,” *Texas Journal of Women and Law*, Vol. 17(2), 2008, 243.

²⁹ *Ibid.*, 229.

³⁰ *González et al. (“Cotton Field”) v. Mexico*, *supra* note 15.

³¹ *Ibid.*, ¶401.

IV v. Bolivia, Amicus Curiae
Ciara O'Connell, Diana Guarnizo-Peralta and Cesar Rodriguez-Garavito(Dejusticia)

gender-based discrimination, abuse and murder of women, and to overcome stereotyping about the role of women in society.” [emphasis added]³²

18. *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*³³

The Court examined the impact of gender-based stereotyping in this case and determined that the ban on IVF can affect men and women, and that the impact of the ban may have a disproportionate impact in women “owing to the existence of stereotypes and prejudices in society.”³⁴ The Court then relied on observations from the World Health Organization to conclude, “while the role and status of women in society should not be defined solely by their reproductive capacity, femininity is often defined by motherhood.”³⁵

19. The *Artavia Murillo et al. v. Costa Rica* judgment included the expert witness testimony of Alicia Neuberger, who explained that,

“(T)he gender identity model is socially defined and molded by the culture; its subsequent naturalization responds to socioeconomic, political, cultural and historic determinants. According to these determinants, women are raised and socialized to be wives and mothers, to take care of and attend to the intimate world of affections. *The ideal for women, even nowadays, is embodied in sacrifice and dedication, and the culmination of these values is represented by motherhood and the ability to give birth...* A woman’s fertility is still considered by much of society to be something natural that admits no doubts. [...] Motherhood has been assigned to women as an essential part of their gender identity, transformed into their destiny.”³⁶

20. The Inter-American Court ultimately concluded in *Artavia Murillo et al. v. Costa Rica* that “gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them.”³⁷

21. Despite advancements made by the Inter-American Court to draw parallels between gender identity, stereotyping and women’s reproductive rights violations, it is important to note the Court’s earlier assertion in the *Artavia Murillo et al. v. Costa Rica* judgment: “motherhood is an essential part of the free development of a woman’s personality.”³⁸ The Inter-American Court relied on the concept of motherhood to find a violation of the right to private life under the American Convention on Human Rights.

22. Although the Inter-American Court emphasized the role of gender stereotyping on women’s enjoyment of their reproductive rights in *Artavia Murillo et al. v. Costa Rica*, it did not address the issue of gender stereotyping in the reparations. The Convention of Belém do Pará was not included in *Artavia Murillo et al. v. Costa Rica*, which limited the ability of the Court to

³² *González et al. (“Cotton Field”) v. Mexico*, *supra* note 15, at ¶602 (22).

³³ *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, Inter-Am. Ct. H.R., (Merits, Reparations, & Costs) 28 November 2012.

³⁴ *Ibid.*, ¶294.

³⁵ *Ibid.*, ¶296.

³⁶ *Ibid.*, ¶298.

³⁷ *Ibid.*, ¶302.

³⁸ *Ibid.*, ¶143.

IV v. Bolivia, Amicus Curiae
Ciara O'Connell, Diana Guarnizo-Peralta and Cesar Rodriguez-Garavito(Dejusticia)

issue reparation that would address the impact of gender-based harm in this case. The gap between gender reasoning and reparation in this case indicates the need to develop women's reproductive rights cases within the violence against women legal framework.

23. *Velásquez Paiz et al. v. Guatemala*³⁹

In regards to gender stereotyping in this case, the Inter-American Court of Human Rights determined that

"(G)ender stereotyping refers to pre-conditioned attributes, behaviors or possessed characteristics or roles that are, or should be performed by men and women respectively, and *it is possible to associate the subordination of women with practices based on socially dominant and persistent gender stereotypes*. In this sense, their creation and use becomes one of the causes and consequences of gender violence against women, these conditions are aggravated when reflected, implicitly or explicitly, in policy and practice, particularly in the reasoning and as language of state authorities."⁴⁰

24. In the reparations issued for this case, the Inter-American Court ordered the State to "...incorporate within the National Education System curriculum, at all levels, a permanent education program on the need to eradicate gender-based discrimination, gender stereotypes and violence against women in Guatemala, in light of the international standards on these matters and the jurisprudence of this Court."⁴¹

25. While the Inter-American Court has consistently ordered gender-based reparations in women's rights cases, it elected not to do so in *Artavia Murillo et al. v. Costa Rica*, which was its first women's reproductive rights case. *IV v. Bolivia* presents an opportunity for the Inter-American Court to articulate and develop the inherent connection between violence against women, as it is addressed through the Convention of Belém do Pará, and violations of women's reproductive rights. Furthermore, the Inter-American Court has the opportunity to issue gender-based reparations designed to *prevent* violations of women's reproductive rights.

**IV. "IV" V. BOLIVIA: RISK OF REPETITION AND THE NEED FOR GENERAL REPAIR
 (GUARANTEES OF NON-REPETITION)**

26. The Court has generally been open to ordering general forms of redress (guarantees of non-repetition) not just in cases of systemic violations of human rights,⁴² but also in those cases where there is a risk of repetition. In cases involving health care personnel, the Court has awarded human rights training in order to prevent the repetition of a violation or a particular situation. For example, in cases related to medical malpractice the Court ordered the state to implement human rights training for justice operators and health care professionals in

³⁹ *Velásquez Paiz et al. v. Guatemala*, Inter-Am. Ct. H.R. (Preliminary Objection, Merits, Reparations, & Costs) 19 November 2015.

⁴⁰ *Ibid.*, ¶180.

⁴¹ *Ibid.*, p. 101, ¶13.

⁴² *González et al. ("Cotton Field") v. Mexico*, *supra* note 15, and *Velásquez Paiz et al. v. Guatemala*, *supra* note 39.

relation to patients' rights.⁴³ Reparation measures were awarded as a way to disseminate information about patients' rights and to facilitate access to justice for patients whose rights had been violated. Also, in *Ximénes-López v. Brasil*,⁴⁴ a case related to inadequate treatment and hospitalization of persons with mental disabilities, the Court ordered the state to develop training and education programs for medical personal and all people working in mental health institutions, which would include the standards and guidelines related to the treatment of people with mental disabilities. In this case, training was necessary in order to transform health care structures and the behavior of a medical community that did not adequately treat people with mental disabilities.

27. In regards to the present case, there is a culture of gender bias and stereotyping among medical personnel in Bolivia that makes the possibility of repetition of this violation very likely. While the 1998 Bolivian Health Regulations⁴⁵ establish a duty for doctors to request patients' voluntary and informed consent prior to performing a tubal ligation procedure, in practice, medical professionals in Bolivia do not always apply these regulations in a consistent way. In a report published by the Center for Reproductive Rights in 2001, it was found that the requirements to access such services were not being wholly complied with by medical personnel in Bolivia. For example, in a visit carried out to the Hospital Materno Infantil Germán Urquidí in Cochabamba, the informed consent forms developed by the Bolivian Health Regulation were not found in the hospital.⁴⁶ Instead, there was a general authorization form that allowed medical doctors to practice "all the necessary tests".⁴⁷ There is no recent data that shows the level of compliance with the obligation to request informed consent in Bolivia. However, the fact that the State does not provide information about the real compliance with this duty should be understood as an indication that the situation has not improved. Even though there is no specific evidence showing that the lack of compliance with the regulation is due to the existence of a gender bias, section two of this amicus already indicated how the medical community very often exercises "paternalistic control" in relation to women's health.

28. In fact, other reports have shown how particular practices in the medical community actually hinder the application of Bolivian laws. For example, in 2014 the Plurinational Constitutional Tribunal of Bolivia deemed unconstitutional the practice of requiring women to obtain judicial authorization in order to access legal abortion services in the case of rape. However, according to information from Amnesty International, medical professionals and prosecutors in Bolivia have not complied with this judgment; they are still requiring judicial

⁴³ *Albán-Cornejo et al. v. Ecuador*, Inter-Am. Ct. H.R. (Merits, Reparations and Costs) 22 November 2007, ¶164; and *Suárez Peralta v. Ecuador*, Inter-Am. Ct. H.R. (Preliminary Objection, Merits, Reparations & Costs) 21 May 2013, ¶206.

⁴⁴ *Ximénes-López v. Brasil*, Inter-Am. Ct. H.R. (Merits, Reparations and Costs) 4 July 2006, ¶250.

⁴⁵ Norma Boliviana de Salud (Bolivian Health Standard) MSPS-98: Anticoncepción Quirúrgica Voluntaria [Voluntary Surgical Contraception], Volume 1, Oclusión Tubárica Bilateral en Riesgo Reproductivo [Bilateral Tube Ligation in cases of Reproductive Risk], approved by the Ministry of Health through Ministerial Resolution No. 517, November 17, 1998. In addition, Article 37 of the Code of Ethics and Medical Deontology of the Medical Association of Bolivia states that: "A person may only be sterilized in response to his or her express, voluntary and documented request for sterilization, or in the event of therapeutic necessity determined strictly by a medical board."

⁴⁶ Center for Reproductive Rights, "Derechos de la Mujer en Bolivia: Un informe Sombra," 9. Available at <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Bolivia%20CESCR%202001%20Spa.pdf>

⁴⁷ *Ibid.*

IV v. Bolivia, Amicus Curiae
Ciara O'Connell, Diana Guarnizo-Peralta and Cesar Rodriguez-Garavito(Dejusticia)

authorization to perform abortions in cases of rape. Amnesty International has determined that “a decisive work of dissemination and education is going to be necessary since there is confusion and lack of information about this topic in the health services, police, prosecutors, ombudsman and other personnel in charge of the compliance of this ruling.”⁴⁸

29. In addition, CEDAW Committee recently expressed its concern “about the persistence of discriminatory stereotypes about the roles and responsibilities of women and men in the family and in the larger society that perpetuate discrimination against women in areas such as [...], health [...],” in relation to Bolivia.⁴⁹

30. If the Inter-American Court of Human Rights does not provide specific reparation measures designed to transform gender bias and stereotyping culture within the Bolivian medical profession, and society in general, there is a high likelihood that violations of women’s reproductive rights, such as those experience by “IV” in this case, will continue to occur in Bolivia.

V. DEVELOPING GENDER-BASED REPARATIONS IN “IV” V. BOLIVIA

31. We suggest that the Inter-American Court of Human Rights exercise its *motu proprio* capacity in order to issue guarantee of non-repetition reparations designed to address gender stereotyping and discrimination within the Bolivian medical sector. We suggest that for each of the three reparations below, the Inter-American Court requires the State to submit a follow-up report twice yearly.

Reparation Suggestion:

The Court orders the State to, within a reasonable time, adopt education and training programs to be delivered to medical students and current medical professionals in the themes of informed consent and gender-based discrimination and stereotyping. The training should be conducted as part of a permanent aspect of medical education and training, and should be developed in conjunction with civil society and the national Ombudsman Office.

32. In addition, because gender-based stereotyping and discrimination intersect with other social factors such as race, ethnicity, economic and citizenship status, and sexuality, we urge the Inter-American Court to order a reparation designed to address gender stereotyping and discrimination on a broader scale in Bolivia, as it did in its 2015 case, *Velásquez Paiz et al. v. Guatemala*.⁵⁰

Reparation Suggestion:

The Court orders the State, within a reasonable time, to incorporate within the public education system, at all levels, a permanent education program on the need to eradicate gender-based discrimination, gender stereotypes and violence against women in Bolivia, in light of the international standards on these matters and the jurisprudence of this Court.

⁴⁸ Amnesty International, “Bolivia: Informe para el Comité para la Eliminación de la Discriminación contra la Mujer de las Naciones Unidas, 61ª Session, 6-24 de julio de 2015,” 12.

⁴⁹ UN, CEDAW (2015) Concluding Observations on the combined fifth and sixth periodic reports of the Plurinational State of Bolivia, UN. Doc. CEDAW/C/BOL/CO/5-6, ¶16.

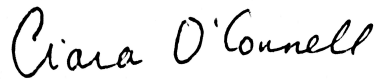
⁵⁰ *Velásquez Paiz et al. v. Guatemala*, *supra* note 39.

IV v. Bolivia, Amicus Curiae
Ciara O'Connell, Diana Guarnizo-Peralta and Cesar Rodriguez-Garavito(Dejusticia)

33. Finally, with reference to the recommendations made by the Inter-American Commission in its Merits Report,⁵¹ we suggest that the Court order the State to adopt an informed consent framework for medical professionals that reflects the criteria of the International Federation of Gynecological and Obstetrics (FIGO).⁵²

Reparation Suggestion:

The Court orders the State, within a reasonable time, to update its standard and domestic regulations on informed consent, which will be distributed to and upheld by members of the Bolivian Medical Community. The Standard should reflect international standards such the ones developed by World Health Organization and the International Federation of Gynecological and Obstetrics' criteria on informed consent.



CIARA O'CONNELL
UNIVERSITY OF SUSSEX



DIANA GUARNIZO-PERALTA
RESEARCHER, DEJUSTICIA



CESAR RODRÍGUEZ-GARAVITO
DIRECTOR, DEJUSTICIA

⁵¹ "IV" v. *Bolivia*, *supra* note 17 at ¶187(4).

⁵² Ethical Issues in Obstetrics and Gynecology, *supra* note 14, at 14.