

Tools for the
Protection of
Human Rights

Summaries of
Jurisprudence

GENDER-BASED
VIOLENCE



CEJIL

*SUMMARIES OF
JURISPRUDENCE*

*Gender-based
Violence*

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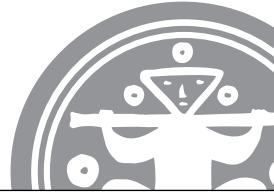


Summaries of Jurisprudence / Gender-based Violence

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*P*RESENTATION

In 2009 the Center for Justice and International Law (CEJIL) introduced the series Tools for the Protection of Human Rights, organized in themes, with the goal to facilitate human rights defenders access and utilization of the standards of national and international jurisprudence. The first of these Summaries of Jurisprudence addresses the Principles of Equality and No Discrimination.

On this occasion, CEJIL is proud to present a new volume -Summaries of Jurisprudence. Gender-based Violence- which includes a selection of decisions from international organs of protection of human rights related to the protection of women victims of violence. This work is the result of an exhaustive research on the Judgments, Reports and Decisions of the Inter-American Court of Human Rights and Inter-American Commission on Human Rights, the European Court of Human Rights, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone and the Committee on the Elimination of Discrimination against Women.

This volume of international standards provides a solid jurisprudential research body and it presents a wider panorama of women's reality in very different contexts revealing the indisputable persistence of gender-based violence in the world, in spite of the advances in the normative field. Moreover, it is necessary to emphasize that the selected cases are some of the most paradigmatic ones among those which, to date, have motivated some type of response from human rights protection systems.

We would like to recognize the initiative and work of Lilita Tojo, Program Director for Bolivia and the Southern Cone, who led this compilation. We are especially grateful to the team of collaborators involved in this project: Ryan Shanovich, John Yandell, Ekaterina Porras Sivolobova and Chelsea Sharon who, as members of the internship program, contributed to the selection and editing of the texts; to Silvia Firmenich and María Luisa Coduras, teachers of the I.E.S. en Lenguas Vivas "Juan Ramón Fernández" in Buenos Aires (Argentina) who promoted an institutional agreement of internships allowing Nancy V. Piñeiro, Guillermo A. Tóffolo and Carla Goretti to conduct their practicum experiences with CEJIL, translating some of the texts included in this volume; and to Julieta Di Corleto who provided encouragement during the preliminary drafts of this initiative.

Finally, we want to recognize the contribution of the United Nations Development Fund for Women, (UNIFEM) - Regional Brazil and Southern Cone, for the advancement of this project.

We hope that it will be a useful tool which contributes to the defense of human rights and to the eradication of violence against women, one of the more tolerated and silenced human rights violations.

Viviana Krsticevic
Executive Director

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on Gender-based Violence*



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*Inter-American Court
of Human Rights*

Miguel Castro-Castro Prison v. Peru

Merits, Reparations and Costs

*Judgment of
November 25, 2006*



[...]

I. INTRODUCTION OF THE CASE

1. On September 9, 2004, pursuant to that stated in Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) submitted an application against the State of Peru (hereinafter “the State” or “Peru”) to the Court. Said application originated from petitions No. 11,015 and 11,769, received at the Commission’s Secretariat on May 18, 1992 and June 5, 1997, respectively.

2. The Commission submitted the petition for the Court to decide if the State is responsible for the violation of the rights enshrined in Articles 4 (Right to Life) and 5 (Right to Humane Treatment) of the American Convention, in relation to the obligation established in Article 1(1) (Obligation to Respect Rights) of the same, in detriment of “at least 42” inmates that died; the violation of Article 5 (Right to Humane Treatment) of the Convention, in relation to the obligation established in Article 1(1) (Obligation to Respect Rights) of the Convention, in detriment of “at least 175” inmates that were injured and of 322 inmates “that having resulted [allegedly] uninjured were submitted to a cruel, inhuman, and degrading treatment;” and for the violation of Articles 8(1) (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention, in relation to the obligation established in Article 1(1) of the same, in detriment of [the [alleged] victims and their next of kin.”

3. The facts presented by the Commission in the application occurred as of May 6, 1992 and they refer to the execution of “Operative Transfer 1” within the Miguel Castro Castro Prison, during which the State, allegedly, caused the death of at least 42 inmates, injured 175 inmates, and submitted another 322 inmates to a cruel, inhuman, and degrading treatment. The facts also refer to the alleged cruel, inhuman, and degrading treatment experimented by the alleged victims after “Operative Transfer 1”.

[...]

VIII. PROVEN FACTS

[...]

Miguel Castro Castro Prison

197.12. The maximum security prison Miguel Castro Castro is a prison for men and it is located in San Juan de Lurigancho, to the East of the city of Lima, capital of Peru.³⁵ It is made up by 12 pavilions of 4 floors each, identified as 1-A and 1-B up to 6-A and 6-B. Each of these pavilions has its own courtyard. The access to pavilions is through a central yard of an octagonal form, known as "Roundhouse". At the entrance of each pavilion there is a closed area called "Coop". The totality of the pavilions is surrounded by a sand yard known as "No man's land". The entrance to the establishment consists of a yard and administrative office, known as "Admissions".³⁶

197.13. In the time in which the events occurred, pavilion 1A of the Miguel Castro Castro Prison was occupied by around 135 female inmates and 50 male, and pavilion 4B was occupied by approximately 400 male inmates.³⁷ The inmates of pavilions 1A and 4B were accused or convicted for the crimes of terrorism or treason,³⁸ and they were allegedly members of the Sendero Luminoso.³⁹ Many of them had been accused and were awaiting conviction, and in some cases they were acquitted.⁴⁰

[...]

"Operative Transfer 1"

197.15. Law Decree No. 25421 of April 6, 1992 ordered the reorganization of the National Penitentiary Institute (INPE) and put the National Police of Peru in charge of the control of security at the penitentiaries. It was within the framework of this stipulation that "Operative Transfer 1" was planned and executed.⁴² The official version was that said "operative" consisted in the transfer of the women that were imprisoned in pavilion 1A of the Miguel Castro Castro Prison, to the maximum security prison for women in Chorrillos.⁴³ The state authorities did not inform the Director of the criminal center, the prisoners, their next of kin or attorneys of the mentioned transfer.⁴⁴

197.16. The real objective of the "operative" was not the mentioned transfer of the inmates, but instead it was a premeditated attack, an operative designed to attack the life and integrity of the prisoners located in pavilions 1A and 4B of the Miguel Castro Castro

Prison. The acts of violence were directed against said pavilions, occupied at the time of the events by inmates accused or sentenced for terrorism crimes or treason.⁴⁵

[...]

IX. THE STATE'S INTERNATIONAL RESPONSIBILITY WITHIN THE CONTEXT OF THE PRESENT CASE

[...]

The So-Called "Operative Transfer 1" that started May 6, 1992

[...]

221. The events, carried out directly by state agents whose actions were protected by their authority, directed their actions toward people imprisoned in a state criminal center, that is, people regarding whom the State had the responsibility to adopt security and special protection measures, in its condition of direct protector of their rights, since they were under its custody.¹²⁵

222. Another important piece of information that this Tribunal will take into account when analyzing the State's international responsibility is that the referred acts of extreme violence of the so-called "Operative Transfer 1" were directed, in first term, against the female inmates imprisoned in pavilion 1A of the Miguel Castro Castro Prison (*supra* para. 197(20)). Later the forces were directed against pavilion 4B of the criminal center (*supra* para. 197(23), 197(24), and 197(31)), once the female inmates started moving to that pavilion for protection, and that the inmates of 4B started helping them. At the time of the facts, high state authorities considered that these women located in pavilion 1A were members of subversive organizations and that determined, in great measure, the state's actions.

223. When analyzing the facts and their consequences the Court will take into account that the women that 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. 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."¹²⁶

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.

225. In this regard, in its Final Report the Commission for Truth and Reconciliation of Peru stated that in the armed conflict there was “a practice [...] of rapes and sexual violence mainly against women,” which “is attributable [...] in first term to state agents [...] and in less measure to members of the subversive groups.” Likewise, the CVR stated that during the mentioned conflict the acts of sexual violence against the women were intended to punish, intimidate, pressure, humiliate, and degrade the population.

226. The Court has verified that different acts that occurred in the present case in detriment of the women responded to the mentioned context of violence against women in said armed conflict (infra paras. 306 through 313).

[...]

XI. VIOLATION OF ARTICLE 5 (RIGHT TO HUMANE TREATMENT) OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) OF THE SAME, AND IN CONNECTION TO ARTICLES 1, 6, AND 8 OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

[...]

Considerations of the Court

[...]

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’.”¹⁴⁸ It has already been proven in this case that the attack started specifically in the prison’s pavilion occupied by the female inmates accused or convicted of crimes of terrorism and treason (*supra* para. 197(13) and 197(20)).

[...]

276. Similarly, with regard to the mentioned aspects specific to violence against women, this Court will apply Article 5 of the American Convention and will set its scope, taking into consideration as a reference of interpretation the relevant stipulations of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, ratified by Peru on June 4, 1996, and the Convention on the Elimination of all Forms of Discrimination against Women, ratified by Peru on September 13, 1982, in force at the time of the facts, since these instruments complement the international corpus juris in matters of protection of women's right to humane treatment, of which the American Convention forms part.¹⁵⁵

A) Regarding the inmates

1) Violations to the right to humane treatment of inmates as a consequence of "Operative Transfer 1"

[...]

290. The attack started against the women's pavilion 1A of the Miguel Castro Castro Prison. The inmates that were located in that pavilion, including the ones that were pregnant, were forced to run from the attack directed to pavilion 4B. This transfer was especially dangerous due to the aforementioned conditions of the attack; the inmates suffered various injuries. A piece of information that shows the extreme conditions in which the attack was carried out was that the prisoners had to crawl on the ground, and climb over dead bodies, in order to avoid being hit by the bullets. This circumstance was especially serious in the case of the women who were pregnant who had to crawl over their stomach.

291. These characteristics of the attack lived by the inmates, who witnessed the death of their prison mates and saw injured pregnant women crawling on the floor, generated, as was described by the witness Gaby Balcázar, "a climate of despair among the women," in such a way that they felt they were going to die. In the same sense, the expert witness Deitsch concluded that during the four days of the attack "[t]he inmates remained with the fear that they were going to die[, which] caused an intense psychological and emotional suffering."

292. It is important to clarify that the evidence provided to the Court and from the statements given by the inmates one can conclude that the pregnant inmates were also victims of the attack to the criminal center. The pregnant women who lived through the attack experimented an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings on anguish, despair, and fear for the lives of their children. The pregnant inmates that have been identified before this Court are Mrs. Eva Challco, who approximately one month after the attack had her son Said Gabriel Challco Hurtado; Vicenta Genua López, who was five months pregnant; and Sabina Quispe Rojas, who was eight months pregnant (*supra* para. 197(57)). In this sense, besides the protection granted by Article 5 of the American Convention, it is necessary to point out that Article 7 of the Convention of Belem do Pará expressly states that the States must ensure that the state authorities and agents abstain from any action or practice of violence against women.

293. Based on the aforementioned, this Tribunal considers that the State is responsible for the violation of the right to humane treatment of the inmates that were injured during the events of May 6 to 9, 1992, which constituted a violation to Article 5 of the American Convention. Likewise, the Court considers that, in the circumstances of the present case, the totality of the acts of aggression and the conditions in which the State deliberately put the inmates (those that died and those that survived) during the days of the attack, which caused all of them a serious psychological and emotional suffering, constituted a psychological torture carried out in offense of all the members of the group, with violation of Articles 5(1) and 5(2) of the American Convention, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. Besides, this Court considers that the violation to the right to humane treatment of Mrs. Eva Challco, Sabina Quispe Rojas, and Vicenta Genua López was exacerbated by the fact that they were pregnant, thus the acts of violence had a greater effect on them. Likewise, the Court considers that the State is responsible for the acts of torture inflicted on Julia Marlene Olivos Peña, in violation of Article 5(2) of the American Convention and of Articles 1, 6, and 8 of the Inter- American Convention to Prevent and Punish Torture.

[...]

2) Treatments received by the inmates after May 9, 1992 and during their transfer to other criminal centers and to hospitals

[...]

298. Among the inmates that were in the conditions described there were pregnant women. The state agents did not have any consideration regarding their specific condition. (...) The face down position in which they had to remain is especially serious in the case of pregnant women. To witness this treatment towards them caused greater anguish among the other inmates.

[...]

300. The Court considers that the treatments described in the previous paragraphs constituted an inhuman treatment in violation of Article 5 of the American Convention. This breach was worse regarding those inmates who were injured and the women who were pregnant.

3) Treatments received in the health centers to which the inmates were transferred during the attack or once it had concluded

[...]

303. With regard to the treatment that must be offered to women who are detained or arrested, the High Commissioner for Human Rights of the United Nations has stated that "they must not be the object of discrimination, and they must be protected from all forms of violence or exploitation." Similarly, it has stated that female detainees must be supervised and checked by female officer and pregnant and nursing women must be offered special conditions during their detention.¹⁵⁹ The Committee on the Elimination of Discrimination against Women has stated that said discrimination includes violence based on gender, "that is, the violence directed towards a women because she is a women or that affects her in an disproportionate manner," and that "acts that inflict damages or suffering of a physical, mental, or sexual nature, threats of committing those acts, coercion, and other forms of deprivation of freedom."¹⁶⁰

304. It was proven that at the Police Hospital the injured inmates, who were in deplorable conditions, were also stripped of their clothes and forced to remain without clothes during almost the entire time they were at the hospital, which in some cases lasted several days and in others weeks, and they were watched over by armed agents (*supra* para. 197.49.).

305. The Court considers that all inmates that were submitted to the mentioned nudity during said prolonged period of time were victims of a treatment that violated their personal dignity.

306. In relation to the aforementioned, it is necessary to make emphasis on the fact that said forced nudity had especially serious characteristics for the six female inmates who, as proven, were submitted to this treatment. Likewise, during the entire time they were in this place, the female inmates were not allowed to clean themselves up and, in some cases, in order to use the restroom they had to do so in the company of an armed guard who did not let them close the door and who aimed their weapon at them while they performed their physiological needs (*supra* para. 197.49.). The Tribunal considers that these women, besides receiving a treatment that violated their personal dignity, were also victims of sexual violence, since they were naked and covered only with a sheet, while armed men, who apparently were members of the State police force, surrounded them. What classifies this treatment as sexual violence is that men constantly observed the women. The Court, following the line of international jurisprudence and taking into account that stated in the Convention to Prevent, Punish, and Eradicate Violence against Women, considers that sexual violence consists of actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever.¹⁶¹

307. The Court points out the context in which said acts were carried out, since the women who suffered them were subject to the complete control and power of State agents, absolutely defenseless, and they had been injured precisely by State police officers.

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. The State is responsible for the violation of the right to humane treatment enshrined in Article 5.2 of the American Convention, in detriment of the six female inmates that suffered those cruel treatments, and whose names are included in Appendix 2 of victims of the present Judgment, that for these effects is considered part of the same.

309. On the other hand, in the present case it has been proven that one female inmate who was transferred to the Police Sanity Hospital was object of a finger vaginal “inspection”, carried out by several hooded people at the same time, in a very abrupt manner, with the excuse of examining her (*supra* para. 197.50.).

310. Following the jurisprudential and legal criterion that prevails both in the realm of International Criminal Law as in comparative Criminal Law, the Tribunal considers that sexual rape does not necessarily imply an non-consensual sexual vaginal relationship, as traditionally considered. Sexual rape must also be understood as act of vaginal or anal penetration, without the victim’s consent, through the use of other parts of the aggressor’s body or objects, as well as oral penetration with the virile member.

311. The Court acknowledges that the sexual rape of a detainee by a State agent is an especially gross and reprehensible act, taking into account the victim’s vulnerability and the abuse of power displayed by the agent.¹⁶² Similarly, sexual rape is an extremely traumatic experience that may have serious consequences¹⁶³ and it causes great physical and psychological damage that leaves the victim “physically and emotionally humiliated”, situation difficult to overcome with time, contrary to what happens with other traumatic experiences.¹⁶⁴

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” (*supra* para. 309) constituted sexual rape that due to its effects constituted torture. Therefore, the State is responsible for the violation of the right to humane treatment enshrined in Article 5(2) of the American Convention, as well as for the violation of Articles 1, 6, and 8 of the mention Inter-American Convention to Prevent and Punish Torture, in detriment of the female inmate indicated in Appendix 2 of victims of the present Judgment that for these effects is considered part of the same.

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.”¹⁶⁵ This Tribunal acknowledges that sexual violence against women has devastating physical, emotional, and psychological consequences for them,¹⁶⁶ which are exacerbated in the cases of women who are imprisoned.¹⁶⁷

4) *General detention conditions to which the inmates were submitted after “Operative Transfer 1”*

[...]

316. In the analysis of the seriousness of the acts that may constitute cruel, inhuman, or degrading treatments or torture it is necessary to weigh in all the circumstances of the case, such as the duration of the treatments, their physical and mental effects, and in some cases, the victim’s gender, age, and health conditions, among others.¹⁷⁴

[...]

318. At the light of the aforementioned criteria, and based on the body of evidence of the case, this Tribunal will examine the body of conditions of detention and treatment to which the inmates were submitted in the criminal centers to which they were transferred or relocated after the “Operative Transfer 1” (*supra* para. 197.44.).

319. Within gross imprisonment conditions we can mention (*supra* para. 197.51. and 197.52.): location in overcrowded cells that do not allow an adequate mobility nor did they ensure reasonable hygiene and health conditions, without access to natural or artificial lighting; precarious feeding conditions; lack of adequate medical attention and of supply of medicines, despite the fact that there inmates that were injured and others that acquired illnesses in the prison; lack of warm clothes, even for those who were in the prison of Yanamayo where the temperatures drop several degrees under zero; severe regimen of solitary confinement; lack of attention to women’s physiological needs when they were denied materials of personal hygiene, such as soap, toilet paper, feminine pads, and underwear in order to be able to change; lack of attention to pre and post natal health needs; prohibition to talk among themselves, read, study, and carry out manual labor. The damages and suffering experimented by women in general and especially the pregnant women and by the inmates that were mothers were especially gross in the terms described below (*infra* paras. 330 to 332).

[...]

322. Below the Court will refer to some parameters and pronouncements with regard to said detention conditions and treatment of the inmates. Likewise, it will analyze the special consequences that some of them had on women in general, pregnant women, and the inmates who were mothers.

323. In what refers to the solitary confinement, the Court has already referred, in other cases, to the effects it causes of the inmates,¹⁷⁸ and it has indicated, *inter alia*, that “prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person’s psychic and moral integrity and the right to respect of the dignity inherent to the human person.”¹⁷⁹ Likewise, it has established that solitary confinement may only be used in an exceptional manner, taking into account the gross effects it generates, since “isolation from the outside world produces in any person moral suffering and psychic perturbations, places them in a situation of particular vulnerability and increases the risk of aggression and arbitrariness in prisons.”¹⁸⁰ In this same sense, the European Court of Human Rights has determined that total sensorial isolation used along with complete social isolation may destroy an individual’s personality; and therefore constitutes an inhuman treatment that is not justifiable by adducing need of security.¹⁸¹

[...]

330. The severe solitary confinement had specific effects on the inmates that were mothers. Several international organizations have made emphasis on the States’ obligation 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 (*supra* para. 319). 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.”¹⁸⁶ Likewise, said Committee also determined that special arrangements must be made for female detainees with their period, pregnant, or accompanied by their children.¹⁸⁷ The commission of those excesses causes special and additional suffering to imprisoned women.

332. It was proven that in the case of the inmates Eva Chalco and Sabina Quispe Rojas the State did not attend to their basic prenatal health needs, and that regarding the latter it did not offer her postnatal medical attention as well (*supra* para. 197.57.), which implied an additional violation to their right to humane treatment.

333. This Tribunal considers that the totality of detention and treatment conditions to which the inmates were submitted in the criminal centers where they were transferred or relocated after the so-called "Operative Transfer 1", constituted physical and psychological torture inflicted on all of them in violation of Articles 5(2) of the American Convention and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

B) Regarding the inmates' next of kin

[...]

340. Finally, the evidence has led to the conclusion that 25 of the inmates' next of kin suffered to the strict solitary confinement and visiting restrictions applied by the State to the inmates after the attack on the criminal center (*supra* para. 197.54. and 197.56.). This suffering implied a violation of the psychic integrity of said next of kin. (...)

341. The Court considers that this type of measures of solitary confinement cause special damage to children due to the deprivation of contact and relationship with their imprisoned mothers, and therefore presumes said suffering with regard to the inmates' children who were under the age of 18 at the time of the solitary confinement (*supra* paras. 197.54. and 197.56.). It has been proven that Yovanka Ruth Quispe Quispe, daughter of the inmate Sabina Virgen Quispe Rojas, and Gabriel Said Challco Hurtado, son of the inmate Eva Challco were in said condition (*supra* para. 197.57.). Since the Court does not have sufficient evidence to identify all the children of the inmates that at that time were under the age of 18, it is necessary that said people present themselves before the competent State authorities, within the 8 months following the notification of this Judgment and prove their relationship and age that proves that they were in the mentioned supposition and, are therefore, victims of said violation.

[...]

Obligation to effectively investigate the facts

343. The analysis of the obligation to effectively investigate the violating facts to the right to humane treatment is done taking into consideration the parameters referred to by the Court in paragraphs 253 through 256 of the present Judgment.

344. Specifically, regarding the obligation to guarantee the right acknowledged in Article 5 of the American Convention, the Court has stated that it implies the duty of the

State to investigate possible acts of torture or other cruel, inhuman, or degrading treatments.¹⁹⁰ Similarly, since Peru ratified the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women on June 4, 1996, as of that date it had to observe that stated in Article 7.b of said treaty, which obliges it to act with the due diligence in the investigation and punishment of said violence. The obligation to investigate is also reinforced by that stated in Article 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, according to which the State is obliged to “take[...] effective measures to prevent and punish torture within their jurisdiction,” as well as to “prevent and punish [...] other cruel, inhuman, or degrading treatment or punishment.” Likewise, according to that stated in Article 8 of this Convention

if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

345. In this same sense, the Tribunal has previously stated that:

in the light of the general obligation to guarantee all persons under their jurisdiction the human rights enshrined in the Convention, established in Article 1.1. of the same, along with the right to humane treatment pursuant to Article 5 (Right to Humane Treatment) of said treaty, there is a state obligation to start ex officio and immediately an effective investigations that allows it to identify, prosecute, and punish the responsible parties, when there is an accusation or well-grounded reason to believe than an act of torture has been committed.¹⁹¹

346. In the present case, the Court considers that from the facts declared as a violation of the right to humane treatment arises for the State the obligation to investigate the infringements of the same, which derives from Article 1.1. of the American Convention along with the mentioned substantive law protected in Article 5 of the same, applying the mentioned provisions of the Inter-American Convention to Protect, Punish, and Eradicate Violence Against Women and of the Inter-American Convention to Prevent and Punish Torture. Said provisions are applicable to the case since they specify and complement the State’s obligation with regard to the compliance of the rights enshrined in the American Convention.

[...]

XV. VIOLATION TO ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION (RIGHT TO A FAIR TRIAL AND RIGHT TO JUDICIAL PROTECTION) IN RELATION TO ARTICLE 1(1) OF THE SAME, AND IN CONNECTION TO ARTICLES 7 OF THE INTER-AMERICAN CONVENTION TO PREVENT, PUNISH, AND ERADICATE VIOLENCE AGAINST WOMEN, AND 1, 6, AND 8 OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

[...]

Considerations of the Court

[...]

377. According to the international obligations acquired by Peru, the latter has the duty to guarantee the right to access justice pursuant to that established in the American Convention, but also pursuant to the specific obligations imposed upon it by the specialized Conventions it has signed and ratified in matters of prevention and punishment of torture and violence against women (*supra* para. 376).

378. In order to comply with the obligation to investigate the State must observe that stated in paragraph 256 of this Judgment, in the sense that "once the state authorities become aware of the fact, they must start, ex officio and without delay, a serious, impartial, and effective investigation." Similarly, since Peru ratified the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women on June 4, 1996, it must comply with that stated in Article 7.b. of said treaty, which obliges it to apply the due diligence to investigate and punish said violence. (...)

379. According to that stated in the previous paragraph, the Court will analyze if the State has complied with its obligation to investigate stated in Articles 8 and 25 of the American Convention, applying the mentioned provisions of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women and the Inter-American Convention to Prevent and Punish Torture. Said provisions are applicable to the case since they specify and complement the State's obligations with regard to compliance of the rights enshrined in the American Convention.

[...]

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 recourses (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 person under its jurisdiction (Article 1.1.).¹⁹⁷

[...]

394. This Court has established that “[a]ccording to international law the obligations imposed by it must be complied with in good faith and domestic legislation may not be invoked to justify its non-compliance.”²⁰¹ Therefore, the State must adopt all measures necessary to comply with the obligation to investigate all the acts that constitute the violations to human rights declared in this Judgment and for that it must take into account that decided by this Court in the present Judgment, including the considerations made regarding the victims of the events, the rights declared violated, and the determination of the seriousness and magnitude of the same. That also implies that the State take into consideration the seriousness of the facts that constitute violence against women, taking into consideration the obligations imposed on it by the treaties it has ratified in this subject.

[...]

404. Therefore, the Court concludes that there is evidence to state that the deaths and tortures committed against the victims of this case by state agents, for the reasons mentioned in the previous paragraphs constitute crimes against humanity. The prohibition to commit these crimes is a norm of the *ius cogens*, and, therefore, the State has the obligation to not leave these crimes unpunished and therefore it must use the national and international means, instruments, and mechanisms for the effective prosecution of said behaviors and the punishment of their perpetrators, in order to prevent them and avoid that they remain unpunished.²⁰⁸

[...]

408. Due to all the aforementioned, this Tribunal considers that the domestic proceedings initiated in the present case have not constituted effective recourses to guarantee a true access to justice by the victims, within a reasonable period of time, that includes the elucidation of the facts, the investigation and, in its case, punishment of those re-

sponsible and the reparation of the violations to the right to life and humane treatment. Therefore, the State is responsible for the violation of Articles 8.1. and 25 of the American Convention, in relation with the obligation included in Article 1.1. of the same, in connection to Articles 7.b. of the Inter- American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the next of kin of the 41 dead inmates, of the surviving inmates, and of the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 of the Chapter on the violation to personal integrity and identified in Appendix 3 of victims of the present Judgment that for these effects is considered part of the same.

[...]

THE COURT DECLARES,

Unanimously, that:

[...]

3. The State violated the right to life enshrined in Article 4 of the American Convention on Human Rights, in relation to Article 1.1. of the same, in detriment of the 41 deceased inmates identified, whose names have been included in Appendix 1 of victims of the present Judgment that for these effects forms part of the same, in the terms of paragraphs 231 to 258 of the same.

4. The State violated the right to humane treatment enshrined in Article 5.1. and 5.2. of the American Convention on Human Rights, in relation to Article 1.1. of said treaty, and in connection with Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the 41 deceased inmates identified and of the surviving inmates, whose names have been included in Appendix 1 of victims of the present Judgment that for these effects forms part of the same, in the terms of paragraphs 262 to 350 of the same.

5. The State violated the right to humane treatment enshrined in Article 5.1. of the American Convention on Human Rights, in relation to Article 1.1. of the same, in detriment of the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 and identified in Appendix 2 of victims of the present Judgment that for these effects forms part of the same, in the terms of paragraphs 334 to 350 of the same.

6. The State violated the right to a fair trial and judicial protection enshrined in Articles 8.1. and 25 of the American Convention on Human Rights, in relation with Article 1.1. of the same, in connection to Articles 7.b. of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the next of kin of the 41 deceased inmates identified, of the surviving inmates, and of the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 , and identified in Appendix 3 of victims of the present Judgment that for these effects is considered part of the same, in the terms of paragraphs 372 to 408 of the same.

7. This Judgment is, *per se*, a form of reparation.

[...]

ENDNOTES

- 35 Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 769 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).
- 36 Cfr. Photographs of the Miguel Castro Castro Prison (dossier of appendixes to the petition, appendix 256, folios 2796 through 2823); and map of the Miguel Castro Castro Prison (dossier of appendixes to the petition, appendix 254, folios 2781 through 2787).
- 37 Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume V, section 2(22), The prisons, page 703 and Volume VII, section 2(68) Extrajudicial killings in the criminal center Canto Grande, page 771 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and argument of the State during the public hearing held before the Inter-American Court on the 26th and 27th days of June 2006.
- 38 Cfr. lists of the inmates detained in pavilions 1A and 4B of the Miguel Castro Castro Prison (dossier of appendixes and appendixes to the petition, appendixes 13, 14, and 15, folios 167 through 262); and argument of the State during the public hearing held before the Inter-American Court on the 26th and 27th days of June 2006.
- 39 Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68) Extrajudicial killings in the criminal center Canto Grande, page 770 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).
- 40 Cfr. Different testimonial statements offered by surviving inmates and the next of kin of surviving and dead inmates (dossier of appendixes to the petition, appendixes between 82 and 246, folios between 1226 and 2732); different forms of written statements offered by surviving inmates and the next of kin of surviving and dead inmates (dossier of appendixes to the brief of pleadings and motions, appendixes between 317 and 412, folios between 3643 and 4933); testimonial statement offered by Gaby Balcázar Medina in the

- public hearing held before the Inter-American Court of the 26th and 27th days of June 2006; and different forms of statements offered by surviving inmates and the next of kin of surviving and dead inmates (evidence presented by the other group of representatives of the alleged victims and their next of kin).
- 42 Cfr. Law decree No. 25421 issued by the President of the Republic of Peru on April 6, 1992, Article 2 (dossier of appendixes to the petition, appendix 7, folio 74).
- 43 Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68) Extrajudicial killings in the criminal center Canto Grande, page 771 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).
- 44 Cfr. Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folio 3221); and different testimonial statements offered by the surviving inmates (dossier of appendixes to the petition, appendixes between 83 and 112, folios between 1237 and 1482).
- 45 Cfr. Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folio 3235); and arguments of the State during the public hearing before the Inter-American Court held on the 26th and 27th days of May 2006.
- 125 Cfr. Case of the Penitentiary Center Capital Regional Yare I and II, Provisional Measures. Ruling of the Inter-American Court of Human Rights of March 30, 2006, Ninth whereas; Case of the Internado Judicial de Monagas (La Pica), Provisional Measures. Ruling of the Inter-American Court of Human Rights of February 9, 2006, Ninth whereas; and Case of the Cárcel de Urso Branco, Provisional Measures. Ruling of the Inter-American Court of Human Rights of June 18, 2002, Eighth whereas.
- 126 Cfr. U.N., Committee for the Elimination of Discrimination Against Women, 11^o meeting period. 19 General Recommendation "Violence against women". Doc. HRI/GEN/1/Rev. 1at84 (1994), para. 16; U.N., Human Rights Commission, 57^o meeting period 2001, Report of Mrs. Radica Coomaraswamy, Special Rapporteur on Violence against women, with inclusion of their causes and consequences, presented pursuant to ruling 2000/45 of the Human Rights Commission, "Violence against women perpetrated and/ or condoned by the State in times of armed conflicts (1997- 2000)", E/CN.4/2001/73, para. 44; and 87
- 148 Cfr. Ombudsman of the People of Peru. Defense Report No. 80, Political Violence in Peru: 1980- 1996, page 33.
- 155 Cfr. Case of the Gómez Paquiyauri Brothers, *supra* note 21, para. 166; Case of the "Juvenile Reeducation Institute", *supra* note 127, para. 172; Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 118, para. 120; and Case of the "Street Children" (Villagrán Morales et al.), *supra* note 152, para. 194.
- 159 Cfr. U.N., Minimum rules for the treatment of prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, paras. 23 and 53.
- 160 Cfr. U.N., Committee on the Elimination of Discrimination against Women, 11^o meeting. General recommendation 19 "Violence against women". Doc. HRI/GEN/1/Rev. 1at84 (1994), para. 6.
- 161 Cfr. ICTR, Case of Prosecutor v. Jean-Paul Akayesu. Judgment of September 2, 1998. Case No. ICTR-96-4-T, para. 688.

- 162 Cfr. Eur.C.H.R., Case of Aydin v. Turkey (GC). Judgment of 25 September 1997, App. No. 57/1996/676/866, para. 83.
- 163 Cfr. U.N., Human Rights Commission. 50° meeting session. Matter of the human rights of all persons submitted to any form of detention or imprisonment, and especially torture and other cruel, inhuman, or degrading treatments or punishments. Report of the Special Rapporteur, Mr. Nigel S. Rodley, presented in accordance to resolution 1992/32 of the Human Rights Commission. Doc. E/CN.4/1995/34 of January 12, 1995, para. 19.
- 164 Cfr. Eur.C.H.R., Case of Aydin v. Turkey (GC), Judgment of 25 September 1997, App. No. 57/1996/676/866, para. 83.
- 165 Cfr. U.N., Human Rights Commission, 54° meeting period. Report presented by Mrs. Radhika Coomaraswamy, Special Rapporteur on violence against women, with the inclusion of its causes and consequence, pursuant to resolution 1997/44 of the Commission. Doc. E/CN.4/1998/54 of January 26, 1998, paras. 12 and 13.
- 166 Cfr. U.N, Human Rights Commission, 54° session. Report presented by Mrs. Radhika Coomaraswamy, Special Rapporteur on violence against women, with the inclusion of its causes and consequences, pursuant to resolution 1997/44 of the Commission. Doc. E/CN.4/1998/54 of January 26, 1998, para. 14.
- 167 Cfr. Oral presentation before the Human Rights Commission of the Special Rapporteur of the United Nations on Torture, Peter Kooijmans, included in: U.N., Commission on Human Rights. 48° session. Summary Record of the 21st Meeting, Doc. E/CN.4/1992/SR.21 of February 21, 1992, para. 35; and U.N., Human Rights Commission. 50° session. Matter of the human rights of all persons submitted to any form of detention or imprisonment, and especially torture and other cruel, inhuman, or degrading treatments or punishments. Report of the Special Rapporteur, Mr. Nigel S. Rodley, presented in accordance to resolution 1992/32 of the Human Rights Commission. Doc. E/CN.4/1995/34 of January 12, 1995, para. 16.
- 174 Cfr. Case of the Gómez Paquiyauri Brothers, *supra* note 21, para. 113; Case of Bámaca Velásquez. Judgment of November 25, 2000. Series C No. 70, para. 162; and Case of the “Street Children” (Villagrán Morales et al.), *supra* note 152, para. 176. In this same sense, cfr. Eur.C.H.R., Case of Akta v. Turkey (3rd), Judgment of 24 April 2003, App. No. 24351/94, para. 312; y Eur.C.H.R., Case of Ireland v. The United Kingdom (GC), Judgment of 18 January 1978, App. No. 5310/71, para. 162.
- 178 Cfr. Case of Montero Aranguren et al. (Detention Center of Catia), *supra* note 128, para. 94; Case of Raxcacó Reyes, *supra* note 171, paras. 95 and 96; and Case of Lori Berenson Mejía, *supra* note 168, para. 103.
- 179 Cfr. Case of De la Cruz Flores, *supra* note 157, para. 128; Case of Maritza Urrutia, *supra* note 150, para. 87; and Case of Bámaca Velásquez, *supra* note 174, para. 150.
- 180 Cfr. Case of De la Cruz Flores, *supra* note 157, para. 129; Case of Maritza Urrutia, *supra* note 150, para. 87; and Case of Bámaca Velásquez, *supra* note 174, para. 150.
- 181 Cfr. Eur.C.H.R., Case of Öcalan v. Turkey(GC), Judgment of 12 May 2005, App. No. 46221/99, para. 191.
- 186 Cfr. International Committee of the Red Cross. Women Facing War: ICRC Study on the Impact of Armed Conflict on Women, 2001, sec. III, ref. 0798 and available at <http://www.icrc.org>. In the same sense, cfr.

- U.N., Minimum rules for the treatment of prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, paras. 15-19.
- 187 Cfr. International Committee of the Red Cross. Women Facing War: ICRC Study on the Impact of Armed Conflict on Women. 2001, ref. 0798 and available at <http://www.icrc.org>, section III. In the same sense, cfr. U.N., Minimum rules for the treatment of prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, para. 23.
- 190 Cfr. Case of Vargas Areco, *supra* note 3, para. 78; Case of Ximenes Lopes, *supra* note 3, para. 147; and Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, para. 92.
- 191 Cfr. Case of Vargas Areco, *supra* note 3, para. 79; Case of Gutiérrez Soler, *supra* note 147, para. 54; and Case of Baldeón García, *supra* note 21, para. 156. In the same sense, cfr. Eur.C.H.R., Case of İlhan v. Turkey [GC], Judgment of 27 June 2000, App. No. 22277/93, paras. 92 y 93; y Eur.C.H.R., Case of Assenov and others v. Bulgaria, Judgment of 28 October 1998, App. No. 90/1997/874/1086, para. 102.
- 197 Cfr. Case of Goiburú et al., *supra* note 5, para. 110; Case of Servellón García et al., *supra* nota 3, para. 147; and Case of Ximenes Lopes, *supra* note 3, para. 175.
- 201 Cfr. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, para. 35; and Case of Almonacid Arellano et al., *supra* note 15, para. 125.
- 208 Cfr. Case of Goiburú et al., *supra* note 5, para. 128.

*Inter-American Court
of Human Rights*

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

*Preliminary Objection,
Merits, Reparations and Costs*

*Judgment of
November 16, 2009*



[...]

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On November 4, 2007, under Articles 51 and 61 of the Convention, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) presented an application against the United Mexican States (hereinafter “the State” or “Mexico”), which gave rise to the instant case. (...)

2. The application relates to the State’s alleged international responsibility for “the disappearance and subsequent death” of the Mss. Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez (hereinafter “Mss. González, Herrera and Ramos”), whose bodies were found in a cotton field in Ciudad Juárez on November 6, 2001. The State is considered responsible for “the lack of measures for the protection of the victims, two of whom were minor children, the lack of prevention of these crimes, in spite of full awareness of the existence of a pattern of genderrelated violence that had resulted in hundreds of women and girls murdered, the lack of response of the authorities to the disappearance [...]; the lack of due diligence in the investigation of the homicides [...], as well as the denial of justice and the lack of an adequate reparation.”

3. The Commission asked that the Court declare the State responsible for the violation of the rights embodied in Articles 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 19 (Rights of the Child) and 25 (Right to Judicial Protection) of the Convention, in relation to the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, together with failure to comply with the obligations arising from Article 7 of the Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter “the Convention of Belém do Pará”). The application was notified to the State on December 21, 2007, and to the representatives on January 2, 2008.

[...]

VII. *VIOLENCE AND DISCRIMINATION AGAINST WOMEN IN THIS CASE ARTICLES 4 (RIGHT TO LIFE), 5 (RIGHT TO HUMANE TREATMENT), 7 (RIGHT TO PERSONAL LIBERTY), 8 (RIGHT TO A FAIR TRIAL) 19 (RIGHTS OF THE CHILD) AND 25 (RIGHT TO JUDICIAL PROTECTION) IN RELATION TO ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) AND 2 (DOMESTIC LEGAL EFFECTS) OF THE AMERICAN CONVENTION, AND ARTICLE 7 OF THE CONVENTION OF BELÉM DO PARÁ*

[...]

112. This difference of opinion requires the Court to examine the context of the facts of the case and the conditions in which the 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. Furthermore, despite the State's acquiescence, it is still necessary to determine the nature and severity of the violations that occurred with regard to Articles 8.1. and 25.1. of the Convention, in relation to Articles 1.1. and 2 of this treaty, and Article 7 of the Convention of Belém do Pará. To this end, the Court will now make the pertinent factual and legal findings, examining the State's obligations of respect, guarantee and non-discrimination.

1. Context

1.1. Ciudad Juárez

113. Ciudad Juárez is located in the north of the state of Chihuahua, on the border with El Paso, Texas. It has a population of more than 1.2 million inhabitants,⁶³ and is an industrial city – where the “maquila industry” (manufacturing and/or assembly plants, hereinafter referred to as “maquila,” “maquiladora” or “maquilas”) has flourished – and a place of transit for Mexican and foreign migrants.⁶⁴ The State, as well as various national and international reports, mention a series of factors that converge in Ciudad Juárez, such as social inequalities⁶⁵ and the proximity of the international border,⁶⁶ that have contributed to the development of different types of organized crime, such as drug-trafficking,⁶⁷ people trafficking,⁶⁸ arms smuggling⁶⁹ and money-laundering,⁷⁰ which have increased the levels of insecurity and violence.⁷¹

1.2. Phenomenon of the murder of women, and numbers

114. The Commission and the representatives alleged that, since 1993, the number of disappearances and murders of women and girls in Ciudad Juárez has increased significantly. According to the Commission, "Ciudad Juárez has become a focus of attention of both the national and the international communities because of the particularly critical situation of violence against women which has prevailed since 1993, and the deficient State response to these crimes."

115. The State acknowledged "the problem it faces owing to the situation of violence against women in Ciudad Juárez, above all, the murders that have been recorded since the beginning of the 1990s in the last century."

[...]

121. The Court takes note that there are no reliable assumptions about the number of murders and disappearances of women in Ciudad Juárez, and observes that, whatever the number, it is alarming. Over and above the numbers which, although significant, are not sufficient to understand the seriousness of the problem of violence experienced by some women in Ciudad Juárez, the arguments of the parties, together with the evidence they have provided, indicate a complex phenomenon, accepted by the State (*supra* para. 115), of violence against women since 1993, characterized by specific factors that this Court considers it important to highlight.

1.3. Victims

122. In the first place, the Commission and the representatives alleged that the victims were young women aged 15 to 25 years, students or workers in the maquila industries or in stores or other local businesses, some of whom had only lived in Ciudad Juárez for a relatively short time. The State did not make any comment in this regard.

123. The plaintiffs' allegations were based on different reports prepared by national and international agencies establishing that the murder victims appeared to be, above all, young women,⁹⁸ including girls,⁹⁹ women workers – especially those working in the maquilas¹⁰⁰ – who are underprivileged,¹⁰¹ students¹⁰² or migrants.¹⁰³

1.4. Method

124. Second, the Commission and the representatives alleged that there were signs of sexual violence in many of the murders. According to a report of the Special Prosecutor's Office, since 1993, some of the murders and disappearances "have revealed similar characteristics and/or patterns of conduct."¹⁰⁴

125. Diverse reports establish the following common factors in several of the murders: the women were abducted and kept in captivity,¹⁰⁵ their next of kin reported their disappearance¹⁰⁶ and, after days or months, their bodies were found on empty lots¹⁰⁷ with signs of violence, including rape and other types of sexual abuse, torture and mutilation.¹⁰⁸

126. Regarding the sexual characteristics of the murders, the State alleged that, according to the figures for 2004, around 26% of the murders were the result of violent sexual acts.

127. Although the Special Prosecutor's Office concluded that most of the murders of women in Ciudad Juárez were independent of each other and, consequently, had been committed under different circumstances, of time, manner, and occasion,¹⁰⁹ it was only in 2005 that it "was able to determine that the number of cases in which there was a pattern of conduct identified as the phenomenon known as 'Muertas de Juárez' [the dead women of Juárez], was about 30% of the 379 identified murders," or in other words, around 113 women. Furthermore, the Commission to Prevent and Eliminate Violence against Women in Ciudad Juárez (hereinafter the "Ciudad Juárez Commission") indicated that, even though there continued to be discrepancies as regards absolute figures, different reports agreed that one-third of all the murders of women were those classified as sex-related and/or serial; the latter "are those with a repeated pattern in which, generally, the victim does not know her attacker and is deprived of her liberty and subjected to multiple abuse and suffering until she dies."¹¹⁰ CEDAW and Amnesty International reports concur that around one-third of the murders had a component of sexual violence or similar characteristics.¹¹¹

1.5. Gender-based violence

128. According to the representatives, the issue of gender is the common denominator of the violence in Ciudad Juárez, which "occurs as a culmination of a situation characterized by the reiterated and systematic violation of human rights." They alleged that "cruel

acts of violence are perpetrated against girls and women merely because of their gender and, only in some cases, are they murdered as a culmination of this public and private violence.”

129. The State indicated that the murders “have different causes, with different authors, in very distinct circumstances and with diverse criminal patterns, but are influenced by a culture of gender-based discrimination.” According to the State, one of the structural factors that have led to situations of violence against women in Ciudad Juárez is the change in family roles, as a result of women working. The State explained that, in Ciudad Juárez, the maquiladora industry started up in 1965, and increased in 1993 with the North American Free Trade Agreement. It indicated that, by giving preference to hiring women, the maquila industries caused changes in their working life that also had an impact on their family life because “traditional roles began to change, with women becoming the household provider.” This, according to the State, led to conflicts within the family because women began to present an image of being more competitive and financially independent.¹¹² In addition, the State cited the CEDAW report to indicate that “[t]his social change in women’s roles has not been accompanied by a change in traditionally patriarchal attitudes and mentalities, and thus the stereotyped view of men’s and women’s social roles has been perpetuated.”

130. Other factors mentioned by the State as generators of violence and marginalization, are the absence of basic public services in the underprivileged areas; and drug-trafficking, arms trafficking, crime, money-laundering and people trafficking, which take place in Ciudad Juárez because it is a border city; the consumption of drugs, the high rate of school desertion, and the presence of “numerous sexual predators” and “military officials [...] who have participated in armed conflicts,” in the neighboring city of El Paso.

[...]

132. The Court notes that, 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 CEDAW that “they are all influenced by a culture of discrimination against women based on the erroneous idea that women are inferior.”¹¹⁵ Mexico’s observations in its reply to CEDAW with regard to the specific actions taken to improve the situation of subordination of women in Mexico and in Ciudad Juárez should also be noted:

[I]t must be acknowledged that a culture deeply rooted in stereotypes, based on the underlying assumption that women are inferior, cannot be changed overnight. Changing cultural patterns is a difficult task for any government, even more so

when the emerging problems of modern society — alcoholism, drug addiction and trafficking, gang crime, sex tourism, etc. — serve to exacerbate the discrimination suffered by various sectors of society, in particular those that are already disadvantaged, such as women, children and indigenous peoples.¹¹⁶

133. Various reports agree that, although there are different motives for the murders in Ciudad Juárez and different perpetrators, many cases relate to gender violence that occurs in a context of systematic discrimination against women.¹¹⁷ According to Amnesty International, the characteristics shared by many of the cases reveal that the victim's gender appears to have been a significant factor in the crime, "influencing both the motive and the context of the crime, and also the type of violence to which the women were subjected."¹¹⁸ The report of the IACHR Rapporteur indicates that the violence against women in Ciudad Juárez "has its roots in concepts of the inferiority and subordination of women."¹¹⁹ In turn, CEDAW 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."¹²⁰

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." The Rapporteur referred to "forces of change [that] challenge the very basis of the machismo" including the incorporation of women into the workforce, which gives them economic independence and offers new opportunities for education and training. While ultimately empowering women to overcome structural discrimination, these factors may exacerbate violence and hardship in the short-run. The inability of men to fulfill traditional machista roles as providers causes family abandonment, unstable relationships or alcoholism, which in turn may increase the risk of violence. Even cases of rape and murder, may be understood as desperate attempts to uphold discriminatory norms that are outpaced by changing socio-economic conditions and the advance of human rights.¹²¹

135. The Ciudad Juárez Commission pointed out that the emphasis placed by the Special Prosecutor's Office on domestic violence and on the significant changes in the social structure as reasons for sex crimes, did not take into account "the elements of the violence that are related to gender-based discrimination that specifically affects women," and this "merges gender-based violence with social violence, without examining how it specifically affects women."¹²²

136. The Commission's report stressed the sexual characteristics of the murders and indicated that "[w]hile the extent of these aspects of the problem is unclear, evidence in certain cases suggests links to prostitution or trafficking for sexual exploitation," and that "both can involve situations of coercion and abuse of women working in or forced to participate in the sex trade."¹²³

1.6. Regarding the alleged femicide

[...]

143. (...) [I]n the instant case the Court will use the expression "gender-based murders of women," also known as femicide.

144. In the instant case, the Tribunal finds that, bearing in mind the evidence and the arguments about the evidence in the case file, it is not necessary or possible to make a final ruling on which murders of women in Ciudad Juárez constitute genderbased murders of women, other than the murders of the three victims in this case. Consequently, it will refer to the Ciudad Juárez cases as murders of women, even though it understands that some or many of them may have been committed for reasons of gender and that most of them took place within a context of violence against women.

145. Regarding the deaths that occurred in the instant case, in the following sections the Tribunal will analyze whether, based on the evidence provided by the parties, they constitute gender-based murders of women.

[...]

1.7.1. Irregularities in the investigations and in the proceedings

147. Even though the State acknowledged that irregularities had been committed in the investigation and prosecution of the murders of women between 1993 and 2003 (...), it did not specify the irregularities it had found in the investigations and the proceedings conducted over those years. However, the Court notes the observations of the IACHR Rapporteur in this regard:

The Mexican State, for its part, recognizes that mistakes were made during the first five years that it was confronted with these killings. It acknowledges, for example, that it was not uncommon for the police to tell a family member attempting to report a girl missing that they should return in 48 hours, when it was clear there

might be something to investigate. Both State and non-state representatives indicated that the authorities in Ciudad Juárez would often dismiss initial complaints by saying the victim was out with a boyfriend and would soon return home. The PGJE [Office of the Attorney General of the state of Chihuahua] further noted a lack of technical and scientific capacity and training at that time for members of the judicial police. Officials of the State of Chihuahua indicated that the deficiencies were such that, in 25 cases dating back to the first years of the killings, the "files" consisted of little more than bags containing sets of bones, which provided virtually no basis to pursue further investigation.¹³⁵

[...]

150. According to the evidence provided, the irregularities in the investigations and the proceedings included delays in starting investigations,¹³⁹ slowness of the investigations or absence of activity in the case files,¹⁴⁰ negligence and irregularities in gathering evidence and conducting examinations, and in the identification of victims,¹⁴¹ loss of information,¹⁴² misplacement of body parts in the custody of the Public Prosecutor's Office,¹⁴³ and failure to consider the attacks on women as part of a global phenomenon of gender-based violence.¹⁴⁴ According to the U.N. Rapporteur on judicial independence, following a visit to Ciudad Juárez in 2001, he "was amazed to learn of the total inefficiency, incompetency, indifference, insensitivity and negligence of the police who investigated these cases earlier."¹⁴⁵ For its part, the Special Prosecutor's Office indicated in its 2006 report that, in 85% of 139 earlier investigations analyzed, it had detected responsibilities that could be attributed to public servants, serious deficiencies and omissions that "prevent resolving the respective murders, causing impunity."¹⁴⁶

1.7.2. Discriminatory attitude of the authorities

[...]

152. [In this regard,] the State indicated that the culture of discrimination against women contributed to the fact that "the murders were not perceived at the outset as a significant problem requiring immediate and forceful action on the part of the relevant authorities."¹⁴⁷ The Tribunal observes that, although the State did not acknowledge his during the proceedings before the Court, it did forward the document in which this acknowledgement appears;¹⁴⁸ accordingly, it forms part of the body of evidence that will be examined in accordance with sound judicial discretion.

[...]

1.7.3. Absence of clarification

[...]

158. The Court observes that various reports agree that the failure to solve the crimes is a very important characteristic of the killings of women in Ciudad Juárez. The 2003 Report of the IACHR Rapporteur indicates that the vast majority of the murders remained in impunity.¹⁵⁴ Furthermore, according to CEDAW “a culture of impunity has taken root which facilitates and encourages terrible violations of human rights,” and the United Nations Office for Drugs and Crime indicated that the diverse and complex factors of the criminal phenomenon in Ciudad Juárez “had tested a system that was insufficient, which has been manifestly overwhelmed by the challenge of crimes for which it was unprepared, resulting in an institutional collapse that has determined the general impunity of those responsible for the crimes.”¹⁵⁵

[...]

161. A related aspect included in the reports is that there are fewer judgments, and the punishments are less, in cases of murders of women with sexual elements. On this point, according to figures that the State provided to the Inter-American Commission, of 229 cases involving the murder of women between 1993 and 2003,¹⁶⁰ 159 were cases with non-sexual motives and, of these, 129 had “concluded”, while of 70 cases of murders of women with a sexual motive, only 24 had “concluded.”¹⁶¹ It is important to note that the State did not specify what it understands by “concluded”¹⁶² and that, in this regard, in its answer to the CEDAW report, it stated that, up until 2004, of the 92 sexual offenses committed, sentences had been handed down in only four cases.¹⁶³

[...]

163. Lastly, the Tribunal observes that some reports indicate that impunity is related to discrimination against women. 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.”¹⁶⁷ Similarly, the U.N. Rapporteur on extrajudicial executions states that: “[t]he events in Ciudad Juárez thus constitute a typical case of gender-based crimes which thrive on impunity.”¹⁶⁸

1.8. The Court's conclusions

164. Based on the foregoing, the Court concludes that, since 1993, there has been an increase in the murders of women, with at least 264 victims up until 2001, and 379 up to 2005. However, besides these figures, which the Tribunal notes are unreliable, it is a matter of concern that some of these crimes appear to have involved extreme levels of violence, including sexual violence and that, in general, they have been influenced, as the State has accepted, by a culture of gender-based discrimination which, according to various probative sources, has had an impact on both the motives and the method of the crimes, as well as on the response of the authorities. In this regard, the ineffective responses and the indifferent attitudes that have been documented in relation to the investigation of these crimes should be noted, since they appear to have permitted the perpetuation of the violence against women in Ciudad Juárez. The Court finds that, up until 2005, most of the crimes had not been resolved, and murders with characteristics of sexual violence present higher levels of impunity.

2. Facts of the case

2.1. Disappearances of the victims

165. Laura Berenice Ramos Monárrez was 17 years old and a fifth semester high school student. The last information about her was that she telephoned a girl friend on Saturday, September 22, 2001, to tell her that she was ready to go to a party.¹⁶⁹ The report that was filed indicated that she disappeared on Tuesday, September 25, 2001, without giving any further details.¹⁷⁰

166. Claudia Ivette González was 20 years old and worked for a maquila plant. According to a close friend, "when she went out, it was almost always for short periods, because she helped her sister take care of her daughter, and therefore sometimes arrived late"¹⁷¹ at work. On October 10, 2001, she arrived at work two minutes late and, consequently, was not allowed in.¹⁷² She disappeared that day.¹⁷³

167. Esmeralda Herrera Monreal was 15 years old and had completed "third year of secondary school."¹⁷⁴ She disappeared on Monday, October 29, 2001, after leaving the house where she worked as a domestic employee.¹⁷⁵

[...]

2.4. Stereotyping allegedly manifested by officials to the victims' next of kin

[...]

198. Esmeralda Herrera's mother testified that, when she reported her daughter's disappearance, the authorities told her that she "had not disappeared, but was out with her boyfriend or wandering around with friends,"²²² "that, if anything happened to her, it was because she was looking for it, because a good girl, a good woman, stays at home."²²³

199. Claudia Yvette's mother said that when she went to present the missing report, an official told a friend of her daughter that "she is surely with her boyfriend, because girls were very flighty and threw themselves at men."²²⁴ Her mother also said that, when she went to file the complaint about the disappearance, she was told that "maybe [her daughter] had gone off with her boyfriend, and would soon return home."²²⁵

200. The mother of Laura Berenice Ramos stated that the police agents told her that she would have to look for her daughter, because "all the girls who get lost, all of them, [...] go off with their boyfriend or want to live alone."²²⁶ She added that, on one occasion, she asked the police agents to accompany her to a dance hall to look for her daughter; they said "no Señora, it's very late, we have to go home and rest and you should wait for your moment to look for Laura," and patted her on the shoulder saying: "go home and relax, have some 'heladas' [beer] and offer a toast to our health; because we can't go with you."²²⁷

201. The State did not contest this testimony by the mothers of the victims.

202. In addition, the testimony of Mrs. Delgadillo Pérez concerning the authorities' actions in this case indicated that "[t]he responsibility of the victim was determined based on her social role in society in the investigator's opinion. This means that, if the murdered woman liked to have a good time, to go out dancing, to have male friends and a social life, she was considered to be partly responsible for what happened."²²⁸ According to the witness "[a]t that time, public officials stigmatized the victims of disappearance because they were women," on the pretext that "they were with their boyfriend" or "out having a good time," "[t]hey even blamed the mothers for allowing their daughters to go out alone or to go out at night."²²⁹

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 dif-

ferent 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” (...).

[...]

207. The Court also observes that the missing person’s form on which the next of kin reported the disappearance required information on the “sexual preferences” of the victims.²³³

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. 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.

[...]

3. The violence against women in this case

[...]

224. Before examining the possible international responsibility of the State in this case, the Tribunal deems it pertinent to establish whether the violence suffered by the three victims constitutes violence against women under the American Convention and the Convention of Belém do Pará.

225. In the case of the Miguel Castro Castro Prison v. Peru, the Court referred to the scope of Article 5 of the American Convention in relation to the specific aspect of violence against women, using the relevant provisions of the Convention of Belém do Pará and the Convention on the Elimination of all Forms of Discrimination against Women as a reference for interpretation, because these instruments complement the international corpus juris, which the American Convention is part of, as regards the protection of the personal integrity of women.²⁴⁸

226. The Convention of Belém do Pará defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”²⁴⁹

227. This Tribunal has established “that not all human right violation committed against a woman implies necessarily a violation of the provisions in the Convention of Belém do Pará.”²⁵⁰

228. In the instant case, the Court takes note, firstly, of the State’s acknowledgement of the situation of violence against women in Ciudad Juárez (*supra* para. 222), and also its statement that the murders of women in Ciudad Juárez “are influenced by a culture of discrimination against women” (*supra* para. 129).

229. Secondly, the Court notes that it has established above (*supra* para. 133) that the reports of the IACHR Rapporteur, CEDAW and Amnesty International, among others, indicate that many of the killings of women in Ciudad Juárez are manifestations of gender-based violence.

230. Thirdly, the three victims in this case were young, underprivileged women, workers or students, as were many of the victims of the murders in Ciudad Juárez (*supra* para. 123). They were abducted and their bodies appeared in a cotton field. It has been accepted as proved that they suffered physical ill-treatment and very probably sexual abuse of some type before they died.

231. All of this leads the Court to conclude that Mss. González, Ramos and Herrera, were victims of violence against women according to the American Convention and the Convention of Belém do Pará. On the same basis, the Court considers that the murders if the victims were gender-based and were perpetrated in an acknowledged context of violence against women in Ciudad Juárez. The Tribunal must now analyze whether the violence perpetrated against the victims, which ended their life, can be attributed to the State.

4. Obligation of non-discrimination and respect and guarantee of rights embodied in Articles 4, 5 and 7 of the American Convention and access to justice in accordance with Articles 8 and 25 thereof

[...]

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.²⁵⁴

235. Regarding the obligation to respect, the Court has stated that the first obligation assumed by the States Parties, in the terms of the said Article, is that of "respecting the rights and freedoms" recognized in the Convention. Thus, the notion of limitations to the exercise of the power of the State is necessarily included in the protection of human rights.²⁵⁵

236. With regard to the obligation to guarantee, the Court has established that it may be fulfilled in different ways, based on the specific right that the State must guarantee and on the specific needs for protection.²⁵⁶ This obligation refers to the duty of the States to organize the entire government apparatus and, in general, all the structures through which public authority is exercised, so that they are able to ensure by law the free and full exercise of human rights.²⁵⁷ As part of this obligation, 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 adequate compensation for the victim." ²⁵⁸ 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." ²⁵⁹

237. Accordingly, the Tribunal must verify whether Mexico fulfilled its obligation to respect and ensure the rights to life, personal integrity and personal liberty of Mss. González, Ramos and Herrera.

[...]

4.2. *Obligation to guarantee*

[...]

248. The Tribunal must now analyze whether the State took adequate steps to prevent the disappearance, abuses and death suffered by the three victims, and whether it investigated these facts with due diligence. In other words, whether it complied with the obligation to guarantee Articles 4, 5 and 7 of the American Convention, in relation to Article 1.1. thereof and Article 7 of the Convention of Belém do Pará, which complements the international corpus juris as regards the prevention and punishment of violence against women,²⁶⁶ and whether it allowed access to justice to the next of kin of the three victims, as stipulated in Articles 8.1. and 25.1. of the American Convention, in relation to Articles 1.1. and 2 thereof.

4.2.1. *Obligation of prevention in relation to the right to personal liberty, to personal integrity and to life of the victims*

[...]

252. The Court has established that the obligation of prevention encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights, and that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences. It is also clear that the obligation to prevent is one of means or conduct, and failure to comply with it is not proved merely because the right has been violated.²⁶⁷

253. The Convention of Belém do Pará defines violence against women (*supra* para. 226) and its Article 7.b obliges the States Parties to use due diligence to prevent, punish and eliminate this violence.

254. Since 1992, CEDAW established that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”²⁶⁸ The 1993 Declaration on the Elimination of Violence against Women of the General Assembly of the United Nations urged the States to “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”²⁶⁹ and so did the Platform for Action of the Beijing World Conference on Women.²⁷⁰ In 2006, the 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.”²⁷¹

255. In the case of *Maria Da Penha v. Brazil* (2000), presented by a victim of domestic violence, the Inter-American Commission applied the Convention of Belém do Pará for the first time and decided that the State had violated its obligation to exercise due diligence to prevent, punish and eliminate domestic violence, by failing to convict and punish the perpetrator for 15 years, despite all the complaints opportunely submitted.²⁷² The Commission concluded that, since the violation was part of a “general pattern of negligence and lack of effectiveness of the State,” not only had the obligation to prosecute and convict been violated, but also the obligation to prevent this degrading practice.²⁷³

256. In addition, the U.N. 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.²⁷⁴

257. Furthermore, according to a report of the U.N. Secretary-General:

It is good practice to make the physical environment safer for women and community safety audits have been used to identify dangerous locations, discuss women's fears and obtain women's recommendations for improving their safety. Prevention of violence against women should be an explicit element in urban and rural planning and in the design of buildings and residential dwellings. Improving the safety of public transport and routes travelled by women, such as to schools and educational institutions or to wells, fields and factories, is part of prevention work.²⁷⁵

258. The foregoing reveals that 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. 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 Court will now examine the measures adopted by the State prior to the facts of this case to comply with its obligation of prevention.

[...]

273. The Court observes that national and international reports agree that the prevention of the murder of women in Ciudad Juárez, and also the response to these killings, has been ineffective and insufficient.²⁹¹ (...)

[...]

277. According to the facts of this case, the victims González, Ramos and Herrera were young women of 20, 17 and 15 years of age respectively, all of them from a humble background, one a student and the other two workers. They left their homes one day and their bodies were found days or weeks later in a cotton field with signs of sexual abuse and other ill-treatment. In the days between their disappearance and the discovery of their bodies, their mothers and next of kin approached the authorities looking for a response, but were met with value judgments concerning the conduct of the victims and with no concrete action designed to find them alive, apart from the reception of statements.

278. The Tribunal has considered proven and the State has acknowledged that, in 2001, Ciudad Juárez experienced a powerful wave of violence against women. The facts of the case reveal significant parallels with the proven context.

279. Even though the State was fully aware of the danger faced by these women of being subjected to violence, it has not shown that, prior to November 2001, it had adopted effective measures of prevention that would have reduced the risk factors for the women. Although the obligation of prevention is one of means and not of results (*supra* para. 251), the State has not demonstrated that the creation of the FEIHM and some additions to its legislative framework, although necessary and revealing a commitment by the State, were sufficient and effective to prevent the serious manifestations of violence against women that occurred in Ciudad Juárez at the time of this case.

280. Nevertheless, according to the Court's jurisprudence, it is evident that a State cannot be held responsible for any human rights violation committed between private individuals within its jurisdiction. Indeed, a State's obligation of guarantee under the Convention does not imply its unlimited responsibility for any act or deed of private individuals, because its obligation to adopt measures of prevention and protection for private individuals in their relations with each other is conditional on its awareness of a situation of real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger. In other words, even though the juridical consequence of an act or omission of a private individual is the violation of certain

human rights of another private individual, this cannot be attributed automatically to the State, because the specific circumstances of the case and the discharge of such obligation to guarantee must be taken into account.²⁹⁶

281. In this case, there are two crucial moments in which the obligation of prevention must be examined. The first is prior to the disappearance of the victims and the second is before the discovery of their bodies.

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 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.

283. With regard to the second moment – before the discovery of the bodies – given the context of the case, the State was aware that there was a real and imminent risk that the victims would be sexually abused, subjected to ill-treatment and killed. The Tribunal finds that, in this context, an obligation of strict due diligence arises in regard to reports of missing women, with respect to search operations during the first hours and days. Since this obligation of means is more rigorous, it requires that exhaustive search activities be conducted. Above all, it is essential that police authorities, prosecutors and judicial officials take prompt immediate action by ordering, without delay, the necessary measures to determine the whereabouts of the victims or the place where they may have been retained. Adequate procedures should exist for reporting disappearances, which should result in an immediate effective investigation. The authorities should presume that the disappeared person has been deprived of liberty and is still alive until there is no longer any uncertainty about her fate.

284. Mexico did not prove that it had adopted reasonable measures, according to the circumstances surrounding these cases, to find the victims alive. The State did not act promptly during the first hours and days following the reports of the disappearances,

losing valuable time. In the period between the reports and the discovery of the victims' bodies, the State merely carried out formalities and took statements that, although important, lost their value when they failed to lead to specific search actions. In addition, the attitude of the officials towards the victims' next of kin, suggesting that the missing persons' reports should not be dealt with urgently and immediately, leads the Court to conclude reasonably that there were unjustified delays following the filing of these reports. The foregoing reveals that the State did not act with the required due diligence to prevent the death and abuse suffered by the victims adequately and did not act, as could reasonably be expected, in accordance with the circumstances of the case, to end their deprivation of liberty. 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.

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.

286. Based on the foregoing, the Court finds that the State violated the rights to life, personal integrity and personal liberty recognized in Articles 4.1., 5.1., 5.2. and 7.1 of the American Convention, in relation to the general obligation to guarantee contained in Article 1.1. and the obligation to adopt domestic legal provisions contained in Article 2 thereof, as well as the obligations established in Article 7.b and 7.c of the Convention of Belém do Pará, to the detriment of Claudia Ivette González, Laura Berenice Ramos Monárrez and Esmeralda Herrera Monreal.

4.2.2. Obligation to investigate the facts effectively, in accordance with Articles 8.1. and 2.1. of the Convention, derived from the obligation to guarantee the rights to life, personal integrity and personal liberty

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 73 substantive right that must be ensured, protected and guaranteed.²⁹⁷ 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,²⁹⁸ and to adopt the necessary laws to investigate and to punish violence against women.

[...]

289. The duty to investigate is an obligation of means and not of results, which must be assumed by the State as an inherent legal obligation and not as a mere formality preordained to be ineffective.³⁰⁰ 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.³⁰¹

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.³⁰²

291. Moreover, the Court has noted that this obligation 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."³⁰³

292. In this regard, within the framework of the obligation to protect the right to life, the European Court of Human Rights has developed the concept of the "procedural obligation" to carry out an effective official investigation in cases of the violation of that right.³⁰⁴ The Inter-American Court has also applied this concept in several cases.³⁰⁵

293. The Tribunal finds that, following the standards established by this Tribunal (*supra* paras. 287 to 291), 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 vigor 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.”³⁰⁶ This criterion is wholly applicable when examining the scope of the obligation of due diligence in the investigation of cases of gender-based violence.

[...]

4.2.2.1. Alleged irregularities in custody of the crime scene, collection and handling of evidence, autopsies, and identification and return of the victims’ remains

[...]

306. The Court concludes that, in this case, irregularities occurred as regards: i) the failure to identify with precision the circumstances of the discovery of the bodies; ii) the negligible rigor in the inspection and preservation of the crime scene by the authorities; iii) the improper handling of some of the evidence collected, and iv) the methods used were inadequate to preserve the chain of custody.

[...]

4.2.2.2. Alleged irregularities in the actions taken against those alleged to be responsible and alleged fabrication of guilty parties

[...]

c) Alleged irregularities relating to the fragmentation of the cases and the failure to investigate them in context

[...]

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.³⁹⁷

[...]

368. The representatives did not submit clear arguments or sufficient evidence to prove that the establishment of specific lines of inquiry for each of the eight Cotton Field cases could have adversely affected the investigations. 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.

[...]

370. What happened in this case is similar to what has been indicated previously as regards the context; that is, it can be observed that many investigations failed to consider attacks on women as part of a generalized phenomenon of gender-based violence. In this regard, the CNDH indicated in its 2003 report that the FEIHM was not examining "the phenomenon globally; rather each case has been dealt with individually, contrary to the legal possibilities, as if they were isolated, fully differentiated cases, instead of dealing with them integrally".⁴⁰⁰ (...)

[...]

388. In conclusion, the Court accepts the acknowledgement of responsibility for the irregularities committed during the first stage of the investigations. However, the Tribunal has found that, during the second stage, the said deficiencies were not entirely rectified. The irregularities in the handling of evidence, the alleged fabrication of guilty parties, the delay in the investigations, the absence of lines of inquiry that took into account the context of violence against women in which the three women were killed, and the inexistence of investigations against public officials for alleged serious negligence, violate the right of access to justice and to effective judicial protection, and the right of the next of kin and of society to know the truth about what happened. In addition, it reveals that the State has failed to comply with ensuring the rights to life, personal integrity and personal liberty of the three victims by conducting a conscientious and competent investigation. The foregoing allows the Court to conclude that impunity exists in the instant case and that the measures of domestic law adopted have been insufficient to deal with the serious human rights violations that occurred. The State did not prove that it had adopted the necessary norms or implemented the required measures, in accordance with Article 2 of the American Convention and Article 7.c of the Convention of Belém do Pará, that would have permitted the authorities to conduct an investigation with due diligence. 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.

389. Based on the foregoing, the Tribunal finds that the State failed to comply with its obligation to investigate – and, consequently, with its obligation to guarantee – the rights embodied in Articles 4.1., 5.1., 5.2. and 7.1. of the American Convention, in relation to Articles 1.1. and 2 thereof and to Article 7.b and 7.c of the Convention of Belém do Pará, to the detriment of Claudia Ivette González, Laura Berenice Ramos Monárrez and Esmeralda Herrera Monreal. For the same reasons, the State violated the rights of access to justice and to judicial protection, embodied in Articles 8.1. and 25.1. of the American Convention, in relation to Articles 1.1. and 2 thereof and to Articles 7.b and 7.c of the Belém do Para Convention, to the detriment of the three victims' next of kin identified in paragraph 9 *supra*.

4.3. Obligation not to discriminate: violence against women as discrimination

[...]

394. From a general point of view, CEDAW has defined discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” In the Inter-American sphere, the Convention of Belém do Pará indicates that violence against women is “a manifestation of the historically unequal power relations between women and men” and recognizes that the right of every woman to a life free of violence includes the right to be free from all forms of discrimination.

395. CEDAW has stated that the definition of discrimination against women “includes gender-based violence, that is, violence that is directed against a woman [i] because she is a woman or [ii] that affects women disproportionately.” CEDAW has also indicated that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”⁴¹²

396. In the case of *Opuz v. Turkey*, the European Court of Human Rights stated that “the State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.” The European Court considered that even though the general and discriminatory judicial pas-

sivity in Turkey was unintentional, the fact that it mainly affected women allowed it to conclude that the violence suffered by the applicant and her mother could be regarded as gender-based violence which is a form of discrimination against women. To reach this conclusion, the European Court applied the principle according to which once it is shown that the application of a specific rule clearly affects a higher percentage of women than men, the State must show that this is the result of objective factors unrelated to any discrimination on grounds of gender. The European Court found that the applicant lived where there was the highest number of reported victims of domestic violence, and that the victims were all women. Moreover, the great majority of these women were of the same origin, and the women victims faced problems when they reported the domestic violence, such as the fact that the police did not investigate the complaints, but assumed that the violence was a "family matter."⁴¹³

397. In the case of the Miguel Castro Castro Prison v. Peru, the Tribunal indicated that women detained or arrested "must not be the object of discrimination, and they must be protected from all forms of violence or exploitation"; that they "must be supervised and checked by female officers"; and that "special conditions" should be provided for pregnant and nursing women. Discrimination includes "violence directed against a woman because she is a woman, or that affects her in a disproportionate manner"; this includes "acts that inflict injuries or suffering of a physical, mental or sexual nature, threats of committing those acts, coercion and others forms of deprivation of freedom."⁴¹⁴

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." In addition, the State also indicated that this culture of discrimination against women was "based on the erroneous idea that women are inferior" (*supra* para. 132).

399. The Tribunal considers that these statements, which the State provided as evidence, concur with its acknowledgement of responsibility, in the sense that, in Ciudad Juárez there is a "culture of discrimination" that influenced the murders of women in Ciudad Juárez. Furthermore, the Court observes that, as established above, several international reports made a connection between the violence against women and the discrimination against women in Ciudad Juárez.

400. In addition, it has been established that, when investigating this violence, some authorities mentioned that the victims were "flighty" or that "they had run away with their

boyfriends,” which, added to the State’s inaction at the start of the investigation, allows the Tribunal to conclude that, as a result of its consequences as regards the impunity in the case, this indifference reproduces the violence that it claims to be trying to counter, without prejudice to the fact that it alone constitutes discrimination regarding access to justice. 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. 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.⁴¹⁵

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 (*supra* para. 398), 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. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.

402. The Court therefore finds that, in the instant case, the violence against women constituted a form of discrimination, and declares that the State violated the obligation not to discriminate contained in Article 1.1. of the Convention, in relation to the obligation to guarantee the rights embodied in Articles 4.1., 5.1., 5.2. and 7.1. of the American Convention to the detriment of Laura Berenice Ramos Monárrez, Esmeralda Herrera Monreal and Claudia Ivette González; as well as in relation to the access to justice established in Articles 8.1. and 25.1. of the Convention, to the detriment of the victims’ next of kin identified in paragraph 9 *supra*.

5. The rights of girls, Article 19 of the American Convention

[...]

406. As established previously, at the time of the facts, the public authorities were aware of a context of disappearances, violence and murders of young women and girls (*supra* para. 129).

407. The independent expert for the United Nations study on violence against children has stated that "[v]iolence against children takes a variety of forms and is influenced by a wide range of factors, from the personal characteristics of the victim and perpetrator to their cultural and physical environments." Economic development, social status, age, sex and gender are among the many factors associated with the risk of lethal violence. He also stated that "sexual violence predominantly affects those who have reached puberty or adolescence," and that girls face greater risk of this type of violence.⁴¹⁶

408. This Tribunal has established that boys and girls have special rights which give rise to specific obligations for the family, society and the State. Moreover, their status requires special protection that must be understood as an additional right that complements all the other rights that the Convention recognizes to each individual.⁴¹⁷ The prevalence of the best interest of the child must be understood as the need to satisfy all the rights of children and adolescents, which obligates the State and affects the interpretation of all the other rights of the Convention when a case concerns minors.⁴¹⁸ Furthermore, the State must pay special attention to the needs and rights of the alleged victims owing to their condition as girls who, as women, belong to a vulnerable group.⁴¹⁹

409. In this case, the Court finds that the State had the obligation to adopt all the positive measures necessary to ensure the rights of the disappeared girls. Specifically, the State had the obligation to ensure that they were found as soon as possible, once the next of kin had reported that they were missing; above all because the State was aware of the existence of a specific context in which girls were being disappeared.

410. Despite the existence of legislation for the protection of children,⁴²⁰ together with specific state policies,⁴²¹ the Tribunal underscores that the evidence provided by the State does not show that, in this specific case, these measures translated into effective measures for initiating a prompt search, activating all resources to mobilize the different institutions and to deploy domestic mechanisms to obtain information to locate the girls rapidly and, once their bodies were found, to conduct the investigations, and prosecute

and punish those responsible effectively and promptly. In summary, the State did not prove that it has proper reaction mechanisms or public policies that would provide the institutions involved with the necessary means to ensure the rights of the girls.

411. Consequently, this Court finds that the State violated the right embodied in Article 19 of the Convention, in relation to Articles 1.1. and 2 thereof, to the detriment of the girls Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez.

6. Right to humane treatment of the victims' next of kin

[...]

6.1. Suffering of the next of kin because of what happened to the victims and because of their search for the truth

[...]

419. The body of evidence reveals that, following the disappearance of the three victims, their next of kin had to take different measures to look for them due to the inactivity of the authorities, who also made derogatory comments about the young women, causing suffering to their next of kin. Thus, the expert reports indicated that the opinions given by the authorities, to the effect that the young women were to blame for their disappearance owing to their behavior, "caused the next of kin confusion and anguish, especially for those who knew that their daughter's life did not correspond to these descriptions."⁴²⁶ Furthermore, "[t]he mothers insist in the pain and suffering experienced owing to the negligence of the authorities and the callousness with which they have been treated, underscoring [...] how their anguish was aggravated by this mistreatment, and by being dissuaded from filing complaints that would perhaps have allowed [the victims] to be found alive and by the absence of information during the whole process."⁴²⁷

[...]

6.2. Threats, intimidation and harassment suffered by the next of kin

[...]

435. The file in the instant case includes information on the existence of a pattern of state conduct towards the next of kin of women victims of violence in Ciudad Juárez,

consisting in depreciatory, disrespectful and even aggressive treatment when they try to obtain information about the investigations.⁴³⁸ In most cases, this results in distrust and fear, so that they do not denounce the facts. The next of kin stated that, at times, they were told to stop making inquiries and taking other steps to seek justice.⁴³⁹ Furthermore, it has been reported that "the harassment and threats directed at the victims' families, their representatives and civil society organizations have intensified as national and international pressure increased," because they are blamed for the national and international dimension that the situation has acquired.⁴⁴⁰

[...]

X. OPERATIVE PARAGRAPHS

602. Therefore, **THE COURT DECIDES**,

[...]

AND ORDERS,

unanimously that,

11. This judgment constitutes *per se* a form of reparation.
12. The State shall, in accordance with paragraphs 452 to 455 of this Judgment, conduct the criminal proceeding that is underway effectively and, if applicable, any that are opened in the future to identify, prosecute and, if appropriate, punish the perpetrators and masterminds of the disappearances, ill-treatments and deprivations of life of Mss. González, Herrera and Ramos, in accordance with the following directives:
 - i) All legal or factual obstacles to the due investigation of the facts and the execution of the respective judicial proceedings shall be removed, and all available means used, to ensure that the investigations and judicial proceedings are prompt so as to avoid a repetition of the same or similar facts as those of the present case;
 - 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 simi-

lar cases and in dealing with victims of discrimination and gender-based violence;

iii) The different entities that take part in the investigation procedures and in the judicial proceedings shall have the necessary human and material resources to perform their tasks adequately, independently and impartially, and those who take part in the investigation shall be given due guarantees for their safety, and

iv) The results of the proceedings shall be published so that the Mexican society learns of the facts that are the object of the present case.

[...]

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 (...). In this regard, an annual report shall be presented for three years.

[...]

20. The State shall create, within six months of notification of this Judgment, a web page that it must update continually with the necessary personal information on all the women and girls who have disappeared in Chihuahua since 1993 and who remain missing. This web page must allow any individual to communicate with the authorities by any means, including anonymously, to provide relevant information on the whereabouts of the disappeared women or girls or, if applicable, of their remains, in accordance with paragraphs 507 and 508 of the present Judgment.

[...]

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 (...). Every year, for three years, the State shall report on the implementation of the courses and training sessions.

[...]

ENDNOTES

- 63 Cf. Radiografía Socioeconómica del Municipio de Juárez prepared by the Municipal Research and Planning Institute, 2002 (case file of attachments to the answer to the application, volume XXV, attachment 2, folios 8488 to 8490, 8493, 8495 and 8510).
- 64 Cf. Radiografía Socioeconómica del Municipio de Juárez 2002, *supra* note 63, folio 8492; IACHR, The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination, OEA/Ser.LV/III.117, Doc. 44, March 7, 2003 (case file of attachments to the application, volume VII, attachment 1, folio 1742); United Nations, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol of the Convention, and reply from the Government of Mexico, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005 (case file of attachments to the application, volume VII, attachment 3b, folio 1921); United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Integration of the human rights of women and a gender perspective: violence against women, Mission to Mexico, E/CN.4/2006/61/Add.4, January 13, 2006 (case file of attachments to the application, volume VII, attachment 3c, folio 2011), and Amnesty International, Mexico: Intolerable killings: 10 years of Abductions and Murders of Women in Ciudad Juárez and Chihuahua, AMR 41/027/2003 (case file of attachments to the application, volume VII, attachment 6, folio 2267).
- 65 Cf. Report on Mexico produced by CEDAW, *supra* note 64, folio 1921; Report of the Special Rapporteur on violence against women, *supra* note 64, folio 2011; Amnesty International, Intolerable killings, *supra* note 64, folio 2268, and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C., Compendio de recomendaciones sobre el feminicidio en Ciudad Juárez, Chihuahua, 2007 (case file of attachments to the pleadings and motions brief, volume XX, attachment 11(1), folio 6564).
- 66 Cf. CNDH, Informe Especial de la Comisión Nacional de los Derechos Humanos sobre los Casos de Homicidios y Desapariciones de Mujeres en el Municipio de Juárez, Chihuahua, 2003 [Special Report of the National Human Rights Commission on the Cases of Homicides and Disappearances of Women in the Municipality of Juarez, Chihuahua, 2003] (case file of attachments to the application, volume VII, attachment 5, folio 2168); Report of the Special Rapporteur on violence against women, *supra* note 64, folio 2011, and Amnesty International, Intolerable killings, *supra* note 64, folio 2267.
- 67 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1742; Report on Mexico produced by CEDAW, *supra* note 64, folios 1921 and 1922; CNDH, Informe Especial, *supra* note 66, folio 2168, and Comisión para Prevenir y Erradicar la Violencia contra las Mujeres en Ciudad Juárez [Commission for the Prevention and Eradication of Violence against Women in Ciudad Juarez], Primer Informe de Gestión, November 2003-April 2004 (case file of attachments to the answer to the application, volume XXV, attachment 7, folio 8666).
- 68 Cf. Report on Mexico produced by CEDAW, *supra* note 64, folio 1922, and Report of the Special Rapporteur on violence against women, *supra* note 64, folio 2011.

- 69 Cf. Comisión para Prevenir y Erradicar la Violencia contra las Mujeres en Ciudad Juárez, Primer Informe de Gestión, *supra* note 67, folio 8666, and Report on Mexico produced by CEDAW, *supra* note 64, folio 195.
- 70 Cf. Report on Mexico produced by CEDAW, *supra* note 64, folio 1922, and Report of the Special Rapporteur on violence against women, *supra* note 64, folio 2011.
- 71 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1742; Report on Mexico produced by CEDAW, *supra* note 64, folios 1921 to 1922; CNDH, Informe Especial, *supra* note 66, folio 2168, and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C., Compendio de recomendaciones, *supra* note 65, folio 6564.
- 98 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1744; Report on Mexico produced by CEDAW, *supra* note 64, folios 1924 and 1926; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 73, folio 2052; Amnesty International, Intolerable killings, *supra* note 64, folios 2256 and 2271, and Office of the Special Prosecutor for the Investigation of Crimes related to the Murders of Women in Ciudad Juárez, Informe Final, *supra* note 87, folio 14605.
- 99 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1764; Amnesty International, *Intolerable killings*, *supra* note 64, folios 2256 and 2271, and testimony given before notary public by the expert witness Jusidman Rapoport on April 21, 2009 (merits case file, volume XIII, folio 3806).
- 100 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1744; Report on Mexico produced by CEDAW, *supra* note 64, folios 1924 and 1926; Report of the Special Rapporteur on violence against women, *supra* note 64, folio 2012, and Amnesty International, *Intolerable killings*, *supra* note 64, folios 2257 and 2271.
- 101 Cf. Report on Mexico produced by CEDAW, *supra* note 64, folios 1924 and 1926; Report of the Special Rapporteur on violence against women, *supra* note 64, folio 2012; Amnesty International, *Intolerable killings*, *supra* note 64, folio 2257; Office of the Special Prosecutor for the Investigation of Crimes related to the Murders of Women in Ciudad Juárez, Informe Final, *supra* note 87, folio 14605; statement made before notary public by expert witness Monárrez Fragoso on November 20, 2008 (merits case file, volume XIII, folio 3911), and Comisión para Prevenir y Erradicar la Violencia contra las Mujeres en Ciudad Juárez, Tercer informe de gestión, May 2005-September 2006, citing the Second Progress Report entitled “El feminicidio: formas de ejercer la violencia contra las mujeres” (case file of attachments to the answer to the application, volume XXVII, attachment 12, folio 9016).
- 102 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1744; Report on Mexico produced by CEDAW, *supra* note 64, folios 1924 and 1926; Report of the Special Rapporteur on violence against women, *supra* note 64, folio 2012, and Amnesty International, *Intolerable killings*, *supra* note 64, folios 2257 and 2271.
- 103 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1744, and Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 73, folio 2053.
- 104 Cf. Office of the Special Prosecutor for the Investigation of Crimes related to the Murders of Women in Ciudad Juárez, Informe Final, *supra* note 87, folio 14525.
- 105 Cf. Report on Mexico produced by CEDAW, *supra* note 64, folios 1924 and 1927, and Amnesty Interna-

- tional, Intolerable killings, *supra* note 64, folio 2271.
- 106 . IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* 64, folio 1744.
- 107 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1744; Report on Mexico produced by CEDAW, *supra* note 64, folio 1927, and final report of the Observatorio Ciudadano, *supra* note 81, folio 6640.
- 108 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1744; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 73, folio 2052; Amnesty International, Intolerable killings, *supra* note 64, folio 2271; CNDH, Recomendación 44/1998, *supra* note 72, folio 2154, and Report on Mexico produced by CEDAW, *supra* note 64, folio 1927.
- 109 Cf. Office of the Special Prosecutor for the Investigation of Crimes related to the Murders of Women in Ciudad Juárez, Informe Final, *supra* note 87, folio 14608. In this regard, it is worth noting that the Ciudad Juárez Commission indicated that, “[a]lthough it is true that it has been difficult to prove that the murders of women in Ciudad Juárez are related to serial killers, the [Special Prosecutor’s Office] should have analyzed the criminal phenomenon constituted by paradigmatic cases; those in which there may be evidence of what the [Special Prosecutor’s Office] calls “murders of women with similar characteristics and/or patterns of conduct.” Similarly, it complained that the Special Prosecutor’s Office “has not yet approached its analysis from a gender perspective, despite international recommendations” (Comisión para Prevenir y Erradicar la Violencia contra las Mujeres en Ciudad Juárez, Tercer informe de gestión, *supra* note 101, folio 9073).
- 110 Comisión para Prevenir y Erradicar la Violencia contra las Mujeres en Ciudad Juárez, Tercer informe de gestión, *supra* note 101, folios 8996 and 8997.
- 111 According to the 2005 CEDAW report, the Chihuahua Women’s Institute referred to 90 cases, the Special Prosecutor’s Office and the Delegate of the Office of the Attorney General of the Republic in Ciudad Juárez mentioned 93 cases and the NGOs counted 98 (Cf. Report on Mexico produced by CEDAW, *supra* note 64, folio 1924).
- 112 These allegations concur with the conclusions of the first progress report of the Ciudad Juárez Commission, which indicated that, during the 1970s and 1980s, the maquila industries were characterized by employing women almost exclusively, in a context of male unemployment; this “produced a cultural shock within the families” and when “the men could not find work, it was the women who supported the household” (Comisión para Prevenir y Erradicar la Violencia contra las Mujeres en Ciudad Juárez, Primer Informe de Gestión, *supra* note 67, folio 8663. See also, Report on Mexico produced by CEDAW, *supra* note 64, folio 1922; statement made before notary public by expert witness Pineda Jaimés on April 15, 2009, merits case file, volume VIII, folio 2825, and testimony of expert witness Jusidman Rapoport, *supra* note 99, folio 3778).
- 115 Report on Mexico produced by CEDAW, *supra* note 64, folio 1957.
- 116 Report on Mexico produced by CEDAW, *supra* note 64, folio 1960.
- 117 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1735; Report on Mexico produced by CEDAW, *supra* note 64, folio 1922; Report of the Special Rapporteur on violence against women, *supra* note 64, folios 2001 to 2002, and Amnesty International, Intolerable killings, *supra* note 64, folios 2259 and 2269.

- 118 Amnesty International, Intolerable killings, *supra* note 64, folio 2269.
- 119 IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1766 (citing the letter of the Secretary of Government of Chihuahua to the Special Rapporteur of February 11, 2002).
- 120 Cf. Report on Mexico produced by CEDAW, *supra* note 64, folios 1937 and 1949.
- 121 Report of the Special Rapporteur on violence against women, *supra* note 64, folios 2001 and 2002.
- 122 Comisión para Prevenir y Erradicar la Violencia contra las Mujeres en Ciudad Juárez, Primer Informe de Gestión, *supra* note 67, folio 9074.
- 123 IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folios 1748 and 1750 (citing the letter of the Secretary of Government of Chihuahua to the Special Rapporteur of February 11, 2002).
- 135 IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1750 (citing the letter of the Secretary of Government of Chihuahua to the Special Rapporteur of February 11, 2002).
- 139 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1746, Report on Mexico produced by CEDAW, *supra* note 64, folio 1924, and Amnesty International, Intolerable killings, *supra* note 64, folio 2274.
- 140 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1767; CNDH, Recomendación 44/1998, *supra* note 72, folio 2140; Office of the Special Prosecutor for the Investigation of Crimes related to the Murders of Women in Ciudad Juárez, Informe Final, *supra* note 87, folios 14579 and 14610; Press conference offered by the Assistant Attorney General for Human Rights, Services to Victims and to the Community and the Special Prosecutor for Crimes related to Acts of Violence against Women, in the Jurists Auditorium, Reforma 211, Mexico, D.F., February 16, 2006, annex 4 of the final report of Observatorio Ciudadano, *supra* note 81, folio 6714.
- 141 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1750; CNDH, Recomendación 44/1998, *supra* note 72, folio 2140; Report of the United Nations Committee of International Experts, *supra* note 76, folio 1929, Office of the Special Prosecutor for the Investigation of Crimes related to the Murders of Women in Ciudad Juárez, Informe Final, *supra* note 87, folio 14579, and statement made before notary public by witness Doretti on April 17, 2009 (merits case file, volume VI, folio 2326 and 2327).
- 142 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1750; Report of the United Nations Committee of International Experts, *supra* note 76, folios 1898 and 1899; testimony of witness Doretti, *supra* note 141, folio 2332.
- 143 Cf. testimony of witness Doretti, *supra* note 141, folios 2371 and 2372.
- 144 Cf. Report of the United Nations Committee of International Experts, *supra* note 76, folio 1897; CNDH, Recomendación 44/1998, *supra* note 72, folio 2154; CNDH, Informe Especial, *supra* note 66, folio 2227, and Amnesty International, Intolerable killings, *supra* note 64, folio 2279.
- 145 Report of the U.N. Special Rapporteur on the independence of judges and lawyers, *supra* note 74, folio 2100.
- 146 Office of the Special Prosecutor for the Investigation of Crimes related to the Murders of Women in Ciudad Juárez, Informe Final, *supra* note 87, folios 14575 and 14609.
- 147 Report on Mexico produced by CEDAW, *supra* note 64, folio 1957

- 148 Cf. Response of the Mexican Government to the CEDAW report under Article 8 of the Optional Protocol to the Convention, January 27, 2005 (case file of attachments to the answer to the application, volume XXV, attachment 6, folios 8612 to 8653).
- 154 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1734.
- 155 Report of the United Nations Commission of International Experts, *supra* note 76, folio 1869
- 160 It should be noted that there are inconsistencies between the global figures, because according to the final report of the Special Prosecutor's Office, up until 2003 there had been 328 cases of murders of women in Ciudad Juárez (Office of the Special Prosecutor for the Investigation of Crimes related to the Murders of women in Ciudad Juárez, Informe Final, *supra* note 87, folio 14646).
- 161 Cf. Attorney General's Office of the state of Chihuahua, Special Prosecutor's Office for the Investigation of Murders of Women, Ciudad Juárez, 2003. Attachments to the fourth monthly report of the State to the Inter-American Commission on Human Rights of February 17, 2003 (case file of attachments to the answer to the application, volume XLII, attachment 75, folio 15446).
- 162 In general, regarding the cases that the State refers to as "concluded", CEDAW indicated in its 2005 report that it was concerned about the fact that cases are considered, and recorded, as having been concluded or solved when they are brought before the courts, "even though the accused have neither been arrested nor punished" (Report on Mexico produced by CEDAW, *supra* note 64, folio 1950). Furthermore, and also in general, in its 2005 report, the CNDH indicated that it had "obtained sufficient information to disprove the affirmations of the PGJE [Office of the Attorney General of the state of Chihuahua], that cases had been solved without any legal grounds to support these assertions" (CNDH, Informe Especial, *supra* note 66, folio 2234).
- 163 Cf. Report on Mexico produced by CEDAW, *supra* note 64, folio 1964. In this regard, it should be noted that, in its report, CEDAW indicated: "The Government assures us that judgments have been rendered in only 4 of the 90 cases considered to involve sexual violence, whereas nearly all of the civil society sources state that those 4 cases have not been resolved either, and that some of the accused may not be guilty. After eight years, only one prisoner has been convicted and punished, and that case is still in the appeal phase." (Report on Mexico produced by CEDAW, *supra* note 64, folio 1934).
- 167 IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1766.
- 168 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 73, folio 2053.
- 169 Cf. appearance of Claudia Ivonne Ramos Monárrez before a deputy official of the Public Prosecutor's Office attached to the Special Prosecutor's Office to Investigate the Disappearances and Murders of Women, on October 1, 2001 (case file of attachments to the application, volume VIII, attachment 17, folio 2621) and appearance of Rocío Itxel Núñez Acevedo before a deputy official of the Public Prosecutor's Office attached to the Special Prosecutor's Office to Investigate the Disappearances and Murders of Women, on October 5, 2001 (case file of attachments to the application, volume VIII, attachment 19, folio 2625).
- 170 Cf. Missing Person Report No. 225/2001, processed on September 25, 2001, with regard to Laura Berenice Ramos Monárrez (case file of attachments to the application, volume VIII, attachment 11, folio 2609), and

appearance of Benita Monárrez Salgado before a deputy official of the Public Prosecutor's Office attached to the Office of the Special Prosecutor to Investigate Murders of Women and Disappearances of Persons on September 25, 2001 (case file of attachments to the application, volume VIII, attachments 12 and 14, folio 2611).

- 171 Information taken from the report issued by two Judicial Police agents attached to the Joint Agency to Investigate and Prosecute the Murders of Women of Chihuahua on September 28, 2007 (case file of attachments to the answer to the application, volume XXXV, attachment 50, docket II, volume IV, folio 12974).
- 172 Cf. Statement made on October 24, 2001, by Juan Antonio Martínez Jacobo before the Office of the Special Prosecutor to Investigate Murders of Women and Disappearances of Persons (case file of attachments to the application, volume VIII, attachment 23, folio 2637) and Missing Person Report No. 234/2001 processed on October 12, 2001, with regard to Claudia Ivette González (case file of attachments to the application, volume VIII, attachment 8, folio 2603).
- 173 Cf. Missing Person Report No. 234/2001, *supra* note 172; appearance of Mayela Banda González before a deputy official of the Public Prosecutor's Office attached to the Office of the Special Prosecutor to Investigate Murders of Women and Disappearances of Persons on October 12, 2001 (case file of attachments to the answer to the application, volume XXXII, attachment 50 docket II, volume I, folio 11102), and testimony given by Mrs. González at the public hearing held before the Inter-American Court on April 28, 2009.
- 174 Appearance of Irma Monreal Jaime before an official of the Public Prosecutor's Office attached to the Office of the Special Prosecutor to Investigate Murders of Women and Disappearances of Persons on October 30, 2001 (case file of attachments to the application, volume VIII, attachment 29, folio 2653).
- 175 Cf. appearance of Irma Monreal Jaime, *supra* note 174; Missing Person Report No. 241/2001, processed on October 30, 2001, with regard to Esmeralda Herrera Monreal (case file of attachments to the application, volume VIII, attachment 13, folio 2613), and testimony given by Mrs. Monreal at the public hearing held before the Inter-American Court on April 28, 2009.
- 222 Cf. Testimony given by Mrs. Monreal, *supra* note 183. See also the statement by Irma Monreal Jaime in the petition filed before the Inter-American Commission on March 6, 2002 (case file of attachments to the application volume XXVII, attachment 42, folio 9802). Similarly, the victim's brother testified that the authorities said they could not do anything "because she had obviously gone off with her boyfriend" (Cf. testimony of expert witness Azaola Garrido, *supra* note 186, folio 3369).
- 223 Cf. testimony of Mrs. Monreal Jaime, *supra* note 183.
- 224 Cf. communication presented by Josefina González before the Inter-American Commission in September 2006 (case file of attachments to the application, volume II, appendix 5 volume I, folio 141).
- 225 Cf. testimony of Mrs. González, *supra* note 183.
- 226 Cf. testimony of Mrs. Monárrez, *supra* note 183.
- 227 Cf. testimony of Mrs. Monárrez, *supra* note 183, and file card issued by the Head of the Federal Investigation Agency reporting on the interview with Benita Monárrez Salgado on October 15, 2003 (case file of attachments to the answer to the application, volume XXXVII, attachment 50, docket III volume II, folio 13579).

- 228 Cf. testimony of witness Delgadillo Pérez, *supra* note 187, folio 3481.
- 229 Cf. testimony of witness Delgadillo Pérez, *supra* note 187, folios 3494 and 3495.
- 233 Missing Person Report No. 225/2001, *supra* note 170, folio 2609; Missing Person Report No.
- 248 Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 276.
- 249 Article 1 of the Convention of Belém do Pará.
- 250 Case of Perozo et al. v. Venezuela, *supra* note 22, para. 295.
- 254 Cf. Case of Cantoral Huamán and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 79, and Case of Kawas Fernández v. Honduras, *supra* note 190, paras. 72 and 73.
- 255 Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 21.
- 256 Cf. Case of the "Mapiripán Massacre" v. Colombia, *supra* note 252, paras. 111 and 113; Case of Perozo v. Venezuela, *supra* note 22, para. 298, and Case of Anzualdo Castro v. Peru, *supra* note 30, para. 62
- 257 Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 166; Case of Kawas Fernández v. Honduras, *supra* note 190, para. 137, and Case of Anzualdo Castro v. Peru, *supra* note 30, para. 62
- 258 Case of Velásquez Rodríguez v. Honduras. Merits, *supra* note 257, para. 174, and Case of Anzualdo Castro v. Peru, *supra* note 30, para. 62
- 259 Case of Velásquez Rodríguez v. Honduras. Merits, *supra* note 257, para. 173; Case of Godínez Cruz v. Honduras. Merits. Judgment of January 20, 1989. Series C No. 5, para. 182, and Case of Gangaram Panday v. Suriname. Merits, Reparations and Costs. Judgment of January 21, 1994. Series C No. 16, para. 62.
- 266 Cf. Case of the Miguel Castro Castro Prison v. Peru, *supra* note 248, para. 276.
- 267 Cf. Case of Velásquez Rodríguez v. Honduras. Merits, *supra* note 257, para. 166; Case of Perozo et al. v. Venezuela, *supra* note 22, para. 149, and Case of Anzualdo Castro v. Peru, *supra* note 30, para. 63.
- 268 Cf. CEDAW, General recommendation 19: Violence against women, 11^o session, 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 84 (1994), para. 9.
- 269 Cf. United Nations, Declaration on the Elimination of Violence against Women. General Assembly resolution 48/104 of 20 December 1993. A/RES/48/104, February 23, 1994, Article 4.c.
- 270 United Nations, Report of the Fourth World Conference on Women, Beijing, September 4 to 15, 1995, Beijing Declaration and Platform for Action approved at the 16^o plenary session held on September 15, 1995. A/CONF.177/20/Rev.1, para. 124 b.
- 271 Report of the Special Rapporteur on violence against women, *supra* note 64.
- 272 IACHR, Case 12,051, Report No. 54/01, Maria Da Penha Maia Fernandes v. Brazil, Annual Report, 2000, OEA/Ser.LV/II.111 Doc.20 rev. (2000).
- 273 IACHR, Maria Da Penha Maia Fernandes v. Brazil, *supra* note 272, para. 56. CEDAW has ruled similarly. Thus, in the case of A.T. v. Hungary (2005), it determined that the State had not complied with the obligations established in the Convention to prevent the violence against the victim and to protect her. In par-

ticular, it stated that it was “particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence” (Cf. CEDAW, Communication No. 2/2003, Ms. A. T. v. Hungary, 32^o session, January 26, 2005 para. 9.3). Similarly, in the case of Yildirim v. Austria, in which the victim was murdered by her husband, CEDAW found that the State had failed in its obligation of due diligence because it had not detained him (Cf. CEDAW, Communication No. 6/2005, Fatma Yildirim v. Austria, 39^o session, 23 July to 10 August 2007, para. 12.1.4 and 12.1.5).

- 274 Cf. United Nations, Violence against women in the family: Report of the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, UN Doc. E/CN.4/1999/68, 10 March 1999, para. 25.
- 275 United Nations, General Assembly, In-depth study on all forms of violence against women. Report of the Secretary-General, Sixty-first session, A/61/122/Add.1, July 6, 2006, para. 352.
- 291 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folio 1749; Report on Mexico produced by CEDAW, *supra* note 64, folio 1924, and CNDH, Recomendación 44/1998, *supra* note 72, folio 2155.
- 296 Cf. Case of the Pueblo Bello Massacre v. Colombia, *supra* note 261, para. 123; Case of the Sawhoyamaya Indigenous Community v. Paraguay, *supra* note 261, para. 155, and Case of Valle Jaramillo et al. v. Colombia, *supra* note 49, para. 78. See also ECHR, Case of Kiliç v. Turkey, Judgment of 28 March 2000, paras. 62 and 63, and ECHR, Case of Osman v. the United Kingdom, Judgment of 28 October 1998, paras. 115 and 116.
- 297 Cf. Case of the Pueblo Bello Massacre v. Colombia, *supra* note 261, para. 142; Case of Heliodoro Portugal v. Panamá. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 115, and Case of Perozo et al. v. Venezuela, *supra* note 22, para. 298.
- 298 Cf. Case of the Miguel Castro Castro Prison v. Peru, *supra* note 248, para. 344
- 300 Cf. Case of Anzualdo Castro v. Peru, *supra* note 30, para. 123, and Case of Garibaldi v. Brazil, *supra* note 252, para. 113
- 301 Cf. Case of Anzualdo Castro v. Peru, *supra* note 30, para. 179, and Case of Garibaldi v. Brazil, *supra* note 252, para. 141.
- 302 Cf. Case of the Pueblo Bello Massacre v. Colombia, *supra* note 261, para. 143; Case of Heliodoro Portugal v. Panamá, *supra* note 297, para. 144, and Case of Valle Jaramillo et al. v. Colombia, *supra* note 49, para. 101.
- 303 Case of the Pueblo Bello Massacre v. Colombia, *supra* note 261, para. 145, and Case of Kawas Fernández v. Honduras, *supra* note 190, para. 78.
- 304 Cf. ECHR, Ergi v. Turkey, Judgment of 28.07(1)998, Reports of Judgments, n. 81, paras. 85-86, and ECHR, Akkoç v. Turkey, Judgment of 10 October 2000, paras. 77 to 99; ECHR, Kiliç v. Turkey, Judgment of 28 March 2000, paras. 78 to 83.
- 305 Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 112; Case of Valle Jaramillo et al. v. Colombia, *supra* note 49, para. 97, and Case of Garibaldi v. Brazil, *supra* note 252, para. 23.

- 306 Cf. ECHR, Case of Angelova and Iliev v. Bulgaria, Judgment 26 July 2007, para. 98.
- 397 Cf. Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, paras. 156, 158 and 164.
- 400 Cf. CNDH, *Informe Especial*, *supra* note 66, folio 2235.
- 412 Cf. CEDAW, General recommendation 19: Violence against women, *supra* note 268, paras. 1 and 6.
- 413 , Case of Opuz v. Turkey, Judgment of 9 June 2009, paras. 180, 191 and 200.
- 414 Cf. Case of the Miguel Castro Castro Prison v. Peru, *supra* note 248, para. 303.
- 415 IACHR, Access to justice for women victims of violence in the Americas, OEA/Ser.LV/II. Doc. 68, January 20, 2007 (case file of attachments to the application, volume VII, attachment 2, folio 1822).
- 416 United Nations, Report of the independent expert for the United Nations study of violence against children, Paulo Sérgio Pinheiro, submitted pursuant to General Assembly resolution 60/231, A/61/299, 29 August 2006, paras. 25, 29 and 30.
- 417 Cf. Juridical Condition and Human Rights of the Child. Advisory opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 53, 54 and 60; Case of the Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 164, and Case of the Yean and Bosico Girls v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 133.
- 418 Cf. Juridical Status and Human Rights of the Child, *supra* note 417, paras. 56, 57 and 60, and Case of the Jean and Bosico Girls v. Dominican Republic, *supra* note 417, para. 134.
- 419 Cf. CEDAW, General recommendation 24: Women and health, twentieth session, A/54/38/Rev.1, 1999, para. 6, and Case of the Jean and Bosico Girls v. Dominican Republic, *supra* note 417, para. 134.
- 420 Cf. Political Constitution of the United Mexican States, Article 4 (case file of attachments to the answer to the application, attachment 43, volume XXVIII, folio 9816) and Law for the Protection of the Rights of Girls, Boys and Adolescents, published in the Federation's Official Gazette on May 29, 2000, Articles 2 to 5 (case file of attachments to the answer to the application, attachment 103, volume XLIII, folio 16049).
- 421 Such as the creation of the National Council for Children and Adolescents (case file of attachments to the answer to the application, attachment 104, volume XLIII, folios 16065 to 16068); the National System for the Integral Development of the Family (merits case file, volume III, folio 1082); the National Action Plan to Prevent, Deal With and Eliminate the Commercial Sexual Exploitation of Children (merits case file, volume III, folio 1082), and the Campaign to Prevent Child Abuse (merits case file, volume III, folio 1085).
- 426 Cf. statement made before notary public by expert witness Lira Kornfeld on April 21, 2009 (merits case file, volume XI, folio 3340).
- 427 Cf. testimony of expert witness Lira Kornfeld, *supra* note 426, folio 3340.
- 438 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folios 1745 and 1770, and Report on Mexico produced by CEDAW, *supra* note 64, folio 1924.
- 439 Cf. IACHR, The Situation of the Rights of Women in Ciudad Juárez, *supra* note 64, folios 1748 and 1769
- 440 Cf. Report on Mexico produced by CEDAW, *supra* note 64, folio 1946.

*Inter-American Court
of Human Rights*

“Las Dos Erres” Massacre v. Guatemala

*Preliminary Objection,
Merits, Reparations and Costs*

*Judgment of
November 24, 2009*



I. INTRODUCTION OF THE CASE AND MATTER OF THE DISPUTE

[...]

2. The application is related to the alleged lack of due diligence in the investigation, prosecution, and punishment of those responsible for the massacre of 251 inhabitants of the community (*parcelamiento*) of Las Dos Erres, la Libertad, Department of Petén, which occurred between December 6 and 8, 1982. This massacre was performed by the specialized group within the armed forces of Guatemala named kaibiles⁶. The community's inhabitants included children, women, and men. The individuals executed had previously suffered blows and mistreatment, and a lot of women had been raped and beaten to the point of abortions. Additionally, in the context of the massacre one of the participating kaibiles abducted a child survivor, took him to his home, and registered him with his last names. The investigations on this massacre began until 1994, during which some exhumation measures were performed. However, the alleged indiscriminate and permissive use of judicial resources, the unjustified delay by the judicial authorities, and the lack of an exhaustive investigation, prosecution, and punishment of those responsible is still pending as of today.

[...]

VIII. VIOLATION OF ARTICLES 8.1. AND 25.1. (RIGHT TO A FAIR TRIAL AND RIGHT TO JUDICIAL PROTECTION) IN RELATION TO ARTICLES 1.1. AND 2 OF THE AMERICAN CONVENTION AND ARTICLES 1, 6 AND 8 OF THE CIPST AND 7.B OF THE CONVENTION OF BELÉM DO PARÁ

[...]

1. Context of the case, background of the Massacre, and Internal Proceeding

A) Context of the Case

[...]

79. At around 4:30 p.m. the kaibiles took the men out of the school, blindfolded and hand-tied, and led them to an unfinished well where they were shot. Afterward, the women and children were taken to the same place. Along the way a lot of girls were raped

by the kaibiles, mainly by sub-instructors. Upon reaching the well, the kaibiles made the victims kneel and asked them whether they were part of the guerrilla, and at that point they struck them on the head with an iron mallet or shot them, throwing the corpses inside the well.(...)

80. At around 6:00 p.m. two girls arrived at the community, and they were raped by two military instructors. On the following day, when the kaibiles left they took the two girls and raped them again, and subsequently slit their throats. Before they left six other families arrived at the community, and they were also shot.

81. On December 9, 1982, residents of the village of Las Cruces approached Las Dos Erres and found household utensils all over the place, animals on the loose, and saw blood, umbilical cords, and placentas on the ground, given that the cruelty displayed by the soldiers reached the point where they caused abortions to pregnant women by beating them or even jumping on their abdomen until the fetus came out miscarried. (...)

[...]

2. Articles 8 and 25 of the American Convention, in relation to Articles 1 and 2 thereof; Articles 1, 6 and 8 of the Inter-American Convention against Torture, and Article 7.b of the Convention of de Belem do Pará.

[...]

C) *Lack of a complete and thorough investigation of the alleged facts of the massacre and those responsible, and other omissions*

C.1 Lack of investigation of all of the facts of the massacre

136. The Court observes that the investigation carried out in the internal jurisdiction has not been complete and thorough, given that it only refers to infringements to life, and not to those related to the facts of the alleged torture against members of the community and other alleged acts of violence against the children and female population. In this regard, the Commission indicated that "the provisions of the [...] Convention of Belém do Pará [...] should be taken into consideration, as they impose the obligation of acting with due diligence when investigating and punishing acts of violence against women." On the other hand, the representatives requested of the Court to declare the State responsible for not complying with the rights contained in Articles 1, 6, and 8 of the CIPST and 7.b of the Convention of Belém do Pará. Finally, the State did not accept the violation of these

Conventions “on the grounds [that] neither of them was effective for the State at the time when the facts occurred, and both procedurally and substantively it is not possible to claim a violation of a law or treaty which does not exist in the juridical life of a State.”

137. The Court notes that in conformity with the American Convention, effective at the time of the facts, the State had the obligation to investigate all of the facts with due diligence, which was still pending at the time of recognition of the Court’s contentious jurisdiction on March 9, 1987. This obligation was subsequently confirmed by the State in the ratification of the CIPST on January 29, 1987 and the Convention of Belém do Pará on April 4, 1995, therefore it had to guarantee compliance as of that time¹⁴⁴, even if they had not been adopted at the time of the massacre. 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 (humane treatment)”¹⁴⁵.

138. Specifically, the Court notes that although the complaint filed by FAMDEGUA on June 14, 1994 was for the crime of murder to the detriment of those buried in the community of Las Dos Erres, the statements of the ex kaibiles in the criminal proceeding of May 27, 1997 indicated that “while they had them gathered [...] they began to torture the men so they would tell them where the weapons were and who in the community were part of the guerrilla [and they] also raped some girls in front of their parents.” Likewise, they indicated that “Instructor Manuel Pop Sun [...] raped [one girl] drastically” and that “that’s [...] how they were massacring [and for women] it [was] not only [...] raping them, [but] also killing them at that time[...] they were savagely raped.” Also survivor Salomé Armando Gómez Hernández declared on December 1, 1995 that “[he had seen] that the men were beaten with the weapons and kicked to the ground [...] and women were pulled [b]y their hair and kicked.” Additionally, on the same date witness César Franco Ibáñez declared that “they also began [...] raping girls[,] you could hear the screams and wails [...] of the girls being raped.” The Court verifies that in relation to the facts described, as well as the CEH report of 1999, the State had official knowledge of alleged acts of torture against the population and children of the community, as well as abortions and other types of sexual violence against girls and women, perpetrated during three days (*supra* para. 78 to 81). However, the State did not initiate an investigation to clarify what occurred or charge those responsible¹⁴⁶.

139. The Court notes, as context, that as indicated by the CEH, during the armed conflict women were particularly chosen as victims of sexual violence. Likewise, in another case occurred within the same context as this massacre, the Court established as a proven fact that "[t]he rape of women was a State practice, executed in the context of massacres, directed to destroying the dignity of women at a cultural, social, family, and individual level.¹⁴⁷" In the case of Las Dos Erres, pregnant women were subject to induced abortions and other barbaric acts (*supra* para. 79 to 81). Likewise, in the expert opinion of psychologist Nieves Gómez Dupuis, performed in August 2005, it was indicated that "exemplifying torture, rape, and acts of extreme cruelty caused the victims [...] grave damages to their mental integrity.¹⁴⁸"

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 patterns¹⁴⁹, constitutes a breach of the State's obligations in relation to grave human rights violations, which infringe non-revocable laws¹⁵⁰(*jus cogens*) and generate obligations for the States¹⁵¹ such as investigating and punishing those practices, in conformity with the American Convention and in this case in light of the CIPST and the Convention of Belém do Pará.

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.¹⁵²

[...]

XI. REPARATIONS (APPLICATION OF ARTICLE 63.1. OF THE AMERICAN CONVENTION)

[...]

233. Based on the foregoing, the State must use the necessary means, in conformity with its domestic legislation, to effectively direct the investigations so as to identify, prosecute, and punish those responsible for the crimes committed in Las Dos Erres, and remove all obstacles, *de facto* and *de jure*, which maintain the case in impunity. Specifically, the

State must ensure that the investigation covers the following criteria:

(...)

b) effectively 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.²⁵⁴ The State must also eventually apply the punishments corresponding to those facts, and execute the pending arrest warrants;

ENDNOTES

- 6 According to the Report by the Commission for Historical Clarification, Guatemala: Memory of Silence (hereinafter "CEH, *Guatemala: Memory of Silence*"), Guatemala: United Nations Office for Project Services, 1999; "the kaibiles were a special counterinsurgency force of the Guatemalan Army, who indifferent operations put into practice the extreme cruelty of their training methods." (Appendixes to the brief of pleadings and motions, appendix 30, f. 10936)
- 144 Cf. *Case of the Miguel Castro Castro Prison v. Peru*, *supra* note 27, para. 377.
- 145 Cf. *Case of the Miguel Castro Castro Prison v. Peru*, *supra* note 27, para. 276, 377 and 379
- 146 In conformity with the legislation effective in Guatemala at the time of the facts (Articles 27 and 69 of the Criminal Code of Guatemala of 1973) the State had the possibility of investigating and identifying the different crimes and those who committed them.
- 147 *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs, *supra* note 143, para. 49.19.
- 148 Cf. Expert opinion of Nieves Gómez Dupuis of August 2005 "regarding the damages to the mental health of the victims due to the Massacre of the Las Dos Erres Community [...] and the measures for psychosocial reparation" (appendixes to the application, appendix 8, f. 2811).
- 149 In this regard, it is worth noting that in international law different courts have ruled on this, such as the International Criminal Tribunal for the Former Yugoslavia, which has qualified sexual violence as comparable to torture and other cruel, inhumane, and degrading treatment, when it has been committed within a systematic practice against the civil population, or with the intention of obtaining information, punishing, intimidating, humiliating, or discriminating the victim or a third party. Cf. *ICTY, Trial Ch II. Prosecutor v. Anto Furundzija*. Judgment, Dec. 10, 1998. para. 267.i, 295; *ICTY, Trial Ch II. Prosecutor v. Delalić et al (Čelebići case)*. Judgment, Nov. 16, 1998. para. 941; *ICTY, Appeals Ch. Prosecutor v. Delalić et al (Čelebići case)*. Judgment, Feb. 20, 2001. para. 488, 501; and *ICTY, Trial Ch II. Prosecutor v. Kunarac et al*. Judgment, Feb. 22, 2001. para. 656, 670, 816. Similarly, the International Criminal Tribunal for Rwanda has also compared rape to torture, indicating that the former can constitute torture if committed by or with the acknowledgements, consent, or instigation of a public officer. Cf. *ICTR, Trial Ch I. Prosecutor v. Akayesu, Jean-Paul*. Judgment, Sep. 2, 1998. para. 687, 688. On the other hand, the European Court of Human Rights has indicated that rape can constitute torture when it has been committed by state agents against people in their custody. Cf.

- ECHR. Case of Aydin v. Turkey.* Judgment, Sep. 25, 1997. Para. 86, 87, and *Case of Maslova and Nalbandov v. Russia.* Judgment. Jul. 7, 2008. Para. 108.
- 150 *Cf. Case of Goiburú et al. v. Paraguay, supra* note 19, para. 128; *Case of the Rochela Massacre v. Colombia, supra* note 34, para. 132, and *Case of Anzualdo Castro v. Peru, supra* note 28, para. 59.
- 151 *Cf. Case of Goiburú et al. v. Paraguay, supra* note 19, para. 131.
- 152 *Cf. Case of the Miguel Castro Castro Prison v. Peru, supra* note 27, para. 378.
- 254 The Committee on the Elimination of Discrimination Against Women, in its General Recommendation No. 19 “Violence against women,” has established that within the framework of armed conflicts States must adopt protective and punitive measures; additionally, it recommended for the States to ensure that the laws against attacks respect the integrity and dignity of all women, and provide protection to the victims; as well as to perform an investigation of the causes and effects of violence and the effectiveness of the response measures; and that they enshrine efficient procedures for reparations, including compensation.

*Inter-American Commission
on Human Rights*

Raquel Martín de Mejía v. Peru

Case N° 10.970

Report N° 5/96

March 1, 1996



On October 17, 1991, the Inter-American Commission on Human Rights (hereinafter the Commission) received a petition reporting violation of the human rights of Fernando Mejía Egocheaga and of his wife Raquel Martín de Mejía. This petition requested that Peru be declared responsible for violation of the following rights recognized in the American Convention on Human Rights (hereinafter the Convention):

[...]

2. In regard to Raquel Mejía, right to humane treatment and right to privacy (Article 11), both in connection with Article 1(1) of the Convention.

[...]

II. FACTS REPORTED

[...]

At 11:15 that night (June 15) [1989], a group of persons with their faces covered by ski masks and carrying submachine guns suddenly turned up at the Mejías' home and demanded to see Dr. Fernando Mejía Egocheaga. When he opened the door, six individuals wearing military uniforms went in and one of them struck Dr. Mejía with his weapon; then the one in charge of the operation ordered him into a yellow government-owned pickup. The events described were witnessed by his wife, Raquel Martín de Mejía.

That same night, about 15 minutes after the above-described events, a group of between six and ten military personnel with their faces concealed by black ski masks showed up at the Mejías' house again. One of them--the one who had been in charge of the abduction of Fernando Mejía--went into the house, apparently to ask Mrs. Mejía for her husband's identity documents.

[...]

Mrs. Mejía tried to explain to him that neither she nor her husband belonged to any subversive movements; however, without listening to her he began to spray himself with her perfumes and finally raped her. (...)

About twenty minutes later the same person returned to the Mejías' home, apparently with the intention of telling Mrs. Mejía that her husband might possibly be taken to Lima

by helicopter the next day. He then dragged her into the room and raped her again. Raquel Mejía spent the rest of the night in a state of terror that the one who had assaulted her would come back and fearing for her safety and for her husband's life.

[...]

(...) [The autopsy] confirmed that Fernando Mejía had been severely tortured and had died from a bullet in the head. (...)

[...]

On three occasions, between June 28 and 30, 1989, Raquel Mejía received anonymous phone calls threatening her with death if she persisted with the investigation of the homicide of her husband.

[...]

Because she feared for her safety, Raquel Mejía left Peru in August 1989, going first to the United States and then to Sweden, where she was granted political asylum.

[...]

V. GENERAL CONSIDERATIONS

[...]

B. Considerations on the substance of the case

1. *Presumption of facts*

[...]

In the present case, (...) the Commission (...) has decided:

- a. *To presume the facts relating to the repeated violation of Raquel Mejía by Peruvian Army personnel to be true*

[...]

The Commission considers that the acts against the husband of Raquel Mejía are closely connected with the sexual abuse that she underwent since they took place the same night and were perpetrated by the same individuals. On these grounds, the circumstantial evidence provided, while not directly pertaining to the case in question, is sufficient, in the Commission's view, to presume the responsibility of troops of the Peruvian Army in the commission of the abuses against Raquel Mejía.

b. To presume the nonexistence of effective domestic recourses that would permit remedies for the human rights violations suffered by Fernando and Raquel Mejía

[...]

Raquel Mejía informed the Commission that when, on June 20, 1989, she filed her declaration with the Oxapampa police concerning the abduction and subsequent homicide of her husband, she did not report the sexual abuse to which she had been subjected because:

[I was] fearful that the violations committed against my person would have caused me to be ostracized and exposed me to greater danger or physical harm...

[...]

The Commission observes that the reasons given by the petitioner for not submitting a petition in the domestic courts are supported by different documents published by intergovernmental bodies and nongovernmental organizations which expressly note that women who have been victims of sexual abuse by members of the security forces or police have no means open to them for obtaining a remedy for the violations of their rights.

The U.N. Special Rapporteur against Torture observes in this connection that "it is reported... that those guilty of [rape and other sexual abuses] were rarely brought to trial even in those cases where complaints were filed with competent authorities. The military courts took no action in these cases and failed to place the accused at the disposal of the civil courts, as they were required to do by law. This situation of impunity together with other factors such as the difficulty of submitting evidence or society's attitude to the victims meant that a large percentage of these cases were never even reported".⁸⁷

Amnesty International has stated that despite the existence of a large number of cases of sexual violations in emergency areas, to date no member of the security forces operating

in those areas has been tried for rape; neither have effective investigations been made following complaints submitted by women who have been victims of sexual abuse by soldiers.⁸⁸

Human Rights Watch, for its part, has observed that despite the widespread incidence of sexual abuse in Peru, very few police and even fewer members of the security forces have been tried for this abuse, even in cases where complaints were filed with the appropriate authorities. On the contrary, the evidence gathered demonstrates that the police and armed forces protect those guilty of these violations and grant them promotions, thereby implicitly tolerating the commission of these crimes.⁸⁹

Human Rights Watch also maintains that it is practically impossible to prove a charge of rape against a member of the security forces. The emergency legislation specifies that crimes committed in the "performance of duty" fall under military jurisdiction, in accordance with the Code of Military Justice. Although sexual abuse is a common crime--and not one of the so-called "duty crimes"--there have been no rape cases in which the ordinary courts have exercised jurisdiction.⁹⁰

Women who have been raped by members of the security forces do not report these assaults for two reasons: public humiliation and the perception that those responsible will never be punished. In addition, they are usually threatened with reprisals against themselves or their families if they do report them.⁹¹

[...]

3. Analysis

a. The repeated sexual abuse to which Raquel Mejía was subjected constitutes a violation of Article 5 and Article 11 of the American Convention on Human Rights

Current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity.

In the context of international humanitarian law, Article 27⁹⁴ of the Fourth Geneva Convention of 1949 concerning the protection due to civilians in times of war explicitly pro-

hibits sexual abuse.⁹⁵ Article 147⁹⁶ of that Convention which lists acts considered as “serious offenses” or “war crimes” includes rape in that it constitutes “torture or inhuman treatment”⁹⁷ The International Committee of the Red Cross (ICRC) has declared that the “serious offense” of “deliberately causing great suffering or seriously harming physical integrity or health” includes sexual abuse.⁹⁸

Moreover, Article 76⁹⁹ of Additional Protocol I to the 1949 Geneva Conventions expressly prohibits rape or other types of sexual abuse. Article 85.4,¹⁰⁰ for its part, states that when these practices are based on racial discrimination they constitute “serious offenses”. As established in the Fourth Convention and Protocol I, any act of rape committed individually constitutes a war crime.¹⁰¹ In the case of non international conflicts, both Article 3¹⁰² common to the four Geneva Conventions and Article 4.2.¹⁰³ of Protocol II additional to the Conventions, include the prohibition against rape and other sexual abuse insofar as they are the outcome of harm deliberately influenced on a person.¹⁰⁴ The ICRC has stated that the prohibition laid down in Protocol II reaffirms and complements the common Article 3 since it was necessary to strengthen the protection of women, who can be victims of rape, forced prostitution or other types of abuse.¹⁰⁵

Article 5 of the Statute of the International Tribunal established for investigating the serious violations of international humanitarian law committed in the territory of the former Yugoslavia, considers rape practiced on a systematic and large scale a crime against humanity.¹⁰⁶

In the context of international human rights law, the American Convention on Human Rights stipulates in its Article 5 that:

1. Every person has the right to have his physical, mental and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment...

The letter of the Convention does not specify what is to be understood by torture. However, in the inter-American sphere, acts constituting torture are established in the Inter-American Convention to Prevent and Punish Torture, which states:

...torture will be understood to be any act performed intentionally by which physical and mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as a personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture will also be understood to be application to a person of methods designed to efface the victim’s personality or

to diminish his physical or mental capacity, even if they do not cause physical pain or mental anguish.¹⁰⁷

[...]

Accordingly, for torture to exist three elements have to be combined:

1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person;
2. it must be committed with a purpose;
3. it must be committed by a public official or by a private person acting at the instigation of the former.

Regarding the first element, the Commission considers that rape is a physical and mental abuse that is perpetrated as a result of an act of violence. The definition of rape contained in Article 170 of the Peruvian Criminal Code confirms this by using the phrasing “[h]e who, with violence or serious threat, obliges a person to practice the sex act...” The Special Rapporteur against Torture has noted that sexual abuse is one of the various methods of physical torture.¹⁰⁹ Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community.¹¹⁰ In this connection, the above-mentioned Special Rapporteur has stated that, particularly in Peru, “...rape would appear to be a weapon used to punish, intimidate and humiliate.”¹¹¹

Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.¹¹²

Raquel Mejía was a victim of rape, and in consequence of an act of violence that cause her “physical and mental pain and suffering”. As she states in her testimony, after having been raped she “was in a state of shock, sitting there alone in her room”. She was in no hurry to file the appropriate complaint for fear of suffering “public ostracism”. “The victims of sexual abuse do not report the matter because they feel humiliated. In addition, no woman wants to publicly announce that she has been raped. She does not know how her husband will react. [Moreover], the integrity of the family is at stake, the children might feel humiliated if they know what has happened to their mother”.

The second element establishes that for an act to be torture it must have been committed intentionally, i.e. to produce a certain result in the victim. The Inter-American Convention to Prevent and Punish Torture includes, among other purposes, personal punishment and intimidation.

Raquel Mejía was raped with the aim of punishing her personally and intimidating her. According to her testimony, the man who raped her told her that she, too, was wanted as a subversive, like her husband. He also told her that her name was on a list of persons connected with terrorism and, finally, warned her that her friendship with a former official in the previous government would not serve to protect her. On the second occasion, before leaving he threatened to come back and rape her again. Raquel Mejía felt terrorized not only for her own safety but also for that of her daughter who was sleeping in another room and for the life of her husband.

The third requirement of the definition of torture is that the act must have been perpetrated by a public official or by a private individual at the instigation of the former.

As concluded in the foregoing, the man who raped Raquel Mejía was member of the security forces who had himself accompanied by a large group of soldiers.

[...]

The petitioners have also asserted that the sexual abuse suffered by Raquel Mejía violates the provisions of Article 11 of the Convention.

Said article specifies that a State must guarantee everybody protection of their honor and dignity, within the framework of a broader right, namely the right to privacy. The relevant parts of paragraphs 1 and 2 of this article read as follows:

1. Everyone has the right to have his honor respected and his dignity respected.
2. No one may be the object of arbitrary or abusive interference with his private life...

The Special Rapporteur against Torture has stated that “Rape is a particularly base attack against human dignity. Women are affected in the most sensitive part of their personality and the long-term effects are perforce extremely harmful, since in the majority of cases the necessary psychological treatment and care will not and cannot be provided.”¹¹³

The Commission considers that sexual abuse, besides being a violation of the victim's physical and mental integrity, implies a deliberate outrage to their dignity. In this respect, it becomes a question that is included in the concept of "private life". The European Court of Human Rights has observed that the concept of private life extends to a person's physical and moral integrity, and consequently includes his sex life.¹¹⁴

[...]

VI. CONCLUSIONS

The Commission, on the basis of the considerations analyzed in this report, formulates the following conclusions:

1. in application of Articles 47 of the Convention and 39 of its Regulations:
 - (...)
 - b. it declares the petitions concerning the human rights violations suffered by Raquel Mejía admissible.

2. In regard to the petitions considered admissible it concludes that:
 - a. the Peruvian State is responsible for the violation of the right to humane treatment (Article 5) and the right to protection of honor and dignity (Article 11) of Raquel Mejía and of the general obligation to respect and guarantee the exercise of these rights contained in the Convention (Article 1.1);

[...]

ENDNOTES

87 U.N., *idem supra*, Note 13 para. 433.

88 *Amnesty International*, *idem supra*, Note 15, p. 22.

89 *Human Rights Watch*, *idem supra*, Note 19, p. 3.

90 *Idem supra*, p. 4.

91 *Idem supra*, p. 5.

94 Article 27, insofar as it concerns us, reads: Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats, thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular, against rape, enforced prostitution or any form of indecent assault...

95 *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*,

May 5, 1994, p. 17.

- 96 Article 147 reads: Serious offenses are those that involve one or more of the following acts, “if committed against persons or property protected by the present Convention: ... torture or inhuman treatment, including ... wilfully fact of causing great suffering or serious injury to body or health ...”
- 97 Final Report..., *Idem supra*, Note 34, p. 17.
- 98 ICRC, *Aide Mémoire* (Dec. 3, 1992) cited in T. Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 426.
- 99 Article 76, entitled “Protection of Women”, specifies that: 1. Women shall be afforded special respect and protected in particular against rape, forced prostitution and any other form of indecent assault.
- 100 Article 85(4) states that: ... The following acts will be considered serious offenses under the present Protocol when committed intentionally and in violation of the Conventions or the Protocol: ... (c) The practices of apartheid and other inhuman and degrading practices, based on racial discrimination, that entail an outrage against personal dignity.
- 101 Final Report ..., *idem supra*, Note 34, p. 17.
- 102 Article 3 states: The following are prohibited, at any time and in any place...
“(a) Attacks against life and bodily integrity, especially homicide in all its forms, mutilations, cruel treatment, torture and ordeals; ... (c) Attacks against personal dignity ...”
- 103 Article 4(2) of Protocol II, for its part, states: 1. All persons who are not participating directly in the hostilities, or have ceased to participate in them, whether or not deprived of their liberty, shall be entitled to respect of their persons, their honor, their religious convictions and practices.... 2. The following shall be prohibited at all times and in all places with respect to the persons referred to in paragraph 1: (a) Attacks against the life, health and physical and mental integrity of persons, in particular homicide and cruel treatments such as torture... .. (e) Attacks against personal dignity, especially humiliating and degrading treatment, rape, forced prostitution and any form of indecent assault;
- 104 Final Report ..., *idem supra*, Note 34, p. 18
- 105 ICRC *Commentary on the Additional Protocols of 8 June, 1977 to the Geneva Conventions of 12 August 1949*, Yves Sandoz, Christophe Swinarski, Bruno Zimmerman, eds. (Geneva: Martinus Nijhoff Publishers, 1987) 1375. Quoted in D. Thomas and R. Ralph, *idem supra*, Note 30, p. 95.
- 106 *United Nations: Secretary General Report on aspects of establishing an international tribunal for the prosecutions of persons responsible for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia*, 32 I.L.M., 1159, 1173, 1174 (1993).
- 107 See Article 2 of the Convention.
- 109 U.N. Doc. E/CN.4/1986/15, para. 119.
- 110 D. Blair, *Recognizing Rape as a Method of Torture*, 19 N.Y.U. Rev.L & Soc. Change 821, 854.
- 111 U.N., *idem supra*, Note 13, para. 431.
- 112 D. Blair, *idem supra*, Note 49, p. 855.
- 113 U.N., *idem supra*, Note 12, para. 580.
- 114 See *X and Y vs. The Netherlands*, Application 8978/80, Series A. No. 167.

*Inter-American Commission
on Human Rights*

X and Y v. Argentina

Case N° 10.506

Report N° 38/96

October 15, 1996



1. On December 29, 1989, the Commission received a complaint against the Government of Argentina regarding the situation of Ms. X and her thirteen-year-old daughter Y.² The complaint alleges that the Argentine State, and particularly the Federal Government's prison authorities who, routinely performed vaginal inspections on the women visitors of Unit No. 1 of the Federal Penitentiary Service (Unidad No. 1 del Servicio Penitenciario Federal) acted in violation of the rights protected under the American Convention on Human Rights. Ms. X and her thirteen-year-old daughter were submitted to vaginal inspections each time they visited her husband and the father of the child, who at the time was incarcerated in the Defendants' Prison in the federal capital. On April of 1989 Ms. X lodged a writ of amparo ("recurso de amparo") demanding that the inspections cease. The petition alleges that this practice by the Federal Penitentiary Service (SPF) constitutes a violation of the American Convention as it offends the dignity of the persons subjected to such a procedure (Article 11), and is a degrading penal measure which extends beyond the person condemned or on trial (Article 5.3) and, furthermore, discriminates against women (Article 24), in relation to Article 1.1.

I. FACTS

[...]

3. According to Major Mario Luis Soto, Chief of Internal Security of the Federal Penitentiary System (Jefe de la Dirección de la Seguridad Interna) in his declaration on the writ of amparo on the present case, because the relatives of inmate sometimes brought drugs or narcotics into the prison in their vaginas, the practice of searching that area had been started some time ago. He added that, at first, gloves were used for frisking that area but, because of the flow of female visitors, approximately 250 women, a lack of surgical gloves and the danger of transmitting AIDS or other diseases to visitors or inspectors, it was decided that visual inspections would be performed.³

4. Regarding Ms. X, Major Soto declared that she had been submitted to both types of inspections and had always protested against the procedure, but had been informed by prison personnel that no exception could be made in her case.⁴ As to the fact that these inspections were also performed on minors, the Chief of Internal Security affirmed that, in such cases, the inspections were always performed in the presence of one or both of the child's parents and that the search was much less rigorous in order to preserve their sense of modesty (pudor).⁵

[...]

VI. ANALYSIS

A. General Considerations

[...]

47. Therefore, when considering this case the Commission must examine two separate issues:

- 1) whether the requirement that Ms. X and her daughter undergo a vaginal inspection before each physical contact visit with Mr. X is in compliance with the rights and guarantees present in the American Convention on Human Rights;
- 2) whether this requirement and the performance of the procedure prevented them from fully exercising their rights protected under the American Convention, particularly those enshrined in Articles 5 (right to humane treatment), 11 (protection of honor and dignity), 17 (protection of the family) and 19 (rights of the child), in relation to Article 1.1, which obliges the States Parties to respect and guarantee the full and free exercise of all the provisions recognized in the Convention without discrimination.

B. The requirement that visitors undergo a vaginal inspection in order to be permitted a physical contact visit

48. The petitioners allege that the requirement that visitors to Unit 1 submit to vaginal searches or inspections in order to be permitted personal contact visits was an illegitimate interference with their exercise of the right to family. Moreover, it is alleged that the measure, by not being in compliance with the Convention, in itself contravened the rights protected by that instrument, and that existence of this requirement and its application violated not only the right to family, guaranteed by Article 17 but also the right to privacy, honor, and dignity, protected by Article 11, and the right to physical integrity guaranteed by Article 5.

49. Although Article 19, which protects the rights of the child, was not invoked by the petitioners, the Commission considers that as one of the alleged victims was a 13-year-old child at the time of the events this provision should also be examined. According to the general principle of international law *iura novit curia* international bodies have the power and even the duty to apply all pertinent legal provisions, even if these have not been invoked by the parties.⁹

50. The Government of Argentina argued that all of the measures it adopted are acceptable restrictions to the Convention's provisions and were reasonable under the circumstances

of the case. The Commission must thus consider what are the State's obligations regarding the provisions of the Convention, and what are the permissible limitations to those rights.

1. *State obligations to "respect and ensure" and the imposition of conditions on the rights protected by the Convention*

[...]

b. *The imposition of limitations*

[...]

60. The Commission considers that in order to be considered in compliance with the Convention such measures should meet three specific conditions. A measure that in any way affects the rights protected by the Convention should necessarily: 1) be prescribed by law; 2) be necessary for the security of all and in accordance with the just demands of a democratic society; 3) and its application must be strictly confined to the specific circumstances present in Article 32.2 and be proportionate and reasonable in order to accomplish those objectives.

1) *The lawfulness of the measure*

[...]

64. (...) [A] measure as extreme as the vaginal search or inspection of visitors, that involves a threat of violation to a number of the rights guaranteed under the Convention, must be prescribed by a law which clearly specifies the circumstances when such a measure may be imposed and sets forth what conditions must be obeyed by those applying this procedure so that all persons subjected to it are granted as full a guarantee as possible from its arbitrary and abusive application.¹⁷

2) *Necessity in a democratic society for the security of all*

[...]

66. The Commission is aware that all countries have rules regarding the treatment of prisoners and detainees, which also regulate their visitation rights as to time, place, manner, type of contact, etc. It is also recognized that corporal searches, and even corporal probing, of detainees and prisoners may sometimes be necessary.

67. The present case, however, entails the rights of visitors whose rights are not automatically limited by virtue of their contact with the inmates.

68. The Commission does not question the need for general searches prior to entry into prisons. Vaginal searches or inspections are nevertheless an exceptional and very intrusive type of search. The Commission would like to underline the fact that a visitor or a family member who seeks to exercise his or her rights to family life should not be automatically suspected of committing an illegal act and cannot be considered, on principle, to pose a grave threat to security. Although the measure in question may be exceptionally adopted to guarantee security in certain specific cases, it cannot be maintained that its systematic application to all visitors is a necessary measure in order to ensure public safety.

3) Reasonableness and proportionality of the measure

[...]

71. The reasonableness and proportionality of a measure can only be ascertained through the examination of a specific case. The Commission notes that a vaginal search is more than a restrictive measure as it involves the invasion of a woman's body. Consequently, the balancing of interests involved in an analysis of the measure's lawfulness, must necessarily hold the government's interest to a higher standard in the case of vaginal inspections or any corporal probing.

72. The Commission considers that the lawfulness of a vaginal search or inspection, in a particular case, must meet a four-part test: 1) it must be absolutely necessary to achieve the security objective in the particular case; 2) there must not exist an alternative option; 3) it should be determined by judicial order; and 4) it must be carried out by an appropriate health professional.

[...]

b) Non-existence of an alternative option

[...]

76. It would seem that other and less restrictive procedures, such as the search of inmates and their cells, are a more efficient and reasonable means of guaranteeing internal

security. In addition, it should not be ignored that the special legal position of prisoners, by its very nature, results in a number of limitations to the exercise of their rights. The state, which has custody of all of those persons in detention and is responsible for their well-being and safety, has a greater latitude to apply what measures may be necessary to ensure security in the case of inmates. By definition, a detainee's personal liberties are restricted and it may therefore occur that corporal searches, and even corporal probing, of detainees and prisoners are sometimes justifiable, using methods compatible with their human dignity. It would have obviously been a more reasonable and simpler measure to search the inmates after a personal contact visit, than submit all of the women visitors to the prisons to such an extreme procedure. Searches of visitors should be carried out only in very specific circumstances and when there is reasonable cause to believe that they pose a real threat to security or are carrying illegal substances.

[...]

79. Moreover, the Commission would also like to note that in the case of Y no real consent was possible. At the time of the facts Ms. Y was a 13-year-old child who was thus entirely dependent on the decision taken by her mother, Ms. X, and on the protection afforded to her by the state. Because of the child's age, it is evident that the vaginal inspection was an absolutely inadequate and unreasonable method.

[...]

C. The rights protected by the Convention

1. The right to physical integrity: Article 5

86. The petitioners alleged a violation of Article 5, in particular, of its paragraphs 2 and 3, which read:

1. Every person has the right to have his physical, mental, and moral integrity respected
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment (...)
3. Punishment shall not be extended to any person other than the criminal.

87. The procedure in question is not *per se* illegal. Nevertheless, when the state performs any kind of physical intervention in individuals, it must observe certain conditions in order to ensure that such treatment does not generate a greater degree of anguish

and humiliation than that which is inevitable. Such a measure should always be the consequence of a judicial order which assures some control over the decision as to the necessity of its application and that the person subjected to it does not feel defenseless before the authorities. Moreover, the measure should always be performed by qualified personnel exercising the necessary care to ensure that no physical harm results from the procedure and conducting the examination in such manner so as to ensure that those persons submitted to it do not feel that their mental and moral integrity has been affected.

[...]

2. *Right to Privacy: Article 11*

90. Article 11 of the Convention stipulates that:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

91. The right to privacy guaranteed by this provision covers, in addition to the protection against publicity, the physical and moral integrity of the person.²⁰ The object of Article 11, as well as of the entire Convention, is essentially to protect the individual against arbitrary interference by public officials. Nevertheless, it also requires the state to adopt all necessary legislation in order to ensure this provision's effectiveness. The right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one's own. In this sense, various guarantees throughout the Convention which protect the sanctity of the person create zones of privacy.

92. Article 11.2 specifically prohibits "arbitrary or abusive" interference with this right. This provision indicates that in addition to the condition of legality, which should always be observed when a restriction is imposed on the rights of the Convention, the state has a special obligation to prevent "arbitrary or abusive" interferences. The notion of "arbitrary interference" refers to elements of injustice, unpredictability and unreasonableness which were already considered by this Commission when it addressed the issues of the necessity, reasonableness, and proportionality of the searches and inspections.

93. Nevertheless, the Commission would like to underscore that the present case involves a particularly intimate aspect of a woman's private life and that the procedure in question, whether its application is justifiable or not, is likely to provoke intense feelings of shame and anguish in almost all persons who are submitted to it. In addition, subjecting a 13 year old child to such a procedure could result in serious psychological damage that is difficult to evaluate. Ms. X and her daughter had a right to have their privacy, dignity and honor respected when they sought to exercise their rights to family, even if a family member was in detention. These rights should have been restricted only in the presence of a particularly serious situation and in very specific circumstances, and then only, with the strict compliance by the authorities with the standards which were outlined above in order to guarantee the legality of the practice.

[...]

3. *Rights of the Family: article 17*

95. It is alleged that undue interference with Ms. X's and her child's visit contravened the rights of her family guaranteed in Article 17, which states:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

96. Article 17 recognizes the central role of the family and family-life in the individual's existence and society, in general. It is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances. In the instant case, the petitioners allege that the exercise of this right suffered an illegitimate restriction and that a number of other rights protected by the Convention, particularly their right to personal integrity and the right to honor and dignity were violated while they sought to exercise this right.

97. The right to family life can suffer certain limitations that are inherent to it. Special circumstances such as incarceration or military service, even though they do not suspend this right, inevitably affect its exercise and complete enjoyment. Though imprisonment necessarily restricts the full enjoyment of the family by forcibly separating a member from it, the state is still obliged to facilitate and regulate contact between detainees and their families and to respect the fundamental rights of all persons against arbitrary and abusive interferences by the state and its public functionaries.²¹

98. The Commission has consistently held that the state is obligated to facilitate contact between the prisoner and his or her family, notwithstanding the restrictions of personal

liberty implicit in the condition of the prisoner. In this respect the Commission has repeatedly indicated that visiting rights are a fundamental requirement for ensuring respect of the personal integrity and freedom of the inmate and, as a corollary, the right to protection of the family for all the affected parties.²² Indeed, and particularly because of the exceptional circumstances of imprisonment, the state must establish positive provisions to effectively guarantee the right to maintain and develop family relations. Thus, the necessity of any measures restricting this right must adjust themselves to the ordinary and reasonable requirements of imprisonment.

99. Personal contact visits are not a right, and indeed in many countries, this type of visit is not even an option. Usually, the possibility of conducting personal contact visits is largely left to the discretion of the internal prison authorities. Nevertheless, when the state regulates the manner in which the right to family is exercised by prisoners and their families, it cannot impose conditions or carry out procedures that constitute an infringement of any of the other rights protected by the Convention, at least without due process of law. All States Parties to the Convention are obliged to ensure that the action of the state as well as the organization of its internal apparatus and legal system are carried out within certain boundaries of legality.

[...]

4. Rights of the Child: Article 19

101. Article 19 reads:

Every minor has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

102. Argentina has also ratified the United Nations Convention on the Rights of the Child, which provides that:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

103. The text of the American Convention recognizes that children must be the subject of special care and attention, and that the State has a duty to adopt all "measures of protection required by his condition." A child is especially vulnerable to violations to his or her rights because, by virtue of their very status, as children have no legal standing in

most cases to make decisions concerning situations that may have grave consequences on their well being. The state has a special duty to protect children and to ensure that, whenever state authorities take actions that may in any way affect a child, special care is taken to guarantee the child's rights and well being.

104. In the instant case the State of Argentina has proposed and performed on a minor, who did not have the legal capacity to consent, a potentially traumatic procedure that potentially could have violated a number of the rights guaranteed by the Convention without observing the requirements of legality, necessity, reasonableness and proportionality which are among the necessary conditions to the imposition of any restriction on the rights of the Convention. Furthermore, the state did not grant Y the minimum protection against abuse or actual physical damage that could have been offered by requiring the proper judicial authority to decide on the propriety of the procedure, and in the event the measure was deemed necessary requiring that it be performed by medical personnel. The Commission does not consider that the existing requirements described by the Chief of Internal Security to protect minors--that the inspections be performed in the presence of one or both of the child's parents, and that the search be less rigorous and seek to preserve a child's sense of modesty (pudor) accorded the petitioner adequate protection.

[...]

VIII. CONCLUSIONS

[...]

114. In Report No. 16/95, the Commission concluded that in order to establish the lawfulness of a vaginal search or inspection in a specific case, these requisites must be met:

- 1) it must be absolutely necessary to achieve the lawful objective in the particular case;
- 2) there must not exist an alternative measure;
- 3) it should be determined by judicial order; and
- 4) it must be carried out by an appropriate health professional.

[...]

116. The Commission thus concludes that by imposing an unlawful condition for the fulfillment of their prison visits without judicial and appropriate medical guarantees and performing these searches and inspections under these conditions, the State of Argen-

tina violated the rights of Ms. X and her daughter Y guaranteed in Articles 5, 11 and 17 of the Convention, in relation to Article 1.1 which requires the Argentine State to respect and guarantee the full and free exercise of all the provisions recognized in the Convention. In the case of Y, the Commission concludes that the State of Argentina also violated Article 19 of the Convention.

[...]

ENDNOTES

- 2 At the request of petitioners, their identities have not been disclosed because of the minority of one victim and the nature of the violations denounced.
- 3 Court of Appeals, 35972-X y otra; s/ writ of amparo-17/151-Int.Ilda., Buenos Aires, April 25, 1989, para. IV.
- 4 Ibid.
- 5 Corte Suprema de Justicia, Ruling on the writ of amparo, Tomo 207 del Libro de Sentencias, Buenos Aires, November 21, 1989, pp. 105, para. 3.
- 9 Permanent Court of International Justice, Lotus case, Judgment No. 9, 1927, Series A No. 10, pp. 31 and European Court of Human Rights, Handyside Case, Judgment of 7 December 1976, Series A No. 24, para. 41.
- 17 In this respect the Court has stated that:
Within the framework of the protection of human rights, the word "laws" would not make sense without reference to the concept that such rights cannot be restricted at the sole discretion of governmental authorities. To affirm otherwise would be to recognize in those who govern virtually absolute power over their subjects. OC-6, Series A No. 6, para. 27.
- 20 In the case of *X & Y v. the Netherlands*, the European Court made such a connection regarding the parallel provision, Article 8, in the European Convention on Human Rights, Judgment of 26 March 1985, Series A Vol. 91, para. 22.
- 21 Article 37 of the United Nations Standard Minimum Rules on the Treatment of Prisoners states:
Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.
Standard Minimum Rules on the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076(LXII) of 13 May 1977.
- 22 On this topic, see the following Commission reports: Miskito Case, pp. 31-2; Cuba Case, p. 62 (1983); and Uruguay Case (1983-84), p. 130, paragraph 10.

*Inter-American Commission
on Human Rights*

*María Eugenia Morales de Sierra
v. Guatemala*

Case N° 11.625

Report N° 4/01

January 19, 2001



I. CLAIMS PRESENTED

1. On February 22, 1995, the Inter-American Commission on Human Rights (hereinafter "Commission") received a petition dated February 8, 1995, alleging that Articles 109, 110, 113, 114, 115, 131, 133, 255, and 317 of the Civil Code of the Republic of Guatemala (hereinafter "Civil Code"), which define the role of each spouse within the institution of marriage, create distinctions between men and women which are discriminatory and violate Articles 1(1), 2, 17 and 24 of the American Convention on Human Rights (hereinafter "American Convention").

2. The petitioners, the Center for Justice and International Law and María Eugenia Morales de Sierra, indicated that Article 109 of the Civil Code confers the power to represent the marital union upon the husband, while Article 115 sets forth the exceptional instances when this authority may be exercised by the wife. Article 131 empowers the husband to administer marital property, while Article 133 provides for limited exceptions to that rule. Article 110 addresses responsibilities within the marriage, conferring upon the wife the special "right and obligation" to care for minor children and the home. Article 113 provides that a married woman may only exercise a profession or maintain employment where this does not prejudice her role as mother and homemaker. They stated that, according to Article 114, a husband may oppose his wife's activities outside the home, as long as he provides for her and has justified reasons. In the case of a controversy with respect to the foregoing, a judge shall decide. Article 255 confers primary responsibility on the husband to represent the children of the union and to administer their property. Article 317 provides that, by virtue of her sex, a woman may be excused from exercising certain forms of guardianship.

3. The petitioners reported that the constitutionality of these legal provisions had been challenged before the Guatemalan Court of Constitutionality in Case 84-92. In response, the Court had ruled that the distinctions were constitutional, as, *inter alia*, they provided juridical certainty in the allocation of roles within marriage. The petitioners requested that the Commission find the foregoing provisions of the Civil Code incompatible in abstracto with the guarantees set forth in Articles 1(1), 2, 17 and 24 of the American Convention.

[...]

IV. CONSIDERATIONS REGARDING THE MERITS

Initial considerations

28. At the outset, it is pertinent to note that, notwithstanding the presentation of various draft reform projects before the Guatemalan congressional commissions charged with pronouncing on such initiatives, as of the date of the present report, the relevant articles of the Civil Code continue in force as the law of the Republic of Guatemala. In brief, Article 109 provides that representation of the marital union corresponds to the husband, although both spouses have equal authority within the home.³ Article 110 stipulates that the husband owes certain duties of protection and assistance to the wife, while the latter has the special right and duty to care for minor children and the home.⁴ Article 113 sets forth that the wife may exercise a profession or pursue other responsibilities outside the home only insofar as this does not prejudice her responsibilities within it.⁵ Article 114 establishes that the husband may oppose the pursuit of his wife's activities outside the home where he provides adequately for maintenance of the home and has "sufficiently justified reasons." Where necessary, a judge shall resolve disputes in this regard.⁶ Article 115 states that representation of the marital union may be exercised by the wife where the husband fails to do so, particularly where he abandons the home, is imprisoned, or is otherwise absent.⁷ Article 131 states that the husband shall administer the marital property.⁸ Article 133 establishes exceptions to this rule on the same basis set forth in Article 115.⁹ Article 255 states that, where husband and wife exercise parental authority over minor children, the husband shall represent the latter and administer their goods.¹⁰ Article 317 establishes that specific classes of persons may be excused from exercising certain forms of custody, including, *inter alia*, women.¹¹

[...]

The right of María Eugenia Morales de Sierra to equal protection of and before the law

31. The right to equal protection of the law set forth in Article 24 of the American Convention requires that national legislation accord its protections without discrimination. Differences in treatment in otherwise similar circumstances are not necessarily discriminatory.¹³ A distinction which is based on "reasonable and objective criteria" may serve a legitimate state interest in conformity with the terms of Article 24.¹⁴ It may, in fact, be required to achieve justice or to protect persons requiring the application of special measures.¹⁵ A distinction based on reasonable and objective criteria (1) pursues a legitimate aim and (2) employs means which are proportional to the end sought.¹⁶

32. Pursuant to the status of Guatemala as a State Party to the Convention on the Elimination of All Forms of Discrimination against Women,¹⁷ and the terms of Article 29 of the American Convention,¹⁸ it must be noted that Article 15.1 of the former requires that States Parties shall ensure that women are accorded equality with men before the law. Article 15(2) specifies that women must be accorded the same legal capacity as men in civil matters, particularly with respect to concluding contracts and administering property, and the same opportunities to exercise that capacity. Discrimination against women as defined in this Convention is:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This definition, responding as it does to the specific causes and consequences of gender discrimination, covers forms of systemic disadvantage affecting women that prior standards may not have contemplated.

33. In the proceedings before the Commission, the State has not controverted that Articles 109, 110, 113, 114, 115, 131, 133, 255 and 317 of the Civil Code create distinctions between married women and married men which are based on sex. In fact, it has acknowledged that aspects of the challenged provisions are inconsistent with the equality and non-discrimination provisions of the Constitution, the American Convention and the Convention on the Elimination of All Forms of Discrimination against Women.

[...]

36. The Commission observes that the guarantees of equality and non-discrimination underpinning the American Convention and American Declaration of the Rights and Duties of Man reflect essential bases for the very concept of human rights. As the Inter-American Court has stated, these principles “are inherent in the idea of the oneness in dignity and worth of all human beings.”¹⁹ Statutory distinctions based on status criteria, such as, for example, race or sex, therefore necessarily give rise to heightened scrutiny. What the European Court and Commission have stated is also true for the Americas, that as “the advancement of the equality of the sexes is today a major goal,” ... “very weighty reasons would have to be put forward” to justify a distinction based solely on the ground of sex.²⁰

37. The gender-based distinctions under study have been upheld as a matter of domestic law essentially on the basis of the need for certainty and juridical security, the need to protect the marital home and children, respect for traditional Guatemalan values, and in certain cases, the need to protect women in their capacity as wives and mothers. However, the Court of Constitutionality made no effort to probe the validity of these assertions or to weigh alternative positions, and the Commission is not persuaded that the distinctions cited are even consistent with the aims articulated. For example, the fact that Article 109 excludes a married woman from representing the marital union, except in extreme circumstances, neither contributes to the orderly administration of justice, nor does it favor her protection or that of the home or children. To the contrary, it deprives a married woman of the legal capacity necessary to invoke the judicial protection which the orderly administration of justice and the American Convention require be made available to every person.

38. By requiring married women to depend on their husbands to represent the union—in this case María Eugenia Morales de Sierra—the terms of the Civil Code mandate a system in which the ability of approximately half the married population to act on a range of essential matters is subordinated to the will of the other half. The overarching effect of the challenged provisions is to deny married women legal autonomy.²¹ The fact that the Civil Code deprives María Eugenia Morales de Sierra, as a married woman, of legal capacities to which other Guatemalans are entitled leaves her rights vulnerable to violation without recourse.²²

39. In the instant case the Commission finds that the gender-based distinctions established in the challenged articles cannot be justified, and contravene the rights of María Eugenia Morales de Sierra set forth in Article 24. These restrictions are of immediate effect, arising simply by virtue of the fact that the cited provisions are in force. As a married woman, she is denied protections on the basis of her sex which married men and other Guatemalans are accorded. The provisions she challenges restrict, *inter alia*, her legal capacity, her access to resources, her ability to enter into certain kinds of contracts (relating, for example, to property held jointly with her husband), to administer such property, and to invoke administrative or judicial recourse. They have the further effect of reinforcing systemic disadvantages which impede the ability of the victim to exercise a host of other rights and freedoms.

The case of María Eugenia Morales de Sierra and rights of the family: equality of rights and balancing of responsibilities in marriage

40. Article 17(1) of the American Convention establishes rights pertaining to family life pursuant to the disposition that, as “the natural and fundamental group unit of society,” the family “is entitled to protection by society and the state.” The right to marry and found a family is subject to certain conditions of national law, although the limitations thereby introduced must not be so restrictive “that the very essence of the right is impaired.”²³ Article 17(4), which derives from Article 16(1) of the Universal Declaration of Human Rights, specifies that “States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities” in marriage and its dissolution. In this regard, Article 17(4) is the “concrete application” of the general principle of equal protection and non-discrimination of Article 24 to marriage.²⁴

41. In the case of Guatemala and other States Parties, the Convention on the Elimination of All Forms of Discrimination against Women specifies steps that must be taken to ensure substantive equality in family law and family relations. Pursuant to Article 16 of that Convention, States Parties are required to ensure, *inter alia*, “on the basis of equality between men and women,” the same rights and duties with respect to the exercise of custody or other types of guardianship of children; the “same personal rights ... to choose a family name, a profession and an occupation;” and the same rights with respect to the ownership, administration and disposition of property.

42. The petitioners have indicated that the cited articles of the Civil Code impede the ability of wife and husband to equally exercise their rights and fulfill their responsibilities in marriage. María Eugenia Morales de Sierra alleges that, although her family life is based on the principle of reciprocal respect, the fact that the law vests exclusive authority in her husband to represent the marital union and their minor child creates a disequilibrium in the weight of the authority exercised by each spouse within their marriage--an imbalance which may be perceived within the family, community and society. While the victim, as a parent, has the right and duty to protect the best interests of her minor child, the law strips her of the legal capacity she requires to do that.

43. As discussed above, the challenged articles of the Civil Code establish distinct roles for each spouse. The husband is responsible for sustaining the home financially, and the wife is responsible for caring for the home and children (Article 110). The wife may work outside the home only to the extent this does not prejudice her legally defined role within it (Article 113), in which case her husband has the right to oppose such activities (Article 114). The husband represents the marital union (Article 109), controls jointly held property (Article 131), represents the minor children, and administers their property (Article 255). The Court of Constitutionality characterized the State’s regulation of matrimony as

providing certainty and juridical security to each spouse, and defended the disposition of roles on the basis that the norms set forth preferences which are not discriminatory, but protective.

44. The Commission finds that, far from ensuring the “equality of rights and adequate balancing of responsibilities” within marriage, the cited provisions institutionalize imbalances in the rights and duties of the spouses. While Article 110 suggests a division of labor between a husband’s financial responsibilities and the wife’s domestic responsibilities, it must be noted that, pursuant to Article 111, a wife with a separate source of income is required to contribute to the maintenance of the household, or to fully support it if her husband is unable to do so. The fact that the law vests a series of legal capacities exclusively in the husband establishes a situation of de jure dependency for the wife and creates an insurmountable disequilibrium in the spousal authority within the marriage. Moreover, the dispositions of the Civil Code apply stereotyped notions of the roles of women and men which perpetuate de facto discrimination against women in the family sphere, and which have the further effect of impeding the ability of men to fully develop their roles within the marriage and family. The articles at issue create imbalances in family life, inhibiting the role of men with respect to the home and children, and in that sense depriving children of the full and equal attention of both parents. “A stable family is one which is based on principles of equity, justice and individual fulfillment for each member.”²⁵

45. In the case of Ms. Morales de Sierra, the Commission concludes that the challenged articles controvert the duty of the State to protect the family by mandating a regime which prevents the victim from exercising her rights and responsibilities within marriage on an equal footing with her spouse. The State has failed to take steps to ensure the equality of rights and balancing of responsibilities within marriage. Accordingly, in this case, the marital regime in effect is incompatible with the terms of Article 17(4) of the American Convention, read with reference to the requirements of Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women.

The right to privacy and the present case

46. Article 11(1) of the American Convention sets forth that every person has the right to have his or her honor and dignity recognized. Pursuant to Article 11(2): “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.” Article 11(3) provides that this right is to be protected by law. The requirements of Article 11 encom-

pass a range of factors pertaining to the dignity of the individual, including, for example, the ability to pursue the development of one's personality and aspirations, determine one's identity, and define one's personal relationships.²⁶

47. A principal objective of Article 11 is to protect individuals from arbitrary action by State authorities which infringes in the private sphere.²⁷ Of course, where State regulation of matters within that sphere is necessary to protect the rights of others, it may not only be justified, but required. The guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention, and is reasonable under the circumstances.²⁸

48. The petitioners claim that the cited articles of the Civil Code, particularly as they restrict María Eugenia Morales de Sierra's ability to exercise her profession and dispose of her property, constitute an arbitrary interference with her right to have her private life respected. In the proceedings generally, the victim has indicated that the cited provisions prevent her from exercising authority over basic aspects of her day-to-day life concerning her marriage, home, children and property. While she and her husband organize their home on the basis of mutual respect, her status in the family, community and society is conditioned by the attribution of authority to her husband to represent the marital union and their minor child. While their jointly held property has been obtained through mutual sacrifice, the law prevents her from administering it. Further, while her husband has never opposed her pursuit of her profession, the law authorizes him to do so at any moment. She notes that, although there are increasing opportunities for women to more fully incorporate themselves into the processes of national life and development, married women such as herself are continuously impeded by the fact that the law does not recognize them as having legal status equivalent to that enjoyed by other citizens.

49. The provisions in question have been upheld as a matter of domestic law on the basis that they serve to protect the family, in particular the children. However, no link has been shown between the conditioning of the right of married women to work on spousal approval, or the subordination of a wife's control of jointly held property to that of her husband and the effective protection of the family or children. In mandating these and other forms of subordination of a wife's role, the State deprives married women of their autonomy to select and pursue options for their personal development and support. This legislation, most specifically in the way it makes a woman's right to work dependent on the consent of her husband, denies women the equal right to seek employment and benefit from the increased self-determination this affords.

50. Whether or not the husband of the victim—in this case María Eugenia Morales de Sierra—opposes her exercise of her profession²⁹ is not decisive in this regard. The analysis turns on the fact that the legislation infringes on the victim’s personal sphere in a manner which cannot be justified. The mere fact that the husband of María Eugenia Morales de Sierra may oppose that she works, while she does not have the right to oppose this in his case, implies a discrimination. This discrimination has consequences from the point of view of her position in Guatemalan society, and reinforces cultural habits with respect to which the Commission has commented in its Report on the Status of Women in the Americas.³⁰ As a married woman, the law does not accord her the same rights or recognition as other citizens, and she cannot exercise the same freedoms they do in pursuing their aspirations. This situation has a harmful effect on public opinion in Guatemala, and on María Eugenia Morales de Sierra’s position and status within her family, community and society.

The obligation of the State to respect and guarantee the rights of María Eugenia Morales de Sierra without discrimination, and to adopt domestic legal measures

51. As is demonstrated in the foregoing analysis, the State of Guatemala has failed to fulfill its obligations under Article 1(1) of the American Convention to “respect the rights and freedoms recognized [t]herein and to ensure to all persons subject to [its] jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of ... [*inter alia*] sex...” “Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.”³¹ Article 1 imposes both negative and positive obligations on the State in pursuing the objective of guaranteeing rights which are practical and effective.

52. Articles 109, 110, 113, 114, 115, 131, 133, 255 and 317 have a continuous and direct effect on the victim in this case, in contravening her right to equal protection and to be free from discrimination, in failing to provide protections to ensure that her rights and responsibilities in marriage are equal to and balanced with those of her spouse, and in failing to uphold her right to respect for her dignity and private life. A person who enjoys the equal protection of and recognition before the law is empowered to act to ensure other rights in the face of public or private acts. Conversely, gender-discrimination operates to impair or nullify the ability of women to freely and fully exercise their rights, and gives rise to an array of consequences.³² The inter-American system has recognized, for example, that gender violence is “a manifestation of the historically unequal power rela-

tions between women and men.”³³ “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...”³⁴ De jure or de facto economic subordination, in turn, “forces many women to stay in violent relationships.”³⁵

53. Recognizing that the defense and protection of human rights necessarily rests first and foremost with the domestic system, Article 2 of the Convention provides that States Parties shall adopt the legislative and other measures necessary to give effect to any right or freedom not already ensured as a matter of domestic law and practice. In the instant case, the State has failed to take the legislative action necessary to modify, repeal or definitively leave without effect Articles 109, 110, 113, 114, 115, 131, 133, 255 and 317 which discriminate against the victim and other married women in violation of Articles 24, 17 and 11 of the American Convention. When the articles at issue were challenged as unconstitutional, the State, acting through its Court of Constitutionality, failed to respond in conformity with the norms of the American Convention.³⁶ Although relevant national and international authorities have identified these articles as incompatible with the State’s obligations under national and international law, they remain the law of the land.³⁷

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 failure of the State to honor the obligations set forth in Articles 1 and 2 of the Convention generates liability, pursuant to the principles of international responsibility, for all acts, public and private, committed pursuant to the discrimination effectuated against the victim in violation of the rights recognized in the American Convention and other applicable treaties. Pursuant to those same principles, the State of Guatemala is obliged to repair the consequences of the violations established, including through measures to restore the rights of María Eugenia Morales de Sierra to the full extent possible, and to provide a just indemnity for the harm she has sustained. Measures of reparation are meant to provide a victim with an effective remedy, with the essential objective of providing full restitution for the injury suffered.³⁸

[...]

VI. CONCLUSIONS

83. On the basis of the foregoing analysis and conclusions, the Commission finds that the recommendations issued in Report 86/98 have been complied with in important

measure. It reiterates its conclusion that the State of Guatemala has not discharged its responsibility for having violated the rights of María Eugenia Morales de Sierra to equal protection, respect for family life, and respect for private life established in Articles 24, 17, and 11 of the American Convention on Human Rights in relation to the heading and paragraph one of Article 110 and paragraph four of Article 317. The Commission accordingly finds the State responsible for having failed to uphold its Article 1 obligation to respect and ensure those rights under the Convention, as well as its Article 2 obligation to adopt the legislative and other measures necessary to give effect to those rights of the victim.

[...]

ENDNOTES

- 3 Article 109 of the Civil Code establishes: "(Representation of the marital union). The husband shall represent the marital union, but both spouses shall enjoy equal authority and considerations in the home; they shall establish their place of residence by common agreement and shall arrange everything concerning the education and establishment of their children, as well as the family budget."
- 4 Article 110 of the Civil Code establishes: "(Protection of the wife). The husband must provide protection and assistance to his wife and is obliged to supply everything needed to sustain the home in accordance with his economic means. The wife has the special right and duty to attend to and look after her children while they are minors and to manage the household chores."
- 5 Article 113 of the Civil Code establishes: "(Wife employed outside the home). The wife may perform work, (38) exercise a profession, business, occupation, or trade, (39) provided that her activity does not prejudice the interests and care of the children or other responsibilities in the home." [Notes 38 and 39 refer to articles of the Constitution and Commercial Code].
- 6 Article 114 of the Civil Code establishes: "The husband may object to his wife pursuing activities outside the home, so long as he provides adequately for maintenance of the home and has sufficiently justified grounds for objection. The judge shall rule outright on the issue."
- 7 Article 115 of the Civil Code establishes: "(Representation by the wife). Representation of the marital union shall be exercised by the wife should the husband fail to do so for any reason and particularly when : 1) If the husband is legally deprived of that right; 2) If the husband abandons the home of his own free will, or is declared to be absent; and 3) If the husband is sentenced to imprisonment and for the duration of such imprisonment."
- 8 Article 131 of the Civil Code establishes: "Under the system of absolute joint ownership [comunidad absoluta] by husband and wife or community of property acquired during marriage [comunidad de gananciales], the husband shall administer the marital property, exercising powers that shall not exceed the limits of normal administration. Each spouse or common-law spouse shall dispose freely of goods registered under his or her name in the public registries, without prejudice to the obligation to account to the other for any

disposal of common property.”

- 9 Article 133 of the Civil Code establishes: “(Administration by the wife). Administration of the marital property shall be transferred to the wife in the instances set forth in Article 115, with the same powers, restrictions, and responsibilities as those established in the foregoing articles.”
- 10 Article 255 of the Civil Code establishes: “Where husband and wife, or common-law spouses, jointly exercise parental authority over minor children, the husband shall represent the minor or incompetent children and administer their goods.”
- 11 Article 317 of the Civil Code establishes: “(Exemption). The following may be excused from exercising custody and guardianship: 1) Those already exercising another custody or guardianship; 2) Persons over sixty years of age; 3) Those who have three or more children under their parental authority; 4) Women; 5) Persons of low-income for whom this responsibility would threaten their means of subsistence; 6) Persons prevented from exercising this responsibility due to chronic illness; and 7) Those who have to be absent from the country for over one year.”
- 13 See e.g., Eur. Ct. H.R., *Belgian Linguistics Case*, Ser. A No. 6, p. 34, para. 10.
- 14 See generally, *id.*; U.N.H.R. Committee, *Broeks v. The Netherlands*, Comm. No. 172/1984, para. 13, *Zwaan de Vries v. The Netherlands*, Comm. No. 182/1984, para. 13.
- 15 See e.g., I/A Court H.R., *Advisory Opinion OC-4/84, “Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,”* January 19, 1984, para. 56.
- 16 See e.g. *Belgian Linguistics Case*, *supra*.
- 17 Guatemala ratified the Convention on August 12, 1982.
- 18 See I/A Court H.R., “Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), *Advisory Opinion OC-1/82 of September 24, 1982*. Series A No. 1.
- 19 *Advisory Opinion OC-4, supra*, para. 55.
- 20 See e.g., Eur. Ct. H.R., *Karlheinz Schmidt v. Germany*, Ser. A No. 291-B, 18 July 1994, para 24, citing, *Schuler-Zraggen v. Switzerland*, Ser. A No. 263, 24 June 1993, para. 67, *Burghartz v. Switzerland*, Ser. A No. 280-B, 22 Feb. 1994, para. 27.
- 21 See generally, Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation 21, “Equality in marriage and family relations,”* U.N. Doc. HRI/GEN/1/Rev.1 at 90 (1994), para. 7.
- 22 See generally, U.N.H.R. Committee, *Ato del Avellanal v. Peru*, Comm. No. 202/1986, para. 10.2.
- 23 Eur. Ct. H.R., *Rees v. United Kingdom*, Ser. A No. 106, 17 Oct. 1986, para. 50.
- 24 See *OC-4/84*, para. 66.
- 25 CEDAW, *General Recommendation 21, supra*, para. 24.
- 26 See, *inter alia*, Eur. Ct. H.R., *Gaskin v. United Kingdom*, Ser. A No. 160 (addressing interest of applicant in accessing records concerning childhood and early development); *Niemetz v. Germany*, Ser. A No. 251-B, para. 29 (noting that respect for private life includes right to “establish and develop relationships,” both personal and professional.)
- 27 See generally, Eur. Ct. H.R., *Kroon v. The Netherlands*, Ser. A No. 297-C, para. 31 (1994).
- 28 See U.N.H.R. Committee, *Toonan v. Australia*, Comm. No. 488/1992, para. 8.3, citing, *General Comment*

- 16[32] on Article 17 [of the ICCPR], Doc. CCPR/C/21/Rev.1 (19 May 1989).
- 29 As noted above, in the present case the victim's husband has not opposed the exercise of her profession.
- 30 Published in, Report of the IACHR 1997, OEA/Ser.LV/II.98 doc. 7 rev., 13 April 1998.
- 31 Velásquez Rodríguez Case, para. 164; Godínez Cruz Case, para. 173.
- 32 See generally, Report on the Status of Women, *supra*, at p. 1018-1020.
- 33 See, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), preamble, Art. 7.e [ratified by Guatemala April 4, 1995].
- 34 CEDAW, General Recom. 19, "Violence against women," U.N. Doc. HR/INGEN/11/Rev.1, p. 84, at para. 11 (1994); see generally, Convention of Belém do Pará, Art. 6(b).
- 35 General Recom. 19, *supra*, para. 23.
- 36 See, Report N° 43/96, Case 11.430, Mexico, OEA/Ser.LV/II.95, Doc. 7 rev., Mar. 14, 1997, para. 102.
- 37 See Report 28/98, *supra*, paras. 6, 7 23 (recording position of State itself that articles in question were not in conformity with national and international obligations); CEDAW, Thirteenth Sess., A/49/38, Sessional/Annual Rpt [consid. of report on Guatemala], paras. 44, 48, 70-71, 78-79, 81 (expressing Committee's concern with respect to "highly discriminatory provisions" of Code restricting or violating fundamental rights.)
- 38 Velásquez Rodríguez Case, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990, Series C No. 9, para. 27.

*Inter-American Commission
on Human Rights*

*Ana, Beatriz y Celia González Pérez
v. Mexico*

Case N° 11.565

Report N° 53/01

April 4, 2001



I. SUMMARY

1. On January 16, 1996, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the IACHR”) received a petition filed by the Center for Justice and International Law (CEJIL, hereinafter “the petitioners”). The petition alleges the international responsibility of the United Mexican States (hereinafter “the State”) for the illegal detention, rape, and torture of the Tzeltal native sisters Ana, Beatriz, and Celia González Pérez, as well as the subsequent failure to investigate and provide redress for those acts. The petitioners allege violation of several rights enshrined in the American Convention on Human Rights (hereinafter the “American Convention”): right to humane treatment (Article 5); right to personal liberty (Article 7); right to a fair trial (Article 8); right to privacy (Article 11); rights of the child (Article 19); and right to judicial protection (Article 25).

2. According to the petition, on June 4, 1994 a group of military personnel detained in the state of Chiapas, Mexico, the sisters Ana, Beatriz, and Celia González Pérez and their mother Delia Pérez de González, in order to interrogate them; the four women were held for approximately two hours. The petitioners allege that the three sisters were separated from their mother, beaten, and raped several times by the military personnel; that on June 30, 1994 a petition was filed with the Federal Public Prosecutor’s Office (Office of the Attorney General of the Republic or “PGR”) based on a gynecological examination; that same examination was corroborated before the said institution by the testimony of Ana and Beatriz, the two older sisters; that the record was transferred to the Office of the Public Prosecutor for Military Justice in September 1994; and that the latter decided finally to close the record for failure of the sisters to come forward to testify again and to undergo an expert gynecological examination. The petitioners assert that the State failed in its duty to investigate the facts denounced, punish those responsible, and provide redress for the violations.

[...]

IV. ANALYSIS

A. Right to personal liberty (Article 7 of the American Convention)

13. Article 7(1) of the American Convention guarantees every person the right to personal liberty and security. The petition alleges that on June 4, 1994, the sisters Ana, Beatriz, and Celia González Pérez, and their mother Delia Pérez de González were “illegally

detained by members of the Mexican Federal Army” at the military checkpoint located on the road to the Jalisco communal lands, Altamirano municipality in Chiapas State, at approximately 2:30 p.m., as they were returning from a neighboring town to which they had gone to sell their agricultural produce.⁵

14. They add that at the time of their detention, “the military personnel started to harass and torture them to make them confess their membership in the EZLN ... since they belong to the Tzeltal ethnic group their knowledge of Spanish is very limited, owing to which they could not respond to the questions that were put to them.”⁶ According to the report, the military officers separated the sisters from their mother at that time and led them to a wooden room when the interrogation allegedly continued.

15. The petitioners maintain that the threats continued in that room, with the participation of a high-ranking officer, who had ordered other soldiers to enter and hold the women. The petition states that the three sisters were then repeatedly raped by the military officers there, until 4:30 p.m. After this, the mother was allowed to enter the room and the official, with the assistance of an interpreter, “threatened the victims and stated that if they reported the incident, they would be detained again and imprisoned at Cerro Hueco or even killed.”⁷

[...]

B. Right to humane treatment and privacy (Articles 5 and 11 of the American Convention)

28. An analysis must now be done of the information pertaining to what was said to have taken place in the closed room near the checkpoint where the Tzeltal sisters were detained in Chiapas, based on the applicable provisions of the American Convention.

[...]

32. The Commission will now discuss the events related by the petitioners and borne out in documents that were not disputed by the Mexican State. The IACHR has ascertained that on June 29, 1994, Dr. Guadalupe Peña Millán, a certified medical practitioner, did a gynecological examination of each of the three sisters and noted that signs of rape were evident, more than 20 days after the facts were reported. This medical evidence was included with the complaint filed on June 30, 1994 with the PGR’s office in San Cristóbal de las Casas, Chiapas. On August 30, 1994, Ana and Beatriz González Pérez

confirmed and explained their complaint before this authority as part of Preliminary Investigation 64/94 that had been opened on the basis of the complaint.

33. The medical report, which was not disputed by the Mexican State, is dated June 29, 1994, and bears the signature of Dr. Guadalupe Peña Millán, whose professional identification number is 1182409, and has been duly registered. She states that she “is available to provide any clarification.” The medical report provides a detailed description of the medical examination done of the three sisters, as well as of the circumstances surrounding the case. In that regard, Dr. Peña Millán explains that the women: “simultaneously received emotional support first and three hours later were sent to the medical clinic, and, with the assistance of a translator, they were told the reasons for the medical check and asked whether they wanted it done. They were also given a detailed description of what the check would entail, and they confirmed that they did want it.”

[...]

38. In the view of the IACHR, the document summarized above contains clear and detailed information, and shows that an in-depth professional examination was done of the three victims involved in this case. The medical evidence was presented in a timely fashion and in the manner required. Despite this, it was not challenged or even considered within the framework of legally valid proceedings in Mexico. Although the burden of proof lay with the Mexican State in terms of the processing of this case by the Inter-American Commission, the Mexican State failed to meet its obligation to disprove the allegations made in a serious and well-founded manner. The Inter-American Commission therefore lends complete credence to the medical certificate issued by Dr. Guadalupe Peña Millán on June 29, 1994 in San Cristóbal de las Casas, Chiapas.

39. The United Nations Commission on Human Rights recently defined a series of principles that must be taken into account by medical professionals in investigating reports related to torture.¹⁸ According to these principles, the conduct of doctors should, at all times, be in keeping with “the strictest ethical guidelines” and the consent of the person to be examined should be obtained. Examinations shall take place in accordance with medical practices, and “never in the presence of security agents or other government officials.” The “reliable report” to be prepared immediately by medical experts should include, at a minimum, the following information:

- i) Circumstances of the interview: name of the subject and name affiliation of those present at the examination; the exact time and date; the location, nature and address of the institution (including, where appropriate, the room) where the ex-

amination is being conducted (e.g. detention center, clinic, house, etc.); the circumstances of the subject at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanor of those accompanying the prisoner, threatening statements to the examiner, etc.); and any other relevant factor;

ii) History: a detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;

iii) Physical and psychological examination: records of all physical and psychological findings on clinical examination including appropriate diagnostic tests and, where possible, color photographs of all injuries;

iv) Opinion: an interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill treatment. A recommendation for any necessary medical and psychological treatment and/or further examination should be given;

v) Authorship: the report should clearly identify those carrying out the examination and should be signed.

40. The medical reports, the parameters of which are defined by the United Nations, must be confidential and must be delivered to the alleged victim or representative appointed by that person. It adds "the report should also be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment."

41. The medical examination done of the González Pérez sisters falls within the parameters established by the United Nations. Indeed, it relates the circumstances under which the interview took place with the level of detail necessary, with data that is sufficiently precise and consistent; it includes the professional interpretation regarding the possible reasons for the injuries noted, contains a recommendation regarding appropriate treatment, and identifies the doctor, who indicates that she is available to provide any clarification necessary.

42. The IACHR establishes, on the basis of the unchallenged report and other evidence available, that Ana, Beatriz, and Celia González Pérez were subjected to illegal interrogation, accompanied by physical abuse that included the rape of the three sisters. These acts were perpetrated on June 4, 1994 in Altamirano, Chiapas, by a group of military officers during the time that the sisters were illegally deprived of their liberty. The context in which

these events took place also leads us to conclude that the acts were committed in a bid to intimidate the three women because of their alleged ties with the EZLN. Furthermore, the IACHR establishes that, as a result of the humiliation created by this abuse, the González Pérez sisters and their mother had to flee their habitual residence and their community.

43. Article 5(1) of the American Convention states that “every person has the right to have his physical, mental, and moral integrity respected.” Article 5(2) of that international instrument clearly prohibits torture and guarantees respect for the human dignity of persons who have been deprived of their liberty. The American Convention to Prevent and Punish the Crime of Torture defines this aberrant practice:

Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

44. Furthermore, Article 11 of the American Convention guarantees every individual the right to respect of this privacy and recognition of his dignity, and states that “no one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”

45. Sexual violence committed by members of the security forces of a State against the civilian population constitutes, in any situation, a serious violation of the human rights protected under Articles 5 and 11 of the American Convention, as well as the guidelines of international humanitarian law. In fact, in its final verdict in the Čelebići case, the International Criminal Tribunal for the former Yugoslavia (ICTY) expressly stated that “there can be no doubt that rape and other forms of sexual assault are expressly prohibited under international law.”¹⁹ The United Nations Special Rapporteur on violence against women explains that “rape during warfare has also been used to terrorize populations and induce civilians to flee their homes and villages.” She also adds that “the consequences of sexual violence are physically, emotionally and psychologically devastating for women victims.”²⁰

46. The IACHR points out that the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention) guarantees all women the right to a life free of violence.²¹

47. In international law, rape is a form of torture under certain circumstances. The IACHR confirmed this in the case of a woman who was abused and harassed for her alleged participation in an armed dissident group:

Rape produces physical and mental suffering for the victim. In addition to the violence suffered at the time that it is perpetrated, victims usually sustain injuries and in some instances become pregnant. Being the object of this kind of abuse also produces psychological trauma resulting from their humiliation on the one hand and victimization on the other, and from the condemnation of members of their community if they report the mistreatment to which they were subjected.

Raquel Mejía was raped in order to inflict personal punishment on her and to intimidate her. Her testimony reveals that the person who sexually abused her told her that both she and her husband were wanted for subversive activities...²²

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.²³ 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.²⁴

49. The concept has been developed in recent years, particularly in cases referred to the International Criminal Tribunal for the former Yugoslavia. In the Furundžija case, this tribunal stated:

As evidenced by international case law, the reports of the United Nations Human Rights Committee and the United Nations Committee against Torture, those of the Special Rapporteur and the public statements of the European Committee for the Prevention of Torture, this vicious and ignominious practice can take on various forms. International case law, and the reports of the United Nations Special Rapporteur evince a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law. Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing, or humiliating the victim, or obtaining information or a confession from the victim or a third person.²⁵

50. The facts established here are particularly serious, since one of the women raped was a minor, and as such was entitled to special protection under the American Convention. Furthermore, the rape took place while the three women were illegally detained, a few months after the armed rebellion of the EZLN, against a backdrop of harassment of persons considered to be “zapatistas,” in an area where this armed dissident group exerted influence.

51. Ana, Beatriz, and Celia González Pérez were sexually assaulted as part of an illegal interrogation conducted by military officers in a zone of armed conflict and were accused of collaborating with the EZLN. The Inter-American Commission, within the context of this case and the pertinent analysis, also lends credence to the reports of death threats and additional acts of torture reported by the aggressors when they released them, since these acts were reported and never investigated in accordance with due process in Mexico. Given the manner in which they were assaulted, the accusations made against them, and the serious threats, it is reasonable to believe that the military officers wanted to humiliate and punish the women for their alleged links with the rebels.²⁶

52. In the view of the Inter-American Commission, abuses targeting the physical, mental, and moral integrity of the three Tzeltal sisters committed by agents of the Mexican State constitute torture.²⁷ Furthermore, the events described herein represent a violation of the private lives of the four women and their families and an illegal attack on their privacy, which led them to flee their community in a situation of fear, shame, and humiliation.

53. Based on international human rights case law, under certain circumstances, the anguish and suffering imposed on the close relatives of the victims of serious human rights violations also constitute a violation of the right of these persons to humane treatment.²⁸ In this case, the IACHR holds the view that the treatment extended to Delia Pérez de González, who had to stand by helplessly and witness the abuse of her three daughters by members of the Mexican Armed Forces and then to experience, along with them, ostracism by her community, constitutes a form of humiliation and degradation that is a violation of the right to humane treatment guaranteed by the American Convention.

[...]

C. Rights of the child (Article 19 of the American Convention)

[...]

56. Article 19 of the American Convention guarantees that every child has “the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” The Inter-American Court has determined that “both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris on the protection of children” that serves “to determine the content and scope of the general provisions contained in Article 19 of the American Convention.”²⁹

57. The Convention on the Rights of the Child was in effect in Mexico on the date on which the events related to this case occurred.³⁰ Article 2 of this instrument states:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

58. The aforementioned instrument also states that “no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation,” and that “the child has the right to the protection of the law against such interference or attacks” (Article 16). The States parties to the Convention on the Rights of the Child undertake to ensure that no child is submitted to torture or other cruel, inhuman, or degrading treatment or punishment or is illegally or arbitrarily deprived of his liberty and, at all times, “is treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age;” and that in accordance with the obligations assumed under international humanitarian law, “the States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict” (Article 37).

59. The Committee on the Rights of the Child recommended that the Mexican State “should intensify its action against all violence resulting in cases of ill-treatment of children, in particular when committed by members of the police forces and security services and the military. The State party should ensure that cases of crimes committed against children by members of the armed forces or the police are tried before civilian courts.”³¹

60. Celia González Pérez was 16 years old at the time that the acts described in this report took place. In the view of the Inter-American Commission, the illegal detention, followed by the physical abuse and rape of the adolescent, as well as the subsequent and continuing impunity of the perpetrators, is a clear violation of the duty of the Mexican State to accord her the special protection guaranteed under the American Convention and other applicable international instruments.

[...]

D. The right to a fair trial and to judicial protection (Articles 8 and 25 of the American Convention) in the investigation of the acts of torture (Articles 6 and 8 of the American Convention to Prevent and Punish Torture)

[...]

63. The victims in this case reported the acts of torture and rape, which allegedly occurred while they were illegally detained, and which are serious offenses in Mexico, to the Office of the Attorney General of the Republic, and described the violation of the human rights guaranteed in the American Convention. The report, which is accompanied by a certificate issued by a gynecologist, was confirmed and expanded upon before the PGR by Ana and Beatriz González Pérez.³³

64. The petitioners add that this medical examination “indicates that sexual intercourse had taken place at the time of the report, and that the rape took place amidst great commotion.” This is borne out by “the statement of at least seven soldiers, which corroborated the account provided by the victims, since they explicitly or tacitly admitted that they had engaged in acts of violence against the sisters and their family.”³⁴

65. On September 2, 1994, the PGR decided to turn over Preliminary Investigation 64/94 to the Office of the Public Prosecutor for Military Justice “because it did not have jurisdiction over the matter.” The representative of the González Pérez sisters in Mexico were opposed to the use of the military court since, in their view, “in this case, the military court is synonymous with privilege, impunity, and partiality, and they would have to subject themselves to a military legal system after being sexually assaulted by elements of the same group.” To demonstrate the partiality of the military courts in this instance, they cite Bulletin N° 38 issued on July 3 by the Department of National Defense (SEDENA), in which this authority “vigorously denied the false charges made against military personnel, and reserved the right to take legal action against persons or institutions who slander our institution.”³⁵

[...]

69. The State has not disputed the filing of the complaint in Mexico or the medical evidence that the victims enclosed therewith. The Inter-American Commission notes that, in light of the serious evidence submitted to the authorities, the Mexican State had an obligation to undertake an prompt, impartial, and effective investigation, in accordance with the guidelines stipulated in its own domestic legislation and the international obligations freely assumed by this State. The information available in this case file reveals that the authorities in the Office of the Attorney General of Mexico transferred their competence to the Office of the Public Prosecutor for Military Justice, which in turn completely ignored the evidence submitted by the victims and proceeded to order another gynecological examination for them. Finally, when the victims refused to undergo another examination as part of the military investigation,³⁸ the PGJM closed the case on September 25, 1995, based on the evidence provided by persons living in the area and the “lack of interest, from a legal standpoint, of the victims and their representatives,” because “ the criminal evidence is not in any way credible, nor is the probable liability of the military officers.”

70. With regard the State’s allegation of lack of interest on the part of the representatives of the victims, CEJIL maintains that the medical examination was done immediately after the events took place, and that the results were submitted to the Office of the Attorney General and subsequently confirmed through a statement provided by the victims. Based on this, the petitioners allege that evidence exists of the infractions that were committed, and that the failure to respond was due to the difficulty in finding the women, who, as a result of the events, were forced to leave their communities and families, and were rejected by the indigenous culture, in accordance with its customs.

[...]

72. The Inter-American Commission must determine whether the actions undertaken by the Mexican courts in this case meet the human rights guidelines that guarantee the right to a fair trial. Article 8(1) of the American Convention guarantees each person the right “to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal” in the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

73. This guideline is compatible with Article 25 of the American Convention, which states:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.

74. The Inter-American Court has indicated that pursuant to Articles 8 and 25 of the American Convention, the States parties have an obligation to provide effective judicial remedies to victims of human rights violations and to support them in accordance with the rules of due process. This is included in the general obligation of these States to guarantee the free and fair exercise of rights recognized under the Convention with respect to each person under their jurisdiction.⁴¹

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.⁴² Consequently, the IACHR holds the view that the investigating authorities should analyze the circumstances surrounding the case and all available elements such as statements, circumstantial evidence, presumption, and other legal elements. 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.

76. In the case of the González Pérez sisters, it has been noted that the medical examination was duly conducted; however, because of an unreasonable and arbitrary decision of the Mexican authorities, it was not considered. The document quoted in this report serves as solid evidence, and is certainly more convincing than the documentation usually available to victims and their representatives in rape cases, for the reasons explained above.

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 effec-

tive remedy includes, in addition to the payment of compensation where appropriate, an investigation that permits identification and punishment of the guilty parties. In analyzing a case similar to the one described in this report, this court added:

The requirement related to a complete and effective investigation of a complaint alleging the rape of an individual while in detention by State agents also calls for an examination of the victim, with due consideration being shown by medical professionals specializing in this area whose impartiality is not affected by the instructions issued by the Office of the Public Prosecutor regarding the scope of the investigation.⁴³

78. The United Nations Commission on Human Rights has formulated a series of principles, mentioned above, on the manner in which an investigation into acts of torture should be conducted. Particularly relevant to this analysis is the principle stipulating that “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.”⁴⁴ Also, it should be noted that point 5(f) of the Draft Declaration of the Independence of Justice (known as the Singhvi Declaration) states that the competence of military courts shall be limited to military offenses.⁴⁵

[...]

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,” as a result of which it is “impossible to conduct the investigation, obtain the information, and provide the remedy that is allegedly available,” and what occurs is *de facto* impunity, which “has a corrosive effect on the rule of law and violates the principles of the American Convention.”⁴⁸ In particular, the IACHR has determined that, as a result of its nature and structure, military courts do not meet the requirements of independence and impartiality imposed under Article 8(1) of the American Convention.⁴⁹ In that regard, the Inter-American Court ruled:

In a democratic State governed by the rule of law, the scope of authority of criminal military courts must apply on a limited and exceptional basis and be aimed at the protection of special legal interests that are tied to the function assigned by law to the military forces. Consequently, the prosecution of civilians cannot fall under military jurisdiction and military officers must be prosecuted for the commission of only those offenses and infractions that, because of their nature, have an adverse effect on the assets of the military.⁵⁰

82. The acts of abuse committed by the members of the Armed Forces that deprived the four victims of their liberty and the rape of the González Pérez sisters, one of whom was a minor at the time of the incident, cannot in any way be considered acts that affect the legal assets of the military, nor does this case pertain to offenses committed while military officers were discharging legitimate functions entrusted to them under Mexican legislation, since, as has been noted, this was a chain of acts of violation that began with the arbitrary detention of the four women. In other words, even if there was no evidence of common offenses that constitute human rights violations (and this is not the case here), there is no link to an activity by the Armed Forces that can justify the involvement of the military courts. The Inter-American Convention stresses that torture in all its forms is categorically prohibited by international law,⁵¹ and, for this reason, the investigation into the facts related to this case by the military courts is completely inappropriate.

83. The American Convention imposes on States the obligation to prevent, investigate, identify, and sanction the perpetrators of and accessories to human rights violations. As the Inter-American Court has indicated:

Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, *inter alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered. 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."⁵²

84. Because of the obligations mentioned above, the State has an obligation to investigate human rights violations, prosecute those responsible, compensate victims, and avoid impunity. The Inter-American Court has indicated in this regard that the State must combat impunity, since this encourages the chronic repetition of human rights violations and strips the victims and relatives of the ability to defend themselves.⁵³

85. In the case under analysis, the Inter-American Commission holds the view that the State has failed to fulfill its obligation related to guarantees under Article 1(1) of the American Convention, which establishes the obligation of the States parties to guarantee the exercise of the rights and freedoms recognized in that instrument with respect to persons under their jurisdiction. This obligation includes the duty to organize the government apparatus, and, in general, all structures through which State power is exercised, in such a way that they are capable of ensuring the full and free exercise of human rights in a legal context. As a result of this obligation, the States parties have a legal duty to

prevent, investigate, and sanction the violation of all rights protected under the American Convention.⁵⁴ The Inter-American Court has maintained that:

If the State apparatus allows this violation to go unpunished and fails to re-establish, insofar as possible, the full exercise by the victim of his rights, then it can be said to have failed in its duty to guarantee the free and full exercise of rights by persons under its jurisdiction.⁵⁵

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.”⁵⁶

[...]

88. This case is characterized by complete impunity, since, more than six years after the date of the human rights violations established herein were committed and reported, the State has failed to fulfill its duty to prosecute and sanction those responsible for violation of the right of the González Pérez family to humane treatment, and has not provided compensation for the injuries or loss caused as a result of these violations. On the contrary, the investigation was transferred to the military courts, which clearly has no competence with respect to the matter and lacks the impartiality necessary to establish the facts in accordance with due process.

[...]

VI. CONCLUSIONS

94. In this report, the Inter-American Commission has assessed all the information available in the case file based on the human rights provisions of the inter-American system and other applicable instruments, case-law, and legal doctrine, in order to make a decision on the merits of the matter. The IACHR therefore ratifies its conclusions in that the Mexican State violated the following rights of Delia Pérez de González and her daughters Ana, Beatriz, and Celia González Pérez, which are enshrined in the American Convention: the right to personal liberty (Article 7); the right to humane treatment and to privacy (Articles 5 and 11); the right to a fair trial and to judicial protection (Articles 8 and 25); and, in the case of Celia González Pérez, the rights of the child (Article 19); all in keeping

with the general obligation set forth in Article 1(1) of that international instrument to respect and guarantee rights. The Inter-American Commission also establishes that the Mexican State is responsible for violation of Article 8 of the Inter-American Convention to Prevent and Punish Torture.

95. The four victims in this case are members of the Tzeltal community in Mexico. When addressing the general situation of human rights in that country, the IACHR reminded the Mexican State of its obligation to respect indigenous cultures and it specifically alluded to the impact suffered by those communities in the state of Chiapas.⁶² In the instant case, the Inter-American Commission highlights that the pain and humiliation suffered by the women was aggravated by their condition of members of an indigenous group. First of all, because of their lack of knowledge of the language of their aggressors and of the other authorities; and also because they were repudiated by their own community as a consequence of the violations established herein.

[...]

ENDNOTES

- 5 Correspondence from the petitioners dated January 16, 1996, page 1.
- 6 Idem
- 7 Idem, page 2.
- 18 United Nations, *Torture and other cruel, inhuman or degrading treatment*. Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. Annex, E/CN.4/RES/2000/43, April 20, 2000.
- 19 Case N° IT-96-21 T, Ruling, para. 476, November 16, 1998. Taken from Louis Henkin et al, Human Rights. Foundation Press, New York, 1999, pages 380 and 381.
- 20 United Nations, *Report submitted by Mrs. Radhika Coomaraswamy, Special Rapporteur on violence against women, including its causes and consequences, in accordance with Resolution 1997/44 of the Commission*, E/CN.4/1998/54, January 26, 1998, paras 13 and 14. An article recently published by Pace University states: Rape is not a novel concept particular to our time. Women have been subjected to various forms of sexual assault in times of peace and in times of war, since time immemorial. In efforts to demoralize and humiliate the enemy, these assaults have occurred with increasing frequency in recent years, especially in internal conflicts, where women are targeted because of their affiliation with the opposition.... Samantha I. Ryan, From the furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crimes, Pace International Law Review, Pace University School of Law, Fall 1999, page 447.
- 21 Mexico signed the Belém do Pará Convention on June 10, 1994 (six days after the events related to this case were confirmed) and deposited its instrument of ratification on November 12, 1998. Article 4 of this

Convention states that “every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments.” These rights include, among others:

The right to have her physical, mental and moral integrity respected; the right to personal liberty and security; the right not to be subjected to torture; the right to have the inherent dignity of her person respected and her family protected; and the right to simple and prompt recourse to a competent court for protection against acts that violate her rights.

- 22 IACHR, Report 5/96 cited above, pages 199 and 200.
- 23 United Nations, E/CN/4/1986/15, paras. 119 and 431.
- 24 European Court of Human Rights, *Aydin v. Turkey*, (57/1996/676/866), Ruling of September 25, 1997, para. 83.
- 25 ICTY, *Prosecutor v. Anto Furudzija*, ruling of December 10, 1998, para. 163. This judicial decision was confirmed in the ICTY Court of Appeals by a ruling of July 21, 2000.
- 26 In that regard, the report of the Special Rapporteur states the following:
Perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation. It is a battle among men fought over the bodies of women. United Nations, E/CN.4/1998/54 cited above, para. 13.
- 27 In a recent decision, the Inter-American Court explains:
According to international standards related to protection, torture can be perpetrated not only through the exercise of physical violence, but also through acts that cause acute physical, mental, or moral suffering for the victim.
Both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Inter-American Convention on that topic cover that possibility. In order to address the right to humane treatment in clear terms, the latter of those two instruments makes express reference to the physical and moral integrity of individuals.
Inter-American Court, Cantoral Benavides Case, Judgment of August 18, 2000, paras. 100 and 101.
- 28 In the case of the “street children of Guatemala, the Inter-American Court established that the victims had been kidnapped, tortured, and assassinated by State agents, who, in addition, abandoned their abused bodies to the elements. Consequently, the Court determined that “the manner in which the remains of the victims were treated, which were sacred to their relatives and to their mothers, constituted a form of cruel and inhuman treatment for them.” Inter-American Court, Case of Villagrán Morales et al., cited above, para. 174. In the decision, the Inter-American Court cites its own precedent in the case of Blake (Judgment of January 24, 1998, para. 115) and other decisions of the European Court of Human Rights and the United Nations Committee on Human Rights.
- 29 Inter-American Court, Villágran Morales case cited above, paras. 194-196.
- 30 Mexico deposited the instrument of ratification for the Convention on the Rights of the Child on September 21, 1990.

- 31 United Nations, Concluding observations of the Committee on the Rights of the Child: Mexico. CRC/C/15/Add. 13, February 7, 1994, para. 17. The Committee also recommended to the authorities that that State allocate resources to children, " particularly children living and/or working in the streets, children belonging to minority groups or indigenous communities and other vulnerable children." (para. 16)
- 33 The case was also documented by Amnesty International in a report on Mexico entitled "Three Tzeltal sisters raped by Mexican soldiers in Chiapas." This report states that "the soldiers reportedly hit the women with their weapons and kicked them to extract information...they were then reportedly raped by about 10 soldiers before being released free of charge on that same day." Amnesty International, *Overcoming Fear: Human rights violations against women in Mexico*, AMR 41/009/1996 of March 3, 1996.
- 34 Correspondence from the petitioners of May 27, 1999, page 8.
- 35 Correspondence from the petitioners of January 16, 1996. In that correspondence, they state: Brigadier General Mario Guillermo Fromow, responsible for criminal proceedings in the military court, stated, in correspondence addressed to Ms. Mercedes Barquet of the College of Mexico A.C. on August 1, 1994, in providing her with information on this case, that the victims have been summoned, through the civil authorities, to appear before the military authorities. In that correspondence, he demonstrates a complete lack of familiarity with the case, confusing the names of the victims with other names that are completely different. Surprisingly, he alleges that no complaint whatsoever had been filed but goes on to state: "the Preliminary Investigation conducted into the events that were publicized contained no report of the events, and they have not been proven. Therefore, to date, the criminal acts have not been proven, let alone the possible responsibility of any member of the military." (*sic*)
- 38 In that regard, the petitioners state:
It is inconceivable that these women, who had endured torture at the hands of the members of that institution, could feel comfortable providing a statement (for the third time) to that entity. The petitioners had, on several occasions, informed the government attorney's office for civil affairs of the fear and trauma of the victims, which made it difficult for them to appear in a civil court, since this would have required them to pass through the military checkpoint. Consequently, it was impossible for them to appear before the military authorities.
It should be noted that, due to the nature of the case, it was logical that the victims would be terrified to appear before a military institution. Furthermore, the entities involved, in this case the Army, would be the ones responsible for conducting the investigation.
The victims, who had already provided a statement to the appropriate court, had no obligation to subject themselves once more to the psychological torture that another round of questioning and gynecological examination would entail, particularly before the entity representing the persons responsible for the torture, illegal detention, and rape of the victims.
The foregoing implies a violation and form of aggression that is the same or worse than that experienced on June 4, 1994. For this reason, the recommendation of military that the investigation be reopened cannot be considered valid, since this would mean ignoring the investigation already conducted by the Federal Public Prosecutor's Office. This is all the more true since they have already obtained the testimony of their

own soldiers who “interrogated” the victims and they admitted that they were at the location and had the opportunity to commit the acts of aggression. The only thing that they do not admit to in their testimony is raping them. However, they admitted that they detained and interrogated them, among other things. Their contradictory statements suggest that the deponents are telling the truth and the soldiers are lying. However, all this information was ignored and none of them was ever prosecuted.

Correspondence from the petitioners dated May 27, 1999, pages 5 and 6.

41 Inter-American Court, Velásquez Rodríguez Case, Preliminary Exceptions, Judgment of June 26, 1987, para. 91.

42 The Beijing Platform establishes several strategic objectives and actions for ensuring equality and combating discrimination in the area of women’s rights, one of which is particularly relevant in this case:

Review national laws, including customary laws and legal practices in the areas of family, civil, penal, labour and commercial law in order to ensure the implementation of the principles and procedures of all relevant international human rights instruments by means of national legislation, revoke any remaining laws that discriminate on the basis of sex and remove gender bias in the administration of justice;

United Nations, Fourth World Conference on Women, Beijing Declaration and Platform for Action, para. 232(d).

43 European Court, Aydin v. Turkey, cited above, para. 107.

44 United Nations, E/CN.4/2000/L.54 cited above, Principle N° 2.

45 United Nations, E/CN.4/Sub.2/1998/Add.1. The United Nations Commission on Human Rights recommended in Resolution 1989/32 that member States be mindful of the principles listed in that document.

48 IACHR, 1995 Annual Report, Report N° 10/95 (Case 10.580, Manuel Stalin Bolaños Quiñonez), Ecuador, para. 48.

49 The unsuitability of military courts to investigate, prosecute, and impose sanctions in cases of human rights violations has been the subject of rulings of the Inter-American Commission:

The military penal system of justice has several unique characteristics that bar access to effective and impartial judicial remedy within this institution. First, military courts cannot even be considered a true judicial system. Military justice is not part of the Colombian Judiciary. This court is run by the public security forces and, for that reason, is included in the Executive. Career judges of the judicial system do not hand down rulings and the Office of the Attorney General does not play a prosecutorial role in the military system of justice.

IACHR, Third Report on the Situation of Human Rights in Colombia (1999), pages 175-186. In that regard, the Constitutional Court of Colombia has indicated:

If an offense is to fall under military criminal jurisdiction, there must be a clear link, from the outset, between the offense and the military service activities. In other words, the punishable act must represent an abuse of power that occurred within the scope of an activity directly linked to that person’s functions within the Armed Forces. The link between the criminal act and the activity related to military service is broken when the offense is extremely serious, such as offenses against humanity. In such cases, the case must be transferred to the civil courts.

Constitutional Court of Colombia, Decision C-358, August 5, 1997.

- 50 Inter-American Court, Case of Durand and Ugarte, Ruling of August 16, 2000, para. 117. The case pertained to the forced disappearance of two persons accused of terrorism in Peru, which occurred in the context of the recapture of “El Frontón” penitentiary by the military forces of that country in June 1986. In its ruling, the Inter-American Court stated that the military officers “used excessive force that went well beyond the limits of their functions, resulting in the deaths of a large number of inmates,” and that, as a result, “the acts that led to this denouement cannot be considered military offenses, but rather common offenses. Therefore, the investigation into these acts and the sanctioning thereof must take place in the regular courts, whether or not the alleged perpetrators were military officers (para. 118).
- 51 In that regard, see the Inter-American Court, Case of Cantoral Benavides mentioned above, paras. 95-103.
- 52 Inter-American Court, Loayza Tamayo Case, Judgment of November 27, 1998, para. 169.
- 53 Inter-American Court, Paniagua Morales et al., Judgment of March 8, 1998, para. 173.
- 54 Inter-American Court, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 166.
- 55 *Idem*, paras. 174 and 176.
- 56 United Nations, Expert on the question of the impunity of persons who violate civil and political rights, as defined by the United Nations, Doc. E/CN.4/Sub.2/1997/20, para. 20. Amnesty International has also referred to the scope of investigations into human rights violations, stating that “the impunity of the act... can occur when the authorities fail to investigate human rights violations, or even when they conduct an investigation, but fail to do so in a prompt and diligent manner and in accordance with international standards in this area” (emphasis added). Amnesty International. Amicus curiae legal brief submitted to the Inter-American Court of Human Rights in the case of Consuelo Benavides Cevallos-Ecuador, December 18, 1997, para. 68 page 23.
- 62 In its report on Mexico, the IACHR stated:
- It is the obligation of the State of Mexico, based on its constitutional principles and on internationally recognized principles, to respect indigenous cultures and their organizations and to ensure their maximum development in accordance with their traditions, interests, and priorities. The Commission considers that the State should conduct a study of the observance of the human rights of indigenous peoples and their organizations, having regard to the fact that article 4 of the Mexican Constitution recognizes that “Mexico is a multi-cultural country whose foundations are its indigenous peoples” and that Mexico has also ratified ILO Convention 169, on indigenous and tribal peoples.
- IACHR, Report on the situation of human rights in Mexico *supra*, pára. 577. See, in the same report, paragraphs 540 to 564.

*Inter-American Commission
on Human Rights*

*Maria da Penha Maia Fernandes
v. Brazil*

Case N° 12.051

Report N° 54/01

April 16, 2001



I. SUMMARY

1. On August 20, 1998, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition filed by Mrs. Maria da Penha Maia Fernandes, the Center for Justice and International Law (CEJIL), and the Latin American and Caribbean Committee for the Defense of Women’s Rights (CLADEM) (hereinafter “the petitioners”), as provided for in Articles 44 and 46 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Article 12 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará or CMV).

2. The petition alleges that the Federative Republic of Brazil (hereinafter “Brazil” or “the State”) condoned, for years during their marital cohabitation, domestic violence perpetrated in the city of Fortaleza, Ceará State, by Marco Antônio Heredia Viveiros against his wife at the time, Maria da Penha Maia Fernandes, culminating in attempted murder and further aggression in May and June 1983. As a result of this aggression, Maria da Penha has suffered from irreversible paraplegia and other ailments since 1983. The petition maintains that the State has condoned this situation, since, for more than 15 years, it has failed to take the effective measures required to prosecute and punish the aggressor, despite repeated complaints. The petition alleges violation of Article 1(1) (Obligation to Respect Rights), 8 (a Fair Trial), 24 (Equal Protection), and 25 (Judicial Protection) of the American Convention, in relation to Articles II and XVIII of the American Declaration of the Rights and Duties of Man (“the Declaration”), as well as Articles 3, 4(a), (b), (c), (d), (e), (f), and (g), and 5 and 7 of the Convention of Belém do Pará. The Commission processed the petition in accordance with the regulations. In view of the fact that the State failed to provide comments on the petition despite the repeated requests of the Commission, the petitioners asked that the events related in the petition be presumed to be true and that Article 42 of the Regulations of the Commission be applied.

3. (...) With respect to the merits of the case, the Commission concludes that the State violated the right of Mrs. Maria da Penha Maia Fernandes to a fair trial and judicial protection, guaranteed in Articles 8 and 25 of the American Convention, in relation to the general obligation to respect and guarantee rights set forth in Article 1(1) of that instrument and Articles II and XVIII of the Declaration, as well as Article 7 of the Convention of Belém do Pará. It also concludes that this violation forms a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action. (...)

[...]

V. ANALYSIS OF THE MERITS OF THE CASE

B. Equality before the Law (Article 24 of the Convention) and Articles II and XVIII of the Declaration

45. The petitioners also allege violation of Article 24 of the American Convention in relation to the right to equality before the law and the right to justice enshrined in the American Declaration on the Rights and Duties of Man (Articles II and XVIII).

46. In that regard, the Inter-American Commission notes that it has followed with special interest developments related to respect for the rights of women, particularly those related to domestic violence. The Commission has received information on the high number of domestic attacks of women in Brazil. In Ceará alone (the place where the events related to this case took place), there were 1,183 death threats reported to special police stations handling women's affairs in 1993, out of a total of 4,755 complaints.¹⁷

47. Compared to men, women are the victims of domestic violence in disproportionate numbers. A study done by the National Movement for Human Rights in Brazil compares the incidence of domestic violence against women and men and shows that in terms of murders, women are 30 times more likely to be killed by their husbands than husbands by their wives. 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, it remains frequently the case that complaints are not fully investigated or prosecuted. In some cases, resource limitations hinder efforts to respond to these crimes. In other cases, women refrain from pressing formal charges. 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. For certain crimes, such as rape, victims must present themselves at an Institute of Forensic Medicine (*Instituto Médico Legal*), which has the exclusive competence

to perform the examinations required by law to process a charge. Some women are not aware of this requirement, or do not have access to such a facility in the timely manner necessary to obtain the required evidence. These Institutes tend to be located in urban areas, and, where available, are often understaffed. Moreover, even when women take the steps necessary to denounce the use of criminal violence, there is no guarantee that the crime will be investigated and prosecuted. Although the Supreme Court of Brazil struck down the archaic “honor defense” as a justification for wife-killing in 1991, many courts remain reluctant to prosecute and punish the perpetrators of domestic violence. In some areas of the country, use of the “honor defense” persists, and in some areas the conduct of the victim continues to be a focal point within the judicial process to prosecute a sexual crime. Rather than focusing on the existence of the legal elements of the crime in question, the practices of some defense lawyers—sustained in turn by some courts—have the effect of requiring the victim to demonstrate the sanctity of her reputation and her moral blamelessness in order to exercise the remedies legally required to be available to her. The initiatives taken by the public and private sector to confront violence against women have begun to combat the silence which customarily has concealed it, but have yet to surmount the social, legal and other barriers which contribute to the impunity in which these crimes too often languish.

48. That report also makes reference to various studies that demonstrate that in cases where statistics have been kept, they have shown that only one percent of the offenses reported to specialized stations are actually investigated. (Unido de Mulheres de Sao Paulo, *A Violencia Contra a Mulher e a Impunidade: Una Questão Política* (1995). In 1994, of 86,815 complaints filed by women who were assaulted in the home, only 24,103 led to police investigations, according to that report.

49. Other reports indicate that 70% of the criminal complaints pertaining to domestic violence are put on hold without any conclusion being reached. Only 2% of the criminal complaints for domestic violence against women lead to conviction of the aggressor. (Report of the San Pablo Catholic University, 1998).

50. In this analysis examining the pattern shown by the State in responding to this kind of violation, the Commission also notes that positive measures have been taken in the legislative, judicial, and administrative spheres.¹⁸ The Commission points to three initiatives that are directly related to the situation seen in this case: (1) the establishment of special police stations to handle reports on violence against women; (2) the establishment of shelters for battered women; and (3) the 1991 decision of the Supreme Court to

strike down the archaic concept of “honor defense ” as a justification for crimes against wives. These positive and other similar initiatives have been implemented on a limited basis in relation to the scope and urgency of the problem, as indicated earlier. In this case, which stands as a symbol, these initiatives have not had any effect whatsoever.

C. Article 7 of the Convention of Belém do Pará

51. On November 27, 1995, Brazil deposited its ratification of the Convention of Belém do Pará, the inter-American instrument by means of which American States acknowledge the extent of this problem, establish guidelines to be followed, make commitments to address it, and establish the possibility for any individual or organization to file petitions and take action on a matter before the Inter-American Commission on Human Rights and through its proceedings. The petitioners are seeking a finding of violation by the State of Articles 3, 4, 5, and 7 of this Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, and are alleging that this case must be analyzed in a context of gender-based discrimination by Brazilian State organs, which serves to reinforce the systematic pattern of violence against women and impunity in Brazil.

52. As indicated earlier, the Commission has *ratione materiae* and *ratione temporis* competence to hear the case pursuant to the provisions of the Convention of Belém do Pará with respect to acts that occurred subsequent to ratification thereof by Brazil, that is, the alleged ongoing violation of the right to effective legal procedures, and, consequently, the tolerance that this would imply of violence against women.

53. The Convention of Belém do Pará is an essential instrument that reflects the great effort made to identify specific measures to protect the right of women to a life free of aggression and violence, both outside and within the family circle. The CVM provides the following definition of violence against women:

Article 2

Violence against women shall be understood to include physical, sexual, and psychological violence:

- a. relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
- b. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and

- c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

54. Within the scope of application of the CMV, reference is made to situations defined by two conditions: first, violence against women as described in sections (a) and (b); and, second, violence perpetrated or condoned by the State. The CMV protects, *inter alia*, the following rights of women when they have been violated by acts of violence: the right to a life free of violence (Article 3), the right to have her life, her physical, mental, and moral integrity, her personal safety, and personal dignity respected, to equal protection before and of the law; and to simple and prompt recourse to a competent court for protection against acts that violate her rights (Articles 4 (a), (b), (c), (d), (e), (f), and (g), and the resulting duty of the State set forth in Article 7 of that instrument. Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women states:

Duties of the States

Article 7

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
- b. apply due diligence to prevent, investigate and impose penalties for violence against women;
- c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
- d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
- f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;

- g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
- h. adopt such legislative or other measures as may be necessary to give effect to this Convention.

55. The impunity that the ex-husband of Mrs. Fernandes has enjoyed and continues to enjoy is at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará. The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

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. 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.

57. The Commission must consider, in relation to Articles 7(c) and (h), the measures taken by the State to eliminate the condoning of domestic violence. The Commission notes the positive measures taken by the current administration towards that objective, in particular the establishment of special police stations, shelters for battered women, and others.¹⁹ However, in this case, which represents the tip of the iceberg, ineffective judicial action, impunity, and the inability of victims to obtain compensation provide an example of the lack of commitment to take appropriate action to address domestic violence. Article 7 of the Convention of Belém do Pará seems to represent a list of commitments that the Brazilian State has failed to meet in such cases.

58. In light of the foregoing, the Commission holds the view that this case meets the conditions for domestic violence and tolerance on the part of the State, defined in the

Convention of Belém do Pará, and that the State is liable for failing to perform its duties set forth in Articles 7(b), (d), (e), (f), and (g) of that Convention in relation to rights protected therein, among them, the right to a life free of violence (Article 3), the right of a woman to have her life, her physical, mental, and moral integrity, her personal safety, and personal dignity respected, to equal protection before and of the law, and to simple and prompt recourse to a competent court for protection against acts that violate her rights (Articles 4(a), (b), (c), (d), (e), (f), and (g)).

[...]

VII. CONCLUSIONS

60. The Inter-American Commission on Human Rights reiterates to the State the following conclusions:

[...]

2. Based on the facts, which have not been disputed, and the foregoing analysis, the Federative Republic of Brazil is responsible for violation of the right to a fair trial and judicial protection, guaranteed in Articles 8 and 25 of the American Convention, in accordance with the general obligation to respect and guarantee rights set forth in Article 1(1) of this instrument, because of the unwarranted delay and negligent processing of this case of domestic violence in Brazil.

[...]

4. The State has violated the rights of Mrs. Fernandes and failed to carry out its duty assumed under Article 7 of the Convention of Belém do Pará and Articles 8 and 25 of the American Convention; both in relation to Article 1(1) of the Convention, as a result of its own failure to act and tolerance of the violence inflicted.

[...]

ENDNOTES

17 Maia Fernandes, Maria da Penha “*Sobrevivi Posso Contar*” Fortaleza 1994, page 150; data based on information received from police stations.

18 As a result of joint action taken by the Government and the CNDM [National Council for Women’s Rights], the 1988 Brazilian Constitution has been amended in a manner that reflects significant progress in women’s

rights. In the context of the National Program on Human Rights, the initiatives proposed by the Government aimed at strengthening the rights of women include: support for the National Council for Women's Rights and the National Program to Prevent Violence against Women; efforts to support and prevent sexual and domestic violence against women, to provide comprehensive assistance to women who are at risk, and to educate the public about discrimination and violence against women and safeguards that are available; repeal of certain discriminatory provisions in the Penal and Civil Code on parental authority; support for efforts to develop gender-specific approaches in the training of State agents and in the establishment of curriculum guidelines at the primary and secondary education levels; and support for statistical studies related to the status of women in the labor sphere. The program also recommends that the Government implement the decisions contained in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.

- 19 See the chapter pertaining to the rights of Brazilian women in the 1997 IACHR Special Report on the Situation of Human Rights in Brazil.

*European Court
of Human Rights*

*Open Door and Dublin Well Woman
v. Ireland*

*Application N° 14234/88;
14235/88*

*Judgment of
October 29, 1992*



[...]

9. The applicants in this case are (a) *Open Door Counselling Ltd* (hereinafter referred to as Open Door), a company incorporated under Irish law, which was engaged, *inter alia*, in counselling pregnant women in Dublin and in other parts of Ireland; and (b) *Dublin Well Woman Centre Ltd* (hereinafter referred to as Dublin Well Woman), a company also incorporated under Irish law which provided similar services at two clinics in Dublin; (c) Bonnie Maher and Ann Downes, who worked as trained counsellors for Dublin Well Woman; (d) Mrs X, born in 1950 and Ms Maeve Geraghty, born in 1970, who join in the Dublin Well Woman application as women of child-bearing age. The applicants complained of an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland by way of non-directive counselling (...). Open Door and Dublin Well Woman are both non-profit-making organisations. Open Door ceased to operate in 1988 (...). Dublin Well Woman was established in 1977 and provides a broad range of services relating to counselling and marriage, family planning, procreation and health matters. The services offered by Dublin Well Woman relate to every aspect of women's health, ranging from smear tests to breast examinations, infertility, artificial insemination and the counselling of pregnant women.

[...]

III. ALLEGED VIOLATION OF ARTICLE 10

53. The applicants alleged that the Supreme Court injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed the rights of the corporate applicants and the two counsellors to impart information, as well as the rights of Mrs X and Ms Geraghty to receive information. They confined their complaint to that part of the injunction which concerned the provision of information to pregnant women as opposed to the making of travel arrangements or referral to clinics (...).

They invoked Article 10 which provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...).
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national

security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

A. Was there an interference with the applicants' rights?

55. The Court notes that the Government accepted that the injunction interfered with the freedom of the corporate applicants to impart information. Having regard to the scope of the injunction which also restrains the “servants or agents” of the corporate applicants from assisting “pregnant women” (...), there can be no doubt that there was also an interference with the rights of the applicant counsellors to impart information and with the rights of Mrs X and Ms Geraghty to receive information in the event of being pregnant. To determine whether such an interference entails a violation of Article 10, the Court must examine whether or not it was justified under Article 10 para. 2 by reason of being a restriction “prescribed by law” which was necessary in a democratic society on one or other of the grounds specified in Article 10 para. 2.

B. Was the restriction “prescribed by law”?

2. *Court's examination of the issue*

[...]

59. This question must be approached by considering not merely the wording of Article 40.3.3o in isolation but also the protection given under Irish law to the rights of the unborn in statute law and in case-law (...).

It is true that it is not a criminal offence to have an abortion outside Ireland and that the practice of non-directive counselling of pregnant women did not infringe the criminal law as such. Moreover, on its face the language of Article 40.3.3o appears to enjoin only the State to protect the right to life of the unborn and suggests that regulatory legislation will be introduced at some future stage (...).

60. Taking into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their role as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable (See the *Sunday Times v. the United Kingdom* judgment of 26 April

1979, Series A no. 30, p. 31, para. 49). This conclusion is reinforced by the legal advice that was actually given to Dublin Well Woman that, in the light of Article 40.3.3o, an injunction could be sought against its counselling activities (...). The restriction was accordingly "prescribed by law".

C. Did the restriction have aims that were legitimate under Article 10 para. 2 ?

61. The Government submitted that the relevant provisions of Irish law are intended for the protection of the rights of others -in this instance the unborn-, for the protection of morals and, where appropriate, for the prevention of crime.

62. The applicants disagreed, contending *inter alia* that, in view of the use of the term "everyone" in Article 10 para. 1 and throughout the Convention, it would be illogical to interpret the "rights of others" in Article 10 para. 2 as encompassing the unborn.

63. The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime since, as noted above (paragraph 59), neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction involved any criminal offence. However, it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum (...). The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect. It is not necessary in the light of this conclusion to decide whether the term "others" under Article 10 para. 2 extends to the unborn.

D. Was the restriction necessary in a democratic society?

[...]

1. Article 2

[...]

66. The Court observes at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2. The applicants have not claimed that the Convention contains a right to abortion, as such, their complaint

being limited to that part of the injunction which restricts their freedom to impart and receive information concerning abortion abroad (...).

Thus the only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals as explained above (see paragraph 63). (...)

2. *Proportionality*

[...]

68. The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable (see, *mutatis mutandis*, for a similar argument, the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, p. 20, para. 45).

It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them (see, *inter alia*, the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 22, para. 48, and the *Müller and Others v. Switzerland* judgment of 24 May 1988, Series A no. 133, p. 22, para. 35). However this power of appreciation is not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

69. As regards the application of the "proportionality" test, the logical consequence of the Government's argument is that measures taken by the national authorities to protect the right to life of the unborn or to uphold the constitutional guarantee on the subject would be automatically justified under the Convention where infringement of a right of a lesser stature was alleged. It is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights. However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions. To accept the Government's pleading on this point would amount to an abdication of the Court's responsibility under Article 19 "to ensure the observance of the engagements undertaken by the High Contracting Parties ...".

70. Accordingly, the Court must examine the question of “necessity” in the light of the principles developed in its case-law (see, *inter alia*, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59). It must determine whether there existed a pressing social need for the measures in question and, in particular, whether the restriction complained of was “proportionate to the legitimate aim pursued” (*ibid.*).

71. In this context, it is appropriate to recall that freedom of expression is also applicable to “information” or “ideas” that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” (see, *inter alia*, the above-mentioned *Handyside* judgment, Series A no. 24, p. 23, para. 49).

72. While the relevant restriction, as observed by the Government, is limited to the provision of information, it is recalled that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion. Furthermore, the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman’s health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.

73. The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a “perpetual” restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of *The Attorney General v. X and Others* and by the concession made by the Government at the oral hearing that the injunction no longer applied to women who, in the circumstances as defined in the Supreme Court’s judgment in that case, were now free to have an abortion in Ireland or abroad (...).

74. On that ground alone the restriction appears over broad and disproportionate. Moreover, this assessment is confirmed by other factors.

75. In the first place, it is to be noted that the corporate applicants were engaged in the counselling of pregnant women in the course of which counsellors neither advocated

nor encouraged abortion, but confined themselves to an explanation of the available options (...). The decision as to whether or not to act on the information so provided was that of the woman concerned. There can be little doubt that following such counselling there were women who decided against a termination of pregnancy. Accordingly, the link between the provision of information and the destruction of unborn life is not as definite as contended. Such counselling had in fact been tolerated by the State authorities even after the passing of the Eighth Amendment in 1983 until the Supreme Court's judgment in the present case. Furthermore, the information that was provided by the relevant applicants concerning abortion facilities abroad was not made available to the public at large.

76. It has not been seriously contested by the Government that information concerning abortion facilities abroad can be obtained from other sources in Ireland such as magazines and telephone directories (...) or by persons with contacts in Great Britain. Accordingly, information that the injunction sought to restrict was already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women's health. Furthermore, the injunction appears to have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain (...).

77. In addition, the available evidence, which has not been disputed by the Government, suggests that the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing themselves of customary medical supervision after the abortion has taken place (...). Moreover, the injunction may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information (see paragraph 76 above). These are certainly legitimate factors to take into consideration in assessing the proportionality of the restriction.

3. *Articles 17 and 60*

78. The Government, invoking Articles 17 and 60 of the Convention, have submitted that Article 10 should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn which enjoys special protection under Irish law.

79. Without calling into question under the Convention the regime of protection of unborn life that exists under Irish law, the Court recalls that the injunction did not prevent

Irish women from having abortions abroad and that the information it sought to restrain was available from other sources (see paragraph 76 above). Accordingly, it is not the interpretation of Article 10 but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad.

4. *Conclusion*

80. In the light of the above, the Court concludes that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued. Accordingly there has been a breach of Article 10.

[...]

*European Court
of Human Rights*

Aydin v. Turkey

Application N° 23178/94

*Judgment of
September 25, 1997*



[...]

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 15 April 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). It originated in an application (no. 23178/94) against the Republic of Turkey lodged with the Commission under Article 25 by Mrs Şükran Aydın, a Turkish national, on 21 December 1993.

[...]

AS TO THE FACTS

1. The applicant

13. The applicant, Mrs Şükran Aydın, is a Turkish citizen of Kurdish origin. She was born in 1976. At the time of the events in issue she was 17 years old and living with her parents in the village of Tasit, which is about ten kilometres from the town of Derik where the district gendarmerie headquarters are located. The applicant had never travelled outside her village before the events which led to her application to the Commission.

2. The situation in the south-east of Turkey

14. Since approximately 1985, serious disturbances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers’ Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces.

At the time of the Court’s consideration of the case, ten of the eleven provinces of south-eastern Turkey had since 1987 been subjected to emergency rule.

1. PARTICULAR CIRCUMSTANCES OF THE CASE

15. The facts in the case are disputed.

A. The detention of the applicant

16. According to the applicant, a group of people comprising village guards and a gendarme arrived in her village on 29 June 1993.

17. Four members of the group came to her parents' home and questioned her family about recent visits to the house by PKK members (see paragraph 14 above). Her family were threatened and subjected to insults. They were then taken to a village square where they were joined by other villagers who had also been forcibly taken from their homes.

18. The applicant, her father, Seydo Aydın, and her sister-in-law, Ferahdiba Aydın, were singled out from the rest of the villagers, blindfolded and driven away to Derik gendarmerie headquarters.

[...]

B. Treatment of the applicant during detention

20. The applicant alleges that, on arrival at the gendarmerie headquarters, she was separated from her father and her sister-in-law. At some stage she was taken upstairs to a room which she later referred to as the "torture room". There she was stripped of her clothes, put into a car tyre and spun round and round. She was beaten and sprayed with cold water from high-pressure jets. At a later stage she was taken clothed but blindfolded to an interrogation room. With the door of the room locked, an individual in military clothing forcibly removed her clothes, laid her on her back and raped her. By the time he had finished she was in severe pain and covered in blood. She was ordered to get dressed and subsequently taken to another room. According to the applicant, she was later brought back to the room where she had been raped. She was beaten for about an hour by several persons who warned her not to report on what they had done to her.

[...]

D. The investigation of the applicant's complaint

23. On 8 July 1993 the applicant together with her father and her sister-in-law went to the office of the public prosecutor, Mr Bekir Özenir, in Derik to lodge complaints about the treatment which they all alleged they had suffered while in detention. The public prosecutor took statements from each of them. The applicant reported that she had been tortured

by being beaten and raped. Her father and sister-in-law both alleged that they had been tortured. According to the applicant, she confirmed her account of what happened to her in a statement given to the Diyarbakır Human Rights Association on 15 July 1993, which was submitted, undated, to the Commission along with her application.

1. *Medical examination of the applicant*

24. All three were sent the same day to Dr Deniz Akkuş at Derik State Hospital. The public prosecutor had requested Dr Akkuş to establish the blows and marks of physical violence, if any, in respect of Seydo and Ferahdiba. In respect of the applicant, he requested that she be examined to establish whether she was a virgin and the presence of any marks of physical violence or injury.

In his report on the applicant dated 8 July 1996, Dr Akkuş, who had not previously dealt with any rape cases, stated that the applicant's hymen was torn and that there was widespread bruising around the insides of her thighs. He could not date when the hymen had been torn since he was not qualified in this field; nor could he express any view on the reason for the bruising. In separate reports he noted that there were wounds on the bodies of the applicant's father and sister-in-law.

25. On 9 July 1993 the public prosecutor sent the applicant to be examined at Mardin State Hospital with a request to establish whether she had lost her virginity and, if so, since when. She was examined by Dr Ziya Çetin, a gynaecologist. According to the doctor's report, dated the same day, defloration had occurred more than a week prior to her examination. No swab was taken and neither the applicant's account of what had happened to her nor whether the results of the examination were consistent with that account were recorded in his report. Dr Çetin did not comment on the bruising on her inner thighs on account of the fact that he was a specialist in obstetrics and gynaecology. He did not frequently deal with rape victims.

26. On 12 August 1993 the public prosecutor took a further statement from the applicant who by that stage was married. On the same day he referred the applicant to Diyarbakır Maternity Hospital requesting that a medical examination be carried out to establish whether the applicant had lost her virginity and, if so, since when. The medical report dated 13 August 1993 confirmed Dr Çetin's earlier findings (see paragraph 25 above) that the hymen had been torn but that after seven to ten days defloration could not be accurately dated.

[...]

2. *The Court's assessment*

80. The Court recalls that it has accepted the facts as established by the Commission, namely that the applicant was detained by the security forces and while in custody was raped and subjected to various forms of ill-treatment (...).

81. As it has observed on many occasions, Article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities (see, for example, the *Aksoy* judgment cited above, p. 2278, § 62).

82. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman treatment or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see the *Ireland v. the United Kingdom* judgment cited above, p. 66, § 167).

83. While being held in detention the applicant was raped by a person whose identity has still to be determined. 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. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.

84. The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her dur-

ing questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre.

85. The applicant and her family must have been taken from their village and brought to Derik gendarmerie headquarters for a purpose, which can only be explained on account of the security situation in the region (see paragraph 14 above) and the need of the security forces to elicit information. The suffering inflicted on the applicant during the period of her detention must also be seen as calculated to serve the same or related purposes.

86. Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.

87. In conclusion, there has been a violation of Article 3 of the Convention.

88. As to the applicant's contention that the failure of the authorities to carry out an effective investigation into her treatment while in custody constituted a separate violation of Article 3 (...), the Court considers that it would be appropriate to examine this complaint in the context of her complaints under Articles 6 and 13 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

[...]

A. Article 6 § 1 of the Convention

99. The Court recalls that Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect (see, for example, the *Holy Monasteries v. Greece* judgment of 9 December 1994, Series A no. 301-A, pp. 36–37, § 80). Furthermore, Article 6 § 1 applies to a civil claim for compensation in respect of ill-treatment allegedly committed by State officials (see, for example, the *Aksoy* judgment cited above, p. 2285, § 92).

100. The applicant has never instituted proceedings before either the civil or administrative courts to seek compensation in respect of the suffering to which she was subjected in custody. On the other hand she has been prepared to invoke the criminal process in order to bring the offenders to justice and, at least in the initial stages of the criminal investigation, to cooperate with the investigating authority. She has sought to explain her failure even to attempt to pursue a claim for compensation on the grounds that she would have no prospect of success in the absence of proof that she had been raped and ill-treated at the hands of agents of the State, and such proof was impossible to adduce on account of the manner in which the public prosecutor conducted the investigation.

[...]

B. Article 13 of the Convention

103. The Court recalls at the outset that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. (...). The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the *Aksoy* judgment cited above, p. 2286, § 95).

Furthermore, the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims (see paragraphs 81 and 83 above), Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.

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 (see paragraph 48 above). However, such a requirement is implicit in the

notion of an “effective remedy” under Article 13 (see the *Aksoy* judgment cited above, p. 2287, § 98).

104. Having regard to these principles, the Court notes that the applicant was entirely reliant on the public prosecutor and the police acting on his instructions to assemble the evidence necessary for corroborating her complaint. The public prosecutor had the legal powers to interview members of the security forces at Derik gendarmerie headquarters, summon witnesses, visit the scene of the incident, collect forensic evidence and take all other crucial steps for establishing the truth of her account. His role was critical not only to the pursuit of criminal proceedings against the perpetrators of the offences but also to the pursuit by the applicant of other remedies to redress the harm she suffered. The ultimate effectiveness of those remedies depended on the proper discharge by the public prosecutor of his functions.

105. The applicant, her father and her sister-in-law complained to the public prosecutor about the treatment they suffered while in custody. In her statement she specifically referred to the fact that she was raped and tortured at Derik gendarmerie headquarters (see paragraph 23 above). 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.

[...]

107. It would appear that his primary concern in ordering three medical examinations in rapid succession was to establish whether the applicant had lost her virginity. The focus of the examinations should really have been on whether the applicant was a rape victim, which was the very essence of her complaint. In this respect it is to be noted that neither Dr Akkuş nor Dr Çetin had any particular experience of dealing with rape victims (see paragraphs 24 and 25 above). No reference is made in either of the rather summary reports drawn up by these doctors as to whether the applicant was asked to explain what had happened to her or to account for the bruising on her thighs. Neither doctor volunteered an opinion on whether the bruising was consistent with an allegation of involuntary sexual intercourse (see paragraphs 24 and 25 above). Further, no attempt was made to evaluate, psychologically, whether her attitude and behaviour conformed to

those of a rape victim. The Court notes that the requirement of a thorough and effective investigation into an allegation of rape in custody at the hands of a State official also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination. It cannot be concluded that the medical examinations ordered by the public prosecutor fulfilled this requirement.

108. It has been contended that the investigation is still being conducted and that the applicant's absence from the vicinity of Derik impeded the investigation for a certain period (...). She has also refused to undergo a further examination involving psychological testing (...). In the view of the Court, this cannot justify the serious defects and inertia which characterised the crucial phase immediately following receipt of the complaint. The public prosecutor had at that stage the legal means to act promptly and gather all necessary evidence including, as appropriate, psychological and behavioural evidence; nor can the decision to suspend the investigation on account of the applicant's absence be justified given the gravity of the offence under investigation.

109. In the light of the above considerations, it must be concluded that no thorough and effective investigation was conducted into the applicant's allegations and that this failure undermined the effectiveness of any other remedies which may have existed given the centrality of the public prosecutor's role to the system of remedies as a whole, including the pursuit of compensation.

In conclusion, there has been a violation of Article 13 of the Convention.

[...]

*European Court
of Human Rights*

Jabari v. Turkey

Application N° 40035/98

*Judgment of
July 11, 2000*



[...]

THE FACTS

1. THE CIRCUMSTANCES OF THE CASE

9. In 1995, at the age of 22, the applicant met a man ("X") in Iran while attending a secretarial college. She fell in love with him and after some time they decided to get married.

10. However, X's family was opposed to their marriage. In June 1997 X married another woman. The applicant continued to see him and to have sexual relations with him.

11. In October 1997 the applicant and X were stopped by policemen while walking along a street. The policemen arrested the couple and detained them in custody as X was married.

12. The applicant underwent a virginity examination while in custody. After a few days she was released from detention with the help of her family.

13. In November 1997 the applicant entered Turkey illegally. In February 1998 the applicant went to Istanbul, from where she tried to fly to Canada via France using a forged Canadian passport.

14. When the applicant arrived at the airport in Paris, the French police found her to be in possession of a forged passport.

15. On 4 February 1998 the applicant was put on a plane for Istanbul. Following her arrival at Istanbul Airport at 1 a.m. on 5 February 1998 she was arrested by policemen on the ground that she had entered Turkey using a forged passport. Her passport was sent for examination.

16. On 6 February 1998 the applicant was transferred from a police station inside the airport to the Aliens Department of the Istanbul Security Directorate. She was brought before the Bakırköy public prosecutor on the ground that she had entered Turkey using a forged passport in contravention of the Passport Act 1950. The public prosecutor ordered her release, finding she had not entered Turkey of her free will. The applicant was handed over to the Istanbul Security Directorate with a view to her deportation. When

the applicant realised that she was going to be sent to Iran she told the Aliens Department that she was an Iranian national. The applicant lodged an asylum application with the Aliens Department. The police rejected her application as it had been submitted out of time. The applicant was informed that under section 4 of the Asylum Regulation 1994 she should have lodged her application for asylum within five days of her arrival in Turkey.

17. According to the applicant, she was held in detention at the Aliens Department until 26 March 1998. Thereafter, following the intervention of the Ankara branch office of the United Nations High Commissioner for Refugees (UNHCR), she was accommodated at a hotel in Istanbul.

18. On 12 February 1998 a staff member of the UNHCR, with the permission of the authorities, interviewed the applicant about her asylum request under the 1951 Geneva Convention relating to the Status of Refugees ("the *Geneva Convention*"). On 16 February 1998 the applicant was granted refugee status by the UNHCR on the basis that she had a well-founded fear of persecution if removed to Iran as she risked being subjected to inhuman punishment, such as death by stoning, or being whipped or flogged.

19. On 8 March 1998 the applicant lodged an application with the Ankara Administrative Court against her deportation. She also asked for a stay of execution of her deportation.

20. On 16 April 1998 the Ankara Administrative Court dismissed the applicant's petitions on the ground that there was no need to suspend her deportation since it was not tainted with any obvious illegality and its implementation would not cause irreparable harm to the applicant.

21. On 4 November 1998 the Ankara Administrative Court found that there was no actual risk of her being deported in view of the fact that she had been granted a residence permit pending the outcome of her application under the European Convention on Human Rights. The court found that it was not required to suspend the deportation order since no such order had yet been made.

[...]

THE LAW

1. ALLEGED VIOLATION OF THE ARTICLE 3 OF THE CONVENTION

33. The applicant maintained that her removal to Iran would expose her to treatment prohibited by Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

34. The applicant stated that she had committed adultery in Iran and had to leave before criminal proceedings could be brought against her. She submitted that she would probably have been prosecuted and sentenced to a form of inhuman punishment. In support of her assertion the applicant relied on, *inter alia*, reports prepared by Amnesty International which refer to cases of women in Iran having been stoned to death for having committed adultery. She stressed that she was granted refugee status by the UNHCR on the ground that she had a well-founded fear of persecution as she belonged to a particular social group, namely women who have transgressed social mores according to the UNHCR guidelines on gender-based persecution.

35. The applicant further claimed that, bearing in mind the established case-law of the Court, stoning to death, flogging and whipping, which are penalties prescribed by Iranian law for the offence of adultery, must be considered forms of prohibited treatment within the meaning of Article 3 of the Convention.

36. The Government maintained in reply that when becoming a Contracting Party to the 1951 Geneva Convention relating to the Status of Refugees (“the *Geneva Convention*”), Turkey had availed itself of the geographic preference option in the Convention to give preference to asylum-seekers from European countries (...). However, for humanitarian reasons the authorities issue temporary residence permits to non-European asylum-seekers like the applicant who are recognised as refugees by the UNHCR pending their resettlement in a third country. Given that the applicant failed to comply with the five-day requirement under the 1994 Asylum Regulation (...), this facility could not be extended to her.

37. The Government further questioned the substance of the applicant’s fears. In their opinion the fact that the applicant failed to make an application to the authorities or to the UNHCR when she arrived in Turkey in 1997 was at variance with her allegations under Article 3 of the Convention. It was also significant that she did not claim asylum

status when she arrived at the airport in Paris (see paragraph 14 above). In the Government's view, it must be doubted whether the applicant would ever have sought refugee status if she had managed to enter Canada.

38. The Court recalls that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. Moreover, the right to political asylum is not contained in either the Convention or its Protocols (see the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 34, § 102).

However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 90-91; the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, §§ 69-70; and the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1853, §§ 73-74).

39. The Court further observes that, having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 (see, *mutatis mutandis*, the *Chahal* judgment cited above, p. 1855, § 79, and p. 1859, § 96).

40. The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that the applicant's failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran (see paragraph 16 above). In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention. It fell to the branch office of the UNHCR to interview the applicant about the background to her asylum request and to evaluate the risk to which she would be exposed in the light of the nature of the offence with which she was charged. The Ankara Administrative Court, on her application for judicial review,

limited itself to the issue of the formal legality of the applicant's deportation rather than the more compelling question of the substance of her fears, even though by that stage the applicant must be considered to have had more than an arguable claim that she would be at risk if removed to her country of origin.

41. The Court for its part must give due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which the applicant would face if her deportation were to be implemented. It is to be observed in this connection that the UNHCR interviewed the applicant and had the opportunity to test the credibility of her fears and the veracity of her account of the criminal proceedings initiated against her in Iran by reason of her adultery. It is further to be observed that the Government have not sought to dispute the applicant's reliance on the findings of Amnesty International concerning the punishment meted out to women who are found guilty of adultery (see paragraph 34 above). Having regard to the fact that the material point in time for the assessment of the risk faced by the applicant is the time of its own consideration of the case (see the *Chahal* judgment cited above, p. 1856, § 86), the Court is not persuaded that the situation in the applicant's country of origin has evolved to the extent that adulterous behaviour is no longer considered a reprehensible affront to Islamic law. It has taken judicial notice of recent surveys of the current situation in Iran and notes that punishment of adultery by stoning still remains on the statute book and may be resorted to by the authorities (...).

42. Having regard to the above considerations, the Court finds it substantiated that there is a real risk of the applicant being subjected to treatment contrary to Article 3 if she were to be returned to Iran.

Accordingly, the order for her deportation to Iran would, if executed, give rise to a violation of Article 3.

[...]

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that in the event of the decision to deport the applicant to Iran being implemented, there would be a violation of Article 3 of Convention;

[...]

*European Court
of Human Rights*

Y. F. v. Turkey

Application N° 24209/94

*Judgment of
July 22, 2003*



[...]

3. Relying on Article 8 of the Convention, the applicant complained that the forced gynaecological examination of his wife constituted a breach of her right to respect for her private life.

[...]

12. On 20 October 1993, following her detention in police custody, Mrs F. was examined by a doctor, who reported that there were no signs of ill-treatment on her body. On the same day she was taken to a gynaecologist for a further examination. The police requested that the report should indicate whether she had had vaginal or anal intercourse while in custody. Despite her refusal, Mrs F. was forced by the police officers to undergo a gynaecological examination. The police officers remained on the premises while Mrs F. was examined behind a curtain. The doctor reported that she had not had any sexual intercourse in the days preceding the examination.

13. On the same day Mrs F. was taken to the Bingöl public prosecutor's office, where she complained about her forced gynaecological examination. The public prosecutor did not record her complaints and ordered her release.

[...]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

[...]

33. The Court observes that Article 8 is clearly applicable to these complaints, which concern a matter of "private life", a concept which covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p.11, § 22). It reiterates in this connection that a person's body concerns the most intimate aspect of private life. Thus, a compulsory medical intervention, even if it is of minor importance, constitutes an interference with this right (see *X v. Austria*, no. 8278/78, Commission decision of 13 December 1979, Decisions and Reports (DR) 18, p. 155, and *Acmanne and Others v. Belgium*, no. 10435/83, Commission decision of 10 December 1984, DR 40, p. 254).

34. The Court notes that the applicant's wife complained to the authorities that she had been forced to undergo a gynaecological examination against her will (see paragraph 16 above). For their part, the Government contended that it would not have been possible to perform such an examination without the consent of Mrs F., who could have objected to it when she was taken to the doctor's consulting room. However, the Court considers that, in the circumstances, the applicant's wife could not have been expected to resist submitting to such an examination in view of her vulnerability at the hands of the authorities who exercised complete control over her throughout her detention (see, *mutatis mutandis*, *Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, pp. 41-42, §§ 113-15).

35. There has accordingly been an "interference by a public authority" with the right of the applicant's wife to respect for her private life.

36. Such an interference will violate Article 8 of the Convention unless it is "in accordance with the law", pursues one of the legitimate aims set out in the second paragraph of that Article, and can be considered "necessary in a democratic society" in pursuit of that aim (see *Dankevich v. Ukraine*, no. 40679/98, § 151, 29 April 2003, and *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61, p. 32, § 84).

[...]

2. *The Court's assessment*

41. The Court must first consider whether the interference was "in accordance with the law". This expression requires primarily that the impugned measure should have some basis in domestic law (see *Kruslin v. France* and *Huvig v. France*, judgments of 24 April 1990, Series A no. 176-A, p. 20, § 27, and Series A no. 176-B, p. 52, § 26, respectively).

42. In this regard, the Court notes that the Government have not argued that the interference complained of was "in accordance with the law" at the relevant time. They referred in their observations to regulations and circulars which were issued after the date of the disputed examination (...). Furthermore, under Turkish law, any interference with a person's physical integrity is prohibited except in the event of medical necessity and in circumstances defined by law (...). Moreover, in the course of the preliminary investigation, a detainee may only be examined at the request of a public prosecutor (...).

43. However, in this case the Government failed to demonstrate the existence of a medical necessity or the circumstances defined by law. Nor did they suggest that a request for a medical examination had been made by the public prosecutor. Finally, while the Court accepts the Government's submission that the medical examination of detainees by a forensic doctor can prove to be a significant safeguard against false accusations of sexual molestation or ill-treatment, it considers that any interference with a person's physical integrity must be prescribed by law and requires the consent of that person. Otherwise, a person in a vulnerable situation, such as a detainee, would be deprived of legal guarantees against arbitrary acts. In the light of the foregoing, the Court finds that the interference in issue was not "in accordance with law".

44. This finding suffices for the Court to hold that there has been a violation of Article 8 of the Convention. It is not therefore necessary to examine whether the interference in question pursued a "legitimate aim" or was "necessary in a democratic society" in pursuit thereof (see *M.M. v. the Netherlands*, no. 39339/98, § 46, 8 April 2003).

*European Court
of Human Rights*

M. C. v. Bulgaria

Application N° 39272/98

*Judgment of
December 4, 2003*



PROCEDURE

1. The case originated in an application (no. 39272/98) against the Republic of Bulgaria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Bulgarian national, M.C. (“the applicant”), on 23 December 1997. In the proceedings before the Court, the President of the Chamber acceded to the applicant’s request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

[...]

3. The applicant alleged violations of her rights under Articles 3, 8, 13 and 14 of the Convention in that domestic law and practice in rape cases and the investigation into the rape of which she had been a victim did not secure the observance by the respondent State of its positive obligation to provide effective legal protection against rape and sexual abuse.

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a Bulgarian national who was born in 1980.

10. She alleged that she had been raped by two men on 31 July and 1 August 1995, when she was 14 years and 10 months old. The ensuing investigation came to the conclusion that there was insufficient proof of the applicant having been compelled to have sex.

[...]

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 3, 8 AND 13 OF THE CONVENTION

109. The applicant complained that Bulgarian law and practice did not provide effective

protection against rape and sexual abuse, as only cases where the victim had resisted actively were prosecuted, and that the authorities had not investigated the events of 31 July and 1 August 1995 effectively. In her view, the above amounted to a violation of the State's positive obligations to protect the individual's physical integrity and private life and to provide effective remedies in this respect.

110. The relevant Convention provisions read:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8, paragraph 1

"Everyone has the right to respect for his private life (...)"

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[...]

B. The Court's assessment

1. General approach

a. The existence of a positive obligation to punish rape and to investigate rape cases

148. Having regard to the nature and the substance of the applicant's complaints in this particular case, the Court finds that they fall to be examined primarily under Articles 3 and 8 of the Convention.

149. The Court reiterates that the obligation of 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 ill-treatment, including ill-treatment administered by private individuals (see *A. v. the*

United Kingdom, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2699, § 22; *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73-75, ECHR 2001-V; and *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002).

150. Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, pp. 11-13, §§ 23-24 and 27, and *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003).

151. In a number of cases, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents (see, *mutatis mutandis*, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I).

152. Further, the Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3164, § 128,).

153. On that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

b. The modern conception of the elements of rape and its impact on the substance of member States' positive obligation to provide adequate protection

154. In respect of the means to ensure adequate protection against rape, States undoubtedly enjoy a wide margin of appreciation. In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account.

155. The limits of the national authorities' margin of appreciation are nonetheless circumscribed by the Convention provisions. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

156. The Court observes that, historically, proof of physical force and physical resistance was required under domestic law and practice in rape cases in a number of countries. The last decades, however, have seen a clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definitions and narrow interpretations of the law in this area (...).

157. Firstly, it appears that a requirement that the victim must resist physically is no longer present in the statutes of European countries.

158. In *common-law* countries, in Europe and elsewhere, reference to physical force has been removed from the legislation and/or case-law (see paragraphs 98, 100 and 138-47 above, in relation to Ireland, the United Kingdom, the United States of America and other countries). Irish law explicitly states that consent cannot be inferred from lack of resistance (...).

159. In most European countries influenced by the continental legal tradition, the definition of rape contains references to the use of violence or threats of violence by the perpetrator. It is significant, however, that in case-law and legal theory lack of consent, not force, is seen as the constituent element of the offence of rape (...).

160. Belgian law was amended in 1989 to state that any act of sexual penetration would constitute rape when committed in respect of a person who had not given consent. Thus, while the reference to "violence, duress or ruse" as punishable means of imposing a non-consensual act remains in the statute, violence and/or physical resistance are not elements of rape in Belgian law (...).

161. Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence (...).

162. The Court also notes that the member States of the Council of Europe, through the Committee of Ministers, have agreed that penalising non-consensual sexual acts, “[including] in cases where the victim does not show signs of resistance”, is necessary for the effective protection of women against violence (...) and have urged the implementation of further reforms in this area.

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 (...). While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.

164. As submitted by the intervener, the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.

165. Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual’s sexual autonomy.

166. In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the member States’ positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

c. The Court’s task in the present case

167. In the light of the above, the Court’s task is to examine whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount

to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention.

168. The issue before the Court is limited to the above. The Court is not concerned with allegations of errors or isolated omissions in the investigation; it cannot replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrators' criminal responsibility.

2. Application of the Court's approach

169. The applicant alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a predominant practice of prosecuting rape perpetrators only in the presence of evidence of significant physical resistance.

170. The Court observes that Article 152 § 1 of the Bulgarian Criminal Code does not mention any requirement of physical resistance by the victim and defines rape in a manner which does not differ significantly from the wording found in statutes of other member States. As seen above, many legal systems continue to define rape by reference to the means used by the perpetrator to obtain the victim's submission (...).

171. What is decisive, however, is the meaning given to words such as "force" or "threats" or other terms used in legal definitions. For example, in some legal systems "force" is considered to be established in rape cases by the very fact that the perpetrator proceeded with a sexual act without the victim's consent or because he held her body and manipulated it in order to perform a sexual act without consent. As noted above, despite differences in statutory definitions, the courts in a number of countries have developed their interpretation so as to try to encompass any non-consensual sexual act (...).

172. In the present case, in the absence of case-law explicitly dealing with the question whether every sexual act carried out without the victim's consent is punishable under Bulgarian law, it is difficult to arrive at safe general conclusions on this issue on the basis of the Supreme Court's judgments and legal publications (...). Whether or not a sexual act in a particular case is found to have involved coercion always depends on a judicial assessment of the facts. A further difficulty is the absence of a reliable study of prosecutorial practice in cases which never reached the courts.

173. Nonetheless, it is noteworthy that the Government were unable to provide copies of judgments or legal commentaries clearly disproving the allegations of a restrictive approach

in the prosecution of rape. The Government's own submissions on the elements of rape in Bulgarian law were inconsistent and unclear (...). Finally, the fact that the vast majority of the Supreme Court's reported judgments concerned rapes committed with the use of significant violence (except those where the victim was physically or mentally disabled), although not decisive, may be seen as an indication that most of the cases where little or no physical force and resistance were established were not prosecuted (...).

174. The Court is not required to seek conclusive answers about the practice of the Bulgarian authorities in rape cases in general. It is sufficient for the purposes of the present case to observe that the applicant's allegation of a restrictive practice is based on reasonable arguments and has not been disproved by the Government.

175. Turning to the particular facts of the applicant's case, the Court notes that, in the course of the investigation, many witnesses were heard and an expert report by a psychologist and a psychiatrist was ordered. The case was investigated and the prosecutors gave reasoned decisions, explaining their position in some detail (...).

176. The Court recognises that the Bulgarian authorities faced a difficult task, as they were confronted with two conflicting versions of the events and little "direct" evidence. The Court does not underestimate the efforts made by the investigator and the prosecutors in their work on the case.

177. It notes, nonetheless, that the presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. Little was done, however, to test the credibility of the version of the events proposed by P. and A. and the witnesses called by them. In particular, the witnesses whose statements contradicted each other, such as Ms T. and Mr M., were not confronted. No attempt was made to establish with more precision the timing of the events. The applicant and her representative were not given the opportunity to put questions to the witnesses whom she accused of perjury. In their decisions, the prosecutors did not devote any attention to the question whether the story proposed by P. and A. was credible, although some of their statements called for caution, such as the assertion that the applicant, 14 years old at the time, had started caressing A. minutes after having sex for the first time in her life with another man (...).

178. The Court thus considers that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made.

179. It is highly significant that the reason for that failure was, apparently, the investigator's and the prosecutors' opinion that, since what was alleged to have occurred was a "date rape", in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances. That approach transpires clearly from the position of the investigator and, in particular, from the regional prosecutor's decision of 13 May 1997 and the Chief Public Prosecutor's decision of 24 June 1997 (...).

180. Furthermore, it appears that the prosecutors did not exclude the possibility that the applicant might not have consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented (...).

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.

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.

183. The authorities may also be criticised for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors (...).

184. Furthermore, they handled the investigation with significant delays (...).

185. In sum, the Court, without expressing an opinion on the guilt of P. and A., finds that the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.

186. As regards the Government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the Court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal-law nature (...).

187. The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention. It also holds that no separate issue arises under Article 13 of the Convention.

[...]

*European Court
of Human Rights*

Siliadin v. France

Application N° 73316/01

*Judgment of
July 26, 2005*



[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

[...]

9. The applicant was born in 1978 and lives in Paris.

10. She arrived in France on 26 January 1994, aged 15 years and 7 months, with Mrs D., a French national of Togolese origin. She had a passport and a tourist visa.

11. It had been agreed that she would work at Mrs D.'s home until the cost of her air ticket had been reimbursed and that Mrs D. would attend to her immigration status and find her a place at school. In reality, the applicant became an unpaid housemaid for Mr and Mrs D. and her passport was taken from her.

12. In the second half of 1994, Mrs D. "lent" the applicant to Mr and Mrs B., who had two small children, so that she could assist the pregnant Mrs B. with household work. Mrs B. also had another daughter from a first marriage who stayed with her during the holidays and at weekends. The applicant lived at Mr and Mrs B.'s home, her father having given his consent.

13. On her return from the maternity hospital, Mrs B. told the applicant that she had decided to keep her.

14. The applicant subsequently became a general housemaid for Mr and Mrs B. She worked seven days a week, without a day off, and was occasionally and exceptionally authorised to go out on Sundays to attend mass. Her working day began at 7.30 a.m., when she had to get up and prepare breakfast, dress the children, take them to nursery school or their recreational activities, look after the baby, do the housework and wash and iron clothes.

In the evening she prepared dinner, looked after the older children, did the washing up and went to bed at about 10.30 p.m. In addition, she had to clean a studio flat, in the same building, which Mr B. had made into an office.

The applicant slept on a mattress on the floor in the baby's room; she had to look after him if he woke up.

15. She was never paid, except by Mrs B.'s mother, who gave her one or two 500 French franc (FRF) notes.

16. In December 1995 the applicant was able to escape with the help of a Haitian national who took her in for five or six months. She looked after the latter's two children, was given appropriate accommodation and food, and received FRF 2,500 per month.

17. Subsequently, in obedience to her paternal uncle, who had been in contact with Mr and Mrs B., she returned to the couple, who had undertaken to put her immigration status in order. However, the situation remained unchanged: the applicant continued to carry out household tasks and look after the couple's children. She slept on a mattress on the floor of the children's bedroom, then on a folding bed, and wore second-hand clothes. Her immigration status had still not been regularised, she was not paid and did not attend school.

18. On an unspecified date, the applicant managed to recover her passport, which she entrusted to an acquaintance of Mr and Mrs B. She also confided in a neighbour, who alerted the Committee against Modern Slavery (*Comité contre l'esclavage moderne*), which in turn filed a complaint with the prosecutor's office concerning the applicant's case.

19. On 28 July 1998 the police raided Mr and Mrs B.'s home.

20. The couple were prosecuted on charges of having obtained from July 1995 to July 1998 the performance of services without payment or in exchange for payment that was manifestly disproportionate to the work carried out, by taking advantage of that person's vulnerability or state of dependence; with having subjected an individual to working and living conditions that were incompatible with human dignity by taking advantage of her vulnerability or state of dependence; and with having employed and maintained in their service an alien who was not in possession of a work permit.

[...]

II. RELEVANT LAW

[...]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION

52. The applicant complained that there had been a violation of Article 4 of the Convention. This provision states, *inter alia*:

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour. (...)

[...]

B. The merits

1. Applicability of Article 4 and the positive obligations

64. The Court notes that the Government do not dispute that Article 4 is applicable in the instant case.

65. The applicant considered that the exploitation to which she had been subjected while a minor amounted to a failure by the State to comply with its positive obligation under Articles 1 and 4 of the Convention, taken together, to put in place adequate criminal-law provisions to prevent and effectively punish the perpetrators of those acts.

66. In the absence of rulings on this matter in respect of Article 4, she referred in detail to the Court's case-law on States' positive obligations with regard to Articles 3 and 8 (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91; *A. v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VI; and *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII).

67. She added that, in the various cases in question, the respondent States had been held to be responsible on account of their failure, in application of Article 1 of the Convention, to set up a system of criminal prosecution and punishment that would ensure tangible and effective protection of the rights guaranteed by Articles 3 and/or 8 against the actions of private individuals.

68. She emphasised that this obligation covered situations where the State authorities were criticised for not having taken adequate measures to prevent the existence of the impugned situation or to limit its effects. In addition, the scope of the State's positive ob-

ligation to protect could vary on account of shortcomings in its legal system, depending on factors such as the aspect of law in issue, the seriousness of the offence committed by the private individual concerned or particular vulnerability on the part of the victim. This was precisely the subject of her application, in the specific context of protection of a minor's rights under Article 4.

69. The applicant added that, in the absence of any appropriate criminal-law machinery to prevent and punish the direct perpetrators of alleged ill-treatment, it could not be maintained that civil proceedings to afford reparation of the damage suffered were sufficient to provide her with adequate protection against possible assaults on her integrity.

70. She considered that the right not to be held in servitude laid down in Article 4 § 1 of the Convention was an absolute right, permitting of no exception in any circumstances. She noted that the practices prohibited under Article 4 were also the subject of specific international conventions which applied to both children and adults.

71. Accordingly, the applicant considered that the States had a positive obligation, inherent in Article 4 of the Convention, to adopt tangible criminal-law provisions that would deter such offences, backed up by law-enforcement machinery for the prevention, detection and punishment of breaches of such provisions.

72. She further observed that, as the public prosecutor's office had not considered it necessary to appeal on points of law on the grounds of public interest, the acquittal of Mr and Mrs B. of the offences set out in Articles 225-13 and 225-14 of the Criminal Code had become final. Consequently, the court of appeal to which the case had been remitted after the initial judgment was quashed could not return a guilty verdict nor, *a fortiori*, impose a sentence, but could only decide whether to award civil damages. She considered that a mere finding that the constituent elements of the offence set out in Article 225-13 of the Criminal Code had been established and the imposition of a fine and damages could not be regarded as an acknowledgment, whether express or in substance, of a breach of Article 4 of the Convention.

[...]

77. The Court points out that it has already been established that, with regard to certain Convention provisions, the fact that a State refrains from infringing the guaranteed rights does not suffice to conclude that it has complied with its obligations under Article 1 of the Convention.

78. Thus, with regard to Article 8 of the Convention, it held as long ago as 1979:
- “... Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life.
- This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court’s view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child’s integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2. ...” (*Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31)
79. It subsequently clarified this concept:
- “Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State’s margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.” (*X and Y v. the Netherlands*, cited above, pp. 11-13, §§ 23, 24 and 27; *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003; and *M.C. v. Bulgaria*, cited above, § 150)
80. As regards Article 3 of the Convention, the Court has found on numerous occasions 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.” (see *A. v. the United Kingdom*, cited above, p. 2699, § 22; *Z and Others v. the United Kingdom*, cited above, §§ 73-75; *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002; and *M.C. v. Bulgaria*, cited above, § 149)

81. It has also found that:

“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.” (see, *mutatis mutandis*, *X and Y v. the Netherlands*, cited above, pp. 11-13, §§ 21-27; *Stubbings and Others v. the United Kingdom*, 22 October 1996, Reports 1996-IV, p. 1505, §§ 62-64; and *A. v. the United Kingdom*, cited above, as well as the United Nations Convention on the Rights of the Child, Articles 19 and 37)

82. The Court considers that, together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe.

[...]

84. The Court notes that, in referring to the above-mentioned case, the Government accepted at the hearing that positive obligations did appear to exist in respect of Article 4.

85. In this connection, it notes that Article 4 § 1 of the Forced Labour Convention, adopted by the International Labour Organisation (ILO) on 28 June 1930 and ratified by France on 24 June 1937, provides:

“The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.”

86. Furthermore, Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956, which came into force in respect of France on 26 May 1964, states:

“Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in Article 1 of the Slavery Convention signed at Geneva on 25 September 1926: ... [d]ebt bondage, ... [a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

87. In addition, with particular regard to children, Article 19 § 1 of the International Convention on the Rights of the Child of 20 November 1989, which came into force in respect of France on 6 September 1990, provides:

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, (...), maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

Article 32 provides:

“1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.”

88. Finally, the Court notes that it appears from the Parliamentary Assembly’s findings (...) that “today’s slaves are predominantly female and usually work in private households, starting out as migrant domestic workers (...).”

89. In those circumstances, the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice (see *M.C. v. Bulgaria*, cited above, § 153).

2. *Alleged violation of Article 4 of the Convention*

90. With regard to the violation of Article 4 of the Convention, the applicant noted from the outset that the right not to be held in servitude laid down in this provision was

an absolute one, in the same way as the right not to be compelled to perform forced or compulsory labour.

91. She said that, although the Convention did not define the terms servitude or “forced or compulsory labour”, reference should be made to the relevant international conventions in this field to determine the meaning of these concepts, while importance had to be attached in the instant case to the criteria laid down by both the United Nations and the Council of Europe for identifying modern forms of slavery and servitude, which were closely linked to trafficking in human beings, and to the internationally recognised necessity of affording children special protection on account of their age and vulnerability.

92. She pointed out that her situation had corresponded to three of the four servile institutions or practices referred to in Article 1 of the Supplementary Geneva Convention of 30 April 1956, namely debt bondage, the delivery of a child or adolescent to a third person, whether for reward or not, with a view to the exploitation of his or her labour, and serfdom. She noted that she had not come to France in order to work as a domestic servant but had been obliged to do so as a result of the trafficking to which she had been subjected by Mrs B., who had obtained her parents’ agreement through false promises. She concluded that such “delivery” of a child by her father, with a view to the exploitation of her labour, was similar to the practice, analogous to slavery, referred to in Article 1 (d) of the United Nations Supplementary Convention of 1956.

93. The applicant also referred to the documentation published by the Council of Europe on domestic slavery and pointed out that the criteria used included confiscation of the individual’s passport, the absence of remuneration or remuneration that was disproportionate to the services provided, deprivation of liberty or self-imposed imprisonment, and cultural, physical and emotional isolation.

94. She added that it was clear from the facts that her situation was not temporary or occasional in nature, as was normally the case with “forced or compulsory labour”. Her freedom to come and go had been limited, her passport had been taken away from her, her immigration status had been precarious before becoming illegal, and she had also been kept by Mr and Mrs B. in a state of fear that she would be arrested and expelled. She considered that this was equivalent to the concept of self-imposed imprisonment described above.

95. Referring to her working and living conditions at Mr and Mrs B.’s home, she concluded that her exploitation at their hands had compromised her education and social in-

tegration, as well as the development and free expression of her personality. Her identity as a whole had been involved, which was a characteristic of servitude but not, in general, of forced or compulsory labour.

96. She added that in addition to the unremunerated exploitation of another's work, the characteristic feature of modern slavery was a change in the individual's state or condition, on account of the level of constraint or control to which his or her person, life, personal effects, right to come and go at will or to take decisions was subjected.

She explained that, although she had not described her situation as "forced labour" in the proceedings before the Versailles Court of Appeal, the civil party had claimed in its submissions that "the exploitation to which Ms Siliadin was subjected ... had, at the very least, the characteristics of 'forced labour' within the meaning of Article 4 § 2 of the Convention ...; in reality, she was a domestic slave who had been recruited in Africa".

97. As to the definition of "forced or compulsory labour", the applicant drew attention to the case-law of the Commission and the Court, and emphasised that developments in international law favoured granting special protection to children.

98. She noted that French criminal law did not contain specific offences of slavery, servitude or forced or compulsory labour, still less a definition of those three concepts that was sufficiently specific and flexible to be adapted to the forms those practices now took. In addition, prior to the enactment of the Law of 18 March 2003, there had been no legislation that directly made it an offence to traffic in human beings.

99. Accordingly, the offences to which she had been subjected fell within the provisions of Articles 225-13 and 225-14 of the Criminal Code as worded at the material time. These were non-specific texts of a more general nature, which both required that the victim be in a state of vulnerability or dependence. Those concepts were as vague as that of the offender's "taking advantage", which was also part of the definition of the two offences. In this connection, she emphasised that both legal commentators and the National Assembly's taskforce on the various forms of modern slavery had highlighted the lack of legal criteria enabling the courts to determine whether such a situation obtained, which had led in practice to unduly restrictive interpretations.

100. Thus, Article 225-13 of the Criminal Code made it an offence to obtain another person's labour by taking advantage of him or her. In assessing whether the victim was vulnerable or in a state of dependence, the courts were entitled to take into account, among other circumstances, certain signs of constraint or control of the individual.

However, those were relevant only as the prerequisites for a finding of exploitation, not as constituent elements of the particular form of the offence that was modern slavery. In addition, this article made no distinction between employers who took advantage of the illegal position of immigrant workers who were already in France and those who deliberately placed them in such a position by resorting to trafficking in human beings.

101. She added that, contrary to Article 225-13, Article 225-14 required, and continued to require, an infringement of human dignity for the offence to be established. That was a particularly vague concept, and one subject to random interpretation. It was for this reason that neither her working nor living conditions had been found by the court to be incompatible with human dignity.

102. The applicant said in conclusion that the criminal-law provisions in force at the material time had not afforded her adequate protection from servitude or from forced or compulsory labour in their contemporary forms, which were contrary to Article 4 of the Convention. As to the fact that the criminal proceedings had resulted in an award of compensation, she considered that this could not suffice to absolve the State of its obligation to establish a criminal-law machinery which penalised effectively those guilty of such conduct and deterred others.

[...]

109. The Court notes that the applicant arrived in France from Togo at the age of 15 years and 7 months with a person who had agreed with her father that she would work until her air ticket had been reimbursed, that her immigration status would be regularised and that she would be sent to school.

110. In reality, the applicant worked for this person for a few months before being “lent” to Mr and Mrs B. It appears from the evidence that she worked in their house without respite for approximately fifteen hours per day, with no day off, for several years, without ever receiving wages or being sent to school, without identity papers and without her immigration status being regularised. She was accommodated in their home and slept in the children’s bedroom.

111. The Court also notes that, in addition to the Convention, numerous international conventions have as their objective the protection of human beings from slavery, servitude and forced or compulsory labour (see “Relevant law” above). As the Parliamentary Assembly of the Council of Europe has pointed out, although slavery was officially

abolished more than 150 years ago, “domestic slavery” persists in Europe and concerns thousands of people, the majority of whom are women.

112. The Court reiterates that Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see, with regard to Article 3, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 163; *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 34-35, § 88; *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports 1996-V*, p. 1855, § 79; and *Selmouni v. France* [GC], no. 25803/94, § 79, ECHR 1999-V).

In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the member States’ positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation (see, *mutatis mutandis*, *M.C. v. Bulgaria*, cited above, § 166).

113. Accordingly, the Court must determine whether the applicant’s situation falls within Article 4 of the Convention.

114. It is not disputed that she worked for years for Mr and Mrs B., without respite and against her will. It has also been established that the applicant has received no remuneration from Mr and Mrs B. for her work.

115. In interpreting Article 4 of the European Convention, the Court has in a previous case already taken into account the ILO conventions, which are binding on almost all of the Council of Europe’s member States, including France, and especially the 1930 Forced Labour Convention (see *Van der Musselle v. Belgium*, judgment of 23 November 1983, Series A no. 70, p. 16, § 32).

116. It considers that there is in fact a striking similarity, which is not accidental, between paragraph 3 of Article 4 of the European Convention and paragraph 2 of Article 2 of Convention No. 29. Paragraph 1 of the last-mentioned Article provides that “for the purposes” of the latter convention, the term “forced or compulsory labour” shall mean “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

117. It remains to be ascertained whether there was “forced or compulsory” labour. This brings to mind the idea of physical or mental constraint. What there has to be is work “exacted ... under the menace of any penalty” and also performed against the will of the person concerned, that is work for which he “has not offered himself voluntarily” (see *Van der Mussele*, cited above, p. 17, § 34).

118. The Court notes that, in the instant case, although the applicant 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 on 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 (...).

Accordingly, the Court considers that the first criterion was met, especially since the applicant was a minor at the relevant time, a point which the Court emphasises.

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.

121. It remains for the Court to determine whether the applicant was also held in servitude or slavery.

Sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions, and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see, among many other authorities, *Selmouni*, cited above, § 101).

122. The Court notes at the outset that, that according to the 1927 Slavery Convention, “slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. It notes that this definition corresponds to the “classic” meaning of slavery as it was practised for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and

Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an “object”.

123. With regard to the concept of “servitude”, what is prohibited is a “particularly serious form of denial of freedom” (see *Van Droogenbroeck v. Belgium*, Commission’s report of 9 July 1980, Series B no. 44, p. 30, §§ 78-80). It includes, “in addition to the obligation to perform certain services for others ... the obligation for the ‘serf’ to live on another person’s property and the impossibility of altering his condition”. In this connection, in examining a complaint under this paragraph of Article 4, the Commission paid particular attention to the Abolition of Slavery Convention (see also *Van Droogenbroeck v. Belgium*, no. 7906/77, Commission decision of 5 July 1979, DR 17, p. 59).

124. It follows in the light of the case-law on this issue that for Convention purposes “servitude” means an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of “slavery” described above (see *Seguin v. France* (dec.), no. 42400/98, 7 March 2000).

125. Furthermore, under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, each of the States Parties to the convention must take all practicable and necessary legislative and other measures to bring about the complete abolition or abandonment of the following institutions and practices:

“(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

126. In addition to the fact that the applicant was required to perform forced labour, the Court notes that this labour lasted almost fifteen hours a day, seven days per week.

She had been brought to France by a relative of her father’s, and had not chosen to work for Mr and Mrs B.

As a minor, she had no resources and was vulnerable and isolated, and had no means of living elsewhere than in the home of Mr and Mrs B., where she shared the children’s bedroom as no other accommodation had been offered. She was entirely at Mr and Mrs B.’s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

127. In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time.

128. As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.

129. In those circumstances, the Court concludes that the applicant, a minor at the relevant time, was held in servitude within the meaning of Article 4 of the Convention.

130. Having regard to its conclusions with regard to the positive obligations under Article 4, it now falls to the Court to examine whether the impugned legislation and its application in the case in issue had such significant flaws as to amount to a breach of Article 4 by the respondent State.

[...]

143. The Court has previously stated that 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 (see, *mutatis mutandis*, *X and Y v. the Netherlands*, cited above, pp. 11-13, §§ 21-27; *Stubbings and Others*, cited above, p. 1505, §§ 62-64; and *A. v. the United Kingdom*, cited above, p. 2699, § 22; and also the United Nations Convention on the Rights of the Child, Articles 19 and 37).

144. Further, the Court has held in a case concerning rape that “the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated” (see *X and Y v. the Netherlands*, cited above, p. 13, § 27).

145. The Court observes that, in the instant case, the applicant, who was subjected to treatment contrary to Article 4 and held in servitude, was not able to see those responsible for the wrongdoing convicted under the criminal law.

146. In this connection, it notes that, as the Principal Public Prosecutor did not appeal on points of law against the Court of Appeal's judgment of 19 October 2000, the appeal to

the Court of Cassation concerned only the civil aspect of the case and Mr and Mrs B.'s acquittal thus became final.

147. In addition, according to the report of 12 December 2001 by the French National Assembly's joint taskforce on the various forms of modern slavery, Articles 225-13 and 225-14 of the Criminal Code, as worded at the material time, were open to very differing interpretations from one court to the next, as demonstrated by this case, which, indeed, was referred to by the taskforce as an example of a case in which a court of appeal had unexpectedly declined to apply Articles 225-13 and 225-14.

148. In those circumstances, the Court considers that the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.

It notes that the legislation has been changed but the amendments, which were made subsequently, were not applicable to the applicant's situation.

It emphasises that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see paragraph 121 above).

[...]

FOR THESE REASONS, THE COURT UNANIMOUSLY

[...]

2. Holds that there has been a violation of Article 4 of the Convention;

[...]

*European Court
of Human Rights*

Tysi c v. Poland

Application N  5410/03

*Judgment of
March 20, 2007*



[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

[...]

9. The applicant became pregnant in February 2000. She had previously had two children, both born by caesarean section. As the applicant was worried about the possible impact of the delivery on her health, she decided to consult her doctors. She was examined by three ophthalmologists (Dr M.S., Dr N. S.-B., Dr K.W.). It transpires from the documents submitted by the applicant that Dr M.S. recommended that the applicant have frequent health checks and avoid physical exertion. Dr N. S.-B. stated that the applicant should consider sterilisation after the birth. All of them concluded that, due to pathological changes in the applicant's retina, the pregnancy and delivery constituted a risk to her eyesight. However, they refused to issue a certificate for the pregnancy to be terminated, despite the applicant's requests, on the ground that the retina might detach itself as a result of pregnancy, but that it was not certain.

10. Subsequently, the applicant sought further medical advice. On 20 April 2000 Dr O. R. G., a general practitioner (GP), issued a certificate stating that the third pregnancy constituted a threat to the applicant's health as there was a risk of rupture of the uterus, given her two previous deliveries by caesarean section. She further referred to the applicant's short-sightedness and to significant pathological changes in her retina. These considerations, according to the GP, also required that the applicant should avoid physical strain which in any case would hardly be possible as at that time the applicant was raising two small children on her own. The applicant understood that on the basis of this certificate she would be able to terminate her pregnancy lawfully.

11. On 14 April 2000, in the second month of the pregnancy, the applicant's eyesight was examined. It was established that she needed glasses to correct her vision in both eyes by 24 dioptries.

12. Subsequently, the applicant contacted a state hospital, the Clinic of Gynaecology and Obstetrics in Warsaw, in the area to which she was assigned on the basis of her residence, with a view to obtaining the termination of her pregnancy. On 26 April 2000 she had an appointment with Dr R.D., head of the Gynaecology and Obstetrics Department of the Clinic.

13. Dr R.D. examined the applicant visually and for a period of less than five minutes, but did not examine her ophthalmological records. Afterwards, he made a note on the back of the certificate issued by Dr O.R.G. that neither her short-sightedness nor her two previous deliveries by caesarean section constituted grounds for therapeutic termination of the pregnancy. He was of the view that, in these circumstances, the applicant should give birth by caesarean section. During the applicant's visit Dr R.D. consulted an endocrinologist, Dr B., whispering to her in the presence of the applicant. The endocrinologist co-signed the note written by Dr R.D., but did not talk to the applicant.

14. The applicant's examination was carried out in a room with the door open to the corridor, which, in the applicant's submission, did not provide a comfortable environment for a medical examination. At the end of the appointment Dr R.D. told the applicant that she could even have eight children if they were delivered by caesarean section.

15. As a result, the applicant's pregnancy was not terminated. The applicant delivered the child by caesarean section in November 2000.

16. After the delivery her eyesight deteriorated badly. On 2 January 2001, approximately six weeks after the delivery, she was taken to the Emergency Unit of the Ophthalmological Clinic in Warsaw. While doing a test of counting fingers, she was only able to see from a distance of three metres with her left eye and five metres with her right eye, whereas before the pregnancy she had been able to see objects from a distance of six metres. A reabsorbing vascular occlusion was found in her right eye and further degeneration of the retinal spot was established in the left eye.

17. According to a medical certificate issued on 14 March 2001 by an ophthalmologist, the deterioration of the applicant's eyesight had been caused by recent haemorrhages in the retina. As a result, the applicant is currently facing a risk of blindness. Dr M.S., the ophthalmologist who examined the applicant, suggested that she should be learning the Braille alphabet. She also informed the applicant that, as the changes to her retina were at a very advanced stage, there were no prospects of having them corrected by surgical intervention.

18. On 13 September 2001 the disability panel declared the applicant to be significantly disabled, while previously she had been recognised as suffering from a disability of medium severity. It further held that she needed constant care and assistance in her everyday life.

19. On 29 March 2001 the applicant lodged a criminal complaint against Dr R.D., alleging that he had prevented her from having her pregnancy terminated on medical

grounds as recommended by the GP and permissible as one of the exceptions to a general ban on abortion. She complained that, following the pregnancy and delivery, she had sustained severe bodily harm by way of almost complete loss of her eyesight. She relied on Article 156 § 1 of the Criminal Code, which lays down the penalty for the offence of causing grievous bodily harm, and also submitted that, under the applicable provisions of social-insurance law, she was not entitled to a disability pension as she had not been working the requisite number of years before the disability developed because she had been raising her children.

[...]

29. In a final decision of 2 August 2002, not subject to a further appeal and numbering twenty-three lines, the District Court upheld the decision to discontinue the case. Having regard to the medical expert report, the court considered that the refusal to terminate the pregnancy had not had a bearing on the deterioration of the applicant's vision. Furthermore, the court found that the haemorrhage in the applicant's eyes had in any event been likely to occur, given the degree and nature of the applicant's condition. The court did not address the procedural complaint which the applicant had made in her appeal against the decision of the district prosecutor.

30. The applicant also attempted to bring disciplinary proceedings against Dr R.D. and Dr B. However, those proceedings were finally discontinued on 19 June 2002, the competent authorities of the Chamber of Physicians finding that there had been no professional negligence.

31. Currently, the applicant can see objects only from a distance of approximately 1.5 metres and is afraid of going blind. On 11 January 2001 the social welfare centre issued a certificate to the effect that the applicant was unable to take care of her children as she could not see from a distance of more than 1.5 metres. On 28 May 2001 a medical panel gave a decision certifying that she suffered from a significant disability. She is at present unemployed and in receipt of a monthly disability pension of PLN 560. She raises her three children alone.

[...]

II. THE MERITS OF THE CASE

[...]

B. Alleged violation of Article 8 of the Convention

67. The applicant complained that the facts of the case had given rise to a breach of Article 8 of the Convention. Her right to due respect for her private life and her physical and moral integrity had been violated both substantively, by failing to provide her with a legal therapeutic abortion, and as regards the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights.

Article 8 of the Convention insofar as relevant, reads as follows:

1. Everyone has the right to respect for his private life (...).
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[...]

2. *The Court's assessment*

a. *The scope of the case*

103. The Court notes that in its decision on admissibility of 7 February 2006 it declared admissible the applicant's complaints Articles 3, 8, 13 and 8 read together with Article 14 of the Convention. Thus, the scope of the case before the Court is limited to the complaints which it has already declared admissible (see, among many authorities, *Sokur v. Ukraine*, no. 29439/02, § 25, 26 April 2005).

104. In this context, the Court observes that the applicable Polish law, the 1993 Act, while it prohibits abortion, provides for certain exceptions. In particular, under section 4 (a) 1 (1) of that Act, abortion is lawful where pregnancy poses a threat to the woman's life or health, certified by two medical certificates, irrespective of the stage reached in pregnancy. Hence, it is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion.

b. Applicability of Article 8 of the Convention

105. The Court first observes that it is not disputed between the parties that Article 8 is applicable to the circumstances of the case and that it relates to the applicant's right to respect for her private life.

106. The Court agrees. It first reiterates that legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (Eur. Comm. HR, Bruggeman and Scheuten v. Germany, cited above [July 12 1977 Report, DR]).

107. The Court also reiterates that "private life" is a broad term, encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (see, among many other authorities, Pretty v. the United Kingdom, § 61). Furthermore, while the Convention does not guarantee as such a right to any specific level of medical care, the Court has previously held that private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity (Glass v. the United Kingdom, no. 61827/00, §§ 74-83, ECHR 2004-II; Sentges v. the Netherlands (dec.) no. 27677/02, 8 July 2003; Pentiacova and Others v. Moldova (dec.), no. 14462/03, ECHR 2005-(...); Nitecki v. Poland (dec.), no. 65653/01, 21 March 2002; Odièvre v. France [GC], no. 42326/98, ECHR 2003-III; *mutatis mutandis*). The Court notes that in the case before it a particular combination of different aspects of private life is concerned. While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.

108. The Court finally observes that the applicant submitted that the refusal of an abortion had also amounted to an interference with her rights guaranteed by Article 8. However, the Court is of the view that the circumstances of the applicant's case and in particular the nature of her complaint are more appropriately examined from the standpoint of the respondent State's above-mentioned positive obligations alone.

c. General principles

109. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must

be justified in terms of the second paragraph, namely as being “in accordance with the law” and “necessary in a democratic society” for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to one of the legitimate aims pursued by the authorities (see e.g. *Olsson v. Sweden* (No. 1), judgment of 24 March 1988, Series A no 130, § 67).

110. In addition, there may also be positive obligations inherent in an effective “respect” for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures (see, among other authorities, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23).

111. However, the boundaries between the State’s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p.19, § 49; *Róžański v. Poland*, no. 55339/00, § 61, 18 May 2006).

112. The Court observes that the notion of “respect” is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case. Nonetheless, for the assessment of positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II; *Carbonara and Ventura v. Italy*, no. 24638/94, § 63, ECHR 2000-VI; and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 133, ECHR 2005-...). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 32, § 67 and, more recently, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI).

113. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, *mutatis mutandis*, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 99, ECHR 2003-VIII).

d. Compliance with Article 8 of the Convention

114. When examining the circumstances of the present case, the Court must have regard to its general context. It notes that the 1993 Act prohibits abortion in Poland, providing only for certain exceptions. A doctor who terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment (...). According to the Polish Federation for Women and Family Planning, the fact that abortion was essentially a criminal offence deterred physicians from authorising an abortion, in particular in the absence of transparent and clearly defined procedures determining whether the legal conditions for a therapeutic abortion were met in an individual case.

115. The Court also notes that in its fifth periodical report to the ICCPR, Committee the Polish Government acknowledged, *inter alia*, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (...). This further highlights, in the Court's view, the importance of procedural safeguards regarding access to a therapeutic abortion as guaranteed by the 1993 Act.

116. A need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves. In the Court's view, in such situations the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman's legal position. The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can

well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.

117. In this connection, the Court reiterates that the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence (see, among other authorities, *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V, §§ 55-63). In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (*AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 19, § 55; and *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV, *mutatis mutandis*). In circumstances such as those in issue in the instant case such a procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body should also issue written grounds for its decision.

118. In this connection the Court observes that the very nature of the issues involved in decisions to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed *post factum* cannot fulfil such a function. In the Court's view, the absence of such preventive procedures in the domestic law can be said to amount to the failure of the State to comply with its positive obligations under Article 8 of the Convention.

119. Against this general background the Court observes that it is not in dispute that the applicant suffered from severe myopia from 1977. Even before her pregnancy she had been officially certified as suffering from a disability of medium severity (...). Having regard to her condition, during her third pregnancy the applicant sought medical advice. The Court observes that a disagreement arose between her doctors as to how the pregnancy and delivery might affect her already fragile vision. The advice given by the two ophthalmologists was inconclusive as to the possible impact of the pregnancy on the applicant's condition. The Court also notes that the GP issued a certificate that her pregnancy constituted a threat to her health, while a gynaecologist was of a contrary view. The Court stresses that it is not its function to question the doctors' clinical judg-

ment as regards the seriousness of the applicant's condition (*Glass v. the United Kingdom*, no 61827/00, § 87, ECHR 2004-II, *mutatis mutandis*). Nor would it be appropriate to speculate, on the basis of the medical information submitted to it, on whether their conclusions as to whether her pregnancy could or could not lead to a deterioration of her eyesight in the future were correct. It is sufficient to note that the applicant feared that the pregnancy and delivery might further endanger her eyesight. In the light of the medical advice she obtained during the pregnancy and, significantly, the applicant's condition at that time, taken together with her medical history, the Court is of the view that her fears cannot be said to have been irrational.

120. The Court has examined how the legal framework regulating the availability of a therapeutic abortion in Polish law was applied to the applicant's case and how it addressed her concerns about the possible negative impact of pregnancy and delivery on her health.

121. The Court notes that the Government referred to the Ordinance of the Minister of Health of 22 January 1997 (...). However, the Court observes that this Ordinance only stipulated the professional qualifications of doctors who could perform a legal abortion. It also made it necessary for a woman seeking an abortion on health grounds to obtain a certificate from a physician "specialising in the field of medicine relevant to [her] condition". The Court notes that the Ordinance provides for a relatively simple procedure for obtaining a lawful abortion based on medical considerations: two concurring opinions of specialists other than the doctor who would perform an abortion are sufficient. Such a procedure allows for taking relevant measures promptly and does not differ substantially from solutions adopted in certain other member States. However, the Ordinance does not distinguish between situations in which there is a full agreement between the pregnant woman and the doctors - where such a procedure is clearly practicable - and cases where a disagreement arises between the pregnant woman and her doctors, or between the doctors themselves. The Ordinance does not provide for any particular procedural framework to address and resolve such controversies. It only obliges a woman to obtain a certificate from a specialist, without specifying any steps that she could take if her opinion and that of the specialist diverged.

122. It is further noted that the Government referred also to Article 37 of the 1996 Medical Profession Act (...). This provision makes it possible for a doctor, in the event of any diagnostic or therapeutic doubts, or upon a patient's request, to obtain a second opinion of a colleague. However, the Court notes that this provision is addressed to members of the medical profession. It only specifies the conditions in which they could obtain a

second opinion of a colleague on a diagnosis or on the treatment to be followed in an individual case. The Court emphasises that this provision does not create any procedural guarantee for a patient to obtain such an opinion or to contest it in the event of a disagreement. Nor does it specifically address the situation of a pregnant woman seeking a lawful abortion.

123. In this connection, the Court notes that in certain State Parties various procedural and institutional mechanisms have been put in place in connection with the implementation of legislation specifying the conditions governing access to a lawful abortion (...).

124. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health.

125. The Court is further of the opinion that the provisions of the civil law on tort as applied by the Polish courts did not afford the applicant a procedural instrument by which she could have vindicated her right to respect for her private life. The civil law remedy was solely of a retroactive and compensatory character. It could only, and if the applicant had been successful, have resulted in the courts granting damages to cover the irreparable damage to her health which had come to light after the delivery.

126. The Court further notes that the applicant requested that criminal proceedings against Dr R.D. be instituted, alleging that he had exposed her to grievous bodily harm by his refusal to terminate her pregnancy. The Court first observes that for the purposes of criminal responsibility it was necessary to establish a direct causal link between the acts complained of – in the present case, the refusal of an abortion – and the serious deterioration of the applicant's health. Consequently, the examination of whether there was a causal link between the refusal of leave to have an abortion and the subsequent deterioration of the applicant's eyesight did not concern the question whether the pregnancy had constituted a "threat" to her health within the meaning of section 4 of the 1993 Act.

Crucially, the examination of the circumstances of the case in the context of criminal investigations could not have prevented the damage to the applicant's health from arising. The same applies to disciplinary proceedings before the organs of the Chamber of Physicians.

127. The Court finds that such retrospective measures alone are not sufficient to provide appropriate protection for the physical integrity of individuals in such a vulnerable position as the applicant (*Storck v. Germany*, no. 61603/00, § 150, ECHR 2005-...).

128. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion.

129. The Court therefore dismisses the Government's preliminary objection and concludes that the authorities failed to comply with their positive obligations to secure to the applicant the effective respect for her private life.

130. The Court concludes that there has been a breach of Article 8 the Convention.

[...]

*European Court
of Human Rights*

Bevacqua and S. v. Bulgaria

Application N° 71127/01

*Judgment of
June 12, 2008*



[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant, Mrs Valentina Nikolaeva Bevacqua, is a Bulgarian national who was born in 1974 and at the relevant time lived in Sofia. In 2003 or 2004 she moved to Italy. The application is submitted by the first applicant on her own behalf and also on behalf of her son S. ("the second applicant"), a minor, who was born in 1997.

6. The first applicant married Mr N. in 1995 and gave birth to S. in January 1997.

7. Later, the relations between the spouses soured, Mr N. became aggressive and on 1 March 2000 the first applicant left the family home with her son and moved into her parents' apartment. On the same day the first applicant filed for divorce and sought an interim custody order, stating, *inter alia*, that Mr N. often used offensive language, battered her "without any reason" and did not contribute to the household budget.

[...]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

54. Relying on Articles 3, 8, 13 and 14, the applicants complained that the authorities failed to take the necessary measures to secure respect for their family life and failed to protect the first applicant against the violent behaviour of her former husband.

55. The Court considers that in the particular circumstances of the present case these complaints fall to be examined under Article 8 of the Convention which reads, in so far as relevant:

"1. Everyone has the right to respect for his private and family life (...)

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[...]

2. *The Court's assessment*

a. *Relevant principles*

64. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves. Children and other vulnerable individuals, in particular, are entitled to effective protection (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, pp. 11-13, §§ 23-24 and 27, and *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003).

65. The right to respect for one's family life under Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation – albeit not absolute – on the national authorities to take such action (see, as a recent authority, *Šobota-Gaji v. Bosnia and Herzegovina*, no. 27966/06, § 51, 6 November 2007, with further references). As regards respect for private life, the Court has previously held, in various contexts, that the concept of private life includes a person's physical and psychological integrity. Furthermore, the authorities' positive obligations – in some cases under Articles 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see the judgments cited in paragraph 85 above and, also, *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, §§ 128-130, and *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII). The Court notes in this respect that the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection has been emphasised in a number of international instruments (...).

b. *Application to the facts of the case*

66. The Court's task is to examine whether the authorities' response to the situation for which the first applicant, acting on her own behalf and on behalf of her son, the second applicant, sought their assistance was in line with their positive obligations flowing from Article 8.

67. The help of the relevant authorities was solicited in a situation where both the first applicant and her husband, who had separated and were divorcing, wished to obtain the custody of their three-year old son and seized the boy repeatedly from each other, including by using physical force. In addition, Mr N., the father, allegedly assaulted the first applicant (...). The first applicant requested interim custody measures and sought assistance in relation to her husband's aggressive behaviour.

(i) Examination of the interim measures application

68. The Court observes that because of its very nature and purpose, an application for interim custody measures must normally be treated with a certain degree of priority, unless there are specific reasons not to do so. No such reasons appear to have existed in the applicants' case. Indeed, the interim custody measures application was based, *inter alia*, on allegations of aggressive behaviour and thus clearly called for priority examination (see paragraph 7 above).

69. It is true that the allegations made by the first applicant, as well as all relevant circumstances regarding the child's situation needed verification which could not be done without the collection of evidence. Therefore, the applicants could not expect to obtain a decision immediately upon submission of the interim measures application.

70. The evidence is, however, that the District Court did not treat the matter with any degree of priority and, during the first six months, ignored the issue of interim measures. In June 2000 it started examining the divorce claim instead of dealing with the temporary custody arrangements first (...).

71. This delay was the result of the domestic courts' practice to adjourn custody issues in divorce proceedings pending the expiry of the statutory reconciliation period (...). While this practice had the legitimate aim to facilitate reconciliation, the Court considers that its automatic application in the applicants' case despite concrete circumstances calling for expedition was unjustified.

72. Furthermore, after 11 September 2000, when the first applicant informed the District Court about the scenes which the child had had to witness earlier that summer, it must have become obvious for the judge dealing with the case that the second applicant, three years old at the time, was adversely affected by the failure of his parents, who lived apart, to agree on temporary custody arrangements pending the divorce proceedings. Furthermore, Mr N. obstructed the possibility for contact between the first applicant and

her child, the second applicant (...). It must have been obvious, therefore, that prompt measures were needed, in particular, in the child's interest.

73. The Court considers that in these circumstances, the authorities' duty under Article 8 to secure respect for the right to private and family life of both applicants – parent and child – required the examination of the interim measures application with due diligence and without delay. They were also under a duty to secure the enjoyment of both applicants' right to normal contacts between them.

74. However, the District Court continued to adjourn the examination of the interim custody application repeatedly, sometimes for reasons so far removed from the substance of the dispute – for example, to verify the registration of a non-governmental organisation (...) – that at least one of those adjournments can fairly be described as arbitrary. Also, the District Court made no effort, as it could have, to collect all relevant evidence in one hearing. It also allowed long intervals between the hearings (...).

75. The Court also considers that the first applicant's decision to withdraw her request for interim measures in February 2001 was not unreasonable in the circumstances, having regard to the unjustified delays in its examination (...).

76. In sum, the District Court's handling of the interim measures issue for a period of approximately eight months (June 2000 – February 2001) is open to criticism as regards its insufficient attention to the need for particular expedition during that period. This attitude, during a period of tense relations between the first applicant and her husband that affected adversely the second applicant, a three-year old child at the time (...), is difficult to reconcile with the authorities' duty to secure respect for the applicants' private and family life.

(ii) The first applicant's complaints about Mr N.'s aggressive behaviour

77. The Court notes that the medical certificate concerning the first incident complained about was issued several days after the events and has, therefore, less evidential value (...).

78. There is no doubt about the evidential value of the second medical certificate, which recorded a bruise on the first applicant's eyelid and her swollen cheek following the incident of 28 June 2000 (...). The Court also notes that Mr N.'s violent behaviour, albeit during a period of time prior to the events at issue, was established by the Sofia City Court in its judgment of 21 March 2002 (...).

79. On the basis of these facts the Court is satisfied that the first applicant's complaints about Mr N.'s behaviour concerned her physical integrity and well-being and that, having regard to the nature of the allegations and the facts of the case as a whole, the question about the adequacy of the authorities' reaction may give rise to an issue under Article 8 of the Convention. Moreover, in the concrete circumstances this question also concerned the second applicant's right to respect for his private life, as he could not effectively exercise his right to regular contacts with the first applicant and, whenever such contacts materialised, was adversely affected by the incidents he had to witness (...).

80. The Court observes that the police and the prosecutors, to whom the first applicant turned for help, did not remain totally passive – Mr N. was issued with a police warning and an attempt was made to broker an informal agreement between the parents, albeit with little effect in practice (...).

81. Furthermore, the Bulgarian legal system provided legal means whereby the first applicant could seek establishment of the facts, as well as Mr N.'s punishment, and compensation – it was open to her to bring private prosecution proceedings and a civil claim for damages against Mr N. (...).

82. Without overlooking the vulnerability of the victims in many cases of domestic violence, in this particular case the Court cannot accept the applicants' argument that her Convention rights could only be secured if Mr N. was prosecuted by the State and that the Convention required State-assisted prosecution, as opposed to prosecution by the victim, in all cases of domestic violence. While the Court cannot exclude that the relevant Bulgarian law, according to which many acts of serious violence between family members cannot be prosecuted without the active involvement of the victim (...), may be found, in certain circumstances, to raise an issue of compatibility with the Convention, its task is limited to the examination of the particular facts before it. It is not the Court's role to replace the national authorities and choose in their stead among the wide range of possible measures that could suffice to secure respect for the applicants' private and family life. Within the limits of the Convention, the choice of the means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation.

83. On the basis of the concrete facts in this case, the Court considers that certain administrative and policing measures – among them, for example, those mentioned in Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe or those introduced in Bulgarian law by the Domestic Violence Act 2005 (...) – would

have been called for. However, at the relevant time Bulgarian law did not provide for specific administrative and policing measures and the measures taken by the police and prosecuting authorities on the basis of their general powers did not prove effective. The Court also considers that the possibility for the first applicant to bring private prosecution proceedings and seek damages was not sufficient as such proceedings obviously required time and could not serve to prevent recurrence of the incidents complained of. In the Court's view, the authorities' failure to impose sanctions or otherwise enforce Mr N.'s obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicants needed. The authorities' view that no such assistance was due as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights.

(iii) Conclusion

84. In the Court's view, the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which affected adversely the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour amounted to a failure to assist the applicants contrary to the State positive obligations under Article 8 of the Convention to secure respect for their private and family life.

FOR THESE REASONS, THE COURT

[...]

2. Holds by six votes to one that there has been a violation of Article 8 of the Convention;

[...]

*European Court
of Human Rights*

Salmanođlu and Polattaş v. Turkey

Application N° 15828/03

*Judgment of
March 17, 2009*



[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

[...]

A. The applicants' detention in police custody medical reports issued in their respect and the investigation into their allegations of ill-treatment

5. On 6 March 1999 at 2 a.m. Nazime Ceren Salmanoğlu was taken into custody by police officers from the Anti-Terrorist Branch of the İskenderun police headquarters on suspicion of membership of the PKK (the Workers' Party of Kurdistan, an illegal organisation).

[...]

7. On the same day, the head of the Anti-Terrorist Branch of the İskenderun police headquarters requested the İskenderun Maternity Hospital to establish Nazime Ceren Salmanoğlu's virginity status and determine whether she had had recent sexual relations (*bakire olup olmadığı ve yakın zamanda cinsel ilişkide bulunup bulunmadığını gösterir kati doktor raporunun verilmesi*). The medical expert, S.S., who conducted the examination, noted, on a document of the police, that Nazime Ceren Salmanoğlu was still a virgin and had not had recent sexual relations.

8. On 8 March 1999 at 11.30 a.m. Fatma Deniz Polattaş was arrested by police officers from the Anti-Terrorist Branch of the İskenderun police headquarters, pursuant to an arrest warrant issued against her within the context of a police operation conducted against the PKK.

9. On the same day, the head of the Anti-Terrorist Branch of the İskenderun police headquarters requested the İskenderun Maternity Hospital to establish Fatma Deniz Polattaş's virginity status and determine whether she had had recent sexual relations. She was examined by S.S. who subsequently informed the police that the applicant was a virgin and had not had recent sexual relations.

10. The applicants allege that they were subjected to ill-treatment while in police custody. In particular, Nazime Ceren Salmanoğlu was blindfolded, forced to stand for a long

time, and deprived of food, water and sleep. She was also insulted and threatened with death and the torture of other members of her family. She was sexually harassed and beaten. Fatma Deniz Polattaş was blindfolded, insulted and beaten. The police officers also inserted a truncheon into her anus, which caused bleeding. A female police officer asked her family to provide clean underwear, which the applicant changed into. The applicants were both stripped naked by this female police officer, A.Y.

[...]

12. On 12 March 1999 at 10.15 a.m. the applicants were once again referred to the İskenderun Maternity Hospital for virginity testing. The applicants were not examined as they refused to undergo a gynaecological examination.

[...]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

[...]

B. Merits

[...]

2. The Court's assessment

a. As regards the alleged ill-treatment during the applicants' detention in police custody

76. The Court reiterates that, in assessing evidence in this field, it applies the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among many others, *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV; *Süleyman Erkan v. Turkey*, no. 26803/02, § 31, 31 January 2008).

77. In the instant case, the Court observes that both parties submitted several medical reports as evidence in support of their submissions to the Court. The reports relied on by

the applicants demonstrate that the applicants were suffering at least from psychological disorders as a result of traumatic experiences which had occurred during their detention in police custody, whereas the reports issued on the applicants' release from detention indicate no sign of ill-treatment on their persons.

78. The Court considers that the consistency of the applicants' submissions, the seriousness of their allegations, their ages at the time of the events and the medical reports issued by the Turkish Medical Association, the Istanbul University and the 4th Section of the Forensic Medicine Institute together raise a reasonable suspicion that the applicants could have been the subject of ill-treatment, as alleged. Consequently, the Court should ascertain which part of the medical evidence submitted by the parties should be taken into consideration in order to determine the merits of the applicants' allegations of ill-treatment. In this respect, the Court must consider the applicants' forensic examinations at the end of their detention in police custody with a view to establishing whether those examinations could have produced reliable medical evidence.

79. The Court reiterates that the medical examination of persons in police custody, together with the right of access to a lawyer and the right to inform a third party of the detention, constitutes one of the most essential safeguards against ill-treatment (see *Türkan v. Turkey*, no. 33086/04, § 42, 18 September 2008; *Algür v. Turkey*, no. 32574/96, § 44, 22 October 2002). Moreover, evidence obtained during forensic examinations plays a crucial role during investigations conducted against detainees and in cases where the latter raise allegations of ill-treatment. Therefore, in the Court's view, the system of medical examination of persons in police custody is an integral part of the judicial system. Against this background, the Court's first task is to determine whether, in the circumstances of the present case, the national authorities ensured the effective functioning of the system of medical examination of persons in police custody.

80. The Court has already reaffirmed the European Committee for the Prevention of Torture's ("CPT") standards on the medical examination of persons in police custody and the guidelines set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Istanbul Protocol", (submitted to the United Nations High Commissioner for Human Rights, 9 August 1999). The Court has held that all health professionals owe a fundamental duty of care to the people they are asked to examine or treat. They should not compromise their professional independence by contractual or other considerations but should provide impartial evidence, including making clear in their reports any evidence of ill-treatment (see *Osman Karademir v. Turkey*, no. 30009/03, § 54, 22 July 2008). The Court has further

referred to the CPT's standard that all medical examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, every detained person should be examined on his or her own and the results of that examination, as well as relevant statements by the detainee and the doctor's conclusions, should be formally recorded by the doctor (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 118, ECHR 2000-X; *Mehmet Eren v. Turkey*, no. 32347/02, § 40, 14 October 2008). Moreover, an opinion by medical experts on a possible relationship between physical findings and ill-treatment was found to be a requirement by the Court.

81. The Court notes that, according to Article 10 of the *Directive on Apprehension, Arrest and Taking of Statements* dated 1 October 1998 ("1998 Directive"), in force at the material time, the medical examination of persons in police custody was compulsory under Turkish law. Article 10 (5) stipulated that a copy of the medical report issued in respect of a detainee should be kept at the health institute and another copy should be sent to the detention centre. A third copy should be given to the detainee when he is released from custody and a fourth copy should be included in the investigation file. The sixth paragraph of the same provision stipulated that the doctor and the detainee should be left alone during the examination, "in cases where there is no restriction with regard to the investigation and to security considerations" (see, for the text of Article 10 of the 1998 Directive, *Annexes to the Interim Report* of the Turkish Government in response to the Report of the CPT on its visit to Turkey from 5 to 17 October 1997, CPT/Inf (99) 3).

82. The Court observes that these provisions of Article 10 were repeatedly criticised by the CPT between 1999 and 2003 (see the following Reports of the CPT: CPT/Inf (2000) 17 § 19; CPT/Inf (2001) 25 §§ 64-66; CPT/Inf (2002) 8 § 42; CPT/Inf (2003) 8 § 41) as they undermined confidence in and the effectiveness of the system of forensic examinations.

83. In this connection, the Court welcomes the revised Directive which came into force on 1 June 2005 following the CPT's observations and recommendations. The new Directive provides that medical examinations must take place in the absence of law enforcement officials unless the doctor requests their presence in a particular case. It also repealed the requirement to send a copy of the medical report to the detention centre (see the Report to the Turkish Government on the visit to Turkey carried out by the CPT from 7 to 14 December 2005, CPT/Inf (2006) 30, § 25).

84. Nevertheless, the Court finds no reason to diverge from the view expressed by the CPT, since it also considers that Article 10 (5) and (6) of the 1998 Directive, when in force,

were capable of diminishing the very essence of the safeguard that the medical examinations constituted against ill-treatment.

85. Turning to the particular circumstances of the present case, the Court observes that the nurse who had been present during Fatma Deniz Polattaş's rectal examination on 6 April 1999 told the *assize court* (penal court) that there had been a prison guard in the examination room (...). However, this was denied by the doctor who had conducted the examination (...). The Court further observes that four other doctors who had examined the applicants also denied the allegation that there had been police officers in the examination rooms. Although the Court is unable to verify these allegations in respect of all examinations, it notes that on at least one occasion, on 12 March 1999, the applicants were examined at the same time in the same room while police officers could hear the conversations between them and the doctor and could see the examination room if they wished (...), in clear breach of the aforementioned CPT standards (see paragraph 80 above).

86. The Court further notes that pursuant to the Ministry of Health Circulars of 1995, at the relevant time doctors designated to perform forensic tasks were requested to use standard medical forms which contained distinct sections for the detainee's statements, the doctor's findings and the doctor's conclusions (see, for a copy of the standard forensic medical form, CPT/Inf (99) 3, cited above). They were to forward copies of medical reports to the police and the public prosecutor in sealed envelopes (see the Report to the Turkish Government on the visit to Turkey carried out by the CPT from 5 to 17 October 1997, CPT/Inf (99) 2, § 39). Moreover, the Prime Minister's Circular of 3 December 1997 expressly stipulated that forensic reports issued in respect of persons in police custody should comply with the standard forensic medical form (...).

87. The Court observes that the doctors who conducted the applicants' medical examinations during their police custody failed to use the standard forensic medical forms despite the aforementioned, clear ministerial instructions. What is more, the doctors only wrote down that they did not observe any sign of physical violence on the applicants' bodies (see paragraphs 6, above). One of the doctors, B.I.K., stated before the *assize court* that Fatma Deniz Polattaş had been disturbed as she had not wished to have physical contact, but failed to note this observation on the applicant's psychological state in her report (...). Moreover, none of the doctors recorded the detainees' statements and their conclusions. The Court is particularly struck by the fact that the doctors merely recorded their findings on the letters which had been sent to them by the police headquarters requesting the medical examination of the applicants and other arrestees (see paragraphs 6, 7 (...) above).

88. Lastly, the Court observes that the applicants were subjected to virginity tests at the start of their detention in police custody (see paragraphs 7 and 9 above). However, the Court notes that the Government have not shown that these examinations were based on and were in compliance with any statutory or other legal requirement. They just submitted that the examinations were carried out following the applicants' complaints of sexual violence and that the latter had consented to the tests. In the latter connection, no evidence of any written consent was submitted by the Government. In assessing the validity of the purported consent, the Court cannot overlook the fact that the first applicant was only sixteen years old at the material time. Nevertheless, even assuming that the applicants' consent was valid, the Court considers that there could be no medical or legal necessity justifying such an intrusive examination on that occasion as the applicants had yet not complained of sexual assault when the tests were conducted. The tests in themselves may therefore have constituted discriminatory and degrading treatment (see, *mutatis mutandis*, *Juhnke v. Turkey*, no. 52515/99, § 81, 13 May 2008).

89. Having regard to the above, the Court finds that the applicants' medical examinations between 6 and 12 March 1999, as well as the examination of 6 April 1999, fell short of the aforementioned CPT standards and the principles enunciated in the Istanbul Protocol. It concludes that in the present case the national authorities failed to ensure the effective functioning of the system of medical examinations of persons in police custody. Therefore, these examinations could not produce reliable evidence. Consequently, the Court attaches no weight to the findings of the reports of 6, 8, 9 and 12 March and 6 April 1999.

[...]

96. Therefore, taking into consideration the circumstances of the case as a whole, in particular the virginity tests carried out without any medical or legal necessity at the start of the applicants' detention in custody (see paragraph 88 above) and the post-traumatic stress disorders from which both applicants subsequently suffered, as well as the serious depressive disorder experienced by Fatma Deniz Polattaş, the Court is persuaded that the applicants were subjected to severe ill-treatment during their detention in police custody when they had only been sixteen and nineteen years of age (see *Akkoç*, cited above, § 116).

[...]

98. In the light of its preceding considerations (paragraphs 94-96 above), the Court concludes that there has been a breach of Article 3 of the Convention under its substantive limb.

*European Court
of Human Rights*

Opuz v. Turkey

Application N° 33401/02

*Judgment of
June 9, 2009*



[...]

PROCEDURE

1. The case originated in an application (no. 33401/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mrs Nahide Opuz (“the applicant”), on 15 July 2002.

[...]

3. The applicant alleged, in particular, that the State authorities had failed to protect her and her mother from domestic violence, which had resulted in the death of her mother and her own ill-treatment.

[...]

II. RELEVANT LAW AND PRACTICE

[...]

B. Relevant international and comparative law material

1. *The United Nations’ position with regard to domestic violence and discrimination against women*

72. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), was adopted in 1979 by the UN General Assembly and ratified by Turkey on 19 January 1986.

73. The CEDAW defines discrimination against women as “(...) any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (...).” As regards the States’ obligations, Article 2 of the CEDAW provides, in so far as relevant, the following:

“States Parties condemn discrimination against women in all its forms, agree to

pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(...)

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;”

74. The Committee on the Elimination of All Forms of Discrimination Against Women (hereinafter “the CEDAW Committee”) has found that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men” and is thus prohibited under Article 1 of CEDAW. Within the general category of gender-based violence, the Committee includes violence by “private act”¹ and “family violence”.² Consequently, gender-based violence triggers duties in States. The General Recommendation no. 19 sets out a catalogue of such duties. They include a duty on States to “take all legal and other measures that are necessary to provide effective protection of women against gender-based violence³ including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence.”⁴ In its Concluding Comments on the combined fourth and fifth periodic report of Turkey (hereinafter “Concluding Comments”), the CEDAW Committee reiterated that violence against women, including domestic violence, is a form of discrimination (see, CEDAW/C/TUR/4-5 and Corr.1, 15 February 2005, § 28).

75. Furthermore, in its explanations of General Recommendation no. 19, the CEDAW Committee considered the following:

“(…) 6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.

Comments on specific articles of the Convention

(...)

Articles 2 f), 5 and 10 c)

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.”

76. In the case of *A.T. v. Hungary* (decision of 26 January 2005), where the applicant had alleged that her common-law husband and father of her two children had been physically abusing and threatening her from 1998 onwards, the CEDAW Committee directed Hungary to take measures “to guarantee the physical and mental integrity of the applicant and her family”, as well as to ensure that she was provided with a safe place of residence to live with her children, and that she received child support, legal assistance and compensation in proportion to the harm sustained and the violation of her rights. The Committee also made several general recommendations to Hungary on improving the protection of women against domestic violence, such as establishing effective investigative, legal and judicial processes, and increasing treatment and support resources.

77. In the case of *Fatma Yildirim v. Austria* (decision of 1 October 2007), which concerned the killing of Mrs Yildirim by her husband, the CEDAW Committee found that the State Party had breached its due diligence obligation to protect Fatma Yildirim. It therefore concluded that the State Party had violated its obligations under Article 2 (a) and (c) through (f), and Article 3 of the CEDAW read in conjunction with Article 1 of the CEDAW and General Recommendation 19 of the Committee and the corresponding rights of the deceased Fatma Yildirim to life and to physical and mental integrity.

78. The United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), in its Article 4(c), urges States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons”.

79. In his third report, of 20 January 2006, to the Commission on Human Rights of the UN Economic and Social Council (E/CN.4/2006/61), the Special Rapporteur on violence against women considered that there is a rule of customary international law that “obliges States to prevent and respond to acts of violence against women with due diligence”.

2. *The Council of Europe*

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.

81. The Committee of Ministers recommended, in particular, that member States should penalise serious violence against women such as sexual violence and rape, abuse of the vulnerability of pregnant, defenceless, ill, disabled or dependent victims, as well as penalising abuse of position by the perpetrator. The Recommendation also stated that member States should ensure that all victims of violence are able to institute proceedings, make provisions to ensure that criminal proceedings can be initiated by the public prosecutor, encourage prosecutors to regard violence against women as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest, ensure where necessary that measures are taken to protect victims effectively against threats and possible acts of revenge and take specific measures to ensure that children’s rights are protected during proceedings.

82. With regard to violence within the family, the Committee of Ministers recommended that Member states should classify all forms of violence within the family as criminal offences and envisage the possibility of taking measures in order, *inter alia*, to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas, to penalise all breaches of the measures imposed on the perpetrator and to establish a compulsory protocol for operation by the police, medical and social services.

3. *The Inter-American System*

83. In *Velazquez-Rodriguez*, the Inter-American Court stated:
“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 an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”⁵

84. The legal basis for the ultimate attribution of responsibility to a State for private acts relies on State failure to comply with the duty to ensure human rights protection, as set out in Article 1(1) of the American Convention on Human Rights.⁶ The Inter-American Court’s case-law reflects this principle by repeatedly holding States internationally responsible on account of their lack of *due diligence* to prevent human rights violations, to investigate and sanction perpetrators or to provide appropriate reparations to their families.

85. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 1994 (Belém do Pará Convention)⁷ sets out States’ duties relating to the eradication of gender based violence. It is the only multilateral human rights treaty to deal solely with violence against women.

86. The Inter-American Commission adopts the Inter-American Court’s approach to the attribution of State responsibility for the acts and omissions of private individuals. In the case of *Maria Da Penha v. Brazil*,⁸ the Commission found that the State’s failure to exercise due diligence to prevent and investigate a domestic violence complaint warranted a finding of State responsibility under the American Convention and the Belém do Pará Convention. Furthermore, Brazil had violated the rights of the applicant and failed to carry out its duty (*inter alia*, under Article 7 of the Convention of Belém do Pará, obliging States to condemn all forms of violence against women), as a result of its failure to act and its tolerance of the violence inflicted. Specifically, the Commission held that:

“(...) tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

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 fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. 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.”⁹

4. Comparative-Law material

87. In 11 member States of the Council of Europe, namely in Albania, Austria, Bosnia and Herzegovina, Estonia, Greece, Italy, Poland, Portugal, San Marino, Spain and Switzerland, the authorities are required to continue criminal proceedings despite the victim's withdrawal of complaint in cases of domestic violence.

88. In 27 member States, namely in Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, England and Wales, Finland, the Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta, Moldova, the Netherlands, the Russian Federation, Serbia, Slovakia, Sweden, Turkey and Ukraine, the authorities have a margin of discretion in deciding whether to pursue criminal proceedings against perpetrators of domestic violence. A significant number of legal systems make a distinction between crimes which are privately prosecutable (and for which the victim's complaint is a pre-requisite) and those which are publicly prosecutable (usually more serious offences for which prosecution is considered to be in the public interest).

89. It appears from the legislation and practice of the above-mentioned 27 countries that the decision on whether to proceed where the victim withdraws his/her complaint lies within the discretion of the prosecuting authorities, which primarily take into account the public interest in continuing criminal proceedings. In some jurisdictions, such as England and Wales, in deciding whether to pursue criminal proceedings against the perpetrators of domestic violence the prosecuting authorities (*Crown Prosecution Service*) are required to consider certain factors, including: the seriousness of the offence; whether the victim's injuries are physical or psychological; if the defendant used a weapon; if the defendant has made any threats since the attack; if the defendant planned the attack; the effect (including psychological) on any children living in the household; the chances of the defendant offending again; the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved; the current state of the victim's relationship with the defendant; the effect on that relationship of continuing with the prosecution against the victim's wishes; the history of the relationship, particularly if there was any other violence in the past; and the defendant's criminal history, particularly any previous violence. Direct reference is made to the need to strike a balance between the victim's and any children's Article 2 and Article 8 rights in deciding on a course of action.

90. Romania seems to be the only State which bases the continuance of criminal proceedings entirely, and in all circumstances, on the wishes/complaints of the victim.

[...]

THE LAW

I. ADMISSIBILITY

[...]

111. In that regard the Court notes that from 10 April 1995 the applicant and her mother had been victims of multiple assaults and threats by H.O. against their physical integrity. These acts of violence had resulted in the death of the applicant's mother and caused the applicant intense suffering and anguish. While there were intervals between the impugned events, the Court considers that the overall violence to which the applicant and her mother were subjected over a long period of time cannot be seen as individual and separate episodes and must therefore be considered together as a chain of connected events.

[...]

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

[...]

B. The Court's assessment

1. Alleged failure to protect the applicant's mother's life

[...]

i) Scope of the case

131. On the above understanding, the Court will ascertain whether the national authorities have fulfilled their positive obligation to take preventive operational measures to protect the applicant's mother's right to life. In this connection, it must establish whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the applicant's mother from criminal acts by H.O. As it appears from the parties' submissions, a crucial question in the instant case is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. despite the withdrawal of complaints by the victims.

132. However, before embarking upon these issues, the 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. Accordingly, the Court will bear in mind the gravity of the problem at issue when examining the present case.

ii) Whether the local authorities could have foreseen a lethal attack from H.O.

133. Turning to the circumstances of the case, the Court observes that the applicant and her husband, H.O., had a problematic relationship from the very beginning. As a result of disagreements, H.O. resorted to violence against the applicant and the applicant's mother therefore intervened in their relationship in order to protect her daughter. She thus became a target for H.O., who blamed her for being the cause of their problems (...). (...)

134. In view of the above events, it appears that there was an escalating violence against the applicant and her mother by H.O. The crimes committed by H.O. were sufficiently serious to warrant preventive measures and there was a continuing threat to the health and safety of the victims. When examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence.

135. Furthermore, the victims' situations were also known to the authorities and the mother had submitted a petition to the Diyarbakır Chief Public Prosecutor's Office, stating that her life was in immediate danger and requesting the police to take action against H.O. However, the authorities' reaction to the applicant's mother's request was limited to taking statements from H.O. about the mother's allegations. Approximately two weeks after this request, on 11 March 2002, he killed the applicant's mother (...).

136. Having regard to the foregoing, the Court finds that the local authorities could have foreseen a lethal attack by H.O. While the Court cannot conclude with certainty that matters would have turned out differently and that the killing would not have occurred if the authorities had acted otherwise, it recalls that a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm

is sufficient to engage the responsibility of the State (see *E. and Others v. the United Kingdom*, no. 33218/96, § 99). Therefore the Court will next examine to what extent the authorities took measures to prevent the killing of the applicant's mother.

iii) Whether the authorities displayed due diligence to prevent the killing of the applicant's mother

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. The applicant explained that she and her mother had had to withdraw their complaints because of death threats and pressure exerted by H.O.

138. The Court notes at the outset that there seems to be no general consensus among States Parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints (see paragraphs 87 and 88 above). Nevertheless, there appears to be an acknowledgement of the duty on the part of the authorities to strike a balance between a victim's Article 2, Article 3 or Article 8 rights in deciding on a course of action. In this connection, having examined the practices in the member States (see paragraph 89 above), the Court observes that there are certain factors that can be taken into account in deciding to pursue the prosecution:

- the seriousness of the offence;
- whether the victim's injuries are physical or psychological;
- if the defendant used a weapon;
- if the defendant has made any threats since the attack;
- if the defendant planned the attack;
- the effect (including psychological) on any children living in the household; the chances of the defendant offending again;
- the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;
- the current state of the victim's relationship with the defendant; the effect on that relationship of continuing with the prosecution against the victim's wishes;
- the history of the relationship, particularly if there had been any other violence in the past;
- and the defendant's criminal history, particularly any previous violence.

139. It can be inferred from this practice that the 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.

140. As regards the Government's argument that any attempt by the authorities to separate the applicant and her husband would have amounted to a breach of their right to family life, and bearing in mind that under Turkish law there is no requirement to pursue the prosecution in cases where the victim withdraws her complaint and did not suffer injuries which renders her unfit for work for ten or more days, the Court will now examine whether the local authorities struck a proper balance between the victim's Article 2 and Article 8 rights.

141. In this connection, the Court notes that H.O. resorted to violence from the very beginning of his relationship with the applicant. On many instances both the applicant and her mother suffered physical injuries and were subjected to psychological pressure, given the anguish and fear. For some assaults H.O. used lethal weapons, such as a knife or a shotgun, and he constantly issued death threats against the applicant and her mother. Having regard to the circumstances of the killing of the applicant's mother, it may also be stated that H.O. had planned the attack, since he had been carrying a knife and a gun and had been wandering around the victim's house on occasions prior to the attack (...).

142. The applicant's mother became a target as a result of her perceived involvement in the couple's relationship, and the couple's children can also be considered as victims on account of the psychological effects of the ongoing violence in the family home. As noted above, in the instant case, further violence was not only possible but even foreseeable, given the violent behaviour and criminal record of H.O., his continuing threat to the health and safety of the victims and the history of violence in the relationship (...).

143. In the Court's opinion, it does not appear that the local authorities sufficiently considered the above factors when repeatedly deciding to discontinue the criminal proceedings against H.O. Instead, they seem to have given exclusive weight to the need to refrain from interfering in what they perceived to be a "family matter" (see paragraph 123 above). Moreover, there is no indication that the authorities considered the motives behind the withdrawal of the complaints. This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by H.O. (...). It is also striking that the victims withdrew their complaints when H.O. was at liberty or following his release from custody (...).

144. As regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' rights under Article 8 of the Convention, the Court recalls its ruling in a similar case of domestic violence (see *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 83, 12 June 2008), where it held that the 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. Moreover, the Court reiterates that, in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts (see, *K.A. and A.D. v. Belgium*, no. 42758/98 and 45558/99, § 81, 17 February 2005). The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case.

145. However, the Court regrets to note that the criminal investigations in the instant case were strictly dependent on the pursuance of complaints by the applicant and her mother on account of the domestic law provisions in force at the relevant time; i.e. Articles 456 § 4, 457 and 460 of the now defunct Criminal Code, which prevented the prosecuting authorities to pursue the criminal investigations because the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more (...). It observes that the application of the aforementioned provisions and the cumulative failure of the domestic authorities to pursue criminal proceedings against H.O. deprived the applicant's mother of the protection of her life and safety. In other words, the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims. 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 (see in this respect Recommendation Rec(2002)5 of the Committee of the Ministers, §§ 80-82 above).

146. The legislative framework preventing effective protection for victims of domestic violence aside, the Court must also consider whether the local authorities displayed due diligence to protect the right to life of the applicant's mother in other respects.

147. In this connection, the Court notes that despite the deceased's complaint that H.O. had been harassing her, invading her privacy by wandering around her property and car-

rying knives and guns (...), the police and prosecuting authorities failed either to place H.O. in detention or to take other appropriate action in respect of the allegation that he had a shotgun and had made violent threats with it (see *Kontrová*, cited above, § 53). While the Government argued that there was no tangible evidence that the applicant's mother's life was in imminent danger, the Court observes that it is not in fact apparent that the authorities assessed the threat posed by H.O. and concluded that his detention was a disproportionate step in the circumstances; rather the authorities failed to address the issues at all. 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 (see the *Fatma Yildirim v. Austria* and *A.T. v. Hungary* decisions of the CEDAW Committee, both cited above, §§ 12.1.5 and 9.3, respectively).

148. Furthermore, in the light of the State's positive obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting the applicant's mother. To that end, the local public prosecutor or the judge at the Magistrate's Court could have ordered on his/her initiative one or more of the protective measures enumerated under sections 1 and 2 of Law no. 4320 (...). They could also have issued an injunction with the effect of banning H.O. from contacting, communicating with or approaching the applicant's mother or entering defined areas (see in this respect Recommendation Rec(2002)5 of the Committee of the Ministers, § 82 above). On the contrary, in response to the applicant's mother's repeated requests for protection, the police and the Magistrate's Court merely took statements from H.O. and released him (...). While the authorities remained passive for almost two weeks apart from taking statements, H.O. shot dead the applicant's mother.

149. In these circumstances, the Court concludes that the national authorities cannot be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 of the Convention.

[...]

3) Conclusion

[...]

153. Moreover, the Court concludes that the criminal-law system, as applied in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of the unlawful acts committed by H.O. The obstacles resulting from the legislation and failure to use the means available undermined the deterrent effect of the judicial system in place and the role it was required to play in preventing a violation of the applicant's mother's right to life as enshrined in Article 2 of the Convention. The Court reiterates in this connection that, once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim (see *Osman v. the United Kingdom*, cited above, § 116). There has therefore been a violation of Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

154. The applicant complained that she had been subjected to violence, injury and death threats several times but that the authorities were negligent towards her situation, which caused her pain and fear in violation of Article 3 of the Convention, which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[...]

B. The Court's assessment

1. Applicable principles

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. 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 (see *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 30, Series A no. 247-C).

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 (see, *mutatis mutandis*, *H.L.R. v. France*, 29 April 1997, § 40, *Reports* 1997-III). 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 (see *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports* 1998-VI).

2. *Application of the above principles to the case*

160. The Court considers that the applicant may be considered to fall within the group of “vulnerable individuals” entitled to State protection (see, *A. v. the United Kingdom*, cited above, § 22). In this connection, it notes the violence suffered by the applicant in the past, the threats issued by H.O. following his release from prison and her fear of further violence as well as her social *background*, namely the vulnerable situation of women in south-east Turkey.

161. The Court observes also that the violence suffered by the applicant, in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention.

162. Therefore, the Court must next determine whether the national authorities have taken all reasonable measures to prevent the recurrence of violent attacks against the applicant’s physical integrity.

163. In carrying out this scrutiny, and bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States.

164. Furthermore, in interpreting the provisions of the Convention and the scope of the State’s obligations in specific cases (see, *mutatis mutandis*, *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 85 and 86, 12 November 2008) the Court will also look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the CEDAW, as well as giving heed to the evolution of norms and principles in international law through other developments such as the Belém do Pará Convention, which specifically sets out States’ duties relating to the eradication of gender-based violence.

165. Nevertheless, it is not the Court's role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive obligations under Article 3 of the Convention (see, *mutatis mutandis*, *Bevacqua and S. v. Bulgaria*, cited above, § 82). Moreover, under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged (see *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 61, 20 December 2007).

166. Turning to its examination of the facts, the Court notes that the local authorities, namely the police and public prosecutors, did not remain totally passive. After each incident involving violence, the applicant was taken for medical examination and criminal proceedings were instituted against her husband. The police and prosecuting authorities questioned H.O. in relation to his criminal acts, placed him in detention on two occasions, indicted him for issuing death threats and inflicting actual bodily harm and, subsequent to his conviction for stabbing the applicant seven times, sentenced him to pay a fine (...).

167. However, none of these measures were sufficient to stop H.O. from perpetrating further violence. In this respect, the Government blamed the applicant for withdrawing her complaints and failing to cooperate with the authorities, which prevented the latter from continuing the criminal proceedings against H.O., pursuant to the domestic law provisions requiring the active involvement of the victim (...).

168. The Court reiterates its opinion in respect of the complaint under Article 2, namely that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity (see paragraphs 137-148 above).

169. However, it cannot be said that the local authorities displayed the required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance and with impunity to the detriment of the rights recognised by the Convention (see, *mutatis mutandis*, *Maria da Penha v. Brazil*, cited above, §§ 42-44). By way of example, the Court notes that, following the first major incident (...), H.O. again beat the applicant severely, causing her injuries which were

sufficient to endanger her life, but he was released pending trial “considering the nature of the offence and the fact that the applicant had regained full health”. The proceedings were ultimately discontinued because the applicant withdrew her complaints (...). Again, although H.O. assaulted the applicant and her mother using a knife and caused them severe injuries, the prosecuting authorities terminated the proceedings without conducting any meaningful investigation (see paragraphs 20 and 21 above). Likewise, H.O. ran his car into the applicant and her mother, this time causing injuries to the former and life-threatening injuries to the latter. He spent only 25 days in prison and received a fine for inflicting serious injuries on the applicant’s mother (...). Finally, the Court was particularly struck by the Diyarbakır Magistrate’s Court’s decision to impose merely a small fine, which could be paid by instalments, on H.O. as punishment for stabbing the applicant seven times (...).

170. In the light of the foregoing, the Court considers that the response to the conduct of the applicant’s former husband was manifestly inadequate to the gravity of the offences in question (see, *mutatis mutandis*, *Ali and Ay e Duran v. Turkey*, no. 42942/02, § 54, 8 April 2008). It therefore observes that the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O.

[...]

173. Finally, the Court notes with grave concern that the violence suffered by the applicant had not come to an end and that the authorities had continued to display inaction. In this connection, the Court points out that, immediately after his release from prison, H.O. again issued threats against the physical integrity of the applicant (...). (...).

[...]

IV. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION

177. The applicant complained under Article 14, in conjunction with Articles 2 and 3 of the Convention, that she and her mother had been discriminated against on the basis of their gender.

Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be

secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

[...]

B. The Court's assessment

1. The relevant principles

183. In its recent ruling in the case *D.H. and Others v. Czech Republic* ([GC], no. 57325/00, 13 November 2007, §§ 175-180) the Court laid down the following principles on the issue of discrimination:

“175. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (*Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV; and *Okpiz v. Germany*, no. 59140/00, § 33, 25 October 2005). (...) It has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001; and *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005), and that discrimination potentially contrary to the Convention may result from a *de facto* situation (see *Zarb Adami v. Malta*, no. 17209/02, § 76, ECHR 2006-...). (...)

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 (see, among other authorities, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III; and *Timishev*, cited above, § 57).

178. As regards the question of what constitutes *prima facie* evidence capable of shifting the burden of proof on to the respondent State, the Court stated in *Nachova and Others* (cited above, § 147) that in proceedings before it there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. Moreover, the level of

persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.

179. The Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation – *Aktaş v. Turkey* (extracts), no. 24351/94, § 272, ECHR 2003-V). 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 *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Anguelova v. Bulgaria*, no. 38361/97, § 111, ECHR 2002-IV). In the case of *Nachova and Others*, cited above, § 157), the Court did not rule out requiring a respondent Government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular case, in which the allegation was that an act of violence had been motivated by racial prejudice. It noted in that connection that in the legal systems of many countries proof of the discriminatory effect of a policy, decision or practice would dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services.

180. As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory (*Hugh Jordan*, cited above, § 154). However, in more recent cases on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or *de facto* situation (*Hoogendijk*, cited above; and *Zarb Adami*, cited above, §§ 77-78), the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.

Thus, in the *Hoogendijk* decision 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. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.”

2. *Application of the above principles to the facts of the present case*

a. *The meaning of discrimination in the context of domestic violence*

184. The Court notes at the outset that when it considers the object and purpose of the Convention provisions, it also takes into account the international-law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty (see *Saadi v. Italy* [GC], no. 37201/06, § 63, ECHR 2008-..., cited in *Demir and Baykara*, cited above, § 76).

185. In this connection, when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law (see paragraph 183 above), the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women.

186. In that context, the CEDAW defines discrimination against women under Article 1 as "(...) any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

187. The CEDAW Committee has reiterated that violence against women, including domestic violence is a form of discrimination against women (...).

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."

189. Furthermore, the Belém do Pará Convention, which is so far the only regional multilateral human rights treaty to deal solely with violence against women, describes the

right of every woman to be free from violence as encompassing, among others, the right to be free from all forms of discrimination.

190. Finally, the Inter-American Commission also characterised violence against women as a form of discrimination owing to the State's failure to exercise due diligence to prevent and investigate a domestic violence complaint (see *Maria da Penha v. Brazil*, cited above, § 80).

191. It transpires from the above-mentioned rules and decisions that the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.

b. The approach to domestic violence in Turkey

192. The Court observes that although the Turkish law then in force did not make explicit distinction between men and women in the enjoyment of rights and freedoms, it needed to be brought into line with international standards in respect of the status of women in a democratic and pluralistic society. Like the CEDAW Committee (see the Concluding Comments at §§ 12-21), the Court welcomes the reforms carried out by the Government, particularly the adoption of Law no. 4320 which provides for specific measures for protection against domestic violence. It thus appears that the 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. The Court notes that the Turkish Government have already recognised these difficulties in practice when discussing the issue before the CEDAW Committee (*ibid*).

193. In that regard, the Court notes that the applicant produced reports and statistics prepared by two leading NGOs, the Diyarbakır Bar Association and Amnesty International, with a view to demonstrating discrimination against women (see paragraphs 91-104 above). Bearing in mind that the findings and conclusions reached in these reports have not been challenged by the Government at any stage of the proceedings, the Court will consider them together with its own findings in the instant case (see *Hoogendijk*, cited above; and *Zarb Adami*, cited above, §§ 77-78).

194. Having examined these reports, the Court finds that the highest number of reported victims of domestic violence is in Diyarbakır, where the applicant lived at the relevant

time, and that the victims were all women who suffered mostly physical violence. The great majority of these women were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income (...).

195. Furthermore, there appear to be serious problems in the implementation of Law no. 4320, which was relied on by the Government as one of the remedies for women facing domestic violence. The research conducted by the aforementioned organisations indicates that when victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint. In this connection, police officers consider the problem as a “family matter with which they cannot interfere” (...).

196. It also transpires from these reports that there are unreasonable delays in issuing injunctions by the courts, under Law no. 4320, because the courts treat them as a form of divorce action and not as an urgent action. Delays are also frequent when it comes to serving injunctions on the aggressors, given the negative attitude of the police officers (see paragraphs 91-93, 95 and 101 above). Moreover, the perpetrators of domestic violence do not seem to receive dissuasive punishments, because the courts mitigate sentences on the grounds of custom, tradition or honour (...).

197. As a result of these problems, the aforementioned reports suggest that domestic violence is tolerated by the authorities and that the remedies indicated by the Government do not function effectively. Similar findings and concerns were expressed by the CEDAW Committee when it noted “the persistence of violence against women, including domestic violence, in Turkey” and called upon the respondent State to intensify its efforts to prevent and combat violence against women. It further underlined the need to fully implement and carefully monitor the effectiveness of the *Law on the Protection of the Family*, and of related policies in order to prevent violence against women, to provide protection and support services to the victims, and punish and rehabilitate offenders (see the Concluding Comments, § 28).

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.

c. Whether the applicant and her mother have been discriminated against on account of the authorities' failure to provide equal protection of law

199. The Court has established that the criminal-law system, as operated in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts by H.O. against the personal integrity of the applicant and her mother and thus violated their rights under Articles 2 and 3 of the Convention.

200. Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence (see, in particular section 9 of the CEDAW, cited at paragraph 187 above).

201. Taking into account the ineffectiveness of domestic remedies in providing equal protection of law to the applicant and her mother in the enjoyment of their rights guaranteed by Articles 2 and 3 of the Convention, the Court holds that there existed special circumstances which absolved the applicant from her obligation to exhaust domestic remedies. It therefore dismisses the Government's objection on non-exhaustion in respect of the complaint under Article 14 of the Convention.

[...]

FOR THESE REASONS, THE COURT UNANIMOUSLY

[...]

4. Holds that there has been a violation of Article 2 of the Convention in respect of the death of the applicant's mother;

5. Holds that there has been a violation of Article 3 of the Convention in respect of the authorities' failure to protect the applicant against domestic violence perpetrated by her former husband;

[...]

7. Holds that there has been a violation of Article 14 read in conjunction with Articles 2 and 3 of the Convention;

ENDNOTES

- 2 See the Committee's General Recommendation No. 19 on "Violence Against Women," (1992) UN doc. CEDAW/C/1992/L.1/Add.15 at § 24 (a).
- 3 Ibid, at § 24 (b); see also § 24 (r).
- 4 Ibid, at § 24 (t).
- 5 Ibid, at § 24 (t) (i); see also paragraph 24 (r) on measures necessary to overcome family violence.
- 6 *Velasquez-Rodriguez v. Honduras*, judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 172.
- 7 Signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969. Article (1) provides as follows: "1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, 'person' means every human being".
- 8 which was adopted by the Organisation of American States (OAS) and came into force on 5 March 1995.
- 9 Case 12.051, Report No. 54/01, Inter-Am. C>H.R., Annual Report 2000, OEA/Ser.LV.II.111 Doc.20 rev. (2000)
- 10 *Maria da Penha v. Brazil*, §§ 55 and 56.

*International Criminal Tribunal
for Rwanda*

Case N° ICTR-96-4-T

Prosecutor v. Jean-Paul Akayesu

*Judgment of
September 2, 1998*



1. INTRODUCTION

[...]

5. FACTUAL FINDINGS

[...]

5.5 Sexual Violence (Paragraphs 12A & 12B of the Indictment)

Charges Set Forth in the Indictment

12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter “displaced civilians”) sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.

12B. Jean Paul Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities.

[...]

Factual Findings

449. Having carefully reviewed the testimony of the Prosecution witnesses regarding sexual violence, the Chamber finds that there is sufficient credible evidence to estab-

lish beyond a reasonable doubt that during the events of 1994, Tutsi girls and women were subjected to sexual violence, beaten and killed on or near the bureau communal premises, as well as elsewhere in the commune of Taba. Witness H, Witness JJ, Witness OO, and Witness NN all testified that they themselves were raped, and all, with the exception of Witness OO, testified that they witnessed other girls and women being raped. Witness J, Witness KK and Witness PP also testified that they witnessed other girls and women being raped in the commune of Taba. Hundreds of Tutsi, mostly women and children, sought refuge at the bureau communal during this period and many rapes took place on or near the premises of the bureau communal - Witness JJ was taken by Interahamwe from the refuge site near the bureau communal to a nearby forest area and raped there. She testified that this happened often to other young girls and women at the refuge site. Witness JJ was also raped repeatedly on two separate occasions in the cultural center on the premises of the bureau communal, once in a group of fifteen girls and women and once in a group of ten girls and women. Witness KK saw women and girls being selected and taken by the Interahamwe to the cultural center to be raped. Witness H saw women being raped outside the compound of the bureau communal, and Witness NN saw two Interahamwes take a woman and rape her between the bureau communal and the cultural center. Witness OO was taken from the bureau communal and raped in a nearby field. Witness PP saw three women being raped at Kinihira, the killing site near the bureau communal, and Witness NN found her younger sister, dying, after she had been raped at the bureau communal. Many other instances of rape in Taba outside the bureau communal - in fields, on the road, and in or just outside houses - were described by Witnesses J, Witness H, Witness OO, Witness KK, Witness NN and Witness PP. Witness KK and Witness PP also described other acts of sexual violence which took place on or near the premises of the bureau communal - the forced undressing and public humiliation of girls and women. The Chamber notes that much of the sexual violence took place in front of large numbers of people, and that all of it was directed against Tutsi women.

450. With a few exceptions, most of the rapes and all of the other acts of sexual violence described by the Prosecution witnesses were committed by Interahamwe. It has not been established that the perpetrator of the rape of Witness H in a sorghum field and six of the men who raped Witness NN were Interahamwe. In the case of Witness NN, two of her rapists were neighbours, two were teenage boys and two were herdsmen, and there is no evidence that any of these people were Interahamwe. Nevertheless, with regard to all evidence of rape and sexual violence which took place on or near the premises of the bureau communal, the perpetrators were all identified as Interahamwe. Interahamwe are also identified as the perpetrators of many rapes

which took place outside the bureau communal, including the rapes of Witness H, Witness OO, Witness NN, Witness J's daughter, a woman near death seen by Witness KK and a woman called Vestine, seen by Witness PP. There is no suggestion in any of the evidence that the Accused or any communal policemen perpetrated rape, and both Witness JJ and Witness KK affirmed that the y never saw the Accused rape anyone.

451. In considering the role of the Accused in the sexual violence which took place and the extent of his direct knowledge of incidents of sexual violence, the Chamber has taken into account only evidence which is direct and unequivocal. Witness H testified that the Accused was present during the rape of Tutsi women outside the compound of the bureau communal, but as she could not confirm that he was aware that the rapes were taking place, the Chamber discounts this testimony in its assessment of the evidence. Witness PP recalled the Accused directing the Interahamwe to take Alexia and her two nieces to Kinihira, saying "Don't you know where killings take place, where the others have been killed?" The three women were raped before they were killed, but the statement of the Accused does not refer to sexual violence and there is no evidence that the Accused was present at Kinihira. For this reason, the Chamber also discounts this testimony in its assessment of the evidence.

452. On the basis of the evidence set forth herein, the Chamber finds beyond a reasonable doubt that the Accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated. There is no evidence that the Accused took any measures to prevent acts of sexual violence or to punish the perpetrators of sexual violence. In fact there is evidence that the Accused ordered, instigated and otherwise aided and abetted sexual violence. The Accused watched two Interahamwe drag a woman to be raped between the bureau communal and the cultural center. The two commune policemen in front of his office witnessed the rape but did nothing to prevent it. On the two occasions Witness JJ was brought to the cultural center of the bureau communal to be raped, she and the group of girls and women with her were taken past the Accused, on the way. On the first occasion he was looking at them, and on the second occasion he was standing at the entrance to the cultural center. On this second occasion, he said, "Never ask me again what a Tutsi woman tastes like." Witness JJ described the Accused in making these statements as "talking as if someone were encouraging a player." More generally she stated that the Accused was the one "supervising" the acts of rape. When Witness OO and two other girls were apprehended by Interahamwe in flight from the bureau communal, the

Interahamwe went to the Accused and told him that they were taking the girls away to sleep with them. The Accused said "take them." The Accused told the Interahamwe to undress Chantal and march her around. He was laughing and happy to be watching and afterwards told the Interahamwe to take her away and said "you should first of all make sure that you sleep with this girl." The Chamber considers this statement as evidence that the Accused ordered and instigated sexual violence, although insufficient evidence was presented to establish beyond a reasonable doubt that Chantal was in fact raped.

[...]

460. Faced with first-hand personal accounts from women who experienced and witnessed sexual violence in Taba and at the bureau communal, and who swore under oath that the Accused was present and saw what was happening, the Chamber does not accept the statement made by the Accused. The Accused insists that the charges are fabricated, but the Defence has offered the Chamber no evidence to support this assertion. There is overwhelming evidence to the contrary, and the Chamber does not accept the testimony of the Accused. The findings of the Chamber are based on the evidence which has been presented in this trial. As the Accused flatly denies the occurrence of sexual violence at the bureau communal, he does not allow for the possibility that the sexual violence may have occurred but that he was unaware of it.

6. *THE LAW*

[...]

6.3. Genocide (Article 2 of the Statute)

6.3.1. Genocide

492. Article 2 of the Statute stipulates that the Tribunal shall have the power to prosecute persons responsible for genocide, complicity to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

493. In accordance with the said provisions of the Statute, the Prosecutor has charged Akayesu with the crimes legally defined as genocide (count 1), complicity in genocide (count 2) and incitement to commit genocide (count 4).

Crime of Genocide, punishable under Article 2(3)(a) of the Statute

494. The definition of genocide, as given in Article 2 of the Tribunal's Statute, is taken verbatim from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention")⁹¹. It states:

"Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

495. The Genocide Convention is undeniably considered part of customary international law, as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention, and as was recalled by the United Nations' Secretary-General in his Report on the establishment of the International Criminal Tribunal for the former Yugoslavia⁹².

496. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975⁹³. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.

497. Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group.

498. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

499. Thus, for a crime of genocide to have been committed, it is necessary that one of

the acts listed under Article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group. Consequently, in order to clarify the constitutive elements of the crime of genocide, the Chamber will first state its findings on the acts provided for under Article 2(2)(a) through Article 2(2)(e) of the Statute, the groups protected by the Genocide Convention, and the special intent or *dolus specialis* necessary for genocide to take place.

[...]

Causing serious bodily or mental harm to members of the group (paragraph b)

502. Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.

503. In the Adolf Eichmann case, who was convicted of crimes against the Jewish people, genocide under another legal definition, the District Court of Jerusalem stated in its judgment of 12 December 1961, that serious bodily or mental harm of members of the group can be caused

“by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture”⁹⁵.

504. For purposes of interpreting Article 2 (2)(b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (paragraph c):

505. The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.

506. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a

group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

Imposing measures intended to prevent births within the group (paragraph d):

507. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

[...]

6.4. Crimes against Humanity (Article 3 of the Statute)

[...]

Crimes against Humanity in Article 3 of the Statute of the Tribunal

578. The Chamber considers that Article 3 of the Statute confers on the Chamber the jurisdiction to prosecute persons for various inhumane acts which constitute crimes against humanity. This category of crimes may be broadly broken down into four essential elements, namely:

- (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
- (ii) the act must be committed as part of a wide spread or systematic attack;
- (iii) the act must be committed against members of the civilian population;
- (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.

[...]

The enumerated acts

585. Article 3 of the Statute sets out various acts that constitute crimes against humanity, namely: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial and religious grounds; and; other inhumane acts. Although the categories of acts that constitute crimes against humanity are set out in Article 3, this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.

586. The Chamber notes that the accused is indicted for murder, extermination, torture, rape and other acts that constitute inhumane acts. The Chamber in interpreting Article 3 of the Statute, shall focus its discussion on these acts only.

[...]

Rape

596. Considering the extent to which rape constitute crimes against humanity, pursuant to Article 3(g) of the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

597. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

598. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:

- (a) as part of a wide spread or systematic attack;
- (b) on a civilian population;
- (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.

[...]

7. *LEGAL FINDINGS*

[...]

7.7. Count 13 (rape) and Count 14 (other inhumane acts) - Crimes against Humanity

685. In the light of its factual findings with regard to the allegations of sexual violence set forth in paragraphs 12A and 12B of the Indictment, the Tribunal considers the criminal responsibility of the Accused on Count 13, crimes against humanity (rape), punishable by Article 3(g) of the Statute of the Tribunal and Count 14, crimes against humanity (other inhumane acts), punishable by Article 3(i) of the Statute.

686. In considering the extent to which acts of sexual violence constitute crimes against humanity under Article 3(g) of its Statute, the Tribunal must define rape, as there is no commonly accepted definition of the term in international law. The Tribunal notes that many of the witnesses have used the term "rape" in their testimony. At times, the Prosecution and the Defence have also tried to elicit an explicit description of what happened in physical terms, to document what the witnesses mean by the term "rape". The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by Witness KK in her testimony - the Interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying - constitutes rape in the Tribunal's view.

687. The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects

and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

688. The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is 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. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute.

[...]

691. The Tribunal has found that the Accused had reason to know and in fact knew that acts of sexual violence were occurring on or near the premises of the bureau communal and that he took no measures to prevent these acts or punish the perpetrators of them. The Tribunal notes that it is only in consideration of Counts 13, 14 and 15 that the Accused is charged with individual criminal responsibility under Section 6(3) of its Statute. As set forth in the Indictment, under Article 6(3) "an individual is criminally responsible as a superior for the acts of a subordinate if he or she knew or had reason to know that the subordinate was

about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof." Although the evidence supports a finding that a superior/subordinate relationship existed between the Accused and the Interahamwe who were at the bureau communal, the Tribunal notes that there is no allegation in the Indictment that the Interahamwe, who are referred to as "armed local militia," were subordinates of the Accused. This relationship is a fundamental element of the criminal offence set forth in Article 6(3). The amendment of the Indictment with additional charges pursuant to Article 6(3) could arguably be interpreted as implying an allegation of the command responsibility required by Article 6(3). In fairness to the Accused, the Tribunal will not make this inference. Therefore, the Tribunal finds that it cannot consider the criminal responsibility of the Accused under Article 6(3).

692. The Tribunal finds, under Article 6(1) of its Statute, that the Accused, by his own words, specifically ordered, instigated, aided and abetted the following acts of sexual violence:

- (i) the multiple acts of rape of ten girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (ii) the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal;
- (iii) the forced undressing and public marching of Chantal naked at the bureau communal.

693. The Tribunal finds, under Article 6(1) of its Statute, that the Accused aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises in respect of (i) and in his presence in respect of (ii) and (iii), and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

- (i) the multiple acts of rape of fifteen girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (ii) the rape of a woman by Interahamwe in between two buildings of the bureau communal, witnessed by Witness NN;
- (iii) the forced undressing of the wife of Tharcisse after making her sit in the mud outside the bureau communal, as witnessed by Witness KK;

694. The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts

of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

- (i) the rape of Witness JJ by an Interahamwe who took her from outside the bureau communal and raped her in a nearby forest;
- (ii) the rape of the younger sister of Witness NN by an Interahamwe at the bureau communal;
- (iii) the multiple rapes of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe by Interahamwe near the bureau communal;
- (iv) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.

695. The Tribunal has established that a widespread and systematic attack against the civilian ethnic population of Tutsis took place in Taba, and more generally in Rwanda, between April 7 and the end of June, 1994. The Tribunal finds that the rape and other inhumane acts which took place on or near the bureau communal premises of Taba were committed as part of this attack.

[...]

7.8. Count 1 - Genocide, Count 2 - Complicity in Genocide

[...]

706. With regard to the acts alleged in paragraphs 12 (A) and 12 (B) of the Indictment, the Prosecutor has shown beyond a reasonable doubt that between 7 April and the end of June 1994, numerous Tutsi who sought refuge at the Taba Bureau communal were frequently beaten by members of the Interahamwe on or near the premises of the Bureau communal. Some of them were killed. Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly and often by more than one assailant. Tutsi women were systematically raped, as one female victim testified to by saying that "each time that you met assailants, they raped you". Numerous incidents of such rape and sexual violence against Tutsi women occurred inside or near the Bureau communal. It has been proven that some communal policemen armed with guns and the accused himself were present while some of these rapes and sexual

violence were being committed. Furthermore, it is proven that on several occasions, by his presence, his attitude and his utterances, Akayesu encouraged such acts, one particular witness testifying that Akayesu, addressed the Interahamwe who were committing the rapes and said that “never ask me again what a Tutsi woman tastes like”¹⁷⁷. In the opinion of the Chamber, this constitutes tacit encouragement to the rapes that were being committed.

707. In the opinion of the Chamber, the above-mentioned acts with which Akayesu is charged indeed render him individually criminally responsible for having abetted in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on members of said group.

[...]

731. With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims¹⁸¹ and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

732. The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do

exercises “in order to display the thighs of Tutsi women”. The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, “let us now see what the vagina of a Tutsi woman tastes like”. As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: “don’t ever ask again what a Tutsi woman tastes like”. This sexualized representation of ethnic identity graphically illustrates that tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group - destruction of the spirit, of the will to live, and of life itself.

733. On the basis of the substantial testimonies brought before it, the Chamber finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed. A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say “tomorrow they will be killed” and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

734. In light of the foregoing, the Chamber finds firstly that the acts described *supra* are indeed acts as enumerated in Article 2 (2) of the Statute, which constitute the factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi. The Chamber is further satisfied beyond reasonable doubt that these various acts were committed by Akayesu with the specific intent to destroy the Tutsi group, as such. Consequently, the Chamber is of the opinion that the acts alleged in paragraphs 12, 12A, 12B, 16, 18, 19, 20, 22 and 23 of the Indictment and proven above, constitute the crime of genocide, but not the crime of complicity; hence, the Chamber finds Akayesu individually criminally responsible for genocide.

[...]

ENDNOTES

- 91 The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly, on 9 December 1948.
- 92 Secretary General’s Report pursuant to paragraph 2 of resolution 808 (1993) of the Security Council, 3 May 1993, S/25704.

- 93 Legislative Decree of 12 February 1975, Official Gazette of the Republic of Rwanda, 1975, p.230. Rwanda acceded to the Genocide Convention but stated that it shall not be bound by Article 9 of this Convention.
- 95 Legislative Decree of 12 February 1975, Official Gazette of the Republic of Rwanda, 1975, p.230. Rwanda acceded to the Genocide Convention but stated that it shall not be bound by Article 9 of this Convention.
- 177 “Ntihazagire umbaza uko umututsikazi yari ameze, ngo kandi mumenye ko ejo ngo nibabica nta kintu muzambaza.”
- 181 See above, the findings of the Trial Chamber on the Chapter relating to the law applicable to the crime of genocide, in particular, the definition of the constituent elements of genocide.

*International Criminal Tribunal
for Rwanda*

Case N° ICTR-97-20-T

Prosecutor v. Laurent Semanza

*Judgment of
May 15, 2003*



1. INTRODUCTION

[...]

B. The Indictment

[...]

8. The Indictment alleges that the Accused acted with the intent to destroy the Tutsi population in Rwanda as an ethnic or racial group. It is further stated that the Accused's acts formed part of a widespread or systematic attack against the Tutsi civilian population on political, ethnic, or racial grounds and that these acts were committed during and in conjunction with a non-international armed conflict in the territory of Rwanda between its Government and the Rwandan Patriotic Front ("RPF").

9. It is alleged in the Indictment that the Accused organized, executed, directed, and personally participated in attacks, which included killings, serious bodily or mental harm, and sexual violence, at four locations in Bicumbi and Gikoro communes during the month of April 1994. (...)

[...]

11. The Indictment further alleges that between 1991 and 1994, the Accused chaired meetings during which he made threatening remarks against Tutsi, and where he incited, planned, and organized the massacres of Tutsi civilians (...), for which he is charged with direct and public incitement to commit genocide (Count 2).

12. The Indictment asserts that between 7 and 30 April 1994, in Gikoro commune, the Accused incited a group to rape Tutsi women before killing them, resulting in the rape of two women and the death of one of them (...). For this event, the Accused is charged with rape (Count 10), torture (part of Count 11), and murder (part of Count 12) as crimes against humanity; and with serious violations of Common Article 3 and Additional Protocol II (part of count 13).

[...]

14. For all the Counts, except for incitement to commit genocide (Count 2) and complicity in genocide (Count 3), the Accused is charged cumulatively with all forms of per-

sonal responsibility pursuant to Article 6(1) and with superior responsibility under Article 6(3) of the Statute.

[...]

V. *THE LAW*

[...]

B. **Crimes Against Humanity**

1. *The relationship between the enumerated acts and the general elements*

326. A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds. Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.

2. *The attack*

327. An “attack” is generally defined as an unlawful act, event, or series of events of the kind listed in Article 3(a) through (i) of the Statute.⁵⁴⁶ An “attack” does not necessarily require the use of armed force, it could also involve other forms of inhumane mistreatment of the civilian population.⁵⁴⁷

a. *The attack must be widespread or systematic*

328. This Tribunal has consistently held that, in line with customary international law, the requirements of “widespread” and “systematic” should be read disjunctively in accordance with the English version of the Statute, rather than cumulatively in accordance with the French text.⁵⁴⁸ The Chamber observes that this jurisprudence does not fully articulate the basis of such a custom. However, the Chamber notes that a Trial Chamber of the International Tribunal for the Former Yugoslavia (“ICTY”) reviewed the limited practice on this issue in the Tadic Judgment and concluded that widespread or systematic was an element of crimes against humanity in customary international law.⁵⁴⁹ The Chamber does not see any reason to depart from the uniform practice of the two Tribunals.

329. “Widespread” refers to the large scale of the attack.⁵⁵⁰ “Systematic” describes the organized nature of the attack.⁵⁵¹ The Appeals Chamber of the ICTY recently clarified that the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, but that the existence of such a plan is not a separate legal element of the crime.⁵⁵²

b. The attack must be directed against any civilian population

330. A civilian population must be the primary object of the attack.⁵⁵³ A population remains civilian in nature even if there are individuals within it who are not civilians and even if the members of the population at one time bore arms, so long as the population is “predominantly civilian”.⁵⁵⁴ The term “population” does not require that crimes against humanity be directed against the entire population of a geographic territory or area.⁵⁵⁵ The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.

c. The attack must be committed on discriminatory grounds

331. Article 3 of the Statute requires that the attack against the civilian population be committed “on national, political, ethnical, racial or religious grounds”. Acts committed against persons outside the discriminatory categories may nevertheless form part of the attack where the act against the outsider supports or furthers or is intended to support or further the attack on the group discriminated against on one of the enumerated grounds.⁵⁵⁶

3. The mental element for crimes against humanity

332. The accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population.⁵⁵⁷ However, the accused need not necessarily share the purpose or goals behind the broader attack. There is no requirement that the enumerated acts other than persecution be committed with discriminatory intent.⁵⁵⁸

4. *The enumerated acts*

333. The Accused is charged with committing crimes against humanity of murder, extermination, torture, rape, and persecution. The Chamber will therefore limit its discussion to these offences.

[...]

d. Rape

344. The Akayesu Judgment enunciated a broad definition of rape which included any physical invasion of a sexual nature in coercive circumstance and which was not limited to forcible sexual intercourse.⁵⁷⁵ The Appeals Chamber of the ICTY, in contrast, affirmed a narrower interpretation defining the material element of rape as a crime against humanity as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator.⁵⁷⁶ Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.⁵⁷⁷

345. While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in Kunarac to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber. In doing so, the Chamber recognises that other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity within the jurisdiction of this Tribunal such as torture, persecution, enslavement, or other inhumane acts.

346. The mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.⁵⁷⁸

[...]

VI. LEGAL FINDINGS

[...]

D. Crimes against humanity

1. *General elements*

439. The Accused is charged with the following crimes against humanity: murder (Counts 4, 12, and 14), rape (Counts 8 and 10), torture (Count 11), persecution (Count 6), and extermination (Count 5).

440. As explained in the legal section above, the Prosecution is required to prove that all crimes against humanity are committed as part of a widespread or systematic attack on a civilian population on the enumerated discriminatory grounds.

441. The Chamber took judicial notice of the fact that there was a widespread or systematic attack in Rwanda:

The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994 [sic]. There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there was a large number of deaths of persons of Tutsi ethnic identity.⁶⁹⁴

442. The Chamber is now in a position to make a more specific legal finding. In light of the judicially noticed facts, the factual findings made in relation to the internal armed conflict in Rwanda,⁶⁹⁵ and the evidence of massacres of civilians between 6 April 1994 and 31 July 1994,⁶⁹⁶ the Chamber finds that there were massive, frequent, large scale attacks against civilian Tutsis in Bicumbi and Gikoro communes. These attacks were carried out by groups of attackers and were directed against large numbers of victims on the basis of their Tutsi ethnicity. The Chamber thus finds beyond a reasonable doubt that at all relevant times there was a widespread attack on the Tutsi civilian population of Bicumbi and Gikoro communes on ethnic grounds. Having found that the attack was widespread, the Chamber need not consider whether it was also systematic.

443. The Defence argued that the Prosecutor must also prove that the crimes against humanity were committed to advance a war effort in an internal armed conflict because such allegations are contained in the Indictment.⁶⁹⁷ The Chamber sees no merit in this argument because there is no legal requirement in the Statute that crimes against humanity be committed in connection with an armed conflict.

[...]

6. *Count 10: Rape*

475. Count 10 charges:

By his acts in relation to the events described in paragraph 3.17 above, Laurent SEMANZA is responsible for the RAPE of Victim A and Victim B as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed CRIMES AGAINST HUMANITY stipulated in Article 3(g) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

476. The Chamber has found, in relation to paragraph 3.17 of the Indictment, that the Accused, in the presence of commune and military authorities, addressed a crowd and asked them how their work of killing the Tutsis was progressing and then encouraged them to rape Tutsi women before killing them. Immediately thereafter, one of the men from the crowd had non-consensual sexual intercourse with Victim A, who was hiding in a nearby home. The Chamber has found that Victim B was killed by two other men from this crowd, but has had insufficient evidence to draw any conclusions about whether she had also been raped.

477. The Chamber finds beyond a reasonable doubt that Victim A was raped by one of the assailants who heard the Accused encouraging the crowd to rape Tutsi women. In light of the generalized instructions about raping and killing Tutsis, the ethnic group targeted by the widespread attack, and the fact that the assailant arrived at Victim A's hiding place with two others who then killed Victim B, the Chamber finds that this rape was part of the widespread attack against the civilian Tutsi population and that the assailant was so aware. The Chamber therefore finds that the principal perpetrator committed rape as a crime against humanity.

478. Having regards, *inter alia*, to the influence of the Accused and to the fact that the rape of Victim A occurred directly after the Accused instructed the group to rape, the Chamber finds that the Accused's encouragement constituted instigation because it was causally connected and substantially contributed to the actions of the principal perpetrator. The assailant's statement that he had been given permission to rape Victim A is evidence of a clear link between the Accused's statement and the crime. The Chamber also finds that the Accused made his statement intentionally with the awareness that he was influencing the perpetrator to commit the crime.

479. The Chamber finds beyond a reasonable doubt that the Accused instigated the rape of Victim A as a crime against humanity. Therefore, the Chamber finds the Accused guilty on Count 10.

7. *Count 11: Torture*

480. Count 11 charges:

By his acts in relation to the events described in paragraphs 3.17 and 3.18 above, Laurent SEMANZA is responsible for the TORTURE of Victim A, Victim B and Victim C as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed CRIMES AGAINST HUMANITY stipulated in Article 3(f) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3) and punishable in reference to Articles 22 and 23 of the same Statute.

a. *Victims A and B*

481. The Chamber has found, in relation to paragraph 3.17 of the Indictment, that the Accused, in the presence of commune and military authorities, encouraged a crowd to rape Tutsi women before killing them. The Chamber has found that Victim A was raped immediately thereafter by one of the men from this crowd. The Chamber has found that Victim B was killed by two other men from this crowd, but has had insufficient evidence to draw any conclusions about whether she had also been raped or tortured.

482. Noting, in particular, the extreme level of fear occasioned by the circumstances surrounding the event and the nature of the rape of Victim A, the Chamber finds that the perpetrator inflicted severe mental suffering sufficient to form the material element of torture. It is therefore unnecessary to determine whether this rape also inflicted severe physical pain or suffering, for which the Prosecutor only adduced evidence of the fact that non-consensual intercourse occurred.

483. The Chamber finds that the rape was committed on the basis of discrimination, targeting Victim A because she was a Tutsi woman. The Chamber recalls that severe suffering inflicted for the purposes of discrimination constitutes torture and, therefore, finds that the principal perpetrator tortured Victim A by raping her for a discriminatory purpose.

484. The Chamber also finds that the torture formed part of the widespread attack on the civilian population since the victim was raped because she was a Tutsi, the ethnicity targeted by the attack. The Chamber finds that the perpetrator was aware of the larger context of his actions, since he acknowledged that he was acting on the encouragement of the Accused to rape women as part of their broader work of killing Tutsis and he knew that others from the crowd were similarly targeting Tutsis for rape and murder. The Chamber therefore finds that the principal perpetrator committed torture as a crime against humanity.

485. The Chamber finds that by encouraging a crowd to rape women because of their ethnicity, the Accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes. Therefore, he was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture. The Chamber finds that his words were causally connected to and substantially contributed to the torture of Victim A because immediately after the Accused made his remarks to the crowd, the assailant went to a nearby home and tortured Victim A by raping her because she was a Tutsi woman. The Chamber notes that the Accused's general influence in the community and the fact that his statements were made in the presence of commune and military authorities gave his instigation greater force and legitimacy. The Chamber finds that the Accused acted intentionally and with the awareness that he was influencing others to commit rape for a discriminatory purpose as part of a widespread attack on the civilian population on ethnic grounds. Therefore, the Chamber finds that the Accused is criminally responsible for instigating torture as a crime against humanity.

[...]

ENDNOTES

- 546 *Musema*, Judgment, TC, para. 205; *Rutaganda*, Judgment, TC, para. 70; *Kayishema and Ruzindana*, Judgment, TC, para. 122; *Akayesu*, Judgment, TC, para. 581.
- 547 *Musema*, Judgment, TC, para. 205; *Rutaganda*, Judgment, TC, para. 70; *Akayesu*, Judgment, TC, para. 581.
- 548 *Ntakirutimana*, Judgment, TC, para. 804; *Bagilishema*, Judgment, TC, para. 77; *Musema*, Judgment, TC, paras. 202-203; *Rutaganda*, Judgment, TC, para. 68; *Kayishema and Ruzindana*, Judgment, TC, para. 123, footnote 26; *Akayesu*, Judgment, TC, para. 579.
- 549 *Tadic*, Judgment, TC, paras. 646-648. See also *Kunarac*, Judgment, AC, para. 93; *Tadic*, Judgment, AC, para. 248; *Krnjelac*, Judgment, TC, para. 55; *Krstic*, Judgment, TC, para. 480; *Kordic and Cerkez*, Judgment, TC, para. 178; *Blaskic*, Judgment, TC, para. 202; *Kupreskic*, Judgment, TC, para. 544; *Jelusic*, Judgment, TC, para. 53.

- 550 *Akayesu*, Judgment, TC, para. 580. See also *Ntakirutimana*, Judgment, TC, para. 804; *Bagilishema*, Judgment, TC, para. 77; *Musema*, Judgment, TC, para. 204; *Rutaganda*, Judgment, TC, para. 69.
- 551 *Ntakirutimana*, Judgment, TC, para. 804; *Musema*, Judgment, TC, para. 204; *Rutaganda*, Judgment, TC, para. 69; *Kayishema and Ruzindana*, Judgment, TC, para. 123; *Akayesu*, Judgment, TC, para. 580.
- 552 *Kunarac*, Judgment, AC, para. 98.
- 553 *Bagilishema*, Judgment, TC, para. 79; *Musema*, Judgment, TC, para. 207; *Rutaganda*, Judgment, TC, para. 72; *Kayishema and Ruzindana*, Judgment, TC, paras. 127, 128; *Akayesu*, Judgment, TC, para. 582.
- 554 *Bagilishema*, Judgment, TC, para. 79; *Rutaganda*, Judgment, TC, para. 72; *Kayishema and Ruzindana*, Judgment, TC, para. 128; *Akayesu*, Judgment, TC, para. 582.
- 555 *Bagilishema*, Judgment, TC, para. 80; *Kunarac*, Judgment, AC, para. 90.
- 556 *Musema*, Judgment, TC, para. 209; *Rutaganda*, Judgment, TC, para. 74.
- 557 *Ntakirutimana*, Judgment, TC, para. 803; *Bagilishema*, Judgment, TC, para. 94; *Musema*, Judgment, TC, para. 206; *Kayishema and Ruzindana*, Judgment, TC, para. 134.
- 558 *Akayesu*, Judgment, AC, para. 467.
- 575 *Akayesu*, Judgment, TC, para. 598. See also *Musema*, Judgment, TC, para. 226.
- 576 *Kunarac*, Judgment, AC, paras. 127-128.
- 577 *Kunarac*, Judgment, AC, paras. 127, 128, 130.
- 578 *Kunarac*, Judgment, AC, paras. 127-128.
- 694 *Semanza*, Decision on Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, Annex A, para. 2. See Annex II, Part A, para. 2.
- 695 See *supra* para. 281.
- 696 See chapter IV hereof.
- 697 Defence Closing Brief p. 116.

*International Criminal Tribunal
for Rwanda*

Case N° ICTR-95-1B-T

Prosecutor v. Mikaeli Muhimana

*Judgment of
April 28, 2005*



III. LEGAL FINDINGS

[...]

C. Crime Against Humanity – Rape (Count 3)

[...]

2. Rape as a Crime Against Humanity

534. On the basis of its factual findings on the allegations of rape in Paragraph 6 of the Indictment, the Chamber has considered the criminal responsibility of the Accused, under Count 3 for rape as a crime against humanity, punishable under Article 3 (g) of the Statute of the Tribunal.

Applicable Law

535. The Chamber notes that both the Defence and the Prosecution in the present case endorse the *Akayesu* definition of rape.⁴⁸⁸

536. The Prosecution invites the Chamber to consider that the disembowelment of Pascasie Mukaremera, as alleged in Paragraph 6 (d) (ii) of the Indictment, and shown by the evidence to have been effected by using a machete to cut her from her breasts to her genitals, constitutes rape. In light of the peculiar factual circumstances of this case, the Chamber deems it necessary to analyse the evolution of the definition of rape in international criminal law.

357. The first judgment in which an international criminal tribunal defined rape as a crime against humanity and an instrument of genocide was issued on 2 September 1998 in the case *Prosecutor v. Akayesu*, by Trial Chamber I of the ICTR. In the present case, rape is charged as a crime against humanity. Emphasizing that “the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts”,⁴⁸⁹ the *Akayesu* Judgment defined rape and sexual violence as:

a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.⁴⁹⁰

538. Recognizing that rape has been historically defined in national jurisdictions as “non-consensual sexual intercourse”, the *Akayesu* Trial Chamber found this description too mechanical, insofar as “variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual”.⁴⁹¹ As an example, the *Akayesu* Trial Chamber referred to its factual finding that a piece of wood was thrust into the sexual organs of a woman as she lay dying: a physically invasive act of the victim’s body, which it found to constitute rape.⁴⁹²

539. Consonant with the definition of rape in *Akayesu*, this Chamber notes with approval the *Furundžija* Trial Chamber’s conclusion that:

The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.⁴⁹³

540. The Chamber observes that the *Akayesu* definition of rape was endorsed by Trial Chamber I of this Tribunal in *Musema*⁴⁹⁴ and *Niyitegeka*,⁴⁹⁵ and by Trial Chamber II of the ICTY in *Delalić*.⁴⁹⁶ No appeal was taken as to this issue in any of these cases.

541. In *Kunarac*, the Trial Chamber referred to the *Akayesu* definition of rape briefly. It made no adverse comments on the definition and tacitly accepted it, but went on to focus on providing the elements of rape. The *Kunarac* Trial Chamber stated:⁴⁹⁷

The specific elements of the crime of rape, which are neither set out in the Statute nor in international humanitarian law or human rights instruments, were the subject of consideration by the Trial Chamber in the *Furundžija* case. There the Trial Chamber noted that in the International Criminal Tribunal for Rwanda judgment in the *Akayesu* proceedings the Trial Chamber had defined rape as “a physical invasion of a sexual nature, committed under circumstances which are coercive”. It then reviewed the various sources of international law and found that it was not possible to discern the elements of the crime of rape from international treaty or customary law, nor from the “general principles of international criminal law or ... general principles of international law” (...).

This Trial Chamber agrees that these elements, if proved, constitute the *actus reus*

of the crime of rape in international law. However, in the circumstances of the present case the Trial Chamber considers that it is necessary to clarify its understanding of the element in paragraph (ii) of the *Furundžija* definition. The Trial Chamber considers that the *Furundžija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which, as foreshadowed in the hearing and as discussed below, is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.

542. It is clear from the above quotation that the *Kunarac* Trial Chamber was dealing with the elements of rape. The Trial Chamber's articulation of the elements of the crime of rape was as follows:⁴⁹⁸

The *actus reus* of the crime of rape in international law is constituted by: 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; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.

The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

543. When the *Kunarac* Appeals Chamber concurred with the Trial Chamber's "definition", it is clear that it was approving the elements set out by the Trial Chamber. That was the issue before the Appeals Chamber. It was not called upon to consider the *Akayesu* definition.

544. In analyzing the relationship between consent and coercion, the Appeals Chamber acknowledged that coercion provides clear evidence of non-consent. The Appeals Chamber in *Kunarac* opined as follows:⁴⁹⁹

(...) with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape. However, in explaining its focus on the absence of consent as the condi-

tion *sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. In particular, the Trial Chamber wished to explain that there 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 Appeals Chamber notes, for example, that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of force so long as "there is a reasonable possibility that the perpetrator will execute the threat". While it is true that a focus on one aspect gives different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.

545. Similarly, the Chamber also recalls that the *Furundžija* Trial Chamber acknowledged that "any form of captivity vitiates consent".⁵⁰⁰

546. Accordingly, the Chamber is persuaded by the Appellate Chamber's analysis that coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape. Further, this Chamber concurs with the opinion that circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.

547. The Chamber notes that the definition of rape, as enunciated in *Akayesu*, has not been adopted *per se* in all subsequent jurisprudence of the *ad hoc* Tribunals. The ICTR Trial Chambers in *Semanza*, *Kajelijeli* and *Kamuhanda*, for example, described only the physical elements of the act of rape, as set out in *Kunarac*, and thus seemingly shifted their analyses away from the conceptual definition established in *Akayesu*.⁵⁰¹

548. The Trial Chamber in *Semanza* stated:⁵⁰²

The *Akayesu* Judgment enunciated a broad definition of rape which included any physical invasion of a sexual nature in coercive circumstance and which was not

limited to forcible sexual intercourse. The Appeals Chamber of the ICTY, in contrast, affirmed a narrower interpretation defining the material element of rape as a crime against humanity as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.

While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunarac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber. In doing so, the Chamber recognises that other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity within the jurisdiction of this Tribunal such as torture, persecution, enslavement, or other inhumane acts.

549. This Chamber considers that *Furundžija* and *Kunarac*, which sometimes have been construed as departing from the *Akayesu* definition of rape –as was done in *Semanza*– actually are substantially aligned to this definition and provide additional details on the constituent elements of acts considered to be rape.

550. The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a “physical invasion of a sexual nature”, *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.

551. On the basis of the foregoing analysis, the Chamber endorses the conceptual definition of rape established in *Akayesu*, which encompasses the elements set out in *Kunarac*.

Legal Findings

[...]

553. The Chamber finds that the Accused also abetted in the commission of rapes by others:

(a) On 16 April 1994, at the same time and in the same area where the Accused raped Mukasine Kajongi in the basement of Mugonero Hospital, two soldiers, in his presence, raped the daughters of Amos Karera. The presence of the Accused

during the rape of Amos Karera's daughters coupled with his own action of raping Mukasine, encouraged the two soldiers to rape Amos Karera's daughters. This encouragement contributed substantially to the commission of these rapes;⁵⁰⁹

(b) On 16 April 1994, while the Accused was raping Witness BJ in the basement of Mugonero Hospital, two men, who accompanied him, were also raping two other girls named Murekatete and Mukasine. The Accused, by his actions, encouraged the other men to commit the rapes of Murekatete and Mukasine. This encouragement contributed substantially to the commission of these rapes;⁵¹⁰

(c) On 22 April 1994, the Accused permitted an Interahamwe named Mugonero to take Witness BG away so that he could "smell the body of a Tutsi woman". The witness was raped several times in Mugonero's residence over a period of two days. The Chamber finds that by allowing Mugonero to take Witness BG home, the Accused encouraged him to rape Witness BG. This encouragement contributed substantially to the commission of the rape.⁵¹¹

557. The Chamber finds that the Accused bears no criminal responsibility for the rape of Pascasie Mukaremera. In its factual findings, the Chamber has found that the Accused disembowelled Pascasie Mukaremera by cutting her open with a machete from her breasts to her vagina. The Chamber has carefully considered the Prosecution's submission to consider this act as rape, and concludes that such conduct cannot be classified as rape. Although the act interferes with the sexual organs, in the Chamber's opinion, it does not constitute a physical invasion of a sexual nature. However, the Chamber will return to consider this incident under its legal findings on murder.⁵¹⁸

[...]

563. Consequently, the Chamber finds the Accused Mika Muhimana GUILTY of RAPE AS A CRIME AGAINST HUMANITY, under Count 3 of the Indictment.

[...]

ENDNOTES

488 Defence Closing Brief, para. 133; T. 20 January 2005, p.5; Prosecution Closing Brief, Chapter 5, para.1.

489 *Akayesu* Judgment (TC) para. 687.

490 *Akayesu* Judgment (TC) paras. 598 and 688.

491 *Akayesu* Judgment (TC) para. 686.

492 *Akayesu* Judgment (TC) para. 686.

493 *Furundžija* Judgment (TC), para. 183.

- 494 *Musema* Judgment (TC), paras. 229, 907, 933, 936.
- 495 *Niyitegeka* Judgment (TC), para. 456.
- 496 *Delalić* Judgment (TC), paras. 478-479.
- 497 *Kunarac* Judgment (TC), paras.437-438.
- 498 *Kunarac*, Judgment (TC), paras. 460, 437, approved in: *Kunarac*, Judgment (AC), para. 128; see also: *Semanza*, Judgment (TC), paras. 345-346.
- 499 *Kunarac*, Judgment (AC), paras. 129-130.
- 500 *Furundžija* (TC), para. 271.
- 501 *Delalić* Judgment (TC), paras. 478-479.
- 502 *Semanza* Judgment (TC), paras. 344-345.
- 509 See *supra*: Chapter II, Sections L and M.
- 510 See *supra*: Chapter II, Sections L and M.
- 511 See *supra*: Chapter II, Section N.
- 518 See *supra*: Chapter II, Section N.

*International Criminal Tribunal
for the former Yugoslavia*

Case N° IT-96-21-T

*Prosecutor v. Zejnil Delalić,
Zdravko Mucić also known as “Pavo”, Hazim
Delić, Esad Landžo also known as “Zenga”
(Čelebići)*

*Judgment of
November 16, 1998*



I. INTRODUCTION

The trial of Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (hereafter “accused”), before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereafter “International Tribunal” or “Tribunal”), commenced on 10 March 1997 and came to a close on 15 October 1998.

[...]

HEREBY RENDERS ITS JUDGMENT.

[...]

B. The Indictment

[...]

3. The Indictment is concerned solely with events alleged to have occurred at a detention facility in the village of Čelebići (hereafter “Čelebići prison-camp”), located in the Konjic municipality, in central Bosnia and Herzegovina, during certain months of 1992. The Indictment charges the four accused with grave breaches of the Geneva Conventions of 1949, under Article 2 of the Statute, and violations of the laws or customs of war, under Article 3 of the Statute, in connection with acts allegedly perpetrated within the Čelebići prison-camp.

[...]

III. APPLICABLE LAW

[...]

C. General Requirements for the Application of Articles 2 and 3 of the Statute

[...]

3. *Nexus between the acts of the accused and the armed conflict*

Bosnia and Herzegovina can be regarded as a violation of international humanitarian law. There must be an obvious link between the criminal act and the armed conflict. Clearly, if a relevant crime was committed in the course of fighting or the take-over of a town during an armed conflict, for example, this would be sufficient to render the offence a violation of international humanitarian law. Such a direct connection to actual hostilities is not, however, required in every situation. Once again, the Appeals Chamber has stated a view on the nature of this nexus between the acts of the accused and the armed conflict. In its opinion,

[i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.²²⁵

[...]

196. In the present case, all of the alleged acts of the accused took place within the confines of the Čelebići prison-camp, a detention facility in the Konjic municipality operated by the forces of the governmental authorities of Bosnia and Herzegovina. The prisoners housed in the prison-camp were arrested and detained as a result of military operations conducted on behalf of the Government of Bosnia and Herzegovina and in the course of an armed conflict to which it was a party. Each of the accused is alleged to have been involved, in some capacity, in the operation of the camp and the acts for which they have been indicted are alleged to have been committed in the performance of their official duties as members of the Bosnian forces.

197. The Trial Chamber is, therefore, in no doubt that there is a clear nexus between the armed conflict in Bosnia and Herzegovina, including the military operations in Konjic, and the acts alleged in the Indictment to have been committed by the four accused in the present case.

[...]

I. Elements of the Offences

[...]

2. *Offences of Mistreatment*

[...]

(b) Torture

[...]

(iv) Rape as Torture

475. The crime of rape is not itself expressly mentioned in the provisions of the Geneva Conventions relating to grave breaches, nor in common article 3, and hence its classification as torture and cruel treatment. It is the purpose of this section to consider the issue of whether rape constitutes torture, under the above mentioned provisions of the Geneva Conventions. In order to properly consider this issue, the Trial Chamber first discusses the prohibition of rape and sexual assault in international law, then provides a definition of rape and finally turns its attention to whether rape, a form of sexual assault, can be considered as torture.

a. Prohibition of Rape and Sexual Assault under International Humanitarian Law

476. There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4(2) of Additional Protocol 11, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4(1) which states that all persons are entitled to respect for their person and honour. Moreover, article 76(1) of Additional Protocol I expressly requires that women be protected from rape, forced prostitution and any other form of indecent assault. An implicit prohibition on rape and sexual assault can also be found in article 46 of the 1907 Hague Convention (IV) that provides for the protection of family honour and rights. Finally, rape is prohibited as a crime against humanity under article 6(c) of the Nürnberg Charter and expressed as such in Article 5 of the Statute.

477. There is on the basis of these provisions alone, a clear prohibition on rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape. Thus, the task of the Trial Chamber is to determine the definition of rape in this context.

b. Definition of Rape

478. Although the prohibition on rape under international humanitarian law is readily apparent, there is no convention or other international instrument containing a defini-

tion of the term itself. The Trial Chamber draws guidance on this question from the discussion in the recent judgment of the ICTR, in the case of the Prosecutor v. Jean-Paul Akayesu⁴⁹² (hereafter "Akayesu Judgment") which has considered the definition of rape in the context of crimes against humanity. The Trial Chamber deciding this case found that there was no commonly accepted definition of the term in international law and acknowledged that, while "rape has been defined in certain national jurisdictions as non-consensual intercourse", there are differing definitions of the variations of such an act. It concluded:

that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law.

[...]

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed under circumstances which are coercitives [...].⁴⁹³

479. This Trial Chamber agrees with the above reasoning, and sees no reason to depart from the conclusion of the ICTR in the Akayesu Judgment on this issue. Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive. Having reached this conclusion, the Trial Chamber turns to a brief discussion of the jurisprudence of other international judicial bodies concerning rape as torture.

c. Decisions of International and Regional Judicial Bodies

480. In order for rape to be included within the offence of torture it must meet each of the elements of this offence, as discussed above. In considering this issue, the Trial Chamber finds it useful to examine the relevant findings of other international judicial and quasi-judicial bodies as well as some relevant United Nations reports.

481. Both the Inter-American Commission on Human Rights (hereafter "Inter-American Commission") and the European Court of Human Rights have recently issued decisions on the question of whether rape constitutes torture. On 1 March 1996, the Inter-American Commission handed down a decision in the case of *Fernando and Raquel Mejia v.*

Peru,⁴⁹⁴ which concerned the rape, on two occasions, of a schoolteacher by members of the Peruvian Army. (...)

[...]

483. The Inter-American Commission found that the rape of Raquel Mejia constituted torture in breach of article 5 of the American Convention of Human Rights.⁴⁹⁵ In reaching this conclusion, the Inter-American Commission found that torture under article 5 has three constituent elements. First, there must be an intentional act through which physical or mental pain and suffering is inflicted on a person; secondly, such suffering must be inflicted for a purpose; and, thirdly, it must be inflicted by a public official or by a private person acting at the instigation of a public official.⁴⁹⁶

484. In considering the application of these principles to the facts, the Inter American Commission found that the first of these elements was satisfied on the basis that:

[r]ape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.⁴⁹⁷

485. In finding that the second element of torture had also been met, the Inter-American Commission found that Raquel Mejia was raped with the aim of punishing her personally and intimidating her. Finally, it was held that the third requirement of the definition of torture was met as the man who raped Raquel Mejia was a member of the security forces.⁴⁹⁸

486. Two important observations may be made about this decision. First, in considering whether rape gives rise to pain and suffering, one must not only look at the physical consequences, but also at the psychological and social consequences of the rape. Secondly, in its definition of the requisite elements of torture, the Inter-American Commission did not refer to the customary law requirement that the physical and psychological pain and suffering be severe. However, this level of suffering may be implied from the Inter-American Commission's finding that the rape, in the instant case, was "an act of violence" occasioning physical and psychological pain and suffering that caused the victim: a state of shock; a fear of public ostracism; feelings of humiliation; fear of how her husband would react; a feeling that family integrity was at stake and an apprehension that her children might feel humiliated if they knew what had happened to their mother.⁴⁹⁹

487. The European Court has also recently considered the issue of rape as torture, as prohibited by article 3 of the European Convention, in the case of *Aydin v. Turkey*. In this case, a majority of the Court referred to the previous finding of the European Commission for Human Rights, when it stated that, after being detained, the applicant was taken to a police station where she was:

blindfolded, beaten, stripped, placed inside a tyre and sprayed with high pressure water, and raped. It would appear probable that the applicant was subject to such treatment on the basis of suspicion of collaboration by herself or members of her family with members of the PKK, the purpose being to gain information and/or deter her family and other villagers from becoming implicated in terrorist activities.⁵⁰⁰

488. The European Court held that the distinction between torture and inhuman or degrading treatment in article 3 of the European Convention was embodied therein to allow the special stigma of torture to attach only to deliberate inhuman treatment causing very serious and cruel suffering.⁵⁰¹ It went on to state that:

[w]hile being held in detention the applicant was raped by a person whose identity has still to be determined. 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 does not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. [...]

Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. *Indeed the court would have reached this conclusion on either of these grounds taken separately.*⁵⁰²

489. By stating that it would have found a breach of article 3 even if each of the grounds had been considered separately, the European Court, on the basis of the facts before it, specifically affirmed the view that rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture. A majority of the Court (14 votes to 7) thus found that there had been a breach of article 3 of the European Convention and, while those judges who disagreed with this finding were not convinced that the events alleged actually took place, they did not otherwise disagree with the reasoning of the majority on the application of article 3.⁵⁰³ Indeed, two of the dissenting judges explicitly

stated that, had they found the acts alleged proven, they would constitute an extremely serious violation of article 3.⁵⁰⁴

490. In addition, the Akayesu Judgment referred to above expresses a view on the issue of rape as torture most emphatically, in the following terms:

Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting.⁵⁰⁵

491. The view that rape constitutes torture is further shared by the United Nations Special Rapporteur on Torture. In an oral introduction to his 1992 Report to the Commission on Human Rights, the Special Rapporteur stated that:

since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.⁵⁰⁶

In his first report he also listed various forms of sexual aggression as methods of torture, which included rape and the insertion of objects into the orifices of the body.⁵⁰⁷

492. The profound effects of rape and other forms of sexual assault were specifically addressed in the Report of the Commission of Experts thus:

Rape and other forms of sexual assault harm not only the body of the victim. The more significant harm is the feeling of total loss of control over the most intimate and personal decisions and bodily functions. This loss of control infringes on the victim's human dignity and is what makes rape and sexual assault such an effective means of ethnic cleansing.⁵⁰⁸

493. Finally, in a recent report, the United Nations Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, has considered the issue of rape as torture with particular regard to the prohibited purpose of discrimination. The United Nations Special Rapporteur referred to the fact that the Committee on the Elimination of Discrimination against Women has recognised that violence directed against a woman because she is a woman, including acts that inflict physical, mental or sexual harm or suffering, represent a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms. Upon this

basis, the United Nations Special Rapporteur opined that, "in many cases the discrimination prong of the definition of torture in the Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture."⁵⁰⁹

(v) Findings

494. In view of the above discussion, the Trial Chamber therefore finds that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows:

- (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
- (ii) which is inflicted intentionally,
- (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
- (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

495. The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.

496. Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.

[...]

IV. FACTUAL AND LEGAL FINDINGS

[...]

F. Factual and Legal Findings relating to specific events charged in the Indictment

[...]

9. *Torture and Rape of Grozdana Čéčez - Counts 18, 19 and 20*

925. Paragraph 24 of the Indictment states that:

Sometime beginning around 27 May 1992 and continuing until the beginning of August 1992, Hazim Delić and others subjected Grozdana ČÉČEZ to repeated incidents of forcible sexual intercourse. On one occasion, she was raped in front of other persons, and on another occasion she was raped by three different persons in one night. By his acts and omissions, Hazim Delić is responsible for:

Count 18. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 19. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 20. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

[...]

(c) Discussion and Findings

936. The Trial Chamber notes that sub-Rule 96(i) of the Rules provides that no corroboration of the testimony of a victim of sexual assault shall be required. It is alleged in the Indictment that Ms. Čéčez was raped by Hazim Delić and by other persons. The Trial Chamber finds the testimony of Ms. Čéčez, and the supporting testimony of Witness D and Dr. Grubač, credible and compelling, and thus concludes that Ms. Čéčez was raped by Mr. Delić, and others, in the Čelebići prison-camp.

937. Ms. Čéčez, born on 19 April 1949, was a store owner in Konjic until May 1992.

She was arrested in Donje Selo on 27 May 1992, and taken to the Čelebići prison-camp. She was kept in Building B for the first two nights of her detention and was then taken to Building A on the third night, where she stayed until her release on 31 August 1992. Upon her arrival at the prison-camp she was taken by a driver, Mr. Džajić, to a room where a man with a crutch was waiting, whom she subsequently identified as Hazim Delić. Another man subsequently entered the room. Ms. Čećez was interrogated by Mr. Delić, who asked her about the whereabouts of her husband and slapped her. She was then taken to a second room with three men, including Mr. Delić. Hazim Delić, who was in uniform and carrying a stick, then ordered her to take her clothes off. He then partially undressed her, put her face down on the bed and penetrated her vagina with his penis. He subsequently turned her over on to her back, took off the remainder of her clothes and again penetrated her vagina with his penis. During this time, Mr. Džajić was lying on another bed in the same room and the other man present was standing guard at the door of the room. Mr. Delić told her that the reason she was there was her husband, and that she would not be there if he was. Later that evening Zdravko Mucić came to the room where she was being kept and asked about the whereabouts of her husband. He noticed her appearance and asked her whether anyone had touched her. She did not dare to say anything as Delić had instructed her not to do so. However Mr. Mucić "could notice that I [Ms. Čećez] had been raped because there was a big trace of sperm left on the bed".⁹⁰³

938. The effect of this rape by Hazim Delić was expressed by Ms. Čećez, when she stated: "...he trampled on my pride and I will never be able to be the woman that I was"⁹⁰⁴. Ms. Čećez lived in constant fear while she was in the prison-camp and was suicidal. Further, Ms. Čećez was subjected to multiple rapes on the third night of her detention in the prison-camp when she was transferred from Building B to a small room in Building A. After the third act of rape that evening she stated: "[i]t was difficult for me. I was a woman who only lived for one man and I was his all my life, and I think that I was just getting separated from my body at this time"⁹⁰⁵. In addition, she was subjected to a further rape in July 1992. As a result of her experiences in the prison-camp Ms. Čećez stated that "[p]sychologically and physically I was completely worn out. They kill you psychologically."⁹⁰⁶

[...]

940. The Trial Chamber finds that acts of vaginal penetration by the penis under circumstances that were coercive, quite clearly constitute rape. These acts were intentionally committed by Hazim Delić who was, an official of the Bosnian authorities running the prison-camp.

941. The purposes of the rapes committed by Hazim Delić were, *inter alia*, to obtain information about the whereabouts of Ms. Čećez's husband who was considered an armed rebel; to punish her for her inability to provide information about her husband; to coerce and intimidate her into providing such information; and to punish her for the acts of her husband. The fact that these acts were committed in a prison-camp, by an armed official, and were known of by the commander of the prison-camp, the guards, other people who worked in the prison-camp and most importantly, the inmates, evidences Mr. Delić's purpose of seeking to intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness. In addition, the violence suffered by Ms. Čećez in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.

942. Finally, there can be no question that these rapes caused severe mental pain and suffering to Ms. Čećez. The effects of the rapes that she suffered at the hands of Hazim Delić are readily apparent from her own testimony and included living in a state of constant fear and depression, suicidal tendencies, and exhaustion, both mental and physical.

943. For these reasons, the Trial Chamber finds Hazim Delić guilty of torture, under count 18 and count 19 of the Indictment for the rape of Ms. Čećez. As count 20 of the Indictment is charged in the alternative to count 19, it is dismissed in light of the guilty finding for count 19 of the Indictment.

10. *Torture and Rape of Witness A - Counts 21, 22 and 23*

944. Paragraph 25 of the Indictment states that:

Sometime beginning around 15 June 1992 and continuing until the beginning of August 1992, Hazim Delić subjected a detainee, here identified as Witness A, to repeated incidents of forcible sexual intercourse, including both vaginal and anal intercourse. Hazim Delić raped her during her first interrogation and during the next six weeks, she was raped every few days. By his acts and omissions, Hazim Delić is responsible for:

Count 21. A Grave Breach punishable under Article 2(b) (torture) of the Statute of the Tribunal;

Count 22. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a)(torture) of the Geneva Conventions; or alternatively

Count 23. A Violation of the Laws or Customs of War punishable under Article 3 of

the Statute of the Tribunal and recognised by Article 3(1)(a)(cruel treatment) of the Geneva Conventions.

[...]

(c) Discussion and Findings

955. Ms. Antić is a Bosnian Serb born in 1948. In 1992, she lived in the village of Idbar with her mother. She was arrested in her village on 15 June 1992 and taken to the Čelebići prison-camp. After her arrival, she was detained in Building A along with other women, where she was kept until her release on 31 August 1992. Upon her arrival at the Čelebići prison-camp, she was immediately interrogated together with another woman, by Hazim Delić, Zdravko Mucić and another person. In answer to a question by Mr. Mucić, she stated that she was not married, at which point Mr. Mucić said to Mr. Delić, “[t]his is just the right type for you”.

956. The Trial Chamber notes that Sub-rule 96(i) of the Rules, provides that no corroboration of the victim’s testimony shall be required. It agrees with the view of the Trial Chamber in the Tadić Judgment, quoted in the Akayesu Judgment, 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 long been denied to victims of sexual assault by the common law.⁹¹¹

957. Despite the contentions of the Defence, the Trial Chamber accepts Ms. Antić’s testimony, and finds, on this basis, and the supporting evidence of Ms. Čećez, Witness P and Dr. Petko Grubač, that she was subjected to three rapes by Hazim Delić. The Trial Chamber finds Ms. Antić’s testimony as a whole compelling and truthful, particularly in light of her detailed recollection of the circumstances of each rape and her demeanor in the court room in general and, particularly, under cross-examination. The alleged inconsistencies between her evidence at trial and prior statements are immaterial and were sufficiently explained by Ms. Antić. She consistently stated under cross examination that, when she made those prior statements, she was experiencing the shock of reliving the rapes that she had “kept inside for so many years”⁹¹². Further, the probative value of these prior statements is considerably less than that of direct sworn testimony which has been subjected to cross-examination.

958. The Trial Chamber thus finds that Ms. Antić was raped for the first time on the night of her arrival in the prison-camp. On this occasion she was called out of Building A and

brought to Hazim Delić in Building B, who was wearing a uniform. He began to interrogate her and told her that if she did not do whatever he asked she would be sent to another camp or she would be shot. Mr. Delić ordered her to take her clothes off, threatened her and ignored her crying pleas for him not to touch her. He pointed a rifle at her while she took her clothes off and ordered her to lie on a bed. Mr. Delić then raped her by penetrating her vagina with his penis, he ejaculated on the lower part of her stomach and continued to threaten and curse her.

959. She was brought back to her room in Building A in tears, where she stated that she exclaimed, "Oh, fuck you, God, in case you exist. Why did you not protect me from this?"⁹¹³. The following day, Hazim Delić came to the door of the room where she was sleeping and she began crying upon seeing him. He then said to her "[w]hy are you crying? This will not be your last time". Ms. Antić stated during her testimony "I felt so miserably [sic], I was constantly crying. I was like crazy, as if I had gone crazy"⁹¹⁴. The rape and the severe emotional psychological suffering and injury experienced by Ms. Antić was also reported by Ms. Čećez and Dr. Grubač.

960. The second rape occurred when Hazim Delić came to Building A and ordered Ms. Antić to go to Building B to wash herself. After doing so, she was led to the same room in which she was first raped, where Delić, who had a pistol and a rifle and was in uniform, was sitting on a desk. She started crying once again out of fear. He ordered her to take her clothes off. She kept telling him that she was sick and asking him not to touch her. Out of fear that he would kill her she complied with his orders. Mr. Delić told her to get on the bed and to turn around and kneel. After doing so he penetrated her anus with his penis while she screamed from pain. He was unable to penetrate her fully and she started to bleed. Mr. Delić then turned her around and penetrated her vagina with his penis and ejaculated on her lower abdomen. After the rape Ms. Antić continued crying, felt very ill and experienced bleeding from her anus, which she treated with a compress, and was provided with tranquillisers.

961. The third rape occurred in Building A. It was daylight when Hazim Delić came in, armed with hand grenades, a pistol and rifle. He threatened her and she again said that she was a sick woman and asked him not to touch her. He ordered her to undress and get on the bed. She did so under pressure and threat. Mr. Delić then pulled his trousers down to his boots and raped her by penetrating her vagina with his penis. He then ejaculated on her abdomen.

962. The Trial Chamber finds that acts of vaginal penetration by the penis and anal penetration by the penis, under circumstances that were undoubtedly coercive, constitute

rape. These rapes were intentionally committed by Hazim Delić who was an official of the Bosnian authorities running the prison-camp.

963. The rapes were committed inside the Čelebići prison-camp and on each occasion Hazim Delić was in uniform, armed and viciously threatening towards Ms. Antić. The purpose of these rapes was to intimidate, coerce and punish Ms. Antić. Further, at least with respect to the first rape, Delić's purpose was to obtain information from Ms. Antić, as it was committed in the context of interrogation. In addition, the violence suffered by Ms. Antić in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.

964. Finally, there can be no question that these rapes caused severe mental and physical pain and suffering to Ms. Antić. The effects of the rapes that she suffered at the hands of Hazim Delić, including the extreme pain of anal penetration and subsequent bleeding, the severe psychological distress evidenced by the victim while being raped under circumstance where Mr. Delić was armed and threatening her life, and the general depression of the victim, evidenced by her constant crying, the feeling that she was going crazy and the fact that she was treated with tranquilizers, demonstrate most emphatically the severe pain and suffering that she endured.

965. For these reasons, the Trial Chamber finds Hazim Delić guilty of torture under count 21 and count 22 of the Indictment for the multiple rapes of Ms. Antić. (...)

[...]

ENDNOTES

225 Tadic Jurisdiction Decision, para. 70.

492 *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber 1,2 Sept. 1998.

493 *Ibid.*, p. 241.

494 Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10.970, 1 March 1996.

495 *Ibid.*, p. 187.

496 *Ibid.*, p. 185.

497 *Ibid.*, p. 186 (footnote omitted).

498 *Ibid.*, p. 187

499 Case No.: IT-96-21-T 16 November 1998

500 *Aydin v. Turkey*, para. 40, sub-para. 4.

- 501 *Ibid.*, para. 82.
- 502 *Ibid.*, paras. 83 and 86 (emphasis added).
- 503 *Ibid.*, p. 38. Joint Dissenting Opinion of Judges Golciklti, Matscher, Pettiti, De Meyer, Lopes Rocha, Makarczyk and Gotchev on the Alleged Ill-treatment (Art. 3 of the Convention), p.45.
- 504 *Ibid.*, Partly Concurring, Partly Dissenting Opinion of Judge Matscher, p. 40, and Partly Concurring, Partly Dissenting Opinion of Judge Pettiti, p. 41.
- 505 Akayesu Judgment, para. 597.
- 506 E/CNA/1992/SR.21, para.35. See "Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment" Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32,E/CNA/1995/34, para. 16.
- 507 Report of the Special Rapporteur, para. 119.
- 508 Commission of Experts Report, Annexes IX to XII S/1994/6741 Add.2 (Vol. V), para. 25.
- 509 "Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict"; Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CNAISub.2/1998/13, 22 June 1998, para. 55.
- 903 Transcription (later T). 496.
- 904 T. 494.
- 905 T. 503
- 906 T. 551.
- 911 Tadic Judgment, para. 536 and Akayesu Judgment, para. 134.
- 912 T. 1825 and T 1837.
- 913 T. 1780.
- 914 T. 1777-T. 1780.

*International Criminal Tribunal
for the former Yugoslavia*

Case N° IT-95-17/1-T

Prosecutor v. Anto Furundžija

*Judgment of
December 10, 1998*



I. INTRODUCTION

The trial of Anto Furundžija, hereafter “accused”, a citizen of Bosnia and Herzegovina who was born on 8 July 1969, before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter “International Tribunal”, commenced on 8 June 1998 and came to a close on 12 November 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor, hereafter “Prosecution”, and the Defense for the accused, the Trial Chamber,

HEREBY RENDERS ITS JUDGMENT

[...]

V. THE EVENTS AT THE BUNGALOW AND THE HOLIDAY COTTAGE IN NADIOCI

[...]

H. Factual Findings

120. Having considered the evidence, the Trial Chamber is satisfied beyond reasonable doubt that the following findings may be made.

1. The Arrest

121. On or about 16 May 1993, Witness D was arrested and taken to the Bungalow by the accused and Accused B. He was interrogated and assaulted by both of them. Accused B in particular, beat him with his fists and on the feet and toes with a baton, in the presence of Witness E, and most of the time in the presence of the accused who was coming and going.

122. On or about 18 or 19 May 1993, Witness A was arrested and taken from her apartment in Vitez by several members of an elite unit of soldiers attached to the HVO¹ and known as the Jokers. She was driven by car to the Bungalow, the headquarters of the

Jokers. Soldiers and several commanders of different units were based at the Bungalow, among whom were the accused, Accused B, Vlado Šantić and others.¹⁴⁹

123. On arrival at the Bungalow, Witness A was taken to a nearby house, the Holiday Cottage, which formed part of the Bungalow complex. She entered a room described as the large room, which was where the Jokers lodged. She was told to sit down and was offered bread and paté to eat. Around her, the soldiers, dressed in Jokers uniforms, awaited the arrival of the man referred to as 'the Boss', who was going to deal with her. Witness A then heard someone announce the arrival of 'Furundžija, and the man she has identified to the satisfaction of the Trial Chamber as being Anto Furundžija, the accused, entered the room holding some papers in his hands.

2. *In the Large Room*

124. Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the accused. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH# and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the accused and the abuse by Accused B were parallel to each other.

125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.

126. Witness A was subjected to severe physical and mental suffering and public humiliation.

3. *In the Pantry*

127. The interrogation of Witness A continued in the pantry, once more before an audience of soldiers. Whilst naked but covered by a small blanket, she was interrogated by the accused. She was subjected to rape, sexual assaults, and cruel, inhuman and degrading treatment by Accused B. Witness D was also interrogated by the accused and subjected to serious physical assaults by Accused B. He was made to watch rape and sexual assault perpetrated upon a woman whom he knew, in order to force him to admit allegations made against her. In this regard, both witnesses were humiliated.

128. Accused B beat Witness D and repeatedly raped Witness A. The accused was present in the room as he carried on his interrogations. When not in the room, he was present in the near vicinity, just outside an open door and he knew that crimes including rape were being committed. In fact, the acts by Accused B were performed in pursuance of the accused's interrogation.

129. It is clear that in the pantry, both Witness A and Witness D were subjected to severe physical and mental suffering and they were also publicly humiliated.

130. There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.

VI. THE LAW

[...]

C. Rape and Other Serious Sexual Assaults in International Law

1. *International Humanitarian Law*

165. Rape in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949¹⁸⁹, Additional Protocol I of 1977¹⁹⁰ and Additional Protocol II of 1977.¹⁹¹ Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties.¹⁹²

166. At least common article 3 to the Geneva Conventions of 1949, which implicitly refers to rape, and article 4 of Additional Protocol II, which explicitly mentions rape, apply qua treaty law in the case in hand because Bosnia and Herzegovina ratified the Geneva Conventions and both Additional Protocols on 31 December 1992. Furthermore, as stated in paragraph 135 above, on 22 May 1992, the parties to the conflict undertook to observe the most important provisions of the Geneva Conventions and to grant the protections afforded therein.

167. In addition, the Trial Chamber notes that rape and inhuman treatment were prohibited as war crimes by article 142 of the Penal Code of the SFRY and that Bosnia and Herzegovina, as a former Republic of that federal State, continues to apply an analogous provision.

168. The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code¹⁹³ and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the 'Martens clause' laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults.¹⁹⁴ The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita,¹⁹⁵ along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.

169. It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.

2. *International Human Rights Law*

170. No international human rights instrument specifically prohibits rape or other serious sexual assaults. Nevertheless, these offences are implicitly prohibited by the provisions safeguarding physical integrity, which are contained in all of the relevant international treaties.¹⁹⁶ The right to physical integrity is a fundamental one, and is undeniably part of customary international law.

171. In certain circumstances, however, rape can amount to torture and has been found by international judicial bodies to constitute a violation of the norm prohibiting torture, as stated above in paragraph 163.

3. *Rape Under the Statute*

172. The prosecution of rape is explicitly provided for in Article 5 of the Statute of the International Tribunal as a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war¹⁹⁷ or an act of genocide,¹⁹⁸ if the requisite elements are met, and may be prosecuted accordingly.

173. The all-embracing nature of Article 3 of the Statute has already been discussed in paragraph 133 of this Judgment. In its “Decision on the Defendant’s Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject-Matter Jurisdiction)” of 29 May 1998, the Trial Chamber held that Article 3 of the Statute covers outrages upon personal dignity including rape.

4. *The Definition of Rape*

174. The Trial Chamber notes the unchallenged submission of the Prosecution in its Pre-trial Brief that rape is a forcible act: this means that the act is “accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression”.¹⁹⁹ This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.²⁰⁰

175. No definition of rape can be found in international law. However, some general indications can be discerned from the provisions of international treaties. In particular, attention must be drawn to the fact that there is prohibition of both rape and “any form of indecent assault” on women in article 27 of Geneva Convention IV, article 76(1) of Additional Protocol I and article 4(2)(e) of Additional Protocol II. The inference is warranted that international law, by specifically prohibiting rape as well as, in general terms, other forms of sexual abuse, regards rape as the most serious manifestation of sexual assault. This is, *inter alia*, confirmed by Article 5 of the International Tribunal’s Statute, which explicitly provides for the prosecution of rape while it implicitly covers other less grave forms of serious sexual assault through Article 5(i) as “other inhuman acts”.²⁰¹

176. Trial Chamber I of the ICTR has held in *Akayesu* that to formulate a definition of rape in international law one should start from the assumption that “the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts”.²⁰² According to that Trial Chamber, in international law it is more useful to focus “on the conceptual framework of State sanctioned violence”.²⁰³ It then went on to state the following:

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when

inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.²⁰⁴

This definition has been upheld by Trial Chamber II quater of the International Tribunal in Delalić.²⁰⁵

177. This Trial Chamber notes that no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.

178. Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings",²⁰⁶ account must be taken of the specificity of international criminal proceedings when utilizing national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.

179. The Trial Chamber would emphasise at the outset, that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.

180. In its examination of national laws on rape, the Trial Chamber has found that although the laws of many countries specify that rape can only be committed against a woman,²⁰⁷ others provide that rape can be committed against a victim of either sex.²⁰⁸ The laws of several jurisdictions state that the actus reus of rape consists of the penetration, however slight, of the female sexual organ by the male sexual organ.²⁰⁹ There are also jurisdictions which interpret the actus reus of rape broadly.²¹⁰ The provisions of civil law jurisdictions often use wording open for interpretation by the courts.²¹¹ Furthermore, all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim:²¹² force is given a broad interpretation and includes rendering the victim helpless.²¹³ Some jurisdictions indicate that the force or intimidation can be directed at a third person.²¹⁴ Aggravating factors commonly include causing the death of the victim, the fact that there were multiple perpetrators, the young age of the victim, and the fact that the victim suffers a condition, which renders him/her especially vulnerable such as mental illness. Rape is almost always punishable with a maximum of life imprisonment, but the terms that are imposed by various jurisdictions vary widely.

181. It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.

182. A major discrepancy may, however, be discerned in the criminalization of forced oral penetration: some States treat it as sexual assault, while it is categorized as rape in other States. Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law.

183. The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlaw-

fully attacking the body or by humiliating and debasing the honor, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

184. Moreover, the Trial Chamber is of the opinion that it is not contrary to the general principle of *nullum crimen sine lege* to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalizing acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime. Indeed, due to the nature of the International Tribunal's subject-matter jurisdiction, in prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenseless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity. Therefore so long as an accused, who is convicted of rape for acts of forcible oral penetration, is sentenced on the factual basis of coercive oral sex – and sentenced in accordance with the sentencing practice in the former Yugoslavia for such crimes, pursuant to Article 24 of the Statute and Rule 101 of the Rules – then he is not adversely affected by the categorisation of forced oral sex as rape rather than as sexual assault. His only complaint can be that a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant. However, one should bear in mind the remarks above to the effect that forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration. Thus the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favors broadening the definition of rape.

185. Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

- (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.

186. As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral

integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.

5. *Individual Criminal Responsibility*

187. It follows from Article 7(1) of the Statute that not only the commission of rape or serious sexual assault, but also the planning, ordering or instigating of such acts, as well as aiding and abetting in the perpetration, are prohibited.

188. There has been some variation in the Prosecution's allegations concerning responsibility for direct perpetration. In the "Prosecutor's Reply Re: Article 7(1) of the Statute of the International Tribunal" filed on 31 March 1998, the Prosecution claimed that it would not be trying the accused for committing rape as the direct perpetrator.²¹⁵ However, in the opening statement the following assertion was made: "We say that by conducting an interrogation under the circumstances described by Witness A, by transferring the victim to another room, by bringing in the other person for the confrontation, and remaining while further beating and sexual abuse occurred, marks (sic) the accused as a direct perpetrator committing the crimes of torture and outrages upon personal dignity, including rape".²¹⁶

189. The Trial Chamber finds that as the Prosecution has relied on Article 7(1) without specification and left the Trial Chamber the discretion to allocate criminal responsibility, it is empowered and obliged, if satisfied beyond reasonable doubt that the accused has committed the crimes alleged against him, to convict the accused under the appropriate head of criminal responsibility within the limits of the Amended Indictment.

[...]

E. How to Distinguish Perpetration of Torture from Aiding and Abetting Torture

250. The definitions and propositions concerning aiding and abetting enunciated above apply equally to rape and to torture, and indeed to all crimes. Nevertheless, the Trial Chamber deems it useful to address the issue of who may be held responsible for torture as a perpetrator and who as an aider and abettor, since in modern times the infliction of torture typically involves a large number of people, each performing his or her individual function, and it is appropriate to elaborate the principles of individual criminal responsibility applicable thereto.

251. Under current international law, individuals must refrain from perpetrating torture or in any way participating in torture.

252. To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also partakes of the purpose behind torture (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).

253. These legal propositions, which are based on a logical interpretation of the customary rules on torture, are supported by a teleological construction of these rules. To demonstrate this point, account must be taken of some modern trends in many States practicing torture: they tend to “compartmentalise” and “dilute” the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.

254. International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasizing the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may be sentenced more severely than others, depending upon the circum-

stances. In other words, the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable.²⁶⁸

255. This, it deserves to be stressed, is to a large extent consistent with the provisions contained in the Torture Convention of 1984 and the Inter-American Convention of 1985, from which it can be inferred that they prohibit not only the physical infliction of torture but also any deliberate participation in this practice.

256. It follows, *inter alia*, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law maxim *quis per alium facit per se ipsum facere videtur* (he who acts through others is regarded as acting himself) fully applies.

257. Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described *supra*, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes.

Thus to summarise the above:

- (i) to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.

[...]

VIII. SENTENCING

A. Introduction

276. The accused, Anto Furundžija, has been found guilty on Count 13, a Violation of the Laws or Customs of War (torture), and Count 14, a Violation of the Laws or Customs of War (outrages upon personal dignity including rape) both under Article 3 of the Statute. It is pursuant to these findings of guilt that the Trial Chamber will proceed to sentence him.

[...]

ENDNOTES

- * Croatian Defense Council siglo.
- # Bosnia and Herzegovin Army siglo.
- 149 T. 527-529; Defence Exhibit D14.
- 189 Art. 27 of Geneva Convention IV.
- 190 Art. 76(1).
- 191 Art. 4(2)(e).
- 192 See common Art. 3, which prohibits “outrages upon personal dignity, and in particular, humiliating and degrading treatment”; Art. 147 of Geneva Convention IV; Art. 85(4)(c) of Additional Protocol I; and Arts. 4(1) and 4(2)(a) of Additional Protocol II. In an *aide-memoire* of 3 Dec. 1992 and in its recommendations to the Conference on the Establishment of an International Criminal Court in Rome, July 1998, the ICRC has confirmed that the act of “wilfully causing great suffering or serious injury to body or health”, categorised as a grave breach in each of the four Geneva Conventions, does include the crime of rape.
- 193 “Francis Lieber, Instructions for the Government of Armies of the United States (1863)”, reprinted in Schindler and Toman (eds.), *The Laws of Armed Conflicts* (1988), p. 10.
- 194 See Roeling and Ruter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East* (1977), vol. I, p. 385.
- 195 In this case, there was found to be command responsibility for rape, and this was punished as a war crime. In its decision of 7 Dec. 1945 the Commission held: “It is absurd [. . .] to consider a commander a murderer

or rapist because one of his soldiers commits a murder or rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them". (Text reprinted in Friedman (ed.), *The Law of War* (1972), vol. II, p. 1597).

- 196 Art. 7 of the ICCPR prohibits cruel, inhuman or degrading treatment, and complaints alleging State failure to prevent or punish rape and serious sexual assaults have been brought to the Human Rights Committee under this provision. In the case of *Cyprus v. Turkey*, 4 EHRR 482 (1982), the European Commission of Human Rights found that Turkey had violated its obligation to prevent and punish inhuman or degrading treatment under Art. 3 as a result of the rapes committed by Turkish troops against Cypriot women. In the *Aydin* case, the European Court found that 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 the 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" (para. 83). Under the African Charter on Human and Peoples' Rights, rape and other serious sexual assaults are caught by Art. 4 as violations of the right to respect for the integrity of the person, and also under Art. 5 which prohibits all forms of cruel, inhuman and degrading treatment. The Inter-American Convention on Human Rights enshrines the right to humane treatment in Art. 5, under which "[e]very person has the right to have his physical, mental and moral integrity respected" and "[n]o one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."
- 197 Art. 3 of the Statute.
- 198 Art. 4 of the Statute.
- 199 Prosecution's Pre-trial Brief, p. 15.
- 200 *Ibid.*, p. 15.
- 201 The parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. The expression at issue undoubtedly embraces such acts as serious sexual assaults short of rape proper (rape is specifically covered by Art. 27 of Geneva Convention IV and Art. 75 of Additional Protocol I, and mentioned in the Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993) S/25704, para. 48, hereafter "Report of the Secretary-General"), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights and covered by the provisions of humanitarian law just mentioned as well as the Report of the Secretary-General), or the enforced disappearance of persons (prohibited by the General Assembly resolution 47/133 of 18 Dec. 1992 and the Inter-American Convention on Human Rights of 1969).
- 202 Case No. ICTR-96-4-T, para. 597.
- 203 *Ibid.*
- 204 *Ibid.*, paras. 597-598.

- 205 Case No. IT-96-21-T, para. 479.
- 206 Para. 5, Separate and Dissenting Opinion of Judge Cassese, *Prosecutor v. Drazen Erdemovic* Judgment, Case No. IT-96-22-A, 7 Oct. 1997.
- 207 See Section 361 (2) of the Chilean Code; Art. 236 of the Chinese Penal Code (Revised) 1997; Art. 177 of the German Penal Code (StGB); Art. 177 of the Japanese Penal Code; Art. 179 of the SFRY Penal Code; Section 132 of the Zambian Penal Code.
- 208 See Art. 201 of the Austrian Penal Code (StGB); French Code Pénal Arts. 222-23; Art. 519 of the Italian Penal Code (as of 1978); Art. 119 of the Argentinian Penal Code.
- 209 See Section 375 of the Pakistani Penal Code 1995; Art. 375 of the Indian Penal Code; The Law of South Africa, W.A. Joubert 1996 at p. 257-8: “The actus reus of the crime consists in the penetration of the female by the male’s sexual organ (*R. v. M.* 1961 2 SA 60 (O) 63). The slightest penetration is sufficient.” (*R. v. Curtis* 1926 CPD 385 389); Section 117 of the Ugandan Penal Code: “[t]here must be “carnal knowledge.” This means sexual intercourse. Sexual intercourse in turn means penetration of the man’s penis into the woman’s vagina”.
- 210 For a broad definition of sexual intercourse, see the Criminal Code of New South Wales s. 61 H (1). See also the U.S. Proposal to the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (19 June 1998 A/CONF.183/C.1/L/10).
- 211 See e.g. the Dutch Penal Code stating in Art. 242: “A person who by an act of violence or another act or by threat of violence or threat of another act compels a person to submit to acts comprising or including sexual penetration of the body is guilty of rape and liable to a term of imprisonment of not more than twelve years or a fine of the fifth category.” See also Art. 201 of the Austrian Penal Code (StGB); French Code Penal Arts. 222-23.
- 212 See e.g. in England and Wales the Sexual Offences Act 1956 to 1992.
- 213 See Art. 180 of the Dutch Penal Code; Art. 180 of the SFRY Penal Code.
- 214 The Penal Code of Bosnia and Herzegovina (1988) Ch. XI states that “[w]hoever coerces a female person with whom he is not married to, into sexual intercourse by force or threat to endanger her life or body or that of someone close to her will be sentenced to between one to ten years in prison”.
- 215 Prosecutor’s Reply Re: Art. 7(1) of the Statute of the International Tribunal, 31 March 1998, p. 2: “The charges against the accused do not portray him as the actual perpetrator of the rape. The Prosecution will not be attempting to show, under Art. 7(1) that the accused “committed” the rape”.
- 216 Prosecution Opening Statement, T. 70.
- 268 See also the *Eichmann* case: “[. . .] even a small cog, even an insignificant operator, is under our criminal law liable to be regarded as an accomplice in the commission of an offence, in which case he will be dealt with as if he were the actual murderer or destroyer”, p. 323, and *Akayesu*, Case No. ICTR-96-4-T, para. 541. See also the *Pinochet* Judgment of the House of Lords, 25 Nov. 1998, per Lord Steyn: “It is apparently conceded that if [General Pinochet] personally tortured victims the position would be different. This distinction flies in the face of an elementary principle of law, shared by all civilised legal systems, that there is no distinction between the man who strikes, and a man who orders another to strike”.

*International Criminal Tribunal
for the former Yugoslavia*

*Case N° IT-96-23-T &
IT-96-23/1-T*

*Prosecutor v. Dragoljub Kunarac,
Radomir Kovač and Zoran Vuković*

Foča

*Judgment of
February 22, 2001*



The trial of Dragoljub Kunarac, Radimir Kovač, Zoran Vuković (“accused”), before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“International Tribunal” or “Tribunal”), commenced on 20 March 2000 and came to a close on 22 November 2000.

Having considered all of the evidence presented to it during the course of the trial, along with the written and oral submissions of the Prosecutor (also “Prosecution”) and the Defense for the accused, the Trial Chamber

HEREBY RENDERS ITS JUDGMENT.

[...]

III. EVIDENCE

A. General background

12. The parties have agreed that an armed conflict existed between the Serb and Muslim forces in the area of Foča.²⁶ (...) The existence of an armed conflict is relevant to charges under both Article 3 and Article 5 of the Tribunal’s Statute.

13. The three accused denied that the incidents alleged in the Indictment were part of a widespread or systematic attack against the civilian population of the Foča municipality and surrounding municipalities of Gacko and Kalinovik.²⁸ The requirement of the existence of a “widespread or systematic attack against any civilian population” is relevant to charges brought under Article 5 of the Tribunal’s Statute.

14. Several Prosecution witnesses stated that in the months leading up to the attack on Foča on 8 April 1992, Muslim workers stopped receiving their salary and that some others were professionally ostracised or simply told that there was no work for them.²⁹ One Defense witness said that the working relationship at the hospital remained cordial.³⁰

15. Other witnesses said that the freedom of movement of Muslim citizens was increasingly restricted, their communication limited and their gatherings banned.³¹ Public announcements prohibiting gatherings and informing the Muslims that they were not free to move around their villages were made.³² Roadblocks were set up, Muslim villagers were prevented from moving around town, and were sometimes put under house arrest.³³

[...]

21. On 8 April 1992, fighting broke out in Foča. The Serbs used heavy artillery to shell the town and para-militaries to clean out the remaining pockets of resistance.⁴⁷ By mid-April, Foča had been taken over by the Serb forces. Fighting continued until mid-July in the surrounding villages and municipalities. In the course of those villages being taken or as soon they had been taken, Muslim inhabitants were systematically subjected to the pattern of abuses described next.

22. The military take-over of villages and towns around Foča was typically achieved without much fighting but did involve futile violence. According to many witnesses, Muslim inhabitants were methodically rounded up and brought to collecting points from villages were attacked in the exact same manner.⁴⁸ (...)

[...]

28. Women were kept in various houses, apartments, gymnasiums or schools. Even prior to their being brought to those detention centers, some witnesses who testified before the Trial Chamber said that they had been physically abused or raped by the soldiers who had captured them. Thus, FWS-50, FWS-48, FWS-75 and FWS-87 stated that they were raped at Buk Bijela, a settlement south of Foča where they had been taken after their capture.⁸¹ FWS-75 was taken away from the group by a man of 40-50 years who proceeded to rape her. She was subsequently raped in this very same room by approximately 10 other men. She fainted after the tenth man.⁸² FWS-50 was taken by the accused Zoran Vuković who was armed and in uniform, allegedly for questioning.⁸³ Zoran Vuković took her to another room in one of the prefabricated barracks and he raped her.⁸⁴ This rape is not charged in Indictment IT-96-23/1. Therefore, the Trial Chamber will not take these facts into account for conviction or sentencing purposes, but it is relevant to the identification of Zoran Vuković by FWS-50 in relation to the rape of FWS-50 with which he is charged in the Indictment. Some other women were spared but were either told about those rapes or were able to judge for themselves what had transpired considering the condition in which those girls and women were brought back.⁸⁵ Girls, women and some elderly men who were at Buk Bijela were then transported by bus to Foča and kept in the Foča High School, which was situated in the Aladža neighborhood of Foča.

29. Living conditions at Foča High School were described by many witnesses as extremely poor.⁸⁶ FWS-62 said that detainees were fed only once every three days and in

insufficient quantity;⁸⁷ there were no washing facilities and no blankets or cushions to sleep on. One old man was also beaten.⁸⁸

30. Several Prosecution witnesses said that the conditions were even worse at Partizan Sports Hall, where most women from Foča High School were transferred next.⁸⁹ According to FWS-105, the conditions at Partizan were “90% worse” than at the Foča High School.⁹⁰ They were more often provoked, raped and taken out, and there were no hygiene facilities and even less food. Several of the witnesses confirmed that food was scarce, of poor quality and provided erratically.⁹¹ One woman, FWS-95, was occasionally allowed to go to town to buy some food, as she knew one of the guards.⁹² Detainees, in particular children, were affected by this regime.⁹³ Sanitary conditions were almost non-existent and only a few gym mattresses were available to sleep on, with detainees squeezed against each other. Violence, including sexual violence, continued with increased intensity.⁹⁴ FWS-62 described how, one night, the woman sleeping next to her was raped in full view of the other detainees and her ten-year old son at her side.⁹⁵ FWS-75 summarised the conditions at Partizan as “dreadful”.⁹⁶

31. Conditions at the Kalinovik High School, where civilians from Gacko, Kalinovik and neighboring villages were kept, were, according to several witnesses, appalling.⁹⁷ Detainees had to sleep on mattresses infested with lice, and there were almost no hygiene facilities. FWS-192 said that there was just one toilet for all the detainees, approximately 70 people, and that she did not have a bath and could barely wash for about two months.⁹⁸ In the initial 10-15 days of their detention, some women were allowed to leave the school to get some food, but this stopped eventually and food became scarce.⁹⁹ Some of the detainees were also beaten, while some others were taken out and never brought back.¹⁰⁰

32. The witnesses said that they could not leave the premises. At Foča High School, there were one or two guards working in shifts who would prevent the detainees from escaping, but they would not prevent soldiers from entering the facilities.¹⁰¹ The detainees felt at the complete mercy of their captors. When asked why she did not try to escape, FWS-51 described the helpless situation in which they found themselves.¹⁰² FWS-50 described the general climate of extreme fear that had been instilled.¹⁰³ Defense expert General Radinovic generally described those facilities where women were kept as “collection centres”, as opposed to “detention centers”, that is, facilities in which supervision is minimal and mainly concentrated on keeping unauthorised persons from entering the premises.¹⁰⁴ This witness also said that his conclusions are based solely on the documents of the Herzegovina Corps, and that he never toured those premises or even talked to former detainees.¹⁰⁵

33. The same restrictions on the movement of detainees applied at Partizan and Kalinovik High School.¹⁰⁶ FWS-87 said that at Partizan, they were allowed to go in the courtyard in front of the hall but not any further.¹⁰⁷ FWS-95, who knew one of the guards, mentioned, however, that she was sometimes allowed to go to town to do some shopping but that no other woman was allowed to do the same.¹⁰⁸ The same applied at Kalinovik High School apart from the first 10-15 days when some detainees were allowed to go out to buy some food for the people held there.¹⁰⁹

34. According to various witnesses, all this was happening in full view and with the knowledge of the local authorities. FWS-192 stated that the chief of the police and the president of the SDS ("Serb Democratic Party") in Kalinovik came to the school to inspect it.¹¹⁰ Likewise, on their way from Buk Bijela to Foča High School, the buses with the Muslim women stopped for several minutes in front of the SUP, the local police station. Some of the soldiers who were in the bus got off and entered the police station or talked to the chief of Foča's police, Dragan Gagovic, in front of the buses.¹¹¹ In addition, several witnesses saw Dragan Gagovic at or in the vicinity of Partizan.¹¹² When they tried to seek the protection of the police, the women were treated rudely and their complaints were ignored. FWS-95 said that she went twice to the police with FWS-48 and FWS-51 to complain about their treatment.¹¹³ On the second occasion, FWS-48 personally complained to Dragan Gagovic. However, no action was taken to address the women's complaints and the conditions did not improve.¹¹⁴ One night in mid-July, as she was trying to escape, FWS-183 tried to seek refuge in the police building but as she was approaching it, the policeman standing guard hit her with the butt of his rifle.¹¹⁵

35. Numerous witnesses stated that soldiers and policemen would come constantly, sometimes several times a day; they would point at women and girls or call them by their names and take them out for rape. The women had no choice but to obey those men and those who tried to resist were beaten in front of the other women.

36. Witnesses described how, as soon as they arrived at Foča High School, women and girls were either taken out of the school, or into the classrooms where they were raped.¹¹⁶ They would sometimes be raped together. Each one of them would be assigned to a soldier and raped by him. Thus, in early July, FWS-50, FWS-75, FWS-87 and FWS-95 were taken together from the main room at Foča High School and brought to another classroom where they were raped by several soldiers.¹¹⁷ FWS-50, FWS-75, FWS-87, FWS-95, FWS-48, FWS-105 and many other women recounted being raped at least once or on several occasions during their time at Foča High school.¹¹⁸ The girls and women were generally taken for a few hours and returned, sometimes overnight, and some of them

were taken away every day. After about 10-15 days, most of the women were transferred to Partizan Sports Hall.

37. At Partizan, witnesses testified that the pattern of rapes was similar and the frequency of rapes and number of soldiers even higher. FWS-51, FWS-50, FWS-75, FWS-87, A.S., FWS-95, FWS-48, FWS-105 and D.B. testified that they and many other women and girls were taken out to be raped, most of them many times.¹¹⁹ Some women who testified before the Trial Chamber had been taken out so often, by so many soldiers, that they were consequently unable to assess with precision the number of times they had been raped. FWS-95 roughly estimated that during the entire period of her detention at both Foča High School and Partizan, that is, about 40 days, she was raped approximately 150 times.¹²⁰

38. Some of the soldiers who came to Partizan to take out women had also been to Foča High School.¹²¹ For example, the chief of Foča's police, Dragan Gagovic, was seen by some witnesses at both locations.¹²²

39. The guards at Partizan, as had been the case at Foča High School, did not try to prevent soldiers from entering the hall. FWS-95 stated, however, that one guard once tried without success to stop soldiers from entering the hall. The soldiers told him that they had a document signed by Dragan Gagovic which allowed them to enter the hall and to take women out; the document allegedly stated that soldiers needed to have sexual intercourse to improve their fighting spirit.¹²³ FWS-48 stated that some soldiers told her that they were ordered to rape their victims.¹²⁴ The process of selection was similar to that at Foča High School: soldiers entered the hall, pointed at women or called their names, took them out, raped them and brought them back. As their stay at Partizan was drawing to an end, the women and girls continued to be taken out more and more often.¹²⁵ FWS-95 stated that the night before she and the other detainees were released from Partizan, she was taken out together with FWS-90, brought to a stadium and raped by many soldiers, mostly by two at the same time.¹²⁶

40. The house at Ulica Osmana Đikica no 16 served as the soldiers' headquarters and meeting point. Some of the men lived there more or less permanently; among them were Dragan or Dragutin/Dragomir Vuković (aka "Gaga"), Miroslav Kontic (aka "Konta"), DP 7, DP 8, Jure Radovic, Dragan Toljic (aka "Tolja"), Bane, Miga and Puko.¹²⁷ FWS-50, FWS-75, FWS-87, FWS-48, FWS-95, D.B. and FWS-105 were all brought to this house at some point and raped.¹²⁸ Some other women and girls were also taken to this house on several occasions for similar abuse.

41. Some of the women from Partizan and Kalinovik High School were at some point moved to different houses and apartments where they continued to be raped and mistreated. In particular, at "Karaman's house" in Miljevina, soldiers had easy access to women and girls whom they raped. FWS-75, FWS-87, A.S., FWS-132, FWS-190, D.B. and other women were kept in this house for some time.¹²⁹ There, they were raped many times by many different soldiers. On 3 August, FWS-75, FWS-87, D.B. and FWS-190 were taken from Aladža to Miljevina where they were handed to DP 3, the man who appeared to be in charge of "Karaman's house".¹³⁰

42. Some women were kept in private apartments. Some spent a few days in one place before being moved to another apartment, generally with different soldiers. Thus, for example, according to their testimony on or about 30 October 1992, FWS-75, FWS-87, A.S. and A.B., a girl aged twelve years at the time, were moved from "Karaman's house" and taken to an apartment in the so-called Lepa-Brena block in Foča.¹³¹ FWS-75 and A.B. spent about 20 days in this apartment during which they were constantly raped by the two occupants of the apartment and by other men who visited.¹³² In mid-November, the two women were taken to a house near the Hotel Zelengora. They stayed in this house for approximately 20 days during which they were continually raped by a group of soldiers. This group of soldiers subsequently took them to yet another apartment where they continued to rape them for about two weeks.¹³³ On or about 25 December 1992, they were brought back to the apartment in the Lepa-Brena block. A.B. was sold for 200 DM and never seen again; FWS-75 was handed to DP 1.¹³⁴ While in the Lepa-Brena apartment, the women were locked in and permitted no contact with the outside world.¹³⁵

43. Similarly, FWS-186 and FWS-191 were kept in a house in Trnovace for several months. On 2 August 1992, they, together with five other women, were taken out of the Kalinovik High School and brought to a house in Aladža.¹³⁶ FWS-191 was told that the women were "rewards" for the Serbs who had captured the Rogoj pass that very day.¹³⁷ FWS-186, FWS-191 and J.G. were then transported from that house in the Aladža neighborhood to a house in Trnovace.¹³⁸ After only three to five days, J.G. was taken to "Karaman's house". The other two women stayed in the Trnovace house for approximately six months. During this period, the women had no control whatsoever over their lives and choices.¹³⁹

[...]

47. As a consequence of the concerted effect of the attack upon the civilian population of Foča and surrounding municipalities, all traces of Muslim presence in the area were

effectively wiped out. Muslim civilians, but for a handful, had been one way or another expelled from the region. According to the 1991 Census, Foča municipality had a pre-war population of about 40,513 inhabitants of whom 52% were Muslim. According to the Prosecutor's evidence, only about ten Muslims remained at the end of the conflict.¹⁶³ Witness DR conceded that none of her Muslim friends lived in Foča anymore.¹⁶⁴ In January¹⁶⁴, Foča was renamed Srinje by reference to the fact that it is now almost exclusively inhabited by Serbs.¹⁶⁵ The town is now part of Republika Srpska.

[...]

IV. APPLICABLE LAW

[...]

D. Rape

436. Rape has been charged against the three accused as a violation of the laws or customs of war under Article 3 and as a crime against humanity under Article 5 of the Statute. The Statute refers explicitly to rape as a crime against humanity within the Tribunal's jurisdiction in Article 5(g). The jurisdiction to prosecute rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to Article 3 of the Statute, including upon the basis of common Article 3 to the 1949 Geneva Conventions, is also clearly established.¹¹¹⁴ (...)

437. The specific elements of the crime of rape, which are neither set out in the Statute nor in international humanitarian law or human rights instruments, were the subject of consideration by the Trial Chamber in the Furundžija case.¹¹¹⁵ There the Trial Chamber noted that in the International Criminal Tribunal for Rwanda judgment in the Akayesu proceedings the Trial Chamber had defined rape as "a physical invasion of a sexual nature, committed under circumstances which are coercive".¹¹¹⁶ It then reviewed the various sources of international law and found that it was not possible to discern the elements of the crime of rape from international treaty or customary law, nor from the "general principles of international criminal law or [...] general principles of international law". It concluded that "to arrive at an accurate definition of rape based on the criminal law principle of specificity ("Bestimmtheitsgrundsatz", also referred to by the maxim "nulleum crimen sine lege stricta"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws".¹¹¹⁷ The Trial Chamber found that, based on its review of the

national legislation of a number of states, the actus reus of the crime of rape is:

- (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.¹¹¹⁸

438. This Trial Chamber agrees that these elements, if proved, constitute the actus reus of the crime of rape in international law. However, in the circumstances of the present case the Trial Chamber considers that it is necessary to clarify its understanding of the element in paragraph (ii) of the Furundžija definition. The Trial Chamber considers that the Furundžija definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundžija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim,¹¹¹⁹ which, as foreshadowed in the hearing¹¹²⁰ and as discussed below, is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.

439. As observed in the Furundžija case, the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world.¹¹²¹ The value of these sources is that they may disclose "general concepts and legal institutions" which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the Furundžija judgment, "common denominators",¹¹²² in those legal systems which embody the principles which must be adopted in the international context.

440. As noted above, the Trial Chamber in the Furundžija case considered a range of national legal systems for assistance in relation to the elements of rape. In the view of the present Trial Chamber, the legal systems there surveyed, looked at as a whole, indi-

cated that the basic underlying principle common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim. The matters identified in the Furundžija definition – force, threat of force or coercion – are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgment suggest that the true common denominator which unifies the various systems may be a wider or more basic principle of penalizing violations of sexual autonomy. The relevance not only of force, threat of force, and coercion but also of absence of consent or voluntary participation is suggested in the Furundžija judgment itself where it is observed that:

[...] all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless.¹¹²³

441. A further consideration of the legal systems surveyed in the Furundžija judgment and of the relevant provisions of a number of other jurisdictions indicates that the interpretation suggested above, which focuses on serious violations of sexual autonomy, is correct.

442. In general, domestic statutes and judicial decisions which define the crime of rape specify the nature of the sexual acts which potentially constitute rape, and the circumstances which will render those sexual acts criminal. The relevant law in force in different jurisdictions at the time relevant to these proceedings identifies a large range of different factors which will classify the relevant sexual acts as the crime of rape. These factors for the most part can be considered as falling within three broad categories:

- (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- (iii) the sexual activity occurs without the consent of the victim.

1. *Force or threat of force*

443. The definition of rape in a number of jurisdictions requires that the sexual act occurs by force or is accompanied by force or threat of force. Typical provisions of this nature include the Penal Code of Bosnia and Herzegovina, which provided relevantly:

[...]whoever coerces a female not his wife into sexual intercourse by force or threat of imminent attack upon her life or body or the life or body of a person close to her, shall be sentenced to a prison term of one to ten years.¹¹²⁴

In Germany, the Criminal Code in force at the relevant time provided:

Rape (1) Whoever compels a woman to have extramarital intercourse with him, or with a third person, by force or the threat of present danger to life or limb, shall be punished by not less than two years' imprisonment.¹²²⁵

444. The Criminal Code of Korea defines rape as sexual intercourse with a female "through violence or intimidation".¹²²⁶ Other jurisdictions with definitions of rape similarly requiring violence, force or a threat of force include China,¹²²⁷ Norway,¹²²⁸ Austria,¹¹²⁹ Spain¹¹³⁰ and Brazil.¹¹³¹

445. Certain jurisdictions require proof of force or threat of force (or equivalent concepts) and that the act was non-consensual or against the will of the victim.¹¹³² This includes some jurisdictions in the United States of America.¹¹³³

2. *Specific circumstances which go to the vulnerability or deception of the victim*

446. A number of jurisdictions provide that specified sexual acts will constitute rape not only where accompanied by force or threat of force but also in the presence of other specified circumstances. These circumstances include that the victim was put in a state of being unable to resist, was particularly vulnerable or incapable of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation.

447. The penal codes of a number of continental European jurisdictions contain provisions of this type. The Swiss Penal Code provides that anyone who compels a woman to have sexual intercourse "notably by threat or by violence, by putting psychological pressure on the victim or rendering her unable to resist" commits rape.¹¹³⁴ The provision on rape in the Portuguese Penal Code contains a similar reference to the perpetrator making it impossible for the victim to resist¹¹³⁵. The relevant provision of the French Penal Code defines rape as "[a]ny act of sexual penetration of whatever nature, committed through violence, coercion, threat or surprise [...]".¹¹³⁶ The Italian Penal Code contains the crime of compelling a person to have sexual intercourse by violence or threats but applies the same punishment to anyone who has intercourse with any person who, *inter alia*, was "mentally ill, or unable to resist by reason of a condition of physical or mental inferiority, even though this was independent of the act of the offender" or "was deceived because the offender impersonated another person".¹¹³⁷

448. In Denmark, section 216 of the Criminal Code provides that rape is committed by any person who "enforces sexual intercourse by violence or under threat of violence",

but specifies that “the placing of a person in such a position that that person is unable to resist the act shall be equivalent to violence.”¹¹³⁸ The Penal Codes of Sweden¹¹³⁹ and Finland¹¹⁴⁰, contain similar provisions. In Estonia, rape is defined in the Criminal Code as sexual intercourse “by violence or threat of violence or by taking advantage of the helpless situation of the victim”.¹¹⁴¹

449. The Japanese Criminal Code provides that “[a] person who by violence or threat, obtains carnal knowledge of a female person of thirteen years or over shall be guilty of rape [...]”.¹¹⁴² Article 178 of the Code however, effectively widens the conduct which will be considered to amount to rape by providing that where a person “by taking advantage of loss of reason or incapacity to resist or by causing such loss of reason or incapacity to resist, commits an indecent act or obtains carnal knowledge of a woman”¹¹⁴³ is to be punished in the same way as provided for in the article relating to rape.

450. The Criminal Code of Argentina defines rape as sexual penetration where there is force or intimidation, where the victim is “of unsound mind or effect, or when due to illness or whatever other reason, they are incapable of resisting” or where the victim is under twelve.¹¹⁴⁴ Similar provisions apply in Costa Rica,¹¹⁴⁵ Uruguay¹¹⁴⁶ and the Philippines.¹¹⁴⁷

451. Some States of the United States of America provide in their criminal codes that sexual intercourse constitutes rape if committed in the presence of various factors as an alternative to force, such as that the victim is drugged or unconscious, has been fraudulently induced to believe the perpetrator is the victim’s spouse, or is incapable of giving legal consent because of a mental disorder or developmental or physical disability.¹¹⁴⁸

452. The emphasis of such provisions is that the victim, because of an incapacity of an enduring or qualitative nature (eg mental or physical illness, or the age of minority) or of a temporary or circumstantial nature (eg being subjected to psychological pressure or otherwise in a state of inability to resist) was unable to refuse to be subjected to the sexual acts. The key effect of factors such as surprise, fraud or misrepresentation is that the victim was subjected to the act without the opportunity for an informed or reasoned refusal. The common denominator underlying these different circumstances is that they have the effect that the victim’s will was overcome or that her ability freely to refuse the sexual acts was temporarily or more permanently negated.

3. Absence of consent or voluntary participation

453. In most common law systems, it is the absence of the victim's free and genuine consent to sexual penetration which is the defining characteristic of rape.¹¹⁴⁹ The English common law defined rape as sexual intercourse with a woman without her consent.¹⁹⁵⁰ In 1976 rape was also defined by statute. Under the provision in force at the time relevant to these proceedings, a man committed rape where "(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it [...]".¹⁹⁵¹ Force or threat or fear of force need not be proven; however where apparent consent is induced by such factors it is not real consent.¹⁹⁵² Similar definitions apply in other Commonwealth countries including Canada,¹⁹⁵³ New Zealand¹⁹⁵⁴ and Australia.¹⁹⁵⁵ In these jurisdictions it is also clear that the consent must be genuine and voluntarily given. In Canada, consent is defined in the Criminal Code as "the voluntary agreement of the complainant to engage in the sexual activity in question".¹⁹⁵⁶ The Code also explicitly identifies circumstances in which no consent will be considered to have been obtained, including that "the agreement is expressed by the words or conduct of a person other than the complainant" or that the accused "induces the complainant to engage in the activity by abusing a position of trust, power or authority".¹⁹⁵⁷ In Victoria, Australia, consent is defined as "free agreement" and the statute defines circumstances in which free agreement is not given, including where a person submits because of the use of force, fear of force or harm, or because the person is in unlawful detention; where the person is asleep or unconscious or is mistaken as to, or is incapable of understanding, the nature of the act.¹⁹⁵⁸

454. The Indian Penal Code provides that sexual intercourse with a woman will constitute rape in any of six defined circumstances. These include that it occurs "[a]gainst her will"; "without her consent", or with her consent if such consent is negated by various circumstances including that it was "obtained by putting her or any person in whom she is interested in fear of death or being hurt".¹¹⁵⁹ The provision on rape in the Bangladesh Penal Code is materially almost identical.¹¹⁶⁰

455. Rape is defined in South Africa at common law as a man intentionally having unlawful sexual intercourse with a woman without her consent.¹¹⁶¹ The Zambian Penal Code provides that rape is committed by any person

[...] who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representa-

tion as to the nature of the act, or, in the case of a married woman, by impersonating her husband.¹¹⁶²

456. Certain non-common law jurisdictions also define rape in terms of non-consensual sexual intercourse. The Belgian Penal Code provides: “Any act of sexual penetration, whatever its nature, and by whatever means, committed on someone who does not consent to it, constitutes the crime of rape.” There is no consent in particular when the act has been imposed through violence, coercion or ruse, or was made possible by the infirmity or the mental or physical incapacity of the victim.¹⁹⁶³

4. *The basic principle underlying the crime of rape in national jurisdictions*

457. An examination of the above provisions indicates that the factors referred to under the first two headings are matters which result in the will of the victim being overcome or in the victim’s submission to the act being non-voluntary. The basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.

458. In practice, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.¹⁹⁶⁴

459. Given that it is evident from the Furundžija case that the terms coercion, force, or threat of force were not to be interpreted narrowly and that coercion in particular would encompass most conduct which negates consent, this understanding of the international law on the subject does not differ substantially from the Furundžija definition.

460. In light of the above considerations, the Trial Chamber understands that the actus reus of the crime of rape in international law is constituted by: 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; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s

free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

5. *The effect of Rule 96: evidence in cases of sexual assault*

461. The Prosecution submits that

[L]ack of consent is not an element of the offence of rape (or any other sexual assault) as defined by the law and rules of the Tribunal, and the existence of force, threat of force, or coercion vitiates consent as a defense.¹¹⁶⁵

It refers to Rule 96 of the Rules of Procedure and Evidence in support of its view that the relevance of consent is only as a defense in limited circumstances.

462. Rule 96 provides:

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defense if the victim
 - (a) has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be admitted into evidence.

463. The reference in the Rule to consent as a "defense" is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood (as demonstrated by many of the provisions referred to above) to be absence of consent which is an element of the crime. The use of the word "defense", which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent with this understanding. The Trial Chamber does not understand the reference to consent as a "defense" in Rule 96 to have been used in this technical way. The reference in Rule 67(A)(ii)(a) to the "defense of alibi" is another example of the use of the word "defense" in a non-technical sense. An alibi is not a defense in the sense that it must be proved by the defendant. A defendant who raises an alibi is merely denying that he was in a position to commit the crime with which he was charged, and by raising that

issue, the defendant simply requires the Prosecution to eliminate the reasonable possibility that the alibi is true.

464. As emphasised by the Appeals Chamber, the Trial Chamber must interpret the Rules of Procedure and Evidence in the light of the relevant international law.¹¹⁶⁶ Consistently with its understanding of the definition of rape in international law, the Trial Chamber does not interpret the reference to consent as a “defense” as a reference to a defense in its technical sense. It understands the reference to consent as a “defense” in Rule 96 as an indication of the understanding of the judges who adopted the rule of those matters which would be considered to negate any apparent consent. It is consistent with the jurisprudence considered above and with a common sense understanding of the meaning of genuine consent that where the victim is “subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression” or “reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear”, any apparent consent which might be expressed by the victim is not freely given and the second limb of the Trial Chamber’s definition would be satisfied. The factors referred to in Rule 96 are also obviously not the only factors which may negate consent. However, the reference to them in the Rule serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given.

[...]

ENDNOTES

- 26 *Prosecution Submission Regarding Admissions and Contested Matters*, 1 Feb 2000; *Prosecution Submission Regarding Admissions and Contested Matters Regarding the Accused Zoran Vuković*, 8 Mar 2000; see pars 1 and 2 of *Admissions by the Parties and Other Matters not in Dispute*.
- 28 *Prosecution Submission Regarding Admissions and Contested Matters, Matters of Facts and Law Which Remain Contested*, 1 Feb 2000, p 10, par 1 and p 11, par 1; and *Prosecution Submission Regarding Admissions and Contested Matters Regarding the Accused Zoran Vuković*, 8 Mar 2000; see par 1 of *Admissions by the Parties and Matters of Fact and Law Which Remain Contested*.
- 29 FWS-33, T 485-486; FWS-152, T 1885; A.S., T 2057; FWS-96, T 2498 and FWS-48, T 2614.
- 30 Witness DC, T 5015 and 5029.
- 31 FWS-33, T 487-489; FWS-52, T 856; A.S., T 1989 and T 1996; FWS-78, T 2096; FWS-132, T 2407; FWS-96, T 2500; FWS-185, T 2841 and 2889; FWS-175, T 3571; FWS-183, T 3661; and FWS-61, T 3738.
- 32 FWS-78, T 2096; FWS-183, T 3661 and FWS-61, T 3738.
- 33 FWS-33, T 462, T 487-489 and T 521; FWS-52, T 851, T 855-856, T 913 and T 916-917; FWS-152, T 1888; A.S., T 1996; FWS-78, T 2077-2078, T 2080 and T 2096; FWS-96, T 2500; FWS-175, T 3567- 3571; FWS-183, T 3659-3661; FWS-61, T 3738; Witness Rajko Markovic, T 5078.

- 47 FWS-65, T 659-661 and T 684-685; FWS-52, T 915; FWS-93, T 1051-1055; FWS-78, T 2088-2093; FWS-190, T 3315-3316. See also Ex P6 and 6/1 concerning the type and use of weapons used to take Foča and surrounding municipalities: Ex P6 is an order of battle instructing the units for further actions and is directed to commanders of basic units and the command of the Trnovo battalion instructing them with respect to the use of artillery weapons. Ex P6/1 are pictures of the weaponry at the disposal of the Serb forces. which they would then be transported to different buildings or schools and detained there.
- 48 The villages of Trosanj and Mješaja, for example, were taken in that way on 3 July 1992
- 81 FWS-50, T 1241-1244; FWS-75, T 1386-1390; FWS-87, T 1670-1671; FWS-48, T 2637-2640.
- 82 T 1389-1390.
- 83 T 1242.
- 84 T 1243.
- 85 FWS-51, T 1126; FWS-52, T 873; FWS-62, T 968 and T 986-987; FWS-95, T 2197; DB, T 3779- 3781; FWS-105, T 4217-4218.
- 86 FWS-51, T 1132-1133; FWS-75, T 1396-1397; FWS-87, T 1676; FWS-95, T 2204-2205; FWS-96 T 2522-2523; FWS-48, T 2648-2649; D.B., T 3784-3785; FWS-105, T 4219-4220.
- 87 T 983.
- 88 FWS-51, T 1132-1134; FWS-95, T 2213; FWS-96, T 2529.
- 89 FWS-51, T 1142-1143; FWS-62, T 989-990; FWS-75, T 1407-1408; FWS-87, T 1739-1740; FWS-95, T 2214-2216; FWS-96, T 2551; FWS-48, T 2653-2654 and 2818; D.B, T 3790; FWS-105, T 4225-4226.
- 90 T 4225.
- 91 FWS-51 said that they would only receive a jar of soup and slices of bread, T 1143. See also FWS-62, T 989-990; FWS-75, T 1407; FWS-87, T 1740; FWS-95, T 2215-2217; FWS-48, T 2818.
- 92 FWS-95, T 2215-2216.
- 93 FWS-51, T 1143.
- 94 FWS-62, T 991; FWS-75, T 1485-1490; FWS-95, T 2215-2216; FWS-96, T 2530; FWS-50, who was once beaten up with a rifle butt, T 1255.
- 95 T 993-995.
- 96 T 1407.
- 97 FWS-185, T 2858; FWS-186, T 2925-2926; FWS-192, T 3032; FWS-191, T 3130.
- 98 T 3032.
- 99 FWS-185, T 2858; FWS-186, T 2994; FWS-191, T 3133; FWS-190, T 3325-3326.
- 100 FWS-185, T 2860; FWS-192, T 3034-3035; FWS-191, T 3131-3132; FWS-190, T 3327-3328.
- 101 FWS-75, T 1397; FWS-87, T 1688; FWS-95, T 2205; FWS-96, T 2523; FWS-48, T 2649-2650.
- 102 T 1205.
- 103 T 1258.
- 104 T 4855 and 4869-4870.
- 105 T 4862-4864.
- 106 With respect to Partizan, see FWS-75, T 1408; FWS-87, T 1689; FWS-95, T 2217; FWS-48, T 2649. With

respect to Kalinovik High School, see FWS-185, T 2857-2858; FWS-186, T 2926; FWS-192, T 3032; FWS-191, T 3134.

107 T 1741-1742.

108 T 2216-2217.

109 FWS-185, T 2857-2858; FWS-186, T 2994; FWS-191, T 3133; FWS-190, T 3325-3326.

110 T 3080.

111 FWS-48, T 2641-2642.

112 FWS-62, T 998-999; FWS-51, T 1160 and T 1218; FWS-50, T 1280-1281; FWS-87, T 1690-1691, FWS-95, T 2249; FWS-96, T 2536; FWS-48, T 2683 and 2692; FWS-105, T 4244.

113 T 2243-4 and 2304-2305. See also FWS-51, T 1221; FWS-48, T 2683-2684 and FWS-105, T 4244.

114 T 2250.

115 T 3676.

116 FWS-50, T 1249-1254; FWS-75, T 1397-1405; FWS-87, T 1676-1687; FWS-95, T 2206-2211, FWS- 48, T 2645-2652 and FWS-105, T 4221-4224. Some other women were not raped but testified about seeing other women being taken out and coming back: FWS-52, T 873; FWS-51, T 1134-1137; FWS- 62, T 975-979; FWS-96, T 2524-2529; D.B., T 3786-3790.

117 FWS-50, T 1250-2; FWS-75, T 1398; FWS-87, T 1678; FWS-95, T 2206-2207.

118 FWS-50, T 1249-54; FWS-75, T 1397-1405; FWS-87, T 1676-1687; FWS-95, T 2206-2213; FWS-48 T 2645-2652; FWS-105, T 4219-4224.

119 FWS-51, T 1145-1150 and T 1155-1162; FWS-50, T 1258; FWS-75, T 1405-1429; FWS-87, T 1690- 1700; A.S., T 1995-1996; FWS-95, T 2217-2225 and T 2230-2246; FWS-48, T 2659-2713; D.B., T 3790-3815; FWS-105, T 4225-4247. The same women also testified about other women being taken out of Partizan. In addition, some women who had not themselves been taken out, testified about other women being taken from Partizan: FWS-62, T 995-1001; FWS-127, T 1870-1872; FWS-96, T 2530- 2534.

120 T 2208.

121 FWS-75, T 1410; FWS-95, T 2224. Other witnesses without expressly stating that some soldiers were indeed the same, specifically name some of them as coming both to Foča High School and Partizan; see FWS-96, T 2524 and T 2531 for example.

122 FWS-51, T 1160-1161 and 1218; FWS-62, T 998-999; FWS-50, T 1280; FWS-87, T 1690-1691; FWS- 95, T 2250-2252; FWS-96, T 2536; FWS-48, T 2683 and 2692; FWS-105, T 4244.

123 T 2217-2219. See also FWS-105, T 4244.

124 T 2700.

125 FWS-105, T 4226.

126 FWS-95, T 2242-2244.

127 FWS-75, T 1411 and T 1414-1415; FWS-87, T 1694 and T 1698-1699; D.B., T 3797 and T 3801-3802; FWS-190, T 3336-3345; FWS-205, T 3480; Dragoljub Kunarac, T 4517-4520 and T 4667-4669.

128 FWS-50, T 1272-1278; FWS-75, T 1411-1431; FWS-87, T 1690-1700; FWS-95, T 2236-2240; FWS- 48, T 2664-2668 and T 2700-2702; D.B., T 3795-3815; FWS-105, T 4228-4230.

- 129 FWS-75, T 1433-1442; FWS-87, T 1702-1707; FWS-AS, T 1995-2005; FWS-132, T 2414-2425; FWS-190, T 3352-3371 and D.B., T 3817-3836.
- 130 FWS-75, T 1433-1435; D.B., T 3815-3818; FWS-87, T 1700; FWS-190, T 3352-3353.
- 131 FWS-75, T 1443-1445; FWS-87, T 1707-1708 and A.S., T 2005-2007. See also FWS-190, T 3372-3375.
- 132 FWS-75, T 1449-1451.
- 133 FWS-75, T 1454-1456.
- 134 FWS-75, T 1494.
- 135 FWS-75, T 1599; FWS-87, T 1814-1815; A.S., T 2012 and T 2022.
- 136 FWS-191, T 3142 and 3154; FWS-186, T 2930-2935; FWS-190, T 3337-3339; FWS-205, T 3470-3477.
- 137 FWS-191, T 3155-3156
- 138 FWS-186, T 2938-2940 and FWS-191, T 3160-3166.
- 139 See FWS-191, T 3182; FWS-186, T 2952
- 163 See Ex P18, Ethnic composition of Foča municipality by settlement, according to the results of the 1991 census (from Population of Bosnia and Herzegovina, Republic of Croatia Bureau of Statistics, pp 101- 110, Apr 1995).
- 164 T 6032. See also Witness Velimir Djurovic, T 5066-5067.
- 165 T 6032. See also Witness Velimir Djurovic, T 5066-5067.
- 1114 See the section on the common elements to Art 3 above (pars 400-409). See, in particular, par (1)(c) of common Article 3 to the Geneva Conventions: “outrages upon personal dignity, in particular humiliating and degrading treatment” which includes rape. See also Prosecutor v Furundžija, Case IT-95-17/1-T, Judgment, 10 Dec 1998, par 173.
- 1115 Prosecutor v *Furundžija*, Case IT-95-17/1-T, Judgment, 10 Dec 1998.
- 1116 Prosecutor v Akayesu, Case ICTR-96-4-T, Judgment, 2 Sept 1998, par 597. This definition of the elements of rape was adopted by a Trial Chamber of the ICTY in Prosecutor v Delalić et al., Case IT-96-21-T, Judgment, 16 Nov 1998, pars 478-9.
- 1117 Prosecutor v Furundžija, Case IT-95-17/1-T, Judgment, 10 Dec 1998, par 177.
- 1118 *Ibid*, par 185 (“Furundžija definition”).
- 1119 The Prosecution, by its emphasis on the need to prove “coercion, force or threats” in the Final Trial Brief (par 754) also apparently favours a narrower definition of what constitutes rape than is indicated by the sources of international law surveyed in this judgment. The submissions, however, appear to misconceive absence of consent as being some sort of “further element” or “additional” factor rather than a matter which encompasses the narrower range of factors which it cites. (see Prosecutor’s Final Trial Brief, pars 755 and 760). As will become apparent, the Trial Chamber does not agree with the Prosecution’s submission that proof of force, threat of force or coercion is an element imposed by international law.
- 1120 T, 19 Apr 2000, p 1980-1982.
- 1121 Prosecutor v Furundžija, Case IT-95-17/1-T, Judgment, 10 Dec 1998, par 177. See also Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000,

par 15: "It is otherwise of assistance to look to the general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence."

1222 Prosecutor v Furundžija, Case IT-95-17/1-T, Judgment, 10 Dec 1998, par 178.

1123 Ibid, par 80.

1124 Penal Code of the Socialist Republic of Bosnia and Herzegovina (1991), Ch XI, Art 88(1). Art 90 also penalises sexual intercourse coerced by taking advantage of the victim's mental illness, temporary insanity, incapacity or any other condition which has rendered her unable to resist.

1225 Strafgesetzbuch, Art 177(1). Art 177 of the German Criminal Code was amended with effect from 1 April 1998 to provide that the crime of sexual coercion or rape is also committed when a perpetrator "tak[es] advantage of the situation in which the victim is defencelessly exposed to the offender's impact". Although this provision is not relevant to the determination of the state of the international law at the time of the crimes alleged in the indictments, it serves as an indication of the trend in national legal systems to a broader range of circumstances which will classify sexual activity as rape.

1226 Criminal Code of Korea, Ch XXXII, Art 297. Translation from Korean government website http://www.dci.sppo.go.kr/laws/crimco_e.htm (site accessed 18 Mar 1999).

1227 Criminal Law (1979), Art 139: "Whoever by violence, coercion or other means rapes a woman is to be sentenced to not less than three years and not less than ten years of fixed-term imprisonment". (This law, which was in force at the time relevant to these proceedings, has been replaced by the 1997 Criminal Code. Section 236 of that Code contains the same prohibition).

1228 General Civil Penal Code, Ch 19, Art 192: "Any person who by force or by inducing fear for any person's life or health compels any person to commit an act of indecency or is accessory thereto shall be guilty of rape [...]". Translation from Norwegian Ministry of Justice, The General Civil Penal Code (1995).

1129 Strafgesetzbuch, Art 201: "[...] by use of severe force or threat of present severe danger of life or limb directed against the victim or a third person [...]" (as in force 1989-1997).

1130 Código Penal, Art 178: "The assault on the sexual liberty of another person, with violence or intimidation, will be punishable as a sexual aggression [...]". "Sexual abuses", which are defined as acts of assault on the sexual liberty of another without consent, are punishable by lesser terms of imprisonment: Art 181.

1131 Código Penal, Art 213 ("[...] violence or serious threat [...]").

1132 Eg, Sierra Leone, where rape is defined by common law (other than rape of minors, which is governed by statutory provisions). Rape is defined by common law in Sierra Leone as "having unlawful sexual intercourse with a woman without her consent by force, fear or fraud": see Thompson, *The Criminal Law of Sierra Leone* (1999), pp 68-69.

1133 New York Penal Law, s 130.05; s 130.35: rape in the first degree involves sexual intercourse without the consent of the victim and which occurs by forcible compulsion, or with a victim who is "incapable of consent by reason of being physically helpless" or is less than eleven years old. Maryland Ann Code (1957), Art 27, 463(a)(1) ("[b]y force or threat of force against the will and without the consent of the other person"). Massachusetts General Laws Ann, c 265, s 22; the definitions of rape and aggravated rape refer to a perpetrator who "compels a person to submit by force and against his will, or compels a

- person to submit by threat of bodily injury”.
- 1134 Code Pénal, Art 190. Emphasis added.
- 1135 Código Penal, Art 164 (as in force in 1992): “Whoever has intercourse with a woman, by means of violence, serious threat or, after, in order to have intercourse, having made her unconscious or has made it impossible for her to resist, or, by the same means constrain her to have intercourse with a third person, shall be punished with imprisonment from 2 to 8 years.” (unofficial translation).
- 1136 Code Pénal, Art 222 (unofficial translation). Emphasis added. A commentary to this provision states that rape consists of sexually abusing someone against their will when the absence of will results from the use of physical/psychological violence or from other coercive measures or tricks to bend the will of the victim. Dalloz, Code Pénal, Nouveau Code Pénal - Ancien Code Pénal (1996-7).
- 1137 Codice Penale, Art 519; see particularly subpars (3) and (4) (as in force in 1992). Translation from New York University, The Italian Penal Code (1978).
- 1138 Danish Criminal Code, Ch 24, Art 216(1). Emphasis added. Translation from Hoyer, Spencer and Greve, The Danish Criminal Code (1997).
- 1139 Penal Code, Ch 6, s 1 provides that rape is committed where a person “by violence or threat which involves or appears to the threatened person to involve an imminent danger, forces another person to have sexual intercourse or to engage in a comparable sexual act” and that “[c]ausing helplessness or a similar state of incapacitation shall be regarded as equivalent to violence”. Translation from Ministry of Justice, The Swedish Penal Code (1999).
- 1140 Penal Code of Finland, Ch 20, s 1(1) (“A person who forces a woman to sexual intercourse by violence or by threat of an imminent danger shall be sentenced for rape [...]. The impairment of the power of the woman to control her conduct or to offer resistance shall be deemed equivalent to violence or a threat”. Unofficial translation on file with ICTY library).
- 1141 Kriminaalkodeks 1992, s 115(1).
- 1142 Criminal Code, Art 177. Translation from EHS Law Bulletin Series, The Penal Code of Japan (1996), Vol II.
- 1143 Emphasis added.
- 1144 Código Penal, Art 119. Emphasis added.
- 1145 Código Penal, Art 156.
- 1146 Código Penal, Art 272. The definition in the Uruguay Code also refers expressly to sexual intercourse being presumed to be violently imposed when imposed on an arrested or detained person by the person having power over the victim’s detention.
- 1147 The Revised Penal Code of the Philippines provides by Art 335 that rape is carnal knowledge of a woman committed by “using force or intimidation”, “when the woman is deprived of reason or otherwise unconscious” or when the victim is under twelve.
- 1148 California Penal Code, s 261(a)(1), (3), (4) and (5). See also the Model Penal Code, s 213.1 which refers to sexual intercourse with a person not the perpetrator’s wife where the victim was compelled “to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone”, the perpetrator “substantially impaired [the victim’s] power to control her conduct by administer-

ing or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance” or that the victim is unconscious or less than ten years old.

1149 See Smith, Smith & Hogan *Criminal Law* (1999), p 457: “The essence of rape is the absence of consent [...]. At one time it was stated that the intercourse must have been procured through force, fear or fraud. Some books continued to state the law in those terms until very recently but they have been out-of-date for well over a century.”

1150 See, eg, Report of the Advisory Group on the Law of Rape (1975), Cmnd 6352, pars 18-22, cited in *R v Olugboja* [1982] QB 320. The English common law definition of rape is reflected in the Hong Kong Crimes Ordinance, s 118: “A man commits rape if-(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not (b) consent to it; [...]”.

1151 Sexual Offences (Amendment) Act 1976, amending s 1 of the Sexual Offences Act 1956. The definition in the Sexual Offences Act 1956 was again amended in 1994 by the Criminal Justice and Public Order Act 1994, s 142 which makes it an offence for a man to rape a woman or a man and specifies that the sexual intercourse may be vaginal or anal.

1152 *R v Olugboja*, [1982] QB 320.

1153 In Canada, rape falls within the statutory crime of sexual assault under s 271 of the Criminal Code. This is any assault of a sexual nature, and assault is defined by s 265 as, in effect, a touching without the consent of the victim.

1154 The New Zealand Crimes Act, 1961 penalises “sexual violation” which is defined as the act of a male raping a female or of any person having “unlawful sexual connection” with another: s 128 (1). Rape is defined as penetration of the woman “(a) Without her consent; and (b) Without believing on reasonable grounds that she consents to that sexual connection”. Section 128A defines matters that do not constitute consent to sexual connection, including the submission or acquiescence of the victim by reason of “the actual or threatened application of force to that person or some other person”, the fear of such application of force, or a mistake as to the identity of the person or the nature and quality of the act to which consent was given.

1155 In New South Wales, where the common law offence of rape has been repealed by statute, rape is encompassed within the crime of sexual assault under s 611 of the Crimes Act 1900 (NSW) which provides that: “Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to penal servitude for 14 years.” See also Crimes Act, 1958 (Vic), s 38(2) which provides in part that: “A person commits rape if- (a) he or she intentionally sexually penetrates another person without that person’s consent while (b) being aware that the person is not consenting or might not be consenting; [...]”. Sexual intercourse or penetration without consent is an offence in the legislation of other states and territories. See Crimes Act 1900 (ACT), s 92D; Criminal Code (WA), s 325; Criminal Law Consolidation Act 1935 (SA), s 48.

1156 Criminal Code, s 273.1(1).

1157 Criminal Code, s 273.1(2).

1158 Crimes Act 1958 (Vic), s 36.

1159 Section 375, Penal Code. The section provides: “Rape. - A man is said to commit ‘rape’ who, except in the

- cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-First.- Against her will. Secondly.- Without her consent. Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.- With or without her consent, when she is under sixteen years of age.”
- 1160 Bangladesh Penal Code, s 375. (Abdul Matin, *The Penal Code* (1994), p 718). The fifth circumstance enumerated in the Indian Penal Code is absent from the Bangladesh Code. The Pakistan Penal Code contained an almost identical provision until its repeal in 1979.
- 1161 See, eg, the decision of K 1958 3 SA 429 (A) 421F. Consent is not established by mere submission: F 1990 1 SACR 238 (A) 249 and a number of different factors such as fear induced by violence or threats will exclude any genuine consent: S 1971 2 SA 591 (A).
- 1162 *Zambian Penal Code*, Cap 87, s 132 of *The Laws of Zambia*.
- 1163 *Code Pénale*, Art 375. See also the *Nicaraguan Código Penal*, Art 195
- 1164 See, eg, *Canadian Criminal Code*, s 273; *Crimes Act 1958 (Vic)*, s 36.
- 1165 *Prosecutor's Pre-Trial Brief I*, par 128.
- 1166 *Prosecutor v Tadic*, Case IT-94-1-A-R77, *Judgment on Allegations of Contempt Against Prior Counsel*, Milan Vujin, 31 Jan 2000, par 25: “Sub-rule (A) to (D) [of Rule 77] are statements of what was seen by the judges at Plenary meetings of the Tribunal to reflect the jurisprudence upon those aspects of the law of contempt as are applicable to the Tribunal. Those statements do not displace the underlying law; both the Tribunal and the parties remain bound by that underlying law”. Rule 96 was explicitly referred to by the Appeals Chamber as another example of the application of that principle (see fn 26 to par 25).

*Special Court
for Sierra Leone*

*Prosecutor v. Issa Hassan Sesay,
Morris Kallon, Augustine Gbao*

Case N° SCSL-04-15-T

*Judgment of
March 2, 2009*



[...]

III. APPLICABLE LAW

[...]

3. Law on the Crimes Charged

[...]

3.3. Specific Offences

[...]

3.3.6. Rape (Count 6)

143. The Indictment charges the Accused in Count 6 with rape as a crime against humanity under Article 2 of the Statute. This Count relates to the Accused's alleged responsibility for the rapes of women and girls in Kono District, Koinadugu District, Bombali District, Kailahun District, Freetown and the Western Area and Port Loko District in different time periods relevant to the Indictment.²⁷⁷

144. This Chamber opines that the offence of rape has long been prohibited as a war crime in international humanitarian law.²⁷⁸ It is also prohibited as a crime against humanity in the Allied Control Council Law No. 10²⁷⁹ and in the Statutes of the ICTY,²⁸⁰ the ICTR²⁸¹ and the ICC.²⁸² The status of rape as an offence under customary international law entailing individual criminal responsibility has been reaffirmed before the *Ad Hoc* tribunals.²⁸³ Indeed, the ICTY Trial Chamber in Kunarac declared that "[r]ape is one of the worst sufferings a human being can inflict upon another."²⁸⁴

145. Thus, the Chamber has held that the constitutive elements of rape are as follows:

- (i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a

coercive environment, or the invasion was committed against a person incapable of giving genuine consent;²⁸⁵

(iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and

(iv) The Accused knew or had reason to know that the victim did not consent.²⁸⁶

146. The first element of the actus reus defines the type of invasion that is required to constitute the offence of rape and covers two types of penetration, however slight. The first part of the provision refers to the penetration of any part of the body of either the victim or the Accused with a sexual organ. The “any part of the body” in this part includes genital, anal or oral penetration.²⁸⁷ The second part of the provision refers to the penetration of the genital or anal opening of the victim with any object or any other part of the body. This part is meant to cover penetration with something other than a sexual organ which could include either other body parts or any other object.²⁸⁸ This definition of invasion is broad enough to be gender neutral as both men and women can be victims of rape.²⁸⁹

147. The second element of the actus reus of rape refers to the circumstances which would render the sexual act in the first element criminal. The essence of this element is that it describes those circumstances in which the person could not be said to have voluntarily and genuinely consented to the act.²⁹⁰ The use or threat of force provides clear evidence of nonconsent, but it is not required.²⁹¹ The ICTY Appeals Chamber has emphasised that the circumstances “that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.”²⁹²

148. The last part of this element refers to those situations where, even in the absence of force or coercion, a person cannot be said to genuinely have consented to the act. A person may not, for instance, be capable of genuinely consenting if he or she is too young, under the influence of some substance, or suffering from an illness or disability.²⁹³

149. The Chamber observes that the very specific circumstances of an armed conflict where rapes on a large scale are alleged to have occurred, coupled with the social stigma which is borne by victims of rape in certain societies, render the restrictive test set out in the elements of the crime difficult to satisfy. Circumstantial evidence may therefore be used to demonstrate the actus reus of rape.²⁹⁴

150. The mens rea requirements for the offence of rape are that the invasion was intentional and that it was done in the knowledge that the victim was not consenting.

151. The Chamber draws attention to the principles regarding inferences that cannot be drawn from evidence adduced in cases of sexual assault that are set out in Rule 96 of the Rules (“the Rules”).

3.3.7. Sexual Slavery and any other Form of Sexual Violence (Count 7)

152. The Indictment in Count 7 charges the Accused with sexual slavery and any other form of sexual violence as a crime against humanity under Article 2 of the Statute. This Count relates to the Accused’s alleged responsibility for the abduction and use as sexual slaves of women and girls in Kono District, Koinadugu District, Bombali District, Kailahun District, Freetown and the Western Area and Port Loko District. The Accused are also alleged to be responsible for the subjection of women and girls to other forms of sexual violence in Koinadugu District, Bombali District, Freetown and the Western Area and Port Loko District. All of the allegations are said to have occurred in different time periods relevant to the Indictment.²⁹⁵

153. (...) the Chamber will here consider only the elements of the offence of “sexual slavery”.²⁹⁶

154. The specific offence of sexual slavery was included for the first time as a war crime and a crime against humanity in the ICC Statute.²⁹⁷ The offence is characterised as a crime against humanity under Article 2(g) of the Statute and the Indictments before the Special Court were the first to specifically indict persons with the crime of sexual slavery.

155. By this assertion, the Chamber does not suggest that the offence is entirely new. It is the Chamber’s view that sexual slavery is a particularised form of slavery or enslavement and acts which could be classified as sexual slavery have been prosecuted as enslavement in the past. In the Kunarac case, for instance, the Accused were convicted of the offences of enslavement, rape and outrages on personal dignity for having detained women for months and subjected them to rape and other sexual acts.²⁹⁸ In that case, the ICTY Appeals Chamber emphasized that “it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape.”²⁹⁹

156. The Chamber opines that the prohibition of the more particular offences such as sexual slavery and sexual violence criminalises actions that were already criminal. The Chamber considers that the specific offences are designed 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 during armed conflict.³⁰⁰

157. As discussed in more detail below, this Chamber takes the view that the offence of enslavement is prohibited at customary international law and entails individual criminal responsibility.³⁰¹ The Chamber is satisfied that this would equally apply to the offence of sexual slavery which is “an international crime and a violation of jus cogens norms in the exact same manner as slavery.”³⁰²

158. Consistent with the Rule 98 Decision, the Chamber has held that the relevant constitutive elements of sexual slavery are:

- (i) The Accused exercised any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
- (ii) The Accused caused such person or persons to engage in one or more acts of a sexual nature; and
- (iii) The Accused intended to exercise the act of sexual slavery or acted in the reasonable knowledge that this was likely to occur.³⁰³

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 persons³⁰⁴ (the slavery element) and second, that the enslavement involved sexual acts (the sexual element).

160. In determining whether or not the enslavement element of the actus reus has been established, the Chamber notes that the list of actions that reflect the exercise of a power of ownership that is included in the element is not exhaustive. The Chamber adopts the following indicia of enslavement identified by the ICTY in *Kunarac et al.*: “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.”³⁰⁵

161. The Chamber also notes that the expression “similar deprivation of liberty” may cover situations in which the victims may not have been physically confined, but were otherwise unable to leave as they would have nowhere else to go and feared for their lives.³⁰⁶

162. To convict an Accused for this offence, the Prosecution must also prove that the Accused caused the enslaved person to engage in acts of a sexual nature. The acts of

sexual violence are the additional element that, when combined with evidence of slavery, constitutes sexual slavery.³⁰⁷

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.³⁰⁸ 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.”³⁰⁹ The duration of the enslavement is not an element of the crime, although it may be relevant in determining the quality of the relationship.³¹⁰

[...]

V. EVALUATION OF EVIDENCE

[...]

5. Crimes in Kono District

[...]

5.2. Legal Findings on the Crimes in Kono District

[...]

5.2.2. Sexual Violence (Counts 6 to 9)

5.2.2.1. Rape (Count 6)

[...]

1285. As an observation pertinent to the evidence on Count 6 in respect of all Districts, the Chamber notes that numerous witnesses used the term “rape” without the Prosecution seeking to clarify the use of the term and the conduct entailed by it. We are cognisant that it is natural for some witnesses to be reticent to provide explicit details of sexual violence, especially in Sierra Leonean society where stigma often attaches to victims of such crimes. Nonetheless, we consider it an unfortunate reality in post-conflict Sierra

Leone that “rape” is a commonly understood concept. The Chamber is therefore of the view that the use of the term “rape” by reliable witnesses describes acts of forced or non-consensual sexual penetration consistent with the actus reus of the offence of rape. This approach may be reinforced by circumstantial evidence of violence or coercion.²⁴⁵¹

[...]

5.2.2.1.3. Sawao, Penduma and Bumpah

1289. The Chamber recalls its findings that:

- (i) sexual acts were perpetrated on TF1-195 five times and an unknown number of times on five other women by rebels in Sawao;²⁴⁵⁵
- (ii) sexual acts were perpetrated on TF1-217’s wife eight times and on an unknown number of other women by rebels in Penduma;²⁴⁵⁶
- (iii) sexual acts were perpetrated on TF1-218 twice by rebels in Bumpah;²⁴⁵⁷ and,
- (iv) rebels inserted a pistol in the vagina of a female civilian in Bomboafuidu.²⁴⁵⁸

1290. The Chamber is satisfied from the evidence in respect of each of these incidents that the actus reus of rape is established. The perpetrators’ acts occurred in the context of armed rebels capturing groups of civilians, and threatening, killing or physically injuring them. The Chamber is satisfied that in such circumstances the women did not consent and were in fact incapable of genuine consent. The Chamber accordingly finds that each of these acts constitute rape as charged in Count 6.

5.2.2.2. Sexual Slavery and ‘Forced Marriage’ (Counts 7 and 8)

1291. The Chamber recalls its findings that:

- (i) an unknown number of women were taken as “wives” by AFRC/RUF fighters in Koidu in February and March 1998;²⁴⁵⁹
- (ii) an unknown number of women were forcibly kept as “wives” by RUF fighters in the civilian camp at Wendedu;²⁴⁶⁰ and,
- (iii) TF1-016 and her daughter were forcibly “married” to RUF members in Kissi-Town.²⁴⁶¹

[...]

1293. The Chamber concludes from the evidence pertaining to Koidu and Wendedu that a consistent pattern of conduct existed towards women who were forced into conjugal relationships. These “wives” were “married” against their will, forced to engage in sexu-

al intercourse and perform domestic chores, and were unable to leave their “husbands” for fear of violent retribution. The Chamber is satisfied that the “husbands” were aware of the power exercised over their “wives” and therefore were aware that their “wives” did not genuinely consent to the “marriage” or perform conjugal “duties” including sexual intercourse and domestic labor of their own free volition.

1294. The Chamber is accordingly satisfied that the perpetrators intended to deprive the women of their liberty by exercising powers attaching to the right of ownership over them, including by forcing the women to engage in acts of a sexual nature. (...)

1295. In relation to Count 8, the Chamber is satisfied that the conduct described by numerous reliable witnesses that rebels captured women and “took them as their wives” in Koidu and Wenedu satisfies the actus reus of ‘forced marriage,’ namely the imposition of a forced conjugal association. We consider that the phenomenon of “bush wives” was so widespread throughout the Sierra Leone conflict that the concept of women being “taken as wives” was well-known and understood.

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.²⁴⁶³ 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.

1297. The Chamber is therefore satisfied that AFRC/RUF rebels forced an unknown number of women into marriages in Koidu; that AFRC/RUF rebels forced an unknown number of women into marriages in Wenedu; and that an RUF member forcibly married TF1-016 in Kissi-Town, which crimes constitute inhumane acts as charged in Count 8.

5.2.2.3. Outrages on Personal Dignity (Count 9)

5.2.2.3.1. Rape, Sexual Slavery and ‘Forced Marriage’

1298. The Chamber finds that the acts of rape, sexual slavery and ‘forced marriage,’ as described above, also constitute in each case a severe humiliation, degradation and violation of the dignity of the victims and the perpetrators knew or ought to have known that their acts would produce this effect.²⁴⁶⁴

[...]

5.2.2.3.2. Bumpah

1302. The Chamber recalls that in February/March 1998, rebels in Bumpah ordered a couple to have sexual intercourse in the presence of the other captured civilians and their daughter. After the enforced rape they forced the man's daughter to wash her father's penis.²⁴⁶⁷

1303. The Chamber recalls its finding that conduct which constitutes "any other form of sexual violence" may form the basis for charges of outrages upon personal dignity.²⁴⁶⁸ The Chamber observes, however, that the Prosecution did not particularise the conduct that constitutes other forms of sexual violence. The Prosecution also restricted its pleadings on sexual violence in the Indictment to crimes committed against "women and girls," thereby excluding male victims of sexual violence.²⁴⁶⁹ The Prosecution therefore failed to adequately plead material facts which it then relied on as evidence of crimes, rendering the Indictment defective. The Chamber must therefore determine whether this defect in the Indictment was cured by clear, timely and consistent notice of the material facts to the Accused.

1304. The Prosecution disclosed a witness statement of TF1-218 in which it is alleged that rebels forced a couple to have sexual intercourse in public and abused the couple's 10 year old daughter.²⁴⁷⁰ As this statement was disclosed prior to the start of the Prosecution case on 5 July 2004, the Chamber finds that this constitutes adequate notice of the material particulars of the form of sexual violence alleged. The Chamber finds that the defect in the Indictment was cured by clear, timely and consistent notice to the Defense.

1305. The Chamber is satisfied that these acts severely humiliated the couple and their daughter and violated their dignity. Given the nature of these acts and the public context in which they occurred, the Chamber further finds that the perpetrators possessed full knowledge that their actions degraded the personal dignity of the victims.

1306. The Chamber accordingly finds that AFRC/RUF rebels committed two outrages upon personal dignity, as charged in Count 9 of the Indictment.

5.2.2.3.3. Bomboafuidu

1307. The Chamber finds that the conduct of AFRC/RUF rebels in forcing approximately 20 captive civilians to have sexual intercourse with each other and slitting the genitalia of

several male and female civilians constituted a severe degradation, harm and violation of the victims' personal dignity.²⁴⁷¹ The Chamber is satisfied that the perpetrators knew their actions would have this effect and so intended.

1308. Again, the Chamber observes that the Prosecution did not particularise the conduct that constitutes other forms of sexual violence and did not plead forms of sexual violence committed against male victims. However, the Chamber finds that the Prosecution adequately notified the Defense of the material fact of this allegation by the disclosure of such information in the witness statement of TF1-192.²⁴⁷² Therefore, the Chamber finds that the defect in the Indictment was cured in a timely, clear and consistent manner causing no material prejudice to the Defense in the preparation of their case.

1309. The Chamber therefore finds that AFRC/RUF rebels in Bomboafuidu committed outrages upon the personal dignity of an unknown number of civilians, as charged in Count 9.

[...]

5.2.6.2. Sexual Violence as Acts of Terrorism

5.2.6.2.1. General Considerations

1346. In making its Legal Findings on sexual violence as an act of terrorism committed against the civilian population, the Chamber has considered the body of evidence aduced in relation to the various Districts of Sierra Leone as charged in the Indictment.

1347. The Chamber observes that sexual violence was rampantly committed against the civilian population in an atmosphere in which violence, oppression and lawlessness prevailed. The Chamber finds that the nature and manner in which the female population was a target of the sexual violence portrays a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror. These fighters employed perverse methods of sexual violence against women and men of all ages ranging from brutal gang rapes,²⁵⁰⁷ the insertion of various objects into victims' genitalia,²⁵⁰⁸ the raping of pregnant women²⁵⁰⁹ and forced sexual intercourse between male and female civilian abductees.²⁵¹⁰ In one instance, the wife of TF1-217 was raped by eight rebels as he and his children were forced to watch. TF1-217 was ordered to count each rebel as they consecutively raped his wife, "he had no power not to" as the rapists laughed and mocked him.²⁵¹¹ After the ordeal, her rapists took a knife and stabbed her in front of the entire family.²⁵¹²

1348. The Chamber is satisfied that the manner in which the rebels ravaged through villages targeting the female population effectively disempowered the civilian population and had a direct effect of instilling fear on entire communities. The Chamber moreover finds that these acts were not intended merely for personal satisfaction or a means of sexual gratification for the fighter. We opine that the savage nature of such conduct against the most vulnerable members of the society demonstrates that these acts were committed with the specific intent of spreading fear amongst the civilian population as a whole, in order to break the will of the population and ensure their submission to AFRC/RUF control.

1349. We note that the physical and psychological pain and fear inflicted on the women not only abused, debased and isolated the individual victim, but deliberately destroyed the existing family nucleus, thus undermining the cultural values and relationships which held the societies together.²⁵¹³ Victims of sexual violence were ostracised, husbands left their wives, and daughters and young girls were unable to marry within their community.²⁵¹⁴ The Chamber finds that sexual violence was intentionally employed²⁵¹⁵ by the perpetrators to alienate victims and render apart communities, thus inflicting physical and psychological injury on the civilian population as a whole. The Chamber finds that these effects of sexual violence were so common that it is apparent they were calculated consequences of the perpetrators' acts.

1350. The Chamber recalls the testimony of TF1-029 describing the general perception among the rebels that "soldiers who captured civilians had a right to rape them and make them their wives."²⁵¹⁶ The Chamber considers this statement indicative of the atmosphere of terror and helplessness that the rebel forces created by systematically engaging in sexual violence in order to demonstrate that the communities were unable to protect their own wives, daughters, mothers, and sisters.²⁵¹⁷ Rebels invaded homes at random and raped women.²⁵¹⁸ In this way the AFRC and RUF extended their power and dominance over the civilian population by perpetuating a constant threat of insecurity that pervaded daily life and afflicted both women and men.²⁵¹⁹

1351. The Chamber has further found that countless women of all ages were routinely captured and abducted from their families, homes and communities and forced into prolonged exclusive conjugal relationships with rebel as 'wives.'²⁵²⁰ The practice of 'forced marriages' and sexual slavery stigmatised the women, who lived in shame and fear of returning to their communities after the conflict.²⁵²¹ The Chamber finds that the pattern of sexual enslavement employed by the RUF was a deliberate system intended to spread terror by the mass abductions of women, regardless of their age or existing marital status, from legitimate husbands and families.

1352. In light of the foregoing, the Chamber finds that rape, sexual slavery, ‘forced marriages’ and outrages on personal dignity, when committed against a civilian population with the specific intent to terrorise, amount to an act of terror. The Chamber considers that the evidence on the record establishes that members of the AFRC/RUF regularly committed such acts of sexual violence as part of a campaign to terrorise the civilian population of Sierra Leone.

5.2.6.2.2. Koidu Town

1353. The Chamber recalls that an unknown number of civilians were raped in Koidu sometime in February and March 1998.²⁵²² These rapes were committed on a regular basis by rebels who forcibly entered random civilian homes at night. The Chamber is satisfied on this basis that the perpetrators of these acts of violence against civilians used rape as a deliberate tactic to terrorise the civilian population of Koidu. The Chamber accordingly finds that AFRC/RUF rebels committed an unknown number of acts of terrorism in Koidu in February and March 1998 as charged under Count 1 of the Indictment.

5.2.6.2.3. Rapes in other locations

1354. We find that the rape by Staff Alhaji in Tombodu, the rapes in Sawao, Penduma, Bumpeh and Bomboafuidu and the outrages on personal dignity committed in Bumpeh and Bomboafuidu reflect a consistent pattern of conduct openly exhibited by the rebel forces in their encounters with civilians.²⁵²³ The Chamber notes that in each case the rapes were committed in front of other civilians. In Penduma, women were lined up and rebels selected their victim one by one. A husband was forced at gun point to witness the rape of his wife. In Bumpeh, victims were forced to laugh and told their lives were over prior to being compelled to have intercourse with each other. In Sawao, as in Penduma, the rapes of multiple women were committed at the same time as men were killed or had their limbs amputated. In Bomboafuidu, a husband and wife and their daughter were openly selected from a group of civilians as the rebels’ victims.

1355. The Chamber is satisfied from this evidence that the public nature of the crimes was a deliberate tactic on the part of the perpetrators to instil fear into the civilians. Given the geographic and temporal proximity of these crimes to each other, and to the killings and amputations in Kono District, the Chamber finds that the rebels regularly used rape and other forms of sexual violence to spread terror among the civilian population of Kono District. We accordingly find that these crimes constitute acts of terrorism as charged in Count 1 of the Indictment.

5.2.6.3. Sexual Slavery, 'Forced Marriage' as Acts of Terrorism

1356. The Chamber recalls its general considerations on sexual violence as acts of terrorism.²⁵²⁴ As found above, the Chamber is satisfied that because of the consistent pattern of conduct demonstrated in the exercise of the sexual violence the above findings of sexual slavery and 'forced marriage' were committed with the requisite and specific intent to terrorise the civilian population. (...)

[...]

6. Crimes in Kailahun District

[...]

6.2. Legal Findings on Crimes in Kailahun District

[...]

6.2.2. Sexual Violence (Counts 6 to 9)

[...]

6.2.2.3. Sexual slavery and "forced marriage" of others civilians

[...]

1466. The Chamber finds that acts of sexual violence were intentionally committed against women and girls in the context of a hostile and coercive war environment in which genuine consent was not possible. The Chamber also finds that when the rebels forcefully took victims as 'wives' they intended to deprive them of their liberty. The Chamber finds that the use of the term 'wife' by the rebels was deliberate and strategic, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions.

1467. The Chamber is satisfied that many fighters had 'bush wives', who, similarly to the cases of TF1-314 and TF1-093 discussed above, were intentionally forced to have sex with the rebels. The Chamber also finds that the perpetrators intended to exercise control and ownership over their victims who were unable to leave or escape for fear that

they would be killed or sent to the front lines as combatants. Accordingly, the Chamber finds that young girls and women were intentionally forced into conjugal relationships with rebels.

1468. We also find that many women were forced into marriage by means of threats, intimidation, manipulation and other forms of duress which were predicated on the victims' fear and their desperate situation.

1469. In relation to the sexual offences alleged in the Indictment, the Chamber notes that the Accused have canvassed the defense of consent and 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 Defense 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.

1470. In light of the foregoing and given the violent, hostile and coercive environment in which these women suddenly found themselves, the Chamber first of all considers that the sexual relations with the rebels, notwithstanding the contention of the Defense to the contrary, and on the basis of very credible and compelling evidence, could not, and was, in circumstances, not consensual because of the state of uncertainty and subjugation in which they lived in captivity.

1471. In this regard, the Chamber is of the opinion and so holds, that in hostile and coercive circumstances of this nature, there should be a presumption of absence of genuine consent to having sexual relations or contracting marriages with the said RUF fighters.

1472. The Chamber is satisfied that 'bush wives' were not only forced into exclusive conjugal sexual relationships but were also expected to perform domestic chores and to bear children.

1473. The Chamber is therefore satisfied that all the elements of sexual slavery and of 'forced marriage' as an other inhumane act have been established. We conclude that an unknown number of women were subjected to sexual slavery and 'forced marriages' in Kailahun District, as charged under Counts 7 and 8 of the Indictment.

[...]

ENDNOTES

- 277 Indictment, paras 54-60.
- 278 The Lieber Code of 1863 listed rape as a serious war crime that merited the death penalty in Articles 44 and 47. (*Instructions for the Government of the United States in the Field by Order of the Secretary of War*, Washington, D.C., General Orders No. 100, 24 April 1863 [Lieber Code]). Rape was implicitly prohibited in Article 46 of the 1907 Hague Convention (IV) which provided for the protection of family honor and rights. Rape is also explicitly prohibited in Article 27 of Geneva Convention IV, Article 76(1) of Additional Protocol I and Article 4(2)(e) of Additional Protocol II.
- 279 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Allied Control Council Law No. 10, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January 1946, Art. II.1(c) [Control Council Law No. 10].
- 280 Article 5(g) of the ICTY Statute.
- 281 Article 3(g) of the ICTR Statute.
- 282 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force July 1, 2002), Art. 7(1)(g) [ICC Statute].
- 283 *Kvocka et al.* Appeal Judgment, para. 395; *Furundžija* Trial Judgment, paras 165-169; *Čelebići* Trial Judgment, paras 476-477. See also: UN SC Res. 1820 (2008), 19 June 2008, para. 4: “rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide[...].”
- 284 *Kunarac et al.* Trial Judgment, para. 655.
- 285 International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Art. 7(1)(g) and Art. 8(2)(b)(xxii) [ICC Elements of Crimes].
- 286 RUF Oral Rule 98 Decision, Transcript of 25 October 2006, pp. 21-22.
- 287 *Furundžija* Trial Judgment, paras 183-185. Para. 184: “[F]orced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration.”
- 288 *Furundžija* Trial Judgment, para. 185.
- 289 ICC Elements of Crimes, fn 50.
- 290 *Kunarac et al.* Appeal Judgment, para. 129; *Kunarac et al.* Trial Judgment, paras 457-459.
- 291 *Kunarac et al.* Appeal Judgment, para. 129.
- 292 *Kunarac et al.* Appeal Judgment, para. 130.
- 293 See, for example, ICC Elements of Crimes, fn 51.
- 294 See *Prosecutor v. Muhimana*, ICTR-95-1B-A, Judgment (AC), 21 May 2007, para. 49 [*Muhimana* Appeal Judgment]; *Prosecutor v. Gacumbitsi*, ICTR-01-64-A, Judgment (AC), 7 July 2006, para. 115 [*Gacumbitsi* Appeal Judgment].
- 295 Indictment, paras 54-60.
- 296 *Infra* paras 457-458.
- 297 Article 7(1)(g) identifies sexual slavery as a crime against humanity and Article 8(2)(b)(xxii) identifies sexual slavery as a grave breach of the Geneva Conventions.

- 298 *Kunarac et al.* Trial Judgment, paras 746-782.
- 299 *Kunarac et al.* Appeal Judgment, para. 186.
- 300 UN SC Res. 1820 (2008), 19 June 2008; Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Minorities, E/CN.4/Sub.2/1998/13, 22 June 1998, paras 7-19; Update to Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/21, 6 June 2000, para. 20
- 301 *Kunarac et al.* Trial Judgment, paras 519-537 and 539; *Krnojelac* Trial Judgment, para. 355. See also *Kunarac et al.* Appeal Judgment, para. 124.
- 302 Update to Final Report of Special Rapporteur, para. 51.
- 303 RUF Oral Rule 98 Decision, Transcript of 25 October 2006, p. 22.
- 304 *Kunarac et al.* Trial Judgment, para. 540. See also *AFRC* Appeal Judgment, para. 102. Case No. SCSL-04-15-T 53 2 March 2009
- 305 *Kunarac et al.* Trial Judgment, para. 543 [original footnotes omitted], cited with approval by the Appeals Chamber in *Kunarac et al.* Appeal Judgment, para. 119.
- 306 *Kunarac et al.* Trial Judgment, para. 750. This expression was also insisted upon by some delegations to the Rome Statute Working Group on Elements of Crimes to ensure that the provision did not exclude from prohibition situations in which sexually abused women were not locked in a particular place but were nevertheless “deprived of their liberty” because they have no where else to go and fear for their lives, see Eve La Haye in Roy S. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, New York: 2001), pp. 191-192 [Lee, *International Criminal Court*].
- 307 Update of Report by Special Rapporteur, paras 47 and 51.
- 308 *Kunarac et al.* Appeals Judgment, para. 120. See also Update of Report by Special Rapporteur, para. 51: “Likewise, a person cannot, under any circumstances, consent to be enslaved or subjected to slavery. Thus, it follows that person accused of slavery cannot raise consent of the victim as a defense.” [original footnotes omitted] Once the element of enslavement has been proven, then the enslaved person would not be capable of providing voluntary and genuine consent.
- 309 *Kunarac et al.* Appeals Judgment, para. 120
- 310 *Kunarac et al.* Appeals Judgment, para. 121.
- 2451 *Supra* paras 147-148.
- 2455 *Supra* paras 1180-1181, 1185.
- 2456 *Supra* paras 1193-1195.
- 2457 *Supra* para. 1206.
- 2458 *Supra* para. 1208.

- 2459 *Supra* paras 1154-1155.
- 2460 *Supra* paras 1178-1179
- 2461 *Supra* paras 1209-1214
- 2463 See Exhibit 381, Fourth Report of the UN Secretary-General on the UN Mission in Sierra Leone, dated 19 May 2000, p. 3578.
- 2464 *Supra* paras 1283-1297.
- 2467 *Supra* para. 1205.
- 2468 *Supra* para. 468.
- 2469 See Indictment, paras 54-60.
- 2470 The Statement of Witness TF1-218 was disclosed to Sesay on 14 November 2003, to Kallon on 10 December 2003, and to Gbao on 17 December 2003.
- 2471 *Supra* para. 1207.
- 2472 Statement of Witness TF1-192, Disclosed to Sesay on 14 November 2003, to Kallon on 10 December 2003 and to Gbao on 17 December 2003.
- 2507 See TF1-217 who describes the rape of five women in front of children and other civilians: Transcript of 22 July 2004, TF1-217, pp. 23-24. TF1-305 was gang raped by eight rebels while her parents were guarded by armed rebels, after the rape she felt dizzy and bled profusely and she stated that she lay on the ground feeling "as if I was in the hands of death itself": Transcript of 27 July of 2004, TF1-305, pp. 54-57.
- 2508 TF1-192 was captured along with 20 other civilians by armed fighters and the men inserted a pistol into the vagina of one of the female captives, leaving it inside her overnight, Transcript of 1 February 2005, TF1-192, p. 68.
- 2509 DIS-157 testified of the rape of a woman who was eight months pregnant by an RUF fighter in Daru in 1998. The victim reported the rape and DIS-157 and other MP Commanders ordered Jalloh to be shot after he admitted to the rape: Transcript of 24 January 2008, DIS-157, pp. 124-126.
- 2510 TF1-064 was a nursing mother who was forced to engage in sexual intercourse with another abductee, a Temne man. The rebels spread her legs, cut her and forced the civilian man to have sex with her while her child stood by crying and the rebels flogged the child and mother: Transcript of 19 July 2004, TF1-064. p. 49.
- 2511 Transcript of 22 July 2004, TF1-217, pp. 17-19, 30.
- 2512 Transcript of 22 July 2004, TF1-217, pp. 17-19, 30.
- 2513 Exhibit 146, Human Rights Watch, "We'll Kill You if You Cry", p. 4.
- 2514 According to TF1-369, fear of discrimination and stigmatisation remains an enormous barrier to the effective reintegration of victims and their families, which prevented the victims from returning to their communities, those who have been reintegrated struggle with psychological trauma and most live in denial along with their families, Exhibit 138, Expert Report Forced Marriage, p. 12088.
- 2515 RUF rebels captured TF1-305 and ordered her mother to make a choice between killing her or taking her away before eight of their gang raped her; Transcript of 27 July 2004, TF1-305, pp. 54-57

- 2516 Transcript of 28 November 2005, TF1-029, pp. 12-13; TF1-196 also heard rebels say that they were going to rape virgins and an RUF rebel threatened to kill TF1-196 if she refused sexual intercourse. She felt shame because she was raped in public: Transcript of 13 July 2004, TF1-196, pp. 26-28.
- 2517 TF1-016's daughter complained of having been raped by an RUF rebel called Alpha, however TF1-016 told her daughter to be patient as they were powerless and "it was war" so nothing could be done: Transcript of 21 October 2004, TF1-016, pp. 18-19.
- 2518 Transcript of 22 July 2004, TF1-217, p. 10.
- 2519 The Chamber notes that the Prosecution restricted its pleading of sexual violence in the Indictment to crimes against women: see paras 54-60.
- 2520 *Infra* paras 1406-1408
- 2521 Exhibit 138, Expert Report Forced Marriage, p. 12097-98; A number of these 'wives' have relocated to other communities who fled from their rebel captors to return to their communities were not welcomed by their communities thus had to return to their abusers, Exhibit 138, Expert Report Forced Marriage, p. 12089.
- 2522 *Supra* paras 1152-1155.
- 2523 *Supra* paras 1171, 1180-1183, 1191-1195, 1205-1208.
- 2524 *Supra* paras 1346-1352.

*Committee on the Elimination of
Discrimination against Women*

A. T. v. Hungary

Communication N° 2/2003

*Views adopted
January 26, 2005*



[...]

VIEWS UNDER ARTICLE 7, PARAGRAPH 3, OF THE OPTIONAL PROTOCOL

1.1 The author of the communication dated 10 October 2003, with supplementary information dated 2 January 2004, is Ms. A. T., a Hungarian national born on 10 October 1968. She claims to be a victim of a violation by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is representing herself. The Convention and its Optional Protocol entered into force in the State party on 3 September 1981 and 22 March 2001, respectively.

1.2 The author urgently requested effective interim measures of protection in accordance with article 5, paragraph 1, of the Optional Protocol, at the same time that she submitted her communication, because she feared for her life.

The facts as presented

2.1 The author states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged. Although L. F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter, reportedly because no shelter in the country is equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

2.2 In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. Hoping to protect herself and the children, the author states that she changed the lock on the door of the family's apartment on 11 March 2000. On 14 and 26 March 2000, L. F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused to allow him to enter the apartment. The author further states that,

on 27 July 2001, L. F. broke into the apartment using violence.

2.3 L.F. is said to have battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates have been issued in connection with separate incidents of severe physical violence, even after L. F. left the family residence, which, the author submits, constitute a continuum of violence. The most recent incident took place on 27 July 2001 when L. F. broke into the apartment and subjected the author to a severe beating, which necessitated her hospitalization.

2.4 The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment (of 54 by 56 square metres) jointly owned by L. F. and the author. Decisions by the court of the first instance, the Pest Central District Court (*Pesti Központi Kerületi Bíróság*), were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court (*Fővárosi Bíróság*) issued a final decision authorizing L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: a) lack of substantiation of the claim that L. F. regularly battered the author; and b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

2.5 The author states that she also initiated civil proceedings regarding division of the property, which have been suspended. She claims that L. F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected on 25 July 2000.

2.6 The author states that there have been two ongoing criminal procedures against L. F., one that began in 1999 at the Pest Central District Court (*Pesti Központi Kerületi Bíróság*) concerning two incidents of battery and assault causing her bodily harm and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. In her submission of 2 January 2004, the author states that there would be a trial on 9 January 2004. Reportedly, the latter procedure was initiated by the hospital ex officio. The author fur-

ther states that L. F. has not been detained at any time in this connection and that no action has been taken by the Hungarian authorities to protect the author from him. The author claims that, as a victim, she has not been privy to the court documents and, that, therefore, she cannot submit them to the Committee.

2.7 The author also submits that she has requested assistance in writing, in person and by phone, from the local child protection authorities, but that her requests have been to no avail since the authorities allegedly feel unable to do anything in such situations.

The Claim

3.1 The author alleges that she is a victim of violations by Hungary of articles 2 a), b) and e), 5 a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She claims that the State party passively neglected its “positive” obligations under the Convention and supported the continuation of a situation of domestic violence against her.

3.2 She claims that the irrationally lengthy criminal procedures against L. F., the lack of protection orders or restraining orders under current Hungarian law and the fact that L. F. has not spent any time in custody constitute violations of her rights under the Convention as well as violations of general recommendation 19 of the Committee. She maintains that these criminal procedures can hardly be considered effective and/or immediate protection.

3.3 The author is seeking justice for herself and her children, including fair compensation, for suffering and for the violation of the letter and spirit of the Convention by the State party.

3.4 The author is also seeking the Committee’s intervention into the intolerable situation, which affects many women from all segments of Hungarian society. In particular, she calls for the a) introduction of effective and immediate protection for victims of domestic violence into the legal system, b) provision of training programmes on gender-sensitivity, the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol, including for judges, prosecutors, police and practising lawyers, and c) provision of free legal aid to victims of gender-based violence, including domestic violence.

[...]

ISSUES AND PROCEEDINGS BEFORE THE COMMITTEE

[...]

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

9.2 The Committee recalls its general recommendation No. 19 on violence against women, which states that “(...) [T]he definition of discrimination includes gender-based violence” and that “[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence”. Furthermore, the general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that “(...) discrimination under the Convention is not restricted to action by or on behalf of Governments (...)” and “[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”. Against this backdrop, the immediate issue facing the Committee is whether the author of the communication is the victim of a violation of articles 2 a), b) and e), 5 a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

9.3 With regard to article 2 a), b), and e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes

the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. 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. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "(...) [T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 a), b) and e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

9.4 The Committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the Committee stressed that "the provisions of general recommendation 19 (...) concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family (...)". In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized vis-à-vis the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since

neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 a) and 16 of the Convention have been violated.

9.5 The Committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the Committee's request for interim measures.

9.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 a), b) and e) and article 5 a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, (...).

[...]

*Committee on the Elimination of
Discrimination against Women*

A. S. v. Hungary

Communication N° 4/2004

*Views adopted
August 14, 2006*



[...]

*VIEWS UNDER ARTICLE 7, PARAGRAPH 3, OF THE OPTIONAL
PROTOCOL*

1.1 The author of the communication dated 12 February 2004, is Ms. A. S., a Hungarian Roma woman, born on 5 September 1973. She claims to have been subjected to coerced sterilization by medical staff at a Hungarian hospital. The author is represented by the European Roma Rights Center, an organization in special consultative status with the Economic and Social Council, and the Legal Defense Bureau for National and Ethnic Minorities, an organization in Hungary. The Convention and its Optional Protocol entered into force for the State party on 3 September 1981 and 22 March 2001, respectively.

The facts as presented by the author

2.1 The author is the mother of three children. On 30 May 2000, she was examined by a doctor and found to be pregnant, the delivery date estimated to be 20 December 2000, during that time, she followed antenatal treatment and attended all the scheduled appointments with the district nurse and gynecologist. On 20 December 2000, the author reported to the maternity ward of Fehérgyarmat Hospital. She was examined and found to be 36 to 37 weeks pregnant and was asked to return when she went into labour.

2.2 On 2 January 2001, the author went into labour pain and her amniotic fluid broke. This was accompanied by heavy bleeding. She was taken to Fehérgyarmat Hospital, one hour's drive by ambulance. While examining the author, the attending physician found that the foetus (the term "embryo" is used) had died in her womb and informed her that a caesarean section needed to be performed immediately in order to remove the dead foetus. While on the operating table, the author was asked to sign a form consenting to the caesarean section. She signed this as well as a barely legible note that had been hand-written by the doctor and added to the bottom of the form, which read:

"Having knowledge of the death of the embryo inside my womb I firmly request my sterilization [a Latin term unknown to the author was used]. I do not intend to give birth again; neither do I wish to become pregnant."

The attending physician and the midwife signed the same form. The author also signed statements of consent for a blood transfusion and for anaesthesia.

2.3 Hospital records show that within 17 minutes of the ambulance arriving at the hospital,

the caesarean section was performed, the dead foetus and placenta were removed and the author's fallopian tubes were tied. Before leaving the hospital the author asked the doctor for information on her state of health and when she could try to have another baby. It was only then that she learned the meaning of the word "sterilization". The medical records also revealed the poor health condition of the author when she arrived at the hospital. She felt dizzy upon arrival, was bleeding more heavily than average and was in a state of shock.

2.4 The author states that the sterilization has had a profound impact on her life for which she and her partner have been treated medically for depression. She would never have agreed to the sterilization as she has strict Catholic religious beliefs that prohibit contraception of any kind, including sterilization. Furthermore, she and her partner live in accordance with traditional Roma customs — where having children is said to be a central element of the value system of Roma families.

2.5 On 15 October 2001, a lawyer with the Legal Defense Bureau for National and Ethnic Minorities, filed a civil claim on behalf of the author against Fehérgyarmat Hospital, *inter alia*, requesting that the Fehérgyarmat Town Court find the hospital in violation of the author's civil rights. She also claimed that the hospital had acted negligently by sterilizing the author without obtaining her full and informed consent. Pecuniary and non-pecuniary damages were sought.

2.6 On 22 November 2002, the Fehérgyarmat Town Court rejected the author's claim, despite a finding of some negligence on the part of the doctors, who had failed to comply with certain legal provisions, namely, the failure to inform the author's partner of the operation and its possible consequences as well as to obtain the birth certificates of the author's live children. The Court reasoned that the medical conditions for sterilization prevailed in the author's case and that she had been informed about her sterilization and given all relevant information in a way in which she could understand it. The Court also found that the author had given her consent accordingly. The Court further viewed as a "partial extenuating circumstance towards the defendant's negligence the fact that, with the author's consent, the doctors performed the sterilization with special dispatch simultaneously with the Caesarean section".

2.7 On 5 December 2002, the lawyer filed an appeal on behalf of the author before the Szabolcs-Szatmár-Bereg County Court against the decision of the Fehérgyarmat Town Court.

2.8 On 12 May 2003, the author's appeal was rejected. The appellate court found that although article 187, paragraph 4 (a), of Hungary's Act on Health Care allowed for the

exceptional performance of the sterilization, the operation was not of a life-saving character, and therefore, the sterilization procedure should have been subject to the informed consent of the author. The appellate court further found that the doctors acted negligently in failing to provide her with detailed information (about the method of the operation, of the risks of its performance and of the alternative procedures and methods, including other options of birth control) and that the written consent of the author could not in and of itself exclude the hospital's liability. The appellate court, however, turned down the appeal on the ground that the author had failed to prove a lasting handicap and its causal relationship with the conduct of the hospital. The appellate court reasoned that the performed sterilization was not a lasting and irreversible operation inasmuch as the tying of fallopian tubes can be terminated by plastic surgery on the tubes and the likelihood of her becoming pregnant by artificial insemination could not be excluded. Based on her failure to prove that she had lost her reproductive capacity permanently and its causal relationship to the conduct of the doctors, the appellate court dismissed the appeal.

[...]

ISSUES AND PROCEEDINGS BEFORE THE COMMITTEE

[...]

Consideration of the merits

11.1 The Committee has considered the present communication in light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

11.2 According to Article 10 (h) of the Convention:

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(...)

h) Access to specific educational information to help to ensure the health and well being of families, including information and advice on family planning.

With respect to the claim that the State party violated article 10 (h) of the Convention by failing to provide information and advice on family planning, the Committee recalls

its general recommendation No. 21 on equality in marriage and family relations, which recognizes in the context of “coercive practices which have serious consequences for women, such as forced ... sterilization” that informed decision-making about safe and reliable contraceptive measures depends upon a woman having “information about contraceptive measures and their use, and guaranteed access to sex education and family planning services”. The Committee notes the State party’s arguments that the author was given correct and appropriate information at the time of the operation, during prenatal care and during her three previous pregnancies as well as its argument that, according to the decision of the lower court, the author had been in a condition in which she was able to understand the information provided. On the other hand, the Committee notes the author’s reference to the judgment of the appellate court, which found that the author had not been provided with detailed information about the sterilization, including the risks involved and the consequences of the surgery, alternative procedures or contraceptive methods. The Committee considers that the author has a right protected by article 10 (h) of the Convention to specific information on sterilization and alternative procedures for family planning in order to guard against such an intervention being carried out without her having made a fully informed choice. Furthermore, the Committee notes the description given of the author’s state of health on arrival at the hospital and observes that any counselling that she received must have been given under stressful and most inappropriate conditions. Considering all these factors, the Committee finds a failure of the State party, through the hospital personnel, to provide appropriate information and advice on family planning, which constitutes a violation of the author’s right under article 10 (h) of the Convention.

11.3 Article 12 of the Convention reads:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

With regard to the question of whether the State party violated the author’s rights under article 12 of the Convention by performing the sterilization surgery without obtaining her informed consent, the Committee takes note of the author’s description of the 17 minute timespan from her admission to the hospital up to the completion of two medical proce-

dures. Medical records revealed that the author was in a very poor state of health upon arrival at the hospital; she was feeling dizzy, was bleeding more heavily than average and was in a state of shock. During those 17 minutes, she was prepared for surgery, signed the statements of consent for the caesarean section, the sterilization, a blood transfusion and anaesthesia and underwent two medical procedures, namely, the caesarean section to remove the remains of the dead foetus and the sterilization. The Committee further takes note of the author's claim that she did not understand the Latin term for sterilization that was used on the barely legible consent note that had been handwritten by the doctor attending to her, which she signed. The Committee also takes note of the averment of the State party to the effect that, during those 17 minutes, the author was given all appropriate information in a way in which she was able to understand it. The Committee finds that it is not plausible that during that period of time hospital personnel provided the author with thorough enough counseling and information about sterilization, as well as alternatives, risks and benefits, to ensure that the author could make a well-considered and voluntary decision to be sterilized. The Committee also takes note of the unchallenged fact that the author enquired of the doctor when it would be safe to conceive again, clearly indicating that she was unaware of the consequences of sterilization. According to article 12 of the Convention, States parties shall "ensure to women appropriate services in connexion with pregnancy, confinement, and the post-natal period". The Committee explained in its general recommendation No. 24 on women and health that "[A]cceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity (...)" The Committee further stated that "States parties should not permit forms of coercion, such as non-consensual sterilization ... that violate women's rights to informed consent and dignity". The Committee considers in the present case that the State party has not ensured that the author gave her fully informed consent to be sterilized and that consequently the rights of the author under article 12 were violated.

11.4 Article 16, paragraph 1 e) of the Convention states:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(...)

e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

As to whether the State party violated the rights of the author under article 16, paragraph 1 e) of the Convention, the Committee recalls its general recommendation No. 19

on violence against women in which it states that “[C]ompulsory sterilization ... adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children”. The sterilization surgery was performed on the author without her full and informed consent and must be considered to have permanently deprived her of her natural reproductive capacity. Accordingly, the Committee finds the author’s rights under article 16, paragraph 1 e) to have been violated.

11.5 Acting under article 7, paragraph 3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it reveal a violation of articles 10 h), 12 and 16, paragraph 1 e) of the Convention and makes the following recommendations to the State party:

- I. Concerning the author of the communication: provide appropriate compensation to Ms. A. S. commensurate with the gravity of the violations of her rights.
- II. General:
 - Take further measures to ensure that the relevant provisions of the Convention and the pertinent paragraphs of the Committee’s general recommendations Nos. 19, 21 and 24 in relation to women’s reproductive health and rights are known and adhered to by all relevant personnel in public and private health centres, including hospitals and clinics.
 - Review domestic legislation on the principle of informed consent in cases of sterilization and ensure its conformity with international human rights and medical standards, including the Convention of the Council of Europe on Human Rights and Biomedicine (“the Oviedo Convention”) and World Health Organization guidelines. In that connection, consider amending the provision in the Public Health Act whereby a physician is allowed “to deliver the sterilization without the information procedure generally specified when it seems to be appropriate in given circumstances”.
 - Monitor public and private health centres, including hospitals and clinics, which perform sterilization procedures so as to ensure that fully informed consent is being given by the patient before any sterilization procedure is carried out, with appropriate sanctions in place in the event of a breach.

*Committee on the Elimination of
Discrimination against Women*

Şahide Goekce (deceased)

v. Austria

Communication N° 5/2005

Views adopted

August 6, 2007



[...]

*VIEWS UNDER ARTICLE 7, PARAGRAPH 3, OF THE OPTIONAL
PROTOCOL*

1. The authors of the communication dated 21 July 2004 with supplementary information dated 22 November and 10 December 2004, are the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, two organizations in Vienna, Austria, that protect and support women victims of gender-based violence. They claim that Sahide Goekce (deceased), an Austrian national of Turkish origin and former client of the Vienna Intervention Centre against Domestic Violence, is a victim of a violation by the State party of articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention and its Optional Protocol entered into force for the State party on 30 April 1982 and 22 December 2000, respectively.

Author's submissions:

2.1 The first violent attack against Sahide Goekce by her husband, Mustafa Goekce, that the authors are aware of took place on 2 December 1999 at approximately 4 p.m. in the victim's apartment at which time Mustafa Goekce choked Sahide Goekce and threatened to kill her. Sahide Goekce spent the night with a friend of hers and reported the incident to the police with the help of the Youth Welfare Office of the 15th district of Vienna the following day.

2.2 On 3 December 1999, the police issued an expulsion and prohibition to return order against Mustafa Goekce covering the Goekce apartment, pursuant to Section 38a of the Security Police Act (Sicherheitspolizeigesetz)¹. In the documentation supporting the order, the police officer in charge of the case stated that two light red bruises were visible under Sahide Goekce's right ear that, according to her, were from the choking.

2.3 Under section 107, paragraph 4, of the Penal Code (Strafgesetzbuch), a threatened spouse, direct descendant, brother or sister or relative who lives in the same household of the accused must give authorization in order to prosecute the alleged offender for making a criminal dangerous threat. Sahide Goekce did not authorize the Austrian authorities to prosecute Mustafa Goekce for threatening her life. Mustafa Goekce was, therefore, charged only with the offence of causing bodily harm. He was acquitted because Sahide Goekce's injuries were too minor to constitute bodily harm.

2.4 The next violent incidents of which the authors have knowledge occurred on 21 and 22 August 2000. When the police arrived at the Goekce's apartment on 22 August 2000, Mustafa Goekce was grabbing Sahide Goekce by her hair and was pressing her face to the floor. She later told the police that Mustafa Goekce had threatened to kill her the day before if she reported him to the police. The police issued a second expulsion and prohibition to return order against Mustafa Goekce covering the Goekce's apartment and the staircase of the apartment building, which was valid for 10 days. They informed the Public Prosecutor that Mustafa Goekce had committed aggravated coercion (because of the death threat) and asked that he be detained. The request was denied.

2.5 On 17 December 2001, 30 June 2002, 6 July 2002, 25 August 2002 and 16 September 2002 the police were called to the Goekce's apartment because of reports of disturbances and disputes and/or battering.

2.6 The police issued the third expulsion and prohibition to return order against Mustafa Goekce (valid for 10 days) as a result of an incident on 8 October 2002 that Sahide Goekce had called in; she claimed that Mustafa Goekce called her names, tugged her by her clothes through the apartment, hit her in the face, choked her and again threatened to kill her. Her cheek was bruised and she had haematoma on the right side of her neck. Sahide Goekce pressed charges against her husband for causing bodily harm and making a criminal dangerous threat. The police interrogated Mustafa Goekce and again requested that he be detained. Again, the Public Prosecutor denied the request.

2.7 On 23 October 2002, the Vienna District Court of Hernals issued an interim injunction for a period of three months against Mustafa Goekce, which forbade Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Sahide Goekce or the children. The order was to be effective immediately and entrusted to the police for execution. The children are all minors (two daughters and one son) born between 1989 and 1996.

2.8 On 18 November 2002, the Youth Welfare Office (which had been in constant contact with the Goekce family because of the violent assaults that took place in front of the children) informed the police that Mustafa Goekce had not obeyed the interim injunction and was living in the family apartment. The police did not find him there when they checked.

2.9 The authors indicate that the police knew from other sources that Mustafa Goekce was dangerous and owned a handgun. At the end of November 2002, Remzi Birkent, the

father of Sahide Goekce, informed the police that Mustafa Goekce had frequently phoned him and threatened to kill Sahide Goekce or another family member; no police report was filed by the police officer taking the statement of Mr. Birkent. Mustafa Goekce's brother also informed the police about the tension between Sahide Goekce and her husband and that Mustafa Goekce had threatened to kill her several times. His statement was not taken seriously by the police or recorded. The police did not check whether Mustafa Goekce had a handgun even though a weapons prohibition was in effect against him.

2.10 On 5 December 2002, the Vienna Public Prosecutor stopped the prosecution of Mustafa Goekce for causing bodily harm and making a criminal dangerous threat on grounds that there was insufficient reason to prosecute him.

2.11 On 7 December 2002, Mustafa Goekce shot Sahide Goekce with a handgun in their apartment in front of their two daughters. The police report reads that no officer went to the apartment to settle the dispute between Mustafa Goekce and Sahide Goekce prior to the shooting.

2.12 Two-and-a-half hours after the commission of the crime, Mustafa Goekce surrendered to the police. He is reportedly currently serving a sentence of life imprisonment in an institution for mentally disturbed offenders. ²

[...]

Consideration of the merits

12.1.1 As to the alleged violation of the State party's obligation to eliminate violence against women in all its forms in relation to Sahide Goekce in articles 2 a) and c) through f), and article 3 of the Convention, the Committee recalls its general recommendation 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "(...) discrimination under the Convention is not restricted to action by or on behalf of Governments (...) " and that "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

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.

12.1.3 In the instant case, the Committee notes that during the three-year period starting with the violent episode that was reported to the police on 3 December 1999 and ending with the shooting of Sahide Goekce on 7 December 2002, the frequency of calls to the police about disturbances and disputes and/or battering increased; the police issued prohibition to return orders on three separate occasions and twice requested the Public Prosecutor to order that Mustafa Goekce be detained; and a three-month interim injunction was in effect at the time of her death that prohibited Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Sahide Goekce or the children. The Committee notes that Mustafa Goekce shot Sahide Goekce dead with a handgun that he had purchased three weeks earlier, despite a valid weapons prohibition against him as well as the uncontested contention by the authors that the police had received information about the weapon from the brother of Mustafa Goekce. In addition, the Committee notes the unchallenged fact that Sahide Goekce called the emergency call service a few hours before she was killed, yet no patrol car was sent to the scene of the crime.

12.1.4 The Committee considers that given this combination of factors, the police knew or should have known that Sahide Goekce was in serious danger; they should have treated the last call from her as an emergency, in particular because Mustafa Goekce had shown that he had the potential to be a very dangerous and violent criminal. The Committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence to protect Sahide Goekce.

12.1.5 Although, the State party rightly maintains that, it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence, such as the right to freedom of movement and to a fair trial, 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 integrity⁴. In the present case, the Committee considers that the behaviour (threats, intimidation and

battering) of Mustafa Goekce crossed a high threshold of violence of which the Public Prosecutor was aware and as such the Public Prosecutor should not have denied the requests of the police to arrest Mustafa Goekce and detain him in connection with the incidents of August 2000 and October 2002.

12.1.6 While noting that Mustafa Goekce was prosecuted to the full extent of the law for killing Sahide Goekce, the Committee still concludes that the State party violated its obligations under article 2 a) and c) through f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and the corresponding rights of the deceased Sahide Goekce to life and physical and mental integrity.

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. At the same time, the Committee is of the view that the submissions of the authors of the communication and the State party do not warrant further findings.

12.3 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it reveal a violation of the rights of the deceased Sahide Goekce to life and physical and mental integrity under article 2 a) and c) through f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and makes the following recommendations to the State party:

- a) Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;
- b) Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim; and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;

- c) Ensure enhanced coordination among law enforcement and judicial officers and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence;
- d) Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation 19 of the Committee, and the Optional Protocol thereto.

12.4 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the German language and widely distributed in order to reach all relevant sectors of society.

[...]

ENDNOTES

- 1 This act has been translated as both the Security Police Act and the maintenance of Law and Order Act.
- 2 He is reportedly of sound mind (*compos mentis*) vis-à-vis the murder but was diagnosed to be mentally disturbed to a higher degree generally
- 4 See paragraph 9.3 of the Committee's views on communication No. 2/2003, A.T. v. Hungary.

*Committee on the Elimination of
Discrimination against Women*

Fatma Yildirim (deceased) v. Austria

Communication N° 6/2005

*Views adopted
August 6, 2007*



[...]

VIEWS UNDER ARTICLE 7, PARAGRAPH 3, OF THE OPTIONAL PROTOCOL

1. The authors of the communication dated 21 July 2004 with supplementary information dated 22 November and 10 December 2004, are the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, two organizations in Vienna, Austria, that protect and support women victims of gender-based violence. They claim that Fatma Yildirim (deceased), an Austrian national of Turkish origin and former client of the Vienna Intervention Centre against Domestic Violence, is a victim of a violation by the State party of articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention and its Optional Protocol entered into force for the State party on 30 April 1982 and 22 December 2000, respectively.

The facts as presented by the authors

2.1 The authors state that Fatma Yildirim married Irfan Yildirim on 24 July 2001. She had three children from her first marriage¹ two of whom are adults. Her youngest daughter, Melissa, was born on 30 July 1998.

2.2 Irfan Yildirim reportedly threatened to kill Fatma Yildirim for the first time during an argument while the couple was on a trip to Turkey in July 2003. On their return to Austria, they constantly argued. Fatma Yildirim wanted to divorce Irfan Yildirim, but he would not agree and threatened to kill her and her children should she divorce him.

2.3 On 4 August 2003, fearing for her life, Fatma Yildirim and her five-year-old daughter, Melissa, moved in with her eldest daughter, Gülen, at 18/29-30 Haymerlegasse. On 6 August 2003, believing that Irfan Yildirim was at work, she returned to their apartment to pick up some of her personal belongings. Irfan Yildirim entered the apartment while she was still there. He grabbed her wrists and held her — but she managed to escape. Subsequently, he called her on her cell phone and threatened to kill her again and she went to the Vienna Federal Police, District Department Ottakring, to report Irfan Yildirim for assault and for making a criminal dangerous threat.

2.4 On 6 August 2003 the police issued an expulsion and prohibition to return order against Irfan Yildirim covering the apartment pursuant to section 38a of the Security Police Act (Sicherheitspolizeigesetz)² and informed the Vienna Intervention Centre against

Domestic Violence and the Youth Welfare Office of the issuance of the order and the grounds therefore. The police also reported to the Vienna Public Prosecutor on duty that Irfan Yildirim had made a criminal dangerous threat against Fatma Yildirim and requested that Irfan Yildirim be detained. The Public Prosecutor rejected that request.

2.5 On 8 August 2003, with the assistance of the Vienna Intervention Centre against Domestic Violence, Fatma Yildirim applied on her own behalf and on behalf of her youngest daughter, to the Vienna District Court of Hernals for an interim injunction against Irfan Yildirim. The Vienna District Court of Hernals informed the Vienna Federal Police, District Department Ottakring, about the application.

2.6 That same day, Irfan Yildirim appeared at Fatma Yildirim's workplace and harassed her. The police were called in to settle the dispute, but they did not report the incident to the Public Prosecutor. Later on, Irfan Yildirim threatened Fatma Yildirim's 26-year-old son, who reported the incident to the police.

2.7 On 9 August, Irfan Yildirim threatened to kill Fatma Yildirim at her workplace. She called the police from her cell phone. By the time that the police arrived at Fatma Yildirim's workplace Irfan Yildirim had left — but was ordered to return there and the police spoke to him. Fatma Yildirim reported Irfan Yildirim to the police again after he threatened her and her son later that night and the police responded by speaking to him on his cell phone.

2.8 On 11 August 2003, Irfan Yildirim came to Fatma Yildirim's workplace at 7:00 pm. He stated that his life was over, that he would kill her and that her homicide would appear in the newspaper. When she called the police, Irfan Yildirim ran away. The police passed on the complaint to police inspectorate 17.

2.9 On 12 August 2003, a staff member (name is given) of the Vienna Intervention Centre against Domestic Violence informed the police at the Vienna Federal Police, District Department Ottakring, by fax message of the death threats, made on 9 and 11 August 2003, of the harassment at Fatma Yildirim's workplace, and of her application for an interim injunction. The police were given Fatma Yildirim's new cell phone number so that the police would always be able to reach her. The police were also asked to pay more attention to her case.

2.10 On 14 August 2003, Fatma Yildirim gave a formal statement about the threats made to her life to the police, who in turn reported to the Vienna Public Prosecutor on duty, requesting that Irfan Yildirim be detained. Again, this request was refused.

2.11 On 26 August 2003, Fatma Yildirim filed a petition for divorce at the Vienna District Court of Hernals.

2.12 On 1 September 2003, the Vienna District Court of Hernals issued an interim injunction pursuant to section 382b of the Act on the Enforcement of Judgments (Exekutionsordnung) against Irfan Yildirim for Fatma Yildirim valid until the end of the divorce proceedings and an interim injunction for Melissa valid for three months. The order forbade Irfan Yildirim from returning to the family's apartment and its immediate surroundings, from going to Fatma Yildirim's workplace and from meeting or contacting Fatma Yildirim or Melissa.

2.13 On 11 September 2003, at approximately 10:50 pm, Irfan Yildirim followed Fatma Yildirim home from work and fatally stabbed her on Roggendorfgasse, which is near the family's apartment.

2.14 Irfan Yildirim was arrested while trying to enter Bulgaria on 19 September 2003. He has been convicted of killing Fatma Yildirim and is serving a sentence of life imprisonment.

[...]

Consideration of the merits

12.1.1 As to the alleged violation of the State party's obligation to eliminate violence against women in all its forms in relation to Fatma Yildirim in articles 2 a) and c) through f), and article 3 of the Convention, the Committee recalls its general recommendation 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that " ... discrimination under the Convention is not restricted to action by or on behalf of Governments ... " and that "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

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.

12.1.3 In the instant case, the Committee notes the undisputed sequence of events leading to the fatal stabbing of Fatma Yildirim, in particular that Irfan Yildirim made continuous efforts to contact her and threatened by phone and in person to kill her, despite an interim injunction prohibiting him from returning to the couple's apartment, the immediate surroundings and her workplace as well as from contacting her, and regular police interventions. The Committee also notes that Fatma Yildirim made positive and determined efforts to attempt to sever ties with her spouse and save her own life — by moving out of the apartment with her minor daughter, establishing ongoing contact with the police, seeking an injunction and giving her authorization for the prosecution of Irfan Yildirim.

12.1.4 The Committee considers that the facts disclose a situation that was extremely dangerous to Fatma Yildirim of which the Austrian authorities knew or should have known, and as such the Public Prosecutor should not have denied the requests of the Police to arrest Irfan Yildirim and place him in detention. The Committee notes in this connection that Irfan Yildirim had a lot to lose should his marriage end in divorce (i.e. his residence permit in Austria was dependent on his staying married) and that this fact had the potential to influence how dangerous he would become.

12.1.5 The Committee considers the failure to have detained Irfan Yildirim as having been in breach of the State party's due diligence obligation to protect Fatma Yildirim. 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.⁶

12.1.6 While noting that that Irfan Yildirim was prosecuted to the full extent of the law for killing Fatma Yildirim, the Committee still concludes that the State party violated its obligations under article 2 a) and c) through f), and article 3 of the convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and the corresponding rights of the deceased Fatma Yildirim to life and to physical and mental integrity.

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. At the same time, the Committee is of the view that the submissions of the authors of the communication and the State party do not warrant further findings.

12.3 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the fact before it reveal a violation of the rights of the deceased Fatma Yildirim to life and to physical and mental integrity under article 2 (a) and (c) through (f) and article 3 of the Convention read in conjunction with article 1 and general recommendation 19 of the Committee and makes the following recommendations to the State party:

- a) Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;
- b) Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;
- c) Ensure enhanced coordination among law enforcement and judicial officers, and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence;
- d) Strengthen training programs and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation 19 of the Committee, and the Optional Protocol thereto.

[...]

ENDNOTES

- 1 Signed consent forms from two adult children and one minor represented by her father have been received.
- 2 This act has been translated as both the Security Police Act and the Maintenance of Law and Order Act.
- 6 See paragraph 9.3 of the Committee's views on communication No. 2/2003, A.T. v. Hungary.

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