

288-20/ CIDH/SE/MPCT-MISC

May 22, 2020

RE: Call for submissions to the UN SRVAW thematic report on rape as a grave and systematic human rights violation and gender-based violence against women

Dear Ms. Dubravka, Šimonović,

I have the honor of addressing Your Excellency on behalf of the Inter-American Commission on Human Rights (IACHR), to transmit information in response to your call for submissions to the UN SRVAW thematic report on rape as a grave and systematic human rights violation and gender-based violence against women.

I hereby submit the standards and jurisprudence of the Inter-American Commission on Human Rights on this matter.

Please accept, the assurances of my highest consideration,



Paulo Abrão
Executive Secretary

Ms. Dubravka, Šimonović
United Nations Special Rapporteur on violence against women

Enclosure

Inter-American standards on sexual violence with focus on rape

Definition of rape in the Inter-American Human Rights System

Sexual violence is an assault upon human dignity and a violation of the right to humane treatment, recognized in Article 5 of the American Convention on Human Rights. For a proper appreciation of the magnitude and nature of the human rights violations that an act of sexual violence involves, the circumstances surrounding the event need to be examined. For example, an act of sexual violence can be a violation of a number of rights recognized in the American Convention and the Convention of Belém do Pará, but it can also lead to a homicide, a violation of the victim's right to life. One of the most common forms of sexual violence that women suffer is rape. Rape is a paradigmatic form of violence against women, whose consequences transcend the victim's personhood.¹

The Inter-American Court of Human Rights held that rape does not necessarily imply nonconsensual vaginal sex, as was traditionally thought. Rape can also be nonconsensual acts involving vaginal or anal penetration of the victim. In the commission of this crime, the assailant may use other parts of his body or even objects; oral penetration with the male organ is also classified as rape.² Physical resistance by the victim is not one of the elements of the crime of rape; the behavior need only involve coercion of some sort.³ When an agent of the State rapes a women in custody, the act is particularly serious and reprehensible, given the victim's vulnerability and the abuse of authority on the part of the agent.⁴⁵

In its judgments in the cases of *Inés Fernández Ortega*⁶ and *Valentina Rosendo Cantú*,⁷ the Inter-American Court of Human Rights affirmed several important principles related to the state obligation of acting with due diligence and of ensuring adequate access to justice in cases of sexual violence: (a) rape constitutes a paradigmatic form of violence against women, the consequences of

¹ Inter-American Commission on Human Rights (IACHR). [Access to justice for women victims of violence in the Americas](#). OEA/Ser.L/V/II. Doc. 63. 9 December 2011. Para. 63-64.

² Inter-American Court of Human Rights (I/A Court H.R.). *Case of the Miguel Castro Castro Prison v. Peru*, Judgment of November 25, 2006. Series C No. 160, para. 310

³ I/A Court H.R. *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C No. 215, para. 105.

⁴ I/A Court H.R. *Case of the Miguel Castro Castro Prison v. Peru*, Judgment of November 25, 2006. Series C No. 160, para. 311.

⁵ IACHR. [Access to justice for women victims of violence in the Americas](#). OEA/Ser.L/V/II. Doc. 63. 9 December 2011. Para. 65.

⁶ IACHR. Report No. 89/08, Case 12.580, Merits, *Inés Fernández Ortega and others* (Mexico), October 30, 2008.

⁷ IACHR. Report No. 36/09, Case 12.579, Merits, *Valentina Rosendo Cantú and other* (Mexico), March 27, 2009.

which even transcend the person of the victim; (b) rape may constitute torture even if it entails a single act or takes place outside state facilities, if intentionality, severe suffering, and the pursuit of a goal by the perpetrators are present; (c) a rape undermines values and essential aspects of a person's private life and represents an intrusion into her sexuality, annulling her right to decide freely with whom to have intimate relations – one of the most personal and private decisions – and over her basic bodily functions; (d) following an act of violence against a woman, it is particularly important for the authorities in charge of the investigation to pursue it with determination and effectiveness, bearing in mind the duty of society to reject violence against women and the State's obligation to eradicate it and to ensure the victims' trust in the public institutions charged with their protection; (e) investigations in cases of sexual violence must strive to avoid revictimization or the re-experiencing of the profoundly traumatic experience; and (f) the victim's statement regarding an act of sexual violence is of fundamental importance in investigating, prosecuting, and punishing the offense.⁸

Criminal laws addressing rape

The IACHR also observes the persistence of inadequate provisions and in some cases discriminatory content within some laws and criminal and civil codes, reflected in the following aspects: definitions of rape that require the use of force and violence rather than lack of consent; the treatment of rape as a crime against decency and not as a violation of a woman's right to bodily integrity; termination of criminal proceedings if the victim withdraws a complaint; and inadequate penalties for crimes involving violence against women.⁹ These provisions have not been adapted to conform to the object and purpose of certain international human rights instruments like the Convention of Belém do Pará.¹⁰

In many criminal codes, values such as honor, social decency, virginity, chastity, and good morals prevail over values such as the mental and physical integrity of the woman and her sexual liberty, thereby impeding the due protection under the law of victims of such crimes or compelling them to prove that they resisted in the case of the crime of rape, or subjecting them to interminable procedures that perpetuate victimization.¹¹

Rape as a torture practice

⁸ I/A Court H.R. Caso Rosendo Cantú Et Al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010.

⁹ See for example, United Nations. [In-depth Study on All Forms of Violence against Women](#), A/61/122/Add.1, July 6, 2006. Para. 277.

¹⁰ IACHR. [Access to justice for women victims of violence in the Americas](#). OEA/Ser.L/V/II. Doc. 63. 9 December 2011. Para. 221.

¹¹ IACHR. [Human Rights on the Status of Women in the Americas](#). OEA/SER.L/V/II.98, doc. 17, October 13, 1998, Section IV, Conclusions.

In addressing rape, the Commission found the combined presence of the three elements set out for establishing the existence of torture in the Inter-American Convention to Prevent and Punish Torture: (1) “an intentional act through which physical and mental pain and suffering is inflicted on a person,” (2) “committed with a purpose,” and (3) “committed by a public official or by a private person acting at the instigation of the former.” In analyzing these elements, the Commission took into account the physical and psychological suffering caused by the rape, the possibility of the victim being ostracized if she reported the incident, and the way in which the rape might have been committed with the intent of punishing and intimidating the victim.¹²

In the report on the merits of the case of the González Pérez Sisters,¹³ the Commission developed the concept of rape as torture and a violation of women’s right to a private life. It pointed out the specific obstacles that indigenous women encounter when seeking judicial protection. The Commission concluded that report by underscoring that the pain and humiliation that the women experienced was aggravated by the fact that they were indigenous women who did not know the language of their assailants and the authorities involved in the process, and by the fact that they were ostracized by their own community because of the crime committed against them.

The report also points out the short- and long-range consequences for the victim, and the reluctance of many victims to report rape. The Commission observed that the victim’s right to honor and dignity under Article 11 had been denied. In its judgment, the European Court had cited the European Commission’s argument to the effect that “rape committed by an official or person in authority on a detainee must be regarded as treatment or punishment of an especially severe kind. Such an offence struck at the heart of the victim’s physical and moral integrity and had to be characterised as a particularly cruel form of ill-treatment involving acute physical and psychological suffering (...)”.¹⁴

Investigations and prosecution in cases of rape

As for sexual violence, the IACHR has noted that several components of the investigative process are critical to fulfilling the State’s duty to act with the required due diligence and ensure access to justice for the victims.

These components include the duty to gather and preserve the respective evidence in support of the criminal investigation needed to find those responsible; identifying potential witnesses and obtaining their statements; determining why, how, where and when the act under investigation transpired; protecting and thoroughly investigating the scene of the crime; and ensuring the right of the victim and her family members to take part in the investigative process; among other measures that are essential for the eventual punishment of those responsible.

¹² IACHR. Report No. 5/96, Case 10.970, Merits, *Raquel Martín de Mejía* (Peru), Section V. General Considerations, B. Considerations on the substance of the case. 3. Analysis.

¹³ IACHR. Merits, Report No 53/01, Ana, Beatriz and Cecilia González Pérez (Mexico), April 4, 2001.

¹⁴ IACHR. Merits, Report No 53/01, Ana, Beatriz and Cecilia González Pérez (Mexico), April 4, 2001.

Officials must also gather and consider the body of evidence and the context in which a rape takes place, and not only focus on direct evidence of physical resistance put up by the victim.¹⁵

Principle of opportunity and the due diligence obligation

The Commission has observed principles applicable to the prosecution of cases of violence against women, which grant prosecutors considerable latitude in deciding which crimes they will seek indictments for and which they will not. This latitude can result in the influence of discriminatory socio-cultural patterns in a prosecutor's decision of which crimes to investigate. The Commission examined this problem in its report on the impact of the Colombian armed conflict on women.¹⁶

The incorrect application by the prosecutor's offices of the principle of opportunity in some countries does not take into account the vulnerability or defenselessness of women victims of violence. Nor does it consider the fact that women who are raped or subjected to other forms of violence may feel compelled to remain silent because they fear their assailant's reprisals and/or community ostracism.¹⁷

Sexual violence against girls and adolescents

In view of the foregoing considerations, the Commission recognizes that sexual violence against girls is a phenomenon with specific dynamics that differentiate it from sexual violence against adults. The Inter-American Court has stressed that rape is an extremely traumatic experience that can have severe consequences and causes great physical and psychological damage, which leaves the victim physically and emotionally humiliated, a situation that can hardly be overcome by the passage of time, unlike what happens with other traumatic experiences.¹⁸ In the case of children victims of sexual violence, this impact could be severely aggravated, suffering an emotional trauma differentiated from adults, and an extremely profound impact, particularly when the aggressor maintains a bond of trust and authority with the victim, as a parent.¹⁹

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¹⁵ IACHR. [Access to Justice for Women Victims of Violence in the Americas](#). OEA/Ser. L/V/II. doc. 68. 2007. Executive Summary, par. 15.

¹⁶ IACHR. [Access to Justice for Women Victims of Violence in the Americas](#). OEA/Ser. L/V/II. doc. 68. 2007. Executive Summary, par. 144.

¹⁷ IACHR. [Access to Justice for Women Victims of Violence in the Americas](#). OEA/Ser. L/V/II. doc. 68. 2007. Executive Summary, par. 145.

¹⁸ Inter-American Commission on Human Rights. [Violence and discrimination against women and girls: Best practices and challenges in Latin America and the Caribbean](#). OEA/Ser.L/V/II. Doc.233/19. Approved by the Inter-American Commission on Human Rights on November 14, 2019. Para. 247.

¹⁹ I/A Court H.R., Case of V.R.P, V.P.C, et al. v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Judgment of March 8, 2018, Series C. No. 250, para.163.

physically and emotionally humiliated, a situation that can hardly be overcome by the passage of time, unlike what happens with other traumatic experiences.²⁰

In general, it is observed that the use of physical force in cases of sexual violence against children is rarely used since many times and in turn, because of their status as girls, victims do not understand the nature of the acts they are inflicted. Likewise, the aggressor is usually a close, trustworthy person or an authority figure, while this type of violence can occur over several weeks, months or even years, in repetitive episodes that may worsen over time.²¹

The particularities of this kind of violence include that the victims tend to remain silent for a long time before making complaints, among other reasons, for fear of not being believed, for the family consequences that the revelation may cause or because they have blocked the memory therefore, in these cases in particular, victim girls do not always have the possibility to make the corresponding complaints quickly or at the same time.²²

Due to the above and with a view to overcoming some of the main barriers and obstacles to access to justice for children, the Commission has recommended extending the limitation periods for crimes committed against children and considering the imprescriptibility of the most serious crimes²³. For its part, the Committee on the Rights of the Child has repeatedly recommended ending the prescription of sanctions and criminal action in cases of sexual violence against girls and boys as a way to protect the rights of children²⁴.

Marital rape

The Commission also notes that in a few countries of the region, marital rape is not criminalized,²⁵ specifically, in Saint Kitts and Nevis²⁶ and Haiti,²⁷ or it is only considered an aggravating factor of

²⁰ I/A Court H.R., Case of V.R.P., V.P.C., et al. v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Judgment of March 8, 2018, Series C. No. 250, para.163.

²¹ World Health Organization, Guidelines For Medico-Legal Care For Victims Of Sexual Violence, Chap.7. Child Abuse, 2003.

²² Inter-American Commission on Human Rights. Violence and discrimination against women and girls: Best practices and challenges in Latin America and the Caribbean. OEA/Ser.L/V/II. Doc.233/19. Approved by the Inter-American Commission on Human Rights on November 14, 2019. Para. 248.

²³ IACHR. Hacia la garantía efectiva de los derechos de niñas, niños y adolescentes: Sistemas Nacionales de Protección. OEA/Ser.L/V/II.166 Doc. 206/17. November 30, 2017, Par.130.

²⁴ Naciones Unidas - Comité de los Derechos del Niño, Observaciones finales sobre los informes periódicos cuarto y quinto consolidados de México, CRC/C/MEX/CO/4-5, 8 de junio de 2015. Párrs.33 y 34; Naciones Unidas - Comité de los Derechos del Niño, Observaciones finales sobre los informes periódicos cuarto y quinto combinados de Chile, CRC/C/CHL/4-5, 2 de octubre de 2015. Pár. 47.

²⁵ UN Women. GBV Developments in The Law. Undated.

²⁶ The Borgen Project. A Look at human rights in St. Kitts and Nevis. October 8, 2017.

sexual violence under the law, as is the case of Peru. In different countries, such as Antigua and Barbuda, Bahamas, Barbados, Jamaica and Saint Lucia, violence in certain circumstances is only criminalized to a limited extent.^{28,29}

The Commission notes that if rape is penalized generically and laws restrict the circumstances in which it can be prosecuted, marriage would imply sexual consent between the spouses at all times. These views are predicated on the notion that the aim of the spousal contract is procreation and, therefore, engaging in sexual relations is an inherent duty to the nature of marriage, with or without consent.³⁰

This duty would especially apply to women because of their gender-based role associated with their reproductive capacity. In this regard, the Commission reiterates that any sexual relation without consent is a form of sexual violence and a form of violence against women. Consequently, the IACHR underscores the recommendation of the CEDAW Committee for States to review relevant provisions of law to ensure that the definition of sexual offenses, in particular, marital rape and rape by an acquaintance or date rape, is based on the lack of free consent and takes into account coercive circumstances.³¹

Most of these countries only prosecute the assailant when the partner is separated, in the process of divorce, or when there is a restraining order in effect;³² and in Jamaica only when the act takes place following legal separation or during judicial proceedings to dissolve the marriage, when the spouse is under a judicial order to not live with or disturb his wife,³³ such as in Barbados, or when the person knows that he has a sexually transmitted disease.³⁴

²⁷ OAS. Segundo Informe de Seguimiento a la implementación de las Recomendaciones del comité de Expertas del MESECVI. April 2015. Paragraph 70/ Table 5.

²⁸ The Nassau Guardian, United Nations call for marital rape laws. December 16, 2017.

²⁹ Inter-American Commission on Human Rights. [Violence and discrimination against women and girls: Best practices and challenges in Latin America and the Caribbean](#). OEA/Ser.L/V/II. Doc.233/19. Approved by the Inter-American Commission on Human Rights on November 14, 2019. Para 101.

³⁰ IACHR. [Access to justice for women victims of violence in the Americas](#). OEA/Ser.L/V/II. Doc. 63. 9 December 2011. Para. 102.

³¹ CEDAW. General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. Para. 29 (e).

³² See cases of: Bahamas, Antigua and Barbuda, and Saint Lucia. Report of the Special Rapporteur on violence against women, its causes and consequences, on her mission to the Bahamas. A/HRC/38/47/Add.2, para.39; UN Women. El progreso de las mujeres en el mundo. En busca de la justicia. Progress of the World's Women: In pursuit of Justice. 2011-2012.

³³ Government of Jamaica. Jamaican Sexual Offences Act. Section 5.

³⁴ Inter-American Commission on Human Rights. [Violence and discrimination against women and girls: Best practices and challenges in Latin America and the Caribbean](#). OEA/Ser.L/V/II. Doc.233/19. Approved by the Inter-American Commission on Human Rights on November 14, 2019.

Evidences and criminal proceedings

The IACHR has verified that evidence other than physical evidence and testimonies needs to be weighed to prove cases of violence against women, particularly those related to sexual violence. The Rules of Procedure and Evidence of the International Criminal Court address several factors that can inhibit a victim from physically resisting a sexual aggression, even when the act has not been consented, and how these factors must be considered within the context of a judicial process.³⁵

According to the rules, these factors may include: "force, threat of force, coercion or taking advantage of a coercive environment" which might have undermined the victim's ability to give "voluntary and genuine" consent.³⁶ As the European Court of Human Rights ruled in the case of *M.C. v. Bulgaria*, certain circumstances might impede the victim from physically resisting sexual abuse, including the environment of coercion created by the assailant. The result can be an absence of "direct" proof or witnesses of the sexual aggression.³⁷

Therefore, medical-legal reports that confine to physical observations, such as determining whether the victim's hymen was still intact, are only part of a group of evidence that must be evaluated to clarify the facts in a sexual violence crime.³⁸

³⁵ United Nations, International Criminal Court, The Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 70.

³⁶ United Nations, International Criminal Court, The Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 70.

³⁷ *M.C. v. Bulgaria*, Eur. Ct. H.R., app. No. 39272/98, Judgment of March 4, 2004, paras.178-184.

³⁸ IACHR. [Access to Justice for Women Victims of Violence in the Americas](#). OEA/Ser. L/V/II. doc. 68. 2007. Executive Summary, par. 196.