

TO BE A WOMAN AND DISAPPEAR

Gender-related Standards of the
Inter-American Court of Human Rights
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IN RECENT DECADES, A GENDER-BASED APPROACH TO THE ANALYSIS OF HUMAN RIGHTS VIOLATIONS HAS GAINED GROUND THROUGHOUT THE WORLD. This has come about primarily through the efforts of women and their organizations who, supported by allies from civil society and the international human rights community, have brought to light the systemic inequity and prevalent discrimination against women and girls.

The persistence of gender-based violence is the starkest manifestation of inequality between women and men. According to the Economic Commission for Latin America and the Caribbean (ECLAC), **gender-based violence occurs systematically in the region, and in all spheres.** Between 60% and 76% of women have been victims of gender-based violence, and on average one in three women has been a victim or is experiencing physical, psychological, and/or sexual violence at the hands of her current or former partner.¹ ECLAC notes that these types of violence are linked to, and increase the risk of, gender-based violence at its worst: **femicide**,² which is the intentional killing of a woman because she is a woman. Latin America is therefore a dangerous region for women and girls.³

This is also evidenced by the fact that, combined with femicides and other criminal phenomena such as human trafficking, **disappearances of women and girls have been on the rise in recent years**,⁴ perpetrated by both criminal organizations and State actors (or both working to-

1 ECLAC. (24 November 2020). ECLAC: The Persistence of Violence against Women and Girls in the Region and Femicide, its Maximum Expression, is Troubling. Available at <https://www.cepal.org/en/pressreleases/eclac-persistence-violence-against-women-and-girls-region-and-femicide-its-maximum>.

2 According to the most recent statistics from ECLAC's Gender Equality Observatory (OIG), in 2019 there were 4,640 femicides in the region; in other words, every day an average of twelve women and girls die because they are women. See, Gender Equality Observatory for Latin America and the Caribbean. *Femicide or feminicide*. Available at <https://oig.cepal.org/en/indicators/femicide-or-feminicide>.

3 UNDP and UN Women. (2017). *From Commitment to Action: Policies to End Violence Against Women in Latin America and the Caribbean*. Panama: UN House. Available at https://www.latinamerica.undp.org/content/rblac/en/home/library/womens_empowerment/del-compromiso-a-la-accion--politicas-para-erradicar-la-violenci.html.

4 Mexico is an example of this phenomenon. According to the Director of Mexico's National Search Commission (CNB),

gether), as ways of reinforcing the dominance of hegemonic masculinity. Besides this current phenomenon, **women and girls were also disappeared during armed conflicts and military dictatorships in Latin America**, when disappearance was a strategy for eliminating people considered political opponents or enemies of a regime, to ensure the supremacy of a political and economic elite or to maintain the existing power hierarchies.

Although most victims of enforced disappearance—then and today—continue to be men,⁵ **the need to investigate the disappearances of women with special diligence and a specialized perspective is not based on statistics, but on the fact that women who are victims of this crime experience it differently than men do.**

When women are disappeared, they may face the same torture, mistreatment, and abuse that men do, but they are also much more likely to be victims of sexual violence and torture, as well as other types of gender-based violence, including in relation to their reproductive rights and their role as mothers.⁶ For example, the cases of pregnant women forcibly separated from their babies at birth during the dictatorship in Argentina, or the children of women disappeared by military forces who were adopted by military families during the internal armed conflict in El Salvador, are well known.⁷

As the case law and scholarly literature has discussed,⁸ **violence against women is not the result of isolated and individual acts of misconduct; rather, is rooted in a web of unequal re-**

Karla Quintana, a quarter of the victims of disappearance are women or girls, most between the ages of fifteen and nineteen. See (October 7, 2020) *Miradas nacionales e internacionales sobre la búsqueda de mujeres desaparecidas* [National and international perspectives on the search for missing women]. Webinar. Office of the Ombudsperson of Peru, available at <https://www.youtube.com/watch?v=OqbYad6u4bM> See also Pérez, M., Quiroga, R. and the Editorial Board (March 8, 2021). *Desapariciones de mujeres, en niveles históricamente altos* [Disappearances of Women at Historically High Levels]. *El Economista*. Available at <https://www.eleconomista.com.mx/politica/Desapariciones-de-mujeres-en-niveles-historicamente-altos-20210308-0008.html>

- 5 Dulitzky, A. and Lagos, C. (2015). *Jurisprudencia Interamericana sobre desaparición forzada y mujeres: La tímida e inconsistente aparición de la perspectiva de género* [Inter-American Case Law on Forced Disappearance and Women: The timid and inconsistent emergence of a gender perspective]. *Lecciones y Ensayos* [Lessons and Essays], 94, 45-94. Available at <http://www.derecho.uba.ar/publicaciones/lye/revistas/94/jurisprudencia-interamericana-sobre-desaparicion-forzada-y-mujeres.pdf>.
- 6 Dewhirst, P. and Kapur, A. (March 2015). The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearances on Women. *International Center for Transitional Justice (ICTJ)*. Available at <https://www.ictj.org/publication/disappeared-and-invisible-women-disappearances>.
- 7 Dewhirst, P. and Kapur, A. (2015, March). The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearances on Women. *International Center for Transitional Justice (ICTJ)*. Available at <https://www.ictj.org/publication/disappeared-and-invisible-women-disappearances>.
- 8 See Office of the United Nations High Commissioner for Human Rights in Guatemala (OHCHR). (2015). *Herramienta para la incorporación del enfoque de derechos humanos y la perspectiva de género, en la elaboración de sentencias relativas a delitos de feminicidio y otras formas de violencia contra la mujer* [Tool for integrating a human rights and gender perspective into judgments in cases involving crimes of femicide and other forms of violence against women]. Guatemala City: Editorial Serviprensa; see also I/A Court H.R. *Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos N° 4: Derechos Humanos y Mujeres* [Journal of Jurisprudence of the Inter-American Court of Human Rights No. 4: Human Rights and Women].

relationships,⁹ especially in the distribution of care work and child-rearing duties, as well as in access to decision-making and economic resources. **To adequately investigate, prosecute, punish, and provide redress in cases involving the disappearance of women, this context must be considered.** Any manifestation of gender inequality experienced by women and girls places them at greater risk of being disappeared.

In international law, the legal protection instruments specific to enforced disappearance recognize that the obligation to investigate, prosecute, and ultimately convict the perpetrator is essential in the fight against impunity,¹⁰ and that States must not adopt measures that interfere with meeting this obligation, such as amnesty laws. The international scholarly literature has also been clear in stating that, if there are reasonable grounds to believe that a person has been the victim of a enforced disappearance, the State has the duty to refer the matter to the judicial authorities for investigation—even absent a formal complaint. This investigation may not be curtailed or impeded in any way, and it should remain open as long as the fate of the disappeared person remains uncertain.¹¹

Article I(b) of the Inter-American Convention on Forced Disappearance of Persons affirms that the States undertake to punish those persons who commit the crime of enforced disappearance, with the ensuing obligation to investigate such cases.¹² Article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance establishes the State's obligation to investigate cases of enforced disappearance of persons, even in the absence of a formal complaint.¹³ This investigation should be thorough and impartial, and the authorities should have the powers and resources to conduct it effectively. The obligation to investigate the disappearance of a person is complemented by the right of the family members to know the truth about the disappeared person's fate and circumstances and, ultimately, to receive his or her mortal remains.¹⁴

In the regional human rights system, enforced disappearance has been one of the main subjects of the decisions of the Inter-American Court of Human Rights (“the Inter-American Court” or “the Court”). The work of this regional body over the past 40 years has had a major impact

9 IACHR. *Violence and Discrimination against Women and Girls*. OEA/Ser.L/V/II, Doc.233, November 14, 2019.

10 All States have a fundamental obligation to investigate the commission of serious human rights violations, which is derived from the obligation of guarantee that requires States to respect and protect the human rights of all persons. See *American Convention on Human Rights*, art. 1.1; *International Covenant on Civil and Political Rights*, art. 2. Regarding the obligation to investigate and punish enforced disappearances in particular, see also Declaration on the Protection of All Persons from Enforced Disappearance.

11 *Declaration on the Protection of All Persons from Enforced Disappearance*, art. 13.

12 *Inter-American Convention on Forced Disappearance of Persons*, art. 1(b).

13 *International Convention for the Protection of All Persons from Enforced Disappearance*, art. 12(2).

14 *International Convention for the Protection of All Persons from Enforced Disappearance*, art. 24.

on the countries of the Americas that have signed the American Convention on Human Rights (“American Convention”) and have recognized the contentious jurisdiction of the Court. However, in its decisions on cases involving the disappearance of women, the impact of this scourge on women has not always been acknowledged or addressed comprehensively.

The case law of the Inter-American Court has advanced significantly in the area of gender discrimination since 2006, beginning with the *Case of the Miguel Castro Castro Prison v. Peru*¹⁵ (2006), then in the landmark *Case of González et al. (“Cotton Field”) v. Mexico*¹⁶ (2009), and the cases of *Women Victims of Sexual Torture in Atenco v. Mexico*¹⁷ (2018) and *López Soto et al. v. Venezuela*¹⁸ (2018), in addition to the Advisory Opinion on *Gender identity, and equality and non-discrimination with regard to same-sex couples* (2017),¹⁹ requested by Costa Rica.

15 I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160. In this case, the Court found the State internationally responsible for the excessive use of force that resulted in the death of dozens of inmates and left many injured in an operation at a prison in Peru. Some female inmates were taken to a hospital where they were forced to remain naked while being guarded by armed men, which constituted—according to the Inter-American Court—an act of sexual violence; the Court also ruled that the digital vaginal “inspection” of a female inmate also constituted rape, which, because of its effects, constitutes torture.

16 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. Series C No. 205. This is a landmark case concerning femicide in Ciudad Juarez, in which the Court established the international responsibility of the State for the lack of diligence in the investigations into the deaths of three young women whose bodies showed signs of rape and who, it was concluded, were deprived of their liberty before their deaths. In this case, the Court held that the State knew that there was a “real and immediate” risk that the victims would be sexually assaulted; however, there was no investigation or search for the women, nor were the perpetrators punished.

17 I/A Court H.R., *Case of Women Victims of Sexual Torture in Atenco v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 28, 2018. Series C No. 371. In this case, the Court declared the Mexican State responsible for the physical, psychological, and sexual violence, rape, and torture perpetrated against eleven women who were arbitrarily detained by police officers during the brutal repression of demonstrations in Atenco in 2006. The assaults and physical and sexual torture suffered by the eleven victims constituted acts of gender-based violence and discrimination.

18 I/A Court H.R., *Case of López Soto et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of September 26, 2018. Series C No. 362. In this case, the Court found the State internationally responsible for acts of physical, verbal, psychological, and sexual violence committed by a private individual against a young woman kidnapped and deprived of her liberty for four months, for having tolerated these acts against the humane treatment, personal liberty, dignity, autonomy, and private life of the victim, and in violation of its State obligations enshrined in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará). The Court determined that the victim had been subjected to sexual slavery during her capture, and that this form of violence disproportionately affects women, “because it exacerbates the historic and persistent relations of subordination and domination between men and women,” and therefore constitutes discrimination against women on the basis of sex and gender. In its opinion, the Court underscored the State’s obligation to refrain from creating situations of *de jure* or *de facto* discrimination, bearing in mind that the principle of equality is inseparable from the essential dignity of the human person (para. 61) and stressed that States should take the necessary measures to ensure access to various rights on equal terms and without discrimination based on sexual orientation or gender identity (para 196).

19 I/A Court H.R., *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24. The Court’s Opinion analyzed State obligations in relation to the right to gender identity and name change procedures, the rights of equality and nondiscrimination, and the international protection of same-sex partnerships.

The Committee on the Elimination of Discrimination against Women (“CEDAW”) has pointed out that “discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women.”²⁰ According to CEDAW, these intersectional factors “make it more difficult for women from those groups to gain access to justice.”²¹ The Court has recognized, along the same lines, that “identifiable subgroups of women suffer from discrimination throughout their lives based on more than one factor combined with their sex, which increases their risk of suffering acts of violence and other human rights violations.”²²

Below, we discuss the case law of the Inter-American Court relating to the enforced disappearance of women in contexts of gender discrimination, extracting the most relevant paragraphs of the cases litigated before the Court.

20 CEDAW. General Recommendation No. 33 on women’s access to justice. CEDAW/C/GC/33, 3 August 2015, para.8.

21 CEDAW. General Recommendation No. 33 on women’s access to justice. CEDAW/C/GC/33, 3 August 2015, para.8.

22 I/A Court H.R., *Case of I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 329, para. 247; I/A Court H.R. *Case of Gonzales Lhuy et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298, para. 288.

1. STANDARDS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

SINCE ITS EARLIEST JUDGMENTS, THE INTER-AMERICAN COURT HAS HEARD CASES IN WHICH ONE OR MORE VICTIMS OF ENFORCED DISAPPEARANCE HAVE BEEN WOMEN.²³ However, in relation to the gender-based violence that women may experience in such conditions, the Court's decisions to date have tended to: (1) not rule on these types of acts, or (2) explicitly find that it was not proven that the female victim of enforced disappearance was subjected to gender-based violence. **In these cases, the Court has not invoked considerations such as those made by the Committee on Enforced Disappearances, which has stated that “[w]omen who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender-based violence.”²⁴**

The Court has so far referred, in only one case, to acts of gender-based violence committed against women during enforced disappearance. In another case, the Court noted that gender stereotypes in the investigation had affected the identification of lines of inquiry, including the possible enforced disappearance of the victim.

1.1 Judgments on the enforced disappearance of women in which the Court did not apply a gender perspective, and in which neither the Inter-American Commission on Human Rights nor the victims' representatives made arguments in this regard

In cases in which the Inter-American Court has established the disappearance of women, it has referred to the context of violence against women and the strict duty of due diligence that arises for States in that context prior to the woman's disappearance, throughout her disappea-

23 In one of the first cases heard by the Court (*Case of Fairén Garbí and Solís Corrales v. Honduras*. Merits. Judgment of March 15, 1989. Series C No. 6), one of the disappeared victims was Yolanda Solís Corrales.

24 Committee on Enforced Disappearances. Concluding observations on the report submitted by Chile under article 29 (1) of the Convention. CED/C/CHL/CO/1, 8 May 2019, para. 33: “(...) The Committee also wishes to emphasize the particularly cruel effect of enforced disappearance on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender-based violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisal as a result of their efforts to locate their loved ones (...)” Similarly, see Committee on Enforced Disappearances. Concluding observations on the report submitted by Peru under article 29 (1) of the Convention. CED/C/PER/CO/1, 23 April 2019, para. 37.

rance, and after her body has been found.²⁵ However, when the Court has established the enforced disappearance of women, it has not considered gender-based violence. These cases can be grouped into two types of approaches taken by the Court: (i) the Court has declared the enforced disappearance of the woman, without explicitly establishing, in the proven facts, acts that could constitute sexual violence or gender-based violence; and (ii) the Court has declared the enforced disappearance of the woman and, although the proven facts include acts that could constitute sexual violence or gender-based violence or a pattern of sexual violence prior to the deprivation of the victims' liberty has been described, it has not considered gender-based violence.

The first line of cases includes, for example, the *Case of Fairén Garbí and Solís Corrales v. Honduras*, the *Case of the Serrano Cruz Sisters v. El Salvador*, the *Case of La Cantuta v. Peru*, the *Case of Tiu Tojín v. Guatemala*, the *Case of Contreras et al. v. El Salvador*, the *Case of Rochac Hernández et al. v. El Salvador*, the *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, and the *Case of Terrones Silva et al. v. Peru*. Even though in several of these cases the Court found a violation of Article 5 of the American Convention due to acts perpetrated against the victims of enforced disappearance that were contrary to humane treatment or to the inherent dignity of the human person,²⁶ it did not address the sexual or gender-based violence that the missing women may have experienced.²⁷

The second line of cases, with no ruling on gender-based violence, includes, for example, the *Case of Caballero Delgado and Santana v. Colombia*, in which witnesses reported that they had seen María del Carmen Santana in the army's custody "totally nude" or "in underwear and barefoot."²⁸ In this case, the Court found the enforced disappearance of the two victims, inclu-

25 See, e.g., 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; I/A Court H.R., *Case of Véliz Franco et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2014. Series C No. 277.

26 See, e.g., I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 113; I/A Court H.R., *Case of Tiu Tojín v. Guatemala*. Merits, Reparations and Costs. Judgment of November 26, 2008. Series C No. 190, para. 54; I/A Court H.R., *Case of Contreras et al. v. El Salvador*. Merits, Reparations and Costs. Judgment of August 31, 2011. Series C No. 232, paras. 85-86; I/A Court H.R., *Case of Rochac Hernández et al. v. El Salvador*. Merits, Reparations and Costs. Judgment of October 14, 2014. Series C No. 285, para. 96; I/A Court H.R., *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 14, 2014. Series C No. 287, para. 322; I/A Court H.R., *Case of Terrones Silva et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2018. Series C No. 360, para. 175.

27 In the *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, the Court found that there was conduct by agents of the State that constituted violence against women with respect to Yolanda Santodomingo Albericci, who was detained, tortured, and later released—but did not rule on gender-based violence with respect to the women it found to be victims of enforced disappearance: Irma Franco Pineda, Cristina del Pilar Guarán Cortés, Gloria Stella Lizarazo Figueroa, Luz Mary Portela León, Lucy Amparo Oviedo Bonilla, and Gloria Anzola de Lanao. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 14, 2014. Series C No. 287, para. 426.

28 I/A Court H.R., *Case of Caballero Delgado and Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C No. 22, paras. 36, 38.

ding María del Carmen Santana, but declared that the right to humane treatment guaranteed by Article 5 of the American Convention on Human Rights had not been violated since, “in its judgment, there [was] insufficient proof that those detained were tortured or subjected to inhumane treatment.”²⁹

In another case, the *Case of the “White Van” (Paniagua Morales et al.) v. Guatemala*, a witness testified that the body of Ana Elizabeth Paniagua Morales “had two red marks under her breasts” and that “her genital organs also bore signs of rape.”³⁰ In this case, the Court found that there were signs of torture on the bodies of the victims who had been deprived of the right to life, but did not refer to the specific conditions of the body of Ana Elizabeth Paniagua Morales.³¹

In the *Case of the Río Negro Massacres v. Guatemala*, the description of the general context noted the practice of “mass or indiscriminate and public rape, at times accompanied by the death of pregnant women or the induction of [miscarriages]” committed by members of the security forces during and before the massacres.³² The description of the facts also indicated, among other acts, that patrolmen and soldiers “forced the women to dance, according to them, as they would with the guerrillas,” and that “some of the girls and women were separated from the group and raped.”³³ In this case, the Court found that the enforced disappearance of seventeen people, including several women, had been established. For all the victims of enforced disappearance, the Court declared the violation of the right to humane treatment (Articles 5.1 and 5.2 of the American Convention on Human Rights) but made no reference to the gender-based violence or rape that the women may have suffered during the enforced disappearance.³⁴

In the *Case of Peasant Community of Santa Barbara v. Peru*, the description of the context in which the events occurred also explicitly referenced the practice of rape of women by army personnel in operations carried out during the extension of the state of emergency in the de-

29 I/A Court H.R., *Case of Caballero Delgado and Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C No. 22, para. 65.

30 I/A Court H.R., *Case of the “White Van” (Paniagua Morales et al.) v. Guatemala*. Merits. Judgment of March 8, 1998. Series C No. 37, para. 67.

31 I/A Court H.R., *Case of the “White Van” (Paniagua Morales et al.) v. Guatemala*. Merits. Judgment of March 8, 1998. Series C No. 37, para. 134. Here, the Court stated, among other things: “Let it be said, moreover, that the victims were killed by stab wounds to the neck and thorax which increased their suffering, and in some cases they were even decapitated. This was a pattern and common denominator in most of the murders connected with the instant [c]ase.”

32 See I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Series C No. 250, para. 59.

33 I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Series C No. 250, para. 77.

34 I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Series C No. 250, para. 127.

partment of Huancavelica.³⁵ At the public hearing, the victims' representatives also alleged that there were testimonies about rapes committed against women during the operation.³⁶ Here, the Court declared the enforced disappearance of the fifteen victims, including the detained women, and determined that the State was responsible for violating the right to humane treatment, recognized in Articles 5.1 and 5.2 of the American Convention, to their detriment; however, it did not rule on the sexual or gender-based violence that the women may have suffered during the enforced disappearance.³⁷

In the *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*, the Court found, in relation to the failure to investigate the rapes committed by State security agents, that:

whenever there is evidence of sexual violence in the context of an internal armed conflict, it should not be treated as a collateral crime; rather, it should be investigated as part of every stage of the overall strategy for investigating possible torture, crimes against humanity, war crimes, or acts of genocide that may have been committed. Sexual violence investigations should be carried out with respect for the cultural characteristics of the victims. Furthermore, possible links between those directly responsible for the sexual violence and their hierarchical superiors should be investigated, as well as the existence of components that may show discriminatory intent and/or the intent to commit genocide.³⁸

However, the Court did not comment on the sexual or gender-based violence that the women victims of enforced disappearance may have suffered, nor did it link the acts of sexual violence alleged by the Inter-American Commission to the women's enforced disappearance.³⁹

35 See I/A Court H.R., *Case of Peasant Community of Santa Barbara v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 1, 2015. Series C No. 299, para. 87.

36 See I/A Court H.R., *Case of Peasant Community of Santa Barbara v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 1, 2015. Series C No. 299, fn. 235.

37 I/A Court H.R., *Case of Peasant Community of Santa Barbara v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 1, 2015. Series C No. 299, para. 189: "When the victims were deprived of their liberty, they were beaten and forced to walk for several hours tied up and without food or water, and they were put into the mine shaft before being killed (...), placing them in a gravely vulnerable situation. This fact may have triggered feelings of loss, intense fear, uncertainty, distress, and pain in the children, which may have varied and intensified depending on the age and particular circumstances of each child. For these reasons, the Court considers that the victims suffered treatment contrary to the inherent dignity of the human being while in State custody, which undermined their physical, mental, and emotional integrity. Such acts also constituted forms of torture because they were committed intentionally, causing severe suffering, including the uncertainty of what might happen to them and the deep fear that they might be violently deprived of their lives—as in fact happened—the purpose of such acts being the deprivation of life."

38 I/A Court H.R., *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 328, para. 256.

39 The Court stated that: "it lacks competence *ratione temporis* to declare violations of the American Convention for the arbitrary detentions, torture, extrajudicial executions, rape, and other forms of sexual violence, forced labor, and destruction and theft of property allegedly committed between 1981 and 1986 to the detriment of the indigenous Mayan

1.2 Judgments on the enforced disappearance of women in which the Court did not apply a gender perspective, even though both the Inter-American Commission on Human Rights and the victims' representatives made arguments in this regard

In cases in which the Inter-American Commission or the victims' representatives have expressly alleged the gender-based violence suffered by women victims of enforced disappearance, **the Court has tended to find that there is no evidence that would allow it to establish that the woman was the victim of gender-based violence.** For example, in the *Case of Vereda La Esperanza v. Colombia*, the Court determined that Irene de Jesús Gallego Quintero had been forcibly disappeared. According to witnesses, Irene de Jesús Gallego Quintero was allegedly held by the military for some time and then handed over to the paramilitary forces.⁴⁰ The victims' representatives argued that, because Irene de Jesús had been the victim of gender-based violence, "the investigation should have taken this aspect into account, and yet it did not."⁴¹ Here, the Court stated that:

the parties and the Commission did not provide evidence to prove that Irene Gallego Quintero was indeed a victim of gender-based violence. In this regard, it should be recalled that the Court has established that not every violation of human rights committed against a woman systematically implies that the violation is related to her gender (...).⁴²

In the *Case of Alvarado Espinoza et al. v. Mexico*, the Court declared the enforced disappearance of the victims, including the enforced disappearance of Nitza Paola Alvarado Espinoza and Rocio Irene Alvarado Reyes. In relation to the two female victims, the victims' representatives contended that their gender "placed them in a situation of vulnerability that was increa-

Achi inhabitants of the village of Chichupac and neighboring communities, as the State correctly asserts. However, the State is not correct as to the continuous or ongoing consequences of these acts, whether they are instantaneous or continuous offenses under domestic criminal law. Whatever the domestic criminal classification, the violation of the Convention to this day is ongoing, since the matter before this Court concerns the violation of current international law, under which the Court judges the State rather than public officials for violating the Convention. In this regard, the State is wrong in its objection to the Court's jurisdiction over the alleged enforced disappearance and the State's alleged failure to implement guarantees of return or voluntary resettlement for those persons who remained displaced after March 9, 1987—the date from which the State recognized the Court's jurisdiction—as well as its alleged failure to investigate serious human rights violations, and therefore, [in its objection to the Court's jurisdiction] over reparations for the acts as well." I/A Court H.R., *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 328, para. 24.

40 See I/A Court H.R., *Case of Vereda La Esperanza v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 341, paras. 83-85, 169-172.

41 See I/A Court H.R., *Case of Vereda La Esperanza v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 341, para. 208.

42 See I/A Court H.R., *Case of Vereda La Esperanza v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 341, para. 209.

sed in relation to the Armed Forces in the context of generalized violence against women in the country” and that, by failing to adopt adequate prevention and protection measures, the State had violated the rights established in Articles 8.1 and 1.1 of the American Convention on Human Rights, in relation to Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.⁴³ The Court, however, “[did] not find sufficient evidence to assert that the reason for the disappearance of two of the victims was gender-based.”⁴⁴

1.3 Cases in which the Court has ruled on acts of gender-based violence in relation to the enforced disappearance of women

The case in which the Court expressly ruled on acts of gender-based violence against a woman victim of enforced disappearance is the *Case of Gelman v. Uruguay*. Here, the Court determined the enforced disappearance of María Claudia García and referred to her pregnancy at the time of her detention as a “condition of particular vulnerability, reason for which—in her case—there was differential treatment.”⁴⁵ The Court also found that the body of María Claudia García had been used “in order to give birth, and for her daughter to be breastfed.”⁴⁶ According to the Court, these facts “reveal a particular conception of women that threatens freedoms entailed in maternity, that which forms an essential part of the free development of the female personhood.”⁴⁷ In the Court’s opinion, the acts committed against María Claudia García

can be classified as one of the most serious and reprehensible forms of violence against women, perpetrated against her by State officials from Argentina and Uruguay, which severely affected her personal integrity [and] were clearly based on her gender (...).⁴⁸

In another case, *Gutiérrez Hernández et al. v. Guatemala*, the Court did not establish, as the Inter-American Commission had maintained, that Mayra Gutiérrez had been the victim of enforced disappearance; however, it did point out that the deficiencies, shortcomings, and omissions

43 See I/A Court H.R., *Case of Abarado Espinoza et al. v. Mexico*. Merits, Reparations and Costs. Judgment of November 28, 2018. Series C No. 370, para. 209.

44 See I/A Court H.R., *Case of Abarado Espinoza et al. v. Mexico*. Merits, Reparations and Costs. Judgment of November 28, 2018. Series C No. 370, para. 248.

45 I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para. 97.

46 I I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para. 97.

47 I I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para. 97.

48 I/A Court H.R., *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para. 98.

in the investigation “constitute a violation of the requirement of due diligence and reasonable time in the investigation and prosecution of the disappearance.”⁴⁹ In relation to the shortcomings in the investigation, the Court considered that “Mayra Gutiérrez was stereotyped, and the motive was prejudged, with the investigation focusing on her personal relationships and lifestyle.”⁵⁰ In the words of the Court: “[n]egative gender biases and stereotypes affected the objectivity of the investigating officers, closing off possible lines of inquiry into the circumstances of the case,”⁵¹ including the one related to her enforced disappearance.⁵²

49 See I/A Court H.R., *Case of Gutiérrez Hernández et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 24, 2017. Series C No. 339, para. 184.

50 See I/A Court H.R., *Case of Gutiérrez Hernández et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 24, 2017. Series C No. 339, para. 184.

51 See I/A Court H.R., *Case of Gutiérrez Hernández et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 24, 2017. Series C No. 339, para. 184.

52 See I/A Court H.R., *Case of Gutiérrez Hernández et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 24, 2017. Series C No. 339, para. 175: “In the particular case of Mayra Gutiérrez, a stereotype was used to blame the victim for what happened, excluding other theories and discarding any other line of investigation, such as the one related to the alleged victim’s work on the adoption and trafficking of children in Guatemala and the report of her alleged enforced disappearance.”

2. CONCLUSION

ALTHOUGH ENFORCED DISAPPEARANCE, AS AN ATROCIOUS PRACTICE THAT REFLECTS SERIOUS VIOLATIONS OF THE INTERNATIONAL OBLIGATIONS OF STATES IN THE AMERICAS, has been a recurring theme in the case law of the Inter-American Court since its inception, our review makes clear that there have been few decisions in which the Court has taken a gender-differentiated approach when the victim has been a woman. However, the standards produced in the analysis of such cases undoubtedly serve as relevant input to guide the activities of States in confronting disappearances, for several reasons.

It is now recognized that the search for disappeared persons should be carried out under the principle of immediate search, meaning that the actions taken should acknowledge the specific contexts faced by women, such as systemic violence against women. Therefore, the theories of disappearance should include human trafficking and femicide as common expressions of violence faced by women in Latin America.

Criminal investigations in such cases should follow lines that consider violence against women, in order to develop an adequate investigation plan with a gender-differentiated approach. It is also important to assist the surviving family members who are victims of this crime, most of whom are women. It is usually women who lead the search for their loved ones, a role that exposes them to the risk of abuse, violence, and extortion. Besides these risks, women relatives of disappeared persons suffer innumerable harms and inequalities, including revictimization; economic harm, especially if their missing partner was the breadwinner; social discrimination; physical and psychological health problems; and unequal access to health care.⁵³

Measures of reparation in these cases must also reflect the structural discrimination and inequality faced by women and girls. Throughout its case law, the Court has stated that, in order to go beyond restitution measures and have a truly corrective effect, reparation measures must be transformative. They must include guarantees of non-repetition.⁵⁴ Although the cases heard by the Court are usually individual human rights violations, when the victims' vulnerability is attributed to structural discrimination or inequality, as in the disappearance of women

⁵³ ICMP. *Gender and the missing*, available at: https://www.icmp.int/news/gender-and-the-missing/#_ftnref5.

⁵⁴ La Barbera, MC. and Wences, I. (2020). *La “discriminación de género” en la jurisprudencia de la Corte Interamericana de Derechos Humanos* [“Gender Discrimination” in the Case Law of the Inter-American Court of Human Rights]. *Andamios*, 17(42), 59-87.

and girls—including enforced disappearance—the problem is collective, not limited to this individual violation.⁵⁵

To deal appropriately with the disappearance of women and girls, whether in the search, the investigation, the prosecution, or in the reparation measures, the structural problem of discrimination and gender violence and its systematic perpetration in Latin America and other regions of the world cannot be ignored. It is incumbent upon human rights bodies to make every effort to recognize and highlight the gender inequality and gender-based violence that manifests, or may manifest, in the disappearance of women and girls—even in the absence of an explicit description of sexual or gender-based violence in the facts of a particular case.

In its judgments, the Inter-American Court can underscore and bring greater attention to the problem of gender inequality and its link to violence against women and girls, including their disappearance. The litigation of contentious cases makes it possible to develop specific standards for investigating, punishing, and redressing these differential impacts, and also to recognize the particular circumstances and intersectional inequalities that make girls and women more vulnerable to being victims of disappearance. When the Court fails to address the sexual or gender-based violence that disappeared women *may* have suffered, it is a missed opportunity to contribute to the fight against discrimination and gender-based violence in general.

55 La Barbera, MC. and Wences, I. (2020). *La “discriminación de género” en la jurisprudencia de la Corte Interamericana de Derechos Humanos* [“Gender Discrimination” in the Case Law of the Inter-American Court of Human Rights]. *Andamios*, 17(42), 59-87.

The Due Process of Law Foundation (DPLF) is a regional organization dedicated to promoting the rule of law and human rights in Latin America through applied research, strategic alliances with actors in the region, lobbying activities and effective communication of our messages. DPLF was founded in 1996 by Professor Thomas Buergenthal and his colleagues from the Truth Commission for El Salvador. It is based in Washington, D.C., with an office in San Salvador, El Salvador, and has a multinational team of professionals working throughout the region.

DPLF has the vision of a Latin America where civil society - using national and international law - participates fully in the consolidation of the rule of law and where judicial institutions are independent, transparent, accessible and aware of the role they play in strengthening democracy. Working alongside civil society organizations throughout Latin America, DPLF provides technical legal assistance, promotes dialogue with government representatives, and creates opportunities for the exchange of information and experiences. In addition, DPLF conducts research and produces publications that analyze and discuss the main human rights challenges in the region, in light of international law and comparative perspectives.

Impunity and Serious Human Rights Violations Program

According to international law and practice, impunity consists of the failure to investigate, prosecute and punish those responsible for human rights violations. States have the obligation to combat it by all possible means, especially in the case of serious human rights violations and crimes against humanity or war crimes.

Impunity can be seen as a multiple violation of rights, since it deprives victims and their families of the right to have the truth established, the right to have justice done, and the right to interpose an effective remedy to obtain reparation. Every year hundreds of people in the region are disappeared in contexts of high criminality or political violence and most of these cases are not adequately investigated. Women are especially affected by this crime and are rarely found dead or alive. Chronic impunity encourages the recurrence of violations and weakens the institutions of justice.

DPLF works to strengthen the institutions in charge of criminal prosecution, those that are in charge of granting reparations, and those that search for disappeared persons, establish processes to learn the truth and preserve memory. Our initiatives include research, lobbying and the exchange of experiences and knowledge between countries and partner organizations throughout Latin America.

DPLF promotes and advises on how the institutional framework of the State, especially justice systems at the domestic level, can be adapted to investigate and prosecute serious human rights violations and international crimes, such as crimes against humanity and war crimes.

Likewise, it seeks to complement and strengthen the work of local organizations to improve legislation, policies and institutional practices in accordance with applicable international standards.

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