

STANDARDS FOR THE PROTECTION OF THE HUMAN RIGHTS OF WOMEN: NECESSARY TOOLS FOR THE DEFENCE OF WOMEN'S POLITICAL PARTICIPATION

STOP VIOLENCE
AGAINST WOMEN
IN POLITICS



OAS
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 **UN
WOMEN** 

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OF THE HUMAN RIGHTS OF WOMEN:
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This document is one of the joint actions that the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the Inter-American Commission of Women of the OAS (CIM/OAS) are promoting to eradicate violence against women in politics in Latin America and the Caribbean.

Work to systematize this guide was completed in January 2020. Therefore, it compiles case law prior to that date.

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ACRONYMS

ACHR:	American Convention on Human Rights
CAT:	Committee against Torture
CEDAW Committee:	Committee on the Elimination of Discrimination against Women
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
ECHR:	European Court of Human Rights
I/A Court H.R.:	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACPPT:	Inter-American Convention to Prevent and Punish Torture
ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the Former Yugoslavia
IHRL:	International Human Rights Law
MESECVI:	Follow-up Mechanism to the Convention of Belém do Pará
SCSL:	Special Court for Sierra Leone
WHO:	World Health Organization

FOREWORD

In recent years, we have made great efforts to promote the participation of women on equal terms and with equal rights in the political arena. Our aim is for women to hold prominent roles in public life and in relevant decision-making spaces, including as elected officials, in political parties, in crisis cabinets, government and educational institutions, trade unions, the media, and social and human rights associations and organizations.

The increasingly broad and active participation of women in these spaces – in which unequal power relations have been the norm – has led to increasing numbers of new mechanisms of exclusion, many of which rely on gender-based violence to minimize women's participation.

Violence against women and opposition to their participation in public spaces has clearly shown that the practices and mechanisms used to exert pressure on us are far removed from the historical practices used against rival men in a political contest.

The different manifestations of violence directed towards Latin American women presidents, congresswomen and political leaders during their terms of office in the last decade have led to political violence spreading from the private to the public sphere and from the national arena to the international arena, demonstrating the danger of normalizing violence against women politicians. Within the structures of power, this violence seems visible only to these women, and invisible to the rest of the world.

Therefore, understanding that acts of violence against women in politics occur because they are women is vital. Understanding the gender dimension of this violence is key. The violence is, for the most part, disguised by presumably higher objectives, such as “party interests”, “campaign priorities” and “decisions of the authorities”. Identifying this gender dimension allows us to take decisions that benefit the women affected and to effect a change of culture that shatters the historic association of women in politics with subordinate roles.

Various initiatives have been launched to address this situation, including: the Declaration on Political Harassment and Violence against Women of the Inter-American Commission of Women (CIM) of the Organization of American States (OAS); the Inter-American Model Law on the Prevention, Punishment and Eradication of Violence against Women in Political Life of the CIM and the Follow-up Mechanism

to the Convention of Belém do Pará (MESECVI); several studies on political violence in the region, led by UN Women; and an important set of legislative initiatives were enshrined in laws and reforms that punish violence against women in this area. The objective of these efforts is to highlight the characteristics of this type of violence, strengthen the capacities of States to influence public discourse and the legislative and justice agendas, and develop the necessary tools to guarantee justiciability in these cases, without hampering the affected women's right to participate.

The CIM, MESECVI and UN Women have prepared this guide in the same spirit. It systematically, analytically and conceptually documents the interrelated nature of 130 judgments and decisions from paradigmatic cases that have been resolved in the international arena. In this way, civil society, women's movements and governmental institutions can make strategic use of the guide for preventing, addressing and punishing political violence against women.

We hope that this tool will help all on the front lines to continue this essential struggle to defend women's rights.



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INTRODUCTION

INTRODUCCIÓN

The objective of this tool is to systematize the international standards set by the universal, inter-American and European systems in the area of women's human rights, as well as by the case law on women's rights emanating from the international criminal courts. Judgments and decisions in paradigmatic cases were compiled and interlinked to allow civil society and governmental institutions to use the tool strategically and in a cross-cutting way to help guarantee the right of women and girls to a life free from violence.

More specifically, this tool will help to: conceptually identify the different types of gender-based violence committed against women based on material, formal, objective and subjective criteria, in accordance with the international, Inter-American and European human rights systems; increase understanding of the symbiotic relationship between gender stereotypes and bias and gender-based violence against women, thereby facilitating the prevention, treatment, punishment and eradication of that violence; and identify and determine the protection standards in force in international human

rights law and apply them when developing and implementing rules and public policies, as well as in the various procedural phases in the strategic litigation of cases of gender-based violence against women.

In order to achieve these objectives, 130 decisions from a number of international institutions and courts in cases of gender-based violence against women were analysed. These institutions and courts include: the CEDAW Committee (15), the Committee against Torture (3), the Special Court for Sierra Leone (2), the International Criminal Tribunal for Rwanda (5), the International Criminal Tribunal for the Former Yugoslavia (17), the Inter-American Commission on Human Rights (7), the Inter-American Court of Human Rights (60) and the European Court of Human Rights (21).

This tool is divided into two parts:

- The first part addresses the essential basic concepts related to gender-based violence against women, in particular the right of women to a

INTRODUCTION



life free of violence; the concepts of equality and non-discrimination; the concept of a “culture of violence and gender-based discrimination”; (multiple) discrimination, and the differentiated impact of violence and apparently neutral standards on the lives of women. It also covers different elements to be taken into account in tackling different forms of violence: psychological, domestic or in any other interpersonal relationship; violence in the workplace; slavery; forced disappearance; political violence and sexual violence, and the impunity that tends to follow the commission of these and other crimes against women.

- The second part examines the obligations of States in relation to the prevention, punishment and eradication of gender-based violence, as well as the protection of victims. It also looks into the duties of States with regard to public international law (including monitoring compliance with conventions, the duty to adopt provisions in domestic law, and the responsibility of States for the acts of individuals), protection of victims, and prevention of violence against women. Furthermore, it explores the right of access to justice and due process through the principle of due diligence (the obligation to investigate



and the application of the gender-sensitive, cultural diversity and age approaches), the negative impact of gender stereotypes and bias (concept and nature, gender stereotypes and bias as a Cause/consequence of violence against women, and examples of gender stereotypes and bias identified by international human rights law). Finally, it addresses the burden of proof, standards for assessing evidence in cases of violence against women (standards for assessing clues and presumptions, testimony, and, especially in cases of sexual violence, consent) and the right to remedy.

Each section of this compendium is accompanied by a brief overview of the applicable legal framework, focusing on the Americas, a region where many obstacles to the full realization of human rights and the consolidation of full citizenship for women and girls still remain.

May this guide will serve as a complement to the collective, inter-institutional and regional work undertaken to guarantee that there is full access to justice and no impunity, and that women and girls live lives free of violence.

An illustration of a diverse group of people protesting in front of a city skyline. The people are shown from the chest up, with various hairstyles and clothing. Some are holding signs, and others are making peace or fist gestures. The background features stylized buildings in shades of blue, purple, and orange, with a few clouds in the sky. The overall style is flat and graphic.

JUSTICE COURT

WE STAND FOR
PARITY - EQUALITY
JUSTICE

1. Gender-based violence against women. Basic concepts

1.1. The right of women to a life free of violence

Legal framework

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Article 3.

American Convention on Human Rights (ACHR): Article 1(1).

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará): preamble and Articles 3, 5, 6 and 8(b).

Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Article 4.

General recommendation No. 35 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) on gender-based violence, updating general recommendation No. 19: paras. 6, 10, 15, 19 and 20.

Violence against women as a violation of human rights and an offence to human dignity that transcends any socio-cultural context

Inter-American Court of Human Rights (I/A Court H.R.), Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010

108. The Court recalls that, according to the Convention of Belém do Pará, violence against women constitutes not only a violation of human rights, but is also “an offense against human dignity and a manifestation of the historically unequal power relations between women and men” that “pervade every sector of society, regardless of class, race or ethnic group, income, culture, level of education, age or religion and strike at its very foundation”.

(See also: I/A Court H.R., Favela Nova Brasília v. Brazil, Judgment of 16 February 2017, para. 245).

Gender-based violence against women. Basic concepts



Violation of the duty of care by States as part of the global pattern of violence against women

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

150. According to the evidence provided, the irregularities in the investigations and the proceedings included delays in starting investigations, slowness of the investigations or absence of activity in the case files, negligence and irregularities in gathering evidence and conducting examinations, and in the identification of victims, loss of information, misplacement of body parts in the custody of the Public Prosecutor's Office, and the failure to consider the attacks on women as part of a global phenomenon of gender-based violence.

1.2. Equality and non-discrimination

1.2.1. The right to equality

Legal framework

CEDAW: preamble and Articles 1, 2(a), 2(c), 4 and 15.

ACHR: Article 24.

Convention of Belém do Pará: Article 4(f) and 4(j).

Inter-American Model Law on the Prevention, Punishment, and Eradication of the Gender-Related Killing of Women and Girls (Femicide/Feminicide): Article 2(a).

CEDAW General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 2 and 33(b).

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: paras. 11 and 13.

The right to equality and non-discrimination as a principle of *jus cogens*

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

150. [T]he Court recalls that, at the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*. The whole juridical structure of national and international public order rests on it and it permeates the whole legal system.

(See also: *I/A Court H.R., Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012, para. 79*).



The right to equality as a fundamental element of a person's dignity	<u>I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012</u> 79. Regarding the principle of equality before the law and non-discrimination, the Court has stated that “the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.” <i>(See also: Advisory Opinion OC-4/84 of 19 January 1984. Series A No. 4, para. 535).</i>
The right to equality in the application of the law	<u>Inter-American Commission on Human Rights (IACHR), Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011</u> 109. The Commission has clarified that the right to equality before the law does not mean that the substantive provisions of the law have to be the same for everyone, but that the application of the law should be equal for all without discrimination. In practice this means that States have the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law. <i>(See also: IACHR, Report No. 57/96, William Andrews (United States), IACHR Annual Report 1999, para. 173; IACHR, Report No. 67/06, Oscar Elías Biscet et al. - Cuba, 21 October 2006, paras. 228-231; IACHR, Report No. 40/04, Maya Indigenous Community (Belize), IACHR Annual Report 2004, paras. 162 and 166).</i>
Differences in treatment based on reasonable and objective criteria is compatible with the right to equality	<u>IACHR, María Eugenia Morales de Sierra v. Guatemala, Report No. 4/01, 19 January 2001</u> 31. Differences in treatment in otherwise similar circumstances are not necessarily discriminatory. A distinction which is based on “reasonable and objective criteria” may serve a legitimate state interest in conformity with the terms of Article 24.



1.2.2. The prohibition of discrimination

Legal framework	<u>CEDAW</u>: Articles 1, 2(b), 2. (d)-(g) and 4. <u>ACHR</u>: Article 1 (1) <u>Convention of Belém do Pará</u>: Article 6.
The interrelationship of discrimination in the ACHR	<u>I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017.</u> 150. In this regard, while the general obligation under Article 1(1) of the American Convention refers to the obligation of the State to respect and to ensure “without discrimination” the rights contained in this treaty, Article 24 protects the right to “equal protection of the law”. Thus, Article 24 of the Convention prohibits legal or factual discrimination, not only with regard to the rights established therein, but also with regard to all the laws enacted by the State and their application. Ultimately, if a State discriminates in the respect and guarantee of a Convention-based right, it would violate Article 1(1) and the substantive right in question. If, on the contrary, the discrimination relates to unequal protection by domestic law or its application, the fact must be analyzed in light of Article 24 of the Convention in relation to the categories protected by Article 1 (1) of the Convention. <i>(See also: I/A Court H.R., Apitz Barbera et al., “First Court of Administrative Disputes”, v. Venezuela, Judgment of 5 August 2008, para. 209; I/A Court H.R., Gonzalez et al. (“Cotton Field”) v. Mexico, Judgment of 16 November 2009, paras. 394 and 395).</i>
The duty of States to refrain from creating situations of discrimination	<u>I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017</u> 150. States must refrain from carrying out actions that might in any way be aimed to create, whether directly or indirectly, situations of de jure or de facto discrimination. <i>(See also: I/A Court H.R., Hacienda Brasil Verde Workers v. Brazil, Judgment of 20 February 2016, para. 336).</i>



The duty of States to promote social progress to prevent discrimination

I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012

120. The Court notes that social, cultural and institutional changes are taking place in the framework of contemporary societies, which are aimed being more inclusive of their citizens' different lifestyles. [...] In this regard, the law and the State must help to promote social progress; otherwise there is a grave risk of legitimizing and consolidating different forms of discrimination that violate human rights.

(See also: European Court of Human Rights (ECHR), Hoffmann v. Austria, Judgment of 23 June 1993, paras. 15 and 33-36).

The duty of States to take effective measures to eradicate discrimination

CEDAW Committee, Şahide Goekce v. Austria, Views of 6 August 2007

12.1.2. The Committee notes that the State Party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed, in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.

The duty to take positive reinforcement measures to combat discrimination

I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012

119. States are internationally compelled to adopt the measures necessary "to make effective" the rights established in the Convention, as stipulated in Article 2 of said Inter-American instrument, and therefore must be inclined, precisely, to confront intolerant and discriminatory expressions in order to prevent exclusion or the denial of a specific status.



Differences in treatment must be substantiated, proportional and have a legitimate purpose	<u>I/A Court H.R., Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, 19 January 1984</u> 57. Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind. <u>I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012</u> 119. The Court considers that to justify a distinction in treatment and the restriction of a right, based on the alleged possibility of social discrimination, proven or not, that the minors might face due to their parents' situation cannot be used as legal grounds for a decision. While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. <u>ECHR, Case "Relating to certain aspects of the laws on the use of languages in Education in Belgium" (merits), Judgment of 23 July 1968</u> 10. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.
The "equality/proportionality test"	<u>I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012</u> 124. As regards the prohibition of discrimination based on sexual orientation, any restriction of a right would need to be based on rigorous and weighty reasons. Furthermore, the burden of proof is inverted, which means that it is up to the authority to prove that its decision does not have a discriminatory purpose or effect. This is especially pertinent in a case such as this, bearing in mind that the determination of harm must be supported by technical evidence and reports from experts and researchers in order to reach conclusions that do not result in discriminatory decisions.



El llamado “test de igualdad/proporcionalidad”

125. Indeed, the burden of proof here falls on the State, which must demonstrate that the judicial decision under consideration has been based on the existence of clear, specific and real harm to the children’s development. Thus, the judicial decisions on such matters would need to define in a specific and concrete manner the connections and causality between the behavior and the alleged impact on the child’s development.

(See also: ECHR, *Karner v. Austria*, Judgment of 24 July 2003, para. 37; ECHR, *DH and others. v. the Czech Republic*, Judgment of 13 November 2007, para. 177; ECHR, *Muñoz Díaz v. Spain*, Judgment of 8 March 2010, para. 50).

1.3. Identifying the “culture of gender-based violence and discrimination”

Legal framework

CEDAW Committee General recommendation No. 33 on women’s access to justice: para. 3.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: paras. 7 and 14.

The culture of gender-based violence and discrimination as system-wide tolerance

IACHR, Maria da Penha Maia Fernandes v. Brazil, Report No. 54/01, 16 April 2001

55. That tolerance [of impunity] 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.

I/A Court H.R., Case of González et al. (“Cotton Field”) v. Mexico, Judgment of 16 November 2009

132. [...] despite the State’s denial that there is any kind of pattern in the motives for the murders of women in Ciudad Juárez, it told the CEDAW [Committee] that “they are all influenced by a culture of discrimination against women based on the erroneous idea that women are inferior.”

134. The United Nations Rapporteur on violence against women explained that the violence against women in Mexico can only be understood in the context of “socially entrenched gender inequality.”

(See also: I/A Court H.R., *Véliz Franco et al. v. Guatemala*, Judgment of 19 May 2014, para. 208).

Gender-based violence against women. Basic concepts



The culture of gender-based violence and discrimination is structural

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

133. In turn, the CEDAW [Committee] stressed that gender-based violence, including the murders, kidnappings, disappearances and the domestic violence "are not isolated, sporadic or episodic cases of violence; rather they represent a structural situation and a social and cultural phenomenon deeply rooted in customs and mindsets" and that these situations of violence are founded "in a culture of violence and discrimination."

The culture of gender-based violence and discrimination as a context that minimizes/eliminates the perception of violence against women as a problem

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

398. In the instant case, the Court finds that the State informed CEDAW that the "culture of discrimination" against women "influenced the fact that the murders [of women in Ciudad Juárez] were not perceived at the outset as a significant problem requiring immediate and forceful action on the part of the relevant authorities."

1.4. Discrimination and violence against women. Multiple discrimination

Legal framework

Convention of Belém do Pará: Articles 6 and 9.

CEDAW Committee General recommendation No. 33 on women's access to justice: paras. 8, 10 and 14(c).

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: paras. 2, 6, 12, 14 and 21.



Gender-based violence against women is also discrimination

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011

110. Gender-based violence is one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying the enforcement of women's rights.

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014

207. The Court considers that gender-based violence – that is, violence directed against a woman because she is a woman, or violence that affects women disproportionately – is a form of discrimination against women, as indicated by other international bodies involved in the protection of human rights, such as the European Court of Human Rights and the CEDAW [Committee]. Both the Convention of Belém do Pará (preamble and Article 6) and the Convention for the Elimination of All Forms of Discrimination against Women (preamble) have recognized the connection that exists between violence against women and discrimination. Similarly, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 2011) recognizes that “violence against women is a manifestation of historically unequal power relations between women and men which have led to the domination over, and discrimination against, women by men, and to the prevention of the full development of women” and also “the structural nature of violence against women as gender-based violence.”

(See also: CEDAW Committee General recommendation No. 19, Violence against Women (1992), paras. 1–6; I/A Court H.R., Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006, para. 303; I/A Court H.R., González et al. (“Cotton Field”) v. Mexico, Judgment of 16 November 2009, paras. 394–402; European Court of Human Rights (ECHR), Opuz v. Turkey, Judgment of 9 June 2009, para. 200).

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009

188. The United Nations Commission on Human Rights expressly recognised the nexus between gender-based violence and discrimination by stressing in resolution 2003/45 that “all forms of violence against women occur within the context of de jure and de facto discrimination against women and the lower status accorded to women in society and are exacerbated by the obstacles women often face in seeking remedies from the State.”



Failure by States to fulfil the duty of due diligence also constitutes discrimination

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011

111. The international and regional systems have pronounced on the strong link between discrimination, violence and due diligence, emphasizing that a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law.

170. Based on these considerations, the Commission holds that the systematic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence, constituted an act of discrimination, a breach of their obligation not to discriminate, and a violation of their right to equality before the law under Article II of the American Declaration.

(See also: General Assembly of the United Nations, Elimination of domestic violence against women, UN Doc. A/RES/58/147, 19 February 2004; CEDAW Committee, A.T. v. Hungary, Decision of 26 January 2005; IACHR, Maria da Penha Maia Fernandes v. Brazil, Report No. 54/01, Judgment of 16 April 2001; I/A Court H.R., González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009; ECHR, Opuz v. Turkey, Judgment of 9 June 2009).

Discrimination caused by multiple factors: gender, underage status, ethnic and/or national origin, sexual orientation, economic status, etc.

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011.

113. The Commission has also recognized that certain groups of women face discrimination on the basis of more than one factor during their lifetime, based on their young age, race and ethnic origin, among others, which increases their exposure to acts of violence.

(See also: IACHR, Access to Justice for Women Victims of Violence in the Americas, OAS/Ser.L/V/II, Doc. 68, 20 January 2007, paras. 195-197; IACHR, Claudia Ivette González et al. v. Mexico, Report of 9 March 2007, paras. 251-252).

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010

123. Since she filed her complaint eight years ago, she has faced a judicial system that has not worked for her, as an indigenous person, a woman and a minor. The failure to investigate the facts and the subsequent impunity for the crime have accentuated the discrimination, subordination and racism against the victim. The State's response to Mrs. Rosendo Cantú has caused her emotional harm and constitutes a humiliation and degradation, which violates her right to personal integrity and privacy. Moreover, impunity in cases of gender-based violence entails a particular level of violence, danger, fear and restriction of the victim's activities.



Discrimination caused by multiple factors: gender, underage status, ethnic and/or national origin, sexual orientation, economic status, etc.

124. For Mrs. Rosendo Cantú, filing the complaints had entailed cutting through all the barriers suffered by indigenous women with the only hope of obtaining justice, but in doing so she encountered a discriminatory and re-victimizing system of justice, since she was “subjected to intimidating and aggressive procedures that caused additional harm to her psychological integrity”. The presence of soldiers in the area after she had filed her complaint caused her intense fear and prompted the community to stop providing the support it had initially offered her. Moreover, the impunity has created a sense of despair in her, and this has led to a resurgence of the symptoms that resulted from the rape as the date of the court appearance nears. Similarly, the investigation of the events by those responsible caused her to feel indignation, fear and a lack of confidence. Finally, Mrs. Rosendo Cantú was a victim of discrimination and violence since she was prevented from accessing justice in conditions of equality.

125. The State prevented her access to primary health care services immediately after the sexual assault when she was denied medical care immediately after the incident on two separate occasions. In addition, they were unable to offer her treatment by doctors specialized in gynecology and, after the rape, Mrs. Rosendo Cantú suffered severe physical pain while facing the risk of a possible pregnancy or infection with a sexually transmitted disease. This lack of care produced additional trauma to her mental integrity, causing her to feel debased and anguished. Furthermore, she did not receive adequate or quality treatment when she had access to medical services because her status as an indigenous minor and victim of a rape was not taken into account. She had to go to a private clinic in the city of Chilpancingo to receive specialized gynecological care, thereby denying her health services that were free of charge, adequate and accessible.

I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador, Judgment of 1 September 2015

288. The Court notes that certain groups of women suffer discrimination throughout their life based on more than one factor combined with their gender, which increases their risk of enduring acts of violence and other violations of their human rights.

290. The Court notes that, in Talía’s case, numerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different.

(See also: ECHR, B.S. v. Spain, Judgment of 24 July 2012, para. 62).



Discrimination caused by multiple factors: gender, underage status, ethnic and/or national origin, sexual orientation, economic status, etc.	<u>CEDAW Committee, M.W. v. Denmark, Views of 22 February 2016</u> 5.8. With regard to the contention of the author that she suffered discrimination as a foreign mother, the Committee further recalls that discrimination against women on the basis of sex and gender is inextricably linked with other factors that affect women, such as nationality, and that States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned, and prohibit them. <u>Comité CEDAW, Caso M.W. vs. Dinamarca, Dictamen de 22 de febrero de 2016</u> 8.2. In contrast with her husband's application under the Protection against Domestic Violence Act that was duly heard, the State party's authorities failed to act with due diligence, to provide her with effective protection and to take into account her vulnerable position, as an illiterate migrant woman with a small daughter without a command of Bulgarian or relatives in the State party. <u>I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014</u> 223. Lastly, the Court has established that women who have been arrested or detained "must not suffer discrimination, and must be protected from all forms of violence or exploitation." This discrimination includes "violence against a woman because she is a woman or that affects women disproportionately;" and includes "acts that inflict physical, mental or sexual harm or suffering, threats to commit such acts, coercion and other forms of deprivation of liberty." <i>(See also: I/A Court H.R., Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006, para. 303; I/A Court H.R., González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009, para. 397).</i>
The duty of States to take effective action as soon as they identify a situation of multiple discrimination	<u>I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010</u> 103. From the moment that the State [becomes] aware that a rape [has] been committed against an individual who is a member of a particularly vulnerable group, given her status as an indigenous person and a minor, it [has] the obligation to conduct a serious and effective investigation to confirm the truth of the matter and to determine who was responsible.



1.5. The differentiated impact of violence on women

Legal framework	<u>CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 29(d).</u>
The differentiated impact of violence on women as a standard of assessment	<u>I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006</u> 223. When analyzing the facts and their consequences, the Court will take into account that the women were affected by the acts of violence differently than the men, that some acts of violence were directed specifically toward the women and others affected them in greater proportion than the men.
The differentiated impact of violence on women must be assessed taking into account their specific, contextual circumstances	<u>ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009</u> 158. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [torture and/or cruel, inhuman or degrading treatment]. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.
The differentiated impact of violence on women by apparently neutral measures	<u>I/A Court H.R., Case of Artavia Murillo et al. ("in vitro fertilization") v. Costa Rica, Judgment of 28 November 2012</u> 299. [...] although infertility can affect both men and women, the use of assisted reproduction technologies is especially related to a woman's body. Even though the ban on IVF [in vitro fertilization] is not expressly addressed at women, and thus appears neutral, it has a disproportionately negative impact on women. <u>I/A Court H.R., Case of I. V. v. Bolivia, Judgment of 30 November 2016</u> 243. Even though sterilization [is] a contraceptive method used by both women and men, non-consensual sterilization [affects] women disproportionately, because they [are] women, and because society assigned the reproductive function and family planning to women.

Gender-based violence against women. Basic concepts



The differentiated impact of violence on women by apparently neutral measures

ECHR, Case of A. v. Croatia, Judgment of 14 October 2010

94. The Court has already accepted that a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable only on the basis of gender, may be considered discriminatory notwithstanding that it is not specifically aimed at that group, unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate.

1.6. Important elements to take into account about the different types of violence against women

Legal framework

Convention of Belém do Pará: Articles 1, 2, 4 and 5.

Inter-American Model Law on the Prevention, Punishment, and Eradication of the Gender-Related Killing of Women and Girls: Articles 3(a) and 5.

CEDAW General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 34-38.

Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: paras. 6-9, 15-18.

General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, of 26 July 2017: paras. 16-18.

1.6.1. Psychological violence

Legal framework

Convention of Belém do Pará: Article 2, in connection with Articles 4 and 5.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 29(a) and 29(e).



Psychological violence

I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006

308. Having forced the female inmates to remain nude in the hospital, watched over by armed men, in the precarious health conditions in which they were, constituted sexual violence in the aforementioned terms, which caused them constant fear of the possibility that said violence be taken even further by the police officers, all of which caused them serious psychological and moral suffering, which is added to the physical suffering they were already undergoing due to their injuries. Said acts of sexual violence directly endangered the dignity of those women.
330. The severe solitary confinement had specific effects on the inmates that were mothers. Several international organizations have made emphasis on the States' obligations to take into consideration the special attention that must be offered to women due to maternity, which implies, among other measures, ensuring that appropriate visits be permitted between mother and child. The impossibility to communicate with their children caused an additional psychological suffering in the inmates that were mothers.
331. Another aspect that affected women was the lack of attention to their physiological needs. The International Committee of the Red Cross has established that the State must ensure that "sanitary conditions [in the detention centers] are adequate to maintain the hygiene and the health [of the prisoners], allowing them regular access to toilets and allowing them to bathe and to wash their clothes regularly." Likewise, said Committee also determined that special arrangements must be made for female detainees with their period, pregnant, or accompanied by their children. The commission of these excesses causes particular and additional suffering to imprisoned women.

CEDAW, Isatou Jallow v. Bulgaria, Views of 23 July 2012

- 2.2. She was not allowed to leave the house without her husband's permission or to seek employment. He constantly told her that her stay in Bulgaria depended on him and threatened that, if she resisted, he could have her imprisoned, confined to a mental institution or deported to the Gambia, without her daughter. He also made harsh comments about her physical appearance, black skin and illiteracy.

ECHR, Case of Siliadin v. France, Judgment of 26 July 2005

118. The Court notes that, in the instant case, although the applicant [a minor at the time] was not threatened by a "penalty", the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat. She was an adolescent girl in a foreign land, unlawfully present in French territory and in fear of arrest by the police. Indeed Mr. and Mrs. B nurtured that fear and led her to believe that her status would be regularised.



1.6.2. Violence “within the family or domestic unit or in any other interpersonal relationship”

Legal framework

Convention of Belém do Pará: Article 2(a), in connection with Articles 4 and 5.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 16.

Violence in the family, household unit or interpersonal relationships

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011.

112. Various international human rights bodies have moreover considered State failures in the realm of domestic violence not only discriminatory, but also violations to the right to life of women.

(See also: CEDAW Committee, Sahide Goekce v. Austria, Opinion of 21 July 2004; ECHR, Opuz v. Turkey, Judgment of 9 June 2009).

CEDAW, Fatma Yildirim v. Austria, Views of 6 August 2007.

12.2. The Committee notes that the authors also made claims that articles 1 and 5 of the Convention were violated by the State party. The Committee has stated in its general recommendation 19 that the definition of discrimination in article 1 of the Convention includes gender-based violence. It has also recognized that there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence.

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009.

132. [T]he Court must stress that the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be confined to the circumstances of the present case. It is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly.



Violence in the family, household unit or interpersonal relationships

158. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [torture and/or cruel, inhuman or degrading treatment]. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.

1.6.3. Violence in the workplace

Legal framework

CEDAW: Article 11.

Convention of Belém do Pará: Article 2(b), in connection with Articles 4 and 5.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 20.

Sexual harassment

CEDAW, Anna Belousova v. Kazakhstan, Views of 13 July 2015

10.12. The Committee recalls that, in accordance with paragraphs 17 and 18 of its general recommendation No. 19, equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace, which includes such unwelcome sexually determined behaviour as physical contact and advances, direct or implied sexual remarks, and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

10.13. The Committee is of the view that the pressure exerted on the author and the nature of the threat and harassment, as well as the attempts to extort money, all stem from her being a woman in a subordinate and powerless position and constituted a violation of the principle of equal treatment.



Forced labour

ECHR, Case of Siliadin v. France, Judgment of 26 July 2005

118. The Court notes that, in the instant case, although the applicant [a minor at the time] was not threatened by a “penalty”, the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat. She was an adolescent girl in a foreign land, unlawfully present in French territory and in fear of arrest by the police. Indeed Mr. and Mrs. B nurtured that fear and led her to believe that her status would be regularised.
119. As to whether she performed this work of her own free will, it is clear from the facts of the case that it cannot seriously be maintained that she did. On the contrary, it is evident that she was not given any choice.
120. In these circumstances, the Court considers that the applicant was, at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor.

1.6.4. Slavery

Legal framework

ACHR: Article 6.

CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 39-41.

Concept of slavery and differences between slavery, servitude and forced labour

International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Kunarac et al., Judgment of 22 February 2001

543. [The factors to be taken into consideration in determining whether enslavement has been committed are:] control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor.



Concept of slavery and differences between slavery, servitude and forced labour

ECHR, Case of Rantsev v. Cyprus and Russia, Judgment of 7 January 2010

275. In *Siliadin*, considering the scope of “slavery” under Article 4, the Court referred to the classic definition of slavery contained in the 1926 Slavery Convention, which required the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an “object”. With regard to the concept of “servitude”, the Court has held that what is prohibited is a “particularly serious form of denial of freedom”. The concept of “servitude” entails an obligation, under coercion, to provide one’s services, and is linked with the concept of “slavery”. For “forced or compulsory labor” [...], the Court has held that there must be some physical or mental constraint, as well as some [issues relating to] the person’s will.

(See also: ECHR, Siliadin v. France, Judgment of 7 July 2005, paras. 117, 122 and 124).

Absence of consent does not have to be proved as an element of the crime of slavery

ICTY, Prosecutor v. Kunarac et al., Appeal Judgment, 12 June 2002

120. In these respects, the Appeals Chamber rejects the Appellants’ contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent. [...] [A]ccordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime [...]. The Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.

Trafficking in persons for the purpose of exploitation as slavery

ECHR, Case of Rantsev v. Cyprus and Russia, Judgment of 7 January 2010

279. The Court observes that the International Criminal Tribunal for the Former Yugoslavia concluded that the traditional concept of “slavery” has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership. In assessing whether a situation amounts to a contemporary form of slavery, the Tribunal held that relevant factors included whether there was control of a person’s movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape, and whether there was control of sexuality and forced labour.



**Trafficking in persons
for the purpose of
exploitation as slavery**

280. The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry, but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions.

1.6.5. Forced disappearance

Legal framework

Inter-American Convention on the Forced Disappearance of Persons: Articles 1 and 2.
General Recommendation No. 2 of the Committee of Experts of the Follow-up Mechanism to the Convention of Belém do Pará (MESECVI): Missing Women and Girls in the Hemisphere

Concept and elements

I/A Court H.R., Case of Blake v. Guatemala, Judgment of 24 January 1998

66. Forced or involuntary disappearance is one of the most serious and cruel human rights violations.

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

123. In this regard, the Court recalls that the disappearance of a person, because his or her whereabouts are unknown, is not the same as a forced disappearance. A forced disappearance of persons is a violation of human rights consisting of three concurring elements: (a) the deprivation of liberty; (b) the direct intervention or acquiescence of State agents; and (c) the refusal to acknowledge the detention and to reveal the fate or whereabouts of the person concerned.

(See also: I/A Court H.R., Gómez Palomino v. Peru, Judgment of 22 November 2005, para. 97; I/A Court H.R., Rodríguez Vera et al. (Missing Persons of the Palace of Justice) v. Colombia, Judgment of 14 November 2014, para. 226).



Legal assessment

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

124. In its case law, the Court has developed the concept that forced disappearance violates multiple norms, and that it is of a permanent or continuing nature, in which the act of disappearance and its execution start with the deprivation of liberty of the person and the subsequent lack of information about his or her fate, and it continues until the whereabouts of the disappeared person are known or their remains are identified with certainty. Hence, the analysis of a possible forced disappearance must encompass the whole series of facts presented to the Court's consideration. It is only thus that the legal analysis of a possible forced disappearance is consequent with the complex violation of human rights that it involves, with its permanent nature, and with the need to consider the context in which the facts occurred, in order to analyze their effects over time and to consider their consequences integrally, taking into account both the inter-American and international corpus juris on protection.

I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015

122. The Court has considered repeatedly that, in this context when there are reports of missing women, an obligation of strict due diligence arises as regards searching for them during the first hours and days. Since this obligation of means is very strict, it requires that thorough search activities be undertaken. In particular, the prompt and immediate action of the police, prosecution and judicial authorities is essential, ordering prompt and necessary measures to discover the victim's whereabouts. Appropriate procedures should exist for reports, and these should lead to an effective investigation starting immediately. The authorities should presume that the person missing is still alive until the uncertainty about their fate ends.

⁻ (See also: I/A Court H.R., *González et al. ("Cotton Field") v. Mexico*, Judgment of 16 November 2009, para. 283; I/A Court H.R., *Véliz Franco et al. v. Guatemala*, Judgment of 19 May 2014, para. 141).



1.6.6. Political violence against women

Legal framework	<u>CEDAW: Articles 7 and 8.</u> <u>Convention of Belém do Pará: Article 2(b), in conjunction with Articles 4 and 5.</u> <u>Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Articles 2-6.</u> <u>CEDAW Committee General recommendation No. 23 on women in political and public life: paras. 5-11 and 13-14.</u> <u>CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 37, 42-46.</u> <u>CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 20.</u>
Political violence against women as a serious violation of human rights	<u>Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Explanatory Memorandum, II</u> [P]olitical violence against women constitutes a serious violation of the human rights of women and is a major threat to democracy. Gender-based violence prevents women from contributing to decision-making that affects their lives, or benefitting from this process, by restricting their choices and limiting their ability to influence political life. In this context, this law emphasizes the urgency of States adopting all the necessary measures for the eradication of political violence against women, in accordance with the mandates established in the international and inter-American legal framework, on the understanding that the elimination of this violence is an essential condition for democracy and governance in the hemisphere.



The concept of “public and political life”	<u>Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Explanatory Memorandum, II</u> For the purposes of this Model Law, the concept of public and political life developed by Recommendation No. 23 of the CEDAW Committee is relevant. According to the recommendation, the political and public life of a country is a broad concept that refers to the exercise of political power, in particular to the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels, as well as many aspects of civil society and the activities of organizations such as political parties, trade unions, professional or industrial associations, women’s organizations, community organizations and other organizations involved in public and political life.
Examples of political violence against women	<u>Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Explanatory Memorandum, II</u> Acts such as preventing a woman from voting; the use of sexual violence against electoral candidates; the burning of women’s election campaign materials; pressures on women to resign; continuous judgements against women in the media, the main perpetrators of symbolic violence which, based on prejudices and stereotypes, undermine the image of women as effective political leaders; the violent messages and threats received by many women in public positions through social networks, which often also affect their families - constitute only some of the terrible acts of violence that women face, for being women in the exercise of their political rights. Sadly, this region has even witnessed the femicide of women for their participation in politics.



Duties of States regarding the prevention and eradication of political violence against women	<u>Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Explanatory Memorandum, II</u> This law also incorporates the provisions of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in particular those relating to political rights. CEDAW, in its article 7, indicates the obligation of States Party to take all appropriate measures to eliminate discrimination against women in the political and public life of their countries and, in particular, to guarantee the exercise of political rights on equal terms with men. Likewise, article 8 of the Convention establishes the obligation to take the necessary measures to ensure women on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations. Other international conventions, declarations and agreements attach great importance to the participation of women in public life, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Political Rights of Women, the Vienna Declaration, and paragraph 13 of the Beijing Declaration and Platform for Action, among others.
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1.6.7. Sexual violence against women

1.6.7.1. In general

Legal framework	<u>Convention of Belém do Pará: Article 2, in connection with Articles 4 and 5.</u> <u>CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 23, 28(b), 34-37, 54 and 67.</u> <u>Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: paras. 17-30.</u> <u>CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: paras. 18 and 29(a).</u>
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Conceptualization of sexual violence

ICTY, Prosecutor v. Kvočka et al., Judgment of 2 November 2001

180. The Akayesu Trial Chamber defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive”. Thus, sexual violence is broader than rape and includes such crimes as sexual slavery or molestation.

I/A Court H.R., Case of J. v. Peru, Judgment of 27 November 2013

358. [T]he Court has considered that sexual violence is constituted by acts of a sexual nature committed on a person without their consent that, in addition to encompassing the physical invasion of the human body, could include acts that do not involve penetration or even any physical contact.

(See also: I/A Court H.R., Espinoza Gonzáles v. Peru, Judgment of 20 November 2014, para. 191; Corte IDH, Favela Nova Brasília v. Brazil, Judgment of 16 February 2017, para. 246).

I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014

192. Also, pursuant to the jurisprudential and normative standards of both international criminal law and comparative criminal law, the Court has considered that rape does not necessarily entail vaginal sexual intercourse as considered traditionally. Rape should also be understood to include acts of vaginal or anal penetration using other parts of the perpetrator’s body or objects, as well as oral penetration by the male organ. In this regard, the Court clarifies that, for an act to be considered rape, it is sufficient that penetration occurs, however slight this may be, in the terms described above. Furthermore, it should be understood that vaginal penetration refers to penetration with any part of the perpetrator’s body or any object, of any genital opening, including the labia majora or minora, as well as the vaginal orifice. This interpretation is in keeping with the concept that any type of penetration, however slight, is sufficient for an act to be considered rape.

(See also: I/A Court H.R., Favela Nova Brasília v. Brazil, Judgment of 16 February 2017, para. 247).

ICTY, Prosecutor v. Kvočka et al., Judgment of 2 November 2001.

Footnote 343 of para. 180. Sexual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender-related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization” and other similar forms of violence. (Rome Statute of the ICC: Articles 7(1)(g), 8(2)(e)(xxii) and 8(2)(e)(vi).



**The objective of
the commission of
sexual violence**

Special Court for Sierra Leone (SCSL), Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case), Judgement of 2 March 2009

156. [It is important] to draw attention to serious crimes that have been historically overlooked and to recognise the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate and instil fear in victims, their families and communities.

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010

117. In general terms, the Court considers that rape, like torture, pursues the objective of intimidating, degrading, humiliating, punishing or controlling the victim.

(See also: IACHR, *Ana, Beatriz and Celia González Pérez v. Mexico*, Report No. 53/01 of 4 April 2001, para. 48).

**Sexual violence
as torture**

I/A Court H.R., Case of the Massacres of El Mozote and nearby places v. El Salvador, Judgment of 25 October 2012

165. The Court considers that the severe suffering of the victim is inherent in rape [...]. In order to characterize a rape as torture, it is necessary to analyze the intent, the severity of the suffering and the purpose of the act, taking into consideration the specific circumstances of each case.

(See also: I/A Court H.R., *Rosendo Cantú et al. v. Mexico*, Judgment of 31 August 2010, paras. 110 and 11).

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010.

114. Aside from the foregoing, the Court has established that an act of torture may be perpetrated both through acts of physical violence and acts that cause acute mental or moral suffering to the victim.

118. The Court also considers that rape may constitute torture even when it consists of a single act or takes place outside State facilities, [such as in the victim's home]. This is so because the objective and subjective elements that define an act as torture do not refer to the accumulation of acts or to the place where the act is committed, but rather to the intention, the severity of the suffering and the purpose of the act, stipulations that have been met in this case.

(See also: Committee against Torture (CAT), *V.L. v. Switzerland*, Decision of 20 November 2006, para. 8.10; I/A Court H.R., *Cantoral Benavides v. Peru*, Judgment of 18 August 2000, para. 100; I/A Court H.R., *Maritza Urrutia v. Guatemala*, Judgment of 27 November 2003, para. 91).



Sexual violence as torture	<u>I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006</u> 312. Based on the aforementioned and taking into consideration that stated in Article 2 of the Inter-American Convention to Prevent and Punish Torture, this Tribunal concludes that the acts of sexual violence to which an inmate was submitted under an alleged finger vaginal “examination” [...] constituted sexual rape that due to its effects constituted torture.
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Sexual violence in the context of armed conflicts	<u>I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006.</u> 223. Different Peruvian and international organizations have acknowledged that during the armed conflicts women face specific situations that breach their human rights, such as acts of sexual violence, which in many cases is used as “a symbolic means to humiliate the other party.” 224. It has been acknowledged that during domestic and international armed conflicts the confronting parties used sexual violence against women as a means of punishment and repression. The use of state power to breach the rights of women in a domestic conflict, besides affecting them directly, may have the purpose of causing an effect in society through those breaches and send a message or give a lesson. 313. The Special Rapporteur of the UN for Violence against Women has established, referring to the violence against women within a context of an armed conflict, that “[s]exual aggression is often considered and practiced as a means to humiliate the adversary” and that “sexual rape is used by both parties as a symbolic act.” <i>(See also: I/A Court H.R., Massacres of El Mozote and nearby places v. El Salvador, Judgment of 25 October 2012, para. 165).</i> <u>I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala, Judgment of 19 November 2004</u> 49(19) The rape of women was a State practice, executed in the context of massacres, designed to destroy the dignity of women at the cultural, social, family and individual levels. <i>(See also: I/A Court H.R., “Las Dos Erres” Massacre v. Guatemala, Judgment of 24 November 2009, para. 139).</i>
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Gender-based violence against women. Basic concepts



Sexual violence in the context of armed conflicts	<u>IACHR, Ana, Beatriz and Celia González Pérez v. Mexico, Report No. 53/01, 4 April 2001</u> 45. The United Nations Special Rapporteur on violence against women explains that it is ["seen and often experienced as a means of humiliating the opposition"] and that "rape during warfare has also been used to terrorize populations and induce civilians to flee their homes and villages".
The traumatic and social consequences of sexual violence	<u>I/A Court H.R., Case of the Massacres of El Mozote and nearby places v. El Salvador, Judgment of 25 October 2012</u> 165. In particular, rape constitutes a paradigmatic form of violence against women, the consequences of which even exceed the person who is the victim. <i>(See also: I/A Court H.R., Favela Nova Brasília v. Brazil, Judgment of 16 February 2017, para. 247; I/A Court H.R., Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010, para. 109).</i> <u>IACHR, Ana, Beatriz and Celia González Pérez v. Mexico, Report No. 53/01, 4 April 2001</u> 48. The United Nations Special Rapporteur against torture has indicated that rape is a method of physical torture that is used in some instances to punish, intimidate, and humiliate. Using similar language, the European Court of Human Rights stated: "Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence." <i>(See also: ECHR, Aydin v. Turkey, Judgment of 25 September 1997, para. 83).</i>



**The traumatic
and social
consequences of
sexual violence**

I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006

313. This Tribunal acknowledges that sexual violence against women has devastating physical, emotional, and psychological consequences for them, which are exacerbated in the cases of women who are imprisoned.

I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala, Judgment of 19 November 2004

49(19) The [indigenous] women who were raped by the State agents on the day of the massacre, and who survived the massacre, still suffer from that attack. [...] These women consider themselves stigmatized in their communities and have suffered from the presence of the perpetrators in the town's common areas. Also, the continuing impunity of the events has prevented the women from taking part in legal proceedings.

I/A Court H.R., Case of the Río Negro Massacres v. Guatemala, Judgment of 4 September 2012

132. With regard to Article 5 of the Convention, the Court has considered that rape is an extremely traumatic experience that has severe consequences and causes great physical and mental harm that leaves the victim "physically and emotionally humiliated," a situation that is difficult to overcome with the passing of time alone, contrary to other traumatic experiences. Therefore, it can be understood that the severe suffering of the victim is inherent in rape, even when there is no evidence of physical injury or disease. Indeed, not all cases of rape result in body injury or disease. Women who are victims of rape also experience severe psychological and even social harm and aftereffects.

(See also: I/A Court H.R., Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010, para. 114; I/A Court H.R., Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006, para. 311.)



1.6.7.2. Basic typology of sexual violence

A. Rape

The concept of “rape” and its evolution

International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Akayesu, Judgment of 2 September 1998

688. Rape [is] a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. [...] Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.

ICTY, Prosecutor v. Anto Furundzija, Judgment of 10 December 1998

185. [The objective elements of the offence of rape are:] I) the sexual penetration, however slight: a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or; b) of the mouth of the victim by the penis of the perpetrator; II) by coercion or force or threat of force against the victim or a third person.

ICTY, Prosecutor v. Kunarac et al., Appeal Judgment, 12 June 2002

129. [T]here are “factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim”. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.



The concept of “rape” and its evolution

I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014

192. Also, pursuant to the jurisprudential and normative standards of both international criminal law and comparative criminal law, the Court has considered that rape does not necessarily entail vaginal sexual intercourse as considered traditionally. Rape should also be understood to include acts of vaginal or anal penetration using other parts of the perpetrator’s body or objects, as well as oral penetration by the male organ. In this regard, the Court clarifies that, for an act to be considered rape, it is sufficient that penetration occurs, however slight this may be, in the terms described above. Furthermore, it should be understood that vaginal penetration refers to penetration with any part of the perpetrator’s body or any object, of any genital opening, including the labia majora or minora, as well as the vaginal orifice. This interpretation is in keeping with the concept that any type of penetration, however slight, is sufficient for an act to be considered rape.

(See also: I/A Court H.R., Favela Nova Brasília v. Brazil, Judgment of 16 February 2017, para. 247).

The absence of consent as an essential element of the criminal offence of rape

ECHR, Case of M.C. v. Bulgaria, Judgment of 4 December 2003

159. It is significant [...] that in case-law and legal theory lack of consent, not force, is seen as the constituent element of the offence of rape.

163. In international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The International Criminal Tribunal for the former Yugoslavia has found that, in international criminal law, any sexual penetration without the victim’s consent constitutes rape and that consent must be given voluntarily, as a result of the person’s free will, assessed in the context of the surrounding circumstances.



B. Sexual slavery

Sexual slavery	<u>SCSL, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case), Judgement of 2 March 2009</u> 159. This Chamber considers that the actus reus of the offence of sexual slavery is made up of two elements: first, that the Accused exercised any or all of the powers attaching to the right of ownership over a person or persons (the slavery element) and second, that the enslavement involved sexual acts (the sexual element). <i>(See also: ICTY, Prosecutor v. Kunarac et al., Judgment of 22 February 2001, para. 540; SCSL, Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu (the AFRC Case), Appeal Judgment, 22 February 2008, para. 102).</i>
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C. Forced marriage

Concept	<u>SCSL, Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu (the AFRC Case), Appeal Judgment of 22 February 2008</u> 190. [T]he perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury.
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Absence of consent	<u>SCSL, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case), Judgement of 2 March 2009</u> 1469. In relation to the sexual offences alleged in the Indictment, the Chamber notes that the Accused [...] contend that the women and girls who they captured and abducted during attacks, and who were victims of those offences, willingly consented to the alleged marriages and sexual relationships. The Defence also contends that the marriages which were so contracted were conducted with the requisite consent of the parties involved. The Chamber observes, however, that parental and family consent to the so-called marriages of these sexually enslaved and abused women was conspicuously absent.
Consequences	<u>SCSL, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case), Judgement of 2 March 2009</u> 1296. The Chamber observes that the conjugal association forced upon the victims carried with it a lasting social stigma which hampers their recovery and reintegration into society. This suffering is in addition to the physical injuries that forced intercourse commonly inflicted on women taken as “wives”. The Chamber thus finds that the perpetrators’ actions in taking “wives” in Koidu inflicted grave suffering and serious injury to the physical and mental health of the victims, and that the perpetrators were aware of the gravity of their actions.



1.7. Impunity

Legal framework	<u>CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, of 26 July 2017: para. 6.</u>
Concept	<u>IACHR, Ana, Beatriz and Celia González Pérez v. Mexico, Report No. 53/01, 4 April 2001</u> 86. Impunity has been defined as “the failure by States to fulfill their obligation to investigate the violation of rights and to impose the appropriate measures on the perpetrators, in particular from a legal standpoint, so that they can be prosecuted and receive the appropriate penalties; to guarantee victims effective resources and remedy for prejudice suffered; and to take the measures necessary to avoid the repetition of these violations”.
Impunity in cases of violence against women contributes to its entrenchment and prevents women from having confidence in the justice system	<u>IACHR, Maria da Penha Maia Fernandes v. Brazil, Report No. 54/01, 16 April 2001</u> 56. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts. <u>CEDAW Committee, Reyna Trujillo Reyes and Pedro Argüello Morales v. Mexico, Views of 21 July 2017</u> 9.5. The Committee also considers that impunity for such offences contributes significantly to the entrenchment of a culture of acceptance of the most extreme forms of violence against women in society, which feeds their continued commission.



Impunity in cases of violence against women contributes to its entrenchment and prevents women from having confidence in the justice system

I/A Court H.R., Case of González et al. (“Cotton Field”) v. Mexico, Judgment of 16 November 2009

163. Thus, for example, the Report of the IACHR Rapporteur concludes that “[w]hen the perpetrators are not held to account, as has generally been the situation in Ciudad Juárez, the impunity confirms that such violence and discrimination is acceptable, thereby fueling its perpetuation.”
388. This judicial ineffectiveness when dealing with individual cases of violence against women encourages an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted as part of daily life.
400. The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.

(See also: I/A Court H.R., Espinoza Gonzáles v. Peru, Judgment of 20 November 2014, para. 280; I/A Court H.R., Velasquez Paiz et al. v. Guatemala, Judgment of 19 November 2015, para. 176; I/A Court H.R., Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017, para. 176).

An illustration of a diverse crowd of people at a protest or rally. The crowd is composed of individuals with various skin tones, hair colors, and styles. Many are holding up their hands in peace signs. A large, light-colored rectangular sign is held up in the center of the crowd. The background is a solid purple color with faint white lines forming a grid. The bottom of the image features a solid green horizontal band, also with faint white grid lines.

PRESENT 50/50
DEMOCRATIC AND SUSTAINABLE FUTURE

2. States' obligations regarding the prevention, protection, punishment and eradication of violence against women

2.1. States' obligations under international human rights law

2.1.1. Monitoring compliance with conventions

Legal framework

Convention of Belém do Pará: Article 7(c).

CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 19-24.

Concept of monitoring compliance with conventions

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010

219. [W]hen a State is a Party to an international treaty such as the American Convention, all its organs, including its judges, are also subject to that treaty, which requires them to ensure that the effects of the provisions of the Convention are not diminished by the application of standards contrary to its object and purpose.

(See also: I/A Court H.R., *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006, para. 124; I/A Court H.R., *Boyce et al. v. Barbados*, Judgment of 20 November 2007, para. 78).



The duty of the Judiciary to ensure compliance with conventions ex officio	<u>I/A Court H.R., Case of Almonacid Arellano et al. v. Chile, Judgment of 26 September 2006</u> 123. [D]omestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. <u>I/A Court H.R., Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, Judgment of 24 November 2006</u> 128. [T]he organs of the Judiciary should exercise not only a control of constitutionality, but also of “conventionality” ex officio between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations.
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2.1.2. The duty to adopt provisions in domestic law

Legal framework	<u>CEDAW</u>: Articles 2, 6-16. <u>ACHR</u>: Article 2. <u>Convention of Belém do Pará</u>: Article 7(c)-(h).
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Legal basis	<u>I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014</u> 189. In addition, the Court indicates that, pursuant to Article 2 of the American Convention and Article 7(c) of the Convention of Belém do Pará, States have the obligation to adopt laws or implement the necessary measures to allow the authorities to investigate with due diligence in cases where violence against women is suspected. <i>(See also: I/A Court H.R., González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009, para. 388).</i> <u>I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009</u> 285. In addition, the Tribunal finds that the State did not prove that it had adopted norms or implemented the necessary measures, pursuant to Article 2 of the American Convention and Article 7(c) of the Convention of Belém do Pará, that would have allowed the authorities to provide an immediate and effective response to the reports of disappearance and to adequately prevent the violence against women. Furthermore, it did not prove that it had adopted norms or taken measures to ensure that the officials in charge of receiving the missing reports had the capacity and the sensitivity to understand the seriousness of the phenomenon of violence against women and the willingness to act immediately.
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2.1.3. The responsibility of States for the acts of individuals

Legal framework	<u>Convention of Belém do Pará: Articles 2 and 7.</u> <u>CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 13-16 and 17(a) and (b).</u> <u>CEDAW Committee general recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: paras. 6 and 24-28.</u>
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States are not responsible for all acts committed by individuals

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

280. According to the Court's jurisprudence, it is evident that a State cannot be held responsible for every human rights violation committed between private individuals within its jurisdiction.

(See also: I/A Court H.R., Pueblo Bello Massacre v. Colombia, Judgment of 31 January 2006, para. 123; I/A Court H.R., Sawhoyamaya Indigenous Community v. Paraguay, Judgment of 29 March 2006, para. 155; I/A Court H.R., Valle Jaramillo et al. v. Colombia, Judgment of 27 November 2008, para. 78).

I/A Court H.R., Case of López Soto et al. v. Venezuela, Judgment of 26 September 2018

138. [T]he nature erga omnes of the treaty-based guarantee obligations of the States does not entail their unlimited responsibility for all acts or deeds of individuals. In other words, even though an act, omission or deed of an individual has the legal consequence of the violation of certain rights of another individual, this cannot automatically be attributed to the State, because it is necessary to take into account the particular circumstances of the case and the implementation of the said obligation of guarantee.

(See also: I/A Court H.R., Pueblo Bello Massacre" v. Colombia, Judgment of 31 January 2006, para. 123; I/A Court H.R., Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017, para. 140; I/A Court H.R., Carvajal Carvajal et al. v. Colombia, Judgment of 13 March 2018, para. 161).

Requirements for States to be responsible for acts committed by individuals

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

291. Moreover, the Court has noted that this obligation [to initiate, ex officio and without delay, a serious, impartial and effective investigation using all available legal means, aimed at determining the truth and the pursuit, capture, prosecution and eventual punishment of all the perpetrators of the events] remains "whatsoever the agent to which the violation may eventually be attributed, even individuals, because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State's international responsibility".

(See also: I/A Court H.R., Pueblo Bello Massacre" v. Colombia, Judgment of 31 January 2006, para. 145; I/A Court H.R., Kwas Fernández v. Honduras, Judgment of 3 April 2009, para. 78).



**Requirements
for States to be
responsible for
acts committed by
individuals**

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009

159. As regards the question whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors, the Court recalls that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals [...]. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

I/A Court H.R., Case of Velásquez Rodríguez v. Honduras, Judgment of 29 July 1988

172. 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.

**The responsibility
of States for acts
committed by
individuals in cases
of domestic violence**

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011

119. [T]he Commission has also noted that a State can be held responsible for the conduct of non-State actors in certain circumstances. It has moreover held that the rights contained in the American Declaration may be implicated when a State fails to prevent, prosecute and sanction acts of domestic violence perpetrated by private individuals.

120. The obligations established in Article II extend to the prevention and eradication of violence against women, as a crucial component of the State's duty to eliminate both direct and indirect forms of discrimination. In accordance with this duty, State responsibility may be incurred for failures to protect women from domestic violence perpetrated by private actors in certain circumstances.

(See also: IACHR, Maria da Penha Maia Fernandes v. Brazil, Report No. 54/01, 16 April 2001, paras. 3 and 37-44).

States' obligations regarding the prevention, protection, punishment and eradication of violence against women



The responsibility of States for acts committed by individuals in cases of domestic violence

CEDAW, X. v. Timor-Leste, Views of 26 February 2018

6.7. The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, prosecute and punish perpetrators and provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations.

2.2. The duty of States to protect women and prevent violence against women

2.2.1. General context

Legal framework

Convention of Belém do Pará: Articles 7 and 8.

Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: paras. 31-36.

The obligation of States to guarantee women's human rights

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

234. The Court has established that, pursuant to Article 1(1) of the Convention, States are obliged to respect and ensure the human rights established therein. The international responsibility of the State is based on the acts or omissions of any branch or entity of the State, irrespective of its hierarchy, that violate the American Convention.



The obligation of States to guarantee women's human rights	236. As part of this obligation [to guarantee], the State has the legal obligation "to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishments on them, and to ensure the victim adequate compensation". The most important factor is to determine "whether a violation [...] has occurred with the support or the acquiescence of the government or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible". <i>(See also: I/A Court H.R., Velásquez Rodríguez v. Honduras, Judgment of 29 July 1988, para. 173; I/A Court H.R., Cantoral Huamaní and García Santa Cruz v. Peru, Judgment of 10 July 2007, para. 79; I/A Court H.R., Kawas Fernández v. Honduras, Judgment of 3 April 2009, paras. 72 and 73).</i>
Adopting the necessary means for the effective enjoyment of women's rights	<u>IACHR, María Eugenia Morales de Sierra v. Guatemala, Report No. 4/01, 19 January 2001</u> 54. The obligation to respect and ensure the rights of the Convention requires the adoption of all the means necessary to assure María Eugenia Morales de Sierra the enjoyment of rights which are effective.
The obligation of due diligence	<u>I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009</u> 254. [T]he U.N. Special Rapporteur on violence against women stated that "[b]ased on practice and the opinio juris [...] it may be concluded that there is a norm of customary international law that obliges States to prevent and respond with due diligence to acts of violence against women". <u>I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010</u> 177. In cases of violence against women, the general obligations established in Articles 8 and 25 of the American Convention are complemented and enhanced for States Parties by the obligations arising from the specific obligations of the Inter-American treaty of the Convention of Belém do Pará. Article 7(b) of this Convention specifically requires the States Parties to apply due diligence to prevent, punish and eradicate violence against women.

States' obligations regarding the prevention, protection, punishment and eradication of violence against women



The obligation of due diligence	<u>I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015</u> 122. The Court has considered repeatedly that, in this context when there are reports of missing women, an obligation of strict due diligence arises as regards searching for them during the first hours and days.
The failure of the State to fulfil its duties to prevent and protect does not need to be intentional	<u>ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009</u> 191. [T]he State's failure to protect women against domestic violence breaches their right to equal protection of the law and [...] this failure does not need to be intentional.
The reinforced obligation of guarantee in relation to violence against women	<u>I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015</u> 133. This failure to comply with the obligation of guarantee is particularly serious owing to the context [of violence against women] known to the State – which placed women in a special situation of risk – and the specific obligations imposed in cases of violence against women by Article 7 of the Convention of Belém do Pará.

2.2.2. Duty to prevent

Legal framework	<u>Convention of Belém do Pará: Articles 7(a) and (b) and 8.</u> <u>Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Article 15(c), (d) and (e).</u> <u>Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls: Article 26.</u> <u>Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: paras. 51 and 56-60.</u> <u>CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 30.</u>
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The duty to prevent is an obligation of means and not of results	<u>I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014</u> 135. Evidently, while the State is obliged to prevent human rights abuses, the existence of a specific violation does not, in itself, prove the failure to take preventive measures. <i>(See also: I/A Court H.R., Velásquez Rodríguez v. Honduras, Judgment of 29 July 1988, para. 175; I/A Court H.R., González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009, para. 252; and I/A Court H.R., Luna López v. Honduras, Judgment of 10 October 2013, para. 118).</i>
The duty to prevent as a reinforced obligation in cases of violence against women	<u>I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009</u> 258. Furthermore, the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence. This should take into account that, in cases of violence against women, the States also have the general obligation established in the American Convention, an obligation reinforced since the Convention of Belém do Pará came into force.
The existence of a culture of gender-based violence and discrimination implies a violation of the duty to prevent	<u>IACHR, Maria da Penha Maia Fernandes v. Brazil, Report No. 54/01, 16 April 2001</u> 56. Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices.
Permissiveness towards gender stereotypes and bias implies a violation of the duty to prevent	<u>CEDAW Committee, O.G. v. Russia, Views of 6 November 2017</u> 7.8 [T]he State party [failed] in its duty to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or superiority of either of the sexes, or on stereotypical roles for men and women.

States' obligations regarding the prevention, protection, punishment and eradication of violence against women



The duty to prevent covers measures in different areas

I/A Court H.R., Case of Velásquez Rodríguez v. Honduras, Judgment of 29 July 1988

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

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

256. In addition, the UN Special Rapporteur on violence against women has provided guidelines on the measures that States should take to comply with their international obligations of due diligence with regard to prevention, namely: ratification of the international human rights instruments; constitutional guarantees on equality for women; existence of national legislation and administrative sanctions providing adequate redress for women victims of violence; executive policies or plans of action that attempt to deal with the question of violence against women; sensitization of the criminal justice system and the police to gender issues; availability and accessibility of support services; existence of measures in the field of education and the media to raise awareness and modify practices that discriminate against women, and collection of data and statistics on violence against women.

The "two moment" standard for the duty to prevent

I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015

110. In the instant case, there are two moments at which the obligation of prevention must be analyzed. The first is before the disappearance of Claudina Velásquez and the second is before the discovery of her body.

(See also: I/A Court H.R., González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009, para. 281 et seq.; I/A Court H.R., Véliz Franco et al. Guatemala, Judgment of 19 May 2014, para. 138).



The “two moment” standard for the duty to prevent	<u>I/A Court H.R., Case of González et al. (“Cotton Field”) v. Mexico, Judgment of 16 November 2009</u> 282. Regarding the first moment – before the disappearance of the victims – the Tribunal finds that the failure to prevent the disappearance does not per se result in the State’s international responsibility because, even though the State was aware of the situation of risk for women in Ciudad Juárez, it has not been established that it knew of a real and imminent danger for the victims in this case. Even though the context of this case and the State’s international obligations impose on it a greater responsibility with regard to the protection of women in Ciudad Juárez, who are in a vulnerable situation, particularly young women from humble backgrounds, these factors do not impose unlimited responsibility for any unlawful act against such women. Moreover, the Court can only note that the absence of a general policy which could have been initiated at least in 1998 – when the CNDH [National Human Rights Commission] warned of the pattern of violence against women in Ciudad Juárez – is a failure of the State to comply in general with its obligation of prevention. <i>(See also: I/A Court H.R., Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014, para. 139).</i>
The duty of States to investigate in cases of negligence in their prevention obligations	<u>IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011</u> 178. The Commission also considers that when there are State failures, negligence and/or omissions to protect women from imminent acts of violence, the State also has the obligation to investigate systemic failures to prevent their repetition in the future.

States' obligations regarding the prevention, protection, punishment and eradication of violence against women



Limits of the duty to prevent

ECHR, Case of Rantsev v. Cyprus and Russia, Judgment of 7 January 2010

218. The Court reiterates that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind 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. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For the Court to find a violation of the positive obligation to protect life, it must be established that 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 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.

(See also: *ECHR, Paul and Audrey Edwards v. the United Kingdom, Judgment of 14 March 2002, para. 55*).

2.2.3. Duty to protect

Legal framework

Convention of Belém do Pará: Articles 7 and 8.

Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Article 15(c) and (e), and Articles 37 et seq.

CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 15, 21-22, 41(a), 57(a), (d), (e) and (h), and 81(k).

Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: para. 13.

CEDAW Committee General recommendation No. 33 on women's access to justice: para. 6.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 31.



The duty to protect is an obligation of means and not results	<u>IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011</u> 134. [T]he obligation to protect [is] one of reasonable means, and not results, holding the State responsible when it failed to take reasonable measures that had a real prospect of altering the outcome or mitigating the harm. <i>(See also: ECHR, Opuz v. Turkey, Judgment of 9 June 2009, para. 136).</i>
The duty to protect involves implementing practical and effective measures	<u>IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011</u> 163. The States' duties to protect and guarantee the rights of domestic violence victims must also be implemented in practice.
The duty to protect entails implementing measures in different areas	<u>ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009.</u> 80. In its Recommendation Rec(2002)5 of 30 April 2002 on the protection of women against violence, the Committee of Ministers of the Council of Europe stated, inter alia, that member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women, and prevention. <u>CEDAW Committee, X. and Y. v. Georgia, Views of 13 July 2015</u> 9.7. The Committee considers that, read in its entirety, the above-mentioned unrefuted facts demonstrate that the State party's authorities have failed in their duty to adopt appropriate legislative and other measures, including sanctions, prohibiting violence against women as a form of discrimination against women; to establish legal protection of women's rights on an equal basis with men and to ensure, through competent tribunals and other public institutions, the effective protection of women against discrimination; to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with that obligation; to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.



2.3. Women's right of access to justice. Due process

2.3.1. General context

Legal framework	<u>ACHR: Article 8.</u> <u>Inter-American Model Law on the Prevention, Punishment, and Eradication of the Gender-Related Killing of Women and Girls: Articles 14, 16 and 18.</u> <u>CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: para. 78.</u> <u>CEDAW Committee General recommendation No. 33 on women's access to justice of 3 August 2015: paras. 1-14 and 23.</u>
The right of access to justice as one of the basic pillars of any democratic State	<u>IACHR, Ana, Beatriz and Celia González Pérez v. Mexico, Report No. 53/01, 4 April 2001</u> 83. As this Court has ruled, Article 25 "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention". <i>(See also: I/A Court H.R., Loayza-Tamayo v. Peru, Judgment of 27 November 1998, para. 169).</i>
The reinforced right of access to justice in cases of violence against women	<u>I/A Court H.R., Case of the "Las Dos Erres" Massacre v. Guatemala, Judgment of 24 November 2009</u> 137. The Court has thus established that "[the State] has the duty to guarantee the right of access to justice [...] in conformity with the specific obligations set forth in the specialized Conventions [...] with regards to the prevention and punishment of torture and violence against women. [T]hese provisions [...] specify and complement the State's obligations regarding compliance with the rights enshrined in the American Convention," as well as the "international corpus juris on the matter of protection of personal integrity [...]". <i>(See also: I/A Court H.R., Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006, paras. 276, 377 and 379).</i>



The right of access to justice entails making all relevant legislative amendments

CEDAW Committee, O.G. v. Russia, Views of 6 November 2017

7.8. The Committee considers that the failure by the State party to amend its legislation relating to domestic violence directly affected the possibility of the author being able to claim justice and to have access to efficient remedies and protection.

2.3.2. The principle of due diligence

A. General context

Legal framework

Convention of Belém do Pará: Article 7(b).

Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Articles 7.1(c) and 29.

Inter-American Model Law on the Prevention, Punishment, and Eradication of the Gender-Related Killing of Women and Girls: Article 2(b).

CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 3, 15, 17(a) and 74-81.

Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: paras. 11 and 41.

CEDAW Committee General recommendation No. 33 on women's access to justice of 3 August 2015: paras. 10, 23, 47 and 51(a) and (i).

CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 24.2.

General Recommendation No. 1 of the Committee of Experts of the Follow-up Mechanism to the Convention of Belém do Pará (MESECVI): Self-defence and Gender-Based Violence: Section. C (p.19 et seq.).



The duty of due diligence as a manifestation of a State's obligation to guarantee

I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru. Merits, Judgment of 25 November 2006

381. The Court has held that, according to the American Convention, the States Parties are obliged to offer the victims of human rights' violations effective judicial recourse (Article 25), that must be substantiated pursuant to the rules of the due process of law (Article 8(1)), all this within the general obligation, of the same States, to guarantee the free and full exercise of the rights acknowledged by the Convention to all persons under its jurisdiction (Article 1(1)).

(See also: I/A Court H.R., Goiburú et al. v. Paraguay, Judgment of 22 September 2006, para. 110; I/A Court H.R., Servellón García et al. v. Honduras, Judgment of 21 September 2006, para. 147; I/A Court H.R., Ximenes-Lopes v. Brazil, Judgment of 4 July 2006, para. 175).

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011

123. The Commission moreover observes that there is a broad international consensus over the use of the due diligence principle to interpret the content of State legal obligations towards the problem of violence against women.

125. Both the Inter-American Commission and the Court have invoked the due diligence principle as a benchmark to rule on cases and situations of violence against women perpetrated by private actors, including those pertaining to girl-children.

(See also: IACHR, Maria da Penha Maia Fernandes v. Brazil, Report No. 54/01, 16 April 2001, paras. 55-58).



The duty of due diligence as a reinforced requirement in cases of violence against women, in particular when it affects the right to life and integrity

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

284. This failure to comply with the obligation to guarantee is particularly serious owing to the context of which the State was aware – which placed women in a particularly vulnerable situation – and of the even greater obligations imposed in cases of violence against women by Article 7(b) of the Convention of Belém do Pará.

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011

128. The protection of the right to life is a critical component of a State's due diligence obligation to protect women from acts of violence.

129. [T]he due diligence duty of States to protect and prevent violence has special connotations in the case of women, due to the historical discrimination they have faced as a group.

130. Cases of violence against women perpetrated by private actors require an integrated analysis of the State's legal obligations under the American Declaration to act with due diligence to prevent, investigate, sanction and offer remedies.

CEDAW Committee, Reyna Trujillo Reyes and Pedro Argüello Morales v. Mexico, Views of 21 July 2017

9.5. In accordance with general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, States parties have a due diligence obligation to prevent, investigate and punish acts of gender-based violence. Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, States parties are obliged to initiate criminal proceedings, bring the perpetrator(s) to trial and impose appropriate penal sanctions.



**The four essential
principles of the due
diligence obligation**

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011

126. The evolving law and practice related to the application of the due diligence standard in cases of violence against women highlights in particular four principles. First, international bodies have consistently established that a State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain circumstances. Second, they underscore the link between discrimination, violence against women and due diligence, highlighting that the States' duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem. States must adopt the required measures to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women.

127. Third, they emphasize the link between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence. Fourth, the international and regional [human rights] systems have identified certain groups of women as being at particular risk for acts of violence due to having been subjected to discrimination based on more than one factor, among these girl-children, and women pertaining to ethnic, racial, and minority groups; a factor which must be considered by States in the adoption of measures to prevent all forms of violence.

(See also: IACHR, Report No. 4/01, Maria Eugenia Morales de Sierra v. Guatemala, Report No. 4/01, 19 January 2001, para. 44; IACHR, Maria da Penha Maia Fernandes v. Brazil, Report No. 54/01, 16 April 2001, paras. 36-44.)



The measures to be taken by States to guarantee due diligence must be comprehensive and effective, and must involve prevention, protection, punishment, eradication and reparation

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, 21 July 2011

181. Investigations must be serious, prompt, thorough, and impartial, and must be conducted in accordance with international standards in this area.

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009.

258. States should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. The prevention strategy should also be comprehensive; in other words, it should prevent the risk factors and, at the same time, strengthen the institutions that can provide an effective response in cases of violence against women. Furthermore, the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence.

CEDAW Committee, X v. Timor-Leste, Views of 26 February 2018.

6.7. Under the obligation of due diligence, States parties must adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors, including having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws.

ECHR, Case of Rantsev v. Cyprus and Russia, Judgment of 7 January 2010

232. For an investigation to be effective, the persons responsible for carrying it out must be independent from those implicated in the events. This requires not only hierarchical or institutional independence but also practical independence. [...] A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention.

States' obligations regarding the prevention, protection, punishment and eradication of violence against women



The measures to be taken by States to guarantee due diligence must be comprehensive and effective, and must involve prevention, protection, punishment, eradication and reparation

I/A Court H.R., López Soto et al. v. Venezuela, Judgment of 26 September 2018

131. In this regard, the Court has established that States must adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, States must have an adequate legal protection framework that is enforced effectively, and prevention policies and practices that allow it to act effectively when reports are received. The prevention strategy must be comprehensive; that is, it must prevent the risk factors and, also, reinforce the relevant institutions so that they can provide an effective response in cases of violence against women. Furthermore, the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence.

(See also: I/A Court H.R., *V. R. P., V. P. C. et al. v. Nicaragua*, Judgment of 8 March 2018, para. 153; I/A Court H.R., *Favela Nova Brasilia v. Brazil*, Judgment of 16 February 2017, para. 243).

Duty of care and the measures to be taken in criminal investigations

CEDAW Committee, X v. Timor-Leste, Views of 26 February 2018

6.5. The Committee further notes that the State party's law enforcement authorities failed to provide the author with medical care after her arrest, inform her of her rights, provide counsel at her first interview or collect evidence that would have aided her defence; kept the author in detention for a great deal longer than is provided for by the law, despite her being a breastfeeding mother; failed to provide the author with psychosocial support after her arrest appropriate to a person claiming to have been attacked and to have killed in self-defence; failed to ensure, when it appointed counsel, that the assistance provided was effective (including the failure to advance arguments to prevent the pretrial detention of a breastfeeding mother, advise her on her defence or consult her in order to provide her with the opportunity to mount her own defence); and finally that judges, despite a retrial being granted on the basis that self-defence had not been duly considered in the first trial, allowed gender stereotypes and bias to affect the weighing of evidence in the second trial, in particular by lending the author's voice less credence than that of her nephew, who had not been present at all relevant times.



**The duty of care
and the obligation
to conduct
proceedings as a
matter of public
interest**

ECHR, Case of Rantsev v. Cyprus and Russia, Judgment of 7 January 2010.

231. [States] cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

I/A Court H.R., Case of J. v. Peru, Judgment of 27 November 2013

350. In addition, with regard to the impediment to opening an investigation ex officio because the offense of rape was subject to private right of action, the Court repeats that, when there is a well-founded reason to believe that an act of torture or ill-treatment has been committed in the sphere of the State's jurisdiction, the decision to open and conduct an investigation is not a discretionary power, but rather the duty to investigate constitutes a peremptory State obligation that arises from international law and cannot be disregarded or conditioned by domestic legal decisions or provisions of any kind.

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009

139. [T]he more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.

145. The Court thus considers that, bearing in mind the seriousness of the crimes committed by H. O. in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints.

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

290. In light of this obligation, as soon as State authorities are aware of the fact, they should initiate, ex officio and without delay, a serious, impartial and effective investigation using all available legal means, aimed at determining the truth and the pursuit, capture, prosecution and eventual punishment of all the perpetrators of the facts, especially when public officials are or may be involved.

(See also: I/A Court H.R., Pueblo Bello Massacre v. Colombia, Judgment of 1 July 2006, para. 143; I/A Court H.R., Heliodoro Portugal v. Panama, Judgment of 12 August 2008, para. 144; I/A Court H.R., Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014, para. 183).



The duty of care and the obligation to conduct proceedings as a matter of public interest

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

186. Whenever there are reasonable grounds to suspect that a person has been subjected to forced disappearance, a criminal investigation must be opened. This obligation is irrespective of whether a complaint has been filed because, in cases of forced disappearance international law and the general obligation to guarantee impose the obligation to investigate the case ex officio, immediately, and in a genuine, impartial and effective manner; hence, it does not depend on the procedural initiative of the victim or his next of kin or on the provision of probative evidence by private individuals.

I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015

145. In such cases, State authorities must open, ex officio and without delay, a serious, impartial and effective investigation as soon as they become aware of facts that constitute violence against women, including sexual violence.

(See also: I/A Court H.R., *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006, para. 378; I/A Court H.R., *Espinoza Gonzáles v. Peru*, Judgment of 20 November 2014, para. 241).

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014

187. In practice, it is often difficult to prove that a murder or act of violent aggression against a woman is gender-based. At times this impossibility stems from the absence of a thorough and effective investigation of the violent incident and its causes by the authorities. This is why the State authorities are bound to investigate ex officio the possible gender-based discriminatory connotations of an act of violence perpetrated against a woman, especially when there are specific indications of sexual violence or some type of evidence of cruelty towards the body of the woman (for example, mutilations), or when such an act takes place in a context of violence against women in a specific country or region.

(See also; I/A Court H.R., *Velásquez Paiz et al. Guatemala*, Judgment of 19 November 2015, para. 146).



B. The duty to investigate violations of women's rights

Legal framework

Convention of Belém do Pará: Articles 7(b) and 8(c).

Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Article 7(b) and 29.

Inter-American Model Law on the Prevention, Punishment, and Eradication of the Gender-Related Killing of Women and Girls: Article 2(b).

Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: para. 55.i.

CEDAW Committee General recommendation No. 33 on women's access to justice of 3 August 2015: paras. 18(e), 23, 25(a)(vi), 26-28 and 50.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: paras. 23, 24.2(b) and 26(b).

General Recommendation No. 2 of the Committee of Experts of the MESECVI: Missing women and girls in the Hemisphere: Section. C (p. 15 and following).

The duty to investigate violence against women arises from the general obligation to guarantee the rights to life, personal integrity and liberty

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

287. The obligation to investigate cases of the violation of these rights arises from the general obligation to guarantee the rights to life, personal integrity and personal liberty: in other words, Article 1(1) of the Convention in conjunction with the substantive right that must be ensured, protected and guaranteed. In addition, Mexico must comply with the provisions of Article 7(b) and 7(c) of the Convention of Belém do Pará, which establishes the obligation to act with due diligence, and to adopt the necessary laws to investigate and to punish violence against women.

(See also: I/A Court H.R., Pueblo Bello Massacre v. Colombia, Judgment of 31 January 2006, para. 142; I/A Court H.R., Heliodoro Portugal v. Panama, Judgment of 12 August 2008, para. 115; I/A Court H.R., Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006, para. 344).



The duty to investigate with due diligence

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

289. The State's obligation to investigate must be complied with diligently in order to avoid impunity and the repetition of this type of act. In this regard, the Tribunal recalls that impunity encourages the repetition of human rights violations.

(See also: I/A Court H.R., *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, para. 179; I/A Court H.R., *Garibaldi v. Brazil*, Judgment of 24 September 2009, para. 141).

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014

183. The State's obligation to investigate must be fulfilled diligently in order to avoid impunity and a repetition of this type of act. Thus, the Court recalls that impunity encourages the repetition of human rights violations. The Court has also noted that this obligation persists "whosoever the agent to whom the violation may eventually be attributed, even private persons, because, if their acts are not genuinely investigated, they would, to some extent, be aided by the public authorities, which would involve the international responsibility of the State".

(See also: I/A Court H.R., *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, para. 177; I/A Court H.R., *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, para. 319; I/A Court H.R., *García and family members v. Guatemala*, Judgment of 29 November 2012, para. 132; I/A Court H.R., *Luna López v. Honduras*, Judgment of 20 October 2013, para. 155).

The duty to investigate as a reinforced requirement in cases of violence against women

I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015

146. The Court has also indicated that the obligation to investigate is increased in the case of a woman who is killed or suffers ill-treatment, or whose personal liberty is violated in a general context of violence against women.

(See also: I/A Court H.R., *Véliz Franco et al. v. Guatemala*, Judgment of 19 May 2014, para. 186).



The duty to investigate as a reinforced requirement in cases of violence against women

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

293. The Tribunal finds that, following the standards established by this Tribunal, [...] the obligation to investigate effectively has a wider scope when dealing with the case of a woman who is killed or, ill-treated or, whose personal liberty is affected within the framework of a general context of violence against women. Similarly, the European Court has said that where an "attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence". This criterion is wholly applicable when examining the scope of the obligation of due diligence in the investigation of cases of gender-based violence.

(See also: ECHR, Angelova and Iliev v. Bulgaria, Judgment of 26 June 2007, para. 98).

IACHR, Ana, Beatriz and Celia González Pérez v. Mexico, Report No. 53/01, 4 April 2001

77. The European Court of Human Rights has established that when an individual files a complaint claiming that he/she has been tortured by State agents, the concept of effective remedy includes, in addition to the payment of compensation where appropriate, an investigation that permits identification and punishment of the guilty parties.

78. "States shall ensure that complaints and reports of torture or ill-treatment shall be promptly and effectively investigated [...] The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial."

81. In the past, the Inter-American Commission has maintained that "when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised," [...] and what occurs is de facto impunity.



**The duty to
investigate violence
against women as
an obligation of
effective means and
not of results, and
as a legal obligation
of States**

I/A Court H.R., López Soto et al. v. Venezuela, Judgment of 26 September 2018

148. The duty to investigate is an obligation of means and not of results that must be assumed by the State as its inherent legal duty and not as a simple formality preordained to be ineffective, or merely as a measure taken by private interests that depends on the procedural initiative of the victims, their next of kin, or the private provision of evidence.

(See also: I/A Court H.R., Yarce et al. v. Colombia, Judgment of 22 November 2016, para. 180).

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014

210. In addition, the Court considers that the lack of due diligence in the investigation of the victim's murder is closely related to the absence of specific norms or protocols for the investigation of cases of the gender-based murder of women and violence against women in general. [...] Consequently, the Court cannot admit the State's argument that it is exempted from responsibility because the State authorities took all the pertinent measures under the laws in force at the time and to the best of their ability.

IACHR, Jessica Lenahan (Gonzales) et al. v. United States, Case No. 12,626, Report No. 80/11, 21 July 2011

181. In addition, the IACHR has established that the State must show that the investigation "was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth".

(See also: I/A Court H.R., González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009, para. 289; I/A Court H.R., Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014, para. 183).



A violation of the duty to investigate cases of violence against women is particularly serious in cases of armed conflict or within a systematic pattern of discrimination

I/A Court H.R., Case of the “Las Dos Erres” Massacre v. Guatemala, Judgment of 24 November 2009

140. In this regard, the Court deems that the lack of investigation of grave facts against humane treatment such as torture and sexual violence in armed conflicts and/or systematic patterns, constitutes a breach of the State’s obligations in relation to grave human rights violations, which infringe non-revocable laws (*jus cogens*) and generate obligations for the States such as investigating and punishing those practices, in conformity with the American Convention and in this case in light of the IACPPT (Inter-American Convention to Prevent and Punish Torture) and the Convention of Belém do Pará.

(See also: ICTR, *Prosecutor v. Akayesu*, Judgment of 2 September 1998, paras. 687-688; ICTY, *Prosecutor v. Delalic et al., Celebici Case*, Judgment of 16 November 1998, para. 941; ICTY, *Prosecutor v. Delalic et al., Celebici Case*, Appeal Judgment, 20 February 2001, paras. 488 and 501; ICTY, *Prosecutor v. Kunarac et al.*, Judgment of 22 February 2001, paras. 656, 670 and 816; I/A Court H.R., *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, paras. 128 and 131; I/A Court H.R., *La Rochela Massacre v. Colombia*, Judgment of 11 May 2007, para. 132; I/A Court H.R., *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, para. 59).

Cases of violence against women must be analysed within the context in which they occur and not in isolation

I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015

50. The Court will not analyze the alleged facts in this case in isolation, but rather in the context described, in order to make it possible to understand the evidence and reach a precise determination of the facts.

146. State authorities have the duty to investigate *ex officio* any possible discriminatory gender-based connotations in an act of violence perpetrated against a woman, especially when there are specific indications of sexual violence of some type, or evidence of cruelty inflicted on the woman’s body (mutilation, for example), or when this act occurs in a context of violence against women in a country or a particular region.



**Cases of violence
against women
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I/A Court H.R., Case of the "Las Dos Erres" Massacre v. Guatemala, Judgment of 24 November 2009

233. b) [E]ffectively investigate all facts of the massacre, taking into account the systematic pattern of human rights violations existing at the time that the facts of the instant case took place, including, apart from the murder of the inhabitants of the community, other possible serious infringements to humane treatment, particularly, the alleged acts of torture, in light of the differentiated impacts of the alleged violence against girls and women.

ECHR, Case of A. v. Croatia, Judgment of 14 October 2010

76. However, in a situation such as the one in the present case, where different sets of criminal and minor offences proceedings concerned a series of violent acts by the same person, namely B, and against the same victim, namely the applicant, it appears that the requirement of effective protection of the applicant's right to respect for her private life would have been better satisfied had the authorities been in a position to view the situation as a whole. That would have given them a better overview of the situation and an opportunity of addressing the need to protect the applicant from various forms of violence in the most appropriate and timely manner.

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

112. This difference of opinion requires the Court to examine the context of the facts of the case and the conditions in which said facts can be attributed to the State, thus entailing its international responsibility derived from the alleged violation of Articles 4, 5 and 7 of the American Convention, in relation to Articles 1(1) and 2 thereof, and of Article 7 of the Convention of Belém do Pará.
368. However, the Court finds that, even though the individualization of the investigations could, in theory, even advance them, the State should be aware that all the murders took place in a context of violence against women. Consequently, it should adopt the necessary measures to verify whether the specific murder that it is investigating is related to this context. Investigating with due diligence requires taking into consideration what happened in other murders and establishing some type of connection with them. This should be carried out ex officio, without the victims or their next of kin being responsible for taking the initiative.



**Noncompliance
of the duty to
investigate with due
diligence results in
discrimination and
impunity in cases
of violence against
women**

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

366. The Court's jurisprudence has indicated that certain lines of inquiry, which fail to analyze the systematic patterns surrounding a specific type of violations of human rights, can render the investigations ineffective.

(See also: I/A Court H.R., *La Rochela Massacre v. Colombia*, Judgment of 11 May 2007, paras. 156, 158 and 164).

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017.

184. In light of the above, the Court considers that, from the initial phases of the investigation, there was a lack of due diligence in following-up the information gathered. Similarly, in the instant case, a stereotyped assessment of Mayra Gutiérrez was made, prejudging the motive and focusing the investigation on her personal relationships and lifestyle. Negative gender biases and stereotypes affected the objectivity of the officers in charge of the investigations, closing possible lines of inquiry into the circumstances of the case. Furthermore, the investigation into the disappearance of Mayra Gutiérrez was characterized by the absence of administrative and/or jurisdictional controls that would make it possible to rectify the irregularities. All this resulted in the case not being seriously, rigorously or exhaustively investigated, which allowed impunity to continue for more than 17 years, constituting a form of gender-based discrimination in access to justice. In the instant case, the deficiencies, failures and omissions in the investigation represent a violation of the requirement of due diligence and reasonable time in the investigation and criminal prosecution of the disappearance of Mayra Gutiérrez.

185. Therefore, in the context of the investigations, in the instant case the State violated both the right to equal protection before the law (Article 24) and the obligation to respect and ensure without discrimination the rights contained in the American Convention (Article 1(1)), without it being necessary to make a distinction between the two forms of discrimination, as well as Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) of the treaty, and Article 7(b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"), to the detriment of Mayra Angelina Gutiérrez Hernández and her family.



C. The application of cross-cutting approaches: the gender-sensitive approach and others

a. The gender-sensitive approach

Legal framework	<u>Convention of Belém do Pará: Article 8.</u> <u>CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 17(d), 38(c) and 56.</u> <u>CEDAW Committee General recommendation No. 33 on women's access to justice: paras. 29(a), 46(b), 48 and 51(g).</u> <u>CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 17.</u> <u>General Recommendation No. 1 of the Committee of Experts of the Follow-up Mechanism to the Convention of Belém do Pará (MESECVI): Self-Defense and Gender-Based Violence: Section. C (p. 18).</u> <u>General Recommendation No. 2 of the Committee of Experts of the MESECVI: Missing women and girls in the Hemisphere: Section. C (p. 20).</u>
The application of the gender-sensitive approach in cases of violence against women is not a prerogative but a duty of the State	<u>I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014</u> 188. Also, in cases where acts of violence against women are suspected, the criminal investigation should include a gender perspective and be carried out by officials with training in similar cases and in attending to victims of discrimination and gender-based violence. 216. Consequently, the Court considers that the investigation into the murder of María Isabel has not been conducted with a gender perspective in keeping with the special obligations imposed by the Convention of Belém do Pará. 251. This investigation should be conducted with a gender-perspective, follow up on specific lines of investigation related to sexual violence, provide the victim's family members with information on progress in the investigation in accordance with domestic law, and ensure that they can participate effectively in the criminal proceedings. In addition, the investigation should be conducted by officials trained in similar cases and in attending to victims of discrimination and gender-based violence. <i>(See also: I/A Court H.R., Espinoza Gonzáles v. Peru, Judgment of 20 November 2014, para. 309).</i>



The application of the gender-sensitive approach in cases of violence against women is not a prerogative but a duty of the State

I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015

200. The Court considers that, in this case, the State failed to comply with its obligation to investigate the violent death of Claudina Velásquez as a possible expression of gender-based violence and with a gender approach.

I/A Court H.R., Case of the “Las Dos Erres” Massacre v. Guatemala, Judgment of 24 November 2009

141. Based on the foregoing, the State should have initiated, ex officio and without delay, a serious, impartial and effective investigation of all of the facts of the massacre related to the violation of the right to life and other specific violations against humane treatment, such as the alleged torture and acts of violence against women, with a gender perspective and in conformity with Articles 8(1) and 25(1) of the Convention, and the specific obligations set forth in Articles 1, 6, and 8 of the Inter-American Convention against Torture and 7(b) of the Convention of Belem do Pará.

(See also: I/A Court H.R., Miguel Castro-Castro Prison v. Peru. Merits, Judgment of 25 November 2006, para. 378).

CEDAW Committee, O. G. v. Russia, Views of 6 November 2017

7.6. In the present case, the compliance of the State party with its obligations under articles 2 (a), (c), (d) and (e) and 5 (a) of the Convention to eliminate gender stereotypes needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author’s case.

Not using the gender-sensitive approach leads to incomplete decision-making and, therefore, the denial of the right of access to justice for women

CEDAW Committee, Anna Belousova v. Kazakhstan, Views of 13 July 2015

10.8. In light of the foregoing, the Committee is of the view that, in the present case, the State party’s institutions and courts failed to give due consideration to the author’s complaint of gender-based violence, which took the form of sexual harassment in the workplace, and to the evidence in support of that complaint, and that they thus failed in their duty to take into apply gender sensitivity to the examination of the complaint.



Applying a gender-sensitive approach will make it possible to open up different lines of investigation, to connect cases of violence with others and with the context of violence in which they occurred

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

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

602.18. The State shall, within a reasonable time, continue standardizing all its protocols, manuals, prosecutorial investigation criteria, expert services, and services to provide justice that are used to investigate all the crimes relating to the disappearance, sexual abuse and murders of women in accordance with the Istanbul Protocol, the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, and the international standards to search for disappeared persons, based on a gender perspective.

I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador, Judgment of 1 September 2015

288. In the case of women with HIV/AIDS, the gender perspective provides a way of understanding living with the illness in the context of the "roles and expectations that affect peoples' lives, choices and interactions (particularly in terms of sexual feelings, desires and behaviors)."

The presence of gender stereotypes and bias is evidence of the lack of application of a gender-sensitive perspective

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

143.c. Gender stereotyping has been identified in several "sections of the case file" when reference is made to the investigative hypothesis concerning Ms. Mayra Gutiérrez's alleged relationships. This occurred in a context of delays in investigating the disappearance of women, as well as the authorities failing to look for the victims promptly while disparaging them and blaming them for their actions, with the consequence that these authorities saw them as unworthy of state action to locate and protect them. In this case, gender stereotyping shifted the blame for what had happened onto the victim and her family, closing down other possible lines of investigation. As such, the investigation was not conducted in a gender-sensitive manner.



The presence of gender stereotypes and bias is evidence of the lack of application of a gender-sensitive perspective	<u>CEDAW Committee, O.G. v. Russia, Views of 6 November 2017.</u> 7.6. The Committee notes that none of these facts has been disputed by the State party and that, read as a whole, they indicate that, by failing to investigate the author's complaint about death threats and threats of violence promptly, adequately and effectively and by failing to address her case in a gender-sensitive manner, the authorities allowed their reasoning to be influenced by stereotypes. The Committee therefore concludes that the State party's authorities failed to act in a timely and adequate manner and to protect the author from violence and intimidation, in violation of the obligations under the Convention.
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The consequences of not applying a gender-sensitive approach	<u>I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015</u> 197. In the Court's opinion, there are three essential aspects of the absence of a gender approach in the criminal investigation. First, the fact that the circumstances prior to her death were rendered invisible, while the evidence indicated the existence of an act of violence prior to her death. Second, the way in which death occurred was rendered invisible, even though the evidence suggested the perpetration of an act of violence after her death. Third, the possible sexual violence was rendered invisible. These three aspects reveal a possible repetition of the violence inflicted on the victim while she was missing, which was in addition to the fact of her murder.
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b. The ethnic/cultural diversity approach

Legal framework	<u>Convention of Belém do Pará: Article 8.</u> <u>Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Article 10(b).</u>
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Implementing the ethnic/cultural diversity approach is not a prerogative of States but their obligation at all stages of the justice process	<u>ICTR, Prosecutor v. Alfred Musema, Judgment of 27 January 2000</u> 105. The Chamber further notes that sensitivity has, and should, be shown by the Parties [...] to these cultural factors. This sensitivity should extend not only to courtroom proceedings but also to the gathering and preparation of evidence.
The importance of the specificities of the victims' language in relation to their importance as witnesses	<u>ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment of 2 September 1998</u> 145. The majority of the witnesses in this trial testified in Kinyarwanda. The Chamber notes that the interpretation of oral testimony of witnesses from Kinyarwanda into one of the official languages of the Tribunal has been a particularly great challenge due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English.
The importance of taking into account how victims perceive and report violence suffered depending on their cultural practices	<u>ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment of 2 September 1998</u> 155. [M]ost Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else. Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener. Similarly, with regard to events in Taba, the Chamber noted that on examination it was at times clarified that evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed. Dr. Ruzindana explained this as a common phenomenon within the culture, but also confirmed that the Rwandan community was like any other and that a clear distinction could be articulated by the witnesses between what they had heard and what they had seen. The Chamber made a consistent effort to ensure that this distinction was drawn throughout the trial proceedings.



The importance of taking into account how victims perceive and report violence suffered depending on their cultural practices	<u>ICTR, Prosecutor v. Alfred Musema, Judgment of 27 January 2000</u> 103. The testimonies of many of the witnesses in this case were affected by cultural factors. The Chamber has not drawn any adverse conclusions regarding the credibility of witnesses when cultural constraints appeared to induce them to answer indirectly certain questions regarded as delicate. [...] While there appears, as the Defence argued, to be in Rwandan culture a “tradition that the perceived knowledge of one becomes the knowledge of all”, the Chamber notes that, as in other cultures, Rwandan individuals are clearly able to distinguish between what they have heard and what they have seen. The Chamber made a consistent effort to ensure that this distinction was drawn throughout the trial, and has taken such matters into careful consideration in assessing the evidence before it.
The importance of taking into account how victims speak about events depending on their cultural practices	<u>ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment of 2 September 1998</u> 156. [A] particular feature of the Rwandan culture [is] that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be “decoded” in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question. The Chamber noted this in the proceedings.
The importance of taking into account how victims speak about events depending on their cultural practices	<u>ICTR, Prosecutor v. Jean-Paul Akayesu, Judgment of 2 September 1998.</u> 156. Similar cultural constraints were evident in their difficulty to be specific as to dates, times, distances and locations. The Chamber also noted the inexperience of witnesses with maps, film and graphic representations of localities, in the light of this understanding, the Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.

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The importance of taking into account how victims speak about events depending on their cultural practices

ICTR, Prosecutor v. Alfred Musema, Judgment of 27 January 2000

104. Finally, the Chamber notes the impact on the testimony of witnesses of cultural factors relating to the use of documents and the witnesses' unfamiliarity with spatio-temporal identification mechanisms and techniques. Certain witnesses had difficulty in being specific as to dates, times, distances and locations, and appeared unfamiliar with the use of maps, films, photographs and other graphic representations. The Chamber has carefully considered witnesses' responses in light of this understanding. It has not drawn any adverse conclusion regarding the credibility of a witness based only on the witness' reticence or circuitousness in responding to questions of such a nature; however, it has taken the accuracy and other relevant elements of such responses into account when assessing such evidence.

c. The age approach. The best interests of the child

Legal framework

Convention of Belém do Pará: Article 8.

Inter-American Model Law on the Prevention, Punishment, and Eradication of Gender-Related Killing of Women and Girls: Article 2(d).

Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: paras. 53, 55(e) and 84.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 31(a)(ii).

The obligation to use the age approach

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010.

201. [A]ccording to Article 19 [rights of the child] of the American Convention, the State must assume a special position as guarantor with greater care and responsibility and must take special measures or steps aimed at the child's best interest.

(See also: I/A Court H.R., Servellón García v. Honduras, Judgment of 21 September 2006, para. 116).



Interaction of the age approach

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010

201. [T]he State should have adopted special measures in favor of Mrs. Rosendo Cantú, not only when filing the criminal complaint, but also during the time when, as a minor, she was involved in the investigations into the offense of which she was the victim, particularly so since she was also an indigenous person, and indigenous children whose communities are affected by poverty find themselves in a situation of particular vulnerability.

(See also: I/A Court H.R., “Las Dos Erres” Massacre v. Guatemala, Judgment of 24 November 2009, para. 184).

The best interests of the child as a legitimate, paramount and imperative consideration

CEDAW Committee, M. W. v. Denmark, Views of 22 February 2016

5.13. The Committee is of the view that the expression “paramount” in the Convention means that the child’s best interests may not be considered on the same level as all other considerations. The Committee is also of the view that, in order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary/paramount consideration, has been respected, any decision concerning a child must be reasoned, justified and explained.

(See also: CEDAW Committee, X. v. Timor-Leste, Views of 26 February 2018, para. 8.7).

I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012

108. The general purpose of protecting the child’s best interest is, in itself, a legitimate aim and is also an imperative. Accordingly, the Court reiterates that the regulating principle regarding children’s rights is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential. Likewise, it should be noted that the preamble of the Convention on the Rights of the Child establishes that children require “special care” and Article 19 of the American Convention states that they must receive “special measures of protection.”

(See also: Juridical Condition and Human Rights of the Child. I/A Court H.R., Advisory Opinion OC-17/02 of 28 August 2002, paras. 56 and 60).

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The inadmissibility of legitimizing discrimination on the grounds that it is in the best interests of the child

I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012

121. On the other hand, with regard to the argument that the child's best interest might be affected by the risk of rejection by society, the Court considers that potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid "harm" for the purposes of determining the child's best interest. If the judges who analyze such cases confirm the existence of social discrimination, it is completely inadmissible to legitimize that discrimination with the argument of protecting the child's best interest. In the instant case, the Court also emphasizes that Ms. Atala had no reason to suffer the consequences of the girls allegedly being discriminated against in their community due to her sexual orientation.

2.3.3. The negative impact of gender stereotypes and prejudice on women's access to justice

A. Gender stereotypes and prejudice as a cause/consequence of violence against women

Legal framework

CEDAW: Articles 5 and 10(c).

Convention of Belém do Pará: Article 7(e) and 8(b).

Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Article 4(b).

Inter-American Model Law on the Prevention, Punishment, and Eradication of Gender-Related Killing of Women and Girls: Article 3(b).

CEDAW General Recommendation No. 23 on women in political and public life: paras. 12 and 20(c).

CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 43 and 68.

Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: paras. 6 and 69.

CEDAW Committee General recommendation No. 33 on women's access to justice: paras. 3, 7, 8, 18(e), 26-29, 35(a)-(b) and 51(h).



Legal framework	<u>CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: paras. 26(c), 30(a)-(b), (d)(i) and (e)(i), and 32(b).</u> <u>General Recommendation No. 1 of the Committee of Experts of the Follow-up Mechanism to the Convention of Belém do Pará (MESECVI): Self-Defense and Gender-Based Violence: Section. C (pp. 18 and 20 et seq.).</u>
Concept	<u>I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009</u> 401. Similarly, the Tribunal finds that gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women. Bearing in mind the statements made by the State [...], the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case. <u>I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015</u> 180. The Court reiterates that a gender stereotype refers to a preconception of the respective attributes, conducts or characteristics, or roles that are or should be played by men and women, and that it is possible to associate the subordination of women to practices based on socially-dominant and socially-persistent gender stereotypes.
Gender stereotypes and prejudice as a cause and consequence of gender-based violence against women	<u>I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009</u> 401. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women. <u>I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015.</u> 180. [The] conception and use [of gender stereotypes and prejudice] becomes one of the causes and consequences of gender-based violence against women, conditions that are exacerbated when they are reflected, implicitly or explicitly, in policies and practices and, particularly in the reasoning and language of State authorities.



Gender stereotypes and prejudice as perpetrators of violence against women

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009

75. [I]n its explanations of General Recommendation No. 19, the CEDAW Committee considered the following: [...]

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.

State's duty to eradicate gender stereotypes and prejudice

CEDAW Committee, O. G. v. Russia, Views of 6 November 2017

7.2. The Committee also emphasizes that the full implementation of the Convention requires States parties not only to take steps to eliminate direct and indirect discrimination and improve the de facto position of women, but also to modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and consequence of discrimination against women. Gender stereotypes are perpetuated through various means and institutions, including laws and legal systems, and can be perpetuated by State actors in all branches and at all levels of government and by private actors.

(See also: CEDAW Committee, R. K. B. v. Turkey, Views of 24 February 2012, para. 8.8; CEDAW Committee, Anna Belousova v. Kazakhstan, Views of 13 July 2015, para. 10.10).

CEDAW Committee Case of, X. and Y. v. Georgia, Views of 13 July 2015

9.7. [The Committee] also considers that the above-mentioned facts show a failure by the State party in its duty to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.



Gender stereotypes and prejudice as a barrier to women's access to justice

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014

213. In this case, gender stereotypes had a negative influence on the investigation of the case, insofar as they transferred the blame for what happened to the victim and to her family members, closing other possible lines of investigation into the circumstances of the case and the identification of the perpetrators.

CEDAW Committee, Karen Tayag Vertido v. Philippines, Views of 16 July 2010

8.4. In this regard, the Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.

8.8. The Committee finally would like to recognize that the author of the communication has suffered moral and social damage and prejudices, in particular by the excessive duration of the trial proceedings and by the revictimization through the stereotypes and gender-based myths relied upon in the judgement.

CEDAW Committee, Anna Belousova v. Kazakhstan, Views of 13 July 2015

10.10. Gender stereotypes are perpetuated through various means and institutions, including laws and legal systems, and can be perpetuated by State actors in all branches and at all levels of government and by private actors.

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

400. In this regard, the Court underscores the words of the Inter-American Commission in its thematic report on "Access to Justice for Women Victims of Violence," to the effect that: "The influence exerted by discriminatory socio-cultural patterns may cause a victim's credibility to be questioned in cases involving violence, or lead to a tacit assumption that she is somehow to blame for what happened, whether because of her manner of dress, her occupation, her sexual conduct, relationship or kinship to the assailant and so on. The result is that prosecutors, police and judges fail to take action on complaints of violence. These biased discriminatory patterns can also exert a negative influence on the investigation of such cases and the subsequent weighing of the evidence, where stereotypes about how women should conduct themselves in interpersonal relations can become a factor."



Gender stereotypes and prejudice as a barrier to women's access to justice

401. [T]he subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case.

CEDAW Committee, O. G. v. Russia, Views of 6 November 2017

7.5. In that regard, the Committee stresses that stereotyping affects women's rights to a fair trial and that the judiciary must be careful not to create inflexible standards on the basis of preconceived notions of what constitutes domestic or gender-based violence, as noted in its general recommendation No. 33 (2015) on women's access to justice.

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

170. The influence exerted by discriminatory socio-cultural patterns may cause a victim's credibility to be questioned in cases involving violence, or lead to a tacit assumption that she is somehow to blame for what happened, whether because of her manner of dress, her occupation, her sexual conduct, relationship or kinship to the assailant and so on. The result is that prosecutors, police and judges fail to take action on complaints of violence. These biased discriminatory patterns can also exert a negative influence on the investigation of such cases and the subsequent weighing of the evidence, where stereotypes about how women should conduct themselves in interpersonal relations can become a factor.

173. The Court has recognized that personal prejudices and gender stereotypes affect the objectivity of State officials responsible for investigating complaints, influencing their perceptions when determining whether or not an act of violence occurred, and their evaluation of the credibility of witnesses and of the victims themselves. "Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts," "which can, in turn, lead to miscarriage of justice, including the revictimization of the applicants." When stereotypes are used in the investigation of violence against women, the right to a life free of violence is infringed, especially in those cases when the use of these stereotypes by law enforcement agents prevents the implementation of appropriate investigations, and this also denies women the right of access to justice. Moreover, when the State fails to take concrete actions to eradicate stereotypes, it reinforces and institutionalizes them, which generates and reproduces violence against women.

(See also: I/A Court H.R., Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014, para. 209; CEDAW Committee, Karen Tayag Vertido v. Philippines, Views of 16 July 2010, para. 8.4).



Gender stereotypes and prejudice as a barrier to women's access to justice	<u>ECHR, Case of Carvalho Pinto de Sousa Morais v. Portugal, Judgment of 25 October 2017</u> 46. The Court has also considered that the issue with stereotyping of a certain group in society lies in the fact that it prohibits the individualised evaluation of their capacity and needs. <u>CEDAW Committee, González Carreño v. Spain, Views of 16 July 2014</u> 9.7. [S]tereotypes affect women's right to impartial judicial process and that the judiciary should not apply inflexible standards based on preconceived notions about what constitutes domestic violence. In this case, the Committee considers that the authorities of the State party, in deciding on the establishment of an unsupervised scheme of visits, applied stereotyped and therefore discriminatory notions in a context of domestic violence and failed to provide due supervision [...]
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B. *Examples of gender stereotypes and prejudice identified under International Human Rights Law (IHRL)*

Women as subordinate to men	<u>CEDAW Committee, Isatou Jallow v. Bulgaria, Views of 23 July 2012</u> 8.6. The Committee also observes that the authorities based their activities on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men.
Downplaying violence against women	<u>I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009</u> 203. The Tribunal underscores that the testimony of Mrs. Delgadillo Pérez and the statements by the victims' mothers and next of kin concur with the context described by different national and international organizations in which public officials and authorities "minimized the problem" and showed a "lack of interest and willingness to take steps to resolve a serious social problem". 208. In addition, both the attitude and statements of the officials reveal that, at the very least, they were indifferent towards the next of kin of the victims and their complaints.



Downplaying violence against women	<u>CEDAW Committee, O. G. v. Russia, Views of 6 November 2017</u> 7.6. [T]he absence of a “real threat” as a [the Russian authorities’] basis for refusing to provide protective measures, [...] 7.9. [The author] was subjected to fear and anguish when she was left without State protection while she was periodically persecuted by her aggressor and was exposed to renewed trauma when the State organs that ought to have been her protector, in particular the police, instead refused to offer her protection and denied her status as a victim.
Some level of physical violence against women is acceptable	<u>CEDAW Committee, V. K. v. Bulgaria, Views of 25 July 2011</u> 9.12. Such stereotyped interpretation of domestic violence is, for example, reflected in the reasoning of the Plovdiv Regional Court that “Striking at someone, you can exercise violence, but only after breaking certain limits of abuse, and, as is the case, the statement of V. K. does not make it clear how exactly she was struck at, namely on the procedure date, neither how her inviolability was affected.” <u>CEDAW Committee, O. G. v. Russia, Views of 6 November 2017</u> 7.6. [T]he Court referenced the refusal by the police to initiate criminal proceedings against K. and the absence of a “real threat” as a basis for refusing to provide protective measures, even though one month earlier the same court had found the same refusal to be unlawful and unsubstantiated. The Committee notes that none of these facts has been disputed by the State party and that, read as a whole, they indicate that, by failing to investigate the author’s complaint about death threats and threats of violence promptly, adequately and effectively and by failing to address her case in a gender-sensitive manner, the authorities allowed their reasoning to be influenced by stereotypes. The Committee therefore concludes that the State party’s authorities failed to act in a timely and adequate manner and to protect the author from violence and intimidation, in violation of the obligations under the Convention.



Violence against women as purely physical violence

CEDAW Committee, V. K. v. Bulgaria, Views of 25 July 2011

9.12. [T]he exclusive focus of the Plovdiv courts on physical violence and on an immediate threat to the life or health of the victim reflects a stereotyped and overly narrow concept of what constitutes domestic violence.

The absence of lasting physical effects as evidence that there was no violence

ECHR, Case of Aydin v. Turkey, Judgment of 25 September 1997

105. Although she may not have displayed any visible signs of torture, the public prosecutor could reasonably have been expected to appreciate the seriousness of her allegations bearing in mind also the accounts which the other members of her family gave about the treatment which they alleged they suffered. In such circumstances he should have been alert to the need to conduct promptly a thorough and effective investigation capable of establishing the truth of her complaint and leading to the identification and punishment of those responsible.

I/A Court H.R, Case of J. v. Peru, Judgment of 27 November 2013

329. Furthermore, it must be pointed out that the absence of physical signs does not mean that ill-treatment has not occurred, because these acts of violence against the individual often do not leave permanent marks or scars. The same is true in cases of sexual abuse and rape, in which their occurrence will not necessarily be reflected in a medical examination, because not all cases of sexual abuse and/or rape cause physical injuries or diseases that can be verified by a medical examination.

(See also: I/A Court H.R., Favela Nova Brasília v. Brazil, Judgment of 16 February 2017, para. 249).



**Intrafamilial and
domestic violence
against women as
a “private matter”**

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009

143. In the Court’s opinion, [...] [the local authorities] seem to have given exclusive weight to the need to refrain from interfering with what they perceived to be a “family matter”.

144. [T]he authorities’ view that no assistance was required as the dispute concerned a “private matter” was incompatible with their positive obligations to secure the enjoyment of the applicants’ rights.

(See also: ECHR, *Bevacqua and S. v. Bulgaria*, Judgment of 12 June 2008, para. 83).

CEDAW, X. v. Timor-Leste, Views of 26 February 2018

6.5. Regarding the second point, namely, gender-based discrimination and gender stereotyping in the State party’s judiciary and other organs, the Defence Force took the author’s partner’s word on trust, and believed that he would no longer beat the author.

ECHR, Case of Eremia v. Moldova, Judgment of 28 May 2013

87. The Court further notes that on 10 January 2011 the first applicant was called to the local police station and was allegedly pressured to withdraw her complaint against A. Moreover, her lawyer’s complaint about that was apparently left without any answer. It is also clear that the Călărași Social Assistance and family Protection Department had failed to enforce the protection order in the applicant’s name until 15 March 2011 and allegedly further insulted the applicant by suggesting reconciliation since she was anyway “not the first nor the last woman to be beaten up by her husband”.



Stereotyping and blaming women's behaviour and appearance

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

208. The Tribunal considers that, in the instant case, the comments made by officials that the victims had gone off with a boyfriend or that they led a disreputable life, and the use of questions about the sexual preference of the victims constitute stereotyping.

(See also: paragraph 400).

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014

212. The body of evidence reveals that, in some investigation reports, explicit reference was made to María Isabel's way of dressing, her social and night life, her religious beliefs, and also her family's lack of concern or supervision. [...] [T]he Assistant Prosecutor of Mixco Agency No. 5 had told her that María Isabel "was a tart, a prostitute". Also, [...] the expert, without any grounds, concluded in his report that the victim had suffered from "emotional instability because she went out with several boyfriends and male acquaintances". [...] [T]he fact that, during the interrogations and in the reports, relevance was given to certain aspects of the private life and prior behavior of María Isabel reveals the existence of gender stereotypes.

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

143.c. Gender stereotyping has been identified in several "sections of the case file" when reference is made to the investigative hypothesis concerning Ms. Mayra Gutiérrez's alleged relationships. This occurred in a context of delays in investigating the disappearance of women, [in which] moreover the authorities failed to look for victims promptly and disparaged and blamed them for their actions, with the consequence that these authorities saw them as unworthy of state action to locate and protect them. In this case, gender stereotyping shifted the blame for what had happened onto the victim and her family, closing down other possible lines of investigation. As such, the investigation was not conducted in a gender-sensitive manner.

161. State officials investigating the events used demeaning language in their reports that emphasized the alleged victim's social and sexual behavior. In particular, they reported suspicions that Ms. Gutiérrez would be found in the place where she "had amorous relations with her lovers", that she was "sexually insatiable", that Mr. A. and Mr. Luis Felipe Figueroa "called her repeatedly, possibly out of jealousy or some other motive," and that Ms. Gutiérrez had failed "to stay faithful in the open relationship she had [with Mr. A.]".



**Stereotyping and
blaming women's
behaviour and
appearance**

175. Moreover, the Court notes that the acts of the officials in charge of the investigation into the disappearance of Mayra Gutiérrez did not occur in isolation, since this Court has repeatedly identified – in the cases of *Véliz Franco et al.*, and *Velásquez Paiz et al.*, v. Guatemala – the tendency of investigators to discredit the victims and to blame them for their lifestyle or their clothes, and to inquire into aspects of their personal and sexual relationships in order to conclude that they were themselves responsible for what happened to them, as well as the existence of gender stereotypes and prejudice that negatively influenced such investigations, insofar as they shifted the blame for what happened onto the victim and her family, closing down other possible lines of investigations into the circumstances of the case and the identity of the perpetrators. In the particular case of Mayra Gutiérrez, a stereotype is used to blame the victim for what happened, excluding all other hypotheses and dismissing any other line of investigation, such as that related to the work done by the alleged victim on the adoption and trafficking of children in Guatemala or her alleged forced disappearance.

(See also: I/A Court H.R., Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014, paras. 90 and 210-212; I/A Court H.R., Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015, paras. 210-212).

I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015

49. Added to this, the Court referred to reports and the testimony of women survivors and their families that mention the “tendency of investigators to discredit the victims and to blame them for their lifestyle or their clothes” and to question the victims on aspects of their personal and sexual relationships.

183. The Court recognizes, reveals and rejects the gender stereotype by which, in cases of violence against women, the victims are presumed to fit the profile of a gang member and/or prostitute and/or “loose woman,” and are not considered sufficiently important to be investigated, while also making the woman responsible for or deserving of being attacked.



**Inadequate
response to
violence against
women**

IACHR, Maria da Penha Maia Fernandes v. Brazil, Report No. 54/01, 16 April 2001

47. In its special report on Brazil in 1997, the Commission found that there was clear discrimination against women who were attacked, resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules, including those arising from the case law of the Brazilian Supreme Court. In its 1997 Report on the Situation of Human Rights, the Commission stated: "Moreover, even where these specialized stations exist, [...] complaints are not fully investigated or prosecuted. [...] In practice, legal and other limitations often expose women to situations where they feel constrained to act. By law, women have to register their complaint at a police station, and explain what happened so the delegate can write up an 'incident report.' Delegates who have not received sufficient training may be unable to provide the required services, and some reportedly continue to respond to victims in ways that make them feel shame and humiliation."

CEDAW Committee, O. G. v. Russia, Views of 6 November 2017

- 7.4. The Committee takes note of the argument of the State party that, because K. was not a member of the author's family at the time of the alleged violence, her claim that she was a victim of domestic violence is unsubstantiated. The Committee is of the view that, as long as the violence towards a former spouse or partner stems from that person being in a prior relationship with a perpetrator, as in the present case, the time that has elapsed since the end of the relationship is irrelevant, as is whether the persons concerned live together.

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009

137. The Government claimed that each time the prosecuting authorities commenced criminal proceedings against H. O., they had to terminate those proceedings, in accordance with the domestic law, because the applicant and her mother withdrew their complaints. In their opinion, any further interference by the authorities would have amounted to a breach of the victims' Article 8 rights.
192. [T]he alleged discrimination at issue was not based on the legislation per se but rather resulted from the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims.



Inadequate response to violence against women	<u>ECHR, Case of M. C. v. Bulgaria, Judgment of 4 December 2003</u> 182. That was not done in the applicant's case. The Court finds that the failure of the authorities in the applicant's case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on "direct" proof of rape. Their approach in the particular case was restrictive, practically elevating "resistance" to the status of defining element of the offence. <u>ECHR, Case of Yazg�l Yilmaz v. Turkey, Judgment of 1 February 2011</u> 48. The Court could not agree with a general practice of automatic gynaecological examinations for female detainees, for the purpose of avoiding false sexual assault accusations against police officers. Such a practice did not take account of the interests of detained women and does not relate to any medical necessity. In that connection, moreover, Ms. Yilmaz had never complained of a rape while in police custody.
Describing violence against women as a "crime of passion"	<u>I/A Court H.R., Case of Guti�rrez Hern�ndez et al. v. Guatemala, Judgment of 24 August 2017</u> 171. "The term 'passion' places the accent on justifying the conduct of the perpetrator." For example, "'he killed her because he was jealous,' 'in an attack of fury,' [are] expressions that encourage blaming the woman who suffered the violence. The victim is blamed and the violent action of the attacker is supported." In this regard, the Court rejects any State practice used to justify violence against women and to blame them for such acts, because an assessment of this nature reveals a discretionary and discriminatory standard based on victim's conduct merely because she is a woman. Consequently, the Court considers that such gender stereotypes are incompatible with international human rights law and measures should be taken to eliminate them whenever they surface. (See also: I/A Court H.R., Vel�squez Paiz et al. v. Guatemala, Judgment of 19 November 2015, para. 187).



It is beneficial for children to be raised by both parents, even if the father has assaulted the mother

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009

147. In any event, the Court would underline that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity.

CEDAW Committee, M. W. v. Denmark, Views of 22 February 2016

5.10. [T]he District Court of Helsingør based its decision on the principle that a child must have contact with both parents and was blatantly biased against the author as a foreign woman inasmuch as, while she never met and spoke to the retsassessor, who heard the case, the latter accused her of being solely interested in herself and of having no empathy and consequently did not even give her visitation rights to O. W.

CEDAW Committee, González Carreño v. Spain, Decision of 16 July 2014

9.4. [D]uring the time when the regime of judicially determined visits was being applied, both the judicial authorities and the social services and psychological experts had as their main purpose normalizing relations between father and daughter, despite the reservations expressed by those two services on the conduct of F. R. C. [...] [Decisions taken in the Spanish judicial system] reflect a pattern of action which responds to a stereotyped conception of visiting rights based on formal equality which, in the present case, gave clear advantages to the father despite his abusive conduct and minimized the situation of mother and daughter as victims of violence, placing them in a vulnerable position.

9.7. [S]tereotypes affect women's right to impartial judicial process and [...] the judiciary should not apply inflexible standards based on preconceived notions about what constitutes domestic violence. In this case, the Committee considers that the authorities of the State party, in deciding on the establishment of an unsupervised scheme of visits, applied stereotyped and therefore discriminatory notions in a context of domestic violence and failed to provide due supervision [...]

(See also: CEDAW Committee, V. K. v. Bulgaria, Views of 25 July 2011, para. 9.11).



It is beneficial for children to be raised by both parents, even if the father has assaulted the mother

CEDAW Committee, A. T. v. Hungary, Views of 26 January 2005

9.3. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.

CEDAW Committee, Şahide Goekce v. Austria, Views of 6 August 2007

12.1.5 [T]he Committee is of the view, as expressed in its views on another communication on domestic violence, that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.

CEDAW Committee, Fatma Yildirim v. Austria, Views of 6 August 2007

12.1.5. Although, the State party maintains that, at that time — an arrest warrant seemed disproportionately invasive, the Committee is of the view, as expressed in its views on another communication on domestic violence that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.

(See also: CEDAW Committee, A. T. v. Hungary, Views of 6 August 2007, para. 9.3).

Children raised by homosexual couples will have difficulties in defining gender or sexual roles

I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012

125. Indeed, the burden of proof here falls on the State, which must demonstrate that the judicial decision under consideration has been based on the existence of clear, specific and real harm to the children's development. Thus, the judicial decisions on such matters would need to define in a specific and concrete manner the connections and causality between the behavior and the alleged impact on the child's development. Otherwise, there is a risk of basing the decision on stereotypes [...] exclusively associated with the unfounded preconception that children raised by homosexual couples would necessarily have difficulties in defining gender or sexual roles.



Reinforcement of women's traditional roles in patriarchal societies

I/A Court H.R., Case of Atala Rizzo and Daughters v. Chile, Judgment of 24 February 2012.

109. [T]he determination of the child's best interest [...] must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child's well-being and not those that are speculative or imaginary. Therefore, speculations, assumptions, stereotypes, or generalized considerations regarding the parents' personal characteristics or cultural preferences regarding the family's traditional concepts are not admissible.

140. [T]o require the mother to limit her lifestyle options implies using a "traditional" concept of women's social role as mothers, according to which it is socially expected that women bear the main responsibility for their children's upbringing and that in pursuit of this she should have given precedence to raising her children, renouncing an essential aspect of her identity.

146. [The Chilean courts] used abstract, stereotyped, and/or discriminating arguments to justify their decisions [...], for which reason said decisions constitute discriminatory treatment against Ms. Atala.

(See also: para. 125).

I/A Court H.R., Case of Artavia Murillo et al. ("in vitro fertilization") v. Costa Rica, Judgment of 28 November 2012

295. Regarding the situation of infertile women, expert witness Hunt explained that "in many societies infertility is attributed mainly and disproportionately to women owing to the persisting gender stereotype that defines a woman as the basic creator of the family."

296. The Court observes that the WHO [World Health Organization] has indicated that, while the role and status of women in society should not be defined solely by their reproductive capacity, femininity is often defined by motherhood. In these situations, the personal suffering of the infertile woman is exacerbated and can lead to unstable marriage, domestic violence, stigmatization and even ostracism.

297. The Court considers that the instant case reveals a similar situation of the influence of stereotypes, in which the Constitutional Chamber gave absolute prevalence to the protection of the fertilized eggs without considering the situation of disability of some of the women.



Reinforcement of women's traditional roles in patriarchal societies

I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru, Judgment of 25 November 2006

270. Likewise, it is important to point out that, in one of its reports, the Ombudsman of the People of Peru concluded that the involvement of women in the armed conflict changed the perception of women and caused "a more cruel and violent treatment regarding those women considered 'suspects'."

CEDAW, X. v. Timor-Leste, Views of 26 February 2018

6.5. Although the first trial is not being taken specifically into account by the Committee, given that the decision resulting from it was overturned by the Court of Appeal, it is clear that, bearing in mind that self-defence in circumstances such as those is a complete defence against the charge of murder, its defects were not satisfactorily remedied and that those initial proceedings, during which the author was told that, "as a wife, you must protect your husband", showed a pattern of deeply held bias that continued into the retrial and has been enormously detrimental to the life of the author and her son.

ECHR, Case of Carvalho Pinto de Sousa Morais v. Portugal, Judgment of 25 October 2017

50. The Court notes that the Supreme Administrative Court also reduced the amount that had been awarded to the applicant in respect of the costs of a maid on the grounds that she was not likely to have needed a full-time maid [...] at the material time as, considering the age of her children, she "probably only needed to take care of her husband".

ECHR, Case of Konstantin Markin v. Russia, Judgment of 22 March 2012

143. [G]ender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.

Women as just a means of procreation

ECHR, Case of Carvalho Pinto de Sousa Morais v. Portugal, Judgment of 25 October 2017, Concurring Opinion of Judge Yudkivska

In other words, the Supreme Administrative Court, in the best patriarchal traditions, connected the woman's sexual life with procreation.



Undermining women's right to sexuality based on their age	<u>ECHR, Case of Carvalho Pinto de Sousa Morais v. Portugal, Judgment of 25 October 2017</u> 49. Moreover, the Supreme Administrative Court relied on the fact that the applicant “[had been] already fifty years old at the time of the surgery and had two children, that is, an age when sexuality [was] not as important as in younger years, its significance diminishing with age”.
Women's inability to make decisions about their own bodies	<u>I/A Court H.R., Case of I. V. v. Bolivia, Judgment of 30 November 2016</u> 243. Furthermore, the fact that women are the sex with the biological capacity to become pregnant and give birth means that, during a caesarean section, they were frequently subjected to non-consensual sterilization, because they were excluded from the process of taking informed decisions with regard to their body and reproductive health on the basis of the prejudicial stereotype that they were unable to take such decisions responsibly. Consequently, the Court considers that the strict protection provided by Article 1(1) of the Convention is applicable based on sex and gender because, traditionally, women have been marginalized and discriminated against in this regard.
A victim's testimony is deemed unreliable as women are inclined to make false accusations	<u>I/A Court H.R., Case of J. v. Peru, Judgment of 27 November 2013</u> 352. The fourth and last justification provided by the State is that, “it has been usual that those prosecuted for terrorism allege unduly that they have been victims of rape or other acts of a sexual nature, even though these assertions are not corroborated by the forensic medicine examinations performed, and their only purpose is to contest the legality of the criminal proceedings.” The Court observes that this argument reveals a notion that (i) automatically assumes that complaints of sexual violence are false, contrary to the obligation to open an investigation ex officio each time that a complaint is made or there are indications that this has occurred [...]; (ii) it is contrary to the context of sexual violence that existed at the time of the facts [...]; (iii) it ignores the fact that not all cases of sexual violation and/or rape cause physical injuries that can be verified by a medical examination [...], and (iv) it reveals a discretionary and discriminatory standard, based on the procedural situation of the women, in order not to open an investigation into an alleged rape or sexual violence. [...] Therefore, the initiation of the investigation cannot be conditioned by the person filing the complaint or by the belief of the authorities, before opening the investigation, that the allegations made are false.



**A victim's testimony
is deemed
unreliable as
women are inclined
to make false
accusations**

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

400. [T]he Court underscores the words of the Inter-American Commission in its thematic report on "Access to Justice for Women Victims of Violence," to the effect that: "the influence exerted by discriminatory socio-cultural patterns may cause a victim's credibility to be questioned in cases involving violence, or lead to a tacit assumption that she is somehow to blame for what happened, whether because of her manner of dress, her occupation, her sexual conduct, relationship or kinship to the assailant and so on. The result is that prosecutors, police and judges fail to take action on complaints of violence."

CEDAW Committee, Karen Tayag Vertido v. Philippines, Views of 16 July 2010

8.5. At the outset of the judgement, the Committee notes a reference in the judgement to three general guiding principles used in reviewing rape cases. It is its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee finds that one of them, in particular, according to which "an accusation for rape can be made with facility", reveals in itself a gender bias.

CEDAW Committee, Anna Belousova v. Kazakhstan, Views of 13 July 2015

10.10. In the present case, the authorities did not explore any reasons why the author's employment contract was not renewed after service of more than 10 years. Furthermore, the Rudnyy City Court referred to the fact that the author did not complain about the alleged sexual harassment while she was still employed, but only after her dismissal, as a circumstance rendering her allegation less credible.

CEDAW, X. v. Timor-Leste, Views of 26 February 2018

2.18. The Court found that I. V.'s testimony was "credible and convincing and removed truthfulness from the version presented by [the author]". The Court did not explain why it considered I. V.'s testimony more credible than that of the author.



A victim's testimony is deemed unreliable as women are inclined to make false accusations	<u>CEDAW Committee, Isatou Jallow v. Bulgaria, Views of 23 July 2012</u> 8.5. The Committee notes that, in issuing the emergency protection order that included a temporary determination of the custody of the author's daughter, the Court relied on the husband's statement and did not consider or was not alerted by the competent authorities to the incidents of domestic violence reported by the author during the visit by social workers and her several requests for help from the police in order to protect herself and her daughter.
A victim and her testimony are deemed unreliable as her behaviour before or after the criminal act is not consistent with the "natural" response expected of a victim	<u>CEDAW Committee, Karen Tayag Vertido v. Philippines, Views of 16 July 2010</u> 8.4. [T]he Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. 8.5. At the outset of the judgement, the Committee notes a reference in the judgement to three general guiding principles used in reviewing rape cases. It is its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee finds that one of them, in particular, according to which "an accusation for rape can be made with facility", reveals in itself a gender bias. [...] The judgement reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behaviour from the author, who was perceived by the court as not being "a timid woman who could easily be cowed". It is clear from the judgement that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation, [...]. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.



A victim and her testimony are deemed unreliable as her behaviour before or after the criminal act is not consistent with the “natural” response expected of a victim

CEDAW Committee, Anna Belousova v. Kazakhstan, Views of 13 July 2015

10.10. In the present case, the authorities did not explore any reasons why the author's employment contract was not renewed after service of more than 10 years. Furthermore, the Rudnyy City Court referred to the fact that the author did not complain about the alleged sexual harassment while she was still employed, but only after her dismissal, as a circumstance rendering her allegation less credible.

CEDAW Committee, J.I. v Finland de 28 de enero de 2013

8.5. The Committee observes that the Varsinais-Suomi District Court questioned the mental state of a victim of domestic violence and her hostility towards her alleged abuser without questioning the mental stability or carrying out an assessment of an accused abuser before giving him the sole custody of a child.

CEDAW Committee, R. P. B. v. Philippines, Views of 21 February 2014

8.9. With regard to the alleged gender-based myths and stereotypes spread throughout the judgement, the Committee, after a careful examination of the main points that determined the judgement, notes that, first, the trial court expected a certain type of behaviour from the author that an ordinary Filipina female rape victim had to demonstrate in the circumstances, i.e. to “summon every ounce of her strength and courage to thwart any attempt to besmirch her honour and blemish her purity”. Second, the court assessed the author's behaviour against this standard and found that her “demeanour was inconsistent with that of an ordinary Filipina” and the “reasonable standard of human conduct” because she had not sought to escape or resist the offender, in particular by making noise or using force. The court stated that “her failure to even attempt to escape [...] or at least to shout for help despite opportunities to do so casts doubt on her credibility and renders her claim of lack of voluntariness and consent difficult to believe”. The Committee finds that those findings in themselves reveal the existence of strong gender stereotyping resulting in sex and gender-based discrimination and disregard for the individual circumstances of the case, such as the author's disability and age.

8.10. The Committee further notes that the gender stereotypes and misconceptions employed by the trial court included, in particular, lack of resistance and consent on behalf of the rape victim and the use of force and intimidation by the perpetrator. It recalls its jurisprudence that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault.



Sexual violence does not take place in affluent and/or educated settings	<u>CEDAW Committee, Karen Tayag Vertido v. Philippines, Views of 16 July 2010</u> 8.5. [T]he Committee finds that to expect the author to resist in the situation at stake reinforces in a particular manner the myth that [educated, articulate, decent and married women cannot be victims of rape].
The characterization of women suspected of being criminals as “unreliable or manipulative”	<u>I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014</u> 272. [E]xpert witness Rebeca Cook stated before the Court that “[t]he characterization of a woman suspected of criminal activity as a ‘bad girl’ allows her maturity and humanity to be denied and, thereby, exempts those in charge of her custody from responsibility.” She asserted that, the characteristics often attributed to women suspected of having committed offenses include: “being assertive, manipulative, lacking credibility, and with a tendency to challenge authority.” The expert witness added that when “[j]udges hold similar gender stereotypes with regard to women suspects, this may result in the decision on the latter’s innocence or guilt not being founded on appropriate evidence, or even that more severe punishments are imposed on them than on women suspects who submit to male authority.” Hence, the Court recognizes and rejects the gender stereotype according to which women suspected of having committed an offense are considered to be intrinsically untrustworthy or manipulative, especially in the context of judicial proceedings. In this regard, the Court has stated that assessments of this nature reveal “a discretionary and discriminatory opinion based on the procedural situation of the women.” <i>(See also: I/A Court H.R, Case of J. v. Peru, Judgment of 27 November 2013, para. 352).</i>



2.3.4. The burden of proof

Legal framework	CEDAW Committee General recommendation No. 33 on women's access to justice: paras. 15(g) and 25(a)(iii).
General context	<u>I/A Court H.R., Case of López Soto et al. v. Venezuela, Judgment of 26 September 2018</u> 163. [I]t should be repeated that, although it is the plaintiff who bears the burden of proving the facts on which his or her allegations are founded, in proceedings on human rights violations the State's defense cannot be based on the applicant's impossibility of providing evidence when the State controls the means to clarify facts that occurred within its territory. <i>(See also: I/A Court H.R., Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010, para. 102; Corte IDH, Caso Espinoza Gonzáles vs. Peru, Judgment of 20 November 2014, para. 261; I/A Court H.R., Munárriz and Escobar et al. v. Peru, Judgment of 20 August 2018, para. 62).</i>
The burden of proof	<u>I/A Court H.R., Case of I. V. v. Bolivia, Judgment of 30 November 2016</u> 244. In this context, the Court emphasizes that "in the case of the prohibition of discrimination based on one of the protected categories contained in Article 1(1) of the Convention, the possible restriction of a right requires a weighty and rigorous justification, which means that the reasons used by the State to differentiate treatment must be particularly significant and based on a thorough substantiation. In addition, the burden of proof is inversed, which means that it is for the authority to prove that neither the purpose nor the effects of the decision were discriminatory." <i>(See also: I/A Court H.R., Gonzales Lluy et al. v. Ecuador, Judgment of 1 September 2015, para. 257; I/A Court H.R., Flor Freire v. Ecuador, Judgment of 31 August 2016, para. 125).</i>



The burden of proof

ECHR, Case of D. H. and others v. the Czech Republic, Judgment of 13 November 2007

177. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment it is for the Government to show that it was justified.

179. In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

(See also: ECHR, Opuz v. Turkey, Judgment of 9 June 2009, para. 183).

CEDAW Committee, O. G. v. Russia, Views of 6 November 2017.

7.7. The Committee considers that the fact that a victim of domestic violence has to resort to private prosecution, wherein the burden of proof is placed entirely on her, denies the victim access to justice, as observed in paragraph 15 (g) of its general recommendation No. 33.

2.3.5. Standards for assessing evidence in cases of violence against women

A. General framework

Legal framework

CEDAW General recommendation No. 33 on women's access to justice of 3 August 2015; para. 23.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19; para. 26(c).

General Recommendation No. 1 of the Committee of Experts of the Follow-up Mechanism to the Convention of Belém do Pará (MESECVI): Self-Defense and Gender-Based Violence; Section. C (p.19 et seq.).



The differentiated evidentiary standard of the human rights courts	<u>I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010</u> 105 As this Court has stated since its first contentious case, in an international tribunal the criteria for the assessment of evidence are less formal than in the domestic legal systems. As an international court, it has special features and characteristics that do not automatically apply to all the procedural elements of domestic courts. International protection of human rights should not be confused with criminal justice. For the effects and purposes of the Judgment of this Court, the elements of proof arising from evidence are sufficient to arrive at the aforementioned conclusions. The standards or requirements of proof are not those of a criminal court, given that it is not up to this Court to determine individual responsibilities or to assess the evidence under that criteria. <i>(See also: I/A Court H.R., Velásquez Rodríguez v. Honduras, Judgment of 29 July 1988, para. 135; I/A Court H.R., Escher et al. v. Brazil, Judgment of 6 July 2009, para. 128).</i>
Context as an element to be taken into account	<u>I/A Court H.R., Case of Godínez Cruz v. Honduras, Judgment of 20 January 1989</u> 135. The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner.
The victim's statement as essential evidence	<u>I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010.</u> 89. First, the Court considers it evident that rape is a specific form of violence which, in general, occurs in the absence of persons other than the victim and the aggressor or aggressors. Given the nature of this type of violence, one cannot expect graphic or documentary evidence and therefore the victim's testimony constitutes fundamental evidence of the act. <i>(See also: I/A Court H.R., Fernández Ortega et al. v. Mexico, Judgment of 30 August 2010, para. 100).</i>



The victim's statement as essential evidence

ECHR, Case of Aydin v. Turkey, Judgment of 25 September 1997

105. Although she may not have displayed any visible signs of torture, the public prosecutor could reasonably have been expected to appreciate the seriousness of her allegations bearing in mind also the accounts which the other members of her family gave about the treatment which they alleged they suffered. In such circumstances he should have been alert to the need to conduct promptly a thorough and effective investigation capable of establishing the truth of her complaint and leading to the identification and punishment of those responsible.

Evidence in cases of sexual violence against women

I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014

278. The Court finds it pertinent to underscore that a guarantee of access to justice for women victims of sexual violence must be the establishment of rules for the assessment of the evidence that avoid stereotyped affirmations, insinuations and allusions.

I/A Court H.R., Case of J. v. Peru, Judgment of 27 November 2013

323. Regarding the alleged "sexual touching," the Court has established that sexual abuse is a particular type of violence that, in general, is characterized by occurring in the absence of persons other than the victim and the perpetrator or perpetrators. Given the nature of this type of violence, the existence of graphic or documentary evidence cannot be expected and therefore the victim's statement constitutes fundamental proof of the act. Notwithstanding the legal definition of the facts [...], the Court considers that this standard is applicable to sexual violence in general.

(See also: I/A Court H.R., Fernández Ortega et al. v. Mexico, Judgment of 30 August 2010, para. 100; I/A Court H.R., Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010, paras. 89 and 95; I/A Court H.R., Espinoza Gonzáles v. Peru, Judgment of 20 November 2014, para. 150).



B. Standards for the assessment of clues and presumptions

Prima facie justification of the context of discrimination

ECHR, Case of D. H. and others v. the Czech Republic, Judgment of 13 November 2007

179. In Hoogendijk, the Court stated: “[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex.”

ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009

198. In the light of the foregoing, the Court considers that the applicant has been able to show, supported by unchallenged statistical information, the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.

The use of circumstantial evidence, clues and presumptions

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010

102. The Court has established as legitimate the use of circumstantial evidence, evidence and presumptions to reach a Judgment “when consistent conclusions regarding the facts can be inferred”.

(See also: I/A Court H.R., Velásquez Rodríguez v. Honduras, Judgment of 29 July 1988, para. 130; I/A Court H.R., Escher et al. v. Brazil, Judgment of 6 July 2009, para. 127).

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

125. By virtue of the lack of direct evidence of the alleged forced disappearance, the Court recalls that the use of circumstantial evidence, clues and presumptions to support a judgment is legitimate, provided that the conclusions are consistent with the facts. [...] In addition, circumstantial or presumptive evidence is especially important in allegations of forced disappearance, since this form of violation is characterized by an attempt to suppress any information that might make it possible to verify the disappearance, whereabouts and fate of the victims.

(See also: I/A Court H.R., Godínez Cruz v. Honduras, Judgment of 20 January 1989, paras. 135-136).



The use of circumstantial evidence, clues and presumptions

I/A Court H.R., Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015

192. That said, it may be assumed that the violent death of Claudina Velásquez Paiz was an expression of gender-based violence in order to apply Article 7 of the Convention of Belém do Pará to the case, taking into account:
- (a) the indications that she had probably been raped: she was not wearing her brassiere, which had been placed between her jeans and her hips, the zipper of her jeans was undone, her belt removed, and her blouse on back-to-front; also the presence of semen in the victim's vagina was recorded;
 - (b) the injuries to the body: an injury around her eye and the left side of her cheek caused before death, and scratches to her [left] knee and side, apparently caused after death, and
 - (c) the context of an escalation of homicidal violence against women in Guatemala; the exacerbation of violence against women and the cruelty inflicted on the bodies of many of the victims in a context of different forms of violence against women.

C. Testimony assessment standards

a. General framework

Testimonial evidence has the same value as all other statements and evidence

ICTY, Prosecutor v. Delalic et al., (Celebici Case), Appeal Judgment, 20 February 2001

503. The Prosecution submits that the testimony of a single witness on a material fact may be sufficient to establish guilt beyond reasonable doubt. Contrary to Deli's contention, the Trial Chamber's reference to a presumption of reliability in relation to victims of sexual assault does not imply that the accused is presumed guilty.
504. [T]his sub-Rule [...] accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of other crimes, something long been denied to victims of sexual assault by the common law.



**Testimonial
evidence has the
same value as all
other statements
and evidence**

505. The Trial Chamber in this paragraph was expressing its agreement with the holding of another Trial Chamber that victims of sexual assault should be considered as reliable as victims of other crimes. The use of the term "presumption of reliability" was inappropriate as there is no such presumption. However, the Appeal Chamber interprets that holding as simply affirming that the purpose of Rule 96(i) is to set forth clearly that, contrary to the position taken in some domestic jurisdictions, the testimony of victims of sexual assault is not, as a general rule, less reliable than the testimony of any other witness. The appellant's argument that the Trial Chamber shifted the burden of proof to the Defence is thus misconceived, as the Trial Chamber did not rely on any "presumption of reliability" to assess the evidence before it.

(See also: ICTY, Prosecutor v. Delalic et al., (Celebici Case), Appeal Judgment, 8 April 2003, paras. 500-507).

**The validity
of a single
witness/victim
statement does
not necessarily
depend on prior
corroboration**

ICTY, Prosecutor v. Delalic et al., (Celebici Case), Appeal Judgment, 20 February 2001

504. The Trial Chamber notes that sub-Rule 96(i) of the Rules, provides that no corroboration of the victim's testimony shall be required.

506. [T]here is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony.

(See also: ICTY, Prosecutor v. Delalic et al., Appeal Judgment, 8 April 2003, paras. 500-507).

ICTY, Prosecutor v. Kupreskic et al., Appeal Judgment, 23 October 2001

33. It follows from the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration.

(See also: ICTY, Prosecutor v. Strugar, Judgment of 31 January 2005, para. 9).



**The validity
of a single
witness/victim
statement does
not necessarily
depend on prior
corroboration**

ICTR, Prosecutor v. Kayishema, Judgment of 21 May 1999

80. Doubts about a testimony can be removed with the corroboration of other testimonies. However, corroboration of evidence is not a legal requirement to accept a testimony.

ICTR, Prosecutor v. Akayesu, Judgment of 2 September 1998

134. In the Tadic judgment rendered by the ICTY, the Trial Chamber ruled that this “Sub-rule accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something which had long been denied to victims of sexual assault in common law [which] certainly does not [...] justify any inference that in cases of crimes other than sexual assault, corroboration is required. The proper inference is, in fact, directly to the contrary”.

(See also: ICTY, Prosecutor v. Tadic, Judgment of 7 May 1997, paras. 535-539).

ICTR, Prosecutor v. Kajelijeli, Judgment of 1 December 2003

41. As a general principle, the Trial Chamber has attached—or declined to attach— probative value to the testimony of each witness [...] according to its relevance and credibility. [...] In particular the Trial Chamber notes the finding in the Tadic Appeal Judgment that corroboration of evidence is not a customary rule of international law and as such should not be ordinarily required by the international Tribunal.

(See also: ICTR, Prosecutor v. Akayesu, Judgment of 2 September 1998, paras. 132-136).



**Proper
assessment
of possible
inconsistencies
in the account
of the facts**

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010

91. The Court considers that it is not unusual that in the retelling of acts of this nature the account may contain some aspects that could be considered, a priori, as inconsistencies. Accordingly, the Court considers that the facts narrated by Mrs. Rosendo Cantú refer to a traumatic moment she suffered and the impact, upon recalling it, can lead to some inaccuracies; these statements were rendered at different times between 2002 and 2010. The Court also takes into account the fact that at the time of the events of this case, Mrs. Rosendo Cantú was a minor.

92. This is not the first time that an international human rights court notes possible differences in the statements of individuals recounting the sexual abuse they have suffered.

93. Furthermore, given the specific circumstances of Mrs. Rosendo Cantú's situation, the Court has no reason to doubt her credibility. The alleged victim is an indigenous woman, and at the time she was a minor living in an isolated mountainous area, who had to walk several hours to receive medical care for the physical assault she suffered and then to file a complaint of rape before various authorities that spoke a language she did not understand. She also knew that these facts would likely have negative repercussions in her social and cultural environment, such as the possible rejection by her community. Moreover, she pressed charges and was persistent with her claim, fully aware of the continuing presence of soldiers near her home and the fact that she had filed serious criminal charges against two of them.

(See also: ECHR, Aydin v. Turkey, Judgment of 25 September 1997, paras. 72-73).

I/A Court H.R., Case of J. v. Peru, Judgment of 27 November 2013

325. [T]he mention of some of the alleged ill-treatment only in some of the statements does not mean that this is false or that the facts reported are not true.

(See also: I/A Court H.R., Cabrera García and Montiel Flores v. Mexico, Judgment of 26 November 2010, para. 113).



The elimination of doubts regarding a testimony.

ICTR, Prosecutor v. Kayishema, Judgment of 21 May 1999.

78 Whether or not the explanation by the witness is enough to remove the doubt is determined on a case-by-case basis considering the circumstances surrounding the inconsistency and the subsequent explanation. However, to be released from doubt the Trial Chamber generally demands an explanation of substance rather than mere procedure. [...]

79. Conversely, where the witness provides a convincing explanation of substance, perhaps relating to the substance of the investigator's question, then this may be sufficient to remove the doubt raised.

ICTY, Prosecutor v. Vasiljevic, Judgment of 29 November 2002.

21. A witness may be asked questions at the trial not asked previously or may through questioning remember details previously forgotten.

(See also: ICTY, Prosecutor v. Naletilic and Martinovic, Judgment of 31 March 2003, para. 10; ICTY, Prosecutor v. Brânanin and Zupljanin, Judgment of 1 September 2004, para. 26; ICTY, Prosecutor v. Strugar, Judgment of 31 February 2005, para. 8; and ICTY, Prosecutor v. Limaj et al., Judgment of 30 November 2005, para. 10).

The fallibility of memory in relation to the recounting of traumatic events and the passage of time

CAT, Tala v. Sweden, Views of 15 November 1996

10.3. The State party has pointed to contradictions and inconsistencies in the author's story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that the inconsistencies that exist in the author's presentation of the facts do not raise doubts about the general veracity of his claims.

ICTR, Prosecutor v. Kajelijeli, Judgment of 1 December 2003

37. The Chamber notes that many of the witnesses who have testified before it have seen and experienced atrocities. They, their relatives or their friends have in several cases, been the victims of such atrocities. The Chamber notes that recounting and revisiting such painful experiences is likely to affect the witness's ability to recount the relevant events in a judicial context.

38. The Chamber recognises in addition the time that had lapsed between the time of the events in question and the testimony of the witnesses.



**The fallibility of
memory in relation
to the recounting
of traumatic events
and the passage
of time**

ICTY, Prosecutor v. Anto Furundzija, Judgment of 10 December 1998

113. The Trial Chamber is of the view that survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses.

ICTY, Prosecutor v. Delalic et al., Appeal Judgment of 20 February 2001

496. [The Appeals Chamber] found that often the testimony of witnesses who appear before it, consists of a "recounting of horrific acts" and that often "recollection and articulation of such traumatic events is likely to invoke strong psychological and emotional reactions [...]. This may impair the ability of such witnesses to express themselves clearly or present a full account of their experiences in a judicial context". In addition, it recognised the time which had lapsed since the events in question took place and the "difficulties in recollecting precise details several years after the fact, and the near impossibility of being able to recount them in exactly the same detail and manner on every occasion [...]". The Trial Chamber further noted that inconsistency is a relevant factor "in judging weight but need not be, of [itself], a basis to find the whole of a witness' testimony unreliable".

497. Accordingly, it acknowledged, as it was entitled to do, that the fact that a witness may forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his or her evidence given in relation to the central facts relating to the crime.

ICTY, Prosecutor v. Krnojelac, Judgment of 15 March 2002,

69. In determining whether any minor discrepancies should be treated as discrediting their evidence as a whole, the Trial Chamber has taken into account the fact that these events took place some nine years before the witnesses gave evidence. Although the absence of a detailed memory on the part of these witnesses did make the task of the Prosecution more difficult, the lack of detail in relation to peripheral matters was in general not regarded as necessarily discrediting their evidence.

(See also: ICTY, Prosecutor v. Brânanin and Zupljanin, Judgment of 1 September 2004, para. 26; ICTY, Prosecutor v. Oric, Judgment of 30 June 2006, para. 18).



The fallibility of memory in relation to the recounting of traumatic events and the passage of time

CAT, Halil Haydin v. Sweden, Views of 16 December 1998

6.7. The Committee notes that the State party has pointed to contradictions and inconsistencies in the author's story and further notes the author's explanations for such inconsistencies. The Committee considers that complete accuracy is seldom to be expected by victims of torture, especially when the victim suffers from post-traumatic stress syndrome; it also notes that the principle of strict accuracy does not necessarily apply when the inconsistencies are of a material nature. In the present case, the Committee considers that the presentation of facts by the author does not raise significant doubts as to the trustworthiness of the general veracity of his claims.

(See also: ICTR, Prosecutor v. Kajelijeli, Judgment of 1 December 2003, para. 40; and ICTY, Prosecutor v. Kupreskic, Judgment of 14 January 2000, para. 31; ICTR, Prosecutor v. Alfred Musema, Appeal Judgment, 16 November 2001, paras. 20 and 60; ICTY, Prosecutor v. Kunarac et al., Judgment of 22 February 2001, paras. 564 and 679; ICTY, Prosecutor v. Anto Furundzija, Judgment of 10 December 1998, para. 113).

b. Assessing testimony in cases of sexual violence. Particular focus on assessing consent

Legal framework

Rules of Procedure and Evidence of the International Criminal Court (ICC): rules 70-71.

CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19: para. 29(e).



General context

ICC Rules of Procedure and Evidence

Rule 70: Principles of evidence in cases of sexual violence.

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

I/A Court H.R., Case of Favela Nova Brasília v. Brazil, Judgment of 16 February 2017

248. The Court has established that rape is a specific form of violence which, in general, occurs in the absence of persons other than the victim and the perpetrator or perpetrators. Given the nature of this type of violence, one cannot expect graphic or documentary evidence and therefore the victim's testimony constitutes fundamental evidence of the act. Notwithstanding the subsequent legal definition of the facts, the Court considers that this standard is applicable to sexual violence in general.

I/A Court H.R., Case of J. v. Peru, Judgment of 27 November 2013

323. In addition, when analyzing the said statements it must be borne in mind that sexual violence corresponds to a type of offense that the victim does not usually report, owing to the stigma that reporting it usually entails.

(See also: I/A Court H.R., *Espinoza Gonzáles v. Peru*, Judgment of 20 November 2014, para. 150).



**The duty to prevent
revictimization**

IACHR, Ana, Beatriz and Celia González Pérez v. Mexico, Report No. 53/01, 4 April 2001

75. Rape is an aberrant act, which because of its very nature requires evidence that is different from other crimes. Subjecting the victim to another episode of humiliation or one that causes that person to relive the events involving the most private parts of the person's body in the form of review proceedings should be avoided. [...] In the absence of evidence, the medical examination must provide all the guarantees for fully respecting the dignity of the person and for considering that individual's mental and psychological condition.

I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014

256. Furthermore, in cases of sexual violence, the Court has underlined that the investigation must try, insofar as possible, to avoid the re-victimization of the presumed victim or the re-experience of the profoundly traumatic incident.

(See also: I/A Court H.R., Fernández Ortega et al. v. Mexico, Judgment of 30 August 2010, para. 196; I/A Court H.R., Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010, para. 180).

**Taking statements
from women who
are victims of sexual
violence.**

I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014

249. In particular, the Court has indicated that, in interviews of a presumed victim of acts of violence or rape, the statement should be made in a safe and secure environment that provides privacy and instils confidence, and that the statement should be recorded in order to avoid or limit the need for its repetition. This statement should contain, with the consent of the presumed victim: (i) the date, time and location of the assault, including a description of the type of surface on which it occurred; (ii) the name, identity and number of assailants; (iii) the nature of the physical contacts perpetrated; (iv) whether weapons or restraints were used; (v) use of medication, drugs, alcohol or other substances; (vi) how clothing was removed, if applicable; (vii) details of actual or attempted sexual activity against the presumed victim; (viii) whether condoms or lubricants were used; (ix) whether there were any subsequent activities by the patient that could alter evidence, and (x) details of any symptoms that the presumed victim has developed since that time.

(See also: I/A Court H.R., Fernández Ortega et al. v. Mexico, Judgment of 30 August 2010, para. 194; I/A Court H.R., J. v. Peru, Judgment of 27 November 2013, para. 324).

States' obligations regarding the prevention, protection, punishment and eradication of violence against women



Subsequent denial of the acts of sexual violence by the victim does not disprove the statements about what happened	<u>I/A Court H.R., Case of J. v. Peru, Judgment of 27 November 2013</u> 324. [T]he Court has considered that a denial of the occurrence of a sexual attack that has been reported does not necessarily disprove the statements where it was indicated that it had happened, but must be analyzed taking into account the specific circumstances of the case and of the victim. (See also: I/A Court H.R., <i>Rosendo Cantú et al. v. Mexico</i>, Judgment of 31 August 2010, para. 95; ECHR, <i>Teslenko v. Ukraine</i>, Judgment of 20 December 2011, paras. 88, 95-96).
The legal definition of the acts by the victim does not invalidate the facts	<u>I/A Court H.R., Case of J. v. Peru, Judgment of 27 November 2013</u> 324. [T]he legal definition of the acts that the presumed victim used in her statements must be assessed taking into account the usual meaning of the words used, which does not necessarily correspond to their legal definition. The relevant factor is to evaluate whether the acts described, and not the legal definition given to them, were consistent.
A lack of precision with regard to dates is irrelevant	<u>ICTY, Prosecutor v. Tadic, Judgment of 7 May 1997</u> 534. [A lack of precision in the victim's statement with regard to dates does not invalidate the credibility of the testimony] when the date or time is not also an element of the offence. While it is usual to allege and prove the date on which the offence charged is asserted to have been committed, the date is not material unless it is an essential part of the offence.
The impact of the traumatic consequences of sexual violence on victims when testifying and their legal assessment	<u>I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014</u> 150. The Court has also taken into account that the statements made by victims of sexual violence relate to an occasion that was very traumatic for them, and its impact may lead to a certain lack of precision when remembering it. Therefore, the Court has noted that the lack of precision in statements relating to sexual violence, or the mention of some of the alleged facts in only some of them, does not mean that such statements are false or that the facts recounted are untrue. (See also: I/A Court H.R., <i>Fernández Ortega et al. v. Mexico</i>, Judgment of 30 August 2010, para. 105; I/A Court H.R., <i>Rosendo Cantú et al. v. Mexico</i>, Judgment of 31 August 2010, para. 91; I/A Court H.R., <i>J v. Peru</i>, Judgment of 27 November 2013, para. 325).



Medical evidence is not required to prove sexual violence

I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014

153. [I]n cases in which sexual violence is alleged, the lack of medical evidence does not decrease the truth of the presumed victim's statement. In such cases, a medical examination will not necessarily reveal the occurrence of violence or rape, because not all cases of violence and/or rape cause physical injuries or ailments that can be verified by such examinations.

273. Meanwhile, expert witness María Jennie Dador stated before the Court that, when investigating cases of sexual violence and torture reported in Peru, the judicial authorities had "accorded too much significance to the medical forensic examinations, the integrity of the hymen or 'loss of virginity' and evidence of physical signs of violence, without considering that, neither at that time nor today, were there or are there technical and scientific or human resources that would allow the justice system to obtain the necessary evidence to charge the assailants."

(See also: ICTR, *Prosecutor v. Akayesu*, Judgment of 2 September 1998, paras. 134-135; ICTY, *Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, para. 271; ICTY, *Prosecutor v. Tadic*, Appeal Judgment of 15 July 1999, para. 65; ICTY, *Prosecutor v. Delalic et al. (Celebici Case)*, Appeal Judgment, 20 February 2001, paras. 504-505; ECHR, *M. C. v. Bulgaria*, Judgment of 4 December 2003, para. 166; I/A Court H.R., *Fernández Ortega et al. v. Mexico*, Judgment of 30 August 2010, para. 124; I/A Court H.R., *J. v. Peru*, Judgment of 27 November 2013, paras. 329 and 333).

The inadmissibility of evidence concerning the conduct of women

ICC Rules of Procedure and Evidence

Rule 71: Evidence of other sexual conduct.

In the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

170. [A]ccording to certain international standards concerning violence against women and sexual violence, evidence relating to the sexual history of the victim is inadmissible, in principle; hence, opening lines of investigation into the previous social or sexual behavior of the victims in cases of gender violence is merely a manifestation of policies or attitudes based on gender stereotypes.

(See also: I/A Court H.R., *Véliz Franco et al. v. Guatemala*, Judgment of 19 May 2014, para. 209).

States' obligations regarding the prevention, protection, punishment and eradication of violence against women



Lack of consent as the cornerstone of any investigation of sexual violence	<u>ECHR, Case of M. C. v. Bulgaria, Judgment of 4 December 2003</u> 181. The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of “direct” proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.
Lack of physical resistance is irrelevant in a court of law and does not imply the granting of consent	<u>CEDAW Committee, Karen Tayag Vertido v. Philippines, Views of 16 July 2010</u> 8.5 [T]he Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence. <u>CEDAW Committee, R. P. B. v. Philippines, Views of 21 February 2014</u> 8.10. It reiterates that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence. It also reiterates that lack of consent is an essential element of the crime of rape, which constitutes a violation of women’s right to personal security, autonomy and bodily integrity.
Lack of consent does not have to be proven by the Prosecutor and/or the woman victim of sexual violence	<u>SCSL, Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case), Judgment of 2 March 2009.</u> 163. The Chamber emphasises that the lack of consent of the victim to the enslavement or to the sexual acts is not an element to be proved by the Prosecution, although whether or not there was consent may be relevant from an evidentiary perspective in establishing whether or not the Accused exercised any of the powers attaching to the right of ownership. The Chamber subscribes to the statement of the ICTY Appeals Chamber that “circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.”



2.3.6. The right to remedy

Legal framework	<u>Convention of Belém do Pará: Article 7(g).</u> <u>Inter-American Model Law on the Prevention, Punishment, and Eradication of Violence against Women in Political Life: Article 47 et seq.</u> <u>Inter-American Model Law on the Prevention, Punishment, and Eradication of the Gender-Related Killing of Women and Girls: Articles 22-25.</u> <u>CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: paras. 15, 17(a), 77, 79 and 81(e) and g.</u> <u>Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices: para. 13.</u> <u>CEDAW Committee General recommendation No. 33 on women's access to justice: paras. 14(e), 19(d)-(e) and (g) and 51(a).</u>
Concept	<u>I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017</u> 199. Reparation of the damage caused by a violation of an international obligation requires, wherever possible, full restitution (<i>restitutio in integrum</i>), which implies restoring the previous situation. When this is not feasible, as in most cases involving human rights violations, the Court will decide on measures to guarantee the infringed rights and to offer redress for the consequences of the violations. Accordingly, the Court has considered the need to grant various measures of reparation, so as to provide full redress for the damage caused. Therefore, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction and guarantees of non-repetition are of special importance given the damage caused. <i>(See also: I/A Court H.R., Velásquez Rodríguez v. Honduras, Judgment of 21 July 1989, paras. 25 and 26; I/A Court H.R., Cantoral Benavides v. Peru, Judgment of 3 December 2001, paras. 79-81; I/A Court H.R., González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009, para. 450; I/A Court H.R., Vásquez Durand et al. v. Ecuador, Judgment of 15 February 2017, para. 187).</i>

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Non-pecuniary damage	<u>I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010</u> 275. In its case law the Court has developed the concept of non-pecuniary damage [and the assumptions under which it must be compensated] and has established that this may include “both the suffering and hardship caused to the direct victims and their family, the impairment of values of great significance to them and also the changes of a non-pecuniary nature in the living conditions of the victim or her family”. (See also: I/A Court H.R., “Street Children” (Villagrán Morales et al.) v. Guatemala, Judgment of 26 May 2001, para. 84).
The right to effective remedy	<u>CEDAW Committee, Karen Tayag Vertido v. Philippines, Views of 16 July 2010</u> 8.3 With regard to the author’s claim in relation to article 2 (c), the Committee, while acknowledging that the text of the Convention does not expressly provide for a right to a remedy, considers that such a right is implied in the Convention, in particular in article 2 (c), by which States parties are required “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”. [...] It considers that for a remedy to be effective, adjudication of a case involving rape and sexual offences claims should be dealt with in a fair, impartial, timely and expeditious manner. <u>CEDAW Committee, R. P. B. v. Philippines, Views of 21 February 2014</u> 8.3. The Committee also recalls that, for a remedy to be effective, adjudication of a case involving rape and sexual offences claims should be dealt with in a fair, impartial, timely and expeditious manner. <u>ECHR, Case of Aydin v. Turkey, Judgment of 25 September 1997</u> 103. Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a “prompt and impartial” investigation whenever there is a reasonable ground to believe that an act of torture has been committed [...]. However, such a requirement is implicit in the notion of an “effective remedy” under Article 13 [of the European Convention on Human Rights].



The right to remedy must also incorporate cross-cutting approaches such as gender sensitivity or cultural diversity

I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017

200. The Court has established that the reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Likewise, the reparations must include an analysis that considers not only the right of the victim to obtain reparation, but that also incorporates a gender perspective, both in their formulation and their implementation.

I/A Court H.R., Case of López Soto et al. v. Venezuela, Judgment of 26 September 2018

270. The Court has established that the reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must observe the concurrence of these factors to rule properly and in accordance with the law. The Court also considers that the reparations must include an analysis that contemplates not only the right of the victim to obtain reparation, but that also incorporates a gender perspective, in both their formulation and their implementation.

(See also: I/A Court H.R., Ticona Estrada v. Bolivia, Judgment of 27 November 2008, para. 110; I/A Court H.R., I. V. v. Bolivia, Judgment of 30 November 2016, para. 326; I/A Court H.R., V. R. P., V. P. C. et al. v. Nicaragua, Judgment of 8 March 2018, para. 337; I/A Court H.R., Coc Max et al. (Massacre of Xamán) v. Guatemala, Judgment of 22 August 2018, para. 144).

I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, Judgment of 31 August 2010.

230. The Commission asked the Court to order the State to guarantee indigenous women access to justice through the design of a policy that respects their cultural identity.

I/A Court H.R., Case of Fernández Ortega et al. v. Mexico, Judgment of 30 August 2010

251. The Court finds, as it has in other cases, that a measure of reparation must be ordered that provides appropriate care for the physical and psychological effects suffered by the victims, which attend to their gender and ethnicity.

267. In the present case, the Court underscores the importance of implementing reparations that have a community scope and that allow the victim to reincorporate herself into her living space and cultural identity, as well as re-establishing the fabric of the community.



Remedies must also incorporate cross-cutting approaches such as gender sensitivity or cultural diversity

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

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

I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014

314. Consequently, the Court establishes that the State must provide, free of charge and immediately through its specialized health care institutions, in an adequate, comprehensive and effective manner, the medical, psychological or psychiatric treatment required by Gladys Carol Espinoza Gonzáles, following her informed consent and if she so wishes, including the provision of medicines, also free of charge. The State must also ensure that the professionals who are assigned assess the victim's psychological and physical conditions adequately and have sufficient training and experience to treat both her physical health problems and the psychological traumas resulting from the cruel, inhuman and degrading treatment, and the torture she has suffered, which included rape and other forms of sexual violence [...].

To this end, and since Gladys Espinoza is currently incarcerated, these professionals must have access to the place where she is confined, and her transfer, as necessary, to health care institutions must be ensured. Subsequently, the treatments must be provided, insofar as possible, in the health care centers nearest to her place of residence in Peru for as long as necessary. This means that Gladys Espinoza must receive a differentiated treatment in relation to the process and the procedures that have to be complied with in order to be treated in the public hospitals.

The right to remedy must be designed to effect change

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of November 16, 2009

450. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State [...], the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.



The right to remedy extends not only to the victims, but also calls for measures of a general nature

CEDAW Committee, O. G. v. Russia, Views of 6 November 2017

9. The Committee makes the following recommendations to the State party:
[...]
- (b) General:
 - (i) Adopt comprehensive legislation to prevent and address violence against women, including domestic violence, introduce ex officio prosecution of domestic and sexual violence and ensure that women and girls who are victims of violence have access to immediate means of redress and protection and that perpetrators are prosecuted and adequately punished;
 - (ii) Reinstate criminal prosecution of domestic violence within the meaning of article 116 of the Criminal Code;
 - (iii) Put in place a protocol for handling domestic violence complaints in a gender-sensitive manner at the level of police stations to ensure that no urgent or genuine complaint of domestic violence is summarily set aside and that victims are given adequate protection in a timely manner;
 - (iv) Renounce private prosecution in cases of domestic violence, given that the process unduly puts the burden of proof entirely on victims of domestic violence, in order to ensure equality between the parties in judicial proceedings;
 - (v) Ratify the Istanbul Convention;
 - (vi) Provide mandatory training for judges, lawyers and law enforcement personnel, including prosecutors, on the Convention, the Optional Protocol thereto and the Committee's general recommendations, in particular general recommendations No. 19, No. 28, No. 33 and No. 35;
 - (vii) Fulfil its obligations to respect, protect and fulfil the human rights of women, including the right to be free from all forms of gender-based violence, including domestic violence, intimidation and threats of violence;
 - (viii) Investigate promptly, thoroughly, impartially and seriously all allegations of gender-based violence against women, ensure that criminal proceedings are initiated in all such cases, bring the alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and impose appropriate penalties;
 - (ix) Provide victims of violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure that they have access to available, effective and sufficient remedies and rehabilitation in line with the guidance provided in the Committee's general recommendation No. 33;
 - (x) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods;
 - (xi) Develop and implement effective measures, with the active participation of all relevant stakeholders, such as women's organizations, to address the stereotypes, prejudices, customs and practices that condone or promote domestic violence.

(See also: CEDAW Committee, Reyna Trujillo Reyes and Pedro Argüello Morales v. Mexico, Views of 21 July 2017, para. 11).



The right to remedy extends not only to the victims, but also calls for measures of a general nature

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

- 602.22. The State shall continue implementing permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective to ensure due diligence in conducting preliminary inquiries and judicial proceedings concerning gender-based discrimination, abuse and murder of women, and to overcome stereotyping about the role of women in society, in the terms of paragraphs 531 to 542 of this Judgment. Every year, for three years, the State shall report on the implementation of the courses and training sessions.
- 602.23. The State shall, within a reasonable time, conduct an educational program for the general population of the state of Chihuahua so as to overcome said situation. In this regard, the State shall present an annual report for three years, indicating the measures it has taken to this end, in the terms of paragraph 543 of this Judgment.

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014

10. The State must, within a reasonable time, draw up a plan to reinforce the INACIF [the Guatemalan National Institute of Forensic Science], with a specific timetable which includes the allocation of adequate resources to allow it to expand its activities throughout national territory and to fulfill its functions, in the terms of paragraph 268 of this Judgment.
11. The State must, within a reasonable time, bring into operation the "specialized jurisdictional organs" and the special prosecutor's office, in the terms of paragraph 270 of this Judgment.
12. The State must, within a reasonable time, implement programs and courses for public officials who are members of the Judiciary, the Public Prosecution Service and the National Civil Police and who are involved in the investigation of the murder of women on standards with regard to prevention, and the eventual punishment and eradication of the murder of women, and provide them with training on the proper application of the relevant laws and regulations, in the terms of paragraph 275 of this Judgment.
13. The State must provide immediate, adequate and effective medical and psychological treatment, free of charge, through the State's specialized health care institutions, to Rosa Elvira Franco Sandoval, if she so wishes, in the terms of paragraph 280 of this Judgment.



The right to redress does not only include legal or compensatory measures

I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, Judgment of 16 November 2009

- 602.16. The State shall, within one year of notification of this Judgment, organize a public act to acknowledge its international responsibility in relation to the facts of this case so as to honor the memory of Laura Berenice Ramos Monárrez, Esmeralda Herrera Monreal and Claudia Ivette González, in the terms of paragraphs 469 and 470 of this Judgment.
- 602.17. The State shall, within one year of notification of this Judgment, erect a monument in memory of the women victims of gender-based murders in Ciudad Juárez, in the terms of paragraphs 471 and 472 of the present Judgment. The monument shall be unveiled at the ceremony during which the State publicly acknowledges its international responsibility, in compliance with the decision of the Court specified in the preceding operative paragraph.

I/A Court H.R., Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012

4. The State shall hold a public act of acknowledgment of international responsibility with regard to the facts of this case, under the terms of paragraphs 263 and 264 of this Judgment.

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014.

323. 9. The State must, within one year of notification of this Judgment, make a public apology, in the terms of paragraphs 257 and 258 of this Judgment.

Guarantees of non-repetition

I/A Court H.R., Case of Véliz Franco et al. v. Guatemala, Judgment of 19 May 2014

25. [T]he Court establishes that the State must conduct the investigation properly and, when appropriate, initiate the corresponding criminal proceedings and, if pertinent, any others that are required to identify, prosecute and punish, as appropriate, those responsible for the abuse and deprivation of the life of the child María Isabel Veliz Franco, in keeping with the guidelines in this Judgment, in order to avoid the repetition of acts that are the same or similar to those of this case. This investigation should be conducted with a gender-perspective, follow up on specific lines of investigation related to sexual violence, provide the victim's family members with information on progress in the investigation in accordance with domestic law, and ensure that they can participate effectively in the criminal proceedings. In addition, the investigation should be conducted by officials trained in similar cases and in attending to victims of discrimination and gender-based violence and discrimination. Lastly, it should be ensured that those in charge of the investigation and of the criminal proceedings, as well as any other persons involved as witnesses, expert witnesses or members of the victim's family, have satisfactory guarantees for their safety.



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- [I/A Court H.R., Case of Rodríguez Vera et al. \(Missing Persons of the Palace of](#)



[Justice\) v. Colombia, Judgment of 14 November 2014](#)

- [I/A Court H.R., Case of Espinoza Gonzáles v. Peru, Judgment of 20 November 2014](#)
- [I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador, Judgment of 1 September 2015](#)
- [I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala, Judgment of 19 November 2015](#)
- [I/A Court H.R., Case of Flor Freire v. Ecuador, Judgment of 31 August 2016](#)
- [I/A Court H.R., Case of the Hacienda Brasil Verde Workers v. Brazil, Judgment of 20 October 2016](#)
- [I/A Court H.R., Case of Yarce et al. v. Colombia, Judgment of 22 November 2016](#)
- [I/A Court H.R., Case of I.V. v. Bolivia, Judgment of 30 November 2016](#)
- [I/A Court H.R., Case of Vásquez Durand et al. v. Ecuador, Judgment of 15 February 2017](#)
- [I/A Court H.R., Case of Favela Nova Brasília v. Brazil, Judgment of 16 February 2017](#)
- [I/A Court H.R., Case of Gutiérrez Hernández et al. v. Guatemala, Judgment of 24 August 2017](#)
- [I/A Court H.R., Case of V. R. P., V. P. C. et al. v. Nicaragua, Judgment of 8 March 2018](#)
- [I/A Court H.R., Case of Carvajal Carvajal et al. v. Colombia, Judgment of 13 March 2018](#)

- [I/A Court H.R., Case of Munárriz and Escobar et al. v. Peru, Judgment of 20 August 2018](#)

- [I/A Court H.R., Case of Coc Max et al. \(Massacre of Xamán\) v. Guatemala, Judgment of 22 August 2018](#)
- [I/A Court H.R., Case of López Soto et al. v. Venezuela, Judgment of 26 September 2018](#)

3.2.2. At European level

A. *European Court of Human Rights (ECHR)*

- [ECHR, Case “Relating to certain aspects of the laws on the use of languages in Education in Belgium \(merits\)”, Judgment of 23 July 1968](#)
- [ECHR, Case of Hoffmann v. Austria, Judgment of 23 June 1993](#)
- [ECHR, Case of Aydin v. Turkey, Judgment of 25 September 1997](#)
- [ECHR, Case of Paul and Audrey Edwards v. United Kingdom, Judgment of 14 March 2002](#)
- [ECHR, Case of Karner v. Austria, Judgment of 24 July 2003](#)
- [ECHR, Case of M. C. v. Bulgaria, Judgment of 4 December 2003](#)
- [ECHR, Case of Siliadin v. France, Judgment of 26 July 2005](#)
- [ECHR, Case of Angelova and Iliev v. Bulgaria, Judgment of 26 July 2007](#)



- [ECHR, Case of D. H. and others v. the Czech Republic, Judgment of 13 November 2007](#)
- [ECHR, Case of Bevacqua and S. v. Bulgaria, Judgment of 12 June 2008](#)
- [ECHR, Case of Medova v. Russia, Judgment of 15 January 2009](#)
- [ECHR, Case of Opuz v. Turkey, Judgment of 9 June 2009](#)
- [ECHR, Case of Rantsev v. Cyprus and Russia, Judgment of 7 January 2010](#)
- [ECHR, Case of Muñoz Díaz v. Spain, Judgment of 8 March 2010](#)
- [ECHR, Case of A. v. Croatia, Judgment of 14 October 2010](#)
- [ECHR, Case of Yazgül Yilmaz v. Turkey, Judgment of 1 February 2011](#)
- [ECHR, Case of Teslenko v. Ukraine, Judgment of 20 December 2011](#)
- [ECHR, Case of Konstantin Markin v. Russia, Judgment of 22 March 2012](#)
- [ECHR, Case of B. S. v. Spain, Judgment of 24 July 2012](#)
- [ECHR, Case of Eremia v. Moldova, Judgment of 28 May 2013](#)
- [ECHR, Case of Carvalho Pinto de Sousa Morais v. Portugal, Judgment of 25 October 2017](#)

B. *Recommendations of the CEDAW Committee*

- [CEDAW Committee General recommendation No. 23 on political and public life](#)
- [CEDAW Committee General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations](#)
- [Joint general recommendation/general comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices](#)
- [CEDAW Committee General recommendation No. 33 on women's access to justice](#)
- [CEDAW Committee General recommendation No. 35 on gender-based violence updating general recommendation No. 19](#)

C. *Recommendations of the Follow-up Mechanism to the Convention of Belém do Pará (MESECVI)*

- [General Recommendation No. 1 of the Committee of Experts of the MESECVI: Self-Defense and Gender-Based Violence](#)
- [General Recommendation No. 2 of the Committee of Experts of the MESECVI: Missing Women and Girls in the Hemisphere](#)

