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Remedies for the Women of Ciudad Juárez through the Inter-American Court of Human Rights

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I. INTRODUCTION

¶1 Over 300 women have been brutally murdered in Ciudad Juárez, Mexico over the past ten years.[1] More than 100 of these murders can be classified as "sexual homicides," with victims having been raped, tortured, and, in many cases, mutilated. Scores of women have also disappeared without a trace. Though several suspects have been arrested, and various theories have been proposed regarding the crimes, the murders have continued with impunity. Local and international non-governmental organizations (NGOs) have drawn attention to these incidents by organizing protests, conducting petition drives, and raising money for the victims' families. The Inter-American Commission on Human Rights (the Commission) has also increasingly given attention to the murders. The Commission's Special Rapporteur for the Rights of Women visited Juárez in the spring of 2002. The information gleaned from this visit led to a Special Report that outlined a litany of human rights abuses and made dozens of recommendations to improve the situation in Juárez. However, the effectiveness of the Commission's Special Reports must be questioned as they have rarely led to substantial human rights improvements. Based on this track record, alternative international remedies should be pursued.

¶2 The past decade has seen something of a "human rights cascade" with the simultaneous strengthening of a number of international human rights institutions that can provide remedies for the victims of abuses. This paper will explore the range of remedies that can be sought in the Inter-American Court of Human Rights ("the Court") including 1) contentious cases, 2) requests for advisory opinions, and 3) petitions for provisional measures.[2] For each of these remedies, I will examine previous precedents,

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[1] *See* Inter-Am. C.H.R., *The Situation of the Rights of Women in Ciudad Juárez Mexico: The Right to Be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, doc. 44 (March 7, 2003) [hereinafter Inter-American Commission Report] (detailing the Juárez situation); AMNESTY INTERNATIONAL, DEVELOPMENTS AS OF 2003, AMR 41/026/2003 [hereinafter AI Report 2003].

[2] A subsequent paper will examine other innovative transnational remedies for the women of Juárez such as: 1) individual petitions to the Human Rights Committee overseeing the International Covenant on Civil and Political Rights, 2) withholding or issuing loans by the Inter-American Development Bank and the World Bank, 3) filing civil suits in U.S. courts under the Alien Tort Claims Act, and 4) the use of

both within the Court and within parallel institutions, as well as its potential effectiveness for improving the situation on the ground in Juárez. A major question will be whether the State of Mexico can be held accountable for what are generally seen as crimes by private individuals. I will rely on several recent cases from the European Court of Human Rights (the European Court) where states have been found liable for the failure to prevent human rights abuses and the failure to exercise due diligence in the investigation of human rights abuses. In considering any remedy for such abuses, it is vital that the remedy will allow for a voice for the victims, and provide agency for their families so that they are not re-victimized by the legal process. The potential global impact of the remedies for the Juárez situation will also be considered. Legal precedents in this case could potentially lead to significant advances regarding human rights worldwide. Since, in most cases, these remedies will be most effective if the "envelope is pushed," that is, if the remedies are used in innovative ways, I will also discuss whether such expansions in institutional power might lead Mexico to withdraw from, or ignore, the Court's jurisdiction. Such a backlash would significantly damage the Court's institutional prestige, thus eroding its effectiveness for providing remedies in the future for these or other victims.

II. THE SITUATION IN JUÁREZ

¶3 As one writer put it, the kidnapping, torture, rape, and murder of women in Juárez represents "the most shameful human-rights scandal in Mexico's recent history."[3] The number of murders has been disputed, but the Commission's Special Rapporteur concluded that at least 268 women had been killed between January of 1993 and January of 2002.[4] Amnesty International claims the total may be 370 murders and that seventy women are still missing.[5] The number of murders peaked in the late 1990s. Between 1985 and 1992, 37 women had been killed, but this number dramatically increased with at least 200 additional murders from 1993 to 2001.[6] The murder rates in Juárez are anomalous in two important respects. While more men than women were killed throughout the 1990s, one study showed that the number of women killed was increasing at twice the rate as for men.[7] Further, the homicide rate for women in Juárez greatly exceeded the Mexican national average and the rates in other border cities. For example, one study showed that the homicide rate for women in Juárez was more than three times as great as that in Tijuana, a border city of comparable size.[8]

¶4 Over 100 of the women killed were also raped, beaten, and, in many instances, strangled, stabbed, mutilated, and/or tortured. Evidence seems to indicate some type of conspiracy targeting a specific group of women. Most of the victims are young (between the ages of fifteen to twenty-five); they are often students or workers at the local

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voluntary codes of conduct to put pressure on multinational corporations.

[3] Alma Guillermoprieto, *Letter from Mexico: A Hundred Women*, THE NEW YORKER, Sept. 29, 2003, at 82, 84.

[4] Inter-American Commission Report, *supra* note 1, ¶ 3.

[5] AI Report 2003, *supra* note 1, at 7.

[6] Inter-American Commission Report, *supra* note 1, ¶ 42.

[7] *Id*.

[8] *Id*. n.9.

maquiladoras; and many of them migrated to Juárez for financial purposes.[9] Many also have similar physical appearances, consisting of a slender physique with dark skin, shoulder-length dark hair, and "attractive" features.[10]

¶5 Juárez is a border town and factory city that is the home of dozens of *maquiladoras* (large foreign-owned assembly plants) that employ much of the workforce. Nearly one-half of the 1.5 million residents of the city migrated there from local villages and small towns searching for economic prosperity.[11] The city's infrastructure had been largely unprepared for such a huge migration, forcing many citizens to find residence in the local "shantytowns."[12] A sprawling city, Juárez also includes many square miles of empty desert, which has sadly become the resting place for many of the murdered women. This combination of underdevelopment and the rapid turnover in population, which are characteristics of a bustling border city, have been major obstacles in solving these murders.

¶6 There have been many theories about the causes of these murders, the more mundane involving drug trafficking, prostitution, and domestic violence.[13] Others speculate that these women are murdered for their organs, which are in turn sold to wealthy recipients in the United States. Some have even concluded that drug rings, or even groups of young men from wealthy families (*los Juniors*), might be using these girls in macabre rituals or as part of some sporting contest.[14]

¶7 Many scholars and NGOs claim that these murders are rooted in a larger national problem in Mexico—the widespread discrimination and abuse of women. Amnesty International's report indicated that until these murders are seen as a direct result of a widespread "pattern of violence against women," the human rights of women would forever be violated.[15] Studies "indicate that approximately one-third to one-half of Mexican women living as part of a couple suffered some form of abuse (physical, emotional, psychological, economic or sexual) at the hands of their partner."[16] Some scholars have linked the murders to the general "wasting of women" associated with the rapid training and turnover of the (predominantly female) workforce in the *maquiladoras*.[17] Discrimination and violence against women was a major focus of the Commission's 2003 report that concluded:

> [I]nsufficient attention has been devoted to the need to address the discrimination that underlies crimes of sexual or domestic violence, and that underlies the lack of effective clarification and prosecution. The

[9] *Id*. ¶ 3.
[10] Guillermoprieto, *supra* note 3, at 85.
[11] AI Report 2003, *supra* note 1, at 24.
[12] Guillermoprieto, *supra* note 3, at 84.
[13] Inter-American Commission Report, *supra* note 1, ¶ 63.
[14] Guillermoprieto, *supra* note 3, at 86. *See also*, *All Things Considered: Explosive Theory on Killings of Juarez Women* (Broadcast of Interview with Diana Washington Valdez on National Public Radio Dec. 4, 2003), *available at* http://www.npr.org/templates/story/story.php?storyId=1532607. *See also* AI Report 2003, *supra* note 1, at 48.
[15] AI Report 2003, *supra* note 1, at 7.
[16] Inter-American Commission Report, *supra* note 1, ¶ 59.
[17] Melissa W. Wright, *A Manifesto Against Femicide*, 33 ANTIPODE 550, 557-58 (2001).

> resolution of these killings requires attention to the root causes of violence against women – in all of its principal manifestations.[18]

A. Responses from the Mexican Authorities

¶8 As of 2003, Mexican authorities claimed that they had resolved 181 of the 268 murders.[19] However, the Mexican authorities deem a case to be "resolved" if

> the Office of the Special Prosecutor felt that it had enough information upon which to make a presumption as to the motive and culpability of a presumed perpetrator and that the person had been presented before a judge (*"consignado"*). It did not necessarily signify that a particular individual had been formally charged or tried.[20]

Further, of the seventy-six cases classified as serial killings, only three convictions have been handed down, and there is much skepticism about the integrity of these convictions. Omar Latif Sharif, an Egyptian national, was convicted and sentenced for three of the murders in 1996, but his sentence is currently under appeal. The authorities have claimed that Sharif directed various gangs to continue the murders while he was in prison. Authorities have indicted, and very recently convicted, members of a gang called "los Rebeldes" in connection with seven rapes and murders in 1996. They have also indicted members of the gangs, "el Tolteca" and "los Ruteros" (thought to be connected with eight crimes in 1999), and the men "el Cerillo" and "la Foca" (thought to be connected with eight crimes in 2001).[21] In October 2004, bus driver Victor Garcia Uribe was found guilty and sentenced to fifty years in prison for eight slayings that occurred in 2001. Though he confessed on videotape, he claimed that he was tortured into giving the confession. He was arrested with another bus driver, Gustavo Gonzalez Mesa, who died under suspicious circumstances while in police custody.[22] The Mexican police gunned down Mesa's attorney after he had received several threats about the case.[23]

¶9 The Mexican government has taken several major steps to investigate the murders in Ciudad Juárez. The *Comisión Nacional de Derechos Humanos* (CNDH), Mexico's National Human Rights Commission, issued important reports in 1998 and 2003 that highlighted abuses by the local authorities and suggested several recommendations.[24] Partly as a response to the first of these reports, a Special Prosecutor's Office was established in Juárez in 1998 that employed specially trained officers and promised access to fingerprint and DNA databases.[25] However, by 2003 there had been very little

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[18] Inter-American Commission Report, *supra* note 1, ¶ 11.
[19] *Id.* ¶ 81.
[20] *Id.* ¶ 82.
[21] *Id.* ¶¶ 49, 83-85.
[22] *Id.* ¶¶ 49-50.
[23] *Id.* ¶ 66. On January 25, 2006, the attorney for Uribe was shot to death in Ciudad Juarez. *See* Frontera NorteSur, *An Explosive Murder Shakes Ciudad Juárez*, (Jan. 26, 2006), *available at* http://www.nmsu.edu/~frontera/.
[24] Inter-American Commission Report, *supra* note 1, ¶¶ 72-75; AMNESTY INTERNATIONAL, MEXICO: ENDING THE BRUTAL CYCLE OF VIOLENCE AGAINST WOMEN IN CIUDAD JUÁREZ AND THE CITY OF CHIHUAHUA, AMR 41/011/2004, 7 (2004) [hereinafter AI Report 2004].
[25] *Id.* ¶ 76.

institutional follow-up to the report.[26] In fact, in a December 2003 report the CNDH found that "public officials of the Mexican State committed acts and omissions that facilitated the direct violation of innumerable provisions in national and international judicial orders" that "suggests ignorance of or contempt for the duty of the State to act with due diligence."[27] In response, the national government established a special prosecutor's office at the federal level to coordinate the investigations in 2004.[28] In September 2004, the Chihuahuan government announced that they would be giving free houses (235 square feet) to forty-seven mothers of victims in addition to "psychological, medical, and legal support, as well as a monthly stipend of $160."[29] Human rights advocates claimed that these gestures were an attempt to silence the mothers to prevent them from pressing their claims, but the director of the state-run Chihuahua Women's Institute claimed that these actions would allow the women to get back on their feet so that they could continue to press for justice for their daughters.[30]

¶10 Despite this recent flurry of activity, most scholars, journalists, and activists following the cases have questioned whether the arrested individuals were even involved in the murders and whether the institutional reforms in the investigative process would have a significant impact. Despite growing local, national, and international pressure, as well as increased efforts by governmental authorities, the unprecedented string of sexual homicides continues. In fact, the crimes have apparently spread to Chihuahua City, the provincial capital, approximately 100 miles to the south. Amnesty International reported that in 2003, forty-three women were murdered in Juárez with nine of these murders classified as sexual homicides, and another three sexual homicides occurred in Chihuahua City.[31] It is imperative that local, national, and international pressure continue to be exerted to solve and eliminate these murders.

¶11 Recently, two other legal scholars have considered human rights remedies for the feminicides in Juárez. Grace C. Spencer explored the possibility of bringing a case in American federal courts under the Alien Tort Claims Act (ATCA) for the abysmal working conditions in the *maquiladoras*.[32] She concludes that such a claim would not rise to the level required under the Supreme Court's recent *Sosa* case.[33] Spencer, though, does not consider whether a case could be brought under the ATCA for Mexico's failure to investigate and prevent the murders as outlined below. Joan H. Robinson does consider whether Mexico can be held accountable for the actions of non-state actors in the Juárez case through an analysis of the Inter-American Court's *Velasquez Rodriguez* case.[34] Robinson's work convincingly argues that holding states accountable for failing

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[26] AI Report 2004, *supra* note 24.

[27] *Id*. at 7.

[28] *Id*. at 7-8.

[29] Olga R. Rodriguez, *Government Promises Houses to Slain Women's Families*, ASSOCIATED PRESS, Sept. 16, 2004, http://www.americas.org/item_16404.

[30] *Id*.

[31] AI Report 2004, *supra* note 24, at 2.

[32] Grace C. Spencer, *Her Body is a Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico*, 40 GONZ. L. REV. 503 (2004 / 2005). *Cf.* Harry F. Chaveriat III, *Mexican Maquiladoras and Women: Mexico's Continued Willingness to Look the Other Way*, 8 NEW ENG. J. INT'L & COMP. L. 333 (2002).

[33] Spencer, *supra* note 32, at 532. *Cf.* Sosa v. Alvarez-Machain 542 U.S. 692 (2004).

[34] Joan H. Robinson, *Another Woman's Body Found Outside Juárez: Applying Velásquez Rodríguez for Women's Human Rights*, 20 WIS. WOMEN'S L.J. 167 (2005).

to investigate and prevent the violations perpetrated by non-state actors will go a long way toward deconstructing the predominant public/private dichotomy in international law and will make courts more willing to broaden the definition of human rights abuses to include widespread domestic violence.[35] The present article expands upon Robinson's work by considering a wider range of remedies through the Court and argues that the Court should borrow from the jurisprudence of the European Court and other institutions to elaborate on the standards it outlined in *Velasquez Rodriguez.*

III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW

¶12 One of the most effective potential international remedies for the women of Juárez could be found in international human rights law by bringing action against Mexico in the Court. The Court came into existence in 1978 and is the final arbiter over violations of the American Convention on Human Rights (the Convention).[36] Mexico ratified the Convention in 1981 and agreed to the Court's jurisdiction on December 16, 1998. The Convention is binding on ratifying states and ensures, *inter alia*, the right to life (Article 4), the right to humane treatment (Article 5) (which includes the protection against torture and "cruel, inhuman, or degrading punishment or treatment"), the right to a fair trial (Article 8), the right to equal protection (Article 24), and the right to judicial protection which includes "simple and prompt recourse, to a competent court or tribunal" for violations of the rights guaranteed by the Convention (Article 25). The women of Juárez may also find recourse in the protections offered by the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), which Mexico ratified on December 12, 1998.[37] This treaty prohibits any form of violence against women, "physical, sexual, or psychological" that occurs in the public or private sphere.[38]

A. State Responsibility for Private Acts

¶13 At first glance, it might be questioned whether Mexico has violated international law in this case. Though some scholars and activists have claimed that the Mexican authorities have been directly involved in the Juárez murders, most theories suggest that private individuals have committed the murders without direct involvement by the Mexican government. Indeed, in its structure, the Convention is a treaty between states and is intended to protect individuals from acts by their states and not from acts by private individuals. Increasingly, however, international legal institutions, including the Court, have held that states can be held responsible for the actions of non-state actors in

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[35] *Id*. at 187-88.

[36] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm [hereinafter American Convention].

[37] Inter-American Commission of Women, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *opened for signature* June 9, 1994, 33 I.L.M. 1534, *available at* http://www1.umn.edu/humanrts/instree/brazil1994.html [hereinafter Inter-American Convention on Violence Against Women].

[38] *Id*. art. 1.

specific cases. In the Inter-American system this responsibility stems from Article 1 of the Convention, which creates positive obligations on states: "the states parties to this Convention undertake to respect the rights and freedoms recognized herein and *to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" (emphasis added). From this duty to ensure rights comes the corollary duty to put in place a legal system that will provide effective recourse for human rights abuses. As the Court ruled in an Advisory Opinion: "any state which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention."[39] In the context of the Juárez case, the Mexican government could be in violation of the Convention for failing to provide security for the women of Juárez once the government knew that human rights violations were likely and for failing to provide due diligence in investigating, prosecuting, and punishing the perpetrators. The Court ruled in its very first contentious case,

> an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[40]

¶14 Such state duties in relation to violence against women are more specifically laid out in Article 7 of the Convention of Belém do Pará which includes state duties "to apply due diligence to prevent, investigate and impose penalties for violence against women." This agreement further requires states to "establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures" and to "ensure that women subjected to violence have effective access to restitution, reparations, or other just and effective remedies."[41] Article 8 incorporates additional steps that states "agree to undertake progressively" including, *inter alia*, promoting "awareness and observance of the right of women to be free from violence" and modifying

> social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.[42]

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[39] Inter-American Court of Human Rights, Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights), Advisory Opinion OC-11/90 (Aug. 10, 1990).

[40] Velásquez Rodriguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 172 (1988).

[41] Inter-American Convention on Violence Against Women, *supra* note 37, art. 7.

[42] *Id.* art. 8.

However, only those duties listed in Article 7 are actionable against a state in the Commission and, ultimately, the Court in a contentious case.

¶15 Both the Convention and the Convention of Belém do Pará provide a basis for finding violations against Mexico in the Court. I argue below that Mexico has failed in its obligations to provide due diligence in the investigation of these murders and failed to take reasonable operational steps to prevent these murders once it knew that the murders fit specific patterns. The next two sections will show how the Court could rely on its first substantive decision and fruitfully borrow from the jurisprudence of the European Court of Human Rights to find Mexico in violation of its international obligations.

B. Investigating, Prosecuting, and Punishing Human Rights Abuses by Non-State Actors

¶16 In its first substantive decision, the *Velásquez Rodríguez* case, the Court broke new ground in international law by laying out the responsibility a state incurs when it has not adequately investigated the actions of non-state actors. This case dealt with the countless disappearances in the early 1980s in Honduras. The Court began by clarifying that Article 1 of the Convention requires that "the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[43] Of particular note is the requirement to provide an adequate investigation. The Court argued, "[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."[44] The Court acknowledged that just because a case is not resolved does not mean that the investigation is inadequate. But, even though Honduras' formal procedures for investigating such cases were "theoretically adequate"[45] in this case, serious questions existed about the effectiveness of the investigation. For instance, judges failed to issue writs to further the investigation. There was no investigation into the overall practice of disappearances and whether the specific case fit into that larger pattern. Also, the legal system often required the victims' families to provide evidence that should have been gathered by the competent authorities.[46]

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[43] Velásquez Rodriguez Case, *supra* note 40, ¶ 166.

[44] *Id.* ¶ 177.

[45] *Id.* ¶ 178.

[46] The Court elaborated on the duty to investigate, as well as the duty to prosecute through a fair legal system in the Las Palmeras Case, Inter-Am. Ct. H.R. (Ser. C) No. 90 (2001). In this case involving the extra-judicial killings of seven Columbian villagers, the Court found that the victims' families were deprived of their right to a fair trial (Art. 8) and their right to judicial protections (Art. 25) even though legal processes were established and investigations took place. The Court stated the general rule that domestic remedies would be illusory if "for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions; or any other situation in which justice is being denied, such as cases in which there has been an unwarranted delay in rendering a judgment." Las Palmeras Case, Inter-Am. Ct. H.R. (Ser. C) No. 90 ¶ 58 (2001). Since the Inter-American Court has had only a few opportunities to examine a state's due diligence to investigate, prosecute, and punish I argue below that it should borrow from the jurisprudence of the European Court of Human Rights, which has addressed this issue in a plethora of cases. Such lesson-drawing from the European Court has been done several times by the Court. For instance, in an analogous situation the Court looked to precedent from the European Court to determine what constitutes a reasonable length of time to complete a judicial proceeding. Genie Lacayo Case, Inter-Am. Ct. H.R. (Ser. C) No. 30 (1997).

¶17 Many human rights organizations have been critical of the Mexican investigation into the Juárez murders. Several instances of investigative misconduct or oversight have been documented in detail including mishandling of DNA evidence of the remains of eight women found together in 2001 and failure to follow up on commonalities among many of the victims.[47] The Inter-American Commission, in its report, also documented missing evidence from case files, case files that only contained a few sheets of paper, as well as very little follow-up on older cases. In some cases, family members have subsequently searched crime scenes two or three months after the victims had been found and recovered clothing and other evidence that the authorities seem to have disregarded.[48] Information has been withheld from the victims' families; family members have been denied the means to identify their loved ones; and, in some cases, the remains have not been returned to the families. "Family members in these and other cases reported having received conflicting or confusing information from the authorities, and having been treated dismissively or even disrespectfully or aggressively when they sought information about the investigation."[49] Moreover, there have been systemic delays in processing missing persons cases, as well as a failure to pass on missing persons cases to the homicide prosecutor in a timely manner. In addition, family members, attorneys, and reporters have been harassed and threatened when they have criticized the investigations.

¶18 This list of negligent behavior on the part of law enforcement officials is only a sample of the complaints that the victims' families have voiced. The Commission's Special Report concluded "the response of the Mexican State to the killings and other forms of violence against women has been and remains seriously deficient. As such, it is a central aspect of the problem. Overall, the impunity in which most violence based on gender remains serves to fuel its perpetuation."[50] From this list of missteps, Mexico seems to have violated the due diligence to investigate the violence against women as laid out in the Convention of Belém do Pará as well as the standards laid out by the Court in the *Velasquez Rodriguez* case.

C. Preventing Human Rights Abuses by Non-State Actors

¶19 Mexico could also be culpable under the Convention and the Convention of Belém do Pará for failing to take reasonable steps to prevent violence against women in Juárez. Very few international cases have examined a state's responsibility for failure to prevent human rights violations by non-state actors, but The European Court has made important rulings in this respect in two recent cases involving Turkey.

¶20 In *Kiliç v. Turkey* the European Court concluded that Turkey had not done enough to protect a pro-Kurdish journalist who had been harassed, received death threats, and

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[47] Kent Patterson, *Activists See Mixed Signals as Juárez Murder Cases Go to OAS,* October 21, 2002, *available at* www.americaspolicy.org/pdf/articles/0210juarez.pdf.

[48] Inter-American Commission Report, *supra* note 1, ¶ 48. Compare Schmidt Camacho's moving description of a "rastreo" or combing of the ground by activists and family members that combines forensics, political activism, and a search for psychological healing (Alicia Schmidt Camacho, *Body Counts on the Mexico-U.S. Border: Feminicidio, Reification, and the Theft of Mexicana Subjectivity*, 4 CHICANA/LATINA STUDIES 22, 43-48 (2004).

[49] Inter-American Commission Report, *supra* note 1, ¶ 48.

[50] *Id*. ¶ 69.

was ultimately shot to death.[51] Although the family had argued that agents acting on behalf of the state perpetrated the killing, it is crucial to note that the Court found there was not enough evidence to implicate the authorities directly. Thus, the case was a question of whether there is a "positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual."[52] The European Court took note of the "difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources," but found the State must take positive operational measures when:

> the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[53]

In this case, the authorities were aware of a particular "real and immediate" risk to Kemal Kiliç because of the number of journalists that had been targeted and because he had individually petitioned the government stating that he and those working at his newspaper had received specific threats. Thus, the European Court found that Turkey had violated the right to life guaranteed by Article 2 of the European Convention.[54]

¶21 In *Kaya v. Turkey*, the Court went one step further and ruled that the government had some responsibility for the death of a doctor who had given aid to wounded members of the PKK (Worker's Party of Kurdistan) even though they were not aware of specific threats to this particular doctor.[55] As in the *Kiliç* case there was insufficient evidence that state agents had perpetrated the killing. Instead, it was generally known that counter-insurgency forces were targeting sympathizers of the PKK and, indeed, a government report had outlined the pattern of killings and ended with a series of recommendations to improve the situation in southeastern Turkey. Based upon this knowledge the Court concluded that Kaya was "at particular risk of falling victim to an unlawful attack,"[56] the government should have been aware of this risk, and, since the government had failed to implement its own recommendations, it had violated its specific obligations to ensure the rights under Article 2 of the European Convention of Human Rights.

¶22 In the Inter-American system, both the Convention and the Convention of Belém do Pará outline broad duties to prevent violence but there has been little case law as to how to apply these guarantees. However, the *Kiliç* and *Kaya* cases from the European system can be directly applied to the Juárez situation. Following the logic of *Kiliç*, in cases where a specific woman receives threats and those threats are made known to the authorities, the government has a duty to take reasonable steps to prevent violence. In *Kaya*, the European Court goes further. When there is a general pattern that is known to

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[51] Kilic v. Turkey, App. No. 22492/93, Eur. Ct. H.R. 128 (2000).
[52] *Id.* ¶ 62.
[53] *Id*. ¶ 63; *Cf.* Osman v. U.K., App. No. 23452/94, Eur. Ct. H.R. 101 (1998).
[54] *Kilic*, App. No. 22492/93 ¶ 77.
[55] Kaya v. Turkey, App. No. 22535/93, Eur. Ct. H.R. 129 (2000).
[56] *Id.* ¶ 89.

the authorities, the state has a duty to take reasonable operational steps to prevent abuses. In the Juárez situation, the Commission has noted many of the responses by the Mexican government to prevent further violence, such as special training programs for law enforcement officers and "measures to install more lights, pave more roads, increase security in high-risk areas and improve the screening and oversight over the bus drivers who transport workers at all hours of the day and night."[57] However, the Commission found that the Mexican authorities had failed to adequately follow up on the recommendations of its own human rights commission just as Turkey had failed to take the necessary steps as outlined in its own internal report in the *Kaya* case. The Mexican government, when it has acted, has failed to provide enough attention to the more general problem of violence against women and its roots in gender discrimination and instead has focused on the so-called "serial killings."[58] The Commission suggested that further training of law enforcement officials was needed as well as additional accountability through evaluation of new initiatives by the authorities. Finally, the State failed to increase its outreach efforts to civil society groups or to conduct a general educational campaign to prevent violence against women.[59] I argue that since Mexico has failed to adequately implement such measures it has violated its duty to prevent the murders in Juárez and is in violation of the right to life as guaranteed under Article 4 of the Convention.

IV. REMEDIES THROUGH THE INTER-AMERICAN COURT

¶23 The Court offers three possible avenues for seeking remedy for human rights abuses such as the failure to provide a remedy through adequate investigations or the failure to take reasonable measures to prevent violence against women. I argue that all three avenues should be explored in this case. The most well-known procedure is a contentious case, which is similar to a trial in the usual sense whereby a state is "accused" of violating parts of the treaty and can present a defense of its actions. The Court is also empowered to issue advisory opinions which provide interpretations of the Convention[60] and to issue provisional measures "in cases of extreme gravity and urgency" to protect individuals or groups "in matters it has under consideration."[61] To date, the Court has issued decisions in approximately forty contentious cases, issued eighteen advisory opinions, and issued orders for more than fifty provisional measures.

¶24 What is most striking about this jurisprudence are the compliance rates for each of these measures, especially in comparison to the relative non-compliance with orders from the Commission. Christine Cerna writes:

> they [states party to the Convention] have accepted the judgments of the Inter-American Court of Human Rights and, this is surprising, because the decisions of the Commission still generally remain unobserved in comparison . . . the most remarkable development in the evolution of the

[57] Inter-American Commission Report, *supra* note 1, ¶ 157.
[58] *Id*. ¶ 154.
[59] *Id*. ¶ 158.
[60] American Convention, *supra* note 36, art. 64(1).
[61] *Id*. art. 63(2).

> Inter-American human rights system, and I cannot emphasize this enough, is that it has become accepted.[62]

A. Contentious Cases

¶25 The Convention permits only states or the Commission to bring contentious cases to the Court,[63] and to date no state has brought a case to the Court. Thus, it would be up to the Commission to bring such a case. Under the Commission's modified Rules of Procedure of 2001, a case will automatically be sent to the Court if the State has not complied with the previous recommendations of a Commission's rulings "unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary."[64] Since four cases related to the Juárez murders have already been filed with the Commission and the Commission's rulings are rarely complied with, it is most likely that the Commission will ultimately send a contentious case to the Court in the Juárez situation.[65]

¶26 Once a contentious case is brought to the Court, it normally proceeds through three distinct phases. First, the states almost invariably file preliminary objections as to why the case should not be heard by the Court. The most commonly used objection is that the victims have not exhausted all local remedies before submitting a case to the Commission, as required by Article 46 of the Convention. In this case, Mexico might claim that it was providing remedies for the women and that its investigation is ongoing. However, the Court has ruled in several cases that, to clear the hurdle of admissibility, the domestic remedy must be both adequate and effective.[66] For example, in *Velasquez Rodriguez*, the Court described situations where the remedy "becomes a senseless formality," specifically when:

> it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to

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[62] Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 203 (2004). But this compliance does have its limits, "in most cases, the state is prepared to pay the pecuniary reparations ordered by the Inter-American Court, but only in the rarest case is it willing to investigate, try and punish the perpetrators, and in those rare cases where it does punish them, they tend to be released from prison after short periods, or never serve prison terms at all." *Id*. 203-04.

[63] American Convention, *supra* note 36, art. 61(1).

[64] Rules of Procedure of the Inter-American Commission on Human Rights, Article 44 Referral of the Case to the Court (Oct. 2003), *available at* http://www.cidh.org/Basicos/basic16.htm.

[65] To date, four petitions have been filed with the Commission (104/02, 281/02, 282/02, and 283/02). Inter-American Commission Report, *supra* note 1, ¶ 26. In March 2005, the Commission was to hear initial arguments on the admissibility of these petitions. Many scholars and court watchers have commented on the inordinate length of time required for a case to make its way through both the Commission and the Court. *See* Michael F. Cosgrove, *Protecting the Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights*, 32 CASE W. RES. J. INT'L L. 39 (2000). The current President of the Court estimates that after making its way through the Commission, it has taken on average of about 28 months for the Court to reach a decision on the merits and another 16 months for judgment on reparations. Antônio A. Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5, 21-22 (2000).

[66] JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 131-133 (2003).

> impede certain persons from invoking internal remedies that would normally be available to others.[67]

In this situation, Mexico's failure to act for more than a decade as well as ongoing harassment of lawyers, victims' families, and activists should lead the Court to decline to wait on domestic remedies to become more than a "senseless formality."

¶27 Once the case clears preliminary objections, it proceeds to the merits phase, where the claim and relevant laws are considered. It is in this phase that the Court would have to consider state responsibilities for the actions of non-state actors, as discussed above. If the state is found responsible in general under Article 1, it could then consider violations of specific rights contained in the rest of the Convention, such as the right to life (Article 4), the right to humane treatment (Article 5) (which includes the protection against torture and "cruel, inhuman, or degrading punishment or treatment"), and the right to judicial protection, which includes "simple and prompt recourse, to a competent court or tribunal" for violations of the rights guaranteed by the Convention (Article 25) or for violations of Article 7 of the Convention of Belém do Pará.

¶28 The Court could, at minimum, consider abuses that occurred after December 1998, the date when Mexico acceded to the jurisdiction of the Court and when it ratified the Convention of Belém do Pará. Mexico ratified the Convention in 1981 and was, therefore, legally bound to offer protection for the women of Juárez since that date. In the European system, the European Commission has ruled that a state could be held responsible for violations that occurred after the treaty had been signed but before the state acceded to the jurisdiction of the legal body. To date, the Inter-American system has not ruled on such jurisdictional questions,[68] but conceivably Mexico could be held responsible for violations from 1981 to 1998 as well.

¶29 If the country is found to be in violation of the Convention, then the case proceeds to the reparations phase. In its first two decades, the Court was criticized for the modest sums it awarded to victims, especially in cases of disappearances and loss of life.[69] Recently, the Court has increased the amounts of monetary damage that is has rewarded and it now far exceeds the amount granted by the European Court in similar cases.[70] The starkest difference between the two courts has been the creative use of non-monetary remedies by the (Inter-American) Court. Often, these remedies have had the purpose of giving agency to the victimized, or at least recognizing the humanity and dignity of the victim. The Court has ordered the state to restore the integrity or identity of the victim by exhuming remains, investigating disappearances, or even locating the children separated from their parents. Victims' families are often given agency through the ability to oversee the investigations of the states[71] as well as the capacity to work with the Court to ensure compliance with reparations orders. In the *Myrna Mack Chang* case, the Court found that Guatemala had violated the right to life, right to fair trial, and right to humane

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[67] *Velásquez Rodriguez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 4 ¶ 68.

[68] PASQUALUCCI, *supra* note 66, at 108.

[69] Ben Saul, *Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights*, 19 AM. U. INT'L L. REV. 523, 575 (2004).

[70] *Id*. at 584.

[71] Juan Humberto Sánchez Case, Inter-Am. Ct. H.R. (Ser. C) No. 99 ¶ 10 (2003).

treatment in the assassination of Chang, an anthropologist and human rights activist.[72] Guatemala accepted unconditional responsibility for the killing. As for reparations, the State was ordered to investigate the case, prosecute and punish the perpetrators, and publish the results of any investigation. However, what is striking is the extent to which the state was also ordered to honor and memorialize the victim, including the establishment of an educational grant in the victim's name. The Court ordered that "the State must also name a well-known street or square in Guatemala City in honor of Myrna Mack Chang, and place a prominent plaque in her memory at the place where she died or nearby, with a reference to the activities she carried out."[73] Finally, the state was ordered to pay over $750,000 in damages and expenses to her family. A similar ruling could go a long way to restoring the subjectivity of the women of Juárez and assist with what one scholar describes as "a vital struggle to retrieve the subjectivity of the victimized women from the brutality of their deaths, to establish their value and social meaning in *life*."[74]

¶30 The Court's increased attention to memorializing the victim could be attributed to the changes in the Court's procedures in 1997 that allow the victim the right to directly address the Court (*locus standi in judicio*) during the reparations stage. The Court's awarding of reparations seems to have changed dramatically since, with monetary damages increasing substantially[75] and almost all of the cases involving creative uses of non-monetary damages occurring after 1998. The newest changes to the Court's rules of procedures, taking effect on June 1, 2001, allow the victims or their relatives to address the Court at all stages of contentious cases. The President of the Court noted that this change "marks a major milestone in the evolution of the inter-American system for the protection of human rights"[76] and this granting of increased agency to the victims surely will lead to dramatic changes in the Court's jurisprudence in contentious cases.

B. Request for an Advisory Opinion

¶31 The Convention also gives the Court the power to issue advisory opinions that interpret the Convention and other "treaties concerning the protection of human rights in the American States."[77] Advisory opinions would, by their very nature, play important roles in setting important interpretive precedents in international law but would appear to have less potential to change the concrete situation in Juárez. And yet, in many cases, these opinions have affected change in domestic laws and in human rights situations. For instance, in an advisory opinion, the Court suggested that Costa Rica change its

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[72] Myrna Mack Chang Case, Inter-Am. Ct. H.R. (Ser. C) No. 101 (2003).

[73] *Id*. ¶ 286.

[74] Camacho, *supra* note 48, at 47. In the Guatemala case stemming from the abduction, torture, and murder of several street children by Guatemalan security forces, the Court ordered "the State to designate an educational center with a name allusive to the young victims in this case and to place in this center a plaque with the names of Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval, Jovito Josué Juárez Cifuentes and Anstraun Aman Villagrán Morales. This will contribute to raising awareness in order to avoid the repetition of harmful acts such as those that occurred in the instant case and will keep the memory of the victims alive." The "Street Children" Case, Inter-Am Ct. H.R. (Ser. C) No. 77 ¶ 103 (2001).

[75] Saul, *supra* note 69, at 577-78.

[76] Antônio A. Cançado Trindade, "Presentation of the Annual Report to the Committee on Juridical and Political Affairs," Permanent Council of the Organization of American States. OEA/ser. G., CP/CAJP-1932/02, 12 (April 25, 2002).

[77] American Convention, *supra* note 36, art. 64.

compulsory licensing law for journalists and Costa Rica complied with this request.[78] Two states, Costa Rica and Argentina, have even directly incorporated the rulings of advisory opinions directly into their domestic law.[79] Further, when an advisory opinion was requested on Guatemala's continued use of the death penalty, "Guatemala unexpectedly announced the suspension of the executions, which never resumed. The public exposure generated by the Court's consideration of the issue resulted in this change of policy."[80]

¶32 Advisory opinions have two important advantages over contentious cases. First, if the Commission is reluctant or slow to send a contentious case to the Court, other institutions in the Organization of American States (OAS) could request an advisory opinion on issues "within their spheres of competence."[81] For instance, in this case the Inter-American Commission on Women could request an advisory opinion because its mandate is "to promote and protect women's rights, and to support the member states in their efforts to ensure full exercise of civil, political, economic, social, and cultural rights that will make possible equal participation by women and men in all aspects of society."[82] Several scholars, as well as the current President of the Court, have suggested that increasing the involvement of other OAS organizations in the matters of the Court would strengthen the system.[83]

¶33 Advisory opinions are also attractive because, as the Court ruled in its first advisory opinion, it could issue interpretations of "any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the Inter-American system are or have the right to become parties thereto."[84] Thus, non-regional treaties fall under the Court's jurisdiction if the given state has agreed to it. For example, in the case involving the application of the death penalty to foreign nationals in the United States,[85] the Court's opinion included interpretations of the Vienna Convention on Consular Relations as well as the International Covenant on Civil and Political Rights (ICCPR). In the Juárez case, the Court might reach outside the American Convention and consider points of law stemming from other treaties that Mexico has ratified such as the ICCPR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and/or the Convention Against Torture (CAT).

¶34 A petition for an advisory opinion should not be a contentious case in disguise. If so, international law would dictate that the Court should either hear this as a contentious case or not hear it at all. In possible contentious cases, the Court has stated that it needs to strike a balance between the protection of human rights in a given case and "the legal

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[78] David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 25 (David J. Harris and Stephen Livingstone, eds. 1998).

[79] Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J INT'L L. 241, 285 (2002).

[80] *Id*. at 286-87.

[81] American Convention, *supra* note 36, art. 64.

[82] Inter-American Convention on Violence Against Women, *supra* note 37.

[83] Pasqualucci, *supra* note 79, at 243.

[84] "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No. 1 ¶ 52 (1982).

[85] The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A) No. 16 (1999).

certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism."[86] Accordingly, the Court has ruled that even though the case appeared to be a disguised contentious case, it would issue an advisory opinion because it was "convinced . . . that its pronouncement on the matter will provide guidance, both to the Commission and to the parties that appear before it, on important procedural aspects of the Convention."[87] Further, the Court found support in numerous cases in other jurisdictions where a Court issued such an opinion even though it might be a contentious case in disguise.[88] The Court has even ruled that if the issue were part of a dispute in an ongoing contentious case, it would issue an advisory opinion.[89] Despite the fact that several cases about the Juárez murders have been filed in the Commission and may ultimately make it to the Court, the Inter-American Commission on Women or other OAS bodies could simultaneously petition for an advisory opinion on a range of legal questions.

1. An Advisory Opinion on the Standards for an Effective Investigation

¶35 A particularly useful substantive question for an advisory opinion would be a clarification of a state's due diligence standards – especially what constitutes an effective investigation. Several questions could be answered on this issue. First, are the standards for effective investigations that have been developed by the European Court applicable in the Inter-American context? Second, considering that most of the European cases have involved investigations of incidents that directly implicate governmental authorities, would such standards apply to a case involving private actors and if so, would there be different standards for effective investigations for different types of cases? Third, the Court could even rule on whether the due diligence standards in the American system should incorporate the previously non-binding recommendations issued by the United Nations on effective investigations. Making such standards binding in the American system would move a long way toward making them part of the customary law of nations.

¶36 Assuming the Court would find that it could borrow from the European system, it could then analyze several recent decisions involving Turkey in order to answer the latter two questions. First of all, most previous cases that involved the failure to provide an effective investigation implicated direct involvement by the authorities or violence against individuals who were in police custody. However, the European Court has recently ruled that the obligation to provide due diligence in the investigation of those killed by force "is not confined to cases where it is apparent that the killing was caused by an agent of the State."[90] In *Ergi v. Turkey*, the Turkish government claimed that its procedural obligations did not extend to a case in which the authorities were not directly implicated, but the European Court ruled "this obligation is not confined to cases where it

[86] Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights), Advisory Opinion OC-15/97, Inter-Am. C.H.R., (Ser. A) No. 15 ¶ 41 (1997).
[87] *Id*.
[88] Western Sahara, Advisory Opinion, ICJ Reports, 12 (1975).
[89] Restrictions to the Death Penalty (arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R., (Ser. A) No. 3 ¶ 39-41 (1983).
[90] Salman v. Turkey, App. No. 21986/93, Eur. Ct. H.R. 357 ¶ 105 (2000).

has been established that the killing was caused by an agent of the State."[91] It could be argued, however, that a state owes a more extensive obligation to investigate when its agents are implicated in a human rights violation or when it occurs in custody. After all, such steps as establishing an independent commission would be more appropriate for state-involved cases. On the other hand, one of the purposes of an effective investigation is to determine the identity of the perpetrators and such a determination would include whether state agents were involved. Such questions about the due diligence to investigate could be clarified by an advisory opinion by the Court.

¶37 The Court could also rule as to what specific international standards must be followed to meet minimum standards for an effective investigation in the Inter-American system. Recall that the Court has already ruled that an investigation must be prompt and adequate, and it must be conducted by an independent agency when the authorities are implicated. The European Court cases have found that an investigation is ineffective when it includes, *inter alia*, the failure to follow leads, delays in contacting witnesses for statements, failure to conduct an adequate autopsy, and poor forensic examinations of crime scenes.[92] In several cases, the European Court has ruled that in violent deaths an autopsy must result in a "complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death."[93] Besides some general guidelines, the rulings of the European Court in this area have been accurately described as "vague, limited, and not integrated."[94] A positive step in creating a clear and coherent set of standards in this area has been the European Court's increasing number of references to the "The Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions" (The Manual) that was passed by the United Nations in 1991.[95] The Manual includes the "Minnesota Protocol" which lays out, *inter alia*, specific procedures for an inquiry into any suspicious death including how a crime scene and evidence should be processed and how to gather personal testimony. It also offers very specific guidelines for how to form a commission of inquiry "in cases where government involvement is suspected."[96] Appended to The Manual is the "Model Autopsy Protocol" which goes into great detail on how autopsies should be performed and includes a checklist to be followed in cases of controversial deaths.[97] The guidelines contained in the Manual and the Model Autopsy Protocol were not originally meant to be binding on states, but "illustrative" of current best practices. However, the Court could issue an advisory opinion that concludes that these protocols,

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[91] Ergi v. Turkey, App. No. 23818/94, Eur. Ct. H.R. 59, ¶ 82 (1998).

[92] *Kaya*, App. No. 22535/93. *Cf*. Hugh Jordan v. The United Kingdom, App. No. 24746/94, Eur. Ct. H.R. 327, ¶ 107 (2001). The "authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death." *Id*.

[93] *Salman*, App. No. 21986/93 ¶ 105.

[94] Kara E. Irwin, *Prospects for Justice: The Procedural Aspect of the Right to Life under the European Convention on Human Rights and its Applications to Investigations of Northern Ireland's Bloody Sunday*, 22 FORDHAM INT. L. J. 1822 (1999).

[95] United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs, *United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, U.N. Doc. ST/CSDHA/12, U.N. Sales No. 91.IV.1 (1991) [hereinafter U.N. Manual].

[96] *Id*. art. IIID.

[97] *Id*. § 4.

in part or in whole, are part of the due diligence to investigate, making them, at minimum, part of customary law in the Inter-American system. Not only would such a ruling go a long way toward standardizing international law, it could also put some added pressure on the Mexican government to conform to international standards in the Juárez investigations.

2. An Advisory Opinion on Domestic Violence as Torture

¶38 The Court could also make a ruling on state culpability for violence against women under the Convention Against Torture (CAT). Several scholars have argued that the CAT should cover violence against women, especially extreme forms of domestic violence, as they are analogous in their intents and effects to official torture.[98] Meyersfeld explains, "extreme forms of domestic violence not only inhibit a woman's ability to enjoy rights and freedoms equally with men; they amount to a dehumanization process which shares with torture the characteristic of the methodical breakdown - physically, emotionally, and mentally - of one human being by another."[99] Even though extreme forms of domestic violence could be analogized to torture, they still might not be among a state's obligations under the CAT. Article 1 limits the definition of torture to those acts "inflicted by or at the instigation of or with the *consent or acquiescence of a public official* or other person acting in an official capacity."[100] However, as Rhonda Copelon argues,

> [I]f the purpose of the "consent or acquiescence" language was to cover situations where the state machinery does not work, then gender-based violence is a case in point . . . . Where domestic violence is a matter of common knowledge and law enforcement and affirmative prevention measures are inadequate, or where complaints are made and not properly responded to, the state should be held to have "acquiesced" in the continued infliction of violence.[101]

¶39 The Court may be open to such a ruling, as the Commission has recently handed down a groundbreaking ruling on state culpability for domestic violence in the *Fernandes v. Brazil* case.[102] In this case, Mrs. Maria da Penha Maia Fernandes' former husband had beaten her and her daughters repeatedly throughout their marriage, and then shot her while she was sleeping. Two weeks later, while recovering from the gunshot wound, he attempted to electrocute her while she was bathing. Despite "the clear nature of the

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[98] *See* Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALBANY L. R. 371 (2003); Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U.J. GENDER SOC. POL'Y & L. 309 (2004); and Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994).

[99] Meyersfeld, *supra* note 98, at 396.

[100] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, art. 1 [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987, *available at* http://www1.umn.edu/humanrts/instree/h2catoc.htm [hereinafter Convention Against Torture].

[101] Copelon, *supra* note 98, at 355-56.

[102] Fernandes v. Brazil, Case 12.051, Inter-Am. C.H.R., Report No. 54/01 (2001).

charges and preponderance of the evidence,"[103] it took almost eight years for the judicial system to move forward to the point of a guilty jury verdict. In the fifteen years since the attempted murders the case has been mired in a myriad of appeals and the ex-husband has remained free. The Commission ruled in 2003 that Brazil was negligent under Articles 1, 8, and 25 of the Convention for failure to ensure human rights by not providing a judicial remedy for Maria de Penha. Further, Brazil was found to have violated five different parts of Article 7 of the Convention of Belém do Pará for failing to provide due diligence in the investigation, prosecution, and punishment of violence against women. The Commission ruled that inaction by the state served to encourage such violence and thus concluded,

> the failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria de Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. . . . Tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.[104]

Such wording is very reminiscent of the "consent or acquiescence" language of CAT and is directly applicable to the situation in Juárez. Indeed, the Commission's report on the Juárez murders cites similar studies evincing a pattern of impunity for domestic violence in Mexico.[105]

¶40 Torture, as well as "cruel, inhuman, or degrading punishment or treatment," is already proscribed under Article 5 of the Convention.[106] However, if extreme forms of domestic violence can be captured under the CAT, a full range of possible remedies becomes available. Article 2 of the CAT requires that "each State Party shall take effective legislative, administrative, judicial or other measure to prevent acts of torture in any territory under its jurisdiction."[107] This obligation is non-derogable, meaning it cannot be eschewed due to war or other exceptional circumstances. To date, 136 countries have ratified the CAT, and the prohibition against torture is now widely considered to be part of customary law, as well as a *jus cogens* norm that is binding on all states. As such, violations could even be actionable in the United States federal court system under the Alien Tort Claims Act and the Torture Victim Protection Act of 1991.[108] Such an advisory opinion could also lead countries, including the United States, to strengthen their asylum laws to protect women who would be subject to extreme forms of domestic violence upon their return.[109] Such potential judicial actions should increase the

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[103] *Id*. ¶ 13.
[104] *Id*. ¶ 55.
[105] Inter-American Commission Report, *supra* note 1, ¶ 59-60.
[106] American Convention, *supra* note 36, art. 5 §2.
[107] Convention Against Torture, *supra* note 100, art. 2 §1.
[108] *See, e.g., Sosa*, 542 U.S. 692.
[109] *See* Barbara Cochrane Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*. 15 AM. U. INT'L L. REV. 895 (2000).

pressure on countries around the globe such as Mexico to take domestic violence more seriously by enacting and enforcing domestic legislation.

C. Request for Provisional Measures

¶41 Besides contentious cases and advisory opinions, the Inter-American Court can issue provisional measures "in cases of extreme gravity and urgency" ordering a country to protect persons from "irreparable damage."[110] The Court originally employed these measures only to protect individuals who would ultimately offer evidence in its proceedings, but now has moved closer to the view of other transnational bodies, namely that provisional measures are a way of ensuring basic human rights as mandated by the Convention.[111] The Commission has recourse to a similar mechanism, namely, precautionary measures, but, as with many actions of the Commission, they do not have the same compliance rate as provisional measures issued by the Court. Often the Court will observe that the Commission's orders for precautionary measures are not complied with and follow-up with provisional measures of its own.[112] Also, the Commission in several cases has requested that the Court issue provisional measures in a case that is still before the Commission. With the Commission having recently ruled favorably on the admissibility of several cases arising from the Juárez murders, the Court could now be asked by the Commission to issue provisional measures. Even if the Commission is unwilling to make such a request, several scholars have suggested that the Court could issue provisional measures in relation to an advisory opinion that it is considering.[113] After all, the Convention's wording on provisional measures does not refer to "cases" but refers to "matters" the Court "has under consideration."[114] To date, neither the Court nor any other transnational body has issued such orders. The Court may be reluctant to move in this direction, because it would then be able to order provisional measures over countries that have not acceded to its jurisdiction and this might invite a possible backlash against its authority.[115] For instance, the Court has issued three advisory opinions in cases dealing presumably with the United States, but the U.S. has not acceded to the Court's jurisdiction. However, one could envision the Court's order having a binding status at least if the advisory opinion involved a country, such as Mexico, that had acceded to its jurisdiction. Either way, provisional measures have become a very effective tool for preventing human rights in the Inter-American system and beyond.

¶42 Recently, the Court issued a strong statement affirming that its orders for provisional measures are based in treaty law and thus are binding on individual states:

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[110] American Convention, *supra* note 36, art. 63 § 2.

[111] Luis Uzcátegui Case, Inter-Am. Ct. H.R. (Ser. E) ¶ 6 (2002).

[112] *See, e.g.*, Álvarez et al. Case, Inter-Am. Ct. H.R. (Ser. E) ¶ 6 (1997) (where the Commission had previously issued two sets of precautionary measures).

[113] PASQUALUCCI, *supra* note 66, at 302.

[114] American Convention, *supra* note 36, art. 63 § 2.

[115] *See* Victor Rodriguez Rescia and Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 631 (2000) (arguing against the general overuse of provisional measures: "Provisional measures may be the most frequently used and efficient mechanism within the inter-American system. In recent years, these measures have been exercised more frequently with satisfactory outcomes. Nevertheless, it is a mechanism that should be used appropriately in order to avoid weakening its effects").

> The provision established in Article 63(2) of the Convention makes it mandatory for the State to adopt the provisional measures ordered by this Tribunal, since there stands "a basic principle of the law of international state responsibility, supported by international jurisprudence, according to which States must fulfill their conventional international obligations in good faith (*pacta sunt servanda*)."[116]

In most cases, it appears that the state in question has complied with these binding orders as can be seen by the number that are ultimately lifted because the threat has subsided – "when it has been proven that the lives and safety of the persons protected are not at grave or imminent risk."[117] The Court has also rescinded parts of orders but affirmed others when some individuals were no longer threatened. Tragically, the Court lifted the order for protection of the Mexican human rights defender Digna Ochoa because she testified that she and her colleagues no longer felt threatened.[118] Two months after the order was lifted, Ochoa was killed in her law office in Mexico City. To monitor compliance, the Court almost always requests follow-up reports on its provisional measures and will often reiterate or strengthen its order to ensure full compliance.

¶43 Because the Court only meets intermittently and provisional measures are urgent in nature, the President of the Court will often issue provisional measures that will then be voted on by the entire court once it is back in session.[119] When the facts of the case in a request for provisional measures are in dispute, the Court will often order a public hearing at which the Commission and the state will testify. Most importantly, the Court has allowed testimony from experts, victims, and relatives.[120]

¶44 For the most part, the Court's early orders for provisional measures only included a very generic command to "adopt all necessary measures to protect the right to life and the physical integrity of" the named persons.[121] But, the Court has now issued more specific orders including timetables for implementing the measures and reporting back to the Court. In the *Luis Uzcátegui* case, the Court ordered Venezuela to "allow the applicants to participate in planning and implementation of the protection measures and, in general, to inform them of progress regarding the measures ordered by the Inter-American Court of Human Rights" as well as "to investigate the facts stated in the complaint that gave rise to the instant measures, with the aim of discovering and punishing those responsible."[122] Venezuela was ordered to comply within fifteen days and report back to the Court on its compliance every two months. In the *Peace Community* case, the Court ordered Columbia to guarantee safe passage on roads near the village, provide safety at

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[116] Constitutional Court Case, Order of the Court of Aug. 14, 2000, Inter-Am. Ct. H.R. (Ser. E) ¶ 14 (2000), *accord* LaGrand (Ger. v. U.S.), Int'l Ct. Justice No. 104, 40 ILM 1069, ¶ 110 (2001) (Where the ICJ forcefully stated that its previous order of provisional measures against the United States "was not a mere exhortation" but "had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States.").

[117] *See* Carpio Nicolle Case, Inter-Am. Ct. H.R., (Ser. E) ¶ 2 (1998).

[118] Digna Ochoa and Plácido et al., Inter-Am. Ct. H.R. (Ser. E) ¶ 4 (2001).

[119] Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 64, art. 25.

[120] Case of Haitians and Haitian Origin in the Dominican Republican Republic, Inter-Am. Ct. H.R. (Ser. E) ¶ 9 (2000).

[121] *See, e.g.*, Chunimá Case, Inter-Am. Ct. H.R. (Ser. E) ¶ 1 (1991).

[122] Luis Uzcátegui Case, Inter-Am. Cr. H.R. (Ser. E) ¶ 3.

the public transportation terminal (where violence had occurred), and "to ensure that the members of the Peace Community effectively and permanently can transport and receive products, supplies, and foodstuffs."[123] Further, the Court ordered that "the State continue to enable participation of beneficiaries of the provisional measures or their representatives in planning and implementation of those measures and, in general, to keep them informed on progress regarding measures ordered by the Inter-American Court of Human Rights."[124]

¶45 The major legal question the Court has wrestled with in issuing provisional measures is the necessary specificity of the "persons" to be covered by the measures. Almost all of the orders for provisional measures have included a listing of the specific individuals to be covered. In the *Case of Haitians*, the Commission requested provisional measures to cover all Haitians that lived near the border between Haiti and the Dominican Republic and were at risk of being unlawfully deported back to Haiti. The Court considered whether a provisional order could cover an indeterminate group and decided only to order measures for specifically named individuals; they further requested that the Commission provide more specific information on those individuals especially at risk. The Court reasoned that it would not be feasible for a state to extend special protection to an indeterminate group of people.[125] The Court followed very similar logic in the *Urso Branco* case where provisional measures were requested to cover all of the inmates in a notoriously violent Brazilian prison. The Court noted its previous decision in the Haitian case, but nevertheless ordered provisional measures for all of the inmates with the caveat that the Brazilian authorities provide the Court with a list of all prisoners within fifteen days.[126]

¶46 The Court, however, explicitly changed its criteria for provisional measures in a case involving a Columbian collective of about 1,200 individuals. This "peace" community had forsworn all violence and involvement in the ongoing civil war but had suffered a series of brutal attacks by nearby paramilitary forces.[127] The Commission requested provisional measures to cover the entire village without naming all covered individuals. The Court agreed to measures for the entire village, arguing:

> while it is true that, on other occasions, the Court has considered [it] indispensable to individualize the people who are in danger of suffering irreparable harm in order to provide them with protective measures, this case has special characteristics that make it different from the background considered by the Court. Indeed, the Community of Paz de San José de Apartadó, formed according to the Commission by about 1200 people, constitutes an organized community, locate[d] in a determined geographic place, whose members can be identified and individualized and who, due to the fact of belonging to said community, all its members are in a

[123] Peace Community of San José de Apartado Case, Inter-Am. Ct. H.R. (Ser. E) ¶ 5 (2002).
[124] *Id*. ¶ 6.
[125] Case of Haitians and Haitian Origin in the Dominican Republican Republic, Inter-Am. Ct. H.R. (Ser. E) ¶ 8.
[126] The Urso Branco Prisons Case, Inter-Am. Ct. H.R. (Ser. E) ¶¶ 1, 3 (2002).
[127] Peace Community of San José de Apartado Case, Inter-Am. Ct. H.R. (Ser. E) (2000) [hereinafter Peace Community Case (2000)].

> situation of similar risk of suffering acts of aggression against their personal integrity and lives.[128]

¶47 The need for individuation appears to have evolved into the need to outline "objective criteria" and similar risks that bind the community together.[129] Two years after the decision, after the paramilitary forces attacked several "service providers" such as those who brought food to the village, the Court extended its order for provisional measures even further to include "all persons linked as service providers to that 'Peace Community.'"[130] This led the President of the Court to reflect that in the increasingly interconnected world, "from a truly communitarian perspective, the fate (*la suerte*) of one is ineluctably linked to the luck of the others. The International Law of Human Rights cannot remain indifferent to that."[131]

¶48 With the Court willing to consider protection for large groups of individuals that are bound by objective criteria and similar risks, provisional measures could be used in several innovative ways to help protect the women of Juárez. The Commission has already issued precautionary measures for Esther Chavez Cano (director of the Casa Amiga women's shelter) and the family members and attorneys of two men indicted for the murders in 2001.[132] The Commission could request provisional measures from the Court for these individuals, as well as for those directly connected to the four individual cases before it, such as employees of specific NGOs, relatives of the victims, or attorneys working on the case. Based upon the *Peace Community* case it is possible that the Court could issue provisional measures to protect a larger group of women, as long as they are of an identifiable group that faces similar risks. The Court could identify specific classes of women that have been especially targeted, such as those who are employees of specific maquiladoras or those who frequent specific areas of the city. Or, since most of the murdered women have been victims of domestic violence, the Court could issue measures to protect women who report such violence.

¶49 In many previous cases, the Commission has requested very specific measures that it would like to have taken, but the Court has most often given a "margin of appreciation" to the state to determine which measures to implement. In the *Peace Community* case, for instance, the Commission originally requested a litany of specific measures, such as installing lights on nearby roads, supplying short wave radios, and repairing the telephone system, but the Court, at least initially, only issued a general order to take "any measures" needed to ensure the security of the members of the Peace Community.[133] Unlike other matters before the Court, in the Juárez case, the Commission has already prepared an extensive report documenting the abuses and suggesting thirty specific recommendations to ensure women the right to be free from violence in Juárez.

¶50 The Court could also draw from the long list of recommendations from the Commission's *Fernandes v. Brazil* domestic violence case. Specifically, the Court could order Mexico to take, at minimum, the following steps: 1) take due diligence in

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[128] *Id.* ¶ 7.
[129] *Id.* ¶ 8 (Abreu-Burelli, Alirio and García-Ramírez, Sergio, concurring).
[130] *Id.* ¶ 8.
[131] *Id.* ¶ 20 (Trindade, A. A. Cançado, concurring).
[132] Inter-American Commission Report, *supra* note 1, ¶ 26.
[133] Peace Community Case (2000), *supra* note 130.

investigating, prosecuting, and punishing those responsible for the crimes, 2) create an independent commission of inquiry with membership from local NGOs and victims' families to analyze current investigative practices, 3) increase training programs on violence against women for law enforcement personnel and other government employees, 4) establish mediation mechanisms for resolving domestic disputes, 5) create police units that are specifically assigned to investigate violence against women, 6) extend special protection for those women who report domestic violence, 7) take other measures to encourage the reporting of domestic violence, and 8) submit periodic reports on progress made in protecting the women in Juárez who are most vulnerable to violence. It is imperative that victims' families and local groups working closely on this issue work with the Court to develop a more extensive list of protective measures. It is worth reiterating that orders for provisional measures from the Court are legally binding, while orders of the Commission are seen as merely hortatory. Thus, it would be expected that Mexican authorities would be more likely to comply with such orders, especially in comparison to the recommendations that have been previously included in the Commission's report on the Juárez situation.

V. CONCLUSION

¶51 The human rights situation in Juárez is complex and multi-faceted. It is grounded in a myriad of social, cultural, demographic, economic, and political conditions, some of which are idiosyncratic to the Mexican border town while others are endemic to Mexico and beyond. Therefore, a comprehensive set of remedies should be pursued through the Court and other transnational institutions. In the Court, each of the three types of remedies should be pursued as each could address different aspects of the abuses in unique ways. Contentious cases offer the best hope for remedying past human rights abuses, especially in relation to the "serial" killings that have garnered much of the international attention. Such a case could lead to reforms in law enforcement and provide reparations to individual families. The Court could order creative reparations that would serve to memorialize the victims and encourage agency for the victims' families. Advisory opinions, at least on the two issues suggested above, would have less impact on the serial killings, but a ruling on the needs for effective investigations could lead to dramatic changes in law enforcement procedures in Juárez, Mexico as well as in the Inter-American system. An advisory opinion on the CAT could have more impact on the domestic violence and the patterns of discrimination against women that have led to impunity in the less notorious cases in Juárez as well as affect changes in domestic laws elsewhere. Finally, a request for provisional measures could lead to dramatic changes in operational policies on the ground, thereby serving to increase the pressure on the Mexican authorities to solve the crimes while also serving to prevent future crimes. A favorable ruling on any of these remedies would establish additional international precedent that a state can be found in violation of human rights treaties for the actions of private actors when the state has failed to prevent or adequately investigate human rights abuses.

¶52 It is important to be cognizant of several limitations of transnational legal decisions in affecting changes for human rights abuses. First, recent rulings by the Court led

Trinidad and Tobago to withdraw from the Court's jurisdiction and Peru unsuccessfully attempted to withdraw when faced with potentially adverse decisions by the Court.[134] After years of work by NGOs and others, Mexico finally acceded to the Court's jurisdiction in 1998. For it to withdraw now would be a major blow to the Court's legitimacy. Equally damaging would be the government's overt refusal to comply with an order from the Court. However, such backlash in this case would be highly unlikely, as the Mexican government has recently made several highly publicized statements on human rights and has taken several concrete steps forward in respecting human rights such as establishing the national human rights commission and making some substantive improvements to the investigation in Juárez. Further, Mexico sought the assistance of the Court through two different advisory opinions in the past six years. Therefore, it is highly unlikely that Mexico would withdraw from the jurisdiction of the Court or refuse to comply with a ruling by the Court. Indeed, the Court's legitimacy has increased recently with an ever-increasing rate of compliance with its decisions.

¶53 The rulings of an international court should not be seen in isolation, but require concomitant actions by those closest to the situation. The murders in Juárez would not have drawn such national and international attention if it were not for the heroic and timorous efforts of the victims' families and other women, including social workers such as Ester Chavez Cano, journalists such as Diana Washington Valdez, and international activists such as Lourdes Portillo. If the Court were to make a ruling in this case, it should not be seen as supplanting the efforts of grassroots groups who will be the ones who affect real change through continued and constant pressure on the local and national governments. Moreover, international legal rulings, because of their ties to abstract international norms, cannot encompass all of the concerns associated with concrete local conditions. An international response will not be able to address the range of issues facing the women in Juárez, nor will it be able to address all of the nuances of the underlying causes of the troubles in Juárez such as a culture of male dominance, class bias, political powerlessness, drug trafficking, and corruption.

¶54 In rushing to create precedents in international law and debating abstract areas of law, it is imperative that the victims and the families are involved and at the forefront of all aspects of any legal proceeding. While recent changes in the Court's operation would allow the victims' families to play major roles in any contentious case or provisional measures, efforts should also be made to involve them in a major way in any requests for advisory opinions. As the President of the Court wrote, "no one better than the victims themselves (or their legal representatives) can defend their rights before the Court . . . . No one better than the victims themselves are well motivated to avoid and overcome procedural 'incidents' which may render them defenseless."[135]

¶55 The mothers of the victims have played crucial roles in this fight and should continue to do so. Anything less than keeping the victims and their families in the forefront risks re-victimizing the victims. Therefore it seems fitting to end with the voice

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[134] *See* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

[135] Antônio Augusto Cançado Trindade, *The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvement of Its Mechanism of Protection*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 414 (David J. Harris & Stephen Livingstone eds., 1998).

of the mothers who have banded together to form *Justicia Para Nuestras Hijas*. In an open letter they write:

> We are humble women who live in the colonias of Chihuahua. We use public transportation, we work for less than the minimum wage, and most of us have only received a primary education. We are mothers of young women who have disappeared. Some of us have finally found our daughters: raped, murdered, and disposed of anywhere. Others of us are still looking for our daughters. We are united today in our suffering, suffering loss of a daughter or the terrible anxiety of not knowing where our daughters are. Our daughters, the disappeared, are captive somewhere, and are in grave danger. Our murdered wanted to be happy: they had dreams, plans, all cut short by their killers. Along with our desperation, our pain, and our anxiety at having lost a daughter, or of not knowing what has happened to her, we have to add the mistreatment we have incurred at the hands of investigating officials.[136]

[136] Camacho, *supra* note 48, at 56-57.