2018 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

Case of María Elena Quispe and Mónica Quispe
v. Republic of Naira

BENCH MEMORANDUM

Prepared by

Julissa Mantilla Falcón

Washington College of Law
American University

Washington DC, 2018

INTRODUCTION

Domestic violence, sexual violence, street harassment and other manifestations of gender-based violence were long treated as private matters and ignored completely in scholarly doctrine, legal standards, and case law. In particular, sexual violence was not always considered a human rights violation or an international crime in the same category as acts such as forced disappearance, extrajudicial execution, or torture.

Now, the world seems to have "discovered" that sexual violence is a form of gender-based violence that has become naturalized, and that its complexity requires urgent attention at all levels, including—of course—in the legal sphere.

Therefore, the objective of this year's case is for the students to become familiar with the gender-based approach in law, research potential responses from the inter-American human rights system, and develop skills that enable them to use international standards to address gender-based violence, which is a grave international phenomenon.

The first part of this document notes some fundamental points of reference for the analysis of the case. The second part discusses aspects that may be highlighted by each team, with the aim of providing some guidelines for the review of their positions and arguments.

PART I: BACKGROUND[1]

I. GENERAL ASPECTS

1. International Human Rights Law (IHRL) and gender perspective:[2] gender-based violence and the principle of nondiscrimination

The application of a gender-based approach to IHRL has been no simple task, at the regulatory level or in international jurisprudence. Beyond treaties like CEDAW (1979)[3] and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) (1994),[4] this differentiated legal perspective is a constant and necessary challenge that has recently been developed at the international level.

Therefore, it must be understood that the gender-based approach allows for the legal analysis to include the characteristics and attributes that are identified in individuals pursuant to socially constructed beliefs, prescriptions, and powers, on the basis of sexual difference and within a dichotomous conception that sets male against female.[5] Social obligations, norms, and prohibitions are established for individuals on the basis of this dichotomy, and underlie discrimination and the subordination of women—as well as of the LGBTI population—that is, all those who do not fit neatly into the masculine and heterosexual model that has been adopted as the standard of reference. By acknowledging this situation, we can understand the impact of gender on the denial of human rights for these groups and the situations of gender-based violence that include, but are not limited to, sexual and domestic violence.

The law—not even IHRL—is no stranger to this process. Therefore, it must be examined from a gender perspective so we can understand its limitations as well as its potential for the effective recognition of human rights and the eradication of violence.

Along these same lines, it is vitally important to acknowledge the gender stereotypes that underlie human rights violations and the problems in the administration of justice that may arise if they are

---

[1] In addition to this text, it is advisable to review the answers to the clarification questions submitted by the participating teams.

[2] On this part, see: Mantilla, Julissa, "Derecho y perspectiva de género: un encuentro necesario," ["Law and Gender Perspective: a Necessary Intersection"] Vox Iuris 32, 2017; Fernández, Marisol & Félix Morales, "Métodos feministas en el Derecho. Aproximaciones críticas a la jurisprudencia peruana," ["Feminist Methods in Law. Critical Approaches to Peruvian Jurisprudence"] 2011; Jaramillo, Isabel Cristina, "La crítica feminista al Derecho. Estudio Preliminar," ["The Feminist Critique of Law. Preliminary Study"] in: Robin West, Género y teoría del Derecho [Gender and Legal Theory], Bogotá, 2000.

[3] Convention on the Elimination of All Forms of Discrimination against Women, 1979, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx

[4] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem do Para", 1994, http://www.oas.org/juridico/english/treaties/a-61.html

[5] Lamas, Marta, "El género es cultura", 2007, http://www.oei.es/historico/euroamericano/ponencias_derechos_genero.php.

reported, as those stereotypes help to establish a general situation of impunity.

As Cook says, a gender stereotype should be understood as "a generalized view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women."[6] This notion undoubtedly entails an element of discrimination by ignoring the individual characteristics of persons and assuming that obligatory qualities exist for those who belong to a specific group.

When individuals decide not to follow the gender prescriptions that have been assigned to them and, therefore, break with the stereotype, situations of violence may arise that the law has not adequately responded to until very recently—whether by initially failing to regulate and punish certain situation of violence (such as domestic violence, which was traditionally considered a "private" matter between individuals), by having legitimized situations of violence (such as criminal laws on rape that would allow the perpetrator to marry the victim in order to avoid going to prison), and by expressly denying equal rights (as with the prohibition of same-sex marriage), among other scenarios. In addition, gender stereotypes in the administration of justice contribute to impunity for human rights violations, as the Inter-American Court has held in its case law.

Therefore, applying a gender perspective to the law allows for a broader acknowledgement of individual rights, but also is rooted in the principle of nondiscrimination and the right to equality that—as the Inter-American Court has maintained—constitute norms of *jus cogens* and "are elements of a general basic principle related to the protection of human rights."[7] The Court also found that there was an "an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and nondiscrimination,"[8] which requires States not only to remove discriminatory regulations from their legal systems but also to combat practices of this kind.

2. Gender stereotypes, gender-based violence, and impunity

As stated previously, a gender stereotype is harmful when it limits the capacity of individuals to develop their personal faculties and make decisions about their lives.[9] But it is also harmful when it serves as the basis for violations of human rights and fundamental freedoms, the investigation of which is limited by those very stereotypes.[10]

[6] Cook, Rebecca & Simone Cusack, Estereotipos de género, Perspectivas legales y trasnacionales [Gender Stereotypes, Legal and Transnational Perspectives], Colombia, 2010.
[7] I/A Court H.R., Advisory Opinion 18/03, Juridical Condition and Rights of Undocumented Migrants, 2003.
[8] Id.
[9] Cook, Rebecca y Simone Cusack, Estereotipos de género, Perspectivas legales y trasnacionales, Colombia, 2010.Cook, Rebecca J., Op. Cit., p. 11.
[10] Ibid.

The Committee on Economic, Social, and Cultural Rights (CESCR)[11] has stated that gender-based expectations tend to place women at a disadvantage with respect to the full enjoyment of their rights, as gender stereotypes about economic, social, and cultural roles prevent men and women from sharing responsibilities in all spheres, as equality demands. Although gender stereotypes affect both men and women, it is women who suffer the most detrimental effects, because stereotypes reinforce and justify power asymmetries and maintain female subordination.[12]

As the Inter-American Court has indicated, discrimination against women is 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."[13] The Court also found that "The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women." Accordingly, the general context of violence and discrimination against women should be understood beyond the occurrence of specific acts.

The Inter-American Court has held that impunity for these types of crimes sends the message that violence against women is tolerated, which "leads to [its] 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."[14]

3. Violence against women as a form of discrimination and a human rights violation

At the international level, CEDAW (1979) is the treaty that addresses discrimination against women as a situation that impairs or nullifies the exercise of their human rights and fundamental freedoms.[15] This treaty establishes that the States Parties undertake to "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women" (Article 2.b) and to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" (Article 2.e). Additionally, Article 5 (a) requires the modification of "the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." In

[11] Committee on Economic, Social, and Cultural Rights, General comment No. 16: The equal right of men and women to the enjoyment of all economic, social, and cultural rights (art. 3), 2005, http://conf-dts1.unog.ch/1%20SPA/Tradutek/Derechos_hum_Base/CESCR/00_1_obs_grales_Cte%20Dchos%20Ec%20Soc%20Cult.html#GEN16

[12] Cardoso Onofre, Emanuela, Mujeres y estereotipos de género en la jurisprudencia de la Corte Interamericana de Derechos Humanos [Women and Gender Stereotypes in the Case Law of the Inter-American Court of Human Rights], in: Eunomía. Revista en Cultura de la Legalidad No. 9, October 2015 – March 2016.

[13] I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico, 2009.

[14] Idem.

[15] Convention on the Elimination of All Forms of Discrimination against Women, 1979, art. 1: "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."

1993, the Declaration on the Elimination of Violence against Women[16] stated that violence against women "is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women." The Declaration further emphasized the existence of specific groups of women that are particularly vulnerable to violence, such as indigenous women, refugees, migrant women, women who live in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women, and women in situations of armed conflict.

Additionally, in its General Recommendation No. 19 of 1992,[17] the CEDAW Committee established that violence against women was a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.[18] The Committee has specified that the treaty's 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."[19] Recently, in July 2017, the CEDAW Committee issued General Recommendation No. 35, which states that the *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law.[20] The Committee also considered that violence against women is a social rather than an individual problem, and that it is one of the means by which the subordinate position and their stereotyped roles are perpetuated, as well as an obstacle to women's full enjoyment of the human rights enshrined in the CEDAW.[21]

Violence against women began to be recognized as a human rights violation following the Declaration on the Elimination of Violence against Women (1993) and the Convention of Belém do Pará (1994). The Convention 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." It further states that violence against women includes physical, sexual and psychological violence, and may occur in different spheres such as the family, the community, or any other place, whether perpetrated by private individuals or by agents of the State, or tolerated by the State.[22]

The Convention additionally acknowledges that violence against women impairs and nullifies the exercise of civil, political, economic, social, and cultural rights, and declares that the States Parties recognize that violence against women impairs and nullifies the exercise of those rights.

---

[16] Declaration on the Elimination of Violence against Women, 1993, http://www.ohchr.org/SP/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx
[17] CEDAW Committee, General Recommendation No. 19, Violence against women, 1992, http://conf-dts1.unog.ch/1%20SPA/Tradutek/Derechos_hum_Base/CEDAW/00_4_obs_grales_CEDAW.html#GEN19
[18] Idem.
[19] Idem, p. 6.
[20] CEDAW Committee, General Recommendation No. 35, p. 1, 2017.
[21] Idem.
[22] Convention of Belém do Pará, Article 2.

One of the principal points of this treaty is that it underscores the right of every woman to be free from violence in both the public and private spheres, which includes, *inter alia*: a) The right of women to be free from all forms of discrimination; and b) The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination (art. 6).

The CEDAW Committee has recognized that this right is indivisible from and interdependent with other human rights, including the right to life, health, liberty and security of the person, the right to equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, freedom of expression, movement, participation, assembly and association.[23] The contextual analysis is therefore vitally important, as it serves as a framework for understanding the different manifestations of gender-based violence.

On this point, the Inter-American Court has noted that violence against women is not only a human rights violation but also "an offense against human dignity and a manifestation of the historically unequal power relations between women and men," that "pervades every sector of society, regardless of class, race, or ethnic group, income, culture, level of education, age or religion, and strikes at its very foundation."[24]

4. Obligations of the State regarding gender-based violence: the principle of due diligence

The principal consequence of the acknowledgement of violence against women as a human rights issue is that the international obligations of the State apply to its prevention, investigation, punishment, and reparation. Moreover, the Inter-American Court has established that in the case of violence against women "the general obligations established in Articles 8 and 25 of the American Convention are supplemented and enhanced for those States that are a party to it by the obligations arising from the specific inter-American treaty, the Convention of Belém do Pará."[25] As is well known, the Convention of Belém do Pará and the CEDAW complement the international *corpus juris* on the prevention and punishment of violence against women.[26]

Along these lines, the Convention of Belém do Pará provides that the States Parties should "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 (Article 7.e)" and, furthermore, "modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to

[23] CEDAW Committee, General Recommendation No. 35, para. 15, 2017.
[24] I/A Court H.R., Case of Favela Nova Brasília v. Brazil, 2017 (only in Spanish).
[25] I/A Court H.R., Case of Veliz Franco et al. v. Guatemala, 2014. paras. 183-184.
[26] I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009, para. 248.

every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women (Article 8.b)." This article should be read in the framework of the American Convention on Human Rights, Article 1.1 of which establishes the State's obligation to respect and guarantee rights. Additionally, Article 2 establishes the obligation of the States to bring their domestic laws into line with the provisions of the Convention in order to guarantee the rights enshrined therein. Finally, in the specific situation of the investigation of a case involving violence against women, the use of stereotypes by a State violates its duty to investigate with due diligence, that is, its duty to "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[27]

As for the obligation to investigate, the applicable human rights standards indicate that it is an obligation of means or conduct, which "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.[28]"

In the specific case of violence against women, Article 4 of the Declaration on the Elimination of Violence against Women[29] stipulates that the States must act with due diligence to prevent and investigate all acts of violence against women, whether perpetrated by the State or by private individuals. They must also take account of the fact that the investigative phase is a critical time, and therefore "the importance of due investigation cannot be overestimated, as deficiencies often prevent and/or obstruct further efforts to identify, prosecute and punish those responsible."[30] Similarly, the Convention of Belém do Pará establishes that 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:

b) Apply due diligence to prevent, investigate and impose penalties for violence against women; (...)
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

[27] I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Judgment of July 29, 1988, para. 166.
[28] I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Judgment of July 29, 1988, para. 177
[29] Declaration on the Elimination of Violence against Women, 1993, http://www.ohchr.org/SP/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx
[30] Inter-American Commission on Human Rights, Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination, OEA/Ser.L/V/II.117, Doc. 44, March 7, 2003, para. 137, cited in para. 38 of the Report of the Inter-American Commission on Human Rights, "Access to Justice for Women Victims of Violence in the Americas," 2006.

include, among others, protective measures, a timely hearing and effective access to such procedures; (...)

The Court has indicated that, in handling a case of violence against a woman, it is particularly important for the authorities in charge of the investigation to conduct it decisively and effectively, bearing in mind society's duty to reject violence against women and the State's obligation to eradicate it and ensure that victims can trust the institutions of the State for their protection.[31]

It is important to address whether the obligations of the State under the Convention of Belém do Pará allow for measures that provide a substitute or alternative to incarceration. On this point, we should refer to the decisions of the Inter-American Commission,[32] which, as a complement to the duty of due diligence, has rejected the use of alternative measures in cases of gender-based violence. In view of this position, criminal law scholars like Di Corleto maintain that "even when the granting of alternatives to incarceration is problematic because of the difficulties women face in asserting their rights in the criminal justice system, and given the specific characteristics of the cycle of violence, a rule that denies it in any scenario does not allow them to overcome all of the obstacles they encounter when they report the crimes perpetrated against them, either."[33] In this regard,[34] it is argued that extreme criminalization has not had good outcomes, as the policies that promote criminal prosecution *ex officio* are detrimental to many women who find themselves at odds with the system because they are not in a position to terminate or continue with a criminal proceeding once it has been initiated. Furthermore, there are not always measures in place to guarantee access to justice taking account of the heterogeneity of the victims and the diversity of their contexts; victims may experience discrimination, as well as disadvantages based on their economic situation, age, or immigration status, and criminal proceedings do not always reflect this diversity. Therefore, Di Corleto contends that "the use of alternatives to incarceration in all cases of gender-based violence may be discriminatory, and the prohibition against granting it for any situation may be arbitrary."[35]

In the specific case of sexual violence, the Inter-American Court has already ruled on matters in which it found, for instance, that evidence pertinent to the determination of sexual violence was omitted from judicial investigations, or its production was delayed, or the evidence was contaminated—meaning that there was no in-depth and effective investigation into the incident of violence, as well as of its possible causes and motives, where blame was shifted to the victim and her relatives, and

[31] I/A Court H.R., Case of Favela Nova Brasília v. Brazil, 2017 (only in Spanish).
[32] See: Case No. 13.240 – "Calle Aliaga, Marcelo re: Motion for cassation," in: Inter-American Commission on Human Rights, 2011, "*Legal Standards related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application.*"
[33] Julieta Di Corleto. Revista Electrónica "Género, Sexualidades y Derechos Humanos." (Centro de Derechos Humanos, Facultad de Derecho, Universidad de Chile) [Electronic Journal "Gender, Sexuality, and Human Rights." (Center for Human Rights, University of Chile School of Law)] Vol. I, No. 2 – July 2013. Medidas alternativas a la prisión y violencia de género [Gender-based Violence and Alternatives to Prison], p. 2.
[34] Ibidem, p. 8
[35] Ibidem, p. 9

authorities failed to pursue other potential lines of investigation into the circumstances of the case and the identification of the perpetrators.[36]

These investigations, moreover, should be conducted impartially and avoid revictimization, which occurs frequently when stereotypes are used. For instance, blaming a victim of violence for having placed herself in a dangerous situation, or discrediting her as a way to explain why she might have been the victim of violence, are some of the aspects most likely to lead to revictimization.[37]

In the case of *Favela Nova Brasília v. Brazil*,[38] the Court held that the States should take comprehensive measures to comply with due diligence, which includes having an adequate legal framework of protection, applying it appropriately, and implementing preventive policies and practices that allow for effective action in response to complaints. The Court stressed that the prevention strategy should be comprehensive—that is, it should prevent risk factors while simultaneously strengthening institutions so they can respond effectively. In other words, it is not enough to create mechanisms and institutions if they do not have an effective impact in practice.

The Inter-American Court has also stated that the obligation to investigate is an obligation of means or conduct that is not considered unmet just because the investigation fails to produce a satisfactory outcome, but that it must be undertaken by the State "as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[39]

When the acts to be investigated concern particular situations where the affected groups are in especially vulnerable situations—as with the victims in the hypothetical case—some specific guidelines must be followed in order for the principle of due diligence to be effective.

In the case of State agents, the responsibility of the States includes preventing acts and omissions that constitute violence against women, investigating, prosecuting, and applying appropriate legal or disciplinary sanctions as well as providing reparation in all cases of gender-based violence against women, including those constituting international crimes, as well as in cases of failure, negligence or omission on the part of public authorities. In so doing, women's diversity and the risks of intersectional discrimination stemming from it should be taken into consideration.[40]

[36] I/A Court H.R., Case of Velásquez Paiz et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 19, 2015. Series C No. 307 (Only in Spanish), para. 190.
[37] Inter-American Commission on Human Rights, Office of the Rapporteur on the Rights of Women. Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination, cit., paras. 125 & 143.
[38] I/A Court H.R., Case of Favela Nova Brasília v. Brazil, 2017 (only in Spanish).
[39] I/A Court H.R., Case of Velásquez Rodríguez v. Honduras, 1988, p. 177.
[40] CEDAW Committee, General Recommendation No. 35, para. 23, 2017.

In its case law, the Inter-American Court has addressed cases involving violence against women not only by examining individual victims but also by seeing them as part of a broader group subject to a structural situation of violence and inequality—a key aspect for understanding individual crimes in their true dimension.[41] The response to individual violations of human rights should therefore include a line of investigation that recognizes the context and continuity, for instance, of violence against women.

In the same vein, the recent Recommendation No. 35 of the CEDAW Committee clearly indicates that the States are responsible for preventing the acts or omissions of their own bodies and agencies that constitute gender-based violence against women—through training and the adoption, implementation and monitoring of legal provisions, administrative regulations, and codes of conduct—as well as through the investigation, prosecution, and application of appropriate legal or disciplinary sanctions and the provision of reparation, in particular for cases of gender-based violence against women that constitute international crimes, as well as in cases of failure, negligence or omission on the part of public authorities. In so doing, women's diversity and the risks of intersectional discrimination stemming from it should be taken into consideration.[42]

5. The notion of sexual violence: contributions from international case law

Although sexual violence is now recognized and condemned as a crime and a human rights violation, this was not always the case. For many years it was kept invisible, whether in the context of armed conflict or in daily life.

It was not until the 1990s, with the case law of the International Criminal Tribunals for the former Yugoslavia (ICTY, 1993) and Rwanda (ICTR, 1994), that the standards related to sexual violence began to really develop, and sexual violence came to be considered a crime against humanity, a war crime, a form of torture, and/or an element of genocide. This body of case law made it possible for the first time to bring cases of sexual slavery and forced nudity to court, and for sexual violence to cease to be considered collateral damage in armed conflicts and to be described as a strategy used to terrorize the population. The main contributions of this case law included setting aside the arguments that demanded the visible suffering of victims. It recognized that sexual violence gives rise to serious pain and suffering—both physical and mental—and established that proving rape was sufficient on its own to prove the element of severe suffering required for an act to constitute torture.

This case law included the landmark 1998 case of *Akayesu*, in which the ICTR defined sexual violence as any act of a sexual nature which is committed on a person under circumstances which are coercive,

[41] Abramovich, Víctor, Responsabilidad estatal por violencia de género: comentarios sobre el caso "Campo Algodonero" en la Corte Interamericana de Derechos Humanos, Anuario de Derechos Humanos, Universidad de Chile [State Responsibility for Gender-Based Violence: Remarks on the "Cotton Field" case in the Inter-American Court of Human Rights, Human Rights Yearbook, University of Chile], p. 168, 2010
[42] CEDAW Committee, General Recommendation No. 35, 2017.

affirming that 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 Tribunal further stated that rape is one form of sexual violence, and defined it as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.

Subsequently, the International Criminal Court included the broad regulation of sexual violence in its Statute, as both a crime against humanity and as a war crime.[43] It should be noted that the Court refers not only to rape but also to forced prostitution, forced pregnancy, forced nudity, forced sterilization, sexual slavery, forced abortion, and other cases of sexual violence.

At the inter-American level, the report of the Inter-American Commission in the case of *Raquel Martin de Mejía v. Peru* (1996) [44]was notable in finding that the rape suffered by the victim was a violation of Article 5 of the American Convention on Human Rights, which refers to the right to humane treatment, and concluding that it constituted an act of torture. This report paved the way for a number of advancements within the sphere of the inter-American system. In the case of *Castro Castro v. Peru* (2006),[45] the Inter-American Court underscored the importance of the gender-based analysis of human rights violations, and established that sexual violence was used as a means of punishment and repression. It found that there was a practice of rape and sexual violence in Peru, carried out mainly against women, used in the armed conflicts as a "symbolic means to humiliate the other party" and as a way to punish and repress women. In subsequent decisions, the Court has set important precedents with regard to the concept of rape, the investigation of acts of violence, the role of justice authorities, and gender stereotypes as a factor that affects the investigation of these acts.

Based on the case law, we can reconstruct the international standards that should guide the State's response to acts of sexual violence. In addition, it should be clear that:

1. The definition of "sexual violence" includes "acts of a sexual nature that are committed on a person without that person's consent, which, in addition to including the physical invasion of the human body, may include acts which do not involve penetration or even physical contact."[46]
2. Rape does not necessarily entail non-consensual vaginal intercourse, as was traditionally considered; rather, "it should also be understood [to include] acts of non-consensual vaginal, anal, or oral penetration without the consent of the victim, with other parts of the assailant's body or objects, as well as oral penetration by the assailant's penis. In particular, rape

[43] Articles 7 & 8 of the Rome Statute of the International Criminal Court, 1998, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
[44] IACHR, Raquel Martín de Mejía v. Peru, Case 10.970 Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 at 168 (1996).
[45] I/A Court H.R., Case of Castro Castro v. Peru, 2006, http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf
[46] I/A Court H.R., Case of Favela Nova Brasília v. Brazil, 2017 (only in Spanish).

constitutes a paradigmatic form of violence against women, and its consequences go far beyond the victim herself."[47]

3. Rape is a particular type of assault that, in general, is characterized by occurring in the absence of other persons beside the victim and the perpetrator or perpetrators.
4. Given the nature of this form of violence, graphic or documentary evidence cannot be expected to exist and, therefore, the victim's statement is an essential piece of evidence concerning the act.
5. Without prejudice to the subsequent legal classification of the acts, the Court considers that standard to be applicable to sexual violence in general.
6. Additionally, the examination of victim statements should take account of the fact that they deal with a type of crime that victims tend not to report, owing to the stigma that reporting it usually entails.
7. The absence of physical signs does not mean that abuse has not occurred, as these acts of violence against the person often do not leave permanent marks or scars. The same is true in cases of sexual violence and rape, which may not necessarily be evidenced by a medical examination.[48]
8. Sexual assaults are a type of crime that victims tend not to report, owing to the stigma that reporting it usually entails.[49]

As we will see below, there are several particular characteristics affecting female victims of violence, including victims of sexual violence and rape, that should be taken into consideration for an appropriate investigation.

The Court also recognizes that sexual violence against women may be used as a means of punishment and repression designed to produce an effect in society and intended to send a message or teach a lesson.

6. Specific nature of the obligation to investigate in cases of sexual violence and rape

As stated earlier, sexual violence in its diverse manifestations is a serious form of violence against women, the prevention, investigation, and punishment of which requires the maximum attention of the State. The Court has held that rape is a paradigmatic form of violence against women, and its consequences go far beyond the victim herself.[50] The Court has additionally established that rape may constitute an act of torture, which "may be perpetrated both through acts of physical violence and acts that cause acute mental or [emotional] suffering to the victim,"[51] considering that the severe

[47] Idem.
[48] Idem.
[49] See: I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, 2010; Case of J. v. Peru, 2013.
[50] I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, para. 109, 2010.
[51] I/A Court H.R., Case of Cantoral Benavides v. Peru. 2000; Case of Maritza Urrutia v. Guatemala.

suffering of the victim is inherent to rape, "even when there is no evidence of physical injuries or disease."[52]

In this regard, the principle of due diligence should follow specific guidelines that depart from the seemingly neutral traditional perspectives that only render these acts invisible. The Court[53] has specified the guidelines that should be considered in the investigation of sexual violence, establishing, for instance, that: i) the victim's statement should be taken in a safe and comfortable environment, providing privacy and trust; ii) the victim's statement should be recorded to avoid or limit the need for repetition; iii) the victim should be provided with medical, health care and psychological treatment, both on an emergency basis, and continuously if required, through an assistance protocol designed to lessen the consequences of rape; iv) a complete and detailed medical and psychological examination should be conducted immediately by suitable trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she may be accompanied by a trusted person if she so wishes; v) the investigative tasks should be coordinated and documented and the evidence handled with care, taking sufficient samples and performing all possible tests to determine the perpetrator of the act, and obtaining other evidence such as the victim's clothing, immediate examination of the crime scene and guaranteeing the proper chain of custody of the evidence, and vi) access to free legal assistance at all stages of the proceedings should be provided for the victim.[54]

In addition, it has been established that in cases of rape, the authorities responsible for the investigation should not focus their efforts on summoning the victim to make statements repeatedly. Rather, they should ensure that other evidence is obtained in order to prevent, to the extent possible, revictimization or the reliving of the traumatic experience.[55] The Inter-American Court has also recalled in its case law that, with regard to violence against women and sexual violence, "evidence relating to the sexual history of the victim is inadmissible, in principle; hence, opening lines of investigation into the previous social or sexual behavior of the victims in cases of gender violence is merely a manifestation of policies or attitudes based on gender stereotypes."[56] Accordingly, when the investigation is contaminated by stereotypical assessments of the victims and/or of the facts, the objectivity of the authorities involved is compromised, and the right to access to justice is infringed.[57]

In these cases, the State could be responsible for the omissions of its own apparatus that prevent the implementation of the above-described standards, for instance, when the State has knowledge of the events—even before the filing of a formal complaint—but fails to open an investigation immediately or provide prompt medical assistance to the victim in order for forensic evidence to be gathered. The Court has also found a lack of due diligence in cases of sexual violence in which it has verified, for instance, that evidence relevant to determining sexual violence was omitted or delayed during judicial

[52] I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico, para. 114, 2010.
[53] Idem, para. 178.
[54] Idem, para. 180.
[55] Ibidem.
[56] I/A Court H.R., Case of Veliz Franco et al. v. Guatemala, 2014, para. 209.
[57] Idem, Case of Gutiérrez Hernández v. Guatemala, 2017, para. 177 (Only in Spanish).

investigations, or when such evidence was contaminated, "meaning that there was no in-depth and effective investigation into the incident of violence, as well as of its possible causes and motives, where blame was shifted to the victim and her relatives, and authorities failed to pursue other potential lines of investigation into the circumstances of the case and the identification of the perpetrators."[58]

Therefore, it should be clear that when a State fails to investigate acts of sexual violence adequately, it establishes a situation of impunity and, furthermore, facilitates the perpetration of additional acts of violence. This is especially true and serious for States that have already had judgments issued against them in the Court in cases involving violence against women, such as Mexico, Peru, and Guatemala, among others. As stated above, the Court has held that impunity encourages the repetition of human rights violations,[59] regardless of the identity of the agent to whom the violation can eventually be attributed, including private individuals; the government's failure to seriously investigate their acts is tantamount to aiding their perpetration, which would give rise to the international responsibility of the State.

It is important to mention that when the victims are detainees—meaning that they are under the absolute control of the State—it creates a more serious and vulnerable situation for them, and therefore the responsibility of the State is greater. On this issue, the Court has indicated that the obligation to conduct an effective investigation has added implications when a woman has died or suffered ill-treatment or restriction of her personal liberty in the context of generalized violence against women,[60] considering also that rape in such circumstances violates the prohibition against torture, which is part of customary international law and has become *jus cogens*.[61]

Each individual case of violence against women is thus framed within the general context of a timeline that reflects both the acts and the judgments of the Court and other international decisions. The respective analysis should include the contextual factors and the specific measures taken by the States in the judicial investigation and punishment of the perpetrators. It should also include the measures related to women's human rights taken by the States over the years that make it possible to change the situation of vulnerability that facilitates and reproduces violence against women. For cases of violence that occurred many years earlier, statutes of limitation are rejected in favor of what the author of the hypothetical case calls "the victims' own time," [62] that is, the acknowledgement of the obstacles faced by victims of sexual violence in reporting these acts, considering that, in many cases, the victims themselves are not aware of the assault they suffered until a considerable length of time has elapsed. Along these lines, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims establish that the States must ensure that their domestic laws provide that "a victim who

[58] Idem, Case of Velásquez Paiz v. Guatemala, 2015, para. 190 (only in Spanish).
[59] Idem, Case of González et al. ("Cotton Field"), 2009, para. 289.
[60] Idem, Case of Espinoza Gonzalez v. Peru, 2014, para. 242.
[61] CEDAW Committee, General Recommendation No. 35, para. 25, 2017.
[62] Mantilla, Julissa. "Yo le quiero contar algo: el tiempo propio de las víctimas de violencia sexual" [I Want to Tell You Something: The Own Time of Victims of Sexual Violence]. September 2, 2017. IUS 360. http://ius360.com/sin-categoria/yo-le-quiero-contar-algo-el-tiempo-propio-de-las-victimas-de-violencia-sexual/

has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."[63]

7. Processes of truth, justice, and reparation for cases of gender-based violence[64]

Truth, justice, and reparation mechanisms have been developed—in addition to those established by the inter-American system—in transitional justice contexts, that is, in processes transitioning from dictatorship to democracy and from armed conflict to peace.[65] Although the facts of the hypothetical case do not necessarily fall within this scenario, it is important to make reference to some basic principles in the implementation of mechanisms that the State establishes in response to identified gender-based violence. Such references should include both the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2006[66] and Resolution 18/7, which created the Office of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. In that resolution, the Council established that the Special Rapporteur must, fundamentally, integrate a gender perspective and a victim-centered approach throughout the work of the mandate. Both perspectives should be understood as interrelated, just as the right to truth, justice, and reparation must be understood.

One of the mechanisms most representative of the right to truth are truth commissions, which can be defined as investigative bodies whose principal objective is to help societies confront their past with a view to overcoming the crises arising from violence and preventing their repetition.[67] In so doing, they investigate the facts, prepare guidelines for the reparation of the harm caused, and propose institutional reforms to ensure that the conditions that facilitated or fostered the violations are modified.[68]

---

63 OHCHR, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005.

64 This part was prepared based on: Mantilla, Julissa, "La importancia de la aplicación del enfoque de género al Derecho: Asumiendo nuevos retos" [The Importance of Applying a Gender Perspective to the Law: Taking on New Challenges]. Themis 63, 2013.

65 However, there are experiences such as the case of Colombia, which has incorporated transitional-type measures in the midst of the armed conflict, such as the 2011 Victims and Land Restitution Law [*Ley de Víctimas y Restitución de Tierras*], for instance.

66 OHCHR, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2006, http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

67 Cuya, Esteban, "Las comisiones de la verdad en América Latina" [Truth Commissions in Latin America], document presented at the seminar *Perú 1980-2000: El reto de la verdad y la justicia* [Peru 1980-2000: The Challenges of Truth and Justice], organized by Aprodeh, Lima, February 2001, p. 1, http://www.aprodeh.org.pe.

68 Valdez, Patricia, "Comisiones de la verdad. El camino recorrido" [Truth Commissions: How Far We Have Come], in *Páginas*, No. 168, 2001, pp. 51-56.

Their field of research is the past, as they focus on a set of abuses perpetrated during a specific period of time, beyond any specific act. They work with a clearly established and widely disseminated mandate, which serves as the measure of the public's expectations and civil society's response. They are temporary; they may last from around six months to two years, after which they present a report that provides an account of the facts investigated and their proposals for redress. In many cases, truth commissions also design reconciliation proposals. They do not exercise judicial or prosecutorial powers, and therefore do not establish the individual legal responsibility of persons involved in the acts investigated. Nevertheless, the information included in the final reports of truth commissions contributes to the administration of justice and the opening of cases with a view to identifying the perpetrators of the violations.

With few exceptions, the mandates of the truth commissions have been established in neutral terms, without differentiating acts based on the sex or identity of the victims. This has made their conclusions and the analysis of the facts overly broad. The voices and stories of women have been left out, their experiences totally ignored. The first Truth Commission was established in Argentina in 1983 (CONADEP), and other such mechanisms were later created in Chile (in 1990 and in 2011), Guatemala (1999), and Peru (2001), among other countries. There are plans to create a similar mechanism in Colombia, a Center for Historical Memory having been established in 2001. Of all of the above mechanisms, only the Peruvian and Guatemalan entities developed a gender and women's human rights perspective, and these aspects have also been incorporated into the Colombian experience.

As noted by UN Women, the mandates of truth commissions have paid scant attention to issues of gender, commonly focusing on violations of political or civil rights such as death, torture, and disappearances, "which can exclude the experience of secondary victims including female relatives."[69] This has caused women to organize their own Tribunals in some cases.

With regard to the right to justice—which is another pillar of transnational justice, and one applicable to the hypothetical case—reference may be made to the litigation of human rights violations committed during the dictatorships in Argentina and Chile. In the case of sexual violence, in April 2010 the court of Santa Fe in Argentina handed down the country's first judgment that established rape as a crime against humanity and therefore not subject to any statute of limitations. It should be underscored that in this case the complainant had kept the sexual violence a secret for 32 years,[70] which raises the likelihood that there are other similar cases that have not yet been reported, let alone prosecuted. In the case of Colombia, the statistics are not very encouraging, either: The November 2012 national report on Colombia of the Office of the Prosecutor of the International Criminal Court states that, as of March 2012, there were only 79 cases of confessed sexual violence in the Justice and

[69] UN WOMEN, Progress of the World's Women, pp. 94-95, 2011.
[70] http://www.pagina12.com.ar/diario/elpais/1-207945-2012-11-16.html , viewed in March 2017.

Peace proceedings, out of a total of 26,026 confessions by former members of paramilitary groups.[71] These considerations are important for the analysis of the hypothetical case and issues such as the application of statutes of limitations and the investigative mechanisms specific to sexual violence.

With regard to the right to reparation, very few of the current reparations programs have taken adequate account of women's needs. Incorporating a gender perspective into a reparations policy entails setting aside certain widespread and erroneous notions about the violation of women's human rights. First, there is the idea that crimes against women are not as important as other human rights violations and do not require the same level of attention, which means that women end up being ignored as rights-holders and, therefore, as victims. The doubts and prejudices surrounding women's testimony, which call into question their demands for redress, must also be set aside.

Therefore, applying a gender perspective to the concept of reparations involves a prior stage; that is, the gender analysis must also be applied to other concepts that serve as the foundation for the establishment of reparations, such as the definition of victims, the notion of harm, the specific measures of reparation, and so on. Additionally, it must be understood that gender exclusion predates the human rights violations—as tends to occur with other types of exclusions—and is aggravated during and after the human rights violations. This is why reparations programs need to include a gender perspective that modifies preexisting situations of pronounced gender inequality.

The exclusion to which women have traditionally been subjected has placed them in circumstances in which they have not been able to effectively enjoy their rights. It has been proven that illiteracy is higher among women; that maternal mortality is one of the main causes of death in our countries, and that women's wages are much lower than men's under the same circumstances and at the same skill level. The exercise of the right to a name and identity, as well as the right to own property, are other examples of the exclusion of women.

This is why it is important to take a *transformative approach* to reparations, which means understanding that it is not necessarily a question of returning the woman to her previous situation, but rather of transforming her situation to the full enjoyment of her rights and freedoms.

II. PART II: THE HYPOTHETICAL CASE

a) On the hypothetical case

As stated earlier, the hypothetical case and the answers to the clarification questions are designed to motivate the students to identify the complexities of gender-based violence, as well as to analyze the specific facts of the problems to be addressed.

[71] Source used in the Report: Office of the Attorney General of Colombia, National Unit of Prosecutors' Offices for Justice and Peace [*Fiscalía de la Nación, Gestión Unidad Nacional de Fiscalías para la Justicia y Paz*].

First, the case presents a broad context of gender discrimination, reflected in both the lack of acknowledgement of diverse gender identities and in the stereotypes present in the administration of justice. This is evident in the case of Zuleimy Pareja, a transgender woman who was murdered by her domestic partner Angelino Mendoza after complaining for years of his violent behavior toward her. The First Criminal Court decided that the crime could not be classified as femicide and considered it a crime of passion, a stereotype that has been rejected by the Inter-American Court in its judgments in cases from Guatemala, including *Veliz Franco, Velásquez Paiz,* and *Gutiérrez Hernández*. The case of Analía Sarmiento, who was raped and murdered by an individual who previously been twice charged and once convicted of rape, but was out on probation, reflects a very serious context of stereotypes and gender-based violence. This context provides the backdrop for the case of María Elena Quispe, who suffered numerous assaults at the hands of her husband Jorge Pérez, as well as for the investigation into the acts of violence against the Quispe sisters. The context analysis should also be applied to the time of the events at issue in the case, that is, to the situation of the Quispe sisters in 1992, when the SMB was operational, and when they were detained on false accusations for a month and forced to do laundry, cook, and clean every day. Both of them were also repeatedly raped—often gang-raped—by the soldiers. Many other women experienced the same situation while detained at the SMB.

A second element is reflected in the statistics—from official sources—on gender-based violence in Naira, which include cases of femicide, assault, rape, street harassment, and hate crimes against the LGBTI population, as well as in the statistics on issues concerning economic, social, and cultural rights, such as the wage gap, the distribution of unpaid domestic labor, and others. In terms of the regulatory framework, Naira has laws prohibiting street harassment as well as domestic violence and violence against women; it has also defined femicide and rape as criminal offenses, but without including other forms of sexual violence. The penalties are quite severe, especially when the victim is a minor, for instance. Nevertheless, the country has not decriminalized abortion in the case of rape, does not recognize same-sex marriage or adoption by same-sex couples, and does not have a gender identity law. The idea of Part II is to address the reality of gender-based violence in view of insufficient laws, and to address the fact that even the existing laws are not applied appropriately due to gender stereotypes.

A third element is found in the so-called "continuum" of sexual violence. The hypothetical case discusses acts of violence and confrontations in the southern region of the country between 1970 and 1990, principally in the provinces of Soncco, Killki, and Warmi, where the armed group "Freedom Brigades" (FB)—which has ties to drug trafficking—began carrying out terrorist actions with the aim of conducting its activities without government interference. The answers to the clarification questions specified that it was neither a civil war nor an armed conflict, in order to keep the discussion from focusing on the application of international humanitarian law. The continuum of sexual violence, then, should be understood based on the analysis of the harm at the time of the events and the difficulties in reporting such violence; it should also be understood based on how the impact of that situation is

still felt today, as with the vulnerable situation of the the Quispe sisters, who belonged to an indigenous group and were living in poverty.

A fourth element is related to whether the State adhered to the principle of due diligence at the time of the acts of violence against the Quispe sisters and when the media covered the events. The hypothetical case states that the then-President of Naira, Juan Antonio Morales, took a number of measures to address the acts of violence, such as declaring a state of emergency, suspending guarantees, and establishing Political and Judicial Command Units in the three provinces, which took control of the area by setting up military bases between 1980 and 1999. The case notes that the media reported some complaints of human rights violations, but that nothing ever came of them, even though subsequent governments opened a few investigations on their own initiative. For that reason, these events are now considered to be part of the past. On this point, the case also states that the government—which had already undertaken several measures to address the general situation of gender-based violence—took specific measures upon learning of the acts perpetrated against the Quispe sisters.

b) Arguments of the Parties

Below is a brief summary of the positions and arguments that may be used by the participating teams:

Arguments for the State:

1. The State met its duty of due diligence in carrying out its international obligations with respect to gender-based violence, by taking measures such as:

    a) The establishment of a Zero Tolerance Policy on Gender-Based Violence (ZTPGBV)
    b) The creation of a Gender-Based Violence Unit in the public prosecutor's office and in the judicial branch that will include specific measures to assist female victims, in addition to mandatory training and education for judges, prosecutors, and other public servants. In addition, this unit will have the authority to penalize public officials who commit acts of gender-based violence and discrimination.
    c) The creation of an Administrative Program on Reparations and Gender to implement reparations measures for the victims of any kind of gender-based violence, prioritizing cases of femicide and rape. Although this program will not allow for the litigation of cases, it will provide different economic and symbolic measures to address physical and mental health, education, housing, and employment, and victims will take part in its design. Registration with the Unified Registry of Victims of Violence is a requirement for accessing this program.
    d) The creation of a High-Level Committee to explore the potential reopening of the criminal cases.
    e) The creation of a Truth Commission (TC) composed of representatives of the state and

civil society, which will urgently undertake to investigate the facts.

f) The creation of a Special Fund for reparations that will be allocated as soon as the TC concludes its report.
g) Regarding the status of children born of rape, the state maintains that it will provide for their immediate registration in the Public Registry of the ZTPGBV.
h) The review the legislation on femicide, violence, discrimination, and issues of gender identity in the coming months so that, with broad citizen participation to create national consensus, those points considered discriminatory can be amended.

Applicable international law

- American Convention on Human Rights
  - Articles 1, 2, 8, and 25
- Convention of Belém do Pará
  - Articles 3, 4, 7, and 8

Case Law of the Inter-American Court

Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009

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

Case of Favela Nova Brasília v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 16, 2017. Series C No. 333

243. In relation to cases of sexual violence against women, the Court has held that the States should take comprehensive measures to comply with due diligence. 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.

2. The State of Naira respects the principle of the separation of powers, and therefore, the Executive Branch cannot interfere in the decisions of the Judicial Branch, which respects the right to procedural due process and legal institutions such as the application of statutes of limitations. It further considers that the prosecution of acts of violence is not necessarily the only measure with which to guarantee truth, justice, and the reparation of victims.

Applicable international law

- American Convention on Human Rights
  - Articles 2, 8, and 25
- Convention of Belém do Pará
  - Article 7

Case Law of the Inter-American Court

Case of the Constitutional Court v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001

71. Although the jurisdictional function belongs, in particular, to the Judiciary under the separation of powers that exists in the rule of law, other public organs or authorities may exercise functions of the same type. In other words, when the Convention refers to the right of everyone to be heard by a competent judge or court to "determine his rights," this expression refers to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations. For that reason, this Court considers that any State organ that exercises functions of a materially jurisdictional nature has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.

75. This Court considers that, under the rule of law, the independence of all judges must be guaranteed and, in particular, that of constitutional judges, owing to the nature of the matters submitted to their consideration.

3. The state of emergency was declared in compliance with the American Convention on Human Rights, that is, the other States Parties were notified through the OAS General Secretariat that Articles 7, 8, and 25 of the ACHR were suspended during the declared state of emergency; they were also notified of the suspension of the rights to the inviolability of the home, freedom of movement, the right of assembly, and the right not to be arrested without a probable cause warrant from a judge or by police authorities *in flagrante delicto*.

Applicable international law

- American Convention on Human Rights
  - Articles 7, 8, 25, and 27

IACHR Jurisprudence

Advisory Opinion OC-8/87 Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)

20. […] under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 and the principles contained in other here relevant international instruments. This has, in fact, been the experience of our hemisphere. Therefore, given the principles upon which the inter-American system is founded, the Court must emphasize that the suspension of guarantees cannot be disassociated from the "effective exercise of representative democracy" referred to in Article 3 of the OAS Charter.

Advisory Opinion OC-9/87. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)

Case 11.166, Walter Humberto Vásquez Vejarano. Peru. April 13, 2000

33. According to the Inter-American Court, The starting point for any legally sound analysis of Article 27

> (...) is the fact that it is a provision for exceptional situations only. It applies solely "in time of war, public danger, or other emergency that threatens the independence or security of a State Party." And even then, it permits the suspension of certain rights and freedoms only "to the extent and for the period of time strictly required by the exigencies of the situation." Such measures must also not violate the State Party's other international legal obligations, nor may they involve discrimination on the ground of race, color, sex, language, religion or social origin.

42. Furthermore, under Article 27(1) of the Convention, the suspension of guarantees must be consistent with the obligations established in other international instruments ratified by the country.

44. […] "in a serious emergency situation it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that 'the judicial guarantees essential for (their) protection' remain in force." It is also essential for the judicial branch to be independent, inasmuch as independence is the fundamental pillar of the rule of law and the protection of human rights. […] recourse to habeas corpus and the Action of Amparo are judicial guarantees for the

protection of rights that cannot be suspended and that "these judicial remedies (are) essential to ensure the protection of those rights." It is the function of the judiciary to protect legality and the rule of law during a state of emergency.

4. Although there were complaints of human rights violations at the time, there were no complaints of sexual violence. Furthermore, the authorities in the town of Warmi issued a public statement denying the reports, saying that they never would have allowed such a situation to exist in their community, and that GTV and Killapura were giving the town a bad name. The vast majority of the town's residents supported the statement of the authorities.

Applicable international law

- American Convention on Human Rights
  - Articles 1, 2, 8, and 25
- Convention of Belém do Pará
  - Articles 2 and 7

Case Law of the Inter-American Court

Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009

279. This Tribunal considers that it is necessary to clarify that not all violations of human rights committed in detriment of a woman necessarily implies a violation of the stipulations of the Convention of Belém do Pará. […] The representatives did not prove how the attacks were "especially direct[ed] against women," nor did they explain the reasons why women became a greater target of attack "based on their condition [of being women]."

280. […] The Court considers that the representatives did not specify the reasons and the manner in which the State incurred in a behavior "directed or planned" against the alleged female victims, nor did they explain the measure in which the proven facts where they were affected "were aggravated by their female condition." The representatives also failed to specify which facts and how they represent attacks that "affected women in a different [or] disproportional manner." Similarly, they have not based their arguments on the existence of acts that, under Articles 1 and 2 of the Convention of Belém do Pará, can be defined as "violence against women," or which would be "the appropriate measures" that, under Article 7(b) thereof, the State did not adopt in this case "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."

5. The State decided to file a preliminary objection to jurisdiction *ratione temporis*, arguing that the

Inter-American Court lacked jurisdiction in relation to the time of the events complained of, which would preclude the Court from rendering a decision with regard to them.

Applicable international law

- American Convention on Human Rights
  - Articles 1.1 and 62

Case Law of the Inter-American Court

Case of Heliodoro-Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008

24. […] the Court cannot exercise its contentious competence to apply the Convention and declare a violation of its provisions when the alleged facts or the conduct of the defendant State that could involve international responsibility took place prior to that State's acceptance of this competence. *Contrario sensu*, the Court is competent to rule on those violations that occurred after the date on which the State accepted the Court's competence or that had not ceased at that date. *(**See also:** Case of Cantos, supra note 11, para. 36; Case of Nogueira de Carvalho et al., para. 44; Case of the Girls Yean and Bosico v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 105).*

25. On this last point, on numerous occasions, the Court has considered that, without infringing the principle of non-retroactivity, it can exercise its competence *ratione temporis* to examine those facts that constitute violations of a continuing or permanent nature; in other words, those that occurred before the date on which the Court's competence was recognized, and that persist after that date *(**See also:** Case of the Serrano Cruz Sisters, para. 65; Case of Nogueira de Carvalho et al., para. 45; Case of Vargas Areco v. Paraguay, para. 63.)*

Arguments for the Victims:

1. The State has not acknowledged that the facts of the case do not involve everyday gender violence, but rather have greater implications due to the possible mass nature of the events in Warmi and the widespread nature of the sexual violence there, the diverse manifestations of which are not covered under current legislation.

Applicable international law

- American Convention on Human Rights
  - Articles 2, 8, and 25.
- Convention of Belém do Pará

- Articles 2, 3, 4, 6, 7, and 8

Case Law of the Inter-American Court

Case of the Plan de Sánchez Massacre v. Guatemala. Reparations. Judgment of November 19, 2004

49. The women who were raped by the State agents on the day of the massacre, and who survived the massacre, still suffer from that attack. The rape of women was a State practice, executed in the context of massacres, designed to destroy the dignity of women at the cultural, social, family and individual levels. These women consider themselves stigmatized in their communities and have suffered from the presence of the perpetrators in the town's common areas.

Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006

223. […] 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."

Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009

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

388. […]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.

Case of the "Las Dos Erres" Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009

139. The Court notes [that] 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 "The 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."

Case of Veliz Franco et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2014

207. The Court considers that gender-based violence – that is, violence directed against a woman because she is a woman, or violence that affects women disproportionately – is a form of discrimination against women, as indicated by other international bodies involved in the protection of human rights, such as the European Court of Human Rights and CEDAW. Both the Convention of Belém do Pará (preamble and Article 6) and the Convention for the Elimination of All Forms of Discrimination against Women (preamble) have recognized the connection that exists between violence against women and discrimination. […].

2. The victims contend that the State failed to comply with the principle of due diligence, both when the acts of sexual violence occurred and at the present time. This is clear because the measures it has taken have not been properly implemented and do not address the actual situation of the Quispe sisters or the ongoing nature of sexual violence.

Applicable international law

- American Convention on Human Rights
  - Articles 1, 2, 8, and 25
- Convention of Belém do Pará
  - Article 7

Case Law of the Inter-American Court

Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009

258. […] States should adopt comprehensive measures to comply with due diligence in cases of

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

388. […] 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.

3. The State is using the statute of limitation as a way to avoid international responsibility for truth, justice, and reparation for the victims. It is also ignoring the standards set forth in the relevant case law of the inter-American system as well as the provisions of international treaties such as the Convention of Belém do Pará, which establishes the obligation of the States to prosecute acts of violence against women.

Applicable international law

- American Convention on Human Rights
  - Articles 1, 2, 8, and 25
- Convention of Belém do Pará
  - Articles 1, 6, 7, and 8

Case Law of the Inter-American Court

Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs. Judgment of May 11, 2007

146. This Court has indicated that the right to judicial access must secure the right of the alleged victims or their next of kin to have every measure taken such that the truth of the events may be known within a reasonable time and that those eventually found responsible be

punished *(**See also:** Case of the Miguel Castro Castro Prison, para. 382; Case of Vargas Areco, para. 101; and Case of the Ituango Massacres, para. 289).*

147. With regard to the violation of Article 13 of the American Convention alleged by the representatives, the Court notes that the right to truth is subsumed within Articles 8 and 25 of the Convention. These Articles provide the right of the victim or his or her next of kin to obtain a State determination of the truth of the events and the corresponding responsibility through an investigation and trial *(**See also:** Case of Almonacid Arellano et al., paras. 148; Case of Blanco Romero et al., para. 62; Case of Gómez Palomino, para. 78.).*

155. The Court finds that, upon an analysis of the lack of due diligence exercised by those who conducted the official investigations, the ineffectiveness of these criminal proceedings is clearly demonstrated. This lack of due diligence is manifested in the unreasonable length of the proceedings; the failure to adopt the necessary measures to protect against the threats which arose during the investigations; the delays, obstacles and obstructions which arose during the proceedings, and the grave omissions in the development of logical lines of investigation.

I/A Court H.R., Case of Favela Nova Brasília v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 16, 2017. Series C No. 333.

244. Article 7.b of the Convention [of Belém do Pará] specifically requires the States Parties to apply due diligence to prevent, investigate and impose penalties for violence against women. Therefore, in the handling of a case of violence against a woman, it is particularly important for the authorities in charge of the investigation to conduct it decisively and effectively, bearing in mind society's duty to reject violence against women and the State's obligation to eradicate it and ensure that victims can trust the institutions of the State for their protection.

252. The Court has also held in numerous judgments that rape is a form of torture. In that regard, the obligation to investigate is reinforced by the provisions of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, which require the State 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," […] [and] 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."

4. The State has ignored the principle of the continuity of the State and its responsibility for the establishment of the SMBs, whose regulations, mechanisms, and duties were assigned by the Executive Branch. The members of the military at the State Military Base had not only military

command authority but also political and judicial authority. They held centralized power and exercised real authority over everything that happened in Warmi. As a result, the population was completely subordinate to them. The victims' failure to file a complaint cannot be interpreted as a mitigation of the State's responsibility, since the president of the Republic of Naira—as the commander-in-chief of the armed forces and the police—could have known about the events. In addition, the Ministry of Justice and Defense, also having control over the armed forces, had the opportunity to find out about and investigate the acts of violence that took place during those years.

Applicable international law

- American Convention on Human Rights
  - Articles 1, 2, 8, and 25
- Convention of Belém do Pará
  - Articles 2, 7, and 8

Case Law of the Inter-American Court

Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006

224. […] The use of state power to [violate] the rights of women in [an internal] conflict, besides affecting them directly, may have the purpose of causing an effect in society through those [violations] and send[ing] a message or [teaching] a lesson.

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.

311. The Court acknowledges that the [rape] of a detainee by a State agent is an especially [serious] and reprehensible act, taking into account the victim's vulnerability and the abuse of power displayed by the agent. Similarly, [rape] is an extremely traumatic experience that may have serious consequences and it causes great physical and psychological damage that leaves the victim "physically and emotionally humiliated," [a] situation difficult to overcome with time, [unlike] what happens with other traumatic experiences.

Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009.

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 […], 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.

Case of the "Las Dos Erres" Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009

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" […].

Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 30, 2010

118. The Court recalls, as indicated by the Convention of Belém do Pará, that violence against women constitutes not only a violation of human rights, but is "an offense against human dignity and a manifestation of the historically unequal power relations between women and men," that "pervades every sector of society, regardless of class, race, or ethnic group, income, culture, level of education, age or religion, and strikes at its very foundation" *(**See also:** Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010, para. 108).*

128. On the other hand, this Court finds that rape may constitute torture even when it is based [on] a single fact alone and takes place outside State facilities, such as in the victim's home (***See also:*** *Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010, para. 118).*

Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010.

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

109. In accordance with international case law and taking into account the provisions of the Convention, the Court has previously considered that sexual violence involves acts of a sexual nature, committed against a person without their consent, and that in addition to the physical invasion of the human body, they may include acts which do not involve penetration or even any physical contact. In particular, rape constitutes a paradigmatic form of violence against women, and its consequences go far beyond the victim herself.

Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, Reparations and Costs. Judgment of October 25, 2012

164. In this regard, the Court reiterates that it is evident that rape is a particular type of violence that is generally characterized by occurring in the absence of anyone other than the victim and the aggressor or aggressors *(**See also:** Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 30, 2010, para. 100).*

165. The Court considers that the severe suffering of the victim is inherent in rape and that, in general, like torture, rape seeks, among other aspects, to intimidate, degrade, humiliate, punish or control the person who endures it. In order to characterize a rape as torture, it is necessary to analyze the intent, the severity of the suffering and the purpose of the act, taking into consideration the specific circumstances of each case […].

Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013

361. The Court considers that the sexual violence perpetrated by a State agent of which Ms. J. was a victim and while she was being arrested is a serious and reprehensible act, taking into account the vulnerability of the victim and the abuse of power [exercised] by the agent. Regarding Article 5 of the Convention, the Court considers that the said act was both physically and emotionally degrading and humiliating, [and therefore] could have had severe psychological consequences for the presumed victim.

363. The Court has indicated that any use of force that is not strictly necessary due to the conduct of the person detained constitutes an attack on human dignity, in violation of Article 5 of the American Convention. […].In addition, the sexual violence of which Ms. J. was a victim [also constitutes a violation of her right to personal integrity].

364. To define what should be understood as "torture" in light of Article 5(2) of the American Convention, according to the Court's case law, an act that constitutes torture occurs when the ill-treatment: (a) is intentional; (b) causes severe physical or mental suffering, and (c) is committed for an objective or purpose. It has also been recognized that, under certain

circumstances, threats and the real danger of a person being subjected to physical injuries produces such a degree of [mental] anguish that it can be considered psychological torture.

Case of Espinoza Gonzáles v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014

195. Lastly, the Court considers it pertinent to recall, as already established in this case, that one of the forms of the generalized practice of torture was the generalized practice of sexual violence against women, in particular by State agents, and against women who were [allegedly] involved in the armed conflict […].

5. The State cannot argue that the denial of the events by local residents and authorities means that they did not take place; to do so would mean disregarding the international standards established for the investigation of acts of sexual violence.

Applicable international law

- American Convention on Human Rights:
  - Articles 1, 2, 4, 5, 6, 7, 8, and 25
- Convention of Belém do Pará:
  - Articles 2, 3, 4, 6, and 7

Case Law of the Inter-American Court

Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 30, 2010

100. First, the Court finds it evident that rape is a special type of violence, which is generally characterized as taking place in the absence of persons other than the victim and the aggressor or aggressors. In view of the nature of this type of violence, one cannot await graphic or documentary evidence, thus the victim's statement becomes the fundamental proof of that which occurred.

Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, Reparations and Costs. Judgment of October 25, 2012

243. […] In cases of violence against women, the general obligations established in the American Convention are complemented and enhanced by those derived from the Convention of Belém do Pará, Article 7(b) of which specifically requires that States Parties apply due diligence to prevent, punish and eradicate violence against women. Likewise, there is an obligation to conduct an effective investigation in certain cases of enforced displacement.

Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013

323. […] The Court has established that sexual abuse is a particular type of violence that, in general, is characterized by occurring in the absence of persons other than the victim and the perpetrator or perpetrators. Given the nature of this type of violence, the existence of graphic or documentary evidence cannot be expected and, therefore, the victim's statement constitutes fundamental proof of the act. Notwithstanding the legal definition of the facts established *infra*, the Court considers that this standard is applicable to sexual violence in general. In addition, when analyzing the said statements it must be borne in mind that sexual violence corresponds to a type of offense that the victim does not usually report, owing to the stigma that reporting it usually entails […].

324. Furthermore, the Court considers that the variations in the legal definitions of sexual violence and rape that the [alleged] victim's representative has accorded to the facts throughout the proceedings before the inter-American system does not discredit the testimony provided in the domestic sphere by Ms. J. concerning the events that occurred. Moreover, the Court notes that this is true even in relation to later statements made by the [alleged] victim. In this regard, the Court has considered that a denial of the occurrence of a [reported sexual attack] does not necessarily disprove the statements [indicating what] had happened, but must be analyzed taking into account the specific circumstances of the case and of the victim. In addition, the legal definition of the acts that the [alleged] victim used in her statements must be assessed taking into account the usual meaning of the words used, which does not necessarily correspond to their legal definition. The relevant factor is to evaluate whether the acts described, and not the legal definition given to them, were consistent.

Case of Veliz Franco et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2014

134. […] From the above it can be inferred that, in keeping with this normative framework concerning violence against women, the obligation to ensure rights acquires special significance in relation to girl children. This is so because the intrinsic vulnerability of childhood may be enhanced, due to the fact that they are female. In this regard, it should be noted that girls are, as has been stated, "particularly vulnerable to violence." The special significance mentioned translates into the State's obligation to act with greater and more rigorous diligence to protect and ensure the exercise and enjoyment of the rights of girl children in response to the fact or the mere possibility of their vulnerability in the presence of acts that actually or potentially involve gender-based violence or could result in this type of violence.

6. The State has not taken account of the victims' situation of special vulnerability, given that they belong to an indigenous community and are living in extreme poverty.

Applicable international law

- American Convention on Human Rights
  - Articles 1, 2, 4, 5, 6, 7, 8, and 25
- Convention of Belém do Pará
  - Articles 2, 3, 4, 5, 6, and 7

Case Law of the Inter-American Court

Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009.

293. […] 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." This criterion is wholly applicable when examining the scope of the obligation of due diligence in the investigation of cases of gender-based violence.

Case of the Plan de Sánchez Massacre v. Guatemala. Reparations. Judgment of November 19, 2004

49.19 The women who were raped by the State agents on the day of the massacre, and who survived the massacre, still suffer from that attack. The rape of women was a State practice, executed in the context of massacres, designed to destroy the dignity of women at the cultural, social, family and individual levels. These women consider themselves stigmatized in their communities and have suffered from the presence of the perpetrators in the town's common areas. Also, the continuing impunity of the events has prevented the women from taking part in the legal proceedings.

Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012

59. […] Thus, during and prior to the said massacres or "scorched earth operations," members of the State security forces committed mass or indiscriminate and public rape, at times accompanied by the death of pregnant women or the induction of abortions. This practice was intended to destroy a woman's dignity at the cultural, social, family and individual levels. In addition, it should be indicated that, according to the CEH, when perpetrated against Mayan

communities "the mass rapes had a symbolic effect, because Mayan women are responsible for the social reproduction of the group […] [and] personify the values to be reproduced in the community."

Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 30, 2010

223. The Court recalls that the victim in the present case is an indigenous woman, in a particularly vulnerable situation, and this will be taken into account in the reparations awarded in this Judgment. Furthermore, the Court finds that the obligation to make reparation to a victim belonging to an indigenous or tribal community may call for measures that encompass the community […].

Case of Rosendo-Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010.

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

III. CONCLUSION

As stated at the outset, the objective of this year's hypothetical case is to challenge the traditional way in which the law has been understood and to encourage the participating teams—as well as the professors and jurists—to understand the importance of the differential approach and the complexity of gender-based violence that the case presents. In addition, it aims to open up the possibilities for the international litigation of these acts of violence that have traditionally not been accorded the same significance, both nationally and at the inter-American level. The case law of the Inter-American Court in recent years shows a new perspective and openness, and it is important for this trend to be consolidated in the interest of the victims' rights to truth, justice, and reparation.