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**INDIGENOUS WOMEN AND THE
STRUGGLE FOR EFFECTIVE JUSTICE**
REPARATIONS FOR HUMAN RIGHTS VIOLATIONS IN GUATEMALA
& MEXICO

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FOREWORD

I would like to stress that the present research is driven by a keen interest in indigenous peoples' rights, struggles, and cosmovisions. This interest might appear too broad; yet, I hope I will be able to offer a line of inquiry that brings about an original view to the analysis, trying to avoid the “flat exposition of popular names and opinions”¹ that such a broad interest may enhance. The present research tries to avoid that pitfall, in fact, it will delve into unusual themes, it will investigate and question the capacity of the current legal edifice of the Inter-American System of Human Rights to give voice to the less-voiced: indigenous women. It is a journey into different perspectives and narratives. The present analysis tries, without any pretentiousness, to find the *spaces* that still need to be developed to bring the necessary changes in the system.

Further, in spite the present thesis is grounded in the realm of law, that does not exclude an interdisciplinary approach, with anthropology as a main ally in my research. Indeed, it is thanks to this interdisciplinary approach that one avoids the risk of misinterpreting the reality under examination.

Also, this research is part of a broader project, the first step of a journey that will continue in the following years. This research has, thus, represented a chance to get acquainted, and to know a field (that of reparations, indigenous peoples' rights, and indigenous women's issues in particular) which, I hope, will host my curiosity and my work in the coming years.

¹ Eco, Umberto. *Come si fa una tesi di laurea: le materie umanistiche*. Bompiani, 2001. Unofficial translation from the Italian version: “piatta rassegna di nomi e opinioni correnti”, p. 19.

ABSTRACT

This research aim at investigating the effectiveness of reparations within the Inter-American System of Human Rights; the focus of our attention is, in particular, the capacity of the reparatory measures awarded by the Inter-American Court of Human Rights to provide effective justice to indigenous women.

Through the voices of some indigenous leaders, we had the chance to explore how the feminine principle, violence against women, justice, and power relations are conceived in some indigenous cosmovisions,

Against this background, we delved into the rights, needs, and perspectives of indigenous women trying to determine to what extent they are included in the reparatory discourse developed by the Court: two case studies helped our analysis: *Plan de Sánchez Massacre v. Guatemala* and *Rosendo Cantú et al. v. Mexico*. These cases allowed us to assess the achievements and shortcomings of the reparation measures awarded by the Court, as well as to assess the degree to which an intersectional approach is used in the discourse and in the model of adjudication embraced by the Court.

Our analysis demonstrates that even though a lot of work still needs to be done in order to attain effective justice for indigenous women, the judgment on the case of *Rosendo Cantú v. Mexico* represents a fundamental step forward in the jurisprudence and reasoning of the Court.

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INTRODUCTION

The gross and systematic human rights violations that happen daily in the world have seen in the jurisprudence and sentences of Regional Courts of human rights a valid ally to respond to this structural suffering and violence that wreck humanity. In particular, the enhancement of the remedial process can be considered as one of the biggest achievements of these courts. The analysis of such process offers an interesting starting point to understand both the evolution of the Inter-American system and the dynamics of the relations between the Inter-American Court of Human Rights (hereinafter referred to also as ‘the Court’) and the national legal systems.

In this regard, it is necessary to introduce a clarification on the object of the present investigation. The object of the investigation, in fact, is not the assessment of the entire remedial process, which comprehends an array of elements: equal and effective access to justice; adequate, effective and prompt reparations; access to relevant information². Even though, as we will see, these aspects are connected to one another, we shall focus the analysis on the reparatory process, hence, that part of the remedial process in which “‘substantive redress’ is granted”³. That is not to endorse, or to claim for, a clear and sharp distinction between these elements; the other elements of the remedial process, in fact, are of a procedural nature and, as such, they are necessary to get to the final steps in which reparation for the wrong suffered is granted to the victims. Nevertheless, we must acknowledge that it is at the moment reparations are awarded that the glimmer of concrete and effective justice appears. It is in this moment that the translation from abstraction to concreteness happens.

The rationale behind this study is that an investigation on reparation measures can unveil something meaningful about how different needs, expectations, and power relations are balanced and translated into the contemporary reparatory discourse. The aim of this paper is, therefore, to investigate the effectiveness of reparations within the Inter-American System of Human Rights; hence, the capacity of the reparation

² UNGA resolution 60/147 adopted on 16 December 2005: UN 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, Annex, para 11.

³ Lenzerini, Federico. *Reparations for indigenous peoples: international and comparative perspectives*. Oxford University Press, 2008, p. 9.

system to provide effective justice to indigenous peoples. Some of the questions we will try to answer in the analysis are the following: are reparations for indigenous peoples effective and inclusive? Are the indigenous sense of what justice is, the plurality of local practices and beliefs taken into account? We will also explore how indigenous women's concerns are addressed in the realm of reparations. The issue of lack of compliance with the Inter-American Court's judgments by certain States will be addressed as well; the gap between the ambitious jurisprudence of the Court and its translation into practice (or better, lack of translation), in fact, represents a great challenge to the credibility of the whole system of protection of human rights developed under the aegis of the OAS; and most of all, if this gap is not filled, then, substantive and effective justice will never be attained. The role of the indigenous movements in filling this gap will thus be brought into the picture.

After an excursus on the main instruments concerning reparations in international law, our investigation will be organized around two axes of analysis. The main axis of our analysis will try to assess the comprehensiveness and effectiveness of the reparation process as developed in the practice of the Inter-American Court of Human Rights. However, it emerges the need for a more complex analysis, which does not leave out the essential link between the Court and the States; thus, the other axis of the investigation will focus on the nexus Court-State. In this regard, we will deal with the challenge of implementation. The gap between the progressive jurisprudence of the Court and the lack of compliance at the domestic level will torment our analysis. In other words, we will be able to explore how the supranational level can inform and shape the domestic level.

This short note aims at underlining the different problems connected to the realm of reparations. We don't have the presumption to resolve all the aforementioned issues, but to put to the test the strength of the system as it is conceived, and put forward a number of ideas and considerations that might produce some interest and a useful basis for reflexion, as well as to suggest possible paths to pursue.

As to the structure of the present work, we will first present a general overview of the international documents, and the principles therein embedded, dealing with the realm of reparations; the analysis will, then, move to direct testimonies of some indigenous leader as to violence and discrimination against indigenous women. In this regard, we will explore some indigenous cosmovisions. Against this background, we shall analyze, in the third section, the case law of the Inter-American Court

dealing with indigenous women to assess to what extent does the reparations system of the Court take into consideration indigenous women's voices and needs when awarding reparations. The analysis, then, will lead us to delve into the contradictions and neglected perspective in the current system. In conclusion, we shall formulate some remarks on the main topics addressed in the dissertation, as well as present some possible redress to the identified shortcomings.

Moving on to the substance of the matter, in the first chapter we want to offer a general view of the notion of reparation, and the different dimensions that it encompasses (material and symbolic as well as individual and collective). Then, we will move to the legal framework in which our analysis is embedded. In this regard, we will shortly examine the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter referred to as Basic Principles) and other human rights instruments that can inform our perspective on reparations: the International Law Commission's Articles on State responsibility, the ILO Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter referred to also as UNDRIP or Declaration) the OAS Declaration on the Rights of Indigenous Peoples, and the American Convention on Human Rights, analyzing some of the provisions herein contained.

Chapter 2 aims at bringing to the surface that *file rouge* that links indigenous cosmovision and gender perspective; it is an attempt to give voice to indigenous women's histories and worldviews both through an analysis of some indigenous narratives and of international instruments specifically designed to protect indigenous peoples and through oral interviews with indigenous leaders⁴. During the interviews, the focus will be placed particularly on three thematic areas: cosmovision, power relations, and justice. To decline it in a more thorough way: first, we will try to assess the relevance of the feminine principle in various indigenous communities' cosmogonies. Then we will move to the theme of power relations within the community; we will focus our attention on violence and discrimination against indigenous women and on the role of colonialism and the influence of the liberal Western world in modifying the power relations between men and women within the

⁴ Interviews carried out during the 2017 Human Rights Training Program for Indigenous Peoples: the Program is the result of the collaboration between the Office of the United Nations High Commissioner for Human Rights and the Pedro Arrupe Institute of Human Rights, University of Deusto.

community. Finally, the attention will be drawn to the realm of justice. These interviews allow us to discover a profound link between the individual and collective perception and consequences of violence. The focus on the presence of the Military, then, give us the possibility to explore the link *cuerpo-territorio*, to illustrate how the Military occupation of a territory influences the communities' life. Finally, these interviews illustrate the perception of justice among indigenous communities and how being an indigenous woman negatively affect the achievement of justice.

One wonders what role will law play in challenging the dominant forms of power and 'localize' the concrete expressions of human rights for indigenous peoples and for indigenous women in particular – this question is the *file rouge* that crosses the whole analysis. Will international law be able to create a legal framework suitable to accommodate the indigenous perspective and overcome the tension between local, national and international needs? What will the role of cultural and legal pluralism be? Will governments be able or willing to adopt a truly pluralistic and sensitive to diversity outlook? What is certain is that the recognition of indigenous women's rights will be one of the measures of the commitment towards pluralism.

The third chapter will represent the core of our research: we will delve into the rights of indigenous women trying to determine to what extent they are included in the reparatory scheme developed by the Court. Two case studies will be proposed: Mexico and Guatemala. The achievement and shortcomings of the respective reparations schemes will be assessed. We will draw our attention to the degree to which intersectionality is represented in the discourse and in the model of adjudication embraced by the Court. Such an analysis intends to develop a dynamic approach that, far from offering a static list of reparatory measures, aims at studying the changing in the Court's approach in the two cases as well as addressing the shortcomings of the Court's decisions. In particular, we will assess the extent to which the fact that women are suddenly brought into the picture affects – if at all – the Court's reasoning. Our analysis would be deemed incomplete if we didn't acknowledge both the 'space of the law' and the 'space of society' in filling the gap currently preventing the effective achievement of justice for indigenous women.

The noteworthy features that emerged from the research lead us to the final part in which we will offer some answers to the queries emerged during the analysis; without the pretension to find a definitive solution to all of them. Some questions will,

inevitably, remain open. The aim, in fact, is to create a space for reflection and to convey the idea that a rethinking of reparations is a pressing need.

CHAPTER I

REPARATIONS IN INTERNATIONAL LAW

1.1 The Notion of Reparations

Before moving forward with our analysis, some clarifications are necessary. As already noted, the present analysis focuses on a particular aspect of the remedial process: reparations, leaving aside the more ‘procedural’ aspects of the right to a remedy; that choice, needless to say, is not motivated by an absence of interest in the procedural aspect, but by the fact that the reparatory phase is “the moment in which the entire remedial procedure comes to fruition and justice is done”⁵.

With respect to indigenous peoples, selecting the appropriate measures of reparation requires, first and foremost, a deep understanding of the reality in which these measures are inserted. As Pascal reminds us: “Vérité en deçà des Pyrénées, erreur au-delà”⁶. So to say, we must know the context, its peculiarities, its ‘truths’, if we aim at developing a reparatory scheme able to effectively work. One of the ‘truth’ that needs to be acknowledged is the relevance of the collective dimension in the cosmovision of indigenous peoples; the whole culture of an indigenous group can not be understood if we fail to account for the importance of the dynamics that govern the relationships among the members of the group. The collective element exercises a fundamental power in the construction of any frame of signification, vision, story, and institution of an indigenous people. Further, indigenous peoples’ understanding of Time must be given a pivotal role when developing a reparatory scheme. Reparations, so to say, must possess an inter-temporal dimension, they must take into consideration the causes and consequences of a violation; hence they should address the past, the present, and the future; moreover, the link between the human and supra-human dimension must not be forgotten.

The testing ground for the success of these judicial reparations is the ability to mediate between these different perspectives. The measures of reparations, far from being just normative works, are a model of reality that wants to be imposed in a

⁵ Lenzerini, Federico. *Reparations for indigenous peoples*, op. cit., p. 9.

⁶ Pascal, *Pensées*, 294.

context that often has no connection to that model; eventually, reparations can not work (or at least can not work avoiding conflicts and tensions) if they do not take into serious consideration the context in which they wish to enter.

Such a short note serves also to distance the reader from the idea that the following section will provide a comprehensive analysis of reparations in every realm of international law. It will not; the aim of the following section is, in fact, to present those instruments that more than others could prove useful in accommodating the claims of indigenous peoples. After a brief overview of more ‘general instruments’, we will move our analysis towards those instruments that are directly linked to our core object of investigation: indigenous peoples and the Inter-American System of Human Rights.

1.2 The ILC Articles and the Basic Principles

1.2.1 ILC Articles on State Responsibility

The first document that deserves our attention is the ILC Articles on State Responsibility. In particular article 31, that reads:

- “1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State”⁷.

The forms of reparations are enlisted in Part II, in article 34 that enlists the measures States should undertake in order to repair to the wrongful act: restitution, compensation, and satisfaction; these measures are further defined in arts 35, 36, and 37. Though these articles are not dealing directly with indigenous peoples, they are very relevant because of the role they recognize to reparations in effectively responding to an internationally wrongful act by a State. As article 33(1) states,

“The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach”⁸.

⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, article 31.

⁸ *Ibidem*, article 33(1).

The forms of reparations herein established pertain to the interstate domain; that said, it can be assumed that the ILC draft articles opened a window for the explicit recognition of some responsibility *erga omnes* of States.

Also, though these forms of reparation relate to the interstate domain, art. 33(2) sets forth a ‘saving clause’⁹ not preventing individuals or groups, IGOs and NGOs to demand satisfaction for the harm suffered.

“This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”¹⁰

Of course, the means to implement these Principles were carefully kept out of the picture. But still, we are now going beyond a State-State relation, and the State which breaches an international obligation has to respond to the other States and to the international community as a whole.

1.2.2 Basic Principles and Guidelines

To grow closer to our core object of investigation, we will now introduce the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹¹, that allows us to move from the wider sphere of International Law to the sector of International Human Rights Law.

The Preamble sets the tone; the General Assembly, in fact, adopts the Basic Principles and Guidelines “*Convinced* that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large”¹². A few lines before, human dignity, as well as a broadly crafted notion of ‘victim’, are presented.

⁹ Lenzerini, Federico. *Reparations for indigenous peoples*, op. cit., p. 59.

¹⁰ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html> [accessed 31 March 2017]

¹¹ UN General Assembly, 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: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <http://www.refworld.org/docid/4721cb942.html> [accessed 31 March 2017]

¹² *Ibidem*, Preamble.

It is noteworthy to underline that the Principles offer a definition of ‘victim’ that does include *collectivities*¹³.

The most useful part of the text, for the purpose of present research, is Part IX, that, in line with the ILC Articles, envisages as forms of reparation: restitution, compensation, satisfaction, and guarantees of non-repetition; and adds rehabilitation. These forms of reparation are detailed in Principles 19 to 23. Reparation is “intended to promote justice”¹⁴, in this respect the Basic Principles are very clear in stressing that a reparatory scheme must be designed according to the particular circumstances relevant to each case. The first principle mentioned by the text is *restitution*, a measure that aims to: “restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.” Such a measure includes: “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property”¹⁵. Needless to say, to re-establish the pre-violation situation is, most of the time impossible, so that *restitutio* is not *in integrum* and thus is matched with other measures of reparations. Nonetheless, in the cases regarding indigenous peoples *restitutio* is most of the time the most adequate measure of reparation, since, a very great deal of indigenous peoples’ claims call for the restoration of ancestral and sacred lands¹⁶.

Another widespread measure of reparation is *compensation*, that according to the Basic Principles “should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case”¹⁷. Compensation is envisaged in case of:

“Physical or mental harm; Lost opportunities, including employment, education and social benefits; Material damages and loss of earnings, including loss of earning potential; Moral damage; Costs required for legal or expert assistance, medicine and medical services, and psychological and social services”¹⁸.

¹³ The relevance of the collective dimension in the *cosmovision* of indigenous peoples can be found also in a General Recommendation by the CERD which underlines that this dimension needs to be addressed when land restitution is part of the reparatory process: CERD, General Recommendation XXIII, Indigenous Peoples (Fifty-first session), 1997, para. 5; in the very same year, a Report by The Sub-Commission on Prevention of Discrimination and Protection of Minorities affirms that “The right to reparation entails both individual measures and general, collective measures”, para. 40.

¹⁴ Basic Principles, op. cit., Part IX, principle 15.

¹⁵ *Ibidem*, principle 19.

¹⁶ Lenzerini, Federico. *Reparations for indigenous peoples*, op. cit., pp. 14-15.

¹⁷ *Ibidem*, principle 20.

¹⁸ *Ibidem*.

It is a very widespread and typical form of reparation, yet, to indigenous peoples, it might not be adequate or effective, in several respects: i.e., in light of their cosmovision money does not play a central role, and thus it is deemed inefficient in bringing justice. Nonetheless, it is very relevant that a violation that concerns the intangible dimensions, so the moral and psychological dimensions, is measured, according to the Basic Principles, in economic terms. That is an important recognition, expanding the realm of compensation to the intangible dimension¹⁹; though it will not wipe out nor totally redress the consequences of the tort suffered, still it is another tile in the complex mosaic of justice.

The third principle mentioned by the Basic Principles is *rehabilitation* that “should include medical and psychological care as well as legal and social services”²⁰. The aim is to enable victims to move on so that the consequences of the harm suffered could be more bearable, not linger in the collective memory and sense of self, and not be transferred through generations.

As to the non-pecuniary measures, a very important principle is *Satisfaction*. Satisfaction measures should include:

“Effective measures aimed at the cessation of continuing violations; [...] full and public disclosure of the truth [...]; [t]he search for the whereabouts of the disappeared, [...] assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; [...] [p]ublic apology, [...] [c]ommemorations and tributes to the victims”²¹.

This is the measure that most accurately voices the needs of the indigenous victims according to their perspective. Such an approach to reparations – where truth, remembrance and justice go hand in hand, where other visions of justice are taken into account, with an eye to the past wrongs and the injustices that affect the present, and one to the possible future – has proven to contribute positively to the recovering of victims. The words of Judge Cañado Trindade hit the mark: “It is incumbent upon all of us, the still living, to resist and combat oblivion, so commonplace in our post-modern, ephemeral times”²². Truth-telling, apologies and commemorations have thus

¹⁹ Koen De Feyter, Stephan Parmentier, Marc Bossuyt, Paul Lemmens, *Out of the ashes: reparation for victims of gross and systematic human rights violations*. Intersentia nv, 2005, pp. 22-23.

²⁰ Basic Principles, op. cit., principle 21.

²¹ *Ibidem*, principle 22.

²² Separate opinion of Judge Antônio Augusto Cañado Trindade in Judgment of the Inter-American Court of Human Rights in the case of the Moiwana Community versus Suriname, para. 93.

a stronger *raison d'être*, they not only link the past and present dimension and help the healing of the victims, but they also endorse a reconciliation process between the victims, the State and the wider society.

The last measure of reparation envisaged by the Basic Principles are the *Guarantees of non-repetition*. These measures have a clear eye to the future, they aim at preventing violations and injustices to happen again in the future. They include legislative, administrative and policy reforms. They recognize the need to erase those *de jure* violations that are present in domestic laws, and that education in human rights law, as well as international humanitarian law, are a priority.

The Basic Principles represent a very relevant document because, they state the need for reparations to be victim-oriented, but they also recognize that the rationale of an adequate and effective reparatory scheme should be broader: the wider society and the State are important pieces of a process that aims to provide a more just and safe future.

Moving to the international instruments designed specifically for indigenous peoples, it is worth analyzing reparations as worded in the ILO Convention No. 169, as well as in the UNDRIP.

1.3 ILO Convention No. 169 and United Nations Declaration on the Rights of Indigenous Peoples

1.3.1 ILO Convention No. 169

Article 15 of the Convention concerns indigenous peoples' rights to natural resources in their lands; this provision establishes that if the government undertakes exploration activities or exploitation of natural resources in indigenous' lands, "[t]he peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities"²³. Apart from compensation, other measures are envisaged.

Article 16 is more accurate in addressing the dislocation of indigenous peoples. Under article 16(3) the obligation of the State to return the land is (indirectly) stated:

²³ ILO, Indigenous and Tribal Peoples Convention, 1989 (No. 169), article 15.

“[w]henever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist”²⁴.

Paragraph 4 of the same article asserts the need to provide indigenous peoples with other lands when the *restitutio* is not possible, or to grant compensation if that measure is preferred by the peoples in question.

“When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.”²⁵

According to article 16(5) then, “Persons thus relocated shall be fully compensated for any resulting loss or injury”²⁶.

1.3.2 United Nations Declaration on the Rights of Indigenous Peoples

Moving to another international instrument crafted specifically to uphold the rights of indigenous peoples, we can assert that the UN Declaration on the Rights of Indigenous Peoples, as most of the scholarly analysis reminds us, is up to date the most progressive instrument as to indigenous peoples’ rights. In regard to the present analysis, one of the most relevant articles is art. 40 that calls for effective remedies for violations of both individual and collective rights:

“Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”²⁷

The article remains vague on the remedies to be adopted. There are, though, other significant provisions that entail a right to reparations: article 8(2) for example enlists

²⁴ *Ibidem*, art. 16.3.

²⁵ *Ibidem*, art. 16.4.

²⁶ *Ibidem*, art. 16.5.

²⁷ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html> [accessed 3 April 2017], art. 40.

the situations against which an obligation by the State to redress is elicited; article 11(2) presents a very broad and progressive view on reparations; it reads:

“States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”

This article is particularly significant since it mentions restitution as a possible mechanism for redress; a restitution that encompasses all of the intangible elements that shape the indigenous identity: spiritual, cultural, intellectual and religious property.

Article 12 establishes that States should abet reparation in the form of “repatriation of ceremonial objects”²⁸.

Moving to tangible property, among the articles dealing with indigenous peoples’ land rights, article 28 is very clear in asserting that the preferable measure of reparation is restitution:

- “1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress”²⁹.

Compensation is mentioned as a valuable alternative, only if restitution is not possible.

It is worth noting that the Declaration is particularly progressive and accurate in addressing the issues related to land rights. Historically, the dispossession of lands and natural resources has been the main feature of the indigenous struggle. As to resources, article 32 paragraph 3 provides that “States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or

²⁸ *Ibidem*, art. 12.

²⁹ *Ibidem*, art. 28.

spiritual impact”³⁰. Many indigenous peoples, trace their origins to lands, mountains, rivers or springs. This makes us understand how to indigenous peoples the definition of cultural identity is intimately linked to land, water, and natural resources³¹. The UNDRIP acknowledges this deep connection and thus endorses reparation measures that respect these elements that so powerfully define cultural identity.

Now, to approach the geographical context in which we shall develop our analysis, we will investigate how reparations are addressed in the dialectics of the Inter-American system of protection of human rights. For that purpose, we will focus our attention on the American Convention on Human Rights and the American Declaration on the Rights of Indigenous Peoples.

1.4 OAS Instruments: the American Convention on Human Rights and the American Declaration on the Rights of Indigenous Peoples

1.4.1 American Convention on Human Rights

The American Convention on Human Rights confers the Court a wide jurisdiction with regard to remedies. Paragraph 1 of article 63 sets out the powers of the Court with regard to remedies and attests the far-reaching jurisdiction of the Court as regards to remedies. The article lays down that:

“If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”³².

The American Convention gives the Court the power to *order* reparations. In this respect article 63 of the Convention is an innovative text (compared to the ECHR for example).

The road to the provision at hand, as we know it today, followed a complicated path; the first draft was much less progressive, and it was because of the strenuous work of the Guatemalan representative that the provision became more

³⁰ *Ibidem*, art. 32(3).

³¹ Rutgerd Boelens, David Getches, Armando Guevara Gil (eds.), *Out of the Mainstream: Water Rights, Politics and Identity*, London, United Kingdom, Earthscan, 2010, see Chapters 1 and 6.

³² Art. 63(1) of the American Convention on Human Rights.

comprehensive, going beyond the mere monetary awards³³. The original Draft of the provision reads as follows: “[a]fter it has found that there was a violation of a right or freedom protected by this Convention, the Court shall be competent to determine the amount of compensation to be paid to the injured party”³⁴. The Guatemalan proposal, which was essentially adopted in the final text³⁵, strengthened the substance and the wording of the provision expanding the power of the Court to allow it to effectively intervene in the field of remedies. A clear step forward from the wording and substance of the first draft of this disposition which provided only for pecuniary compensation.

Art. 63, as the jurisprudence of the Court proves, demonstrates that a reparatory framework can go beyond the mere monetary compensation, the aim should be the restoration, where possible, of the *status quo ante*. Indeed, the text of the American Convention enables the progressive development of the Court’s jurisprudence. The far-reaching competence of the Court, hence its power to indicate the remedies to be taken, matched by the fact that the Member States can not escape these obligations, given the binding nature of the Court’s decisions³⁶ can represent an essential element in giving voice to victims’ needs.

What we are trying to claim is that positive changes can be elicited by legislative action though it is true that the protection of victims of human rights’ violations calls for something more than mere legislative action³⁷.

As to soft law instruments, over the years there have been numerous instruments that have claimed this right. The presence of so many soft law instruments indicates that slowly it is emerging a commonality of ideals at the international level that might lead in time to an evolution of these statements into affirmative action and binding treaties. As stated by Martin Köppel, soft law instruments facilitate “learning

³³ Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge University Press, 2013, p. 190.

³⁴ Draft American Declaration on Human Rights, art. 52(1). See Conferencia especializada interamericana sobre derechos humanos, San José, Costa Rica, 7-22 de noviembre de 1969 actas y documentos, OEA/Ser.K/XVI/1.2, art 52(1) reads: “Cuando reconozca que hubo violación de un derecho o libertad protegido en esta Convención, la Corte tendrá competencia para determinar el monto de la indemnización debida a la parte lesionada”.

³⁵ See Observations by the Governments of the Member States on the Draft Inter-American Convention on Protection of Human rights; Guatemala, OEA/Ser. K/ XVI/1.1 doc. 24 (English) 8 November 1969, in T. Buergenthal e R. Norris (eds), *Human rights: The inter-American System*, booklet 13, vol. 2, at 119, 132.

³⁶ Art. 67 and art. 68(1) of the American Convention on Human Rights.

³⁷ Greblo, Edoardo. “Diritti minimi.”, 2010.

processes or learning by doing”³⁸. These instruments have therefore the advantage of allowing States to see the possible concrete impact of a certain arrangement without suffering the troublesome consequences that can result from a breach of a binding agreement³⁹. The American Declaration on the Rights of Indigenous Peoples, that was adopted in June 2016, is too *young*, so we can not affirm its usefulness as a soft law instrument in the realm of reparations, but a short analysis of its provisions might help us assessing its possible impact in the near future.

*1.4.2 American Declaration on the Rights of Indigenous Peoples*⁴⁰

The American Declaration on the Rights of Indigenous Peoples, a long-awaited document, has finally been adopted in June 2016 by the General Assembly of the Organization of American States. This document is, in many respects, unique compared to similar texts. Yet, in regard to reparations, the text of the American Declaration does not appear revolutionary. The general provision contained in art. 33 reads:

“Indigenous peoples and persons have the right to effective and appropriate remedies, including prompt judicial remedies, for the reparation of all violations of their collective and individual rights. The states, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.”⁴¹

Article 30 deals with armed conflicts and it is reflective of the social and political reality of many countries in the Americas. Article 30 paragraph 4(c) reads as follows: “[States] Shall take measures of effective reparation and provide adequate resources for the same, in *jointly with the indigenous peoples* affected, for the damages incurred caused by an armed conflict.”⁴². Indeed, armed conflicts have been a central feature in Latin and Central America, making it necessary for both the international human rights bodies and national governments to address a violent past, and its legacy. Reparations gained a central role in this post-conflict and post-authoritarian scenarios.

³⁸ Martin Köppel, “The Effectiveness of Soft Law: First Insights from Comparing Legally Binding Agreements with Flexible Action Programs”, *Georgetown International Environmental Law Review*, 2009, 21: 821-835, p. 825.

³⁹ *Ibidem*, p. 825.

⁴⁰ American Declaration on the Rights of Indigenous Peoples (Adopted at the third plenary session, held on June 15, 2016), AG/RES. 2888 (XLVI-O/16).

⁴¹ *Ibidem*, art. 33.

⁴² American Declaration on the Rights of Indigenous Peoples, *op.cit.*, article 30 paragraph 4(c).

In these contexts, it became more and more clear that in order to achieve justice for indigenous peoples, it is not enough to punish the perpetrators, a more comprehensive vision of reparations is needed, one that takes into account victims' needs and perspective⁴³.

The American Declaration on the Rights of Indigenous Peoples is a testament to the international trend to built a more comprehensive and inclusive conception of reparations. The Declaration, compared to any other international instrument concerning indigenous peoples, goes one step further; in fact, it introduces an innovative provision that is gender sensitive; indigenous women are finally included in the picture. According to said provision, States shall guarantee effective reparations to indigenous women:

“[States] Shall take special and effective measures in collaboration with indigenous peoples to guarantee that indigenous women, children live free from all forms of violence, especially sexual violence, and shall guarantee the right to access to justice, protection, and effective reparation for damages incurred to the victims”⁴⁴.

Needless to say, these commendable proclamations are encouraging, yet, they need to be translated into practice, in domestic law and policies, into a real commitment to redress, if they aim at enhancing effective justice. These developments notwithstanding, in fact, indigenous peoples' rights as stipulated by international treaties are marked by an alarming ineffectiveness; and it is this ineffectiveness and lack of guarantees that we must fix. This is one of the main challenges facing the contemporary law on indigenous peoples' rights. On the ability of law to adapt and concretely respond to new challenges, will depend the resolution of the problem. In fact, as long as the rights of indigenous peoples remain on paper we risk to witness a dangerous deterioration of the – already not rosy – situation.

1.4.3 The Challenges Ahead

We will devote the following part of the analysis to discuss and examine the reparations schemes developed by the Inter-American Court according to an intersectional perspective so to bring into view the complex nexus 'indigenous communities-indigenous women-justice' and the possible tensions between the wider

⁴³ Rubio-Marín, Ruth, and Pablo De Greiff. "Women and reparations." *International Journal of Transitional Justice* 1.3 (2007): 318-337, pp. 318-319.

⁴⁴ *Ibidem*, art.30, paragraph 4(d).

group's rights and the sub-group's (women) rights. So, one axis of analysis will assess how comprehensive and effective is the reparation scheme as in the practice of the Court. The other axis will explore how the supranational level can inform and shape the domestic level.

First, we will try to lay the foundations for a thorough understanding of the struggles and specificities of indigenous women's experience through the lens of anthropology. The challenge of designing coherent and context-wise reparatory schemes, in fact, requires us to disclose and illuminate the symbolic system in which they are enclosed, not just the legal-side of the matter.

Then, we will discuss the case studies of *Masacre de Plan de Sánchez v. Guatemala* and *Rosendo Cantú et al. v. Mexico*. In the analysis of both cases, first we will provide the reader with some general information on the social, political and legal context, then we will present an in-depth analysis of the reparation awarded by the Inter-American Court. This section will give us the opportunity to assess the commitment to intersectionality in the jurisprudence of the Inter-American Court. As already said, the Court is known for its progressive posture in the adjudication and redress of indigenous peoples' claims. The following chapter, far from challenging this assertion, aims at opening a space where to accommodate other perspectives, approaches, discourses. We will investigate law capacity – or lack thereof – to recognize indigenous women's multifaceted experience. Their complex 'intersectional experiences'⁴⁵, in fact, are hardly recognized under the law.

Intersectionality can bring to the surface the structural dynamics beyond the violence or discrimination suffered by indigenous women. Intersectionality can enlarge the current international human rights' discourse and give visibility to the issues and experiences of people "who fall within multiple protected categories simultaneously"⁴⁶. Law, as Davis sharply notices, can efficiently and effectively protect some categories of people but it might fall short of answers when dealing with individuals that live at the intersection. In this regard, intersectionality posits a way out of the quagmire; in fact intersectionality:

⁴⁵ The notion of women's intersectional experiences and the failure of law to respond and remedy to the violation perpetrated against women in a way that is consistent, and that considers all the components that construct women's identity is very well developed in Davis, Aisha Nicole. "Intersectionality and International Law: Recognizing Complex Identities on the Global Stage." *Harv. Hum. Rts. J.* 28 (2015): 205.

⁴⁶ Davis, Aisha Nicole. "Intersectionality and International Law", *op. cit.*, p. 216.

“uncover[s] where the overlap of individual categories creates a negative space as opposed to an enhanced protection. Within that negative space, the experiences of double (or more) minorities fall outside of legal precedents and are thus left without recognition and remedy under the law”⁴⁷.

Thus far human rights instruments and mechanisms of protection have not shown a great capacity to deal with these multifaceted experiences. Yet, law is not fixed, and the reparatory discourse can evolve and help to provide justice, albeit partial, to indigenous women; again, in order to do so, the dual dimension of indigenous women’s experience needs to be acknowledged.

To bring more challenges to the present analysis, let us move to the problem of untangling indigenous women’s experience, to know it, albeit partially, and to understand how the weft of their experience can be translated from theory into practice; how it can be intertwined with the current human rights’ discourse of the Inter-American System.

⁴⁷ *Ibidem*, p. 209.

CHAPTER 2

INDIGENOUS WOMEN, ANTHROPOLOGY, AND LAW

2.1 Whose culture? Cosmovisions and Indigenous Women

In this section, we aim at traveling a road that is too often neglected. It is the road that brings us to the realm of indigenous women's voices, perspectives, and narratives. Indigenous women's voices are becoming stronger and vigorous; they can reveal us new paths that deserve to be studied since they are a powerful tool for enlarging the human rights discourse around indigenous peoples. Indigenous women's voices have been restrained for decades, but the dialogue between these women around the world has slowly grown over the years, building confidence and awareness. It is this network of indigenous women at the global level that can shape and reinforce the local level. It is necessary to give these voices a space if we aim at going beyond the incompleteness of a story narrated from one angle alone.

When we try to bring to the surface indigenous women's voices we have to face many obstacles, one of them is the fact that on many occasions, the men-led indigenous movements are not open to the idea of showing the violations and discrimination that happen inside their communities: problems such as violence, rapes, and discrimination against indigenous women are, in fact, perceived as a pitfall that can weaken the indigenous cause⁴⁸. In many parts of the world, this recalcitrance to address women's issues in the indigenous groups results in a lack of women's voice in the indigenous rights agenda.

To be more specific, we could ground this recalcitrance toward women's issues, as well as a pronounced use of violence against women, in quite a fair number of realities⁴⁹. Yet, the conditions under which violence become a pattern in many

⁴⁸ Indigenous Women's Forum (1st: 2008: Lima) Sharing progress for new challenges: memoirs, p. 130. A clarification is necessary: this tendency to hide the violations perpetrated against indigenous women inside the community is not universal, and in many indigenous movements indigenous women's voices are becoming stronger and respected. Thus, problems such as rape and violence are brought to the forefront and are slowly becoming part of some indigenous movements' agenda.

⁴⁹ For relevant data on violence against women in the countries under examination *see* for Mexico: <https://unstats.un.org/unsd/gender/Events/20%20Oct%202015/Mexico.pdf>, and for data on violence against women in Guatemala *see*: <http://evaw-global-database.unwomen.org/fr/countries/americas/guatemala>

indigenous communities presents some peculiar traits that are relevant to our inquiry. Investigating the *whys* and the *hows* behind the use of violence against indigenous women, their oppression and the obliteration of their demands represents a first step to enhance their representation within the indigenous movements and – as the lack of women’s voices is mirrored at the international level with instruments that are not capable of enhancing their perspective – in the international arena too. Let us consider the analysis by Mona Polacca, an indigenous woman from the Havasupai Peoples from the United States. In one of her speeches before the International Indigenous Women Forum, she recalls the time she was involved in a dialogue with a tribe in the Native American South West in Arizona. She reported that the men of the tribe admitted that there was a lot of violence in their community especially against women. She explains that the elders said that there were practices used to solve the intra-community problems (practices that have been forgotten and that did not involve the use of violence); that once, women were treated with respect⁵⁰. This example shows us that the questions posed by MacKinnon: “[i]s male supremacy sacred because it has become a tribal tradition? under what conditions?” and also “[s]ince when is male supremacy a tribal tradition?”⁵¹ are not a western feminist bias. In fact, an aspect that must be considered in explaining the use of violence against women in that indigenous community has to do with the remnants of colonialism and the wake of modernity⁵². It is these phenomena that slowly eradicated some positive practices and perspectives from the indigenous cosmovision.

Another issue that is worth addressing concerns the shortcomings behind many development interventions as well as judicial measures, that most often fail to take into account the intersection of ethnicity, gender, and class in creating discrimination. Indeed, gender and ethnicity are often seen as ‘mutually exclusive’ and ‘polarized’⁵³. This is the very way in which indigenous women are made invisible. To borrow the wise words of Clifford Geertz: “the things of this world, and human beings among them, are arranged into categories, some hierarchic, some coordinate, but all clear-

⁵⁰ *Ibidem*, p. 133.

⁵¹ MacKinnon, Catharine A. *Feminism unmodified: Discourses on life and law*. Harvard University Press, 1987. pp. 67-69.

⁵² Choque, María Eugenia, and Guillermo Delgado. *Indigenous women and transnational struggles: notes on renarrativized social memory*. No. 32. Chicano/Latino Research Center, Merrill College, University of California, 2000. p. 10.

⁵³ Radcliffe, Sarah A. *Dilemmas of difference: Indigenous women and the limits of postcolonial development policy*. Duke University Press, 2015. p. 3.

cut, in which matters out-of-category disturb the entire structure and must be either corrected or effaced”⁵⁴. Indigenous women live ‘at the intersection’, their demands as indigenous *and* women require a complex answer, an answer that both the international community and many indigenous movements fail to provide.

A first step to address this caveat is to examine the narratives and cosmovisions of indigenous women from some indigenous communities. We will discuss the Mayan movement in Guatemala since Guatemalan Mayan women have been particularly active in this attempt to resolve the division between culture and gender. They worked, and are working, in order to open a fissure in the indigenous movement through which slowly enlarging the discourse so to include their specific needs⁵⁵.

Mayan women from Guatemala have been particularly active in the last years in this process of finding and fostering their narratives as indigenous women. In this regard, there are principles that have been recovered by these women *from* their cosmogonies; as MacLeod reminds us: “from – and not opposing – Mayan culture, philosophy, and cosmovision”⁵⁶. Concepts such as complementarity and balance were given particular value since they are strongly rooted in these People’ symbolic order, hence they represent the best tool to enhance equality between men and women within the community.

Now, what is the meaning of these concepts?:

“complementarity means that everything, including men and women, constitutes important parts of the cosmos; Duality implies that everything in the cosmos has two sides or has positive or negative energies; The balance, refers to the harmony between all the elements and their energy”⁵⁷.

Further,

“Complementarity is the total experience of reality. The ideal is not the end of one of the opposites, but the harmonious integration of the two, a unity, as a dynamic and reciprocal union. The concept of complementarity refers precisely to this interconnection between all elements of the universe”⁵⁸.

⁵⁴ Geertz, Clifford. *Local knowledge: Further essays in interpretive anthropology*. New York, Basic books, 1983, p. 180.

⁵⁵ Hernández Castillo, R. Aída. "The emergence of indigenous feminism in Latin America." *Signs: Journal of Women in Culture and Society* 35.3 (2010): 539-545.

⁵⁶ Macleod, Morna. *Nietas del fuego, creadoras del alba: Luchas político-culturales de mujeres mayas*. Guatemala, FLACSO, 2011. p. 120. Unofficial Translation from the original version: “**desde** –y no oponiéndose a– la cultura, la filosofía y la cosmovisión mayas”.

⁵⁷ *Ibidem*, p. 122.

⁵⁸ *Ibidem*, p. 124.

This is a radical simplification of a cosmovision that is much richer than that; yet the example above helps us understanding that this way of crafting reality by indigenous women is a clear sign that they are looking to retrieve a conceptualization of life that goes beyond separation and looks for unity, a form of unity that includes differences rather than denying them or seeing them as incompatible opposites. If we look at Mayan cosmogony in this way we do understand how the fact that women have been slowly relegated to a position of subordination represents a great damage and loss for indigenous peoples as a whole. We can clearly understand that if we look at the role of Mother Earth in many indigenous cosmovisions. In this regard, the words spoken by Ángela Chislla from the Quechua peoples of Peru are particularly powerful:

“I am a woman just like Mother Earth: strong, fertile, protester, productive and quiet. I am also aware that they have tried to change us for over 500 years of our history, but we have survived and we are here before all those who tried to exterminate us. For more than 500 years, they have tried to change our history, this ancient history, our spirituality, our costumes our wisdom, our knowledge, and have also sacked our riches. Today they carry on sacking by means of their laws, ill-treating Mother Earth without any kind of compassion. They drill without even caring that it has life, they remove all of its organs and riches with which Mother Earth protects and looks after us and feeds us”⁵⁹.

This statement of an indigenous woman from Peru can be found also in the Mayan epistemology. Indigenous women around the world have shown this idea of complementarity and interdependence between living creatures and Mother Earth. The Earth seen as a mother, a woman, has in indigenous women *her* best ally. If women are left behind in the indigenous struggle, if women narratives are not brought forward then the whole indigenous struggle will be weakened. Unfortunately, the deep meaning of these concepts, and thus their translation in everyday life has been partly lost, affecting the relationship among indigenous man and women within the community. Another issue that is worth mentioning is that these principles started being used by Mayan man in such a way as to naturalize the subordination of women and the asymmetry of power between men and women.

In regard to this asymmetry of power, the words of Marta Juana López, a Mayan indigenous woman, are very significant especially for the clarity with which she

⁵⁹ Indigenous Women's Forum (1st: 2008: Lima) Sharing progress for new challenges: memoirs, p. 138.

unties the link between machismo and indigeneity: “The Mayas are macho because they are men, not because they are Mayans”⁶⁰ a statement that is very similar to MacKinnon one’s that we previously mentioned. We cannot hide behind the veil of cultural diversity, we can not just defend women’s oppression and subordination as cultural diversity. We must ask ourselves: since when these practices are there? whose interpretation of that particular indigenous community’s culture are we listening to? Intersectionality can help us at least to identify these challenges, it can help us understand the manifold cause beneath the oppression and discrimination indigenous women have to face. It is only through this deep understanding that indigenous communities, the international community, and CSOs can actually find an appropriate way to confront these enduring injustices.

This deep rethinking and re-appropriation by indigenous women of their people’s cosmovision is not a characteristic just of the Guatemalan Mayan women, in fact, we can find other examples of this process also in the rest of the Americas. Indigenous women are rediscovering their culture and “re-narrativizing” their imageries, histories, practices, and traditions⁶¹. It is a powerful act of re-appropriation of one’s voice within a culture, not against it. Mames indigenous women in Mexico are another suitable example of indigenous women who are trying to enlarge the indigenous peoples’ discourse; on the one hand, they are supporting the indigenous cause and struggle and on the other, they are advancing and promoting their rights and needs as indigenous women. They are opening a space for dialogue within their community and outside the community⁶².

Going back to our main example, the Mayan movement in Guatemala has been a space of resistance and protest, it has been a space in which to claim for the recognition of the indigenous reality, buried beneath the post-colonial and neoliberal discourse in the Guatemalan society. Within the movement, dissident voices slowly grew, it is the voices of women who criticize some interpretations of their own culture by the men of the community and ask for the recognition of their perspective, a perspective that a hegemonic discourse has deleted. A movement that too often

⁶⁰ Macleod, Morna. *Nietas del fuego, creadoras del alba*, op. cit., p. 136. Author’s translation.

⁶¹ Choque, María Eugenia, and Guillermo Delgado. *Indigenous women and transnational struggles: notes on renarrativized social memory*. No. 32. Chicano/Latino Research Center, Merrill College, University of California, 2000. p.8.

⁶² Hernández Castillo, Rosalva Aida. "La otra frontera." *Identidades múltiples en el Chiapas poscolonial*. México: CIESAS, Miguel Angel Porrúa (2001). p. 234.

emphasized the struggle between the mainstream Guatemalan reality and the indigenous identity. While struggling to gain some recognition as indigenous, the movement often kept aside the heterogeneous demands coming from within the movement; so that indigenous women's issues remained negligible requests, ancillary demands. The Mayan cosmovision as re-read by Mayan men served as a powerful weapon to keep women in a subordinate position. Yet, from inside the movement, women started to question this hegemonic interpretation. Women started untangling the threads of the Mayan indigenous cosmovision. It is, as MacLeod would put it, a "lucha en el terreno simbólico"⁶³, it is in this symbolic space that they fight for the practical transformation of their lives. The meaning of complementarity, duality, and balance needs to be re-read so to retrieve a non-exclusionary culture, a cosmovision that includes indigenous women's perspective. Yet, this process of transformation is doomed to failure if the 'side of the law' keeps excluding these women's visions and claims.

2.2 Indigenous Women and International Law

This section aims at investigating whether the international discourse on indigenous peoples adequately addresses the needs and rights of indigenous women. In order to do so, we will analyze the UNDRIP – considered by most of the scholars⁶⁴ as the most progressive instrument for the protection of indigenous peoples– and we will not forget the general normative framework in which indigenous peoples' rights are enshrined. We will try to assess to what extent these instruments protect the rights that are specific to indigenous women.

The current international human rights framework possesses key instruments of protection of indigenous peoples and women so that we can say that indigenous women are protected as indigenous people by the UNDRIP, and as women by, for example, the CEDAW, or the Convention of Belém do Pará. What we are stating here is not a lack of protection in International Law for indigenous people *or* for women. Nonetheless, when we go beyond this duality and we ask International Law how does it deal with Indigenous women's rights, here we find the gap. The human rights

⁶³ Macleod, Morna. *Nietas del fuego, creadoras del alba*, op.cit., p. 120.

⁶⁴ See for example, Pulitano, Elvira, and Mililani Trask, eds. *Indigenous Rights in the Age of the UN Declaration*. Cambridge University Press, 2012; see also Charters, Claire, and Rodolfo Stavenhagen, eds. *El desafío de la Declaración*. IWGIA, 2010.

discourse falls short in including these women under its aegis of protection; their voices and needs are overlooked.

2.2.1 *The UNDRIP and Indigenous Women: Shortcomings*

Moving to the substance of the matter, let us analyze the provisions contained in the Declaration through uncommon lenses. Let us not focus on the benefits and achievements brought about by the UNDRIP but on what is absent. The architects of the Declaration did a progressive work, no doubts, yet good intentions aside, indigenous women weren't given a great deal of attention –too much an alien theme for many.

Only 3 of the 46 articles that compose the Declaration mention indigenous women. Article 21(1) calls for States to pay attention to “the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities”⁶⁵. Then, art. 22 strengthen the idea. Art 22(2) calls for States “in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”⁶⁶. The last article that is worth mentioning is art. 44 that reads: “All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals”⁶⁷.

These positive elements notwithstanding, we must underline that the Declaration remains very vague as to the ‘rights and special needs’ of indigenous women; there is no declination of these elements. Also, the Declaration is supposed to apply equally to both indigenous man and women; yet, that *neutral* approach can be a very negative one for women, since it puts men and women on the same level when women actually face other, and multifaceted, discriminations that men do not suffer. If difference is rendered invisible beyond the veil of an equality that does not exist in reality, then dangerous consequences on indigenous women’s lives might emerge⁶⁸.

Another caveat on the Declaration is the fact that women’s needs are put alongside with those of children, people with disabilities and the elderly. From that

⁶⁵ UNDRIP, art. 21(1).

⁶⁶ *Ibidem*, art. 22(2).

⁶⁷ *Ibidem*, art. 44.

⁶⁸ Kuokkanen, Rauna, “Indigenous Women's Rights and International Law: Challenges of the UN Declaration on the Rights of Indigenous Peoples” (2014) in *Routledge Handbook of Indigenous Peoples’ Rights*. Eds. C. Lennox & D. Short. Routledge, 2016. Available at SSRN: <https://ssrn.com/abstract=2414293>.

conceptualization of women, we can see how they are considered to be inherently vulnerable⁶⁹. Yet, women are not inherently vulnerable, and an international document that fails to look at this vulnerability as the result of a structural oppression must be deemed inadequate to create any positive change for indigenous women. The aforementioned shortcomings do not pertain only to the UNDRIP, on the contrary, they are a sort of leitmotiv to the whole human rights edifice. Yet, it is worth noting that the American Declaration on the Rights of Indigenous Peoples represents a step forward in the ongoing process of creating a more comprehensive and inclusive edifice of human rights that is able to address the specific issues of indigenous women. The American Declaration handles the issues of gender equality, violence and discrimination against indigenous women. Indigenous women's issues are mentioned in articles 7, 27, 30 and 32 of the Declaration, they are given a space that until 2016 no other document ever gave them. This notwithstanding, much still needs to be done since, as MacKinnon points out, "[h]uman rights have not been women's rights – not in theory or in reality, not legally or socially, not domestically or internationally"⁷⁰.

Further, MacKinnon, as well as many other feminist scholars, sharply remarked that human rights focus on those violations that take place in the public sphere. However, most of the violations suffered by women are likely to happen in the private sphere. Again, the violations experienced by women are to some extent different than those experienced by men. Is this difference taken into account in the UNDRIP, or is it overlooked? As Charlesworth points out, domestic work, childbirth and reproduction-related issues are not addressed by the array of international human rights instruments that concern indigenous peoples nor by the UNDRIP. This universal-neutral wording that permeates the conceptual framework of universal human rights instruments makes women's issues invisible⁷¹.

The UNDRIP was designed to address and protect indigenous peoples, and, to many extents, it does comply with the objectives it sets out. Yet, it does only partially

⁶⁹ For a thorough analysis of the topic (though from another geographical angle) see Ertürk, Yakin. Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to Sweden. A/HRC/4/34/Add. 3, 2007; see also Iorns, Catherine J. "The Draft Declaration on the Rights of Indigenous Peoples." *Aboriginal Law Bulletin* 3.64 (1993): 4-5.

⁷⁰ MacKinnon, Catharine A. "Rape, genocide, and women's human rights." *Harv. Women's LJ* 17 (1994): 5.

⁷¹ Charlesworth, Hilary (1994). What Are "Women's International Human Rights"? *Human Rights of Women: National and International Perspectives*. Cook, R. J. Philadelphia, University of Pennsylvania Press: 58-84.

address indigenous women concerns. This shortcoming is worrisome since the Declaration was supposed to be the turning point for indigenous peoples; it was designed to be innovative and advanced, to avoid the gaps and overcome the pitfalls perpetuated by international human rights law until then. Yet, in the end, it did not; again indigenous women's issues are rendered invisible by a gender-neutral approach and the only provisions that mention women indirectly label them as inherently vulnerable.

Structural oppression and discrimination are not mentioned, let alone challenged. The intra-group dynamics of oppression and the discrimination and oppression stemming from the wider society are not dealt with⁷².

2.3 Women's Voices: An Indigenous Women Perspective on Cosmivision, Power Relations and Justice⁷³

This section aims at bringing to the surface that *file rouge* that links indigenous cosmivision and gender perspective; it is an attempt to give voice to indigenous women's histories and worldviews through oral interviews. During the interviews, the focus was placed particularly on three thematic areas: cosmivision, power relations, and justice. To decline it in a more thorough way: first, we tried to assess the relevance of the feminine principle in various indigenous communities' cosmogonies: the focus was placed on the Myths, spirituality, and principles that guide each of the communities, such as the principles of complementarity, balance and duality. In this regard, it was particularly interesting to hear of the relation linking women to Mother Earth in indigenous peoples' cosmivision. Then we moved to the theme of power relations within the community; we focused on violence and discrimination against indigenous women and on the role of colonialism and the influence of the liberal Western world in modifying the power relations between men and women within the community. Finally, the attention was drawn to the realm of justice; this part of the interview, in particular, puts to the forefront the link between cosmivision and justice.

⁷² Kuokkanen, Rauna, "Indigenous Women's Rights and International Law", op. cit., p. 129 ss.

⁷³ Special thanks to the indigenous leaders who agreed to participate in the interviews: Guadalupe Martinez, Olympia Palmar, and Iris Brito.

To anticipate some of the conclusions, these interviews allow us to discover a profound link between the individual and collective perception and consequences of violence. In particular, we investigated gender-based violence and how it affects the victim. In this regard, the interviews show a common belief among the representatives of the different indigenous communities that the experience of violence affected not only the direct victim but the whole family and the community. The presence of the Military, then, give us the possibility to explore the link *cuerpo-territorio*, to illustrate how the Military occupation of a territory influences the communities' life. Finally, these interviews illustrate the perception of justice among indigenous communities and how being an indigenous woman negatively affect the achievement of justice.

2.3.1 Interview with Guadalupe Martinez, Náhuatl Indigenous Community, Mexico

The interview with Guadalupe Martinez emphasized many important aspects of the cosmovision of the Náhuatl Indigenous Community. First of all the deep connection between plants, animals and human beings. In Ms. Martinez's culture, the Earth is perceived as feminine (Mother Earth). In her people's culture, there is a ritual calendar of 272 days which approximately correspond to the gestation of a baby. As to symbolism, the serpent that is the carer of the Milpa is female. The serpent is very important, it is cherished. So we can see how many symbols in the cosmovision are associated with the feminine principle and play a very powerful and positive role. Also, mythology and cosmogony are associated with the feminine and its creative power.

Mother Earth. *She* is the most important, she feeds all the creature of the planet. There are rituals connected to Mother Earth that deals with cultivation, life, and death; for example, the placenta and umbilical cord of newborn babies in some communities are buried in the earth, they need to go back to Mother Earth. Her culture was very feminine oriented one, with a complementarity of the feminine and masculine principles in every dimension; for every feminine principle there is a masculine one: there is a Lord of the Dead and a Lady of the Dead. The colonization process brought a fracture in this cosmovision introducing very masculine-oriented principles. The introduction of the Christian religion, in particular, has created a chasm in the indigenous way of life, because this religion introduces a male god that

is the lord of the sky, the Earth, everything; so that the balance, duality, and complementarity that used to guide this community was strongly corrupted.

Mrs. Martinez also emphasized the importance of the native language explaining that when you lose your language you lose a way of feeling, of understanding, you lose your cosmovision.

As to the bi-univocal relation connecting *cuerpo* and *territorio*, according to indigenous peoples the Earth has life, there is an interrelation between people and Nature. Women are part of a territory, so that if you violate a woman you send a message to the whole community living in the territory. Also if you violate a territory (with mines, oil drilling, deforestation, etc.) you profoundly violate a people's identity, especially women, given their relation to Mother Earth.

When addressing the topic of the decision-making process within the indigenous community, Mrs. Martinez explained community women have decisional power, go to the assembly etc. so that there is not a lack of representation of women within the community.

2.3.2 Interview with Olympia Palmar, Wayuu Indigenous Community, Venezuela

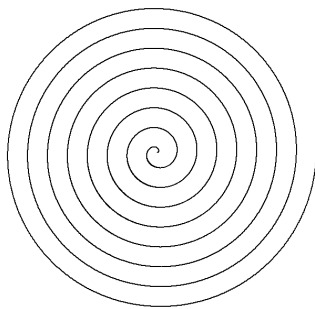
In her people's cosmogony according to the sacred narration, at the beginning, there were the Constellations, that are formed by *Oscuridad*, *Claridad*, *Mar*, and *Frio*⁷⁴. When the Clarity arrived, it rained. The rain (masculine) fell in love with the Earth (feminine) and fecundated it, the second generation was born, plants; then the third generation follows, it is the animals; and the fourth, humans. Humans were given two gifts, the gift of reason and the gift of speech. Words are very meaningful in this indigenous community. There is a link between words and justice. With Mrs. Palmar, the focus was placed particularly on justice. The justice system is guided by men. When there is a conflict, or a violence is committed, the two uncles of the victim and the victimizer lead the talk; but the women of the family accompany them. Women do not talk during the meeting; publicly women do not talk but this does not mean they do not partake in the process: before going to the house of the victimizer to obtain justice, in fact, the women talk to the men, they construct the discourse, they prepare what is going to happen during the meeting. Before the meeting they also perform some rituals, they talk to the rain, to Nature, to assist the process.

⁷⁴ The four Constellations: Obscurity, Clarity, Sea, and Cold.

Recognition of the wrong done it is very important in this community. Recognition is a fundamental part of the justice process.

Another relevant aspect is that the individual is embedded in a community, the subject is a collective subject. So, justice has a collective reach as well.

Life is seen in this community as a spiral where the individual, the community, plants, and animals interconnect and flow together. That explains why when looking for justice there is not a separatist approach but an inclusive one that does not forget the collective dimension in which the individual is embedded.



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According to the interviewee, the Militarization of the region is the first violence against the territory and against women. Women feel violated by this military occupation, because of their direct link with the earth. As to territory, many indigenous women are imprisoned because they cross the border between Venezuela and Colombia to trade their products. But actually, the ancestral territory of the Wayuu exists at the intersection of these two States. the Wayuu people live at this crossroad of the two States. They do not feel as separated because of an institutionally imposed border. Women suffer the most this discrepancy between their ancestral territory and the artificial border.

2.3.3 Interview with Iris Brito, Nabaj indigenous people, Guatemala

Mrs. Brito comes from the Nabaj indigenous community and speaks Ixhil. She works with women who survived gender-based violence. During the interview, Mrs. Brito focused her attention particularly on the healing process after the violence is suffered.

⁷⁵ This is a reproduction of a drawing by Ms Palmar that represents Life. Life is a spiral where the individual, the community, plants, and animals interconnect and flow together. After drawing the spiral she drew some dots representing animals, plants and peoples, then she divided the spiral with some lines as to explain that all the different aspect of one's life –as well as past, present and future– though might appear separated are in reality interconnected in the circularity of the spiral.

She explained that the healing process is linked to the indigenous cosmivision. Healing starts from the reality one comes from, and indigenous rituals and plants are used. Plants are very relevant in this healing process. During the conflict in Guatemala, there has been a fracture and women partly lost the knowledge of the plants, now they are recovering it.

There is an understanding of reality among her community, especially as for women are concerned, that can be explained as a tight link: *cuerpo-Tierra*. Both the body of a woman and a territory can be violated and appropriated. A woman is not the owner of her body nor of land. During a conflict, it is very common to use sexual violence against women to take the control over a territory, a community. So both the body and the land need to be (re)appropriated by women, the lack of control on these two symbolic as well as physical spaces is the key to the debasement and oppression of indigenous women. The body, Mrs. Brito explained, is the first battle-ground for every woman, the body as the land is a *territorio de lucha* for these indigenous women.

Finally, the interview led us to discover the role of women within the community. According to Mrs. Brito, many indigenous leaders put women aside. Colonialism and then the entrance of the Western liberal world affected negatively the power relations within the community. As to the decision-making process in her region, there is rarely a woman leader. The specific fight of women is not supported by indigenous men and generally, women do not have power in the movement.

According to their cosmivision, every person has a Nahual, a spiritual animal. If we consider Hernandez Castillo's Official Expertise Anthropological Report in the case of Inés Fernández Ortega v. Mexico we can learn more as to the relevance of this spiritual animal in the lives of indigenous peoples who share this belief. The expert explains that because of the violence Inés experienced, her spiritual animal— which according to the cosmivision of her indigenous community is also a protector— suffered the violence too, and, as exposed by Inés' mother-in-law, her spiritual animal has left, and went to the mountains unable to come back⁷⁶. The healing process can not be complete as long as this separation persists, and the achievement of justice is the key for this healing to happen.

⁷⁶ Hernández Castillo, R. Aída. *Multiple InJustices: Indigenous Women, Law, and Political Struggle in Latin America*. TUCSON, University of Arizona Press, 2016, p. 241.

2.3.4 Final remarks

As to indigenous peoples, in most cases the *subject* of rights it is not the individual, it is a collective subject. In this regard, indigenous peoples in Latin America are looking for a philosophical and legal change that takes into account collectivities. It is a battle on the cognitive field, in States built on the ideal of the individual as the only right-holder. We saw how within indigenous communities, some principles have been forgotten or debased by the colonialist and later on by the liberal world impositions of an epistemic hegemony. The right path for indigenous peoples (with the active participation of women) is to recover and re-narrativize these principles and to address power relations.

Indigenous Cosmovisions can be a powerful tool, a space in which and from which a reconstruction of the balance within the community is made possible. Indigenous cosmovision as re-narrativized by indigenous women doesn't mean that a "separatist standpoint"⁷⁷ is created where masculine and feminine are separate from one another, it is not a process that aims at creating division, but at recovering principles and a harmony that too often has been lost within the community. The indigenous women that have been interviewed for the present work highlighted the relevance of the collective dimension to them and the indigenous cosmovision. So to say, any re-narrativization, any process of fighting for indigenous women's right is not an attempt to deny the value of the community and so to place the individual at the top, it is an attempt to create a more just space for women within the community. Cosmovision is a powerful symbolic space in which the connection between gender and indigenous values is critically analyzed by indigenous women. A clear sign that there is in many indigenous movements a powerful attempt by women to recuperate some values that have been lost and upon which to reconstruct a balanced and respectful indigenous epistemology⁷⁸.

The intention of this section was to encourage reflections on the importance of understanding indigenous cosmovision when developing a reparation scheme. This focus on indigenous cosmovision and the interconnectedness of gender and indigeneity should never be lost by the judicial bodies charged with the task of

⁷⁷ *Ibidem*, p. 14.

⁷⁸ In this regard *see*: de Sousa Santos, Boaventura. *Epistemologies of the South: Justice against epistemicide*. Routledge, 2015.

defending and promoting indigenous peoples' rights. It was a way to open a window on the approach that the human rights discourse should develop in order to overcome the tension between women's rights and indigenous peoples' rights. The analysis of Hernández Castillo is particularly sharp as to the growing efforts that indigenous women are taking to enlarge their influence in indigenous movements and before the international community. To use Hernández words, indigenous women are "developing their own discourses and political practices from a culturally-located gender perspective"⁷⁹. This standpoint is key to advance the protection of indigenous women and indigenous peoples as a whole. A hegemonic discourse that tries to silence some of the voices within the indigenous movement, in fact, can only impoverish it. Women are acting according to a culturally-sound perspective, they do not forget the powerful link between the individual and the collective dimension. And it is from this standpoint that reparations for indigenous women should be developed.

2.4 Invisible Intersections

The idea that underlies the whole section is that the international discourse on indigenous peoples is falling short of answer when faced with indigenous women's needs. Dilemmas arise once we leave the safe ground of the mainstream perspective for uncharted waters. In this regard, we must advance a remark: what the international community is failing to acknowledge is not the need for a gendered analysis nor it is lacking a focus on indigeneity, the issue here lays at the intersection of these two worlds.

So far the mainstream international discourse of human rights has been shaped to respond to either one or the other issue – to be more specific, either to the women issue or to the indigenous one. Thinking away from this *aut aut* approach we can say that ethnicity, sex, religion or whatever ground of discrimination, interweave. Failing to recognize this pitfall is the very problem keeping the violations against indigenous women invisible.

Thinking away from theory, we will now try to delve into practice using case studies from Mexico and Guatemala; we will assess how gender and indigeneity intersect and most importantly we will address the key issue of the capacity of the

⁷⁹ Hernández Castillo, R. Aída. *Multiple InJustices*, op.cit., p. 106.

Inter-American Court to embrace indigenous women's cosmovisions, perspectives, and needs in its reparatory discourse. *Ça va sans dire*, the capacity to embed the intersectional approach in its practice will be assessed as well.

CHAPTER III
THE RIGHTS OF INDIGENOUS WOMEN: A CALL FOR AN
INTERSECTIONAL APPROACH

3.1 Case *Plan de Sánchez Massacre v. Guatemala*⁸⁰

The aim of this section is to investigate how gender intersects with indigeneity and other forms of discrimination in Guatemala placing women in a condition of particular vulnerability. More specifically, we will try to assess the adequacy of the reparations awarded by the Inter-American Court of Human Rights in the case *Plan de Sánchez Massacre v. Guatemala*. We will analyze the extent to which the failure to recognize this intersection by the Inter-American Court in the case *Plan de Sánchez v. Guatemala* –where reparations have been awarded without a concrete focus on gender– negatively affects women, enhancing their invisibility and the invisibility of violence committed against them. First, we will present the facts of the case, then we will examine the reparations awarded by the Court and discuss achievements and shortcomings of the reparations awarded.

3.1.1 Facts

This case concerns a series of grave human rights violations that took place in 1982 during the internal armed conflict that devastated Guatemala for more than 30 years. On July 18, 1982, in the afternoon, a group of 60 men (members of the Army, the *Patrullas de Autodefensa Civil*, and military agents) entered the village of Plan de Sánchez, Municipality of Rabinal; they took girls and young women to one place and raped and murdered them. All the others (the elderly, boys and men) were gathered and executed in another house. In the end, during the massacre, about 268 people were killed (mostly Maya Achi people). The two locations, where the rapes and murders happened, were finally set on fire⁸¹. Later that day some military agents from

⁸⁰ I/A Court HR, *Masacre de Plan de Sánchez v. Guatemala*, Judgment of 5 May 2004 (Merits), Ser C No 105; judgment of 19 November 2004 (Reparations), Ser C No 106.

⁸¹ I/A Court HR, *Masacre de Plan de Sánchez v. Guatemala*, judgment of 19 November 2004 (Reparations), Ser C No 106, para. 49(2).

two neighboring villages (Chipuerta and Concul) arrived at Plan de Sánchez together with some members of the PAC, they authoritatively commanded the survivors to quickly bury the corpses⁸². Eventually, the commando destroyed the rest of the houses and stole everything belonging to the community⁸³.

3.1.2 Reparations awarded by the Inter-American Court

Now, let us explore the judgment in a more thorough way. The Court found that the State of Guatemala was to be held responsible for the violation of many rights enshrined in the American Convention on Human Rights, namely the right to humane treatment, right to a fair trial, right to privacy, freedom of conscience and religion, freedom of thought and expression, freedom of association, and right to property, right to equal protection, right to judicial protection⁸⁴. Accordingly, the Court ordered a set of measures of reparation.

In the judgment on reparation issued in November 2004, the Court ordered Guatemala to investigate the facts of the massacre perpetrated in Plan de Sánchez in order to identify, as well as to prosecute and punish those responsible⁸⁵. The Court particularly stresses the importance to fight judicial ineffectiveness; impunity in fact not only hinder the healing of the victim, preventing them from obtaining justice but also, with an eye to the future, “encourages the chronic repetition of the human rights violations in question”⁸⁶.

Another relevant measure of reparation ordered by the Court concerns the organization of a public act in which the State recognizes its responsibility for the events. Already in April 2004, at the public hearing, the State expressed its regret for what happened on July 18, 1982. The State also apologized to the victims, their relatives, and the survivors. Finally, the State acknowledged its international responsibility for the massacre and the violations of the above-mentioned articles of the American Convention⁸⁷. Yet, the Court deems that this act of acknowledgment is

⁸² *Ibidem*, para. 49(3).

⁸³ *Ibidem*, para. 49(4).

⁸⁴ *Ibidem*, para. 17.

⁸⁵ *Ibidem*, para. 94 to 99.

⁸⁶ *Ibidem*, para. 95.

⁸⁷ *Ibidem*, para. 100.

not enough to repair the victims, and orders the State to carry out a public act to acknowledge its responsibility:

“the Court considers that the State must organize a public act acknowledging its responsibility for the events that occurred in this case to make reparation to the victims. The act should be carried out in the village of Plan de Sánchez, where the massacre occurred, in the presence of high-ranking State authorities and, in particular, in the presence of the members of the Plan de Sánchez community and the other victims in this case [...] Also, Guatemala must conduct this act in both Spanish and in Maya-Achí, and publicize it in the media”⁸⁸.

This act will serve also as a platform wherein to honor the memory of the victims of the massacre⁸⁹. In order to better understand the role of memory in a reparation process, it is worth recalling the words of Judge Cançado-Trindade:

“Memory is enduring, it resists the erosion of time, it surges up from the depths and darkness of human suffering; since the routes of the past were traced and duly trod, they are already known, and remain unforgettable. In this respect, a great thinker of the twentieth century said that we should never ignore “respect for the eternal human rights, appreciation for what is old, and the continuity of the culture and history of the spirit.” [...] In summary, the human conscience is the material source of all law. The collective conscience of the members of the Mayan people has given eloquent testimony of its spiritual, individual and collective existence, which identifies, connects and distinguishes them. The fate of each one of them is inescapably linked to that of the other members of their communities”⁹⁰.

The memory of the victims needs to be honored because according to these people’s spirituality there is a permanent link with the dead. The balance between the two dimensions is endangered in the moment in which the violence perpetrated against the departed is not recognized. The rest of the community can not move forward with this unresolved issue. Honoring the memory of the victims is a necessary step in the path towards effective justice and towards a more just future. As to memorialization, we can affirm that the progressive jurisprudence of the Court was able to evolve in time and adequately develop to give voice to the victims’ needs. This opinion by Judge Cançado-Trindade is a clear example that an approach to reparations – where remembrance and justice go hand in hand, has been taken

⁸⁸ *Ibidem*, para 100.

⁸⁹ *Ibidem*, para. 101.

⁹⁰ I/A Court HR, *Masacre de Plan de Sánchez v. Guatemala*, Merits, Separate Opinion of Judge Cançado-Trindade, Epilogue, para. 41 and 43.

seriously by the Court; the Court indeed has acknowledged the relevance of memory in contributing positively to the recovering of the victims⁹¹.

Another relevant measure of reparation concerns the translation of both the judgments of the Court (Merits and Reparations) into the Maya-Achí language. Also, the Court deems necessary a publication in Spanish and Maya-Achí of the most pertinent parts of said judgments⁹².

Moving on to other reparatory measures, the Court orders the State to provide medical treatment to the victims. The treatment needs to be comprehensive so to include also psychological and psychiatric treatment⁹³. The Commission indicated that it was necessary to focus on the particular violations committed against women:

“The Court should order the State to formulate plans to assist the recovery, rehabilitation and full reincorporation into the community of the women who were victims of rape, in conjunction with the women leaders of the community and mental health professionals”⁹⁴.

Despite this indication by the Commission, the Court did not mention any specific plan to support women victims of rape.

Other measures aimed at preserving and fostering the Maya-Achí culture, deeply endangered by the loss of the elderly and the women of the community, who are the transmitters of the culture in all its aspect, from language to rituals. Their death produced a vacuum in the transmission of culture that has troublesome consequences for the identity of the community as a whole⁹⁵. To this extent, the Court ordered the State to develop programs aimed at countering the loss of the Maya-Achí culture⁹⁶.

⁹¹ As to the need to respect the victims’ perspective and traditions when ‘pursuing justice’, see: Separate opinion of Judge Antônio Augusto Cançado Trindade in Judgment of the Inter-American Court of Human Rights in the case of the *Moiwana Community versus Suriname*, para. 93: “It is incumbent upon all of us, the still living, to resist and combat oblivion, so commonplace in our post-modern, ephemeral times. The dead need our faithfulness, they are entirely depended upon it. The duties of the living towards them are thus not limited to securing respect for their remains and to granting them a proper burial; such duties also encompass perennial remembrance. [...] Remembrance is a manifestation of gratitude, and gratitude is perhaps the noblest manifestation of rendering true justice.”

⁹² I/A Court HR, *Masacre de Plan de Sánchez v. Guatemala*, Reparations, para. 102-103.

⁹³ *Ibidem*, para. 107.

⁹⁴ *Ibidem*, para 90 i).

⁹⁵ *Ibidem*, Testimonial and expert evidence, para 38 d) Expert report of Augusto Willemsen-Díaz.

⁹⁶ *Ibidem*, para. 110: “Given the harm caused to the members of the Plan de Sánchez community and to the members of the communities of Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac, owing to the facts of this case, the Court decides that the State shall implement the following programs in these communities (in addi-

It goes without saying, the Court ordered compensation for pecuniary and non-pecuniary damages⁹⁷.

3.1.3 Analysis

After a brief overview of the reparations awarded by the Court, in the following section, we will try to address some of the shortcomings of such reparatory scheme, with an eye to possible alternative or complementary measures that could have responded in a more proper way to the needs of indigenous women.

First, if the rationale behind reparations is to compensate for the violence and losses that the victim suffered and nothing more, then the chance that the victim can heal from the harm is very little. Whereas, if reparations are conceptualized in a more comprehensive way with the aim to transform the overall situation, the chances that these women can heal and live a more just life are greater. So to say, a reparation scheme that does not address the structural problems that brought to the violence suffered is quite useless. Instead, it should be a project that engages the entire society and community in the attempt to transform those features that put women in a situation of disadvantage and invisibility.

Another missing piece in this mosaic is the involvement of women victims in the process of designing the reparation measures. As stated by Rubio-Marín and de Greiff: “[c]onceived as a space for the participation of victims, the design and implementation of an administrative reparations program can, in itself, be a project that offers women a reparative sense of recognition both as victims and as valuable agents of political and social transformation”⁹⁸.

We are witnessing a judgment that is progressive to many extents, yet the violations that targeted indigenous women, because they were indigenous *and* women, are not given space in the reparation scheme ordered by the Court. Most

tion to the public works financed by the national budget allocated to that region or municipality): a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization; [...] d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities”.

⁹⁷ *Ibidem*, para. 72-76 and 117.

⁹⁸ Rubio-Marín, Ruth, and Pablo de Greiff. "Women and reparations." *The International Journal of Transitional Justice* 1.3 (2007): 318-337, p. 324.

importantly, this judgment leaves many issues unresolved so that the chance that this type of violence keeps happening is very high.

What is not taken into account is that this type of violence is followed by a situation of total impunity, nobody heard these women's voices. The Court is paying attention to the massacre and leaves behind rape. Women who were victims of rape and survived the massacre find before themselves a situation of impunity and of non-recognition of the extreme harm it was perpetrated against them.

Impunity came after physical and spiritual destruction took place. So, a part from the violence suffered on that 18 of July, the survivors had to face a situation of non-recognition of the awful events that took place, a situation in which any demand for justice was countered by a total lack of interest by the authorities, and this attitude pushed many victims to not report the violations they suffered, afraid of the consequences that a report of said acts of violence would have caused, such as further harassment by the military⁹⁹.

As stated in The CEH's report:

“The CEH's investigation has demonstrated that the rape of women, during torture or before being murdered, was a common practice aimed at destroying one of the most intimate and vulnerable aspects of the individual's dignity. The majority of rape victims were Mayan women. Those who survived the crime still suffer profound trauma as a result of this aggression, and the communities themselves were deeply offended by this practice. The presence of sexual violence in the social memory of the communities has become a source of collective shame”¹⁰⁰.

Rape, as well as the mutilation of corpses and various forms of torture, was “used by the State to cause social disintegration”¹⁰¹.

The lack of punishment of those responsible, the lack of justice, the failure to acknowledge this kind of violence perpetrated against indigenous women have a negative impact on the victims' lives causing shame and stigmatization. Indeed, what is the healing power of reparations if justice and truth are absent from the picture? If perpetrators are not effectively persecuted, and the truth not acknowledged, then,

⁹⁹ I/A Court HR, *Masacre de Plan de Sánchez v. Guatemala*, Reparations, Testimonial and expert evidence, para 38 e) Expert report of Nieves Gómez Dupuis, psychologist.

¹⁰⁰ Historical Clarification Commission. "Guatemala: Memory of Silence." *Guatemala City: Historical Clarification Commission* (1999), para. 91.

¹⁰¹ *Ibidem*, para. 50.

even the most adequate reparations will not be able to help the victims recovering from the damage suffered.

An aspect that the Court did not take in consideration is the multitude of obstacles that indigenous women have to face in their path to obtain justice. First and foremost, access to justice is rendered difficult. In the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, some indigenous representatives discussed with the Special Rapporteur on the topic and stated that:

“One of the most important and invisible issues is the participation of indigenous women. [...] Women are second-rate citizens [...]. For indigenous women, access to justice is doubly difficult. Women are faced with double discrimination and are totally unprotected, while no recourse is offered to them through the system of justice. [...] ¹⁰².

The discrimination that indigenous women in Guatemala have to face, and had to face in the aftermath of the Plan de Sánchez massacre, as women *and* as indigenous is not properly addressed by the Court.

The design of the measures of reparations does not address sufficiently and directly those types of violence that affect women. The problem is that the reconstruction of a community after a massacre can not do without indigenous women. So, when we analyze the case at hand we must not lose sight of the unresolved issues; we must go beyond the achievements and ask ourselves: in whose name are these reparations awarded? It appears that indigenous women’s particular concerns are rendered invisible under the apparently neutral and comprehensive label of ‘indigenous people’. Again, this judgment has many positive aspects, yet all the above-mentioned issues are not taken into consideration by the Court in ordering reparations. The judgment represents *per se* a good starting point, a first step in the process of protecting indigenous people, yet it is a process that needs to keep developing in order to become more comprehensive and inclusive.

Now, in order to assess the success of any judicial act, we must direct our attention to the national level and the willingness and capacity of the State to comply with the decision. In this regard, we will analyze the three last Orders of Monitoring

¹⁰² Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to Guatemala, UN Doc. E/CN.4/2003/90/Add.2, para. 46.

Compliance with Judgment of July 1, 2009¹⁰³; February 21, 2011¹⁰⁴ and November 24, 2015¹⁰⁵.

In 2009, the Court declared that the State had fully complied with the obligations to publish the Judgment in Spanish and in Maya Achí; to pay for the maintenance of the Chapel used by the surviving victims to preserve the memory and pay homage to those who were killed in the massacre. The State partially complied with the payments for pecuniary and non-pecuniary damages to the victims¹⁰⁶.

In the Order of Monitoring Compliance of 2011¹⁰⁷ the Court found that the State had fully complied with the translation of the American Convention in Maya-Achí

¹⁰³ I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of July 01, 2009.

¹⁰⁴ I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of February 21, 2011. (Only in Spanish).

¹⁰⁵ I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 24, 2015. (Only in Spanish)

¹⁰⁶ I/A Court H.R., Case of the Plan de Sánchez, Monitoring Compliance with Judgment of July 01, 2009, op.cit., Declares: 1. “That, in conformity with what has been indicated in this Order, the State has fully complied with the following operative paragraphs of the Judgment on Reparations: a) publication of the Judgment, in the Official Gazette and in another newspaper of national circulation, in Spanish and in Maya Achí, (operative paragraph five); and b) payment of the amount established for maintenance and improvements to the infrastructure of the chapel in which the victims pay homage to those executed in the Plan de Sánchez massacre (operative paragraph six). 2. That as stated in this Order, the State has partially complied, to the relevant extent, with the following operative paragraph of the Judgment on Reparations: a) payment to Salomé Ic Rojas of the full compensation amount awarded to her by this Court for pecuniary and non-pecuniary damage in the Judgment on Reparations, in conformity with Considering clause 36 of this Order (operative paragraphs ten, eleven, thirteen, fourteen, and fifteen of the Judgment on Reparations)”.

¹⁰⁷ I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of February 21, 2011. (Only in Spanish) DECIDES: 1. “According to the terms of this Order, the State has complied with the translation of the American Convention on Human Rights into Maya-Achí, the dissemination of the translation in the municipality of Rabinal and its delivery to the victims (operative paragraph four of the Judgment on Reparations). 2. In accordance with the present Order, the State has partially complied with the following operative paragraph in relation to the following operative paragraphs of the Judgment on Reparations: a) To create programs in the affected communities on the study and dissemination of the Maya-Achí culture in these communities through the Guatemalan Academy of Mayan Languages, or a similar organization (operative paragraph nine of the Judgment on Reparations); b) To pay the heirs of Lucía Raxcacó Sesám the full compensation amount awarded to them by this Court as pecuniary and non-pecuniary damages, in accordance with Considering Clause 33 of the present Order (operative paragraphs ten, eleven, thirteen, fourteen, and fifteen of the Judgment on Reparations); and, c) To pay the heirs of Natividad Morales the full compensation amount awarded to them by this Court as pecuni-

and partially complied with the obligation to develop programs aimed at the dissemination of the Maya-Achí culture and to pay some of the victims for pecuniary and non-pecuniary damages.

It is worth noting that still in 2015 there were some pending issues, some obligations the State did not comply with. In 2015 the issue of investigation and possible punishment of the perpetrators and masterminds of the Plan de Sánchez Massacre were still open. This delay by the State in the realm of investigation and sanction¹⁰⁸ is particularly troublesome. In the previous chapter, in fact, we got acquainted with the conception of justice among different indigenous groups, and, as stated by the indigenous leaders, recognition is a fundamental part of the justice process. The perpetrator needs to recognize the wrong done, no justice can come out of unresolved issues. In this context of impunity there is no possible heal for the victims, and there is no chance to move forward because there is no closure; and violence, massacres, and rapes are openly tolerated. The persisting impunity not only foster violence but it also represents a strong disincentive from seeking redress.

In its order of 2015, the Court stresses the importance of identifying and tackling the structural obstacles that foster this situation of judicial ineffectiveness. The Court acknowledges the need to adopt the necessary reforms at the legal, institutional and political level¹⁰⁹.

ary and non-pecuniary damages, in accordance with Considering Clause 33 of the present Order (operative paragraphs ten, eleven, thirteen, fourteen, and fifteen of the Judgment on Reparations)”.

¹⁰⁸ I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 24, 2015. (Only in Spanish) para 135: “No obstante, según se puede observar de la información proporcionada, las dilaciones derivadas del uso de los recursos judiciales por parte de los imputados se ha perpetuado hasta la fecha, facilitando la continuación de la impunidad por los hechos que corresponden a las Sentencias señaladas previamente. Ello ha tenido impacto especialmente en las investigaciones penales en los casos Bámaca Velásquez (supra Considerando 69), Masacre Plan de Sánchez (supra Considerando 92) y Masacre de las Dos Erres (supra Considerando 111). Aunado a ello, la Corte no cuenta con información que acredite que los jueces respectivos hayan tomado alguna acción para dirigir dichos procesos judiciales hacia una conclusión, frente a los recurrentes recursos ejercidos por los imputados”.

¹⁰⁹ *Ibidem*, para. 174: “Finalmente, la Corte ha valorado que en el 2015 Guatemala cambió su actitud de desacato (supra Considerandos 25, 26 y 29) y que, recientemente, a finales de octubre de 2015, inclusive presentó, de oficio, un informe sobre el cumplimiento de la obligación de investigar, el cual da cuenta que en algunos casos, como Masacre Plan de Sánchez, se han dado pasos en las diligencias de investigación en el 2015. Sin embargo, es preciso advertir que Guatemala, en ninguno de los informes presentados durante el 2015, se refirió a los obstáculos estructurales identificados por la propia Fiscalía General de la Nación en mayo de 2014 (supra Considerandos 23 y 32). En vista de los obstáculos estructurales y comunes a los 12 casos identificados en la presente decisión de supervisión de cum-

That said, we can assess the commitment of the State in addressing this diffused violence against women, looking at the Report of the Special Rapporteur on violence against women. In her analysis, Rashida Manjoo addresses the issues of sexual violence and how the Penal Code of Guatemala criminalize it:

“In Guatemala, the current experience of massive and violent killings of indigenous women has a legacy stemming back to colonial times, further increasing during the 36-year armed conflict. Indigenous Maya women constituted 88 per cent of victims of sexual and systematic attacks, with such attacks being publicly and intentionally perpetrated, mainly by military and paramilitary personnel. After the 1996 Peace Accord, no efforts were made to seek justice for and provide reparations to the victims and their families. In fact, article 200 of the Penal Code (repealed in 2006) afforded immunity to perpetrators of sexual violence and kidnapping of women and girls over 12 years old, where the perpetrator subsequently married the victim. Thus a State-endorsed impunity was established, condoning all forms of violence, particularly against indigenous women”¹¹⁰.

Article 200 of the Penal Code granted immunity to perpetrators of sexual violence of girls over 12 years old and women, as long as the perpetrator married the victim. The law was repealed when Guatemalan Congress passed Decree 17-73¹¹¹. Yet, if we look at article 173 of the Penal Code, as now in place, we can appreciate only a minimal improvement in the criminalization of sexual intercourse¹¹² as the

plimiento de sentencias, Guatemala necesariamente debe dar respuesta a esta problemática. Los funcionarios que participan en las labores de investigación, juzgamiento penal y ejecución de condenas no deben afrontar estos obstáculos de forma aislada. La superación de los mismos debe comprender un análisis mayor, que permita determinar la necesidad de reformas, cambios o fortalecimientos a nivel legal, institucional o de políticas públicas”.

¹¹⁰ Rashida Manjoo, A/HRC/20/16, “Report of the Special Rapporteur on violence against women, its causes and consequences”, 23 May 2012, para. 63.

¹¹¹ Código Penal de Guatemala. Decreto No. 17-73. El Congreso de la República de Guatemala, available

at:<https://www.oas.org/dsp/documents/trata/Guatemala/Legislacion%20Nacional/Codigo%20Penal%20Guatemalteco%20DECRETO%20DEL%20CONGRESO%2017-73.doc>.

¹¹² Código Penal de Guatemala. Decreto No. 17-73. El Congreso de la República de Guatemala, artículo 173.”Quien, con violencia física o psicológica, tenga acceso carnal vía vaginal, anal o bucal con otra persona, o le introduzca cualquier parte del cuerpo u objetos, por cualquiera de las vías señaladas, u obligue a otra persona a introducirselos a si misma, será sancionado con pena de prisión de ocho a doce años.Siempre se comete este delito cuando la víctima sea una persona menor de catorce años de edad, o cuando sea una persona con incapacidad volitiva o cognitiva, aún cuando no medie violencia física o psicológica. La pena se impondrá sin perjuicio de las penas que puedan corresponder por la comisión de otros delitos”. *Reformado por el Artículo 28, del Decreto Del Congreso Número 9-2009 el 03-04-2009.

Guatemalan legislation now prosecute sexual intercourse when the child is under the age of 14.

3.1.4 Final Remarks

Impunity is a complicated task and, minimal improvements aside, the degree of impunity is still abnormally high in Guatemala, and it is one of the main reasons why indigenous peoples can not overcome the harm suffered and restore a personal and collective balance. Impunity is not just a legal phenomena, it is a widespread attitude with consequences that hit the legal, social and cultural dimensions. The capacity of the Court to inform the national level, so to push the State to overcome this phantom that impedes the pursuit and achievement of justice, does not go far enough in the case of Guatemala; the slowness in the State translation of the judgment into practice is a testament to this shortcoming.

Also, an analysis of the diverse and intersecting forms of discrimination that indigenous women face is fundamental when designing the reparatory scheme. In fact, too often the intersection of these grounds of discrimination passes by unperceived by the judicial organs. The Court in this judgment does not go far enough as to include indigenous women' specific concerns.

In order to remedy the violations suffered by indigenous women, the first step is to make their voice heard, they need to be involved in the reparation process; any measure of reparation, if it aims at being effective, need to suit the needs of the victims. In this regard, the Court could have adopted other measures and been bolder in its pronouncements.

This is not all. The most critical issue is that there is a divergence between the reasoning of the Court and those of the Commission and experts proposed by the Commission. In fact, both the Commission and the experts stress the need to address specifically the violations perpetrated against indigenous women. It looks as a wasted dialogue, or at least an interruption in the communication between these two bodies happened. The Commission and experts indicated the need to address the rape of indigenous women. Rape according to the experts, affects the body and spirit of women as well as the spirit of the community itself. It affects the perception of women within the community and has troublesome consequences for the identity of the community as a whole. Now, the Court in awarding reparations is not taking into consideration that women were raped *and* killed, and those who survived still need to

keep living with this non-criminalized and unrecognized violence. This lack of recognition makes it impossible to live that cathartic moment that is needed to restore a personal and collective balance broken by the events of that July 1982; recognition of the victims' suffering, in fact, is the first step to enable the victims to overcome their losses and the harm suffered.

To conclude, we can affirm that some of the conclusions reached by the Court in this judgment are progressive and adequate, and able to answer the needs of the indigenous people involved. Yet, some questions inevitably arise: whose voices are heard? whose voices are left behind? In the case at issue, the voices of indigenous women do not find a place in the reparation scheme. The Inter-American Court needs to further develop the edifice of remedial measures in a way to bring indigenous women's perspectives to the forefront.

In the next section, we will try to assess to what extent the Court was able to develop a more progressive stance and embrace indigenous women's cosmovision and needs in the reparatory scheme in the case of *Rosendo Cantú et al. v. Mexico*.

3.2 The Case of *Rosendo Cantú et al. v. Mexico*¹¹³

This section aims at investigating the role of reparations in the realm of indigenous women's rights.

We will focus our attention on the case of *Rosendo Cantú et al. v. Mexico* issued on August 31, 2010. We can consider this ruling by the Inter-American Court as the last one of a triad that includes also the cases of *González et al. v. Mexico* (herein after referred to as "Cotton Field"), and the case *Fernández Ortega et. al. v Mexico*. All the above-mentioned cases, in fact, deal with women's rights issues in Mexico. These are just a few cases that concern violations perpetrated against women, but killings, violence, and rapes against women in Mexico are not sporadic happenings quite the opposite, they constitute a pattern of State conduct¹¹⁴. The *Cotton Field*

¹¹³ Inter-American Court of Human Rights, *Rosendo Cantú et al. v. Mexico* (ser. C) No. 216, judgment of August 31, 2010 (preliminary objections, merits, reparations and costs).

¹¹⁴ Killings, violence and rapes against women in Mexico are not sporadic happenings but a pattern of State conduct. In regard to femicide in Mexico it is noteworthy the work of Marcela Lagarde: see Lagarde, Marcela. "Del Femicidio Al Feminicidio." *Desde El Jardín De Freud*, no. 6, 2006. Lagarde, Marcela. "Antropología, feminismo y política: violencia feminicida y derechos humanos de las mujeres." (2008).

case, in particular, represents a cornerstone, though it does not deal with indigenous women, it represents a standard setting case in regards to issues of discrimination and violence against women. The cases of *Fernández Ortega* and *Rosendo Cantú* contribute to the enlargement of the Court's reasoning dealing with the intersecting realms of indigenous peoples and women. In particular, the case under analysis deals with the rape and torture of an indigenous woman. This intersection of legal realms, instruments, and perspectives is a powerful tool that can propel the Court to develop its jurisprudence.

First, we will present the facts of the case *Rosendo Cantú et al. v. Mexico*, then we will delve into the judgment of the Court examining the violations and the conclusions reached by the Court, paying attention in particular to the awarded reparations. We will then discuss, in the third part, the achievements and shortcomings related to the decision, trying to determine the challenges ahead. Finally, we will conclude with some observations as for the relevance of the use of an intersectional approach in this case.

3.2.1 The Remedial Process: Reparations Awarded by the Inter-American Court of Human Rights

First of all some preliminary remarks: the Inter-American Court is not the first *space of justice* the victim took the case to; this step was the consequence of the many flaws in the national justice system that brought to the impunity of the perpetrators. Also, the case of *Rosendo Cantú v. Mexico* was chosen for the relevance of the conclusions reached by the Court and the potential it has in developing the jurisprudence of the Court. In particular, in the case at hand, we can witness the dedication of this judicial body to further develop a victims-based approach to the remedial process.

Further, the case introduces a number of fascinating matters such as the interrelation of the collective, indigenous and gender dimensions. We will focus our attention on the symbolic measures of reparations trying to assess the adequacy and effectiveness of said measures in light of all the previous discussion on indigenous cosmovision and indigenous women.

i) Background and Context

This section will present a judgment issued on August 31, 2010 by the Inter-American Court that deals with the rape of an indigenous woman by members of the Armed Forces in the state of Guerrero.

Valentina Rosendo Cantú is an indigenous woman from the Me'paa indigenous group. She was a minor when she was sexually assaulted in February 2002. She was married and lived with her husband Mr. Fidel Bernardino Sierra and their daughter Yenys¹¹⁵. After the violence suffered, she was rejected by the community and by her husband¹¹⁶.

In her testimony, Mrs. Rosendo Cantú recalled the events that brought to the sexual assault: she was washing clothes at a stream, afterward, when she was bathing, some members of the Military approached her. They were trying to obtain information about some men, “los encapuchados”¹¹⁷, she was threatened with the use of a weapon and she responded she did not know any of them. Then she was hit in the stomach in the attempt to obtain the requested information. Eventually, one of the soldiers raped her. Once he finished, another soldier sexually assaulted her¹¹⁸.

After this short note, we can delve into the judgment. We will proceed with the analysis of the reparations awarded by the Court in the case at issue. First, it is worth noting that the Court found several violations both of the American Convention and the Convention of Belém do Pará. The State is held responsible, *inter alia*, for the violation of the victim's right to personal integrity, dignity, and the right to access to justice without discrimination¹¹⁹. The judgment of *Rosendo Cantú* concerns a woman

¹¹⁵ I/A Court HR, *Rosendo Cantú et al. v. Mexico*, para. 72.

¹¹⁶ *Ibidem*, para 133: “The Commission pointed out that, as a result of these events, Mrs. Rosendo Cantú was abandoned by her husband and was forced to move to Chilpancingo with her daughter, as a consequence of being rejected by her community”.

¹¹⁷ “Los encapuchados” are a political-military organization active in Mexico.

¹¹⁸ I/A Court HR, *Rosendo Cantú et al. v. Mexico*, para 73.

¹¹⁹ *Ibidem*, para 295 “3. The State is responsible for the violation of the rights to personal integrity, dignity and privacy, enshrined, respectively, in Articles 5(1) and 5(2), 11(1) and 11(2) of the American Convention on Human Rights, in relation to Article 1(1) thereof, and Articles 1, 2 and 6 of the Convention to Prevent and Punish Torture, and for not fulfilling its obligations under Article 7(a) of the Convention of Belém do Pará, to the detriment of Mrs. Rosendo Cantú, in accordance with paragraphs 89 to 121 and 127 to 131 of this Judgment. 4. The State is responsible for the violation of the right to personal integrity, enshrined in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Yenys Bernardino Rosendo, in accordance with paragraphs 137 to 139 of this Judgment. 5. It is not appropriate to rule on the alleged violation of the right to per-

whose experience is imbued with violence, poverty, and discrimination. She experienced violence and exclusion at every level. First, she was a victim of violence perpetrated by State agents; then the national justice system that was supposed to redress the wrong suffered mirrored the same pattern of exclusion and discrimination she experiences in the other spheres of society. She faced judicial barriers: the State failed to provide the victim with a translator when she had to file her complaint. Now, through an analysis of reparations, we will assess the shortcomings and opportunities contained in the judgment.

ii) *The Central Role Given to Symbolic Measures*

First of all, it is important to clarify who are the victims: both Mrs. Rosendo Cantú and her daughter are considered as victims¹²⁰ and both of them are supposed to benefit from the reparations ordered by the Court¹²¹.

In the realm of reparations the Court addresses, first of all, the problem of judicial ineffectiveness. In fact, through the judgment, the Court acknowledges the obstacles indigenous women have to face to have effective access to justice; and also that sexual crimes end often in impunity. For that reason, the Court deemed necessary to pronounce itself on the issue of due diligence in the prevention as well as

sonal integrity, established in Article 5(1) of the American Convention on Human Rights, to the detriment of Mr. Victoriano Rosendo Morales, Mrs. María Cantú García and the siblings of Mrs. Rosendo Cantú, under the terms established in paragraph 140 of this Judgment. 6. The State is responsible for the violation of the right to a fair trial and judicial protection, established in Article 8(1) and 25(1) of the American Convention, to the detriment of Mrs. Rosendo Cantú: a) in relation to Article 1(1) and 2 thereof, under the terms of paragraphs 159 to 167 of this Judgment, and b) in relation to Article 1(1) of the American Convention, and did not fulfill the obligation established in Article 7(b) of the Convention of Belém do Pará, under the terms of paragraphs 174 to 182 of this Judgment. Likewise, Mexico did not fulfill its obligation to guarantee, without discrimination, the right to have access to justice established in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mrs. Rosendo Cantú, under the terms of paragraphs 183 to 185 of this Judgment. 7. The State is not responsible for non-compliance with Articles 1, 6 and 8 of the Convention to Prevent and Punish Torture, to the detriment of Mrs. Rosendo Cantú, under the terms of paragraph 186 of this Judgment. 8. The State is responsible for the violation of the rights of the child, enshrined in Article 19 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Mrs. Rosendo Cantú, as stated in paragraphs 200 to 202 of this Judgment.”

¹²⁰ *Ibidem*, para 139: “the Court concludes that the rape of Mrs. Rosendo Cantú, the consequences of the rape and the impunity in this case have caused emotional trauma to Yenys Bernardino Rosendo, in violation of the rights recognized in Article 5(1) of the American Convention, in relation to Article 1(1) thereof”.

¹²¹ *Ibidem*, para. 207.

investigation and sanction that are needed in cases of sexual violence. As established in paragraphs 222 and 223 of the judgment at issue, the State must adopt the legislative reforms that are necessary to guarantee the compatibility of article 57 of the Military Justice Code with the American Convention and international standards¹²². Furthermore, the State is required to adopt the necessary legislative reforms to guarantee an effective remedy “to enable those affected by the intervention of the military justice system to have an effective remedy available to contest its jurisdiction”¹²³. That measure was ordered by the Court because the State of Mexico extended the jurisdiction of the Military Justice system to the crime under analysis, though the crime at issue had no link to the military discipline nor to the rights connected to that system¹²⁴.

For the purpose of our investigation, it is particularly relevant to look at the *symbolic* measures to assess the comprehensiveness and cultural appropriateness of said measures. In particular, the Court considers:

“that the State should organize a public act of acknowledgement of international responsibility, in relation to the facts of this case. During said act, reference should be made to the human rights violations declared in this Judgment. It should be conducted through a public ceremony, held in the Spanish and Me’paa languages, in the presence of high-ranking national authorities and authorities of the state of Guerrero, the victims and authorities and members of the victims’ community”¹²⁵.

Another relevant measure concerns training programs for officials, in this regard the Court includes a gender and ethnic perspective in its wording:

“As it has done on previous occasions, the Court orders the State to continue implementing continuous training programs and courses on the diligent investigation of cases of sexual abuse against women, which include a gender and ethnicity perspective. These courses must be offered to federal-level officials and officials in the state of Guerrero, particularly to those in the Public Prosecutor’s Office, the judicial branch, the police force and health workers with competence in these types of cases, who because of their functions constitute the first line of response to women victims of violence”¹²⁶.

¹²² *Ibidem*, para. 222.

¹²³ *Ibidem*, para. 223.

¹²⁴ *Ibidem*, para. 163.

¹²⁵ *Ibidem*, para. 226.

¹²⁶ *Ibidem*, para. 246.

Other relevant measures call for the provision of health services for women victims of sexual assaults as well as participatory programs that are deemed necessary to help these women to reinsert themselves in the indigenous community¹²⁷. Again, as to medical and psychological care, the Court states that both gender and ethnicity must be taken into account:

“The Court finds, as it has in other cases, that it is essential to order a measure of reparation to provide appropriate care for the physical and psychological effects suffered by the victims, having regard to their gender and ethnicity”¹²⁸.

As indicated by the Court then, the State is expected to continue to offer services for women victims of sexual violence, but there is no need to open a new center in the victims’ village as long as the existing center is improved in terms of human and material resources. The Court deems it appropriate to order the State to provide a translator who speaks the victims’ language (Me’paa)¹²⁹.

Also, the Court further declines the treatments to be provided by the State according to a victim-oriented perspective:

“In particular, the psychological or psychiatric treatment must be provided by State personnel and institutions specializing in the treatment of victims of acts of violence as in this case. If the State cannot offer such services, it must provide these by using specialized private or civil society institutions. In providing this treatment, the specific circumstances and needs of each victim must be taken into account, so that they are offered individual and family treatment, as agreed with each one, following an individual evaluation”¹³⁰.

In the case at hand the Court also ordered the State to award a scholarship to Mrs. Rosendo Cantú and her daughter:

“in this case the Court deems it appropriate to order as a measure of satisfaction, as it has on other occasions, that the State award scholarships to Mrs. Rosendo Cantú and her daughter, Yenys Bernardino Rosendo, to study in Mexican public institutions, covering all the costs of their education until the completion of their higher education, either in technical or university studies”¹³¹.

¹²⁷ *Ibidem*, B. Measures of satisfaction, rehabilitation, and guarantees of non-repetition vii).

¹²⁸ *Ibidem*, para. 252.

¹²⁹ *Ibidem*, para. 260.

¹³⁰ *Ibidem*, para. 253.

¹³¹ *Ibidem*, para. 257.

This measure, just to anticipate our conclusions, seems inadequate to many extents, particularly because it completely leaves out of the picture the victims' culture and language.

Moving on to other reparatory measures, the Court orders the State of Mexico to continue the existing "awareness and sensitization campaign for the general population concerning the prohibition and effects of violence and discrimination against indigenous women in all aspects of their lives"¹³².

As to compensation, the Court, consistent with its prior decisions, orders compensation for both pecuniary and non-pecuniary damages. The Courts consider that,

"the fact that Mrs. Rosendo Cantú was a minor at the time of the events; the nature and seriousness of the violations committed; the sufferings caused to the victims and the manner in which they have been treated; the time that has elapsed since the rape; the denial of justice; the change in their living conditions and other consequences of a non-pecuniary nature that they suffered, the Court deems it appropriate to establish, in equity, the amount of US\$ 60,000 (sixty thousand dollars of the United States of America) as compensation for non-pecuniary damage in favor of Mrs. Rosendo Cantú"¹³³.

We tried to present an overview of the reparation scheme developed by the Court, taking into account the most relevant pronouncements as to compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In the following section, we will analyze the achievements and shortcomings in the reparations scheme.

3.2.2 Analysis

As already mentioned, the *Cotton Field* case, though it does not deal with indigenous women, still, it is a point of departure from which the Court could build a new line of reasoning related to indigenous women. Hence it is worth offering a brief overview of the main elements of the case. In particular, it is worth noting the use of a gender-based analysis in the reasoning of the Court. Violence and discrimination are interpreted through the lenses of gender. The judgment of the Court attains a particular importance if we look at the realm of reparations¹³⁴. The Court, in fact,

¹³² *Ibidem*, para. 267.

¹³³ *Ibidem*, para. 279.

¹³⁴ Celorio, Rosa M. "The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting." *U. Miami L. Rev.* 65 (2010): 819, p. 848.

states that the components of the traditional scheme of reparation as developed in the Basic Principles (restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition) should encompass a gender perspective. Yet, according to the Court that is not enough, in fact one of the main features of the traditional scheme provides for the reestablishment of the pre-violation situation, but as the Court wisely stresses, this might not be an adequate response in a context of systemic discrimination. In such a situation the Court deems necessary to enlarge the reparatory measures so to encompass also *rectification*. So reparations are charged with the task of *changing* the situation¹³⁵. It is noteworthy to look thoroughly at the language used by the Court as to violence and discrimination: violence is presented as a “structural situation”¹³⁶; further, the Court acknowledges that the violations in the case at hand occurred in a situation of “structural discrimination”¹³⁷. Behind these violations we can trace a “culture of gender-based discrimination”¹³⁸.

In light of all the above, we can move on to the case of *Rosendo Cantú*. The wording of the Court in so far as rape is concerned is progressive in many regards. Rape is described by the Court as being a particularly heavy and intense form of violence that impacts not only the sexual life of the victim but her life as a whole. Furthermore, the Court acknowledges that the presence of the Military in the state of Guerrero “has placed the population, particularly the women, in a situation of extreme vulnerability”¹³⁹ and as the *Secretariat for Women’s Affairs of the state of Guerrero* underlined, indigenous women are the ones that suffer the most¹⁴⁰.

The Court’s line of reasoning is particularly relevant for the sharp analysis of the structural barriers indigenous women have to face in their struggle for justice.

The case of *Rosendo Cantú* has many other positive aspects. The Court acknowledges that the State of Mexico failed to provide the victim with a translator in two crucial moments, namely when she asked for medical care and when she had to

¹³⁵ I/A Court HR, Cotton Field, para 450: “the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable”. See also Celorio, Rosa M. “The Rights of Women in the Inter-American System” op. cit., p. 849.

¹³⁶ I/A Court HR, Cotton Field, para. 132

¹³⁷ *Ibidem*, para. 450.

¹³⁸ *Ibidem*, para. 164.

¹³⁹ I/A Court HR, Rosendo Cantú et al. v. Mexico, para. 71.

¹⁴⁰ *Ibidem*, para. 71.

file her complaint and that fault constituted an obstacle in the victim's attempt to achieve justice:

“The Court considers it proven that Mrs. Rosendo Cantú was not provided with a translator by the State when she required medical care, or when she filed her initial complaint; nor did she receive information, in her own language, about the subsequent steps taken regarding her complaint” [...]

“the inability to file a complaint and receive information in her language at the initial stages of this case implied treatment that did not consider Mrs. Rosendo Cantú's situation of vulnerability based on her language and ethnicity, thereby constituting an unjustified impairment of her right to obtain justice”¹⁴¹.

The analysis offered by the Court takes into account how traits linked to the victim ethnicity might influence her capacity to access justice, thus these elements need to be taken into account by the State to assure she can *obtain justice*.

Another very relevant stance was taken by the Court in the case of *Rosendo Cantú*: the Court considers proven that rape actually occurred, even if initially the victim did not report that she was raped. The trauma of the event and lack of trust in the authorities explain the victim recalcitrance in asserting that she was raped:

“The Court considers that the fact that she did not indicate that she had been raped in the two initial medical consultations should be understood in the context of the circumstances of the case and the victim. First, sexual assault is a type of crime that victims are reluctant to report. This is the case in indigenous communities, given the particular cultural and social circumstances that the victim must face (supra para. 70), as well as fear in cases such as these. Also, at the time the events, Mrs. Rosendo Cantú was a minor who suffered a traumatic incident during which, in addition to being physically and sexually assaulted, death threats were made against her community by the soldiers who attacked her. Thus, in the Court's opinion, the fact that she did not tell either the first or the second doctor that she had been raped does not discredit her statements regarding the existence of the rape. Finally, this omission may be due to her lack of security or sufficient trust to talk about what happened”¹⁴².

Further, the Court reasoned that the *cultural circumstance* needed to be taken into consideration. So that the fact that the victim belongs to an indigenous community and the perception of such a violation inside the community cumulate with the trauma and lack of trust in the authorities in explaining the victim recalcitrance in reporting

¹⁴¹ *Ibidem*, para. 185.

¹⁴² I/A Court HR, *Rosendo Cantú et al. v. Mexico*, para. 95.

the crime. Once again, the Court acknowledges that there was a need to look at the matter also through the lenses of indigeneity.

i) The Collective Dimension

As to reparations, the type of reparations that are awarded by the Court can reveal much as to the Court's commitment in trying to effectively respond to violations against indigenous women. In the case at hand, there are many positive elements. First, the Court remarks that the fact that the victim is an indigenous woman and that she was a minor when the sexual assault happened are factors that determine a condition of vulnerability. Second, the consequences of rape are considered by the Court as going beyond the victim¹⁴³. The Court takes into consideration the fact that the victim is a member of an indigenous community, thus reparation might need to have a wider reach and embrace also the community level. As we already noted in chapter 2, in most of the indigenous communities the construction of "subjectivity is always linked to the collective"¹⁴⁴. Also, an individual reparation scheme might impair the balance in the community; an indigenous community might experience also individual violations in a more comprehensive way, so that the violence committed against one member of the group can be perceived as a harm that affects all the community and reparation need to face this possibility, otherwise the balance within the community risks to be broken¹⁴⁵. In cases of sexual violence, in fact, the victim might be rejected by her community. After having experienced a traumatic event such as rape, the victim risks to be thrown out from the community, an event that would worsen the psychological as well as the socio-economic condition of the victim¹⁴⁶.

¹⁴³ *Ibidem*, para. 109. "In particular, rape constitutes a paradigmatic form of violence against women, and its consequences go far beyond the victim herself."

¹⁴⁴ Hernández Castillo, R. Aída. *Multiple InJustices: Indigenous Women, Law, and Political Struggle in Latin America*. TUCSON, University of Arizona Press, 2016, p. 240.

¹⁴⁵ I/A Court HR, *Rosendo Cantú v. Mexico*, para. 206: "The Court reiterates that Mrs. Rosendo Cantú is an indigenous woman, a girl at the time when the violations occurred, whose situation of particular vulnerability will be taken into account in the reparations awarded in this Judgment. Furthermore, the Court considers that the obligation to repair the damage caused in a case involving victims belonging to an indigenous community may call for measures that encompass the entire community".

¹⁴⁶ ICTJ Briefing, *Getting to Full Restitution: Guidelines for Court-Ordered Reparations in Cases Involving Sexual Violence Committed during Armed Conflict, Political Violence, and State Repression*, 4/11/2017, pp. 15-16.

Further, the Court affirms that the State must ensure that a gender-based perspective is implemented during all the stages of the case¹⁴⁷. Finally, the Court also deems necessary that a gender and ethnicity perspective is used in training programs for the armed forces¹⁴⁸.

ii) Caveats

As we briefly saw in the previous section, there is a series of very well-crafted measures of satisfaction, rehabilitation, and guarantees of non-repetition. This judgment is progressive to many extents, nonetheless there are some caveats that need to be addressed. As noted earlier, in the case at hand the Court also ordered the State to award a scholarship to Mrs. Rosendo Cantú and her daughter “to study in Mexican public institutions, covering all the costs of their education until the completion of their higher education, either in technical or university studies”¹⁴⁹. This measure, good intentions left aside, seems inadequate to many extents, particularly because it completely leaves out of the picture the victims’ culture and language. Mrs. Rosendo and her daughter would be able to access a higher level of education as long as they accept to leave behind fundamental traits of their identity. Education can be used as a tool for assimilation of indigenous peoples in the wider society, a tool to slowly eradicate their cultural peculiarities; for that reason, the Court should have been more careful and culturally sensitive in developing this measure of reparation¹⁵⁰.

Moving on to other reparatory measures, in paragraph 267 the Court orders the State of Mexico to continue the existing campaigns to raise awareness as to the prohibition of violence against indigenous women. The incidence of violence against women and particularly indigenous women in the state of Guerrero is a testament of

¹⁴⁷ I/A Court HR, Rosendo Cantú et al. v. Mexico, para. 213: “the victim, an indigenous woman, has had to overcome numerous obstacles to obtain justice, the State has an obligation to continue to offer the means by which the victim may fully access and participate in all the proceedings of the case. To this end it must ensure that an interpreter is provided and that she can rely on assistance with a gender-based perspective, all the above in consideration of her special vulnerability.”

¹⁴⁸ *Ibidem*, para. 246-249

¹⁴⁹ *Ibidem*, para. 257.

¹⁵⁰ In this regard, it is very interesting the approach to education developed in some countries in Latin America in order to construct an alternative education model that includes indigenous peoples’ needs. Still, achievements at the level of legislation and policies are not enough if they are not translated into practice. For a thorough analysis on education and indigenous peoples *see*: Cortina, Regina, ed. Indigenous Education Policy, Equity, and Intercultural Understanding in Latin America. Palgrave Macmillan US, 2017.

the ineffectiveness of these campaigns. They need to be coupled with other means and be reshaped.

Mainly we believe it is deemed necessary to recognize and specify the intersection between the issues of gender and indigeneity in construing and shaping discrimination. If this step is not undertaken, and a new space is opened to these victims who fall outside the habitual categories that are recognized by the law, then they will be confined to that *negative space*¹⁵¹ that is not covered by the law. If we consider paragraph 213 of the judgment we can recognize many positive aspects, in its content and in its wording, yet the direct intersection of the elements of indigeneity and gender are not established. So that if an interpreter is provided to the victim, allowing her to effectively participate in the proceedings of the case if the interpreter is a man, this still might not be the best solution for the victim who is a woman victim of rape. The other way around, a gender-based assistance can be extremely positive yet, if the assistance is devoid of a deep understanding and knowledge of the indigenous context the victims belongs to, then the assistance can not be truly effective. What is missing here is the recognition of the intersection and interaction of these two features of the victim's identity: being a woman *and* being indigenous. This interaction must be not only recognized but also concretely brought to life when legal, medical and social assistance is offered. This intersection remains in the background in the judgment at issue and this failure to recognize this intersection risks to enhance indigenous women's invisibility.

3.2.3 Final Remarks

The judgment of *Rosendo Cantú* represents an important step for indigenous women since it sets a precedent that presents very relevant elements in the realm of reparation, where both gender and ethnicity are given a prominent position. The Court, as we saw, acknowledges also the importance of the collective dimension when awarding reparation. So to say, justice does not take place in a vacuum, it is not context-less, and the individual and collective dimensions need to be carefully balanced in the case an indigenous person is the victim of the violation. For indigenous women, another aspect that deserves our attention in the reasoning of the

¹⁵¹ See Davis, Aisha Nicole. "Intersectionality and International Law: Recognizing Complex Identities on the Global Stage." *Harv. Hum. Rts. J.* 28 (2015): 205.

Court concerns the fact that the Court did not limit its analysis to the rights contained in the American Convention but analyzed the violations also in light of the Convention of Belém do Pará¹⁵². And from June 2016, the jurisprudence of the Court can be enriched by the use of the American Declaration on the Rights of Indigenous Peoples, that, as previously stated, contains some relevant provisions specifically crafted for the protection and promotion of indigenous women's rights. This process of creating connections among the different treaties can actually deepen the understanding of the violations against indigenous women.

From a judicial point of view the main obstacle is that the intersection of multiple grounds of discrimination that an indigenous woman suffers are seldom recognized, with this judgment, though, the Court has started a process of addressing the issues of structural discrimination as well as illuminate the path toward a reparation scheme that can balance the different dimensions of gender, indigeneity and collective rights. The point is that so far these are still uncharted waters, a domain largely underexplored. New legal standards wait to be built, this is indeed a new challenge for the Court. There is also a concomitant challenge, the problem of translating the rulings into reality. Hence, the capacity of the supranational level to inform the national level; a political work to persuade the Member States into complying with the decisions. In this regard, we can assess the success of the Court briefly analyzing the Orders of Monitoring Compliance with Judgment of November 21, 2014¹⁵³ and April 17, 2015¹⁵⁴, linked to the case at hand. In 2014 the Court resolved that the State had totally complied with the obligation to carry out a public act in which to acknowledge its international responsibility; with the obligation to provide psychological and medical assistance to the victims; to provide scholarships to the victims; to compensate the victims for pecuniary and non-pecuniary damages¹⁵⁵.

¹⁵² See Celorio, Rosa M. "The Rights of Women in the Inter-American System of Human Rights", *op. cit.*, pp. 856-858.

¹⁵³ I/A Court H.R., Cases of Fernández Ortega et al. and Rosendo Cantú and other v. México. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 21, 2014.

¹⁵⁴ I/A Court H.R., Cases of Radilla Pacheco, Fernández Ortega et al., and Rosendo Cantú and other v. Mexico. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of April 17, 2015.

¹⁵⁵ I/A Court H.R., Cases of Fernández Ortega et al. and Rosendo Cantú and other v. México. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 21, 2014. (only in Spanish) RESUELVE "1. Declarar, de conformidad con lo señalado en la parte conside-

The last Order of Monitoring Compliance with Judgment was issued in 2015. The focus was on the reforms the State was supposed to adopt to adapt Article 57 of the Military Justice Code to the American Convention and international standards. The other issue to be evaluated was the State compliance to the order of introducing the necessary reforms to establish an effective remedy for contesting jurisdiction for those who were negatively affected by the military justice system. The Court resolved that the State partially complied with these obligations¹⁵⁶. We can conclude that, formally, the State of Mexico introduced some reforms and implemented some actions to comply with the judgment. Yet, four years after the judgment many obligations are still not complied with, especially punishment for those criminally responsible. The issue of the military presence in the community's territory, impunity, structural discrimination and violence against indigenous women are still

rativa de la presente Resolución, que el Estado ha dado cumplimiento total a sus obligaciones de: .a) realizar un acto público de reconocimiento de responsabilidad internacional (punto resolutivo 15 y párrafo 244 de la Sentencia del caso Fernández Ortega y otros y punto resolutivo 14 y párrafo 226 de la Sentencia del caso Rosendo Cantú y otra); .b) brindar el tratamiento médico y psicológico que requieran las víctimas (punto resolutivo 17 y párrafos 252 y 253 de la Sentencia del caso Fernández Ortega y otros y punto resolutivo 19 y párrafos 252 y 253 de la Sentencia del caso Rosendo Cantú y otra); .c) otorgar becas de estudios en instituciones públicas mexicanas en beneficio de Noemí, Ana Luz, Colosio, Nelida y Neftalí, todos ellos de apellidos Prisciliano Fernández, y en beneficio de la señora Rosendo Cantú y de su hija, Yenys Bernardino Rosendo (punto resolutivo 21 y párrafo 264 de la Sentencia del caso Fernández Ortega y otros y punto resolutivo 20 y párrafo 257 de la Sentencia del caso Rosendo Cantú y otra), y .d) pagar las cantidades fijadas por concepto de indemnizaciones por daño material e inmaterial (punto resolutivo 25 y párrafos 286, 293 y 300 a 307 de la Sentencia del caso Fernández Ortega y otros y punto resolutivo 24 y párrafos 274, 279 y 287 a 294 de la Sentencia del caso Rosendo Cantú y otra) y .e) pagar las cantidades fijados por concepto de reintegro de costas y gastos (punto resolutivo 25 y párrafos 299 y 300 a 307 de la Sentencia del caso Fernández Ortega y otros y punto resolutivo 24 y párrafos 286 y 287 a 294 de la Sentencia del caso Rosendo Cantú y otra)".

¹⁵⁶ I/A Court H.R., Cases of Radilla Pacheco, Fernández Ortega et al., and Rosendo Cantú and other v. Mexico. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of April 17, 2015, (only in Spanish) RESUELVE: "1. Declarar, de conformidad con lo señalado en los Considerandos 9 a 23 de la presente Resolución, que el Estado ha dado cumplimiento parcial a su obligación de adoptar las reformas legislativas pertinentes para compatibilizar el artículo 57 del Código de Justicia Militar con los estándares internacionales en la materia y la Convención Americana sobre Derechos Humanos, de acuerdo con el punto dispositivo décimo de la Sentencia del caso Radilla Pacheco, el punto dispositivo décimo tercero de la Sentencia del caso Fernández Ortega y otros, y el punto dispositivo décimo segundo de la Sentencia del caso Rosendo Cantú y otra. 2. Declarar, de conformidad con lo señalado en los Considerandos 28 a 31 de la presente Resolución, que el Estado ha dado cumplimiento total a su obligación de adoptar las reformas pertinentes para permitir que las personas afectadas por la intervención del fuero militar cuenten con un recurso efectivo de impugnación de tal competencia, de acuerdo con los puntos dispositivos décimo cuarto de la Sentencia del caso *Fernández Ortega y otros* y décimo tercero de la Sentencia del caso *Rosendo Cantú y otra*".

unresolved. Nonetheless, the judgment of the Court, as well as the monitoring procedure, pushed the Mexican State to put in place important changes, especially the reform of art. 57 of the Military Justice Code, which means that now a case dealing with sexual violence perpetrated by the military will be tried by a civilian court and will fall outside the military jurisdiction¹⁵⁷.

If again, we consider the victim's understanding of justice as far as her culture and cosmovision are concerned, the fact that those responsible for sexual violence have not been punished, has a terrible consequence: the direct victims, as well as the entire community, can not heal properly because the Truth was not recognized and justice has not been done¹⁵⁸.

In conclusion, the Court showed us that framing a more comprehensive picture of justice is possible, yet the road ahead is full of challenges and these achievements must be appropriated by national and international judicial bodies, indigenous movements, and activists, otherwise they will remain a dead letter and soon the situation of indigenous women would regress to the previous (not rosy) situation. This judgment presents some shortcomings but it also represents an opportunity for the Court, an important legal precedent, a basis on which to introduce a stronger reasoning able to include these intersections and address the structural discrimination that subtends the violence and exclusion that indigenous women suffer.

¹⁵⁷ Hernández Castillo, R. Aída. *Multiple Injustices*, op. cit., p. 185.

¹⁵⁸ *Ibidem*, pp. 240-243.

CONCLUSIONS

“We must not look upon the ideas as chimerical, nor decry it as a beautiful dream, notwithstanding the difficulties that stand in the way of its realization.”¹⁵⁹

Immanuel Kant

The analysis undertaken gave us the opportunity to unveil the achievements and shortcomings of the contemporary reparatory discourse as developed by the Inter-American Court of Human Rights. We assessed the capacity of the reparations awarded by the Court in the cases *Masacre de Plan de Sánchez v. Guatemala* and *Rosendo Cantú et al. v. Mexico* to provide effective justice to indigenous women. Then, we investigated the existing gap between the ambitious jurisprudence of the Court and its translation into practice.

In the first chapter, we presented a general overview of the notion of reparation as well as an array of diverse international documents dealing with the realm of reparations. This brief overview gave us the opportunity to critically approach the issue of indigenous women in the international discourse on human rights and to assess the potential of the reparatory discourse to help indigenous women to achieve justice. We analyzed the Basic Principles, the International Law Commission’s Articles on State Responsibility, the ILO Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples. Then to move closer to the geographical context in which we wanted to develop our analysis, we investigated how reparations are conceptualized in the dialectics of the Inter-American system of protection of human rights. We focused our attention on the American Convention on Human Rights and on the American Declaration on the Rights of Indigenous Peoples. According to the analysis, we can affirm that the American Declaration on the Rights of Indigenous Peoples, issued in June 2016, is, so far, the most progressive

¹⁵⁹ Kant, Immanuel. "On Education, tr." Annette Churton, Mineola, NY: Dover (original publication 1803) 2003, p.8.

instrument in terms of reparation measures for indigenous peoples, and for indigenous women in particular, since it introduces innovative provisions that include indigenous women in the picture. Yet, such a progressive instrument does not exist in a vacuum, it is a testament to a broader international effort to build a more comprehensive and inclusive conception of reparations. The American Declaration on the Rights of Indigenous Peoples is setting the bar very high as to the protection of indigenous women, now it is up to the other regional system to aim at the same goal. For sure, we can state that the Inter-American system has shown the way for international developments.

In Chapter 2, we drew our attention to indigenous women's voices, perspectives, and narratives. In particular, we focused on the re-appropriation by indigenous women of their cosmovision. In the Americas, indigenous women are rediscovering their culture and "re-narrativizing" their histories and traditions; they are rediscovering the values of complementarity, balance, and equality. This process is a powerful tool in the path of obtaining a more equal and just future inside and outside their communities. Narratives and Myths are the first symbolic spaces from which to start shaping a practical change. Any battle for justice starts in the cognitive field, thus, this trend in both Mexico and Guatemala are a positive sign. Yet, this process of transformation is doomed to failure if the 'side of the law' keeps excluding these women's visions and claims.

As to how and if the international discourse on indigenous peoples adequately addresses the needs and rights of indigenous women, we saw how specific treaties and soft law instruments have gradually recognized the rights of indigenous peoples. Yet, achievements aside, we saw how the UNDRIP falls short in including these women under its aegis of protection. The main caveat on the Declaration is the fact that women are considered to be inherently vulnerable; this attitude that permeates the document is proven by the fact that women are always mentioned alongside children, people with disabilities and the elderly. One of the most progressive documents for the protection of indigenous peoples fails to look at this vulnerability as the result of a structural oppression and discrimination. The aforementioned shortcomings are a sort of leitmotiv to the whole human rights edifice. Yet, it is worth noting that the American Declaration on the Rights of Indigenous Peoples addresses the issues of gender equality, violence and discrimination against indigenous women,

thus it represents a step forward in the ongoing process of creating a legal space that is able to include and address the specific issues of indigenous women.

Then, through oral interviews with some indigenous leaders, we tried to bring to the surface that *file rouge* that links indigenous cosmovision and gender perspective.

We discovered that indigenous cosmovisions can be a powerful tool, a starting point from which to begin the reconstruction of a balance within the community. The indigenous women who shared their stories are aware of the gap between the positive values in their myths and cosmovisions and the everyday oppression and discrimination they suffer. This re-narrativization of cosmovisions they are undertaking is not a process that aims at creating division between men and women within the community but at recovering principles and a harmony that too often have been lost. This process of critically analyzing their own cultures is a clear sign that there is in many indigenous movements a powerful attempt by women to recuperate some values that have been lost and upon which to reconstruct a balanced and respectful indigenous epistemology.

We draw our attention to cosmovision in the belief that it is fundamental to understand indigenous cosmovision to develop a reparation scheme that is culturally sound and effective. This focus on indigenous cosmovision and the interconnectedness of gender and indigeneity should never be lost by the judicial bodies charged with the task of defending and promoting indigenous peoples' rights. Indigenous women's voices showed us that indigenous cosmovisions contain strong elements for the protection and promotion of women's rights. The Inter-American Court needs to keep improving its commitment in understanding and looking at cosmovision when ordering reparations. This standpoint is key to advance the protection of indigenous women and indigenous peoples as a whole. And it is from this standpoint that reparations should be developed.

Chapter 3 gave us the opportunity to compare the situation of indigenous women in two countries: Guatemala and Mexico and to discuss the comprehensiveness and effectiveness of the reparation schemes developed by the Inter-American Court.

As to Guatemala, we investigated the adequacy of the reparations awarded by the Inter-American Court of Human Rights in the case *Masacre de Plan de Sánchez v. Guatemala*. We analyzed the extent to which the failure to recognize the intersection of multiple grounds of discrimination (gender and indigeneity) by the Court

negatively affected women victims, enhancing their invisibility and the invisibility of the violence committed against them.

Though this judgment is progressive to many extents, the violations that targeted indigenous women because they were indigenous *and* women are not given space in the reparation scheme ordered by the Court. Women who were victims of rape and survived the massacre found before themselves a situation of impunity and of non-recognition of the extreme harm it was perpetrated against them. In the end, indigenous women's particular concerns are rendered invisible under the apparently neutral and comprehensive label of 'indigenous people'. Also, the fact that more than ten years after the judgment was issued, Guatemala still has not fully complied with many reparation measures ordered by the Court is a testament to a deeply rooted problem in the dialogue between the supranational and the national level.

Another critical issue is that there is an incongruity between the reasoning of the Court and that of the Commission, the expert witnesses proposed by the Commission and the victims' representatives. In fact, the Commission, the experts, and the victims' representatives stress the need to address specifically the violations perpetrated against indigenous women. Nonetheless, the Court in awarding reparations is not taking into consideration these suggestions, it is not addressing the fact that women were raped *and* killed, and those who survived still need to keep living with this non-criminalized and unrecognized violence.

The judgment on the case of *Rosendo Cantú v. Mexico* was issued six years after Plan de Sánchez and, to many extents, represents a fundamental step forward in the jurisprudence and reasoning of the Court.

In the case of *Rosendo Cantú*, the Court includes a gender and ethnic perspective in its wording. According to our analysis, we can conclude that the comprehensiveness and cultural appropriateness of the measures awarded represent a step forward in respect to the *Plan de Sánchez* case. Also, the Court wisely stresses that the traditional approach to reparations that calls for the reestablishment of the pre-violation situation might not be a fully adequate response in a context of systemic discrimination. In such a situation the Court deems necessary to enlarge the reparatory scheme so to encompass also *rectification*. The rationale of the Court is that reparations should be a tool for transforming the situation. So to say, reparations need to look ahead to the future not just back to the past. So conceived, reparations are *transformative* because they contribute to transforming an entire system that

oppresses and marginalizes women. Transformative reparations aim at addressing the structural oppression, injustice, and marginality that women suffer, not just at restoring the 'status quo ante'. To use the words of Walker:

“Reparations guided by the aim of restoring the victim to her condition prior to the violation might only recreate or reinforce conditions of powerlessness, inequality or insecurity. In its most ambitious version, the call for transformative reparations insists that reparations instead must aim at the reconstruction of economic, social and political relations that oppress women and that are often among the causes of women’s exposure to the violations they have suffered”¹⁶⁰.

It is noteworthy to look thoroughly at the language used by the Court as to violence and discrimination: violence, in fact, is presented as a ‘structural situation’; the Court also acknowledges that these violations are not isolated incidents, rather, behind them we can trace a deeply rooted gender-based discrimination, a cultural pattern. Further, the Court affirms that the State must ensure that a gender-based perspective is implemented during all the stages of the case. And finally, the Court also deems necessary that a gender and ethnicity perspective is used in training programs for the armed forces. We can conclude that, though a lot still needs to be done to promote and protect indigenous women’s rights in the Americas, the Court is developing progressive legal standards. Yet, the problem remains that the Inter-American system needs to set attainable standards. It is a fine balance between creating progressive and innovative standards that push the boundaries of indigenous women’s rights further, and to do it in a way that States can translate in practice. The challenge is now to balance ideals and practical reality. The testing ground for the success of these reparations is the ability to mediate between these different perspectives. The measures of reparation, far from being just normative works, in fact, are a model of reality that wants to be imposed in a context; eventually, reparations can not work if they do not take into serious consideration the context in which they wish to enter.

As to the dialectics between the national jurisdiction and the Inter-American Court, we can conclude that, formally, the State of Mexico introduced some relevant reforms (especially the reform of art. 57 of the Military Justice Code) and implemented some actions to comply with the judgment. Yet, four years after the

¹⁶⁰ Walker, Margaret Urban. "Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations." *International Journal of Transitional Justice* 10.1 (2015): 108-125, p. 109.

judgment many obligations are still not complied with, especially punishment for those criminally responsible.

If we consider the victim's understanding of justice as far as her culture and cosmovision are concerned, the fact that those responsible for sexual violence have not been punished, has a terrible consequence: the direct victim, as well as the entire community, can not heal properly because truth was not recognized and justice has not been done. In conclusion, the Court showed us that framing a more comprehensive picture of justice is possible, yet the road ahead is full of challenges and these achievements must be appropriated by national and international judicial bodies, indigenous movements and activists, otherwise they will remain a dead letter and the situation of indigenous women risks to regress to the previous (not rosy) situation.

Reparations should work on two axes: on the one hand, they should aim at tackling the deeply rooted structural inequality and discrimination that subtend the Mexican and Guatemalan States. On the other hand, such a broad goal risks to lose sight of the direct victims' needs, so that reparations needs also to be firmly focused on the victim and her immediate and near future's concerns. In the long run, the aim is, for sure, a far-reaching and extensive change that is able to embrace the wider society, but it needs to respond to the victim's needs in the short term. The pressing need of the near future is to develop this transformative process in a way to address the intersectional life experience of indigenous women. It is necessary to further expand the discourse on reparations so that they can adequately respond to indigenous women's necessities. The Court must find a way to formulate reparatory schemes that are consistent with the needs of indigenous women's rights. It goes without saying, this process should be accomplished with the participation of all the relevant actors. Judicial decisions, in fact, are just one side of the matter, any effective change needs the direct involvement of the victims. To conclude, the challenge ahead is to designing reparations in a way to produce positive effects for the people concerned also according to the victims' understanding of justice. This process requires a deep understanding of the values, imaginaries, and conception of justice that permeate the reality that reparations aim at regulating. To be fully legitimate then, reparations must not leave behind indigenous women's voices.

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