

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTION PETITION NO. 122 OF 2013

IN THE MATTER OF

ALLEGED DENIAL, VIOLATION, AND INFRINGEMENT OF AND/OR THREAT TO THE RIGHT TO LIFE; THE PROHIBITION OF TORTURE; INHUMAN AND DEGRADING TREATMENT; THE RIGHT TO SECURITY OF THE PERSON; THE PROTECTION OF THE LAW; THE RIGHT TO EQUALITY BEFORE THE LAW AND FREEDOM FROM DISCRIMINATION; THE RIGHT TO INFORMATION; AND THE RIGHT TO EFFECTIVE REMEDY AFFORDED BY SECTIONS 70, 71 AND 74 OF THE REPEALED CONSTITUTION OF KENYA AS READ WITH ARTICLES 19, 20, 21, 22, 23, 24, 25, 26, 27(I), 28, 29, 262, 263 AND 264 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010 AND SECTIONS 6, 7 AND 19 OF THE SIXTH SCHEDULE THEREOF;

IN THE MATTER OF

RULES 11, 12, 13, 14 AND 15 OF THE [REPEALED] CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOMS OF INDIVIDUALS) HIGH COURT PRACTICE & PROCEDURE RULES 2006 AS READ WITH SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010;

IN THE MATTER OF

THE (REPEALED) POLICE ACT, CHAPTER 84 (REPEALED) ADMINISTRATION POLICE ACT, CHAPTER 85; PENAL CODE, CHAPTER 63, CRIMINAL PROCEDURE CODE, CHAPTER 75; SEXUAL OFFENCES ACT (ACT NO. 3 OF 2006); INTERNATIONAL CRIMES ACT (ACT NO. 16 OF 2008); NATIONAL POLICE SERVICE (ACT NO. 11A OF 2011); NATIONAL POLICE SERVICE COMMISSION ACT (ACT NO. 30 OF 2011); INDEPENDENT POLICING OVERSIGHT AUTHORITY ACT (ACT NO. 35 OF 2011); OFFICES OF THE ATTORNEY-GENERAL ACT (ACT NO. 40 OF 2012);

IN THE MATTER OF

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; THE UNIVERSAL DECLARATION OF HUMAN RIGHTS; THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS; THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT; TREATY OF THE EAST AFRICAN COMMUNITIES

BETWEEN

1. COALITION ON VIOLENCE AGAINST WOMEN
2. INDEPENDENT MEDICO-LEGAL UNIT
3. THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS
4. PHYSICIANS FOR HUMAN RIGHTS
5. JWM, a female victim of Sexual and Gender Based Violence
6. PKK, a female victim of Sexual and Gender Based Violence
7. SMM, a female victim of Sexual and Gender Based Violence
8. CNR, a female victim of Sexual and Gender Based Violence
9. LGS, a female victim of Sexual and Gender Based Violence
10. SKO, a female victim of Sexual and Gender Based Violence
11. DOJ, a female victim of Sexual and Gender Based Violence
12. FOO, a female victim of Sexual and Gender Based Violence

PETITIONERS

AND

1. THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA
2. THE DIRECTOR OF PUBLIC PROSECUTIONS OF THE REPUBLIC OF KENYA
3. THE INDEPENDENT POLICING OVERSIGHT AUTHORITY
4. THE INSPECTOR-GENERAL OF THE NATIONAL POLICE SERVICE OF THE REPUBLIC OF KENYA
5. THE MINISTER FOR MEDICAL SERVICES OF THE REPUBLIC OF KENYA
6. THE MINISTER OF PUBLIC HEALTH AND SANITATION OF THE REPUBLIC OF KENYA

RESPONDENTS

AMICUS CURIAE BRIEF

SUBMITTED BY

THE REDRESS TRUST

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I. Introduction

1. The Redress Trust (REDRESS) is an international human rights organisation, based in London, United Kingdom and The Hague, the Netherlands. It has a mandate to assist survivors of torture and related international crimes in seeking justice and other forms of reparation. REDRESS has extensive experience in intervening before national, regional and international courts and tribunals, including the African Commission on Human and Peoples' Rights (African Commission), the Extraordinary African Chambers, the European Court of Human Rights (ECtHR), the Inter-American Commission and Court of Human Rights (IACmHR and IACtHR), the International Criminal Court, the United Nations' Committee Against Torture and Human Rights Committee, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the High Court of Kenya (Constitutional and Human Rights Division) (this Court).¹
2. These submissions are made pursuant to joinder of REDRESS in the proceedings as *Amicus Curiae* on 27 August 2014.
3. It is argued in this matter that following the announcement of election results in Kenya on 30 December 2007, widespread violence erupted in the entire country until March 2008. In the course of the post-election violence, women were subjected to rape, attempted rape, defilement, attempted defilement, gang rape, forced pregnancy, and other forms of sexual and gender based violence (SGBV). Men were subjected to sodomy, forced circumcision and amputation of their penises and other forms of SGBV. Victims of SGBV frequently did not report the crimes committed against them because they feared that nothing would be done to assist them or that the police would protect State-actor perpetrators. It is alleged that the police often refused to document and investigate reports of SGBV victims, and that SGBV victims were unable to access medical services and were sometimes turned away by the State run hospitals. The Petitioners submit that the perpetrators of the violence included members of the Kenya Police Services, Administrative Police and other State security agents as well as non-State actors. The Petitioners argue that the 1st- 4th Respondents failed to train law enforcement officers in lawful methods of conducting law enforcement operations, to take adequate security measures to prevent the commission of crimes and to punish the crimes committed by State and non-State actors. The Petitioners furthermore argue that the 1st- 4th Respondents failed to protect the rights of Petitioners 5 to 12 and other victims of SGBV from violations committed against them. The Petitioners submit that there was a failure to investigate and prosecute those responsible, and to provide reparation to the victims.
4. This case raises critical issues regarding State obligations to, *inter alia*, prevent, protect against, investigate and prosecute SGBV and to provide reparation to victims. REDRESS makes this submission to assist this Court in addressing those issues by identifying the regional and international legal framework and, where applicable, comparative jurisprudence on the obligations of the State of Kenya to prevent and respond to sexual and gender-based violence. The submission

¹ See further, <https://redress.org/our-work/casework/>

focuses on general due diligence obligations and in particular the obligation to investigate and prosecute SGBV and to provide reparation to victims, and measures employed by courts and other bodies to afford reparation.

II. International Law on Due Diligence Obligations

5. Kenya is bound by the international body of law referenced in the present brief. This follows from Articles 2(5) and 2(6) of the Constitution of Kenya (2010) according to which “general rules of international law” are incorporated into domestic law and “any treaty or convention ratified by Kenya form part of the law of Kenya.”²

II.1. Legal basis for due diligence obligations

6. It is universally acknowledged under international law that States have obligations towards potential and actual victims before and after SGBV is perpetrated. This derives from the principle of due diligence which requires States to prevent violations, protect victims, investigate and prosecute such violations, and provide reparation to victims.
7. Traditionally, international human rights instruments, such as treaties and conventions, have imposed responsibility on States over conduct by State actors or actors whose conduct is attributable to the State.³ States are responsible for the acts of individuals who are called upon to represent the State, and thus international human rights obligations generally apply to these State actors. However, the principle of due diligence has developed under international law to extend State responsibility where the State fails to ensure protection of individuals against violations committed not only by State, but also non-State actors, i.e. individuals acting in their private

² Kenya is State party to a range of treaties and conventions relevant for the consideration of SGBV, including the 1949 Geneva Conventions I-IV (ratified 29 September 1966) and their Additional Protocols I-II of 1977 (23 February 1999); International Covenant on Economic, Social and Cultural Rights (ICESC), GA Res 220A (XXI), UN Doc A/6316 (1966), entry into force 3 January 1976 (ratified 1 May 1972); International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), UN Doc A/6316 (1966), entry into force 23 March 1976 (ratified 1 May 1972); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), GA Res 34/180, UN Doc A/34/46, entry into force 3 September 1981 (ratified 9 March 1984); Convention on the Rights of the Child (CRC), GA Res 44/25, UN Doc A/44/49 (1989), entry into force 2 September 1990 (ratified 30 July 1990); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), GA Res 39/46, UN Doc A/39/51 (1984) entry into force 26 June 1987 (ratified 21 February 1997); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), GA Res 2106 (XX), UN Doc A/6014 (1966), entry into force 4 January 1969 (ratified 13 September 2001); Rome Statute of the International Criminal Court, 17 July 1998 entry into force 1 July 2002 (ratified 15 March 2005); African Charter on Human and Peoples' Rights (African Charter), OAU Doc CAB/LEG/67/3 rev.5, (1982) entry into force 21 October 1986 (ratified 23 January 1992); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), OAU Doc CAB/LEG/66.6 (13 September 2000), entry into force 25 November 2005 (ratified 17 December 2003); African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entry into force 29 November 1999 (ratified 25 July 2000).

³ See UN Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (hereinafter UN Human Rights Committee, General Comment No. 31), 29 March 2004, para. 8; *Report of the UN Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, A/HRC/23/49, 14 May 2013 (hereinafter SR VAW Due Diligence Report 2013), para. 11.

capacity, without the authority to represent the State.⁴ The extension of the principle of due diligence to include the conduct of non-State actors means that a State also has the duty to prevent and protect, investigate and prosecute, as well as provide reparation for human rights violations committed by non-State actors. As stated by the African Commission:

The doctrine of due diligence is therefore a way to describe the threshold of action and effort which a State must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights.⁵

8. The due diligence principle in international human rights law is based on a number of international and regional legal instruments. The earliest recognition thereof specifically in relation to violence against women can be found in General Recommendation No. 19 adopted by the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) in 1992 which provides:

Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.⁶

9. The UN General Assembly confirmed this principle in its Declaration on the Elimination of Violence Against Women of 1993, requiring States to:

Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.⁷

⁴ See historical background in UN Special Rapporteur on violence against women, its causes and consequences, *The due diligence standard as a tool for the elimination of violence against women*, E/CN.4/2006/61, 20 January 2006 (hereinafter SR VAW Due Diligence Report 2006), paras. 19-29.

⁵ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, 15 May 2006, (hereinafter African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*), para. 147.

⁶ CEDAW, *General Recommendation No. 19: Violence against women*, 1992, para. 9; in its updated General Recommendation No. 35 the Committee similarly provides that “States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women,” see CEDAW, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35, 26 July 2017, (hereinafter CEDAW, General Recommendation No. 35), para. 24 (b); see also CEDAW, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situation*, CEDAW/C/GC/30, 18 October 2013 (hereinafter CEDAW General Recommendation No. 30), para. 15: “[...] States must exercise due diligence to prevent, investigate, punish and ensure redress for the acts of private individuals or entities that impair the rights enshrined in the Convention.”

⁷ UN General Assembly, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104, 20 December 1993, Article 4(c), see also UN General Assembly, *Resolution 61/143: Intensification of efforts to eliminate all forms of violence against women*, A/RES/61/143, 30 January 2007, para. 7: “[...] States have the obligation to promote and protect all human rights and fundamental freedoms of women and girls and must exercise due diligence to prevent, investigate and punish the perpetrators of violence against women and girls and to provide protection to the victims [...]”

10. The UN Human Rights Committee similarly stated in 2004:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 [ICCPR] would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.⁸

11. The Special Rapporteur on violence against women concluded in 2006 that "it is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence."⁹ The UN Committee Against Torture (CAT) has also recognised due diligence obligations in its General Comment No. 2 of 2007, finding that a State bears responsibility "where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention."¹⁰
12. In its General Recommendation No. 35, updating General Recommendation No. 19, the CEDAW Committee in 2017 considered that the "failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations."¹¹
13. At the regional level, due diligence obligations specifically in relation to violence against women are codified in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)¹² which sets out a list of State obligations in the areas of prevention, protection, prosecution, and reparation. These are similarly set out in other regional conventions adopted at the Inter-American level¹³ as well as by the Council of Europe.¹⁴
14. A range of human rights courts and mechanisms have confirmed due diligence obligations under international law. In its landmark ruling in *Velásquez Rodríguez v. Honduras*, the IACtHR in 1988 established:

⁸ Human Rights Committee, General Comment No. 30, para. 8.

⁹ SR VAW Due Diligence Report 2006, para. 29.

¹⁰ Committee Against Torture (CAT), *General Comment No. 2: Implementation of article 2 by State Parties*, CAT/C/GC/2/RCP.1/Rev.4, 23 November 2007 (hereinafter CAT General Comment No. 2), para. 18.

¹¹ CEDAW, General Recommendation No. 35, para. 24 (b).

¹² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (13 September 2000), entered into force 25 November 2005 (hereinafter Maputo Protocol).

¹³ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para), 9 June 1994, Article 7(b): "The States Parties [...] undertake to [...] apply due diligence to prevent, investigate and impose penalties for violence against women."

¹⁴ Council of Europe Convention on preventing and combating violence against women and domestic violence, 12 April 2011, Article 5(2): "Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors."

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, **not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.**¹⁵

15. Even though the complaint in *Velásquez Rodríguez v. Honduras* was not based on SGBV, it has served as a precedent for subsequent decisions of the IACtHR,¹⁶ and other regional human rights bodies that ruled on SGBV cases, including the African Commission,¹⁷ the Community Court of Justice of the Economic Community of Western African States (ECOWAS Community Court of Justice),¹⁸ and the European Court of Human Rights (ECtHR).¹⁹ At the international level, the CEDAW Committee has also recognised the due diligence principle for different forms of SGBV in their jurisprudence.²⁰
16. Due diligence obligations apply in times of peace as well as during armed conflict. This has been established by the African Commission for States parties to the African Charter on Human and People's Rights (African Charter), including Kenya, in the case of *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*. The Commission recalled that "State Parties to the African Charter **[are obliged] to respect human and people's rights at all time including in times of armed conflict.**"²¹ According to the Commission, the African Charter does not contain a derogation clause which allows States to suspend human rights in times of emergencies or conflict since only Article 27(2) allows for the limitation of the rights enshrined in the African Charter.²²
17. CEDAW's General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations - the authoritative guidance to State Parties of the Convention on the Elimination

¹⁵ IACtHR, *Velásquez Rodríguez v. Honduras*, Merit, Judgment of 29 July 1988, Series C No. 4, para. 172.

¹⁶ IACtHR, *González et al. ("Cotton Field") v. Mexico*, Judgment of 16 November 2009, Series C No. 205 (hereinafter *González et al. ("Cotton Field") v. Mexico*).

¹⁷ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*; African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication 279/03-296/05, 27 May 2009 (hereinafter African Commission, *Sudan Human Rights Organisation et al v. Sudan*); African Commission, *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*, Communication 323/06, 16 December 2011; African Commission, *Organisation Mondiale Contre la Torture (OMCT) et Ligue de la Zone Afrique pour la Défense des Droits des Enfants et Elèves v. Democratic Republic of Congo*, Communication 325/06, 4-18 November 2015, (hereinafter African Commission, *OMCT et al v Democratic Republic of Congo*) para. 59.

¹⁸ ECOWAS Community Court of Justice, *Hadijatou Mani Koraou v. Niger*, ECW/CCJ/JUD/06/08, 27 October 2008.

¹⁹ ECtHR, *M.C. v. Bulgaria*, App. No. 39272/98, 4 December 2003; ECtHR, *Opuz v. Turkey*, App. No. 33401/02, 9 June 2009 (hereinafter ECtHR, *Opuz v Turkey*); ECtHR, *M. and C. v. Romania*, App. No. 29032/04, 27 September 2011; ECtHR, *O'Keeffe v. Ireland*, App. No. 35810/09, 28 January 2014; ECtHR, *N.D. v. Slovenia*, App. No. 16605/09, 15 January 2015; ECtHR, *Y. v. Slovenia*, App. No. 41107/10, 28 May 2015; ECtHR, *M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015; ECtHR, *M.G.C. v. Romania*, App. No. 61495/11, 15 March 2016; ECtHR, *I.C. v. Romania*, App. No. 36934/08, 24 May 2016.

²⁰ CEDAW, *A.T. v. Hungary*, Communication 2/2003, 26 January 2005; CEDAW, *Goekce v. Austria*, Communication 5/2005, 6 August 2007 (hereinafter CEDAW, *Goekce v. Austria*); CEDAW, *Fatma Yildirim v. Austria*, Communication 6/2005, 6 August 2007 (hereinafter CEDAW, *Fatma Yildirim v. Austria*); CEDAW, *Vertido v. the Philippines*, Communication 18/2008, 16 July 2010; CEDAW, *Maria de Lourdes da Silva Pimentel v. Brazil*, Communication 17/2008, 25 July 2011; CEDAW, *Jallow v. Bulgaria*, Communication 32/2011, 23 July 2012; CEDAW, *V.K. v. Bulgaria*, Communication 20/2008, 25 July 2011; CEDAW, *Cecilia Kell v. Canada*, Communication 19/2008, 28 February 2012; CEDAW, *S.V.P. v. Bulgaria*, Communication 31/2011, 12 October 2012; CEDAW, *R.P.B. v. the Philippines*, Communication 34/2011, 21 February 2014 (hereinafter CEDAW, *R.P.B. v. the Philippines*); CEDAW, *Angela González Carreño v. Spain*, Communication 047/2012, 16 July 2014.

²¹ African Commission, *Sudan Human Rights Organisation et al v. Sudan*, para. 165.

²² *Ibid.*

of All Forms of Discrimination against Women (CEDAW) on concrete measures that States should take to ensure “women’s human rights are protected before, during and after conflict”²³ – similarly makes clear that

States parties’ obligations continue to apply during conflict or states of emergency without discrimination between citizens and non-citizens within their territory or effective control, even if not situated within the territory of the State party.²⁴

18. The African Commission’s decision in *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan* which dealt with the allegations of widespread violence, including SGBV, committed within Sudan (in Darfur),²⁵ and the CEDAW Committee’s General recommendation No. 30²⁶ make clear that this principle covers both international and internal armed conflicts. The Maputo Protocol similarly requires States parties to ensure the protection of women in armed conflicts.²⁷

II.2. Due Diligence Standards

19. States’ due diligence obligations can be broadly categorised into measures to be taken before violations occur, which include the obligation to protect and to prevent violations, and measures to be taken after rights have been violated, which include the investigation and prosecution of the crimes committed, and reparation for victims. There is no blueprint on how States must meet their due diligence obligations or on which measures they need to adopt. However, in assessing State compliance with their due diligence obligations, regional and international human rights bodies and courts have identified a range of criteria and standards as outlined below.²⁸

II.2.1. Due diligence obligations must be assessed on a case-by-case basis

20. When assessing whether or not a State has fulfilled its due diligence obligations, each case must be examined in light of the specific context and circumstances. The African Commission held in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, a case where the complainants alleged widespread violence, including rape, perpetrated by supporters of the ruling party against individuals believed to support the opposition during the run up to elections in 2000 and 2002:

²³ See Aisling Swaine and Catherine O’Rourke in UNWOMEN, ‘Guidebook on CEDAW general recommendation no.30 and the UN Security Council resolutions on women, peace and security,’ 2015, at <http://www.unwomen.org/en/digital-library/publications/2015/8/guidebook-cedawgeneralrecommendation30-womenpeacesecurity>.

²⁴ CEDAW General Recommendation No. 30, para. 2.

²⁵ African Commission, *Sudan Human Rights Organisation et al v. Sudan*, paras. 1 – 14.

²⁶ CEDAW General Recommendation No. 30, para. 4.

²⁷ Maputo Protocol, Article 11.

²⁸ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, para. 155.

The extent of a State's responsibility must not be determined in the abstract. Each case must be treated on its own merits depending on the specific circumstances of the case and the rights violated.²⁹

21. Similarly, the ECtHR stated in *Opuz v Turkey*, a case concerning domestic violence in which the State authorities failed to protect the victims despite numerous complaints to the police, that due diligence obligations and their fulfilment need to “be answered in the light of all the circumstances of any particular case.”³⁰

II.2.2. Measures must be coordinated and holistic

22. The different due diligence obligations are closely interlinked.³¹ In the cases of *Goekce v. Austria* and *Fatma Yildirim v. Austria*, the CEDAW Committee for instance found that there is a need for a “comprehensive model [...] that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators.”³² The CEDAW Committee considered that Austria had violated its due diligence obligations to prevent and protect against SGBV because the police and the public prosecutor failed to take actions available under the legal system - such as detention and responding to emergency calls - to prevent the victim’s husband from eventually killing her despite prior complaints of violence and abuse over a prolonged period.³³ According to the CEDAW Committee, the failure to take action constituted a violation of the due diligence obligation to prevent and protect against SGBV even though the perpetrator was prosecuted and convicted to life imprisonment after the killing of the victim.³⁴ This conclusion confirms that merely tackling one obligation, in this case the obligation to investigate and prosecute, while neglecting other obligations, in this case the obligation to prevent and protect, is not sufficient.
23. The IACtHR follows the same principle and requires States to “adopt comprehensive measures to comply with due diligence in cases of violence against women,”³⁵ which

[...] encompasses the organisation of the entire State structure – including the State’s legislative framework, public policies, law enforcement machinery and judicial system – to adequately and effectively prevent and respond to these problems.³⁶

²⁹ *Ibid.*

³⁰ ECtHR, *Opuz v. Turkey*, para. 130.

³¹ ECtHR, *M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, para. 136.

³² CEDAW, *Goekce v. Austria*, para. 12.1.2; CEDAW, *Fatma Yildirim v. Austria*, para. 12.1.2; confirmed in CEDAW, *Angela González Carreño v. Spain*, Communication 047/2012, 16 July 2014, para. 9.9.

³³ CEDAW, *Goekce v. Austria*, para. 12.1.3; CEDAW, *Fatma Yildirim v. Austria*, para. 12.1.5.

³⁴ *Ibid.*, para. 12.1.6 in both decisions.

³⁵ IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 258; see also Convention of Belem do Para, Article 7(c).

³⁶ IACHR, *Jessica Lenahan v. United States*, Report No. 80/11, Case 12.626, 21 July 2011 (hereinafter IACHR, *Jessica Lenahan v. United States*), para. 125.

24. The obligation to take comprehensive and coordinated measures also applies when States are faced with SGBV in conflict. In such contexts, the CEDAW Committee calls on States to use “legislation, policies and protocols” to prohibit conflict-related SGBV, to “link security actors with service providers,” and to ensure that victims have access to “comprehensive medical treatment, mental health care and psychosocial support.”³⁷

II.2.3. Measures must be taken in a non-discriminatory manner

25. The African Commission³⁸ and the CEDAW Committee³⁹ have held that SGBV is a form of discrimination against women. Therefore, measures undertaken by States in fulfilment of their due diligence obligations in SGBV cases should not reinforce but rather combat this underlying discrimination.⁴⁰
26. In several decisions, the CEDAW Committee found that the respondent States did not meet the required due diligence obligations because the relevant conduct was based on discriminatory gender stereotypes and misconceptions of SGBV.⁴¹ For example, in *R.P.B. v. the Philippines*, the domestic criminal court acquitted the accused, who was charged with the rape of a 17-year old deaf and mute girl, as it considered that the victim did not sufficiently fight back and did not try to escape or call for help.⁴² The CEDAW Committee found that the court’s assessment of the victims’ conduct “reinforces in a particular manner the myth that women must physically resist the sexual assault.”⁴³
27. In *M.C. v. Bulgaria*, the ECtHR came to the same conclusion by stating that “any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy.”⁴⁴
28. The requirement for non-discrimination extends to the attitude and conduct of authorities towards victims and their family members. In *González et al. (“Cotton Field”) v. Mexico*, where three young women were abducted, sexually abused, and killed, the IACtHR found that the State had violated its due diligence obligations by failing to “ensure that the officials in charge of receiving missing persons reports had the capacity and sensitivity to understand the seriousness of the phenomenon of violence against women and the willingness to act immediately.”⁴⁵ By failing to act immediately, the authorities’ policies and practices reflected discriminatory gender stereotypes.⁴⁶

³⁷ CEDAW, General Recommendation No. 30, para. 38.

³⁸ African Commission, *OMCT et al v Democratic Republic of Congo*, para. 81.

³⁹ CEDAW, *General Recommendation No. 19: Violence against women*, 1992, para. 6.

⁴⁰ See SR VAW Due Diligence Report 2006, para. 34.

⁴¹ CEDAW, *R.P.B. v. the Philippines*, para. 8.9; CEDAW, *Vertido v. the Philippines*, Communication 18/2008, 16 July 2010, para. 8.5;

CEDAW, *V.K. v. Bulgaria*, Communication 20/2008, 25 July 2011, para. 9.12.

⁴² CEDAW, *R.P.B. v. the Philippines*, para. 8.9.

⁴³ *Ibid*, para. 8.10.

⁴⁴ ECtHR, *M.C. v. Bulgaria*, App. No. 39272/98, 4 December 2003, para. 166.

⁴⁵ IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 285.

⁴⁶ *Ibid*, paras. 398 and 401.

29. The jurisprudence outlined above equally applies in cases of conflict-related SGBV. According to the CEDAW Committee, “conflict exacerbates existing gender inequalities, placing women at a heightened risk of various form of gender-based violence by both State and non-State actors.”⁴⁷ The investigation and prosecution of conflict-related SGBV should therefore not be marred by discriminatory gender stereotypes. Police and other officials receiving reports in conflict situations are required to act with sensitivity and awareness.

II.2.4. States must take measures when they knew or should have known of violations

30. Due diligence obligations arise when the State *knew or should have known* of the potential of violations, or of on-going or past violations.⁴⁸ The African Commission for instance found in a case where police officers witnessed the abduction of a girl who was subsequently gang raped by non-State actors, that the Democratic Republic of the Congo did not act with due diligence because:

It suffices that the Respondent State was informed of the situation and did not undertake the necessary actions to remedy them.⁴⁹(unofficial translation)

31. States know or should have known about violations where for example there is a history of violent attacks, an escalation of violence over time, or where victims had requested authorities to protect them,⁵⁰ rendering violations foreseeable and predictable.⁵¹ In *González et al. (“Cotton Field”) v. Mexico*, the IACtHR referred to warnings and alerts issued by national and international bodies about a pattern of abduction and sexual violence followed by murder of women in a particular area at that time, which, according to the Court, resulted in the State being aware of the violations.⁵² However, despite this awareness, the State failed to adopt legislation or implement measures “that would have allowed the authorities to provide an immediate and effective response to the reports of disappearance [of the three victims in the case] and to adequately prevent the violence against women.”⁵³

32. Applying these standards of assessing knowledge or foreseeability to situations of conflict, it follows that due diligence obligations are triggered when the State has a general awareness of SGBV committed during the conflict or when there has been a history of SGBV in similar circumstances, for example during earlier periods of conflict. The prevalence of SGBV in nearly all situations of armed conflict⁵⁴ makes SGBV during conflict generally foreseeable. This in turn imposes a general obligation on States to undertake measures of prevention and protection prior to the conflict and to investigate, prosecute and punish and provide reparation to victims where SGBV was committed.

⁴⁷ CEDAW General Recommendation No. 30, para. 34.

⁴⁸ See for example CAT, General Comment No. 2, providing that States have due diligence obligations when they “know or have reasonable grounds to believe” that torture or ill-treatment are perpetrated, paras. 18, 22; see also ECtHR, *Opuz v. Turkey*, para. 129.

⁴⁹ African Commission, *OMCT et al v Democratic Republic of Congo*, para. 38.

⁵⁰ CEDAW, *Goekce v. Austria*, para. 12.1.4; CEDAW, *Fatma Yildirim v. Austria*, para. 12.1.4.

⁵¹ CEDAW, *Angela González Carreño v. Spain*, Communication 047/2012, 16 July 2014, para. 9.3; see also ECtHR, *Opuz v. Turkey*, paras. 134, 136.

⁵² IACtHR, *González et al. (“Cotton Field”) v. Mexico*, paras. 274 - 279.

⁵³ *Ibid*, para. 285.

⁵⁴ See overview of conflict settings in: *Report of the Secretary General to UN Security Council on Conflict-Related Sexual Violence*, S/2015/203, 23 March 2015.

II.2.5. Due diligence obligations cannot be delegated to private actors

33. Due diligence obligations are genuine State obligations which cannot be delegated to private actors.⁵⁵ The State cannot absolve itself of responsibility simply because some of its functions are undertaken by private sector entities. The State must at a minimum maintain oversight and quality control of measures undertaken by those actors and ensure the implementation of proper safeguards and measures against violations. The IACHR for instance considered in *Maria de Lourdes da Silva Pimentel v. Brazil*, a case concerning the death of the victim due to inadequate medical treatment provided by a private institution after a stillbirth, that States retain due diligence obligations even where services are delegated to private actors and found that

[...] the State is directly responsible for the action of private institutions when it outsources medical services and that, furthermore, the State always maintains the duty to regulate and monitor private health-care institutions.⁵⁶

II.2.6. Measures must be reasonable and have real prospect of avoiding or mitigating harm

34. States are required to put in place measures that are both reasonable and have a real prospect of avoiding or mitigating harm. The ECtHR notes that “a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.”⁵⁷ Similarly, the African Commission considered that an “analysis of the feasibility of the effective State action must ... be undertaken.”⁵⁸

35. In specifying what constitutes “reasonable measures”, the ECtHR takes into account the gravity of the violation⁵⁹ and considers whether the measures are “within the scope of the powers which, judged reasonably, might have been expected to avoid that risk” and do not “impose an impossible or disproportionate burden on the authorities.”⁶⁰ The IACHR also follows this approach.⁶¹

36. This suggests that existing patterns of SGBV, a history of violence and the gravity of the potential violation must be taken into account when assessing the reasonableness of the measures taken. Applied to situations of conflict-related SGBV, the measures taken by the State, if any, must be evaluated in light of past occurrences of SGBV, existing patterns of SGBV prior to the conflict and its gravity to determine whether the State took all reasonable measures to prevent and protect against SGBV. This may include measures aimed at addressing systemic and structural causes for SGBV, such as legislative reform, professional trainings on SGBV, devising and implementing a national action

⁵⁵ Committee Against Torture, General Comment No. 2, paras. 18 and 22.

⁵⁶ IACHR, *Maria da Penha v. Brazil*, Report No. 54/01, Case 12.051, 16 April 2001 (hereinafter IACHR, *Maria da Penha v. Brazil*), para. 7.5.

⁵⁷ ECtHR, *Opuz v. Turkey*, App. No. 33401/02, 9 June 2009, para. 136; confirmed in ECHR, *O’Keeffe v. Ireland*, App. No. 35810/09, 28 January 2014, para. 149.

⁵⁸ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, para. 156.

⁵⁹ *Ibid*, para. 132.

⁶⁰ *Ibid*, para. 129.

⁶¹ IACHR, *Jessica Lenahan v. United States*, para. 134.

plans to combat violence against women, public education campaigns, and promotion of behavioural change for men.

III. The obligation to investigate and prosecute

37. As part of their due diligence obligations, States are obliged to investigate and prosecute human rights violations. The obligation to investigate and prosecute violations is aimed at ensuring accountability and punishment for the violation, thereby deterring future violations, and to provide a form of justice for the victim(s). International and regional jurisprudence identifies specific criteria for the investigation and prosecution of violations.

38. In *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, complainants alleged that the Republic of Sudan had committed massive and systematic human rights violations, including rape of women and girls, in the Darfur region.⁶² The African Commission found that for a State “[t]o discharge itself from [due diligence] responsibility [to investigate], it is not enough to investigate” but rather investigations must be effective.⁶³ By referencing its own jurisprudence and the jurisprudence of the ECtHR⁶⁴, the African Commission developed the following minimum standards for investigations to be considered effective. According to the Commission:⁶⁵

- Investigations must be carried out by entities independent from the suspects;
- Investigations must be conducted promptly and expeditiously;
- Investigations must have sufficient resources;
- The findings must be published for public scrutiny;
- Prosecutions must be initiated where sufficient evidence is found.

39. Specifically in regards to SGBV, the African Commission found that the status of complaints made by rape victims to the police remained unclear in some places, whereas in other places the cases had been closed as the perpetrator could not be identified by the victim.⁶⁶ This fact together with the persistence of violence in Darfur led the African Commission to find a “lack of effectiveness to guarantee investigations and suppression of the said violations.”⁶⁷ In *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission highlighted the link between the obligation to investigate and the obligation to prevent violations, noting that

[W]here States [...] routinely disregard evidence of murder, rape or assault, States generally fail to take the minimum steps necessary to protect their citizens’ rights to

⁶² *Ibid*, paras. 1-14.

⁶³ African Commission, *Sudan Human Rights Organisation et al v. Sudan*, para. 150.

⁶⁴ See for example ECtHR, *M. and Others v. Italy and Bulgaria*, App. No. 40020/03, 31 July 2012, para. 100.

⁶⁵ African Commission, *Sudan Human Rights Organisation et al v. Sudan*, para. 150.

⁶⁶ *Ibid*, para. 151.

⁶⁷ *Ibid*, para. 153.

physical integrity and, in extreme cases, to life. This sends a message that such attacks are justified and will not be punished.⁶⁸

40. In addition, the African Commission has considered in a case involving sexual violence against women that for an investigation to be considered effective, victims must be kept informed about the progress about decisions taken in the course of the investigation.⁶⁹ The CEDAW Committee affirms the African Commission's findings also in the context of SGBV committed during conflict by calling on States to "provide effective and timely remedies that respond to the different types of violations experienced by women" during conflict.⁷⁰ It notes that effective investigation, prosecution and punishment are necessary because "[p]assive acquiescence of past violence reinforces the culture of silence and stigmatization."⁷¹
41. This also corresponds to the ECtHR's jurisprudence that considers an investigation to be effective where it leads to the establishment of the facts of the case and to the identification and punishment of those responsible, and provided that it is carried out promptly and expeditiously.⁷²
42. The ECtHR requires State authorities to "explore all facts and decide on the basis of an assessment of all the surrounding circumstances" and "explore the options available for a thorough investigation of the case."⁷³ In cases with two diverging versions of the facts, the ECtHR requires a "context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances."⁷⁴ Investigative measures suggested by the ECtHR include the taking of detailed statements from the alleged victim and of eye-witnesses, forensic evidence, and additional medical reports.⁷⁵
43. The IACtHR and IACHR adopt the same standards of impartiality, effectiveness, and promptness.⁷⁶ In *González et al. ("Cotton Field") v. Mexico*, the IACtHR rigorously examined all the steps taken by the investigating bodies and found a number of irregularities, such as insufficient preservation of the crime scene and improper handling of evidence, which in their totality constituted a failure to conduct effective investigations.⁷⁷

⁶⁸ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, para. 160.

⁶⁹ African Commission, *Safia Ishaq Mohammed Issa (represented by The Redress Trust and African Centre for Justice and Peace Studies) v. Sudan*, Admissibility Decision, May 2014, para. 58 (on file with REDRESS).

⁷⁰ CEDAW General Recommendation No. 30, para. 81(g).

⁷¹ *Ibid.*, para. 78.

⁷² ECtHR, *M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, para. 148; see also ECtHR, *D.J. v. Croatia*, 42418/10, 24 July 2012, para. 85; ECtHR, *W. v. Slovenia*, App. No. 24125/06, 23 January 2014, para. 64; ECtHR, *O'Keeffe v. Ireland*, App. No. 35810/09, 28 January 2014, para. 172; ECtHR, *N.D. v. Slovenia*, App. No. 16605/09, 15 January 2015; ECtHR, *Y. v. Slovenia*, App. No. 41107/10, 28 May 2015, para. 96.

⁷³ ECtHR, *M. and C. v. Romania*, App. No. 29032/04, 27 September 2011, paras. 117 to 118.

⁷⁴ ECtHR, *I.C. v. Romania*, App. No. 36934/08, 24 May 2016, para. 54; see also ECtHR, *M.C. v. Bulgaria*, App. No. 39272/98, 4 December 2003, para. 177; ECtHR, *M.G.C. v. Romania*, App. No. 61495/11, 15 March 2016, para. 71; ECtHR, *I.G. v. Moldova*, App. No. 53519/07, 15 May 2012, para. 43.

⁷⁵ See for example ECtHR, *M. and Others v. Italy and Bulgaria*, App. No. 40020/03, 31 July 2012, para. 100; ECtHR, *Y. v. Slovenia*, App. No. 41107/10, 28 May 2015, para. 96.

⁷⁶ IACtHR, *González et al. ("Cotton Field") v. Mexico*, para. 290; IACHR, *Jessica Lenahan v. United States*, para. 196.

⁷⁷ IACtHR, *González et al. ("Cotton Field") v. Mexico*, para. 306.

44. States cannot discharge their obligation to investigate and prosecute by delegating their duties to victims of the violations. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the African Commission confirmed that States have an obligation to ensure investigations and cannot rely on victims to initiate procedures.⁷⁸ In *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*, the complainants had reported violations, including SGBV, to the domestic authorities, alleging they had suffered abuse at the hands of supporters of the regime during an anti-government demonstration. The Public Prosecution Office decided not to prosecute because the victims could not identify the perpetrators.⁷⁹ The African Commission found that by dismissing the cases the State authorities failed to fulfil their duty to investigate the violations:

In order to be impartial, it would have been of paramount relevance in the investigative processes for the [Public Prosecution Office] to obtain if necessary proprio motu additional evidence from other sources by giving room for more witnesses in the scene to make illustrative statements that could corroborate the statements made by the Victims. Instead, the [Public Prosecution Office] gave undue attention to the ‘discrepancies’ made by the Victims which made it arrive at the tenuous conclusion that it could not proceed with the investigations because the perpetrators could not be identified, creating an appearance of an actual lack of impartiality.⁸⁰

45. According to the Commission, States must ensure “a thorough or scrupulous procedure which leads to results that identify the perpetrators and punishes those responsible.”⁸¹
46. In *Opuz v. Turkey*, the ECtHR takes the ACHPR’s conclusion a step further by requiring States to continue prosecution on their own motion even where the victims withdraw their complaint:

It can be inferred from this practice [of State Parties to the European Convention on Human Rights] that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.⁸²

47. This is particularly important in cases of sexual violence as victims often shy away from reporting the crime due to the consequence they might encounter, such as being abandoned by their husbands and families or being stigmatised by their communities. Victims may also not report SGBV because of the obstacles they face, such as remoteness from the next police station, demand of fees or bribes and complicated reporting procedures as well as fear of retaliation when reporting the crime.⁸³

⁷⁸ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, para. 70.

⁷⁹ African Commission, *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*, Communication 323/06, 16 December 2011, paras. 1-22.

⁸⁰ *Ibid*, para. 233.

⁸¹ *Ibid*, para. 230.

⁸² ECtHR, *Opuz v. Turkey*, para. 139.

⁸³ REDRESS, *Written Evidence Submitted to the House of Lords Select Committee on Sexual Violence in Conflict*, 18 September 2015, available at <https://redress.org/publication/submission-to-the-uk-house-of-lords-on-sexual-violence-in-conflict/> para. 36.

48. The above listed requirements of effectiveness, impartiality, timeliness, and expeditiousness also apply to the adjudication of charges of sexual violence by a court. This was established by the CEDAW Committee in *R.P.B. v. the Philippines* and *Vertido v. the Philippines*:

The Committee also recalls that for a remedy to be effective, adjudication of a case involving rape and sexual offences claims should be dealt with in a fair, impartial, timely and expeditious manner.⁸⁴

49. In addition, the CEDAW Committee has made it clear that States have the duty to investigate not only for the purpose of criminal prosecution but also for the aim of determining the failure of authorities to protect and prevent violations with a view to preventing recurrence. In *Angela González Carreño v. Spain*, the CEDAW Committee found that due diligence includes

[...] the obligation to investigate the existence of failures, negligence or omissions on the part of public authorities which may have caused victims to be deprived of protection.⁸⁵

⁸⁴ CEDAW, *R.P. B. v. the Philippines*, Communication 34/2011, 21 February 2014, para. 8.3; confirmed in CEDAW, *Vertido v. the Philippines*, Communication 18/2008, 16 July 2010, para. 8.3.

⁸⁵ CEDAW, *Angela González Carreño v. Spain*, Communication 047/2012, 16 July 2014, para. 9.9; see also IACHR, *Jessica Lenahan v. United States*, Report No. 80/11, Case 12.626, 21 July 2011, para. 178.

IV. The obligation to provide reparation to victims of SGBV

IV.1 Legal basis

50. The right to reparation and its corresponding State obligation to provide reparation is widely acknowledged by international treaties,⁸⁶ international humanitarian law,⁸⁷ international criminal law,⁸⁸ other international instruments,⁸⁹ regional treaties⁹⁰ and declarative instruments.⁹¹ The African Commission,⁹² African Court on Human and Peoples' Rights (ACtHR),⁹³ IACtHR,⁹⁴ ECtHR⁹⁵ and UN treaty bodies⁹⁶ have also recognised this right in their jurisprudence.

51. CEDAW General Recommendation No. 30 and the Guidance Note of the UN Secretary-General on Reparations for Conflict-Related Sexual Violence (UN Guidance Note)⁹⁷ are of particular significance

⁸⁶ *Universal Declaration of Human Rights*, 10 December 1948, Article 8; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, Article 6; *ICCPR*, Article 2; *UNCAT*, Article 14; *CRC*, Article 39; *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Article 24(4).

⁸⁷ *The Hague Convention respecting the Laws and Customs of War on Land*, 18 October 1907, Article 3; *Additional Protocol I to the Geneva Conventions*, 12 August 1949, Article 91.

⁸⁸ *Rome Statute of the International Criminal Court*, 1 July 2002, Articles 68 and 75.

⁸⁹ *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34, 29 November 1985; *UN 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*, UNGA Res 60/147, 16 December 2005 (UN Basic Principles on Reparation); CAT, *General Comment No. 3: Implementation of article 14 by States parties*, CAT/C/GC/3, 13 December 2012 (hereinafter CAT General Comment No. 3); UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 16; UN Security Council, *Resolution 2122 (2013)*, adopted by the Security Council at its 7044th meeting, on 18 October 2013, S/RES/2122 (2013), para. 13; CEDAW, *General recommendation No. 33: General recommendation on women's access to justice*, CEDAW/C/GC/33, 23 July 2015 (hereinafter CEDAW General Recommendation No. 33), para. 19(b).

⁹⁰ The African Commission has interpreted the African Charter to include an obligation of all State Parties to the Charter to provide redress, including reparation. See for instance African Commission, *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment* (Article 5), adopted in February 2017 (African Commission, *General Comment No. 4*), para. 1; Maputo Protocol, Article 2(f); *American Convention on Human Rights*, 22 November 1969, Article 25; *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para)*, 9 June 1994, Article 7(g); *European Convention on Human Rights*, 4 November 1950, Article 13.

⁹¹ See e.g. UN Basic Principles on Reparation, UNGA Resolution 60/147, 16 December 2005; African Commission, *Resolution 111: Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence*, 15–28 November 2007, para. 2; African Commission, *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*, February 2002, para. 50.

⁹² See for example, African Commission, *Abdel Hadi Radi and others (represented by REDRESS) v Sudan*, Communication 368/09, 5 November 2013; African Commission, *Institute for Human Rights and Development in Africa (on behalf of Emaila Connateh & 13 others) v. Angola*, Communication 292/04, 22 May 2008; African Commission, *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v. Guinea*, Communication 249/02, 7 December 2004; African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*; African Commission, *The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v. Nigeria*, Communication 155/96, 27 October 2001.

⁹³ ACtHR, *Norbert Zongo et al. v. Burkina Faso*, Judgment on Reparation, Application No. 013/2011, 6 June 2016.

⁹⁴ See for example IACtHR, *Pueblo Bello Massacre v. Colombia*, Judgment of 11 May 2007, Series C, No. 163; IACtHR, *Rochela Massacre v. Colombia*, Judgment of 31 January 2006, Series C, No. 140; IACtHR, *Plan de Sanchez Massacre v. Guatemala*, Judgment of 19 November 2004, Series C, No. 116.

⁹⁵ See for example ECtHR, *Aslakhanova and Others v. Russia*, App. No. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012; ECtHR, *Cyprus v. Turkey*, App. No. 25781/94, 12 May 2014.

⁹⁶ See for example Human Rights Committee, *Giri v. Nepal*, Communication No. 1863/2009, 19 July 2012; Human Rights Committee, *Mihoubi v. Algeria*, Communication No. 1874/2009, 18 October 2013.

⁹⁷ UN Secretary General, *Guidance Note of the Secretary General of the UN on Reparations for Conflict-Related Sexual Violence*, June 2014 (UN Guidance Note), available at <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

in the context of conflict-related SGBV. Both set out specific requirements for State obligations to provide reparation when SGBV occurs in international or non-international armed conflict. Similar guidance on the right to reparation for SGBV, including in the context of SGBV committed during conflict, within the African human rights system can be found in the Maputo Protocol, the African Commission's Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence⁹⁸ and the African Commission's General Comment No.4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted in February 2017 (African Commission, General Comment No.4).⁹⁹

52. States are obliged to remedy human rights violations to the fullest possible extent. Reparation therefore needs to take a variety of forms, as spelt out further in the UN 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 (UN Basic Principles on Reparation)¹⁰⁰, the CAT General Comment No. 3 on the implementation of Article 14 UNCAT and the African Commission's General Comment No. 4. These instruments provide for a non-exhaustive list of different forms of reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

53. In addition, in some contexts a distinction is made between collective and individual reparation.¹⁰¹ However, the notion of "collective" is not clearly defined under international law.¹⁰² The UN Secretary-General emphasises in the Guidance Note that "collective reparations are not a substitute for individual reparations."¹⁰³ Reparation for victims of SGBV can be provided through administrative programs set up by the government and independent of a court decision.¹⁰⁴ The existence of such programs must, however, not hinder victims from seeking reparation awards by courts which should complement administrative reparation programs.¹⁰⁵

IV.2. International and regional standards on reparation

54. Extensive international and regional instruments and jurisprudence exist that help identify the standards and forms of reparation required to redress the harm suffered. In cases of SGBV, these standards have been interpreted in a gender-sensitive way to ensure that the specific harm of SGBV can be addressed.

⁹⁸ African Commission, Resolution 111 on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, 15-28 November 2007.

⁹⁹ African Commission, General Comment No. 4.

¹⁰⁰ UN Basic Principles on Reparation.

¹⁰¹ For example, the Extraordinary Chambers in the Courts of Cambodia only has the mandate to award collective reparation, see Internal Rules (Rev. 9), as revised on 16 January 2016, Rule 23(1)(b).

¹⁰² Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para. 38.

¹⁰³ UN Guidance Note, p. 7.

¹⁰⁴ *Ibid*, p. 6; see also Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para. 3.

¹⁰⁵ UN Guidance Note, p. 6.

IV.2.1. Adequate, effective, prompt and proportional

55. Reparation needs to be “adequate, effective, and prompt” and “proportional” to the gravity of the violation and the harm suffered.¹⁰⁶
56. SGBV frequently carries gender-specific consequences, such as unwanted pregnancies, children born out of rape, HIV/Aids infection, damage to reproductive organs, infertility, stigma, loss of family support, low self-esteem and feeling of worthlessness.¹⁰⁷ For States to comply with their obligation to provide adequate and proportionate reparation for this specific form of violence, these gender-specific consequences need to be taken into account through acquiring “a full understanding of the gendered-nature and consequences of the harm suffered.”¹⁰⁸ In the same vein, the African Commission’s General Comment No. 4 requires states to “adopt specific measures to address the barriers” faced by victims of SGBV.¹⁰⁹
57. In addition, the underlying cause of gender discrimination which produced the violation in the first place must be taken into consideration when determining the adequacy of the reparation.¹¹⁰ The African Commission in its General Comment No. 4 for instance provides that

The ultimate goal of redress is transformation. Redress must occasion changes in social, economic and political structures and relationships in a manner that deals effectively with the factors which allow for torture and other ill-treatment. This transformation envisages processes with long-term and sustainable perspectives that are responsive to the multiple justice needs of victims and therefore restore human dignity. It requires a broad interpretation of State Parties’ [to the African Charter] obligations to provide redress, including putting in place legal, administrative and institutional frameworks to give effect to the right to redress.¹¹¹

58. Specifically in the context of SGBV in conflict, the UN Guidance Note states that

Reparations should strive to have a transformative effect on these inequalities, rather than reinstate or reinforce the structural conditions within society that

¹⁰⁶ African Commission, General Comment No. 4, paras. 21-28; UN Basic Principles, para. 15; CEDAW General Recommendation No. 30, para. 79; Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003, para. 24; IACtHR, *Loayza Tamayo v. Peru*, Judgment of 27 November 1998, Series C, No. 42, para. 87; CEDAW, *A.T. v. Hungary*, Communication 2/2003, 26 January 2005, para. 9.6(l)(b); IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of 21 July 1989, Series C No. 7, para. 27; ECOWAS Community Court of Justice, *Djot Bayi v. Nigeria*, Communication ECW/CCJ/JUD/01/09, 28 January 2009, paras. 45-46.

¹⁰⁷ Nicola Jones et al., Overseas Development Institute, *The fallout of rape as a weapon of war - The life-long and intergenerational impacts of sexual violence in conflict*, June 2014, available at http://cdn.basw.co.uk/upload/basw_100421-5.pdf; African Commission, General Comment No. 4, para. 60; CEDAW General Recommendation No. 30, para. 37.

¹⁰⁸ UN Guidance Note, p. 5; CEDAW Recommendation No. 30, para. 79.

¹⁰⁹ African Commission, General Comment No. 4, para. 60.

¹¹⁰ IACtHR, *González et al. (“Cotton Field”) v. Mexico*, Judgment of 16 November 2009, Series C No. 205, para. 450; UN Guidance Note, p. 5; CEDAW General Recommendation No. 30, para. 79.

¹¹¹ African Commission, General Comment No. 4, para. 8.

uphold such practices and beliefs and that inform the perpetration of sexual violence.¹¹²

59. As further outlined below (see Section IV.3. (iv)), such transformative potential is likely to be achieved with guarantees of non-recurrence as they embrace structural and systemic changes. For cases of SGBV in conflict, the CEDAW Committee recommends that States “mandate institutional reforms, repeal discriminatory legislation and enact legislation providing for adequate sanctions, in accordance with international human rights standards.”¹¹³
60. SGBV victims sometimes face urgent needs which if unaddressed risk irreparable harm, such as fistulas, anal or uterine prolapses, and severe depression and anxiety. In such cases, measures of reparation are only effective if they are provided immediately, and if necessary on an interim basis, including through surgeries or counselling.¹¹⁴
61. The CAT has made clear that adequate reparation will usually require the State to provide a combination of different forms of reparation to “cover all the harm suffered by the victim [...] while always bearing in mind the circumstances of each case.”¹¹⁵ The African Commission’s General Comment No. 4 and the UN Guidance Note thus recommend a combination of the different types of measures, including individual, collective, symbolic, and material reparation, to be awarded through an administrative program and/or by courts which complement each other.¹¹⁶

IV.2.2. Accessible and non-discriminatory

62. Once measures of reparation have been awarded or a reparation programme has been established, victims must be able to access and obtain reparation in practice.¹¹⁷ This in turn requires victims to have access to information about what is available and how to apply for reparation.¹¹⁸ Another issue that needs to be considered to support SGBV victims’ equal access to reparation is the question of the required standard of proof. For court-ordered reparation awards, the UN Guidance Note recommends “to consider the adoption of a lower standard of proof than the standard which is required for a criminal conviction”, such as the balance of probabilities, to make it easier for victims to prove the violation and harm suffered.¹¹⁹

¹¹² UN Guidance Note, p. 8.

¹¹³ CEDAW General Recommendation No. 33, para. 19(e).

¹¹⁴ UN Guidance Note, p. 12 f; CEDAW General Recommendation No. 30, para. 4(c).

¹¹⁵ CAT, *Ali Ben Salem v. Tunisia*, 7 November 2007, *Communication no. 269/2005*, para. 16.8; see also UN Basic Principles on Reparation, para. 18; see also CEDAW General Recommendation No. 33, para. 19(b); CAT General Comment No. 3; UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 16.

¹¹⁶ African Commission, General Comment No. 4, para. 61; UN Guidance Note, pp. 5-6.

¹¹⁷ Maputo Protocol, Article 4(2)(f); see also UN Guidance Note, p. 10.

¹¹⁸ African Commission, *Resolution 111: Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence*, 15-28 November 2007, para. 2.

¹¹⁹ UN Guidance Note, p. 14; see also ICC Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2*, No. ICC-01/04-01/06 A 2 A 3, 3 March 2015, para. 81.

63. Awards of reparation must be made without discrimination.¹²⁰ This entails that States must put in place positive measures to enable all victims and victim groups to access reparation measures, especially when they are traditionally discriminated or marginalised.¹²¹ The principle of non-discrimination also demands that no victim who has suffered harm as a result of a violation should be excluded from being a beneficiary of the reparation award because of their gender, religion, ethnicity or similar criteria.¹²²
64. Victims of SGBV face specific obstacles when trying to access justice and reparation which may prevent them from coming forward, such as stigma attached to SGBV, household and child care obligations that limit their possibility to travel, illiteracy and remoteness which hamper their capacity to file claims, and the risk of retaliation.¹²³ The design and implementation of reparation measures must therefore take these hurdles into account and create a process that allows SGBV victims to fully and safely benefit from reparation. This can be best achieved through meaningful consultation and participation of SGBV victims throughout.¹²⁴

IV.3. Types of reparation awarded in cases of SGBV

65. International and regional courts and human rights bodies have in the past awarded reparation specifically to redress the harm suffered as a result of SGBV. The resulting jurisprudence outlined below can provide guidance for this Court when examining requests for reparation for victims of SGBV.

(i) Restitution

66. Restitution is understood as measures which “restore the victim to the original situation” before the violation occurred.¹²⁵ In cases of SGBV, restoring victims to their original situation may risk placing them in a discriminatory environment which caused the violation in the first place because sexual violence can be based on pre-existing discrimination against women.¹²⁶ Thus, the reparation awards made by international and regional human rights bodies in cases of SGBV have concentrated on forms of reparation which intend to address the underlying discrimination against women and thus are transformative in nature.
67. The African Commission for instance has awarded restitution measures that go beyond the individual’s personal situation and intend to rebuild the victims’ living environment following violations, including SGBV, perpetrated on a large scale. In a case against Sudan involving widespread violations of the African Charter, including SGBV, in Darfur, it requested Sudan to “rehabilitate economic and social infrastructure, such as education, health, water, and agricultural

¹²⁰ UN Basic Principles, para. 25.

¹²¹ CAT General Comment No. 3, paras. 32 and 33; CEDAW General Recommendation No. 30, para. 38(c).

¹²² See UN Basic Principles on Reparation, para. 25.

¹²³ See REDRESS, *Written Evidence Submitted to the House of Lords Select Committee on Sexual Violence in Conflict*, 18 September 2015, available at <https://redress.org/publication/submission-to-the-uk-house-of-lords-on-sexual-violence-in-conflict/> para. 36; and UN Guidance Note, pp. 10 to 12.

¹²⁴ UN Guidance Note, pp. 10 to 12; CEDAW General Recommendation No. 30, para. 81(e).

¹²⁵ UN Basic Principles, para. 19.

¹²⁶ UN Guidance Note, p. 8.

services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the IDPs and Refugees.”¹²⁷ Such a form of restitution combined with other structural measures combating the root causes of SGBV as described below has the potential to be transformative for the lives of victims.

(i) Rehabilitation

68. Rehabilitation encompasses services and other forms of support, including medical and psychological care, and legal or social services, which re-establish the victim’s independence, physical, mental, social, and economic capacity or provide new skills to fully participate in society.¹²⁸ Regional and international human rights mechanisms have awarded rehabilitation measures that have sought to redress the medical and psychological situation of the individual victim(s), but also addressed institutional shortcomings, requesting States to put in place a framework that ensures that victims of SGBV have access to rehabilitation.

a) Psychological and Health Care

69. The most common form of rehabilitation awarded in SGBV cases is psychological and health care.¹²⁹ For example, in a case where the police did not prevent the abduction of a girl who was later assaulted and gang-raped, the African Commission called on the State to “accord adequate and sufficient reparation to the victim such as the necessary medical and psychological assistance” (unofficial translation).¹³⁰

70. The CEDAW Committee,¹³¹ the UN Human Rights Committee,¹³² and the IACtHR¹³³ require that rehabilitative services are provided free of charge. The IACtHR also emphasised that treatment to address consequences of SGBV must be “appropriate and effective” as well as immediate¹³⁴ and that “the circumstances and particular needs of each victim must also be taken into consideration.”¹³⁵ Given the specific harm that SGBV can cause, such as fistula or other gynaecological problems, the UN Human Rights Committee awarded the provision of “specialized medical assistance.”¹³⁶ In case States’ medical facilities are not capable of providing such services, they must “recur to specialized

¹²⁷ African Commission, *Sudan Human Rights Organisation et al v. Sudan*, para. 229(5).

¹²⁸ CAT General Comment No. 3, para. 11.

¹²⁹ See for example IACtHR, *Rosando Cantú et al v. Mexico*, Judgment of 31 August 2010, Series C No. 216, para. 295(19) (hereinafter IACtHR, *Rosandu Cantú et al v Mexico*); IACtHR, *Fernández Ortega et al v. Mexico*, Judgment of 30 August 2010, Series C No. 215, para. 308(17).

¹³⁰ African Commission, *OMCT et al v Democratic Republic of the Congo*, para. 88(ii).

¹³¹ CEDAW, *R.P.B. v. the Philippines*, para. 9(a)(ii).

¹³² Human Rights Committee, *María Cruz Achabal Puertas v. Spain*, Communication 1945/2010, 27 March 2013, para. 10(c).

¹³³ IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 602(24); IACtHR, *“Las Dos Erres” Massacre v. Guatemala*, Judgment of 24 November 2009, Case No. 11681, para. 270 (hereinafter IACtHR, *“Las Dos Erres” Massacre v. Guatemala*).

¹³⁴ IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 602(24).

¹³⁵ IACtHR, *“Las Dos Erres” Massacre v. Guatemala*, para. 270; see also IACtHR, *Plan de Sanchez Massacre v. Guatemala*, Judgment of 19 November 2004, Series C, No. 116, para. 107.

¹³⁶ Human Rights Committee, *María Cruz Achabal Puertas v. Spain*, Communication 1945/2010, 27 March 2013, para. 10(c); see also IACtHR, *“Las Dos Erres” Massacre v. Guatemala*, para. 270.

private or civil society institutions.”¹³⁷ In a post-conflict context where State structures might not be fully functioning, rehabilitation services can often be provided by civil society organisations.

71. Measures of rehabilitation can also have a structural impact. The CEDAW Committee for instance recommended the establishment of “education and training programmes to encourage health providers to [...] respond to specific health needs related to sexual violence” as well as “guidelines and protocols to ensure health services are available and accessible in public facilities.”¹³⁸ Along the same lines, the IACtHR has awarded rehabilitation for victims of SGBV and requested the State to improve the “provision of material resources and personnel” to an existing health centre which treated SGBV victims and to set up appropriate protocols there.¹³⁹ Such measures can ensure that SGBV victims’ specific needs can be dealt with when they seek support.

b) Educational Measures

72. Beyond rehabilitating the physical and mental well-being, the IACtHR has awarded socio-economic measures by ordering the State to provide scholarships to both the victim and her children in two cases of rape committed by armed forces in Mexico.¹⁴⁰ It should be noted that the IACtHR found that the children had suffered harm as a consequence of what their mother went through.¹⁴¹
73. The IACtHR also ordered the establishment of a school that can be safely accessed by the victim’s daughters since the road to reach the current school was considered insecure given the incident of their mother’s rape and the military presence.¹⁴² Through these awards, the IACtHR specifically sought to address the wide-ranging impact of SGBV on the lives of victims and their relatives, notably the stigma and ostracism attached to SGBV and the vulnerable living conditions.

(ii) Compensation

74. Compensation is a monetary award for material (pecuniary) damages as well as moral (non-pecuniary) damages for the harm suffered.¹⁴³ Compensation awards constitute a constant part of reparation orders made by international and regional human rights bodies. In some cases the amount is not specified but left to the discretion of the implementing entity. For example, the African Commission awarded “just and adequate” compensation for victims of SGBV and other violations both in *Zimbabwe Human Rights NGO Forum v. Zimbabwe* and in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, without specifying the amount or providing criteria for calculating the monetary award.¹⁴⁴

¹³⁷ IACtHR, “*Las Dos Erres*” Massacre v. Guatemala, para. 270.

¹³⁸ CEDAW, *Maria de Lourdes da Silva Pimentel v. Brazil*, Communication 17/2008, 25 July 2011, para. 8(2)(b).

¹³⁹ IACtHR, *Rosando Cantú et al v. Mexico*, paras. 260 and 295(21).

¹⁴⁰ *Ibid*; IACtHR, *Fernández Ortega et al v. Mexico*, Judgment of 30 August 2010, Series C No. 215, para. 308(21) (hereinafter IACtHR, *Fernández Ortega et al v. Mexico*).

¹⁴¹ IACtHR, *Rosando Cantú et al v. Mexico*, para. 138; IACtHR, *Fernández Ortega et al v. Mexico*, paras. 145 - 147.

¹⁴² IACtHR, *Fernández Ortega et al v. Mexico*, paras. 268 to 270.

¹⁴³ UN Basic Principles on Reparation, para. 20; African Commission, General Comment No.4, para. 37.

¹⁴⁴ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe* *dispositif*; *Sudan Human Rights Organisation et al v. Sudan*, para. 229(4).

75. Certain criteria are taken into account when determining compensation. First, the level of harm caused by the experience of SGBV frames the award of compensation. Second, any compensation amount awarded must be adequate/appropriate or just and fair.¹⁴⁵

76. In *Hadijatou Mani Koraou v. Niger*, the ECOWAS Community Court of Justice awarded individual monetary compensation of approximately \$18,415 USD (10,000,000 CFA) to the victim who was sold to a man at the age of 14 according to a practice in Niger. She was kept as a slave in his household for nine years during which she was repeatedly raped, physically abused, and had to perform household duties.¹⁴⁶ In explaining the amount awarded, the ECOWAS Community Court of Justice stated:

A close examination of the facts in cause clearly demonstrate that the Applicant has gone through undeniable physical, psychological and moral harm, as a result of her nine (9) years of servitude, justifying the award of a relief in reparation for the harm thus suffered.¹⁴⁷

77. This is along the reasoning of the CEDAW Committee, which calls on States to ensure that compensation must be “commensurate with the gravity of the violations.”¹⁴⁸ The ECtHR has awarded non-pecuniary damages in SGBV cases ranging from 4,000 EUR to 50,000 EUR, taking into account the psychological harm,¹⁴⁹ such as distress, anguish, and frustration, the State failure to meet due diligence duties,¹⁵⁰ previous rulings in cases of sexual abuse,¹⁵¹ the gravity and duration of the violation and the compensation already received.¹⁵² The IACtHR takes into account the age of the victim at the time the violations were committed, as well as “the nature and seriousness of the violations committed; the sufferings caused to the victim and the manner in which they have been treated; the time that has elapsed since the rape; the denial of justice; and also the

¹⁴⁵ Human Rights Committee, *María Cruz Achabal Puertas v. Spain*, Communication 1945/2010, 27 March 2013, para. 10(b); Human Rights Committee, *Fatima Mehalli v. Algeria*, Communication 1900/2009, 21 March 2014, para. 9(g); Human Rights Committee, *V.D.A. v. Argentina*, Communication 1608/2007, 29 March 2011, para. 11; IACHR, *Raquel Martí de Mejía v. Perú*, Report No. 5/96, Case 10.970, 1 March 1996, para. VII(3); see also IACHR, *X and Y v. Argentina*, Report No. 38/96, Case 10.506, para. 120; ECtHR, *O’Keeffe v. Ireland*, App. No. 35810/09, 28 January 2014, para. 201.

¹⁴⁶ ECOWAS Community Court of Justice, *Hadijatou Mani Koraou v. Niger*, ECW/CCJ/JUD/06/08, 27 October 2008, paras. 9 - 14.

¹⁴⁷ *Ibid*, para. 96.

¹⁴⁸ CEDAW, *T.P.F. v. Peru*, Communication 22/2009, 17 October 2011, para. 9(a); see also *R.P.B. v. the Philippines*, para. 9(a)(i); CEDAW, *V.K. v. Bulgaria*, Communication 20/2008, 25 July 2011, para. 9.16(a); CEDAW, *Angela González Carreño v. Spain*, Communication 047/2012, 16 July 2014, para. 11(a)(i); CEDAW, *Jallow v. Bulgaria*, Communication 32/2011, 23 July 2012, para. 8.8(1); CEDAW, *Maria de Lourdes da Silva Pimentel v. Brazil*, Communication 17/2008, 25 July 2011, para. 8(1); CEDAW, *Vertido v. the Philippines*, Communication 18/2008, 16 July 2010, para. 8.9(a).

¹⁴⁹ ECtHR, *I.C. v. Romania*, App. No. 36934/08, 24 May 2016, para. 65 (12,000 EUR); ECtHR, *M.G.C. v. Romania*, App. No. 61495/11, 15 March 2016, para. 79 (9,000 EUR); ECtHR, *Opuz v. Turkey*, para. 210 (30,000 EUR); ECtHR, *Valiuliene v. Lithuania*, App. No. 33234/07, 26 March 2013, para. 91 (5,000 EUR); ECtHR, *Zontul v. Greece*, App. No. 12294/07, 17 January 2012, para. 120 (50,000 EUR).

¹⁵⁰ ECtHR, *M. and C. v. Romania*, App. No. 29032/04, 27 September 2011, para. 154 (13,000 EUR).

¹⁵¹ ECtHR, *M.C. v. Bulgaria*, App. No. 39272/98, 4 December 2003, para. 192 (20,000 EUR).

¹⁵² ECtHR, *N.D. v. Slovenia*, App. No. 16605/09, 15 January 2015, para. 85 (4,000 EUR); ECtHR, *Zontul v. Greece*, App. No. 12294/07, 17 January 2012, para. 120 (50,000 EUR).

alteration in their living conditions.”¹⁵³ In a decision on conflict-related rapes committed in the context of a massacre, the IACtHR considered the “frustration and other psychological and emotional damages derived from the lack of justice and continued impunity” when assessing compensation.¹⁵⁴ The ECtHR also looks at the State failure to meet due diligence duties,¹⁵⁵ previous rulings in cases of sexual abuse¹⁵⁶ and the compensation already received.¹⁵⁷

78. With regard to the required proof of damage for monetary awards, the IACtHR applies a presumption of (pecuniary and non-pecuniary) damage when awarding reparation in SGBV cases. According to the IACtHR, it can be presumed that the experience of rape and its consequences leads to some form of inactivity or neglect of income-generating work and thus the Court determines a just amount in cases where the victim does not present any proof in support of the damage claimed.¹⁵⁸ The IACtHR and the International Court of Justice (ICJ) similarly apply a presumption of ‘immaterial damage’ in cases of serious human rights violations as “non-material injury is an inevitable consequence” of such violations.¹⁵⁹

(iii) Satisfaction

79. Measures intended to provide victims with a sense of satisfaction or justice are also a form of reparation. They should include verification and disclosure of the truth and whereabouts of the perpetrators and symbolic measures, such as public apologies or commemorations.¹⁶⁰

a) Investigation and Prosecution

80. The duty to investigate and prosecute and allow civil proceedings against the persons liable for the violations forms part of satisfaction.¹⁶¹ It is standard jurisprudence of international and regional human rights bodies to order an investigation and prosecution of SGBV as a form of satisfaction. As this corresponds to the due diligence obligation to investigate and prosecute, the standards on how to investigate and prosecute set out above (see Section III), in particular avoiding gender stereotypes that can undermine such procedures,¹⁶² and targeted investigations of SGBV with specialized personnel,¹⁶³ equally apply here.

¹⁵³ IACtHR, *Rosando Cantú et al v. Mexico*, para. 279 (with the Court awarding \$60,000 USD in non-pecuniary damages to a victim of rape); see also IACtHR, *Fernández Ortega et al v. Mexico*, para. 293; IACtHR, *Plan de Sanchez Massacre v. Guatemala*, Judgment of 19 November 2004, Series C, No. 116, para. 83.

¹⁵⁴ IACtHR, *“Las Dos Erres” Massacre v. Guatemala*, para. 286.

¹⁵⁵ ECtHR, *M. and C. v. Romania*, App. No. 29032/04, 27 September 2011, para. 154 (13,000 EUR).

¹⁵⁶ ECtHR, *M.C. v. Bulgaria*, App. No. 39272/98, 4 December 2003, para. 192 (20,000 EUR).

¹⁵⁷ ECtHR, *N.D. v. Slovenia*, App. No. 16605/09, 15 January 2015, para. 85 (4,000 EUR).

¹⁵⁸ IACtHR, *Rosando Cantú et al v. Mexico*, paras. 270 to 287; the Court found that in regards to the plaintiff’s pecuniary losses, she had to stop working as a result of having been raped and because of the time she spent in the pursuit of justice. The Court considered that “it is likely that the effects of the rape caused her to be inactive for some time” and awarded her \$5,500 USD in equity for her pecuniary losses, see para. 274; see also IACtHR, *Fernández Ortega et al v. Mexico*, paras. 281-293.

¹⁵⁹ International Court of Justice, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgment 19 June 2012, para. 21.

¹⁶⁰ UN Basic Principles, para. 22.

¹⁶¹ CAT General Comment No. 3, para. 17.

¹⁶² CEDAW, *R.P.B. v. the Philippines*, para. 9(b)(iii); CEDAW, *Vertido v. the Philippines*, Communication 18/2008, 16 July 2010, para. 8.9(b).

¹⁶³ IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 602 (12)(ii).

81. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the African Commission ordered the establishment of a “Commission of Inquiry to investigate the causes of violence which took place from February – June 2000 and bring those responsible for the violence to justice.”¹⁶⁴ Similarly, in *Sudan Human Rights Organisation et al v. Sudan*, the African Commission called on Sudan to “conduct effective official investigations into the abuses” and “take steps to prosecute those responsible for the human rights violations, including murder, rape, arson and destruction of property.”¹⁶⁵ Additionally, the African Commission recommended that the State “desist from adopting amnesty laws for perpetrators of human rights abuses”.¹⁶⁶
82. With regard to this particular form of reparation, the IACtHR has ruled that “the State may not apply amnesty laws nor argue prescription, non-retroactivity of the criminal law, former adjudication, the *non bis in idem* principle [...] to excuse itself from this obligation”.¹⁶⁷ The IACtHR also highlights that for an investigation and prosecution of SGBV to fulfil a reparative function, it must enable the victim(s) to fully participate,¹⁶⁸ and that the publication of investigation/ prosecution results forms an integral part of satisfaction.¹⁶⁹

b) Symbolic measures of reparation as forms of satisfaction

83. As an example of symbolic forms of reparation as forms of satisfaction, the IACtHR stated in various SGBV cases that its own “judgment constitutes per se a form of reparation” and ordered its publication.¹⁷⁰ Additionally, the IACtHR ordered the State to “carry out a public act of acknowledgment of its international responsibility regarding the facts of the case” in a number of SGBV cases.¹⁷¹
84. As another form of symbolic reparation, in a case where a pattern of abductions, rapes and killings of women in a certain area was found, the IACtHR awarded the construction of a “monument in memory of the women victims of gender-based murder.” The IACtHR ordered that the monument be designed via public consultation, together with an unveiling ceremony to honour all victims of such violations, including those who were not considered in the case at hand.¹⁷² In two case of massacres during the conflict in Guatemala where a number of women were raped, the IACtHR required the State to “perform a public act of recognition of

¹⁶⁴ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, dispositif; see also African Commission, *OMCT et al v Democratic Republic of Congo*, para. 88(i).

¹⁶⁵ African Commission, *Sudan Human Rights Organisation et al v. Sudan*, paras. 229(1) and (3).

¹⁶⁶ *Ibid.*

¹⁶⁷ IACtHR, *“Las Dos Erres” Massacre v. Guatemala*, para. 233a; see also IACtHR, *Plan de Sanchez Massacre v. Guatemala*, Judgment of 19 November 2004, Series C, No. 116, para. 99.

¹⁶⁸ IACtHR, *Rosando Cantú et al v. Mexico*, para. 213; IACtHR, *Fernández Ortega et al v. Mexico*, para. 230.

¹⁶⁹ IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 602(12); IACtHR, *“Las Dos Erres” Massacre v. Guatemala*, para. 236.

¹⁷⁰ IACtHR, *Rosando Cantú et al v. Mexico*, paras. 295(9) and (15); IACtHR, *Fernández Ortega et al v. Mexico*, paras. 308(10) and (11); IACtHR, *González et al. (“Cotton Field”) v. Mexico*, paras. 602(11) and (15).

¹⁷¹ IACtHR, *Rosando Cantú et al v. Mexico*, paras. 295(9) and (14); IACtHR, *Fernández Ortega et al v. Mexico*, para. 308(15); IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 602(16).

¹⁷² IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 602(17).

international responsibility” in the form of a public ceremony in the presence of high State representatives which would reference the violations.¹⁷³

(iv) Guarantees of non-recurrence

85. The category of guarantees of non-recurrence incorporates actions taken to prevent future violations. As a transformative measure of reparation it is aimed at structural change, to be achieved for instance by way of law reform, human rights education and training.¹⁷⁴

a) Legislative Reform

86. The African Commission envisioned systemic and structural measures by ordering the State to “undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations” as were committed in the case at hand.¹⁷⁵ Similarly, in the case against the Democratic Republic of the Congo, the African Commission demanded the adoption of “the most adequate regulative measures to suppress sexual violence”¹⁷⁶ (unofficial translation).

87. The CEDAW Committee has in various cases requested the review and amendment of domestic laws which in itself it found to be discriminatory.¹⁷⁷ The IACHR similarly required Brazil to “continue and expand the reform process that will put an end to the condoning by State of domestic violence against women in Brazil and discrimination in the handling thereof.”¹⁷⁸

b) Implementation of Existing Laws

88. Where an appropriate legal framework is in place, the CEDAW Committee has recommended the “implementation and monitoring”¹⁷⁹ of the domestic laws and the “enactment and application of policies”.¹⁸⁰ In *Jessica Lenahan v. United States* the IACHR additionally pointed out that “these [implementation] measures should be accompanied by adequate resources destined to foster their implementation.”¹⁸¹

c) Trainings and Protocols

89. In a case against the Democratic Republic of the Congo, the African Commission demanded the State to “organise training sessions for organs charged with the application of the law, in particular the police and magistrates, on the handling of cases of violence against girls, in particular rape, in

¹⁷³ IACtHR, “*Las Dos Erres*” Massacre v. *Guatemala*, paras. 261-262; IACtHR, *Plan de Sanchez Massacre v. Guatemala*, Judgment of 19 November 2004, Series C, No. 116, para. 100.

¹⁷⁴ UN Basic Principles on Reparation, para. 23.

¹⁷⁵ African Commission, *Sudan Human Rights Organisation et al v. Sudan*, para. 229(2).

¹⁷⁶ African Commission, *OMCT et al v Democratic Republic of Congo*, para. 88(iii).

¹⁷⁷ CEDAW, *S.V.P. v. Bulgaria*, Communication 31/2011, 12 October 2012, para. 10(2)(d); CEDAW, *R.P.B. v. the Philippines*, para. 9(b)(i)(ii); CEDAW, *V.K. v. Bulgaria*, Communication 20/2008, 25 July 2011, paras. 9.16(b)(i) and (ii); CEDAW, *Vertido v. the Philippines*, Communication 18/2008, 16 July 2010, paras. 8.9(b)(i) and (ii).

¹⁷⁸ IACHR, *Maria da Penha v. Brazil*, para. 61(4); see also IACHR, *X and Y v. Argentina*, Report No. 38/96, Case 10.506, para. 118.

¹⁷⁹ CEDAW, *Fatma Yildirim v. Austria*, para. 12.3(c); CEDAW, *Goekce v. Austria*, para. 12.3(c).

¹⁸⁰ CEDAW, *S.V.P. v. Bulgaria*, Communication 31/2011, 12 October 2012, para. 10(2)(e); see also CEDAW, *Angela González Carreño v. Spain*, Communication 047/2012, 16 July 2014, para. 11(b)(ii).

¹⁸¹ IACHR, *Jessica Lenahan v. United States*, para. 201(4).

conformity with the relevant stipulations of the [African] Charter and the [Maputo] Protocol.”¹⁸² (unofficial translation)

90. The most common form of transformative reparation recommended by the CEDAW Committee consists of trainings for officials who are called upon to deal with SGBV, such as “adequate and regular training on the [CEDAW] Convention, the Optional Protocol thereto and the [CEDAW] Committee’s general recommendations, in particular general recommendation Nos. 18 and 19, to judiciary and legal professionals so as to ensure that stereotypes and gender bias do not affect court proceedings and decision-making.”¹⁸³ In other decisions, the CEDAW Committee requires such trainings to be mandatory.¹⁸⁴
91. The IACHR similarly ordered “[m]easures to train and raise the awareness of the judiciary and specialized police so that they may understand the importance of not condoning domestic violence.”¹⁸⁵ To mainstream such trainings, the IACHR recommended to include the rights of women and pertinent international law in teaching curriculums of State organs.¹⁸⁶
92. In cases of SGBV committed by security agents, the IACtHR also ordered “permanent training programs and courses on diligent investigation in cases of sexual violence against women, which include an ethnic and gender-based perspective” as a form of reparation.¹⁸⁷ More generally, the IACtHR ordered “permanent and obligatory training and education program or course on human rights, directed at the members of the Armed Forces”.¹⁸⁸ Such specialised training was deemed necessary for the authorities in charge of responding to serious human rights violations which should include methods on how to investigate patterns of such violations and how to provide effective protection.¹⁸⁹

d) Coordination in Justice Sector

93. As another structural measure to improve prevention of SGBV and protection of victims, the CEDAW Committee recommended “enhanced coordination among law enforcement and judicial officers, and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence.”¹⁹⁰ The IACHR ordered the establishment of “special police

¹⁸² African Commission, *OMCT v Democratic Republic of the Congo* para. 88(vi).

¹⁸³ CEDAW, *R.P.B. v. the Philippines*, para. 9(b) (iv); see also CEDAW, *Fatma Yildirim v. Austria*, para. 12.3(d); CEDAW, *Goekce v. Austria*, para. 12.3(d); CEDAW, *A.T. v. Hungary*, Communication 2/2003, 26 January 2005, para. 9.6.(II)(d); CEDAW, *Angela González Carreño v. Spain*, Communication 047/2012, 16 July 2014, para. 11(b)(iii); CEDAW, *Jallow v. Bulgaria*, Communication 32/2011, 23 July 2012, para. 8.8(2)(c); CEDAW, *Maria de Lourdes da Silva Pimentel v. Brazil*, Communication 17/2008, 25 July 2011, para. 8(2)(c); CEDAW, *Vertido v. the Philippines*, Communication 18/2008, 16 July 2010, paras. 8.9(b)(iii) and (iv).

¹⁸⁴ CEDAW, *V.K. v. Bulgaria*, Communication 20/2008, 25 July 2011, para. 9.16(b)(iv).

¹⁸⁵ IACHR, *Maria da Penha v. Brazil*, para. 61(iv)(a); see also IACHR, *Jessica Lenahan v. United States*, para. 201(4).

¹⁸⁶ IACHR, *Maria da Penha v. Brazil*, para. 61(6).

¹⁸⁷ IACtHR, *Rosando Cantú et al v. Mexico*, para. 295(17); IACtHR, *Fernández Ortega et al v. Mexico*, para. 308(19).

¹⁸⁸ IACtHR, *Rosando Cantú et al v. Mexico*, para. 195(18); IACtHR, *Fernández Ortega et al v. Mexico*, para. 308(20); see also IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 602(22).

¹⁸⁹ IACtHR, *“Las Dos Erres” Massacre v. Guatemala*, para. 253.

¹⁹⁰ CEDAW, *Fatma Yildirim v. Austria*, para. 12.3(a); CEDAW, *Goekce v. Austria*, para. 12.3(a).

stations to address the rights of women and to provide them with the special resources needed for the effective processing and investigation of all complaints related to domestic violence.”¹⁹¹

e) Awareness Raising

94. Addressing the wider discrimination of women in society as a root cause for SGBV, the African Commission has called for “sensitisation campaigns for the public, in order to modify the perception and the patterns of social conduct linked to violence against women and girls, in particular sexual violence and especially rape.”¹⁹² (unofficial translation)
95. The IACtHR demanded in a case concerning the gang-rape of an indigenous woman by the military a “campaign to raise awareness and to sensitize the population regarding the prohibition and effects of violence and discrimination of indigenous women.”¹⁹³ In a similar case, the IACtHR ordered the State to provide “necessary resources so that the indigenous Me’paa community may establish a community center, to be considered a Women’s Center, where educational activities regarding human rights and the rights of women can be carried out.”¹⁹⁴

¹⁹¹ IACHR, *Maria da Penha v. Brazil*, para. 61 (5).

¹⁹² African Commission, *OMCT et al v Democratic Republic of Congo*, para. 88 (iv).

¹⁹³ IACtHR, *Rosando Cantú et al v. Mexico*, para. 295 (23); see also IACtHR, *González et al. (“Cotton Field”) v. Mexico*, para. 602 (23).

¹⁹⁴ IACtHR, *Fernández Ortega et al v. Mexico*, para. 308 (22).

ANNEX: LIST OF AUTHORITIES

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