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Rape culture at stake:

The case of Spain in the compliance of its international obligations

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ABSTRACT

According to the European Union Agency for Fundamental Rights, one in twenty women over the age of fifteen has been raped in the European Union. Rape victims face not only the violation of their sexual integrity and autonomy but also multiple barriers to access to justice and reparation due to gender stereotypes, rape myths, victim-blaming, and questioning of their credibility.

In Spain, a gang rape that took place in 2016 became a media case known as *La Manada*, triggering huge social mobilizations throughout the country and even international coverage when it was first considered by the regional courts as sexual abuse but not rape. This case has called into question the definition of rape under the existing domestic legislation and in general the institutional response to this type of crime. Motivated by this case and considering the duty that according to the international standards Spain has in the fight against gender violence, this thesis will discuss the role that the State plays in the perpetuation of rape culture.

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TABLE OF ABBREVIATIONS

CAT	Committee Against Torture
CEDAW	Convention for the Elimination of Discrimination Against Women
DEVAW	Declaration on the Elimination of Violence Against Women
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
IACH	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NGO	Non-governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
RAINN	Rape, Abuse & Incest National Network
UN	United Nations
UNGA	United Nations General Assembly
VAW	Violence Against Women

TABLE OF CONTENTS

ABSTRACT	2
ACKNOWLEDGMENTS.....	3
TABLE OF ABBREVIATIONS.....	4
INTRODUCTION	6
1. THEORETICAL FRAMEWORK	10
1.1. Conceptualizing rape	10
1.1.1. Rape myths.....	13
1.2. Rape culture	15
2. INTERNATIONAL STANDARDS OF RAPE.....	18
2.1.1. Rape as a violation of international human rights law	18
2.1.2. Rape as an international crime	20
The role of the European system	22
2.2. International guiding principles of rape.....	23
2.2.1. Legislative framework	24
2.2.2. Prevention	27
2.2.3. Investigation, Prosecution, and Punishment.....	28
2.2.4. Reparation	34
2.3. Conclusion.....	36
3. LEGISLATIVE FRAMEWORK OF RAPE IN SPAIN	37
3.1. Prevalence	37
3.2. Criminalization.....	39
3.3. Protective measures	45
3.4. Preventive measures	50
3.5. Conclusion	53
4. PROSECUTING RAPE: A CHANNEL FOR INSTITUTIONAL VIOLENCE.....	55
4.1. Introduction: institutional violence	55
4.2. Illustrating institutional violence: <i>La Manada</i> case and others.....	57
4.3. Repercussion.....	71
5. CONCLUSION	74
BIBLIOGRAPHY.....	76

INTRODUCTION

The fight against sexual violence has strongly erupted over the last few years. Social networks have echoed movements such as the #metoo movement against sexual harassment or the Chilean choreography "*Un violador en tu camino*" replicated all over the world¹.

Sexual harassment and sexual violence are globally perceived as the two most important issues facing women and girls². So is confirmed by figures: one in three women worldwide have experienced physical and/or sexual violence by an intimate partner or non-partner³. In Europe, one in twenty women from the age of fifteen has been raped, which corresponds to more than nine million women. The results reflected the extensive abuse that affects women's lives, and how it is systematically un-reported to authorities⁴.

Un-reporting is one of the challenges when addressing sexual violence. It makes the problem invisible and prevents from knowing its real magnitude. In fact, the official data related to sexual violence never represents its real extent, but rather the culture of reporting⁵. But what are the reasons preventing victims from reporting? The European Women's Lobby pointed out that women are afraid to ask for protection, are not aware of the available services, and do not believe that the legal system would protect them⁶. Other studies have also identified as main reasons the tolerance of violence, the belief in the subordinate role of women, and low confidence in the justice system. In short, it is

¹ Charis McGowan, 'Chilean anti-rape anthem becomes international feminist phenomenon' (2019) *The Guardian* <<https://www.theguardian.com/world/2019/dec/06/chilean-anti-rape-anthem-becomes-international-feminist-phenomenon>> accessed 21 May 2020.

² International Women's Day, 'Global attitudes towards gender equality' (2019) <<https://www.kcl.ac.uk/giwl/research/global-attitudes-towards-gender-equality>> accessed 21 May 2020.

³ World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, 'Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence' (2013) <<https://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>> accessed 21 May 2020.

⁴ European Union Agency for Fundamental Rights, 'Violence against women: an EU-wide survey' (2014) <<https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>> accessed 25 May 2020.

⁵ *ibid* 68.

⁶ European Women's Lobby, 'EWL Barometer on Rape in the EU in 2013' (2013) <<https://www.womenlobby.org/2013-EWL-Barometer-on-Rape-Report?lang=en>> accessed 27 May 2020.

the lack of confidence in the justice system coupled with stigma and shame that discourages women from reporting and seeking justice⁷.

The truth is that once victims decide to report, their fears become true. Studies evidence that victims face multiple barriers to access to justice and reparation due to gender stereotypes, rape myths, victim-blaming, and questioning of their credibility⁸, contrary to States' obligations.

Since sexual violence is a form of discrimination and gender-based violence due to the disproportionate way in which it affects women⁹, States are obliged to exercise due diligence to prevent, investigate, prosecute, and provide reparation for any act of sexual violence¹⁰. Controversial rape rulings in Spain, Denmark, and the UK have recently shown that the States are failing in those obligations¹¹. Related to Spain, a gang rape that took place in 2016 during the festivities of San Fermín, known as *La Manada* (the “Wolf Pack” case), was considered by the regional court as sexual abuse but not rape in absence of violence or intimidation¹². The rulings lead to widespread protests across the country turning it into a media case even for the international press¹³.

This case has called into question the definition of rape under the existing domestic legislation, as well as the judicial acting. In essence, the institutional response of Spain to this type of crime, motivating the present investigation.

Moreover, beyond the international obligations, cases of sexual violence enclose a greater responsibility for States due to the symbolic impact attributed to sexual crimes on society. Mithu M. Sanyal states rape as a crime more influential than any other in our lives since the information we receive about it goes beyond the sexual aggression, towards gender,

⁷ Amnesty International, 'Right to be free from rape: overview of legislation and state of play in Europe and International Human Rights' (2018) <<https://www.amnesty.org/en/documents/eur01/9452/2018/en/>> accessed 8 May 2020.

⁸ *ibid.*

⁹ Report of the Secretary General: 'In-depth study of all forms of gender-violence against women' (6 July 2006) UN Doc A/61/122/Add., 1.

¹⁰ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, article 5.

¹¹ Amnesty International, 'Human Rights in Europe: Review of 2019' (2020) <<https://www.amnesty.org/en/documents/eur01/2098/2020/en/>>, accessed 23 May 2020.

¹² Patria Ortega, 'La Manada se libra de la violación' El País (Madrid, 24 April 2018) <https://elpais.com/politica/2018/04/26/actualidad/1524732098_409166.html> accessed 25 May 2020.

¹³ James Badcock, 'Spain 'wolf pack' case: Thousands protest over rape ruling' BBC (Madrid, 26 April 2018) <<https://www.bbc.com/news/world-europe-43915551>> accessed 25 May 2020.

relations between sexes, and even sexuality¹⁴. In the same vein, Beatriz Gimeno claims that the resulting judgment and social treatment of rape are a reflection of the historical relations between men and women, and so on, a social, symbolic, legal, and media reflection of the position of women and men in a given society¹⁵. It is this societal impact which further strengthens the motivation for this research.

Research question and methodology

Considering what has been described, this thesis aims to examine to what extent Spain is complying with its international obligations concerning sexual violence, under the premise that a lack of compliance could contribute to the perpetuation of the culture of rape. This is the research question of this exploratory analysis that will be addressed by an interdisciplinary methodology by combining a normative, judicial, and sociological approach. We can say that it is mainly a legal study, with a social argument basis: the societal impact of state's actions regarding sexual violence.

The structure of the thesis develops as follows:

The first chapter reviews academic literature on rape to establish a theoretical framework about consent, the influence of rape myths, and the concept of rape culture, which will provide for a deep understanding of the subject.

The second chapter brings in place the international normative framework related to sexual violence. Based on primary sources: treaties, jurisprudence, and soft-law, I will identify the international guiding principles about rape and the state obligations arising from them to examine in the following chapters if Spain complies with them.

The third chapter consists of a review of the national legislative framework regulating rape. Although the main approach is legal, reports and statistical data are taken into consideration since the chapter includes the following subsections: prevalence, criminalization, protective measures, preventive measures, and conclusion.

The fourth chapter continues examining the compliance of Spain with a focus on the institutional response during the prosecution process. We will check the application of

¹⁴ Mithu M. Sanyal, *Violación: Aspectos de un crimen, de Lucrecia al #MeToo* (1st ed. Reservoir Books, 2019).

¹⁵ Beatriz Gimeno, '¿A quién estamos juzgando?' (2017), CTXT <<https://ctxt.es/es/20171115/Firmas/16201/cultura-violacion-juicio-san-fermin-feminismo-beatriz-gimeno.htm>> accessed 12 May 2020.

international standards through the case of *La Manada* as the core of this research, but we will also rely on further cases to gain a more comprehensive appreciation.

Lastly, a final conclusion is expressed to recap what has been elaborated and give an answer to the research question.

While the total eradication of rape may be utopian, like any crime, it is certainly possible to work on its prevention and non-enforcement. This thesis aims to contribute to this in some way.

1. THEORETICAL FRAMEWORK

1.1. Conceptualizing rape

Everyone has an idea of what is rape, but there is not a real common understanding: “different people endorse different understandings of what rape is”. Which makes it an essentially contested concept¹⁶.

Since it is deeply rooted in specific political, economic, and cultural environments, the understanding of rape varies among countries and over time¹⁷. In short, the meaning of rape depends on the cultural and historical contexts in which it occurs¹⁸.

What is clear is that rape is understood to be a harm, which makes it to be condemned. The debate rises on what acts account to rape, and what are the motives¹⁹ behind it. West refers to rape as a harm only criminalized when it involves other harm, which used to be theft to another man’s property, and that today is a form of violence that men understand²⁰. His point of view, even from 1988, is not such out-of-date in what refers to the androcentric view of violence by the justice system, about we will talk later.

According to Freedman, the definition of rape and sexual violence has been extended due to the contribution of several social mobilizations²¹, which undoubtedly applies to feminism. Within the second wave of feminism in the decade of 1970, rape has been read by many feminists as an instrument to perpetuate the oppression of women, breaking with the classic view of rape as an inevitable response to the sexual needs of men²². Susan Brownmiller is one of the first exponents of this narrative, that radically changed the discourse and treatment of rape by identifying it as an intimidating process through which men keep women under fear, that is, the cause and origin of patriarchy²³.

Brownmiller understands rape as an act of violence and power that has nothing to do with sexuality, in opposite to Mckinnon who argued rape as violent because of the sexual act that is itself. For Cahill, both theories fail: “to define rape as primarily violent is to fail to

¹⁶ Hilkje Charlotte Hänel, *What is Rape?: Social Theory and Conceptual Analysis* (Bielefeld : transcript Verlag. 2018) 54.

¹⁷ Joanna Stiebert, *Rape myths, the Bible and #MeToo* (1st ed. Routledge Focus 2020).

¹⁸ Joanna Bourke, *Rape. A History from 1860 to the Present* (Virago 2007).

¹⁹ We refer to the causes behind the crime, even if they are never legitimate reasons.

²⁰ Robin West, 'Jurisprudence and Gender' (1988) 55(1), *The University of Chicago Law Review*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846810> accessed 3 June 2020.

²¹ Estelle Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Harvard University Press 2013).

²² *ibid.*

²³ Susan Brownmiller, *Against Our Will. Men, Women and Rape* (Simon and Schuster, 1975).

address the particular sexual meaning that rape holds for women, and to define it as primarily sexual is to adopt a totalizing theory of power and to understand the feminine body and subject as only constructed”²⁴. From her point of view, rape is both a violent and a sexual act, that she names as an “embodied experience” with both gendered and sexual meanings that affects not only the victims but all women because of the perpetuation of gender hierarchies²⁵.

In the same vein, Hänel argues rape not as one act, but a cumulation of diverse acts with a specific social meaning accounting to social practice. This implies that rape is not an individual wrong but “a social practice that helps to sustain and reproduce social and structural injustice”²⁶. Rape, together with other social practices, constitutes a social structure that makes it possible for certain individuals to rape and for others to be raped or live in fear of being raped (e.g. women or gender non-conforming people, as exemplified by the author)²⁷. Hänel is one of the exponents of the most predominant narrative that points rape as a structural problem beyond an individual crime.

How can be then addressed the wrong of the social structure? Consent has been extensively settled as the “antidote” for rape, functioning nowadays as a criterion to a better legislation of rape. The lack of consent claimed by the feminist mobilizations in the 1970s has evolved into an affirmative approach. In the United States, following the numerous cases of rape on university campuses, student organizations expressed the need to convert consent into an affirmative expression, instead of “No means No”, which showed to be insufficient and not a real option in many situations²⁸. The affirmative consent seeks to ensure the freedom of the person who gives it, that is, without coercion nor power relations. But that is a challenge for our social structure since consent lays in social structures, cultural practices, and complex relations of power²⁹.

About consent, Carole Pateman defends a subtly different approach which suggests that placing consent in a central place of the narrative denies women as free and equal

²⁴ Ann J. Cahill, *Rethinking rape* (1sted. Cornell University Press, 2001) 12.

²⁵ *ibid.*

²⁶ Hilke Charlotte Hänel, *What is Rape?: Social Theory and Conceptual Analysis* (Bielefeld: transcript Verlag, 2018) 249.

²⁷ *ibid.*

²⁸ Ana Vidu & Gema Tomás Martínez ' The Affirmative “Yes”. Sexual Offense Based on Consent. Masculinities and Social Change' (2019) 8(1), 91 <https://www.researchgate.net/publication/331262804_The_Affirmative_Yes_Sexual_Offense_Based_on_Consent> accessed 5 June 2020.

²⁹ *ibid.*

individuals. Consent must be given to something or someone, and in a relationship between the sexes, it has been always women who consent to men. Pateman argues that an egalitarian sexual relationship does not necessarily need to be based on consent, “as it is only one way, and not the most important way, in which free and equal individuals can mutually commit themselves or assume obligations”. For her, it lacks an expression to reflect a form of personal life in which two equals freely agree³⁰.

Although this thesis advocates to criminalize rape in the absence of consent, it is important to consider Pateman's argument when regarding the discourse that the state employs in its prevention, investigation, and prosecution. Since assuming women always as the guarantors of consent can implicitly perpetuate gender roles ingrained in power relations, consent should not be the only approach in the discourse against rape.

In this vein, many authors point to other factors to consider beyond consent, such as education, health care, or safe living conditions. For instance, the anthropologist and feminist activist Rita Segato points to the precariousness of life as a factor related to rape. Unlikely many feminists, for Segato, rape is not a problem of gender or men versus women³¹, but a symptom of history and the precariousness of life nowadays: “due to the lack of employment, the insecurity when employed, the precariousness of all the ties... man can no longer comply with his mandate of masculinity, with the obligation to be strong, to be powerful, what makes violence (sexual, physical, warlike) the only way to restore the male position”³². Segato qualifies rape as an expressive crime, a crime of power by sexual means. Her research with rapists led her to understand rape as an act of moralization in which the rapist “does not feel that he acted against the law but in favor of a law that is a moral law” From her point of view, this crime lies in a social problem that transcends gender, and that reflects a society that needs a “pedagogy of cruelty”³³.

What most of the rape’s literature agrees on is that it is a structural problem, a reflection of the historical and social dynamics we are living in. There is no magic recipe against it

³⁰ Carole Pateman, 'Women and Consent' (1980) 8(2) Political Theory, 164 <<http://www.jstor.org/stable/190792>> accessed 30 May 2020.

³¹ See for instance the aforementioned Susan Brownmiller.

³² Florencia Vizzi & Alejandra Ojeda, ‘Rita Segato: “Una falla del pensamiento feminista es creer que la violencia de género es un problema de hombres y mujeres”’, La tinta (22 September 2017) <<https://latinta.com.ar/2017/09/rita-segato-falla-pensamiento-feminista-violencia-genero-problema-hombres-mujeres/>> accessed 6 June 2020.

³³ Reynaldo Sietecase, ‘Rita Segato: “La violación es un acto de poder y de dominación”’, La Vanguardia (14 April 2017) <<http://www.lavanguardia.com.ar/index.php/2017/04/14/rita-segato-la-violacion-es-un-acto-de-poder-y-de-dominacion/>> accessed 6 June 2020.

so its prevalence demands that we identify the cultural and social schemes that seem to “fuel” this crime. And in this, the State has the main responsibility.

1.1.1. Rape myths

Talking about the State's discourse on rape, it is necessary to bring up the so-called "rape myths". Despite being a very contested concept, there is always a dominant understanding of rape among society, which fails to acknowledge the wide range of rape forms that exist. As we will see, the influence exercised by rape myths results in damaging consequences for victims, since they prevent the judicial system to appreciate their experiences and harm, and ultimately, recognize them as victims³⁴.

The concept of rape myths started to be referred by feminists and sociologists during the 1970s, but it was Marta Burt in 1980 the first one on researching on the influence of rape myths, defining them as: “prejudicial, stereotyped or false beliefs about rape, rape victims, and rapists”³⁵. Further developments would go point out the cultural function of rape myths on society: to explain rape cases. Or in words of Lonsway and Fitzgerald: “to deny and justify male sexual aggression against women”³⁶. Some authors claim that, in essence, rape myths enable to maintain the status quo related to gender norms³⁷.

Although rape myths vary according to the societal and cultural context, they usually follow a common pattern allowing researchers to identify four main categories: “beliefs that blame the survivor”, “beliefs that cast doubt on allegations”, “beliefs that excuse the accused”, and “beliefs that assume rape only occurs in certain social groups”³⁸.

Rape myths are part of our daily life, being hard to not adopt them. They unconsciously shape our understanding of sexual abuse and allow certain individuals to construct sexual scripts that result in rape³⁹. They are commonly held by both perpetrators and victims. In fact, it has been reflected that rape myths can provide comfort to women and men in the

³⁴ Hilkje Charlotte Hänel, *What is Rape?: Social Theory and Conceptual Analysis* (Bielefeld : transcript Verlag. 2018).

³⁵ Martha R. Burt, ‘Cultural myths and supports for rape’ (1980) 38 *Journal of personality and social psychology*, 217 in Olivia Smith, *Rape trials in England and Wales* (Palgrave Macmillan, 2018).

³⁶ Kimberly A. Lonsway & Louise F. Fitzgerald, ‘Rape myths: In review’ (1994) 18 *Psychology of Women Quarterly*, 134.

³⁷ James E. Thornton, ‘Myths of aging or ageist stereotypes’ (2002) 28 (4) *Educational Gerontology*, 301.

³⁸ Gerd Bohner, Friederike Eyssel, Afroditi Pina, Frank Siebler, & G. Tendayi Viki, ‘Rape myth acceptance: affective, behavioural, and cognitive effects of beliefs that blame the victim and exonerate the perpetrator’, 17, in Olivia Smith, *Rape trials in England and Wales* (Palgrave Macmillan, 2018) 55.

³⁹ Hilkje Charlotte Hänel, *What is Rape?: Social Theory and Conceptual Analysis* (Bielefeld : transcript Verlag. 2018).

way that they allow them to distance themselves from the possibility of being victims or perpetrators of rape⁴⁰.

While rape myths have been recognized to serve healing processes, they can also hinder victims from acknowledging what happened, what Peterson and Muehlenhard referred to as ‘unacknowledged rape’. In their researcher, they found that women victims of rape and unable to conceptualize their own experience as one of rape were more likely to accept rape myths and were raped in ways that matched the rape myths they accepted. They also found that many of the women that endorse rape myths interpret their behavior in line with those myths, which led them to blame themselves⁴¹.

Now, the focus should not stay only on perpetrators and victims since rape myths are widely held by many institutional professionals, which results in severe implications considering their role. Studies have shown that police officers, among others, rely on rape myths making them more unlikely to investigate or process rape charges when the case does not concur with their beliefs⁴². Likewise, jurors were observed to drawing upon rape myths during trials. As we said, the myths negatively affect the way victims are perceived and treated in court proceedings, for example not considering rape survivors not as “genuine victims” when there is a lack of physical resistance⁴³. Dinos, et al. concluded that rape myths have an impact on juror decision-making, particularly when attributing a guilty verdict: “individuals holding rape stereotypical attitudes were found to be more likely to judge defendants as not guilty”⁴⁴.

Later on, we will be able to verify in practical terms that rape myths still entail a significant barrier to the prosecution of rape cases⁴⁵.

⁴⁰ Kathryn M. Ryan, ‘The Relationship between Rape Myths and Sexual Scripts: The Social Construction of Rape’ (2011) 65 *Sex Roles*, 774 <<https://doi.org/10.1007/s11199-011-0033-2>> accessed 8 June 2020.

⁴¹ Zoë D. Peterson & Charlene L. Muehlenhard, ‘Was it rape? the function of women’s rape myth acceptance and definitions of sex in labelling their own experiences’ (2004) 51 *Sex Roles*, 129 <<https://doi.org/10.1023/B:SERS.0000037758.95376.00>> accessed 9 June 2020.

⁴² Olivia Smith, *Rape trials in England and Wales* (Palgrave Macmillan, 2018).

⁴³ Hilkje Charlotte Hänel, *What is Rape?: Social Theory and Conceptual Analysis* (Bielefeld : transcript Verlag, 2018).

⁴⁴ Sokratis Dinos, Nina Burrowes, Karen Hammond, Christina Cunliffe, ‘A systematic review of assessment of rape victims: Do rape myths impact on juror decision making?’ (2015) 43 (1) *International Journal of Law, Crime and Justice* <<https://doi.org/10.1016/j.ijlcrj.2014.07.001>> accessed 9 June 2020.

⁴⁵ Katie M. Edwards, Jessica A. Turchik, Christina M. Dardis, Nicole Reynolds, Christine A. Gidycz, ‘Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change’ (2011) 65 *Sex Roles* (2011),761 <<https://doi.org/10.1007/s11199-011-9943-2>> accessed 9 June 2020.

1.2. Rape culture

The concept of rape culture was also born during the 1970s second wave of feminism⁴⁶. One of the reference definitions of rape culture is from Buchwald et al. as “the social, cultural and structural discourses and practices in which sexual violence is tolerated, accepted, eroticized, minimized and trivialized”⁴⁷. The Marshall University’s Women’s Center defines it as “an environment in which rape is prevalent and in which sexual violence against women is normalized and excused in the media and popular culture”, giving as examples: blaming victims, trivializing sexual assault, sexually explicit jokes, tolerance of sexual harassment, inflating false rape report statistics, or assuming that only “weak” men get raped, among others⁴⁸. Despite some variations, generally, all theories point to cultural norms and social practices that turn rape into an inevitable part of society.

However, not everyone supports the existence of the rape culture. For Luke Gittos rape culture is a dangerous myth that qualifies as “antithetical to freedom” since it encourages intolerance for certain attitudes and a harmful notion of inherent vulnerability that problematizes intimacy. He also claims that the impact of panic and hysteria around rape has shuttled down a rational debate, which is affecting the due process, leading to informal forms of justice that prioritize “the validation and confirmation of individual experience above the objective establishment of the truth”⁴⁹.

The American largest anti-sexual-violence organization, RAINN (Rape, Abuse & Incest National Network) has also shown reluctant towards rape culture. They condemned the trend towards blaming rape culture for the problem of sexual violence on campuses instead of the individual at fault, mitigating personal responsibility⁵⁰. This differs from the view that behind personal responsibility, there are cultural attitudes, values, beliefs, and norms that enable those individual behaviors⁵¹. Feminist approaches have suggested

⁴⁶ Mithu M. Sanyal, *Violación: Aspectos de un crimen, de Lucrecia al #MeToo* (1st ed. Reservoir Books, 2019).

⁴⁷ Emilie Buchwald, Pamela Fletcher, Martha Roth, *Transforming a rape culture* (1st ed. Milkweed Editions, 1993).

⁴⁸ Marshall University’s Women’s Center, ‘Rape culture’ <<https://www.marshall.edu/wcenter/sexual-assault/rape-culture/>> accessed 10 June 2020.

⁴⁹ Luke Gittos, *Why Rape Culture is a Dangerous Myth: From Steubenville to Ched Evans* (Andrews UK Ltd., 2015) 82.

⁵⁰ The Rape, Abuse & Incest National Network (RAINN), ‘RAINN Urges White House Task Force to Overhaul Colleges’ Treatment of Rape’ (February 28, 2014) <<https://www.rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf>> accessed 11 June 2020.

⁵¹ Nicola Henry & Anastasia Powell, ‘Framing Sexual Violence Prevention: What Does It Mean to Challenge a Rape Culture?’ in Nicola Henry & Anastasia Powell, *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014) 1.

not focus that much on the responsibility of individuals but on a shared and societal responsibility, which requires an understanding of the socio-cultural basis of rape⁵².

Misogyny beliefs, sexist attitudes, and rape myths are some components of the so-called rape culture that is daily perpetuated among society through channels as language, media, or institutions⁵³. Many authors point out that rape culture has been benefited from the era of networking. New technologies have become a new medium for rape culture being spread considering the ability of media to reach and influence massive numbers of people⁵⁴. Inevitably, the media's ideas to which we are exposed, contribute to our ideas since our childhood, shaping our understanding of social problems, including rape⁵⁵. The language that media uses, including rape myths and gender stereotypes, undermines its origin as a violent crime committed in search of power, instead of sexual pleasure⁵⁶. Moreover, it can arrive to tell society, including children and even perpetrators themselves that we do not condemn these crimes, which is the ultimate expression of rape culture⁵⁷. In words of Nicola Henry and Anastasia Powell, "technology plays a vital role in challenging the notion that rape culture is a figment of the feminist imagination"⁵⁸.

Besides media, rape culture is "infiltrated" in other multiples institutions, the criminal system for instance. In fact, feminist theories have identified it as one of the patriarchal environments that most perpetuates rape culture⁵⁹. If, as we have seen, rape myths

⁵² Carine M. Mardrossian, 'Toward a New Feminist Theory of Rape'(2002) 27(3) *Signs*,743 in Nicola Henry & Anastasia Powell, *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014).

⁵³ Nicola Henry & Anastasia Powell, 'Framing Sexual Violence Prevention: What Does It Mean to Challenge a Rape Culture?' in *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014) 1.

⁵⁴ Nicola Henry and Anastasia Powell, 'The Dark Side of the Virtual World Towards a Digital Sexual Ethics' in *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014) 84.

⁵⁵ Nancy Berns, 'Framing the victim: Domestic violence, media, and social problems' (2004) Hawthorne, N.Y.: Aldine. In Lily K. Thacker, 'Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System' (2017) 1(1) Article 8 *Kentucky Journal of Undergraduate Scholarship* 89 <<https://encompass.eku.edu/kjus/vol1/iss1/8>> accessed 12 June 2020.

⁵⁶ H. Benedict, 'The language of rape' (1993) in Lily K. Thacker, 'Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System'(2017) 1(1) Article 8 *Kentucky Journal of Undergraduate Scholarship* 92 <<https://encompass.eku.edu/kjus/vol1/iss1/8>> accessed 12 June 2020.

⁵⁷ Sarah Brown, 'Rape Culture or a Culture of Rape? American Rape Culture Compared to South African Rape Accommodating' (2018) Senior Honors Theses 223 <<https://digitalcommons.brockport.edu/honors/223>> accessed 12 June 2020.

⁵⁸ Nicola Henry and Anastasia Powell, 'The Dark Side of the Virtual World Towards a Digital Sexual Ethics' in ⁵⁸ Nicola Henry and Anastasia Powell, *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014) 99.

⁵⁹ Sarah Projansky, *Watching rape: Film and television in postfeminist culture* (New York University Press, 2001).

influence legal processes and decision-making, we could expect rape culture to determine how the justice system addresses cases of rape.

Lily K. Thacker refers to victim-blaming as another part of the rape culture, which is generally practiced towards women in the criminal justice system. She considers victim-blaming, rape culture, and the criminal justice system as all inherently related, leading to the revictimization of rape survivors in courts⁶⁰. Reinterpreting the words of Peterson, we can say that what happens in the courtroom is a by-product of rape culture⁶¹. In fact, many authors have pointed to the criminal justice system as a barrier itself when addressing sexual violence, instead of remedy according to the view of RAINN.

That is why many feminists consider that sexual violence will only be effectively addressed once social and cultural norms are reformed, and not by legal norms solely. For Wendy Larcombe, ‘rape culture’ rather than rape law may explain the law’s limits to some extent⁶². In the same vein, Goldberg-Ambrose concludes that the most difficult goal to achieve when reforming rape legislation is a change in knowledge, values, and attitudes about gender and sexuality because, despite recent developments in judicial education, “it remains difficult to get judges to make dramatic changes in their conception of justice and trial process”⁶³.

While rape culture should not serve as a justification for the state’s failure on preventing sexual violence, we cannot ignore the influence it exercises over the institutional actors. And that is why we must ensure that the State does not perpetuate it in the exercise of its obligations.

⁶⁰ Lily K. Thacker, ‘Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System’(2017) 1(1) Article 8 Kentucky Journal of Undergraduate Scholarship 89 <<https://encompass.eku.edu/kjus/vol1/iss1/8>> accessed 12 June 2020.

⁶¹ Latoya Peterson, ‘The not-rape epidemic’. In J. Friedman & J. Valenti, *Yes means yes: Visions of female power and a world without rape* (Berkeley, CA: Seal., 2008) 209.

⁶² Wendy Larcombe ‘Limits of the Criminal Law for Preventing Sexual Violence’ in Nicola Henry and Anastasia Powell, *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014) 70.

⁶³ Carole Goldberg-Ambrose, ‘Unfinished Business in Rape Law Reform’ (1992) 48(1) Journal of Social Issues 179 <https://www.academia.edu/2760244/Unfinished_Business_in_Rape_Law_Reform> accessed 13 June 2020.

2. INTERNATIONAL STANDARDS OF RAPE

Once generally introduced the topic, this chapter will observe the international legal framework related to rape to acknowledge the guiding principles and the states' obligations that emanate from it. To this purpose, in the first part, we will make a short review over the consolidation of rape as a violation of International Human Rights Law (IHRL) and International Humanitarian Law (IHL), as well as the mutual influence exercised between the international framework and the European one. In the second place, we will address in detail the international legal framework derived from IHRL and IHL to identify the main guiding principles of rape that have been consolidated until date. As we will note below, this framework is nourished by written law, soft-law instruments, and jurisprudence of treaties-bodies and international tribunals. It covers not only the elements of rape as an international crime, but above all, and more relevant to this investigation, the corresponding states' obligations.

2.1. International legal framework related to rape

2.1.1. Rape as a violation of international human rights law

Rape as a form of Violence Against Women (VAW) is considered today a violation of human rights laws, enshrined by a complex body of norms and state's practice.

Many authors allege that the basis to consider rape as a violation of human rights can be found in the Universal Declaration of Human Rights that sets all human beings as "free and equal in dignity and rights", and "entitled to all the rights and freedoms without distinction of any kind"⁶⁴. However, the principle of non-discrimination expressed in the Universal Declaration and following human rights treaties (seen the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights) was made in male terms, acknowledging women in contrast to men rather than as rights bearers themselves. The androcentric construction of human rights law led to ignoring the reality of women's lives and consequently failed to cover the majority of the violence they experience, which made contemporary feminists question the claim of objectivity and universality in human rights law⁶⁵.

⁶⁴ United Nations General Assembly (UNGA), 'Universal Declaration of Human Rights' (10 December 1948) UNGA Res 217 A(III) art 1 and 2.

⁶⁵ Hilary Charlesworth, 'Human Rights as Men's Rights'. In Julie Peters & Andrea Wolper (eds.) *Women's Rights, Human Rights: International Feminist Perspectives* (London: Routledge, 1995) 103.

This normative gap related to VAW led rape to be initially understood as a violation of the right to private life⁶⁶; later as an act of torture and inhuman and degrading treatment or punishment⁶⁷; and more recently, as a form of gender discrimination since the CEDAW Committee formally recognized gender-based violence as a form of discrimination, and therefore as a breach of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶⁸.

Since then, even that there is no binding international convention dealing exclusively with VAW, a broad framework has been raised within the human rights sphere, composed first of all, by the legally binding norms that explicitly address VAW: the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belem do Para Convention); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); and the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention); and secondly, by a comprehensive range of soft-law instruments⁶⁹. These extend from international conferences such as those resulting in the Vienna Declaration and Programme of Action, until numerous non-binding but powerful documents, such as the United Nations Declaration on the Elimination of Violence against Women (DEVAW) which provided the first explicit definition of violence against women⁷⁰.

In this regard, diverse bodies within the United Nations (UN) system, have developed international standards regarding gender-based violence and specifically rape, seen for instance the United Nations Special Rapporteur on violence against women, its causes and consequences⁷¹ or the Human Rights Council which has widely appealed to the

⁶⁶ As seen in: *X and Y v. The Netherlands* App no 8978/80 (ECtHR, 26 March 1985); *Raquel Martín de Mejía v. Peru*, Report N° 5/96 Case 10.970 (IACHR 1 March 1996).

⁶⁷ Seen for instance: *Aydın v. Turkey* App no 23178/94 (ECtHR, 25 September 1997); *Prosecutor v Akayesu*, ICTR-96-4-T (2 September 1998).

⁶⁸ United Nations Committee on the Elimination of Discrimination Against Women, 'General recommendation No. 19: Violence Against Women' (1992) UN Doc A/47/38.

⁶⁹ Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (Cambridge University Press, 2017).

⁷⁰ UNGA, 'Declaration on the Elimination of Violence against Women' (20 December 1993) UN Doc A/RES/48/104 art 1.

⁷¹ United Nations Economic and Social Council (ECOSOC), 'Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk' (20 January 2006) UN Doc E/CN.4/2006/61.

concerning prevalence of rape and how the lack of accountability reinforces the normalization and tolerance of these crimes among society⁷².

Also, several treaty-bodies have reinforced the prohibition of rape under human rights law and extended the corresponding scope of state's obligations, seen for instance the Human Rights Committee⁷³ and the Committee on Economic, Social and Cultural Rights in the context of their respective Covenants⁷⁴; as well as the Committee Against Torture (CAT) which has discussed rape in the context of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment⁷⁵, ruling in 2017 its first decision convicting a case rape⁷⁶.

The qualification of rape as torture not only has been developed among international human rights law but also and first under international humanitarian law and international criminal law. Thus, we will review now how this domain has contributed to making the prohibition of rape reach an international standard⁷⁷.

2.1.2. Rape as an international crime

Rape and other forms of sexual violence in the context of armed conflict are explicitly prohibited by some provisions of international humanitarian treaties⁷⁸ and reinforced by customary practice. In parallel, international criminal law provides another basis to conceptualize rape as a crime against humanity, a war crime, or even genocide⁷⁹.

The International Criminal Tribunal for Rwanda (ICTR), established in 1994 by the United Nations Security Council, became the first international tribunal to ruled rape as

⁷² UNGA, adopted by Human Rights Council 'Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence' (25 June 2013) UN Doc A/HRC/RES/23/25.

⁷³ Human Rights Committee, 'General Comment No. 28. Article 3 (The equality of rights between men and women)' (29 March 2000) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

⁷⁴ United Nations Economic and Social Council, 'General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc E/C.12/GC/22.

⁷⁵ Seen for instance: United Nations Committee against Torture (CAT), 'General Comment No. 2 Implementation of article 2 by States parties' (24 January 2008) UN Doc CAT/C/GC/2.

⁷⁶ *Mrs. A v. Bosnia and Herzegovina* (22 August 2019) Communication No. 854/2017 UN Doc. CAT/C/67/D/854/2017.

⁷⁷ Felice D. Gaer, 'Rape as a Form of Torture: The Experience of the Committee Against Torture' (2012) 15 (2) CUNY L 293 <<https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1301&context=clr>> accessed 25 June 2020.

⁷⁸ Seen for instance Article 27 of the Fourth Geneva Convention Relative to Civilians.

⁷⁹ International Committee of the Red Cross (ICRC), 'Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts' Legal factsheet (11 March 2015) <<https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed>> accessed 25 June 2020.

a crime against humanity and as genocide if employed to destroy a particular group (*Akayesu* case). Drawing guidance on this ruling, the International Criminal Tribunal for Yugoslavia (ICTY) was the first international criminal tribunal to enter convictions for rape as a form of torture in *Mucić et al*⁸⁰. These cases set a milestone in the prosecution of rape as an international crime, that was strengthened with the adoption of the Rome Statute of the International Criminal Court (ICC), which expressly recognized that rape could constitute a crime against humanity and a war crime⁸¹. Since then, both ICTY and ICTR, and the Special Court for Sierra Leone to a lesser extent, have issued extensive jurisprudence on the matter⁸², which has contributed to evolving the interpretation of rape and enhancing the scope of obligations that emanate from IHL⁸³.

Regarding rape in the context of armed conflict, the United Nations Security Council has played an important role by calling up states involved in an armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, as contained for instance in its benchmark Resolution 1325⁸⁴. The Security Council has also helped to reinforce common international standards that extend the conflict scope such as strengthening national laws to enhance investigation and prosecution of sexual violence or the duty to guarantee an effective remedy according to the provisions of international law⁸⁵.

This shows how the international human rights law alongside criminal and humanitarian law mutually nourishes each other, instituting rape as a violation under the international law framework. Furthermore, the prohibition of rape is also suggested to have reached a

⁸⁰ Angela M. Banks, 'Overview of Sexual Violence and International Criminal Law' (2005) Women's Initiatives for Gender Justice <www.iccwomen.org> accessed 25 June 2020.

⁸¹ International Criminal Court, 'Rome Statute of the International Criminal Court' (Rome, 17 July 1998, in force on 1 July 2002) United Nations, Treaty Series, vol. 2187, No. 38544, Depository: Secretary-General of the United Nations, <http://treaties.un.org>.

⁸² A third of the total cases that ICTY has completed (24 cases) and more than half of those of ICTR (13 cases) have involved sexual violence against civilians; in: United Nations, Department of Peacekeeping Operations, 'Review of the sexual violence elements of the judgments of International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820' (2010) <<https://www.unwomen.org/en/docs/2010/1/review-of-the-sexual-violence-elements-of-the-judgments-of-international-criminal-tribunals>> accessed 13 July 2020.

⁸³ ICRC, 'Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts' Legal factsheet (11 March 2015) <<https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed>> accessed 25 June 2020.

⁸⁴ United Nations Security Council, 'Resolution 1325 (2000) Adopted by the Security Council at its 4213th meeting, on 31 October 2000. UN Doc S/RES/1325.

⁸⁵ United Nations Security Council, Resolution 2467 (2019) Adopted by the Security Council at its 8514th meeting, on 23 April 2019. UN Doc S/RES/2467 para 1.

principle of customary international law according to the *opinio juris* and state practice from the last twenty-five years⁸⁶, which allows committed those states that are not parties of the binding instruments we have mentioned above.

The role of the European system

As we will see below, the regional human rights systems have played a key role in the consolidation of international standards towards rape. In Europe, both the European Union and the Council of Europe had taken extensive action towards the eradication of VAW (including rape) under their respective mandates.

By its part, the Council of Europe has adopted numerous measures including the adoption of the Istanbul Convention, becoming the second regional treaty to specifically address VAW, and for many, the most comprehensive one⁸⁷. Under the Convention, violence against women is understood as a violation of human rights and a form of discrimination against women⁸⁸. For State parties to meet their obligations to prevent, protect, and prosecute violence against women, the Convention establishes an extensive framework of detailed measures about data collection, prevention, protection, investigation, and prosecution, or international cooperation. Moreover, beyond the general due diligence obligation, it requires state parties to place the rights of victims at the center and to adopt a gender perspective in any measures taken, which makes the Convention particularly valued in terms of victims' protection and support⁸⁹.

It should be noted that the Istanbul Convention is so ambitious and comprehensive due in large part to the previous international and regional law standards in which it is built on⁹⁰. The European Court of Human Rights (ECtHR) for instance, has been one of these remarkable influences by setting important standards regarding rape since 1985 when ruled for the first time a rape case under its jurisdiction⁹¹.

⁸⁶ CEDAW Committee, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (26 July 2017) UN Doc CEDAW C/GC/35.

⁸⁷ Jackie Jones, 'The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)' in Rashida Manjoo and Jackie Jones (eds), *The legal protection of women from violence: normative gaps in International Law* (1st ed Routledge, 2018) 139.

⁸⁸ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, article 1.

⁸⁹ UN Human Rights Council, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' (10 June 2015) UN Doc A/HRC/29/27.

⁹⁰ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, Preamble.

⁹¹ *X and Y v. The Netherlands* App no 8978/80 (ECtHR, 26 March 1985).

Among its jurisprudence, the Court has mostly understood rape as a breach of the prohibition of torture and a breach of the right to respect the private and family life. Under the view that the Convention is a living instrument, the Court has interpreted an increasingly imperative of states' obligations deriving from the Convention. Consequently, beyond the duty to criminalize rape through an appropriate legal framework, the Court has been requiring positive obligations such as the duty to prevent breaches of rights, to provide information and advice, to effectively respond to any breach of rights, as well as to provide resources to those whose rights are at risk. This approach responds to the general tendency in international law that “no longer require states of restraining interference, but rather demands interference by the state into matters of sexual autonomy”⁹².

2.2. International guiding principles of rape

To identify the international guiding principles related to rape, we must look after the provisions of the written norms, and the interpretation of the judicial bodies which have had a significant influence on their consolidation⁹³.

State's obligations towards rape lie in the principle of *due diligence*, according to which states are not only obliged to respect human rights, that is, refrain from violating them, but to guarantee them. This principle transformed the conventional view of the state's responsibility under human rights law and attributed them the positive obligation ‘to protect’ individuals against the acts of private persons⁹⁴.

Since gender-based violence widely occurs within the private sphere, the applicability of the due diligence standard in the VAW framework acquires significant relevance. The General Recommendation No.19 by the CEDAW Committee marked a turning point by expressly recognizing that “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

⁹² Maria Eriksson, *Defining rape: Emerging obligations for states under international law* (Martinus Nijhoff Publishers, 2011) 244.

⁹³ Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (Cambridge University Press, 2017).

⁹⁴ Council of Europe, ‘Preventing and combating domestic violence against women: A learning resource for training law-enforcement and justice officers’(2016) <<https://rm.coe.int/16805970c1>> accessed 15 June 2020

for providing compensation”⁹⁵. Upcoming instruments on the matter, as DEVAW⁹⁶ or the UN Special Rapporteur on violence against women, its causes, and consequences⁹⁷ strongly reinforced the due diligence standard towards VAW. However, it would reach a more imperative status when included by binding norms such as Belem do Para Convention, and when both the ECtHR and the Inter-American Court of Human Rights (IACtHR) established state’s responsibility when failing to comply with it⁹⁸.

In this regard, it has been suggested that the due diligence principle has contributed to overcome the shortcomings of human rights concerning VAW, by providing a parameter of states’ obligations⁹⁹. As we will examine below, the due diligence principle as a whole has been embodied in specific measures to fulfill the obligations of prevention, protection, prosecution, and compensation of forms of violence against women such as rape. Let us take a close look at each of them:

2.2.1. Legislative framework

According to international standards, the first requirement of states is that related to legislative measures, that is, to criminalize all forms of gender-based violence against women and that the legal sanctions commensurate with the gravity of the offense¹⁰⁰. The Belem do Para Convention, for instance, requires state parties to generally condemn all forms of violence against women and “to adopt such legislative or other measures as may be necessary to give effect to this Convention¹⁰¹”.

In particular to rape, CEDAW Committee demands states to “ensure that is characterized as a crime against the right to personal security and physical, sexual and psychological

⁹⁵ United Nations Committee on the Elimination of Discrimination Against Women, ‘General recommendation No. 19: Violence Against Women’ (1992) UN Doc A/47/38.

⁹⁶ UNGA, ‘Declaration on the Elimination of Violence against Women’ (20 December 1993) UN Doc A/RES/48/104 art 4.c.

⁹⁷ The UN Special Rapporteur on violence against women, its causes and consequences has widely promoted the due diligence standard as a tool to eliminate VAW, since it has the potential to transform patriarchal gender structures and values that perpetuate and entrench violence against women, if demanding full compliance of States with international law and to hold non-state actors accountable for their acts. See: ECOSOC, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk’ (20 January 2006) UN Doc E/CN.4/2006/61.

⁹⁸ Seen for instance: *González et al. (“Cotton Field”) v. Mexico* (IACtHR16 November 2009).

⁹⁹ Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (Cambridge University Press, 2017).

¹⁰⁰ United Nations Committee on the Elimination of Discrimination Against Women ‘General recommendation No. 19: Violence Against Women’ (1992) UN Doc A/47/38

¹⁰¹ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women “Convention of Belém do Pará” (Adopted at the Twenty-fourth Regular Session of the General Assembly of the Organization of American States, Belém do Pará, Brazil, 9 June 1994).

integrity and that the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances”¹⁰².

Under the international law framework, definitions of rape have widely evolved due to the extensive labor of the human rights instruments¹⁰³ but especially due to the jurisprudence of the judicial bodies. The most remarkable change has been from requiring the use of force or violence towards a lack of consent, in which the international tribunals have notably influenced: the ICTR, which provided the first definition of rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” in *Akayesu*, turned to adopt later the absence of consent as the standard criterion in *Bagosora*, following the approach of the ICTY in *Kunarac et al.* This one became a landmark case since the court understood that although “force or threat of force provides clear evidence of non-consent, force is not an element per se of rape” and in certain cases, the victim’s consent can simply not be given freely¹⁰⁴.

For its part, the ECtHR noted by the first time in *M.C. v. Bulgaria* the international trend towards recognizing lack of consent as the essential element in determining rape and sexual abuse and judged on that basis. Considering that States must prosecute any non-consensual sexual acts including when the victim had not physically resisted, as occurred in the alleged case, the Court found both a violation of article 3 of the Convention and article 8 because the Bulgarian legislation did not sanction sexual violence when no resistance from the victim¹⁰⁵. Likewise, the IACtHR has repeatedly considered sexual violence as those actions of a sexual nature committed against a person without his or her

¹⁰² CEDAW Committee, ‘General recommendation No. 35 on gender-based violence against women, updating General recommendation No. 19’ (26 July 2017) UN Doc CEDAW C/GC/35 para 29(e).

¹⁰³ For instance, the Special Rapporteur, calling upon States to revise Criminal/Penal codes and ensure that the definition of rape is based on the absence of consent and in line with international standards: Office of the High Commissioner for Human Rights (OHCHR), ‘International Day on the Elimination of Violence against Women 25 November 2019: Absence of consent must become the global standard for definition of rape’ (Geneve, 22 November 2019) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25340&LangID=E>> accessed 22 June 2020.

¹⁰⁴ ICRC, ‘Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts’ Legal factsheet (11 March 2015) <<https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed>> accessed 25 June 2020.

¹⁰⁵ *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003).

consent, and that in addition to understanding the physical invasion of the human body, they can include acts that do not involve penetration or even physical contact¹⁰⁶.

As reflecting of this progress is the inclusion of consent as a key element in the criminalization of sexual violence, required by Article 36 of the Istanbul Convention. The provision states that “consent must be given voluntarily, as the result of the person’s free will, assessed in the context of the surrounding circumstances” (paragraph 2), and that the criminal offenses apply to all non-consensual sexual acts, irrespective of the relationship between the perpetrator and the victim (paragraph 3)¹⁰⁷. Accordingly, States are required to provide for criminal legislation that includes the notion of lack of consent even that it is left to their discretion the wording of the legislation and the factors to reach the “freely given consent” character¹⁰⁸.

By its part, the Committee on Economic, Social and Cultural Rights has understood rape to deny individuals their full sexual and reproductive health protected under Article 12 of the Covenant. And therefore, a breach of States parties’ obligations when they do not guarantee minimum essential levels of the right to sexual and reproductive health, by ensuring among others “the legal prohibition of domestic and sexual violence, including marital rape”¹⁰⁹.

As a way to summarize the main features that States need to attend when criminalizing rape, we may consider the recommendation made by the United Nations Handbook for Legislation on Violence against Women related to sexual violence:

- Define sexual assault as a violation of bodily integrity and sexual autonomy;
- Replace existing offenses of rape and “indecent” assault with a broad offense of sexual assault graded based on harm;
- Provide for aggravating circumstances including, but not limited to, the age of the survivor, the relationship of the perpetrator and survivor, the use or threat of

¹⁰⁶ *Fernández Ortega y otros Vs. México* (IACtHR 30 August 2010); *Penal Miguel Castro Castro Vs. Perú* (IACtHR 24 November 2006).

¹⁰⁷ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, article 36.

¹⁰⁸ Council of Europe, ‘Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence’ (Istanbul, 11 May 2011) CETS 210, para 192.

¹⁰⁹ United Nations Economic and Social Council, ‘General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2 May 2016) UN Doc E/C.12/GC/22 para 49(d).

violence, the presence of multiple perpetrators, and grave physical or mental consequences of the attack on the victim;

- Remove any requirement that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:
 - Requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or
 - Requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances;
- Specifically criminalize sexual assault within a relationship (i.e., “marital rape”), either by:
 - Providing that sexual assault provisions apply “irrespective of the nature of the relationship” between the perpetrator and complainant; or
 - Stating that “no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation”¹¹⁰.

2.2.2.Prevention

As a general measure, states are required to implement appropriate preventive measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes, inequality in the family, and the neglect or denial of women’s civil, political, economic, social and cultural rights¹¹¹. To this purpose, there is a range of detailed measures that states shall employ such as awareness-raising, education, training of professionals, preventive intervention, and treatment programs, as well as tackling the private sector and media¹¹².

¹¹⁰ UN Women, ‘Handbook for Legislation on Violence against Women’ (2012) New York, p.24. <<https://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>> accessed 9 July 2020.

¹¹¹ CEDAW Committee, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (26 July 2017) UN Doc CEDAW C/GC/35, art 30.a.

¹¹² Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, art (13-17).

However, states are also required to adopt specified preventive interventions when necessary. In this regard, both the Inter-American and the European Courts have found a violation of the duty of prevention in those cases where the State, knowing a possible violation, does not act due diligence through concrete actions to prevent the violation¹¹³.

2.2.3. Investigation, Prosecution, and Punishment

Since an investigation is one of the measures that embody the due diligence obligation of States¹¹⁴, states' international responsibility may be committed if they fail to carry it. The IACHR has reiterated that the absence of an investigation is a violation of the State's obligation to guarantee the human rights contained in the American Convention (article 1.1) and Belem do Para Convention (article 7.b). Moreover, when concerning cases of violence against women the duty to investigate acquires an additional scope¹¹⁵.

Similarly, the European Court has considered the failure of the State's positive obligations to effectively investigate and punish all forms of rape and sexual abuse as a violation of article 3 of the Convention, as seen in *P.M. v. Bulgaria*, or *Y. v. Slovenia* in which they had passed more than seven years between the applicant's complaint and the rendering of the first-instance judgment¹¹⁶.

Now, regarding prosecution and punishment, states must ensure effective access for victims to courts and tribunals and that the authorities adequately respond to all cases of gender-based violence against women¹¹⁷. To this end, there have been developed important principles concerning the investigation and trial process when addressing rape:

- a. Duty to consider the body of evidence and the context in which sexual violence occurs

According to the Istanbul Convention, the prosecution of this offense requires a context-sensitive assessment of the evidence to establish whether the victim has freely consented. Moreover, the assessment must consider the wide range of behavioral responses to sexual

¹¹³ *E. and others v. the United Kingdom* App no 33218/96 (ECtHR, 2 July 1996); *González et al. (Cotton Field) v. Mexico*, (IACtHR 16 November 2009).

¹¹⁴ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, art 5.2.

¹¹⁵ *González et al. (Cotton Field) v. Mexico*, (IACtHR 16 November 2009).

¹¹⁶ ECtHR Press Unit, 'Factsheet-Violence against women' (May 2020) <https://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf> accessed 28 June 2020.

¹¹⁷ As stated in: CEDAW Committee, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (26 July 2017) UN Doc CEDAW C/GC/35, art 32.a.

violence and rape and should not be based on assumptions of typical behavior in such situations.¹¹⁸

The various judicial bodies have observed this guiding principle over their jurisprudence, as seen in the *Cotton Field* case, in which the Inter-American Court considered the lack of context-investigation as an irregularity in the process involving the international responsibility of the Mexican State¹¹⁹. Similarly, the ECtHR established in *M.C. v. Bulgaria* the international responsibility of Bulgaria by closing an investigation for sexual violence against a minor for not finding direct evidence about the victim's physical resistance. For the Court, authorities should have explored all the facts, have decided based on an assessment of all the surrounding circumstances, and the investigation and its conclusions should have been centered on the issue of non-consent¹²⁰. In a later case (*E.B. v. Romania*), the Court reinforced this standard considering that the authorities had placed too much emphasis on the lack of proof of resistance and had failed to take the context-sensitive approach required owing to the slight intellectual incapacity of the victim¹²¹.

b. Prohibition on the use of evidence relating to the sexual behavior of the victim in the judicial process

Under the Rules of Procedure and Evidence of the International Criminal Court is unacceptable to admit evidence of the prior or subsequent sexual conduct of a victim or witness¹²². Similarly, in the human rights sphere, the Committee against Torture has requested complaint mechanisms and investigations to prevent the introduction of discriminatory evidence and harassment of victims and witnesses¹²³.

The prohibition of the use of evidence relating to the sexual behavior of the victim is particularly relevant to rape cases since it perpetuates the damaging stereotypes of victims as promiscuous and/or immoral and not worthy of protection. So, it is used during the judicial process to challenge the respectability, the credibility, and the lack of consent of

¹¹⁸ Council of Europe, 'Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence' (Istanbul, 11 May 2011) CETS 210, para 192.

¹¹⁹ *M.C. v. Bulgaria* App no 39272/98 (ECtHR, 4 December 2003).

¹²⁰ *González et al. ("Cotton Field") v. Mexico* (IACtHR 16 November 2009).

¹²¹ *E.B. v. Romania* App no 49089/10 (ECtHR, 19 March 2019).

¹²² ICC, 'Rules of Procedure and Evidence' (2013) Rule 70 <<https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>> accessed 11 July 2020.

¹²³ CAT, 'General comment No. 3 (2012): Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3.

victims¹²⁴. In this regard, the Istanbul Convention expressly requires states to permit evidence relating to the sexual history and conduct of the victim only when it is relevant and necessary¹²⁵ since, as states in the Explanatory Report, it “should not be considered as an excuse for acts of violence against women and domestic violence allowing to exonerate the perpetrator or to diminish his liability”¹²⁶.

c. Stereotypes

Beyond the adoption of preventive measures to eradicate stereotypes as root causes of VAW, states must ensure that the interpretation of legislation and prosecution of rape cases are not influenced by gender stereotypes, in other words, judicial stereotyping¹²⁷. This is not that easy since, inevitably, judges hold their own biases and are usually part of dominant groups such as male¹²⁸.

Judicial stereotyping not only violate the obligations States have, but it has been considered as a violation of human rights itself¹²⁹. It poses a strong barrier for women victims of VAW to access to justice by compromising impartiality; influencing judges’ understanding of the nature of criminal offenses and their perception of whether the violence had or had not occurred; affecting judges’ view about the credibility of witnesses, blaming the victims for the attack experienced, and ultimately, preventing judges from holding perpetrators accountable¹³⁰.

How judicial stereotyping undermine justice was proved by the CEDAW Committee in *Vertido v. The Philippine*, in which the sexual stereotypes and misconceptions influenced

¹²⁴ Diana Guarnizo, ‘Acceso a la justicia’ para Mujeres víctimas de violencia sexual. Cuarto Informe de Seguimiento al Auto 092 de la Corte Constitucional’ (Comisión Colombiana de Juristas, 2011) <https://www.coljuristas.org/documentos/libros_e_informes/acceso_a_la_justicia_para_mujeres.pdf> accessed 10 July 2020.

¹²⁵ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, article 54.

¹²⁶ Council of Europe, ‘Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence’ (Istanbul, 11 May 2011) CETS 210, para 278.

¹²⁷ *ibid* para 192.

¹²⁸ Alexandra Timmer, ‘Gender Stereotyping in the case law of the EU Court of Justice’ (2016) *European Equality Law Review* (1) 37 <<https://www.equalitylaw.eu/downloads/3867-european-equality-law-review-1-2016>> accessed 25 August 2020.

¹²⁹ OHCHR: ‘Gender Stereotyping as a Human Rights Violation’ (2013) <<https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx>> accessed 26 May 2020.

¹³⁰ OHCHR, ‘Summary report on the recommendations of the panel discussion on gender stereotyping and on women’s human rights in the context of sustainable development agenda’ (16 September 2014) UN Doc A/HRC/27/73 para 7.

the evaluation of the applicant's testimony and ultimately the Court's decision¹³¹. The CEDAW Committee recalled that all judicial proceedings shall be impartial, fair, and unaffected by gender stereotypes or discriminatory interpretation of legal provisions in a later case, *R. P. B. vs. The Philippines*, in which noted gender stereotypes and misconceptions by the court concerning the lack of resistance: "to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. It reiterates that there should be no assumption in law or practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence"¹³². By its part, the IACtHR has interpreted the use of stereotypes by judicial officials as a form of discrimination¹³³.

d. Protection of the victim's privacy and dignity

Before, during, and after legal proceedings, "states must adopt and implement effective measures to protect and assist women complainants of and witnesses to gender-based violence, including by protecting their privacy and safety"¹³⁴. The Inter-American Commission (IACH) has noted protective measures during the process to protect the security, privacy, and intimacy of the victims as part of the positive obligations to effectively investigate rape crimes¹³⁵. Also, the Inter-American Court has considered the guarantee of personal security as a derived obligation of the principle of due diligence¹³⁶.

In *Y. v. Slovenia*, the ECtHR held a violation of article 8 since the Slovene authorities had failed to protect the applicant's integrity during the criminal investigation and trial, in which a particularly sensitive approach was required. In this case, the Court pointed out the general impact of the judicial proceedings on the victims, since in the present case the cross-examination was used as a means of intimidating and humiliating witnesses¹³⁷.

¹³¹ *Karen Tayag Vertido v. The Philippines* (22 September 2010) Communication No. 18/2008 CEDAW C/46/D/18/2008.

¹³² *R. P. B. vs. The Philippines* (21 February 2014) Communication No. 34/2011 CEDAW/C/57/D/34/2011, para 8.10.

¹³³ *González et al. (Cotton Field) v. Mexico*, (IACtHR 16 November 2009).

¹³⁴ CEDAW Committee, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (26 July 2017) UN Doc CEDAW C/GC/35, art 31.a.

¹³⁵ *Raquel Martín de Mejía v. Peru*, Report N° 5/96 Case 10.970 (IACHR 1 March 1996); and *Ana, Beatriz and Celia González Pérez v. Mexico*, Report N° 129/99 Case 11.565 (IACHR 19 November 1999).

¹³⁶ *Rosendo Cantú and other vs. México* (IACtHR 31 August 2010).

¹³⁷ *Y. v. Slovenia* App no 41107/10 (ECtHR, 28 May 2015).

e. Avoid revictimization

The protection of the victim's privacy and dignity is inextricably linked with the need to avoid revictimization, as seen in *Rosendo Cantú and other vs. México*, in which the Court stressed that, in cases of sexual violence, the investigation should try to avoid in what possible the re-victimization or re-experimentation of the profound traumatic experience once the victim remembers or testifies about what happened¹³⁸.

The Istanbul Convention specifically demands states to protect from intimidation, retaliation, and repeat victimization¹³⁹. Also, DEVAW requested States to ensure that the revictimization of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices¹⁴⁰.

This standard has been extensively reinforced by judicial bodies, such as the Committee Against Torture that required a gender-sensitive approach to judicial and non-judicial proceedings to avoid re-victimization of victims of torture or ill-treatment¹⁴¹. Also, the ECtHR has extensively discussed the importance of protecting the rights of sexual abuse victims during criminal proceedings in its most recent case: *Mraovic v. Croatia*. In this case, the applicant complained that the domestic courts had justified excluding the public from the hearing of his case by the need to protect the victim's private life, without balancing this against his right to a public hearing. The Court, however, considered that the State had been under the obligation to protect the victim from secondary victimization since the cross-examination of a rape victim in court reveals information about the most intimate aspects of the victim's life. Moreover, in this case, an even higher degree of protection to the victim was required since the police authorities had breached her privacy by unlawfully publishing her personal information¹⁴².

¹³⁸ *Rosendo Cantú and other vs. México* (IACtHR 31 August 2010) para 180.

¹³⁹ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, art 56.1.a.

¹⁴⁰ United Nations, 'Beijing Declaration and Platform of Action', adopted at the Fourth World Conference on Women (27 October 1995) art 124.f.

¹⁴¹ CAT, 'General comment No. 3 (2012): Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3.

¹⁴² *Mraovic v. Croatia* App no 30373/13 (ECtHR, 14 May 2020).

f. Ensuring financial assistance, legal aid, medical and psychosocial services

States are required to ensure access to financial assistance, legal aid, medical, psychosocial, and counseling services to victims of gender-based violence¹⁴³ since they are essential to ensure the justiciability, availability accessibility, good quality, provision of remedies for victims, and accountability of justice systems”¹⁴⁴.

In the case *Fernández Ortega et.al vs.México*, the IACtHR recalled that among the guiding principles of a criminal investigation into sexual violence it is necessary that: medical, health and psychological care is given to the victim, both on an emergency basis and an ongoing basis if required; and to ensure that access to free legal aid is provided to the victim during all stages of the proceedings, among others measures¹⁴⁵.

The CEDAW Committee has condemned the non-assistance of the victim in *S.V.P. v. Bulgaria*, in which observed that no legal aid scheme existed for the execution procedure, even for victims who are disabled as a result of the sexual violence experienced, such as the author’s daughter. Accordingly, the Committee finds that the victim’s right to effective compensation for the moral damage suffered has been violated¹⁴⁶.

Moreover, besides financial aid and general assistance, victims of sexual violence require immediate access to comprehensive and integrated services. Seen for instance Article 25 of the Istanbul Convention, which specifically requests for victims of sexual violence “appropriate, easily accessible rape crisis or sexual violence referral centers for victims in sufficient numbers to provide for medical and forensic examination, trauma support and counseling for victims”¹⁴⁷. Due to the traumatic nature of sexual violence, victims of sexual violence including rape, require a particularly sensitive response by trained and specialized staff, and that is why crisis centers, shelters, hotlines, and counseling services have been widely recalled under international law framework for victims of rape¹⁴⁸.

¹⁴³ CEDAW Committee, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (26 July 2017) UN Doc CEDAW C/GC/35, para 31(a)(iii).

¹⁴⁴ CEDAW Committee, ‘General recommendation No. 33 on women’s access to justice’ (3 August 2015) UN Doc CEDAW/C/GC/33, para 38.

¹⁴⁵ *Fernández Ortega et al. v. Mexico* (IACtHR 30 August 2010) para 194.

¹⁴⁶ *S.V.P v. Bulgaria* (24 November 2012) Communication No. 31/2011 UN Doc CEDAW/C/53/D/31/2011.

¹⁴⁷ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, article 25.

¹⁴⁸ See, for instance: UN Women, ‘Handbook for Legislation on Violence against Women’ (2012) New York p.30; and CEDAW Committee, ‘General recommendation No. 33 on women’s access to justice’ (3 August 2015) UN Doc CEDAW/C/GC/33, para 16.b.

Under IHL, states are also obliged to ensure that victims of rape and others forms of sexual violence have access to medical, psychosocial, and psychological care, as well as economic assistance considering that those crimes can have devastating effects on victims' lives, including their ability to earn a living and to provide for themselves¹⁴⁹.

2.2.4. Reparation

The right to an effective remedy is enshrined under IHRL, both by written law¹⁵⁰ and subsequent jurisprudence¹⁵¹, as well as under IHL¹⁵². International law establishes different forms of reparation to redress gross violations of human rights law and serious violations of humanitarian law such as restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition¹⁵³.

Regarding gender-based violence, the CEDAW Committee has stated that according to the obligation of due diligence, state parties will be held responsible if they fail to provide reparations for, acts or omissions by non-State actors that result in gender-based violence against women¹⁵⁴. Moreover, when interpreting the obligation of state parties to provide appropriate remedies, it has detailed that “remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women”¹⁵⁵. Specifically, for cases involving

¹⁴⁹ ICRC, ‘Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts’ Legal factsheet (11 March 2015). <<https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed>> accessed 25 June 2020.

¹⁵⁰ See, for instance: article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, or article 25 of the American Convention on Human Rights.

¹⁵¹ See, for instance: *Mrs. A v. Bosnia and Herzegovina* (22 August 2019) Communication No. 854/2017 UN Doc. CAT/C/67/D/854/2017.

¹⁵² Additional Protocol I expressly recognizes the obligation of States to compensate victims for violations of Geneva Conventions I-IV, which has also been recognized as customary law by the Rule 150 of the ICRC study on customary IHL: ICRC, ‘Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts’ Legal factsheet (11 March 2015) <<https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed>> accessed 25 June 2020.

¹⁵³ See, for instance: UNGA, ‘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’ (21 March 2006) UN Doc A/RES/60/147.

¹⁵⁴ CEDAW Committee, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (26 July 2017) UN Doc CEDAW C/GC/35.

¹⁵⁵ CEDAW Committee, ‘General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) UN Doc CEDAW/C/GC/28, para 32.

rape and sexual offenses, the Committee has considered that “for a remedy to be effective, claims should be dealt in a fair, impartial, timely and expeditious manner”¹⁵⁶.

The ECtHR has considered this standard in *W. v. Slovenia*: because the State failed to conduct a prompt and effective trial of the charges of rape and sexual abuse of the applicant, the Court stated that an award of compensation would have constituted an appropriate form of redress for the delays and related mental distress suffered by the applicant. However, the Court concluded that the compensation awarded to the applicant by the domestic courts did not constitute sufficient redress and thus she may still claim to be a “victim” under the Convention¹⁵⁷.

It should be noted that in cases of sexual violence, measures of reparation should go beyond individual victims towards a structural transformation, that is, overturning the pre-existing patterns of structural discrimination, subordination, hierarchies, and stereotypes, that are the root causes of sexual violence against women¹⁵⁸. The IACtHR has notably contributed to this regard by introducing a gender-sensitive approach towards a more transformative reparation. The case of *Cotton Field v Mexico* was a benchmark in this respect because the Court considered the reparations should be designed in a way that their effect is not only of restitution but also of rectification, and ordered among others, specific measures to allow access to justice for victim’s families¹⁵⁹.

The case *Fernández Ortega et al. v. Mexico*, also reflects this approach on the reparation measures. The Court took into account that the victim was an indigenous woman in a particularly vulnerable situation, and considered the importance of implementing reparations that have a community scope and that allow the victim to reincorporate herself into her living space and cultural identity. Consequently, the Court requested as a measure of reparation that “the State provide the necessary resources for the Me’phaa indigenous community of Barranca Tecoani to be able to establish a community center, which is set up as a women’s center and in which educational activities are held on human

¹⁵⁶ *Karen Tayag Vertido v. The Philippines* (22 September 2010) Communication No. 18/2008 UN Doc CEDAW C/46/D/18/2008, para 8.3.

¹⁵⁷ *W. v. Slovenia* App No 24125/06 (ECtHR, 23 January 2014).

¹⁵⁸ UNGA, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo’ (23 April 2010) UN Doc A/HRC/14/22.

¹⁵⁹ *González et al. (Cotton Field) v. Mexico* (IACtHR 16 November 2009).

rights and women's rights, under the responsibility and management of the women of the community, including Mrs. Fernández Ortega if she so desires"¹⁶⁰.

This standard has been extensively recalled regarding victims of conflict-related sexual violence since they face considerable obstacles in obtaining access to an effective remedy, including reparations. The UN Secretary-General has released several tools in this regard, for instance, a Guidance Note to provide policy and operational guidance for United Nations engagement in the area of reparations for victims of conflict-related sexual violence¹⁶¹. The Nairobi Declaration of the Right to A Remedy and Reparation for Women and Girls Victims of Sexual Violence is a well-acclaimed example of gender-sensitive reparations. Recognizing reparation as an integral part of processes that assist societies to recover from armed conflict and ensure history will not repeat, the Declaration advocates for as a transformative and participative process which take into account preexisting gender relations and power imbalances to ensure a fair assessment of the harm inflicted and equal access to reparation programs¹⁶².

2.3. Conclusion

Rape as a form of violence against women is considered today a violation of human rights laws and an international crime when committed in certain circumstances. These doctrines, IHL and IHRL, have provided the basis for the prohibition of rape to reach an international standard. As a result of the jurisprudence of the courts and the efforts of human rights mechanisms, specific standards have been established to guide States on their duty of prevention, protection, prosecution, and reparation of rape.

Since States' failure to comply with their obligations is interpreted as a form of encouragement and/or de facto permission, their international responsibility may be compromised under international law¹⁶³. Bearing those standards in mind, this chapter will serve as a guide to examine the compliance of Spain with its international obligations towards rape.

¹⁶⁰ *Fernández Ortega et al. v. Mexico* (IACtHR 30 August 2010) para 267.

¹⁶¹ OHCHR; UN Women, 'Guidance note of the Secretary-General: Reparations for Conflict-Related Sexual Violence' (June 2014), <<https://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>> accessed 10 July 2020.

¹⁶² Nairobi Declaration of the Right to A Remedy and Reparation for Women and Girls Victims of Sexual Violence (2007), International Meeting on Women's and Girl's Right to a Remedy and Reparation, Nairobi.

¹⁶³ CAT, 'General Comment No. 2 Implementation of article 2 by States parties' (24 January 2008) UN Doc CAT/C/GC/2 para 18.

3. LEGISLATIVE FRAMEWORK OF RAPE IN SPAIN

Since the Spanish State is bound by the legal framework we have just observed¹⁶⁴, the objective now is to examine how Spain complies with the duty of due diligence in the prevention, investigation, punishment, and provide reparation for acts of rape.

This chapter is going to focus on the first requirement States have to comply with: an appropriate legislative framework. Specifically, on the criminalization of rape and the protective measures in place since already in 2015 the CEDAW Committee expressed to be alarmed about the legislation in place and the prevalence of violence against women in Spain, including sexual violence¹⁶⁵. Both matters continue to be of concern.

The chapter is divided into the following subsections: prevalence, criminalization, protective measures, preventive measures, and conclusion.

3.1. Prevalence

A comparative study across 27 countries in the world reveals that in Spain sexual violence is identified as the top issue facing women and girls (44%)¹⁶⁶. It is easy to identify that sexual violence is a matter of concern for the Spanish society. The difficulty is to get to know the real extent, especially if there is a lack of research about, as in Spain.

The first study that provided any data in this regard was the already cited FRA report of violence against women in Europe from 2014. Concerning Spain, 22% of women interviewees have experienced physical and/or sexual violence by a current or previous partner, or by any other person since the age of 15¹⁶⁷. It should be noted that this data does not allow us to know the specific prevalence of sexual violence since it also includes physical violence. But it is the first close to it.

At the national level, it was in 2015 when the Macro-Survey on Violence against Women provided for the first time data on the prevalence of sexual violence. The results revealed that 13.7% of women residents in Spain aged 16 years old and over had suffered sexual violence throughout their lives from partners, former partners, or third parties

¹⁶⁴ It has ratified the European Convention on Human Rights, the CEDAW, and the Istanbul Convention, among others.

¹⁶⁵ CEDAW Committee, 'Concluding observations on the combined seventh and eighth periodic reports of Spain' (29 July 2015) UN Doc CEDAW/C/ESP/CO/7-8.

¹⁶⁶ International Women's Day, 'Global attitudes towards gender equality' (2019) <<https://www.kcl.ac.uk/giwl/research/global-attitudes-towards-gender-equality>> accessed 21 May 2020.

¹⁶⁷ European Union Agency for Fundamental Rights, 'Violence against women: an EU-wide survey' (2014) <<https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>> accessed 25 May 2020.

(acquaintances, friends, relatives, strangers, etc.). Of this total, 6.7% of women aged 16 or over had suffered attempted rape and other forms of sexual violence, and 1.4% had suffered rape¹⁶⁸.

The most recent data we can reach on the subject are the number of crimes recorded¹⁶⁹ in 2018 which amounted to a total of 13.782, of which 78% corresponds to sexual abuse and sexual assault (10.727). These, maximum exponents of sexual crimes, have experienced significant growth in recent years up to 60% since 2012, especially marked for the period 2016-2018¹⁷⁰. Experts point this significant increase as a result of *La Manada* case that may have marked a turning point on society's awareness, encouraging complaining¹⁷¹.

La Manada case has also prompted a societal focus on gang-rapes. The project "Femicide.net", a portal that collects figures of gender-based violence cases, reports, and awareness campaigns, has created a specific statistic on multiple sexual assaults, which to date amount to 197 gang-rapes since 2016¹⁷². Even the Sexual Crimes' Report from the Ministry of Interior carried out a detailed analysis of the cases of sexual abuse and assault committed by two or more perpetrators during the period 2016-2019 to detect a possible "copycat" trend since *La Manada*. In fact, the data reflect an increase of 31% of total multiple sexual abuse and assaults for the period 2016-2018, but the report points to a general increase of sexual offenses' reports, rather than specifically of multiple sexual offenses¹⁷³.

Beyond the issue of gang-rapes, there is a clear growing trend on sexual violence crimes, on the rise since 2016. Although we cannot know the real magnitude, if we consider that

¹⁶⁸ Ministry of health, social services, and equality: Government Office against Gender based Violence 'Survey on violence against women 2015. Main results' (2015) <https://violenciagenero.igualdad.gob.es/en/violenciaEnCifras/macroencuesta2015/Avance_Resultados2015/home_valida.htm> accessed 20 July 2020.

¹⁶⁹ Qualified as "known facts".

¹⁷⁰ Ministerio del Interior, 'Informe sobre delitos contra la Libertad e Indemnidad Sexual en España' (2018) <<http://www.interior.gob.es/prensa/balances-e-informes/2018>> accessed 19 July 2020.

¹⁷¹ Marta Borraz & Ana Ordaz, 'Las denuncias por violencia sexual han crecido un 60% en los últimos seis años' elDiario.es (19 marzo 2019) <https://www.eldiario.es/sociedad/denuncias-agresion-sexual-aumentaron_1_1646195.html> accessed 19 July 2020.

¹⁷² Geoviolenciasexual, 'Agresiones sexuales múltiples en España desde 2016: casos actualizados' <<https://geoviolenciasexual.com/agresiones-sexuales-multiples-en-espana-desde-2016-casos-actualizados/>> accessed 17 July 2020.

¹⁷³ Ministerio del Interior, 'Informe sobre delitos contra la Libertad e Indemnidad Sexual en España' (2018) <<http://www.interior.gob.es/prensa/balances-e-informes/2018>> accessed 19 July 2020.

the reporting figures are just a small percentage of the real extent¹⁷⁴, they certainly suggest a high prevalence of sexual violence in Spain.

3.2. Criminalization

According to the international standards identified before, States have to criminalize all forms of gender-based violence against women with legal sanctions that commensurate with the gravity of the offense. Specifically, about rape, they must criminalize it as a violation of bodily integrity and sexual autonomy and remove any requirement of being committed by force as well as proof of penetration, that is, placing the absence of consent as the determining element¹⁷⁵. Let us observe to what extent Spain complies with it:

The Spanish Penal Code, which originally dates from 1995, regulates in the title VIII the offenses “against sexual freedom and indemnity” through three chapters: sexual assault (Articles 178 to 180), sexual abuse (Article 181 and 182), and sexual abuse and sexual assault of minors (Article 183 to 183 quater).

Sexual assault is defined in Article 178 in the following terms: “*Whoever offends against the sexual freedom of another person, using violence or intimidation, shall be punished for sexual assault with a sentence of imprisonment from one to five years.*”¹⁷⁶

This is the basic type of sexual assault, which criminalizes the attack on sexual freedom in which some kind of violence or intimidation is employed. It does not specify which actions are understood to reach the crime, which implies a broad and non-exclusive threshold. However, this form of criminalization is not in line with international standards. It is based on the existence of violence or intimidation rather than on the absence of consent, as required by the CEDAW Committee and the Istanbul Convention, to which Spain is part of¹⁷⁷.

According to jurisprudence, both violence and intimidation must be suitable for overcoming the will of the victim, without requiring heroic resistance from the victim.

¹⁷⁴ According to ASPACIA foundation, only 20% of the sexual violence is denounced in Spain. Similarly, the Macro Survey on Violence Against Women 2015 by the Women' Institute showed that only 6% of women raped by someone other than their partner make a formal complaint against their aggressor.

¹⁷⁵ CEDAW Committee, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (26 July 2017) UN Doc CEDAW C/GC/35.

¹⁷⁶ España. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. Boletín Oficial del Estado «BOE» núm. 281, de 24/11/1995.<<https://www.boe.es/eli/es/lo/1995/11/23/10/con>> accessed 20 July 2020.

¹⁷⁷ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, article 36.

However, it requires that the victim make clear his or her refusal in such a way that it is perceived by the author¹⁷⁸. This is one of the serious flaws in the understanding, and therefore investigation and prosecution of sexual assault in Spain. The demand for resistance by victims has been objected by the European Court of Human Rights which has stated that states must investigate the crime in all circumstances and based primarily on lack of consent¹⁷⁹.

It should also be noted that this form of criminalization is gender-neutral, both the active and passive subjects can be male or woman and the crime may be committed in either homosexual or heterosexual relationships.

After the basic type of sexual assault, Article 179 of the Penal Code criminalizes rape as follows: “*When the sexual assault consists of vaginal, anal or oral penetration, or inserting body parts or objects into either of the first two orifices, the offender shall be convicted of rape with a sentence of imprisonment from six to twelve years*”.

This provision makes rape a qualified sexual assault according to the way it is infringed. It is a form of criminalization exclusive by establishing two forms of commission (carnal access and/or the introduction of bodily members or objects) as elements of the type, and therefore, enforceable. This way of configuring a most serious sex crime corresponds to a phallogocentric conception that gives preponderance to the "access carnal". This makes the precept of the criminal legal good "sexual freedom" contradictory since the injury to the victim's freedom is consummated from the moment an act with a sexual connotation is imposed regardless of the degree of physical contact¹⁸⁰. That way has been established by international tribunals as well as the IACtHR which has affirmed that sexual violence can include acts that do not involve penetration or even physical contact¹⁸¹.

This way of criminalizing rape by the Spanish Penal Code corresponds to rape myths and stereotypes that limit the punishment to only one of the possible forms in which it occurs. Its threshold is so strict that prevents the inclusion of other possible experiences of sexual

¹⁷⁸ Luis Rodríguez (direct), *Código Penal. Comentado y con Jurisprudencia* (3rd ed Wolkers Kluwer, Madrid 2009).

¹⁷⁹ *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003).

¹⁸⁰ Adela Asúa, ‘El significado de la violencia sexual contra las mujeres y la reformulación de la tutela penal en este ámbito. Inercias jurisprudenciales’ (2008) in Patricia Laurenzo, María Luisa Maqueda, Ana María Rubio (eds.), *Género, violencia y derecho* (Valencia: Tirant lo Blanch), 131.

¹⁸¹ *Fernández Ortega y otros Vs. México* (IACtHR 30 August 2010); *Penal Miguel Castro Castro Vs. Perú* (IACtHR 24 November 2006).

assault leaving unprotected a big part of victims¹⁸². For instance, forced oral sex does not fall under this provision, so it would be considered under the basic type of assault, with a lesser penalty.

Article 180 sets out the aggravating circumstances that apply to both the basic type of sexual assault (article 178) and rape (article 179):

1. *“The assaults of article 178 shall be punished with imprisonment from five to ten years, and those of article 179 with imprisonment from twelve to fifteen years when the circumstances considered in this article concur:*

1ª. When the violence or intimidation exercised is of a particularly degrading or vexatious nature.

2ª. When the acts are committed by the joint action of two or more persons.

3ª. When the victim is particularly vulnerable, due to his or her age, illness, disability, or situation, except as provided for in article 183.

4ª. When, for the execution of the crime, the perpetrator has taken advantage of a relationship of superiority or kinship, being an ascendant, descendant or brother, by nature or adoption, or similar, with the victim.

5ª. When the author makes use of weapons or other equally dangerous means, likely to produce death or any of the injuries provided for in articles 149 and 150 of this Code, without prejudice to the penalty that may apply for death or injury caused.

2. If two or more of the above circumstances apply, the penalties provided for in this article shall be imposed in the upper half.

So far we have talked about sexual assault, in which is included rape. But the Spanish Penal Code provides for another type, sexual abuse, when attacks on sexual freedom occur without violence or intimidation. Article 181 states:

1. Whoever, without violence or intimidation and without there being consent, perpetrates acts against the sexual freedom or indemnity of another person, shall be convicted of

¹⁸² Ana Rojas Martín, 'The Institutionalization of rape culture: The case of "La Manada" in Spain' (2019), Universidad Autónoma de Madrid <https://www.researchgate.net/publication/336122929_The_Institutionalization_of_rape_culture_La_Manada_in_Spain> accessed 10 May 2020.

sexual abuse, with a sentence of imprisonment from one to three years or a fine of eighteen to twenty-four months.

2. For the purposes of the preceding section, non-consensual sexual abuse is deemed to be that perpetrated on persons who are unconscious, or whose mental disorder is taken advantage of, as well as those committed by overcoming the will of the victim using narcotics, drugs or any other natural or chemical substance that is appropriate for such purpose.

3. The same punishment shall be imposed when consent is obtained by the offender availing himself of a situation of manifest superiority that deprives the victim or liberty.

4. In all the preceding cases, when the sexual abuse consists of vaginal, anal, or oral penetration, or inserting body parts or objects into either of the first two orifices, the offender shall be punished with a sentence of imprisonment from four to ten years.

5. The punishments shall be imposed on the upper scale when the circumstances include the victim's especially vulnerable situation or that the offender has taken advantage of a superiority or family relationship¹⁸³.

As we see, sexual abuse is a less serious type than sexual aggression, that criminalizes attacks against sexual freedom in which there is no use of violence or intimidation. In this type, the Penal Code does refer to *non-consensual acts* but the lack of consent is subject to certain circumstances: being unconscious, have taken advantage over mental disorder, or being under the effect of narcotics, drugs, etc. In other words, it is a very exclusionary definition that does not cover all possible situations in which sexual abuse can occur. Similarly to sexual aggression, this leaves out a large number of victims who have been subjected to sexual violence that does not meet these characteristics.

To sum up, the Spanish Penal Code classifies crimes against sexual freedom and indemnity in two types: on one hand, attacks against sexual freedom exercised by the use of violence or intimidation -sexual aggressions-, and on the other hand, attacks against sexual freedom when no use of violence or intimidation-sexual abuse-.

¹⁸³ Translation of the original article from: Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 'Report submitted by Spain pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report)' (19 February 2019), 48 <<https://rm.coe.int/state-report-from-spain/16809313e0>> accessed 15 July 2020.

This classification presents serious difficulties for the courts in deciding whether to convict for one or the other type, which has led to controversial shortcomings, for instance in *La Manada* case as we will see below. The Supreme Court itself has recognized that the criminal classification produces confusion and has tried to clarify it on the ruling of *La Manada* as follows: "the difference between the type of sexual abuse and the most serious type of sexual assault does not consist in the concurrence of carnal access, but the use of violence or intimidation. The crime of sexual abuse is one in which the victim's sexual freedom is violated without violence and intimidation, nor consent. In the crime of sexual assault, the victim does not freely consent either, but the perpetrator takes advantage of the use of force or intimidation to break the victim's will. In short, while in the crime of sexual abuse the consent is obtained in a flawed manner or by advantage of the state of incapacity to obtain it, in the sexual assault the will of the perpetrator is imposed by force or intimidation"¹⁸⁴.

This difficulty in its practical application has led the courts to show a tendency to convict for the crime of sexual abuse rather than sexual assault, as shown by a study of sentences in which 56.59% of the convictions have been qualified as "sexual abuse" and only 43.42% as "sexual assault". While 47.95% of the particular allegations of the victim have requested the facts to be judged as abuse and 52.05% of them as assaults¹⁸⁵.

Besides the confusion between the two penal types, this way to criminalize the attacks against sexual freedom is not in line with the guiding principles since it does not place the absence of consent as the forming element of the crime¹⁸⁶. Although the Supreme Court has understood that there is no consent in both types of crime, this lack of consent has to be a result of violence or intimidation in the case of sexual assault, and as result of sensory deprivation, mental disorder abuse or use of drugs in the case of sexual abuse. In essence, the absence of consent is conditioned to certain circumstances that again, do not represent the whole possible experiences, therefore leaving victims unprotected.

¹⁸⁴ España. Tribunal Supremo (Sala de lo Penal, Sección 1ª). Sentencia num. 344/2019 de 4 de Julio. p.24.

¹⁸⁵ María Barcons; Encarna Bodelón; M. Jimena Martínez (et al), 'Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial' (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002.

¹⁸⁶ Seen for instance Article 36 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210.

The decision of *La Manada* case, which we will see in detail later, put in question the prosecution of rape and made clear the need to reform the Penal Code. In fact, social pressure led the Ministry of Justice to charge a report with a proposal to reform the offenses against sexual freedom and indemnity¹⁸⁷, and motivated the Parliament to process in 2018 a draft law of an “Act of Comprehensive Protection of Sexual Freedom and for the eradication of sexual violence”. The draft includes prevention, awareness, and training measures, recognition of rights to the victims, and amendments of the Criminal code. Specifically, it amends to eliminate the distinction between sexual assault and sexual abuse, making sexual assault a crime of all non-consensual physical sexual violence, with attenuated or aggravated rates depending on the specific assumptions. This way, the use of violence or intimidation would be just one of the possible situations considered as sexual assault but not an exclusive constituent element. Likewise, carnal access by vaginal, anal, or mouth, or the introduction of other body members or objects by either of the first two routes would be one of the aggravating circumstances instead of the enforceable elements for rape as now¹⁸⁸.

This Act was a comprehensive and promising legislative proposal; however, it has not come to fruition. Likewise, the submission of the report to review the crimes of sexual assault and sexual abuse has been extended up twice, which means that the criminal response towards rape cases continues to be governed by the provisions of the Penal Code seen above. According to legal sociology, the social rejection of judicial decisions such as the case of *La Manada* represents a social and political opportunity to revise the legislation in place¹⁸⁹. It proved to be, yet the opportunity was lost. Despite these political initiatives, Spain continues in the list of countries that do not comply with the mandates of the Istanbul Convention, to mention one¹⁹⁰.

¹⁸⁷ Sección cuarta. Penal: “Informe que analice los delitos de agresión y abuso sexual, acompañando, en su caso, texto articulado de una propuesta legislativa de reforma del Código Penal” (2018) <<https://www.mjusticia.gob.es/cs/Satellite/Portal/es/actividad-legislativa/comision-general-codificacion/propuestas>> accessed 16 July 2020.

¹⁸⁸ España. Proposición de Ley de Protección Integral de la Libertad Sexual y para la erradicación de las violencias sexuales. Boletín Oficial de las Cortes Generales, Serie B Núm. 297-1 (20 Julio 2018) <http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-297-1.PDF> accessed 20 July 2020.

¹⁸⁹ Ana Vidu & Gema Tomás Martínez ' The Affirmative “Yes”. Sexual Offense Based on Consent. Masculinities and Social Change' (2019) 8(1), 91 <https://www.researchgate.net/publication/331262804_The_Affirmative_Yes_Sexual_Offense_Based_on_Consent> accessed 5 June 2020.

¹⁹⁰ According to Amnesty International, in Europe only 8 countries out of 32 define rape based on the absence of consent in their legislation: Amnesty International, 'Right to be free from rape: overview of

3.3. Protective measures

In addition to an appropriate criminalization, States also must take the necessary legislative or other measures to protect and support all victims and witnesses of all forms of gender-based violence¹⁹¹.

In Spain, the main norm in place regarding gender-based violence is the Organic Law 1/2004 on Integrated Protection Measures against Gender Violence¹⁹². This norm only considers gender violence against women when is perpetrated by their present or former spouse or partner. This means that other forms of gender-based violence, including sexual violence, when perpetrated outside the partner/spouse sphere are not considered as such. This explains the mentioned concerns of the CEDAW Committee that required Spain in its periodic report to urgently include the other forms of gender-based violence to protect victims outside the couple scope¹⁹³. This requirement has not been accomplished to date, as denounced by the Shadow Report sent to the CEDAW Committee last year¹⁹⁴.

In 2017 the Spanish Parliament adopted a State Pact on Gender-based violence in which acknowledged the need to extend the scope to all types of violence against women according to the Istanbul Convention. The Pact ensured that specific and comprehensive laws would be governed for the intervention and protection of each type of violence, and in the meantime, these forms of violence would receive preventive and statistical measures in the framework of the Organic Law 1/2004¹⁹⁵.

As far as sexual violence is concerned, any specific law has been passed despite the mentioned attempt. And remains outside the scope of the national law on gender-based violence. In other words, under the national legislative framework sexual violence is not

legislation and state of play in Europe and International Human Rights' (2018) <<https://www.amnesty.org/en/documents/eur01/9452/2018/en/>> accessed 8 May 2020.

¹⁹¹ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, article 18.

¹⁹² España. Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género. Boletín Oficial del Estado «BOE» núm. 313, de 29/12/2004. <<https://www.boe.es/eli/es/lo/2004/12/28/1/con>> accessed 20 July 2020.

¹⁹³ CEDAW Committee, 'Concluding observations on the combined seventh and eighth periodic reports of Spain' (29 July 2015) UN Doc CEDAW/C/ESP/CO/7-8.

¹⁹⁴ Plataforma CEDAW Sombra 'Informe Sombra sobre la aplicación en España 2015-2018 de la CEDAW' (2019) <<https://cedawsombraesp.wordpress.com/2019/05/15/informe-sombra-sobre-la-aplicacion-en-espana-2015-2018-de-la-cedaw/>> accessed 29 July 2020.

¹⁹⁵ Ministerio de la Presidencia, Relaciones con las Cortes e Igualdad, 'Documento refundido de medidas del Pacto de Estado en materia de Violencia de Género. Congreso+Senado' (13 de mayo de 2019) <https://violenciagero.igualdad.gob.es/pactoEstado/docs/Documento_Refundido_PEVG_2.pdf> accessed 20 July 2020.

recognized as a violation of human rights and a form of discrimination against women, which has a significant impact on its victims and the assistance they receive. But let us look first at what measures are in place to better understand the consequences of this.

Concerning sexual violence, Spain has the Law 35/1995, of 11 December, on aid and assistance to victims of violent crimes and crimes against sexual freedom, that establishes a system of public aid for the benefit of direct and indirect victims of those crimes. However, it is a very general law that only concerns financial aid awarded to victims when the established criterion is met. The most remarkable thing is that requires to set up Crime Victims' Support Offices at all courthouses and tribunals, and that in cases of offenses against sexual freedom that cause the victim harm in her/his mental health, the amount of the aid will cover the costs of the treatment freely chosen by the victim¹⁹⁶.

The Crime Victims' Support Offices¹⁹⁷ provide support and assistance to victims of violent crimes resulting in death, serious injury, or damage to physical or mental health, as well as victims of crimes against sexual freedom, whether direct or indirect victims. The aim of these offices is the general legal orientation of the victim, psychological support to victims, and referral to the social resources they need¹⁹⁸. A comprehensive service, in theoretical terms. However, the latest report available on the functioning of the Offices (of 2017) identifies several problems such as lack of knowledge of professionals of the administration of justice on the Statute of the Crime Victim, lack of adequate dissemination of the service available, inadequate facilities, lack of means for the performance of assistance to victims of crime, or precarious situation of psychology professionals who assist victims in the Offices¹⁹⁹. Results that are not very encouraging regarding the assistance the victims receive from this service.

¹⁹⁶ España. Ley 35/1995, de 11 de diciembre, de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual. Boletín Oficial del Estado de 12 de diciembre de 1993, núm. 296.

¹⁹⁷ Regulated by Law 4/2015 of 27 April, of the Statute of the Crime Victim and, in particular, by Royal Decree 1109/2015 of 11 December implementing Law 4/2015 of 27 April on the Statute of the Crime Victim and regulating the Crime Victims' Support Offices.

¹⁹⁸ Ministerio de Justicia, 'Oficinas de asistencia a las víctimas de delitos violentos y contra la libertad sexual' (Last updated 24/01/2020) <https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/oficinas-asistencia-victimas#id_1288784221142> accessed 30 July 2020.

¹⁹⁹ Ministerio de Justicia, 'Informe sobre la evaluación periódica del sistema de atención a las víctimas del delito' (2017) <https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/oficinas-asistencia-victimas#id_1288805872702> accessed 19 August 2020.

We must also look at the law governing these offices, the Law 4/2015 of 27 April of the Statute of the Crime Victim²⁰⁰, which has been a legislative advance concerning the rights of victims. This law, which constitutes the transposing of the European Union Directive 2012/29/E, has the vocation of being the general catalog of the rights of all victims of crime. It recognizes extra-procedural rights common to all victims, rights of the victim in terms of participation in the criminal proceedings, and protective measures for victims during the investigation²⁰¹ and prosecution phase²⁰². The law also provides for the adoption of specific protective measures according to the character of the victim (age, mental disorder...), the nature of the crime caused, the extent of the damage, and the circumstances of the crime²⁰³.

It is also worth mentioning the provisions related to requiring specialized training of judicial personnel about the protection of victims during the penal process (Article 30), the adoption of any Protocols necessary to make more effective the protection of victims and their rights (Article 31) as well as the mandate for social awareness campaigns in favor of victims, and the self-regulation of public and private media to preserve the privacy, dignity and other rights of victims (Article 34)²⁰⁴.

On balance, the Statute of the Crime Victim represents a good provision of rights, responding to many of the fundamental standards identified in the previous chapter. However, it is a very generic law. Since crimes are different, it is expected that victims may have different needs, which is the case of sexual violence. Due to its very nature, the victims of sexual violence present particular needs that are not covered in this Law such as forensic examinations, to mention one.

²⁰⁰ España Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito. Boletín Oficial del Estado de 28 de abril de 2015, núm. 101.

²⁰¹ It includes that victims be made to testify as few times as possible and only when strictly necessary for the purpose of the criminal investigation, that victims may be accompanied by a person of their choice during the practice of the proceedings, and that medical examinations of victims are only carried out when indispensable for the purposes of criminal proceedings.

²⁰² It includes preventing eye contact between the victim and the alleged perpetrator; ensure that the victim can be heard without being present in the courtroom through the use of communication technologies; holding of the oral hearing without the presence of an audience, and avoid questions relative to the victim's private life that do not have relevance to the criminal act being prosecuted.

²⁰³ España Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito. Boletín Oficial del Estado de 28 de abril de 2015, núm. 101, article 23.

²⁰⁴ *ibid.*

3.3.1. Protocols and guides

Since the Statute provides for the adoption of appropriate and necessary protocols to protect the victims, we should take a look at those adopted in the judicial field to put into practice what has been framed. It should be noted that, since the conceptualization of gender-based violence in Spain has been focused on the violence that occurred in the context of a relationship (commonly referred to as domestic violence), most of the protocols and guides barely cover sexual violence outside that scope²⁰⁵.

Out of the ten general protocols adopted to date²⁰⁶, the only one that deals with sexual violence in all its forms, i.e. outside the sphere of the partner, is the Common Protocol for Health Action on Gender-based Violence (2012) which devotes an independent section to establish guidelines for action in case of sexual assault. Those are: referring the victim as quickly as possible to the nearest hospital; creating an environment that facilitates communication, confidentiality, and privacy with the victim; collecting information with the greatest tact, sensitivity, and care of language; informing the victim of all the explorations that will be done and the purpose of these explorations; and that the gynecological and forensic evaluation be carried out in a single act to reduce the psychological impact suffered by the woman after the assault²⁰⁷.

The Guidelines adopted are also devoted to domestic violence. Of the eight currently in place, the Good Practice Guide for Taking Statements from Victims of Gender-Based Violence is perhaps the most comprehensive one in scope. Although still shows a predominant focus on domestic violence, the Guide includes general good practices regarding the declaration of victims and the attention given to victims at the place of the trial and the stage of execution of the sentence. It also establishes several essential points to avoid secondary victimization, by insisting on not make the victims feel guilty, not questioning the veracity of what they tell, not increasing their anxiety, and in short, not

²⁰⁵ Seen for instance, the Medical-forensic Protocol for urgent risk assessment of gender-based violence (2012) <<http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Guias-y-Protocolos-de-actuacion/Protocolos/Protocolo-medico-forense-de-valoracion-urgente-del-riesgo-de-violencia-de-genero>> accessed 31 July 2020.

²⁰⁶ They can be consulted on the website of the General Council of the Judiciary: <<http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Guias-y-Protocolos-de-actuacion/Protocolos/?perfil=3>>

²⁰⁷ Ministerio de Sanidad, Servicios Sociales e Igualdad, 'Protocolo común para la actuación sanitaria ante la Violencia de Género' (2012) p. 65 <<http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Guias-y-Protocolos-de-actuacion/Protocolos/Protocolo-comun-para-la-actuacion-sanitaria-ante-la-violencia-de-genero---2012>> accessed 31 July 2020.

exercising institutional mistreatment that perpetuates the physical, economic, social and psychological damages derived from the first victimization²⁰⁸.

On general terms, there is a lack of protection from the national legislative framework over other forms of gender violence beyond the domestic scope. The State-Pact from 2017 acknowledged it and included a set of measures to change that. However, many of them have not been implemented, so the situation has not changed that much.

As it is the case of sexual violence, whose specific law proposed has not been approved by Parliament. For the time being, victims are still governed by the general Statute of the Crime Victims' and do not have access to the protection measures of the Gender Violence' Organic Law such as labor rights and social security benefits, specific employment program, economic rights (social assistance and access to housing and public residences for the elderly), or the consequent Accreditation of situations of gender violence²⁰⁹.

Besides, there is one aspect that aggravates the lack of protection from the national framework, the fact that competences in the area of gender violence are shared between the State, the Autonomous Communities, and Local entities. To start with, there are currently as many definitions of gender-based violence as there are Autonomous Communities. Despite being based on the Organic Law 1/2004, each Community has adopted its legislation with a diverse definition of gender-based violence, broader than the national one in many cases. Thus, unlike the national framework, there are Communities in which sexual violence is considered in any case as gender-based violence²¹⁰. Also, the protocols for action, in the absence of common national ones, are different in each community, creating disparities on the attention to victims. For instance, in some communities, a prior report is necessary to receive health care (Madrid) while in others (Andalusia) it is possible to go to the medical center before reporting²¹¹. Likewise,

²⁰⁸ Consejo General del Poder Judicial, 'Guía de buenas prácticas para la toma de declaración de víctimas de violencia de género' (2018) <<http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Guias-y-Protocolos-de-actuacion/Guias/Guia-de-buenas-practicas-para-la-toma-de-declaracion-de-victimas-de-violencia-de-genero>> accessed 31 July 2020.

²⁰⁹ España. Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género. Boletín Oficial del Estado «BOE» núm. 313, de 29/12/2004. <<https://www.boe.es/eli/es/lo/2004/12/28/1/con>> accessed 20 July 2020.

²¹⁰ Maria Barcons; Encarna Bodelón; M. Jimena Martínez (et al), 'Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial' (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002

²¹¹ Amnistía Internacional España, 'Ya es hora de que me creas. Un sistema que cuestiona y desprotege a las víctimas' (2018) <<https://doc.es.amnesty.org/ms-opac/>> accessed 13 May 2020.

some communities have a center or service specializing in sexual violence while others do not. According to data from 2017, only 9 of the 17 Autonomous Communities have specialized care centers for victims of sexual violence, which are not open 24 hours and are usually situated in the capital of the provinces²¹². That is, there are not enough centers and those that exist are not fully accessible to potential victims, contrary to the requirements of the Istanbul Convention²¹³. On balance, the lack of a national framework that addresses sexual violence is aggravated by the territorial inequalities and differences that victims are subjected to, which results in miserable protection.

3.4. Preventive measures

This problem also extends to the area of prevention. According to international standards, States are required to implement appropriate preventive measures to address the underlying causes of gender-based violence, such as awareness-raising, education, training of professionals, preventive intervention, or tackling the private sector and media²¹⁴. In this regard, the Spanish government has mainly focused its prevention resources on domestic-violence, over other forms of gender-based violence such as sexual violence. The State Pact from 2017 tried to change that, so in 2018 the first awareness-raising campaign against sexual violence was launched²¹⁵. Last year, a second campaign on the matter was released targeting men for the first time and focusing on the absence of consent²¹⁶. It should be noted that the competences in the measures and instruments for awareness, detection, and prevention are also shared between the three levels: State, Autonomous Communities, and Local entities, so the awareness efforts are different according to the city or Autonomous Community²¹⁷.

²¹² Plataforma Estambul Sombra ‘Spanish Istanbul Shadow Report’ (2018) <<https://plataformaestambulsombra.wordpress.com/>> accessed 3 August 2020.

²¹³ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, art 25.

²¹⁴ *ibid.* art (13-17).

²¹⁵ The campaign carried the slogan "We are one, against sexual violence". Available on the website of the Government Delegation against Gender Violence: <<https://violenciagenero.igualdad.gob.es/sensibilizacionConcienciacion/campannas/violenciaGobierno/soMosUna/home.htm>> accessed 18 August 2020.

²¹⁶ Under the slogan "If you do not understand a No, you're a potential sex offender. No is No. Respect the limits yes or yes". Available on the website of the Government Delegation against Gender Violence: <<https://violenciagenero.igualdad.gob.es/sensibilizacionConcienciacion/campannas/violenciaGobierno/violenciaSexual/home.htm>> accessed 18 August 2020.

²¹⁷ The campaigns of the Autonomous Communities for gender-based violence can be consulted here: <<https://violenciagenero.igualdad.gob.es/sensibilizacionConcienciacion/campannas/otroMaterial/campannas/home.htm>> accessed 18 August 2020.

Another aspect that should be noted is that the lack of data already mentioned significantly impairs the task of raising social awareness. Yet in 2018, the Government conducted the first report on the Social Perception of Sexual Violence. The results provided very relevant information on the state of the situation and on what should be addressed. For instance, the need to challenge myths that persist in society such as the belief (held by 34.1% of interviewees) that men commit sexual aggression due to mental problems. It also helps to know which population group should be targeted, for instance, the results showed that young people aged 16 to 34 and persons aged 35 to 59 reject sexual violence to a greater extent than older people. Also, that women show a less tolerance of sexist attitudes compared to men, cite reasons that do not shift the blame from the aggressor more often than men, and they generally show fewer myths' holding. On balance, data is essential to acknowledge the extent of the problem and to design the resources to address it.

The State-Pact from 2017 also allocated educational measures to comply with Article 14 of the Istanbul Convention that requires States to include teaching material on equality between women and men, non-stereotyped gender roles, or gender-based violence against women, among others²¹⁸. This has not been accomplished yet. Although the Autonomous Communities have the competences of education, there is a common educational framework²¹⁹ that does not require any materials to educate in gender equality nor the eradication of gender violence, not even specifically on sexual violence. In the Shadow Report submitted to GREVIO in 2019, the NGOs claimed the need of sexual and equality education at all stages and levels of education, and the elimination of gender stereotypes from the curricula, teaching materials, school books, and educational practices²²⁰, as the CEDAW already pointed out in its country- report Observations in 2015²²¹.

Among the Observations, the CEDAW Committee also called for legal education and regular training for government officials, judges, lawyers, magistrates, prosecutors, police officers, and other officials on the Convention as an effective framework on gender

²¹⁸ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, art 14.

²¹⁹ Known as LOMCE (Ley Orgánica 8/2013, de 9 de diciembre, para la mejora de la calidad educativa). Boletín Oficial del Estado, de 10 de diciembre de 2013, núm.295.

²²⁰ Plataforma Estambul Sombra 'Spanish Istanbul Shadow Report' (2018) <<https://plataformaestambulsombra.wordpress.com/>> accessed 3 August 2020.

²²¹ CEDAW Committee, 'Concluding observations on the combined seventh and eighth periodic reports of Spain' (29 July 2015) UN Doc CEDAW/C/ESP/CO/7-8.

equality and the advancement of women²²². The Istanbul Convention also calls for appropriate training for relevant professionals on the prevention and detection of such violence, equality between women and men, the needs, and rights of victims, as well as on how to prevent secondary victimization. The aforementioned State Pact against Gender Violence established measures in this regard, promoting specialized training in gender violence for media professionals, professionals in the administration of justice, and the State's security forces, albeit without explicit reference to sexual violence²²³. For instance, the General Council of the Judiciary established in 2019 the first mandatory training course on gender perspective for judges who want to access any specialty²²⁴. A very valuable measure that however does not cover the judges who have a place and who are the ones that actively participate in the task.

Finally, concerning media, Spain has the Observatory of the Image of Women, which collects citizens' complaints about content considered to be sexist²²⁵. However, beyond the annual reports it publishes on this subject, it is not very operational. For instance, it takes no action about attitudes and stereotypes about the roles of women and men which are a root cause of violence against women and persist among the media. The State Pact on Gender Violence also included some measures in this regard, such as committing the media to publicize the convictions in cases of gender-based violence, to help eradicate any sense of impunity for the perpetrators of these crimes. However, the dissemination of cases of gender-based violence can be tricky. For instance, the media narrative of *La Manada* case mainly employed a discourse perpetuating gender stereotypes about the victim and aggressors, relating the sexual violence in a melodramatic way that associates it as an exceptional evil and not as a symptom of the society itself²²⁶. The aforementioned

²²² CEDAW Committee, 'Concluding observations on the combined seventh and eighth periodic reports of Spain' (29 July 2015) UN Doc CEDAW/C/ESP/CO/7-8.

²²³ Ministerio de la Presidencia, Relaciones con las Cortes e Igualdad, 'Documento refundido de medidas del Pacto de Estado en materia de Violencia de Género. Congreso+Senado' (13 de mayo de 2019) <https://violenciagenero.igualdad.gob.es/pactoEstado/docs/Documento_Refundido_PEVG_2.pdf> accessed 20 July 2020.

²²⁴ Poder Judicial España, 'El CGPJ pone en marcha el primer curso de formación obligatoria en perspectiva de género para los jueces que quieran acceder a cualquier especialidad' (8 March 2019) <<http://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/El-CGPJ-pone-en-marcha-el-primer-curso-de-formacion-obligatoria-en-perspectiva-de-genero-para-los-jueces-que-quieran-acceder-a-cualquier-especialidad>> accessed 19 August 2020.

²²⁵ Information regarding the Observatory of the Image of Women can be consulted here <<http://www.inmujer.gob.es/observatorios/observImg/home.htm>> accessed 21 August 2020.

²²⁶ María Angulo Egea, 'Subjetividad y violación social. El caso de La Manada' (2019), 31 *Tropelías: Revista de Teoría de la Literatura y Literatura Comparada*, 86 <<https://papiro.unizar.es/ojs/index.php/tropelias/article/view/3197>> accessed 12 May 2020.

Rita Segato places a lot of responsibility on the media over the cases replicating *La Manada*: "The case is replicated because, even though they are criticized and condemned, they continue to appear as a show of power... a show that is very easy to replicate when rapists appear in the media as powerful men"²²⁷. How media inform on gender-based violence can reinforce the root causes of it, and ultimately empower it. So, it is still a challenge for media to fight gender-based violence without perpetuating rape culture.

3.5. Conclusion

Neither the criminal nor the legislative framework addresses sexual violence as a form of gender-based violence. To realize its gender character is enough to look at the 2018 report on crimes against freedom and sexual indemnity in which 85% of the victimizations were women. An even higher percentage concerning the crimes at stake: 86% in cases of sexual abuse and 90% in cases of sexual assault. Data that we must contrast with the distribution by sex of those responsible: 96% of this type of crimes were committed by men, 98% in cases of sexual abuse, and 99% in cases of sexual aggression²²⁸. This makes it clear that it is a form of violence exercised on women by men, so it should be addressed as such.

On one hand, the criminalization of sexual violence by the Spanish Penal Code needs urgent reform to become in line with international standards. The classification in two types of crime (sexual abuse and sexual aggression) respond to an approach that places the existence of violence at the center, instead of the absence of consent.

On the other hand, the legislative framework is primarily focused on gender-based violence when committed on the partner scope, leaving other forms such as sexual violence unattended. Despite that the State Pact of 2017 was willing to reverse that and came to place some measures, the situation has not changed that hard. Moreover, many competencies on gender-based violence such as prevention or care-services belong to regional or even local competence, which results in territorial inequalities and differences.

²²⁷ Lionel S. Delgado, 'Rita Segato: "Hay que demostrar a los hombres que expresar la potencia a través de la violencia es una señal de debilidad"' 'El Salto' (26 October 2019) <<https://www.elsaltodiario.com/feminismos/rita-segato-hay-que-demostrar-hombres-expresar-potencia-violencia-senal-debilidad>> accessed 19 August 2020.

²²⁸ Ministerio del Interior, 'Informe sobre delitos contra la Libertad e Indemnidad Sexual en España' (2018) <<http://www.interior.gob.es/prensa/balances-e-informes/2018>> accessed 19 July 2020.

This leads us to the conclusion that Spain does not ensure an appropriate legislative framework for sexual violence, including rape. Nor does it prevent, nor combat it according to the international standards by which it is bound.

4. PROSECUTING RAPE: A CHANNEL FOR INSTITUTIONAL VIOLENCE

We have seen that Spain is failing to comply with its legal obligations concerning rape. But the problem does not end there. Legislative reform may be necessary, but not sufficient since the lack of judicial protection is also a question of judicial interpretation²²⁹. Goldberg-Ambrose, among others, concludes that the greatest obstacle for a successfully rape's law reform is the attitudes and juror misconceptions about rape and its victims²³⁰. In other words, nor the best legislation would be able to address rape if attitudes, myths, and stereotypes prevent its proper implementation²³¹. This makes the role of judges and, in general, any authority that participates during the trial, fundamental. As already discussed, States may be internationally responsible if they do not ensure effective access from victims to courts and an adequate response from the authorities²³². In Spain, judicial agents engage in victim-blaming, victim-questioning, rape myths holding, and gender stereotyping during the judicial processes of sexual violence cases. Based on the standards we have previously identified for the prosecution of rape, this chapter will illustrate that Spain does not comply with them and exercises institutional violence. The chapter will be divided into three sections: an introduction about institutional violence, a main section exemplifying the violence exercised during judicial trials, and a final remark of its societal impact.

4.1. Introduction: institutional violence

States can be directly responsible for the violation of rights connected to gender-based violence. According to the responsibility they have towards sexual violence, States can exercise several forms of institutional violence during the prevention, investigation, prosecution, and reparation of this crime through both actions or omissions of the State and its authorities²³³.

²²⁹ Themis Asociación de Mujeres Juristas, 'Conclusiones de la Asociación de Mujeres Juristas Themis sobre líneas de reforma del código penal en materias de delitos contra la libertad sexual' <<https://www.mujeresjuristasthemis.org/prensa/noticias/193-manifiesto-sobre-lineas-de-reforma-del-codigo-penal-en-materias-de-delitos-contra-la-libertad-sexual>> accessed 17 July 2012.

²³⁰ Carole Goldberg-Ambrose, 'Unfinished Business in Rape Law Reform' (1992) *Journal of Social Issues* 48 (1), 173.

²³¹ Amnesty International, 'Right to be free from rape: overview of legislation and state of play in Europe and International Human Rights' (2018) <<https://www.amnesty.org/en/documents/eur01/9452/2018/en/>> accessed 8 May 2020.

²³² As stated in: CEDAW Committee, 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (26 July 2017) UN Doc CEDAW C/GC/35, art 32.a.

²³³ Diana Maffia & Celeste Moretti, 'Violencia mediática y simbólica'. Observatorio de Justicia y Género <http://www.psi.uba.ar/academica/carrerasdegrado/psicologia/sitios_catedras/practicas_profesionales/825>

Even though I will focus on the institutional violence exercised during the prosecution process, this does not exclude parallel institutional violence in other fields such as health services, or social and psychological care. In fact, as Bumiller suggests, it often occurs a “complementarity” between social services and the penal system by forming a common space in which women are disempowered and new victimizations occurred²³⁴.

Unfortunately, the institutional violence during the judicial process is a common phenomenon to gender-based violence in general, as exposed by Encarna Bodelón on her investigation on domestic violence²³⁵. This can be partly explained by the androcentric character of the institutions and the law itself which can act as a source of inequality between men and women, in the sense that only the acts of violence understood by men as such are adequately recognized under a juridical perspective²³⁶.

It should be noted that institutional violence is not recognized at all among the Spanish legislation. Neither the Organic Act 1/2004 on Integrated Protection Measures against Gender Violence, nor the Law 4/2015 of 27 April on the Statute of the Victim of the Crime includes definitions on institutional violence, and barely refers to the secondary victimization process. Only the Good Practice Guide for Taking Statements from Victims of Gender-Based Violence mentioned in the previous chapter refers to institutional violence and provides guidelines on how to avoid it²³⁷. The lack of a system of redress for victims of state’s negligence was already pointed out in 2014 by the CEDAW Committee regarding the failure of Spain on a case of domestic violence²³⁸. The aforementioned State Pact also included among its measures an analysis of the alleged failures of the judicial system and the assumption by the State of economic reparation for

[rol_psicologo/material/descargas/unidad_3/obligatoria/violencia_mediatica.pdf](#)> accessed 13 August 2020.

²³⁴ Kristin Bumiller, *In an Abusive State. How neoliberalism appropriated the feminist movement against sexual Violence* (Durham, Duke University Press, 2008).

²³⁵ Encarna Bodelón, ‘Violencia institucional y violencia de género’ (2014) Universidad Autónoma de Barcelona <<https://revistaseug.ugr.es/index.php/acfs/article/view/2783>> accessed 4 August 2020.

²³⁶ Pilar Albertín Carbó, ‘A Feminist Law Meets an Androcentric System: Gender-Based Violence in Spain’ (2018), Universitat de Girona <<https://www.researchgate.net/publication/326718807>> accessed 12 May 2020.

²³⁷ Consejo General del Poder Judicial, ‘Guía de buenas prácticas para la toma de declaración de víctimas de violencia de género’ (2018) <<http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Guias-y-Protocolos-de-actuacion/Guias/Guia-de-buenas-practicas-para-la-toma-de-declaracion-de-victimas-de-violencia-de-genero>> accessed 31 July 2020.

²³⁸ CEDAW Committee, ‘Communication No. 47/2012. Decision adopted by the Committee at its fifty-eighth session’ (15 August 2014) UN Doc CEDAW/C/58/D/47/2012, para 3.7.

damage in cases where judicial negligence is proven²³⁹. However, there is no further decision on the application of this measure, so it continues to be a pending task.

4.2. Illustrating institutional violence: *La Manada* case and others

In this section, we will expose the institutional violence exercised during judicial processes in Spain. Mainly through the case of *La Manada*, due to its repercussion, but relying on other cases since it is a systematic problem. To do so, we will take as reference each of the standards identified for the prosecution of rape and check if they are met.

We must first contextualize the case of *La Manada*. It relates to a rape of a woman by five men in a hallway during the celebrations of San Fermin on the 7th of July of 2016. The case was considered by the tribunals of Navarre (first the Provincial Audience and later the Superior Court of Navarre) as a crime of sexual abuse rather than sexual assault as denounced by the victim²⁴⁰. It should be remembered that in the Spanish Penal Code sexual abuse (in absence of violence or intimidation) correspond to a lower penal category than sexual assault, and consequently a lower penalty. This verdict outraged the Spanish public opinion provoking unprecedented massive demonstrations across the streets and social networks, and consequently an unusual international media coverage²⁴¹. In fact, the indignation was so significant that the case reached the European Parliament where a special debate took place, and the United Nations, where the Executive Coordinator and Spokesperson on Addressing Sexual Harassment and Other Forms of Discrimination, Purna Sen, considered that the ruling underestimates the seriousness of rape and undermines clear obligations to protect women's rights²⁴².

Three years later, the case has been reviewed by the Supreme Court which ruled sexual assault instead of sexual abuse²⁴³. However, beyond the debate on the criminalization,

²³⁹ Ministerio de la Presidencia, Relaciones con las Cortes e Igualdad, 'Documento refundido de medidas del Pacto de Estado en materia de Violencia de Género. Congreso+Senado' (13 de mayo de 2019). <https://violenciagero.igualdad.gob.es/pactoEstado/docs/Documento_Refundido_PEVG_2.pdf> accessed 20 July 2020.

²⁴⁰ Ana Rojas Martín, 'The Institutionalization of rape culture: The case of "La Manada" in Spain' (2019), Universidad Autónoma de Madrid <https://www.researchgate.net/publication/336122929_The_Institutionalization_of_rape_culture_La_Manada_in_Spain> accessed 10 May 2020.

²⁴¹ BBC, 'Spain 'wolf pack' case: Thousands protest over rape ruling' (26 April 2018) <<https://www.bbc.com/news/world-europe-43915551>> accessed 5 August 2020.

²⁴² RTVE, 'La sentencia de La Manada abre el debate en el Parlamento Europeo sobre la violencia sexual y llega a la ONU' (2 May 2018) <<https://www.rtve.es/noticias/20180502/sentencia-manada-abre-debate-parlamento-europeo-sobre-violencia-sexual-llega-onu/1725897.shtml>> accessed 5 August 2020.

²⁴³ España. Tribunal Supremo (Sala de lo Penal, Sección 1ª). Sentencia num. 344/2019 de 4 de Julio de 2019.

what has been extensively criticized is the judicial practice on the case. Let us check it based on the international standards previously established:

In the first place, one of the international standards regarding rape prosecution is to apply a context-sensitive assessment that considers a wide range of behavioral responses to sexual violence, and not be based on assumptions of typical behavior in such situations. In *La Manada's* ruling, the victim's behaviors before, during, and after the assault were judged according to those behaviors that are understood to be expected. For instance, the victim was questioned and had to explain why, under the situation in which she felt harassed, she did not turn directly to -x- street, “seeking the light and looking for more people instead of continuing for a dark street”²⁴⁴.

Also, despite admitting various possible reactions and that the complainant reacted intuitively to the situation by adopting an attitude of submission, the ruling pointed that “the complainant's possibilities of reacting following rational thought were compromised because at the time of the facts she was influenced by alcohol, which altered her knowledge, reasoning, ability to understand the reality and caused her disinhibition and diminished her capacity for self-control”²⁴⁵. This assessment seems to explain the victim's reaction based on the influence of alcohol, suggesting that otherwise, her reaction might have been different. This not only places responsibility on the victim but also dismisses the rationality of the reaction, not to mention the harmful references to her inhibition and capacity for self-control. In short, these comments do nothing but perpetuate stereotypes of sexual assault victims.

Especially invasive in this regard is the judge of the dissenting vote who questions all behavior of the victim during the moments previous to the aggression, considering that those infer the concurrence or not of knowledge, consent, or intentionality. For instance, he finds surprising that, when she could not communicate properly by phone with her friend Luis Pablo, she did not use WhatsApp to meet again, which by his point of view “gives body to the doubt suggested by the defenses as to whether the origin and object of the call was not the one that ultimately resulted from she: postpone the meeting with Luis

²⁴⁴ España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia num. 38/2018 de 20 de marzo de 2018. P 21.

²⁴⁵ *ibid.* p. 32.

Pablo for later and obviously continue to enjoy the party with the Sevillians group”²⁴⁶. He also questions that she waits on the street while the defendants tried to get a hotel room, the path that the victim traced with the group, or why she makes out with one of the guys of the group. The judge uses all these actions as indicative of contrary intentions to the ones she claims, making value judgments based on his assumptions.

The truth is that the behavior of the victim before the act is frequently used as a basis for a legal response, going beyond the object of the judgmental task that should be limited exclusively to the criminal act²⁴⁷. In the STSJ CL 3394/2019 decision that revokes the preliminary sentence and acquits the accused, it is considered that the conduct of the complainant from the moment she met the accused is strange: "it is neither logical nor credible that, if the accused proposed her to go to his apartment, an offer that she rejected, however, she continued with him not only during the walk but when they arrive at the doorway of the house, even entering inside the portal and then in the elevator..." And it added, "it is clear that she had plenty of opportunities to go home or return during this journey to the pub where his friends had stayed, without being recorded that force or violence or intimidation get the complainant to engage in such conduct"²⁴⁸.

Concerning what should be the object of the trial, that is, the sexual assault itself, the victim's behavior is also used as an argument to prove or disprove the occurrence of it. Seen for instance the dissenting vote in *La Manada* sentence which questions the victim's reactions as follows "makes it difficult to explain that at the first attempts of the sexual approach she felt intimidation or fear of such intensity that she would not be able to express the least word, the slightest gesture, not even the slightest movement that would denote, at least perplexity at what was happening; that she is incapable even of making the instinctive gesture of to hold on to the clothes that are being taken from her; an explanation that, despite having been requested in court, she was unable to give"²⁴⁹. This is a perfect reflection of the fact that victims are still expected to resist in some way, and

²⁴⁶ España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia num. 38/2018 de 20 de marzo de 2018. p.77.

²⁴⁷ Maria Barcons; Encarna Bodelón; M. Jimena Martínez (et al), 'Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial' (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002.

²⁴⁸ España. Tribunal Superior de Justicia de Castilla y León (Sala de lo Civil y Penal) Sentencia núm. 50/2019 de 10 de septiembre de 2019.

²⁴⁹ España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia num. 38/2018 de 20 de marzo de 2018. p.85.

when they do not, their behavior is used to question the facts. Moreover, assuming that their non-action means giving their sexual consent dehumanizes the attacked person²⁵⁰.

The victim's behavior after the assault also comes under scrutiny, especially concerning the haste in making the complaint, which gives the story greater support than those in which there is a delay or elapsed time. In the sentence SAP TF 2302/2019 of 11 of October, the victim's story is not believed for not meeting the requirements that constitute proof and among other allusions, the court refers "the time of the events is approximately 3:30 a.m. on September 19, well, according to the witness Tomasa, at 6 or 7 a.m. they retire to the hotel to sleep, having stayed during this time in other leisure establishments, according to her, not "partying" but trying to Encarna to calm down, being 10:30 p.m. of the same day when they decide to go to denounce the facts. This behavior is not consistent with an event of the gravity described"²⁵¹.

This also happened in *La Manada* case in which the Counsel for the Defence asked the victim that if "as a young university student, she did not consider that the first thing she should do was to report the aggression she had suffered". She explained that that was why she was looking for her mobile phone so that she could call her friend to ask for his help. She is also asked to explain why the first thing she mentioned to the couple who found her was the theft of her phone instead of the sexual assault, for which the victim states "I cannot give you an explanation, I just went out, I was very nervous, I wanted to take my phone to call Jorge to explain the situation and since I couldn't find...". That explanation is then used by the judge of the particular vote to question her by stating "it is not understood that, at the moment when finally and after all her experiences of that night their reunion takes place, she postpone telling him (Jorge) the truly dramatic thing that she had suffered that night". The fact is that this judge questions every action of the victim, everything she did or did not do after the aggression: "when she leaves the portal she doesn't take the direction she took before entering it but the opposite direction; she does not ask for help, neither inside the building nor later in the street; when she is helped she does not denounce the aggression but the removal of the mobile phone; at no time

²⁵⁰ Ana Rojas Martín, 'The Institutionalization of rape culture: The case of "La Manada" in Spain' (2019), Universidad Autónoma de Madrid <https://www.researchgate.net/publication/336122929_The_Institutionalization_of_rape_culture_La_Manada_in_Spain> accessed 10 May 2020.

²⁵¹ España. Audiencia Provincial de Santa Cruz de Tenerife (Sección 6ª) Sentencia núm. 284/2019 de 11 de octubre de 2019. p.3.

does she ask to be taken to Jorge or to try to warn him in any way... and when she finally meets him, she does not say anything to him either. Certainly, the facts do not match up with what she declares...”²⁵².

As we can see, there are expected behaviors of the victim in a scenario of sexual violence, built around beliefs related to gender stereotypes, and what is known as the "ideal victim"²⁵³. This brings up another of the international standards to apply when prosecuting sexual violence: the eradication of judicial stereotyping. The judgments above show that they are still prevalent in practice undermining the legitimacy of those behaviors that differ from the expected.

The influence of stereotypes and myths becomes very evident concerning physical injuries or trauma as a result of the assault. Their acquirer such determining importance for the courts that the victimization of the complainant comes to be measured by the existence (or not) of damage, requiring it to be proved²⁵⁴. Seen for instance in SAP GI 1358/2017 of 8 of November, where the Court states “There is a first important piece of information that prevents us from having violence as a proven fact, and that is the health report from the forensic doctor. This report concludes that no recent or chronic or evolved skin lesions can be seen, and the report does not show any lesions on the thighs, (where, according to the minor, the force would have been used by the defendant to perform the sex act)... Nor does the examination of the hymen provide any evidence of sexual assault, since the forensic report states that the hymen is permeable, but that there is no edema or erosion and that the vagina and cervix are free of lesions...”²⁵⁵. In this case, the absence of physical injury is one of the factors that “prevent” the Chamber from accepting the victim's statement as sufficient evidence, deciding therefore to acquit the accused.

Similarly, in the case of *La Manada* both the defenses of the accused and the judge of the dissenting vote use the absence of injury as evidence for dismissal. In particular, the last one states: "This fact (the absence of injuries) corroborates the non-existence of the force described in the complaint, because if the facts had occurred as the complainant narrated

²⁵² España. Audiencia Provincial de Santa Cruz de Tenerife (Sección 6ª) Sentencia núm. 284/2019 de 11 de octubre de 2019. p. 112.

²⁵³ Maria Barcons; Encarna Bodelón; M. Jimena Martínez (et al), ‘Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial’ (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002.

²⁵⁴ *ibid*.

²⁵⁵ España. Audiencia Provincial de Girona (Sección 3ª). Sentencia núm. 588/2017 de 8 de noviembre de 2017. p. 5.

one would expect that some kind of injury or brand would necessarily have occurred. Concerning vaginal penetrations, the absence of injuries may be unspecific, but ... the absence of anal injuries is unreasonable, which not only excludes the existence of violence but also casts reasonable doubt on the lack of consent maintained by the accusations"²⁵⁶. That is to say, he not only questions the existence of violence but the absence of consent by the victim, which is even more serious.

In other words, physical injuries are a support to the victim's testimony, becoming even a conditioning element: if there are no injuries, the seriousness of the fact is not corroborated, preventing the Court to condemn it. This is rooted in the belief that women lie about being raped²⁵⁷. This "mistrust" of women is such that even the existence of injuries does not ensure greater credibility on the part of the Chamber, see for example in the sentence SAP GI 118/2016 of 15 of February when the Court states: "Regarding the origin of the injuries, the forensic doctors declare that the blow is due to a contusive mechanism and the excoriations to an erosive mechanism of friction. Of this, it is clear that the injuries are the result of the assault by the accused, but it is not beyond doubt that this assault was intended to overcome the victim's resistance to sexually assault her"²⁵⁸.

In the eyes of the Court, the existence of trauma also becomes an accredited element according to the stereotype of "true rape" or "ideal victim"²⁵⁹. The general idea that sexual assault should lead the victim to a state of devastation is very harmful. It does not reflect the reality of the victims and prejudices their credibility for behaviors such as being calm or not crying. See for instance the aforementioned sentence SAP TF 2302/2019 of 11 of October in which the Court refers to the behaving of the victim as one of the circumstances that weaken her credibility, leading to the acquittal of the accused: "The presumed victim shows a coldness, an absence of emotions in the account of the facts, not in accordance with what was narrated"²⁶⁰.

²⁵⁶ España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia num. 38/2018 de 20 de marzo de 2018. p.98.

²⁵⁷ Maria Barcons; Encarna Bodelón; M. Jimena Martínez (et al), 'Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial' (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002.

²⁵⁸ España. Audiencia Provincial de Girona (Sección 4ª). Sentencia núm.94/2016 de 15 de febrero de 2016. p.7.

²⁵⁹ *Although I feel reluctant to these terms, I think it is convenient to use them at certain times during this investigation.

²⁶⁰ España. Audiencia Provincial de Santa Cruz de Tenerife (Sección 6ª). Sentencia núm. 284/2019 de 11 de octubre de 2019. p.3.

It is also discrediting to the victim's testimony to have returned to "normal life"²⁶¹, as we can see in the sentence SAP B 14199/2017 of 14 of November in which the Tribunal considered relevant that "the experts did not detect, even though it was only a few months from the time of the occurrence of the reported events until the time of the examination, no change or affectation of the minor, either at home or school"²⁶².

In our main case study, *La Manada*, this is also a substantial element. While the majority of the Court considers proven that the victim suffers from post-traumatic stress disorder as a result of the events, the judge of the dissenting vote departs from this criterion because "there is any objective proof that she has needed, or been prescribed, any pharmacological treatment, or that she has followed therapeutic treatment, or of her evolution, or result, and there is no evidence that a clinical diagnosis has even been attempted to support her affirmation. As there is no record of the identification of her therapist...". What is more significant is that, while admitting that "the fact that after a traumatic experience a person makes an effort to recover the normality of her life is something that can be understood without the need for argumentation", he states the following: "that the complainant was able to maintain her activity in social networks, to go out with her friends and enjoy holidays during the whole summer of 2016 and did not need requesting or following any treatment, neither psychological nor pharmacological...suggests, whatever the symptoms she had, that the intensity of the symptoms, allowed her to at least dispense with any treatment, which also gives an idea of the seriousness of those"²⁶³. In the end, he questions the well-being of the victim, her symptoms, because she kept doing her life without declared treatment.

Continuing with the international standards on the prosecution of rape cases, another widely established standard by both international and human rights courts is the prohibition of the use of evidence relating to the prior or subsequent sexual behavior of the victim in the judicial process. As we pointed out before, this is particularly relevant in cases of sexual violence because it is usually used during the trial process to challenge

²⁶¹ It must be noted that this idea responds to superficial criteria since there is no way of truly knowing this unless the victim admits it. But it is still one of the aspects that the Courts takes into account.

²⁶² España. Audiencia Provincial de Barcelona (Sección 7ª). Sentencia núm. 726/2017 de 14 de noviembre de 2017. p.6.

²⁶³ España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia núm. 38/2018 de 20 de marzo de 2018. p. 106.

the respectability, the credibility, and the lack of consent of victims²⁶⁴. See for instance how in the sentence SAP GI 118/2016 the Court discredits the victim's testimony for her sexual conduct after the assault: "It also doesn't make much sense that a person who was sexually assaulted on Friday night, who has no financial or emotional dependency on the defendant, stays in the house on Saturday, not taking advantage of the presence of the accused's brother to leave, but bathe with the defendant and go to the room together, where she has consensual sex with the defendant"²⁶⁵.

Concerning this issue, the Istanbul Convention expressly requires states to not permit evidence relating to the sexual history and conduct of the victim unless it is relevant and necessary²⁶⁶. As warned before, this margin of appreciation can be tricky. For example, in the case of *La Manada*, the Court considered the sexual history of the victim as proof of "the radical inequality in maturity and experience" in sexual activities between the complainant and the accused when determining the superiority context of the events: "we consider that at the time of the facts she was at the dawn of her sexual life, she had never had sexual relations in a group, nor with persons unknown and in no circumstance had she been penetrated by anal means. This experience of her sexuality cannot be compared with that of the accused...". Although in this case the sexual history of the victim is not used to question her credibility or the absence of consent, it is used on her behalf to prove her "inferiority" (in sexual experience terms). This, implicitly perpetuates stereotypes about victims, harming those who do not fit, for example in case the victim has the same or more maturity and sexual experience as the accused. Because of this, neither the sexual history of the victim neither her sexual behavior should conditionate the Court's ruling.

Continuing with the set standards, the protection of the victim's privacy and dignity during the process has been recognized as an essential part of the state's obligations regarding any form of gender-based violence²⁶⁷. As it is stipulated in article 22 of the Spanish Statute of the Victim of Crime "Judges, courts, prosecutors and other authorities and officials responsible for criminal investigations, as well as all those who in any way

²⁶⁴ Diana Guarnizo, 'Acceso a la justicia' para Mujeres víctimas de violencia sexual. Cuarto Informe de Seguimiento al Auto 092 de la Corte Constitucional' (Comisión Colombiana de Juristas, 2011) <https://www.coljuristas.org/documentos/libros_e_informes/acceso_a_la_justicia_para_mujeres.pdf> accessed 10 July 2020.

²⁶⁵ España. Audiencia Provincial de Girona (Sección 4ª). Sentencia núm.94/2016 de 15 de febrero de 2016. p.7.

²⁶⁶ Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210, article 54.

²⁶⁷ *ibid.* art 56.1 (f).

intervene or participate in the process, shall adopt, the necessary measures to protect the privacy of all victims and their families and, in particular, to prevent the dissemination of any information that might facilitate the identification of victims who are minors or victims with disabilities in need of special protection”²⁶⁸.

While this should apply to any victim, it acquires a special dimension when investigating and prosecuting sexual violence in which victims are notably more exposed to secondary victimization than in other types of crime²⁶⁹. For this reason, it is particularly serious the fact that the personal data of the victim of *La Manada* were filtered due to an error of the Audience of Navarra, for which an investigation is still ongoing²⁷⁰. As a result of this, the data of the victim (name and surname, university, even a copy of her ID card, and photographs) were disseminated on the internet through two of the most visited forums in Spain. The Cybercrime Unit of the National Police has proceeded with an investigation in this respect, identifying at least one of the people responsible for this leak²⁷¹. However, it was not possible to prevent the victim from being exposed and subjected to revictimization by receiving humiliating comments, being blamed, and discredited.

It should be noted that this occurred after the sentence was published. However, standards in this regard were neither met during the judicial proceeding. To start with, the Court came to admit as evidence a report by a detective commissioned by the defense on the victim's private life, to expose the fact that after the assault she was able to "lead a normal life". The report, which raised a wave of demonstrations, was at the end withdrawn from the case by the proposer itself. This report, which attempted to discredit the victim's testimony, involves an intrusion into the victim's privacy and intimacy, as the Court itself considers. This has been recognized by the Court which, despite having admitted it as evidence, qualifies it as “behavior that is difficult to justify”: “the symptoms of intrusion

²⁶⁸ España Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito. Boletín Oficial del Estado de 28 de abril de 2015, núm. 101, article 22.

²⁶⁹ Steffen Bieneck and Barbara Krahe, ‘Blaming the victim and exonerating the perpetrator in cases of rape and robbery: Is there a double standard?’ (2011) *Journal of Interpersonal Violence* 26. <<https://doi.org/10.1177/0886260510372945>> accessed 11 August 2020.

²⁷⁰ Consejo General del Poder Judicial, ‘El CGPJ abre una investigación sobre la filtración de datos personales de la sentencia 38/2018 de la Sección Segunda de la Audiencia de Navarra’ (2018) <<http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunales-Superiores-de-Justicia/TSJ-Navarra/Sala-de-prensa/Archivo-de-notas-de-prensa/-El-CGPJ-abre-una-investigacion-sobre-la-filtracion-de-datos-personales-de-la-sentencia-38-2018-de-la-Seccion-Segunda-de-la-Audiencia-de-Navarra>> accessed 8 August 2020.

²⁷¹ Rocío Pacheco, ‘Un vecino de Barcelona difundió los datos de la víctima de 'La Manada'’ *Crónica Global* (22 November 2018) <https://cronicaglobal.elespanol.com/vida/vecino-barcelona-datos-victima-manada_193658_102.html> accessed 11 August 2020.

and her negative state of mind were exacerbated by the knowledge that she had been followed by private detectives, the feeling of intrusion into her most restricted area of privacy, and the concern about her freedom and security that this produced; we consider that these reactions and attitudes towards behavior difficult to justify are perfectly understandable given the perception of this intrusion into her privacy"²⁷².

In fact, it should be noted that the Chamber did consider from the report a photograph published by the victim on her social network Instagram, having to explain in her statement the circumstances and reasons why she had inserted it. The Court again, despite having admitted it first, penalizes it on the ruling. The inappropriateness of admitting such evidence became even more clear with the approach that the dissenting vote takes of it: “that, a few days before the hearing, when it is sustained by the accusations that such a prospect has meant a new turn in the life of the complainant... echo the motto *Whatever you do, take off your panties*²⁷³ doesn't suggest a traumatized person at all”²⁷⁴. This makes it clear that this type of evidence was not necessary for the investigation and trial of the sexual assault and it only served the dissenting judge to try to discredit the victim.

In addition to their privacy, States must also protect the dignity of victims during the judicial process. Specifically, in cases of gender-based violence, a sensitive approach is required to avoid secondary victimization as a consequence of gender-insensitive laws or judicial enforcement²⁷⁵. The absence of efficient measures in this respect is especially noticeable in the case of *La Manada*, in which the judge of the dissenting vote expressed himself in the most insensitive way about the victim, especially when interpreting the content of the videos of the sexual assault²⁷⁶: “I don't see in any of the videos and photographs any sign of violence, force, or brutality exercised by men against the women... but total disinhibition and explicit sexual acts in an atmosphere of joy and happiness...”. Offensively, he interprets no lack of consent by the victim because of her gestures: “the lack of consent is not evident in the expressions, sounds, and attitudes that I observe in the videos as far as the woman is concerned”... “in none of the images do I

²⁷² España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia núm. 38/2018 de 20 de marzo de 2018. p. 34.

²⁷³ This sentence belongs to the post upload by the victim in her Instagram.

²⁷⁴ *ibid.* p. 116.

²⁷⁵ See in *Y. v. Slovenia*, in which the ECtHR hold the State responsible because the Slovene authorities failed to protect the applicant's integrity during the criminal investigation and trial, in which a particularly sensitive approach was required.

²⁷⁶ Videos that, should be noted, were spread by the defendants in two groups of WhatsApp.

perceive in her expression, nor in her movements, any hint of opposition, rejection, disgust, revulsion, refusal, discomfort, suffering, pain, fear, discontent, bewilderment or any other similar feeling. The expression on her face is at all times relaxed and, precisely for this reason, incompatible in my opinion with any feeling of fear, dislike, rejection, or refusal... on the contrary, what her gestures, expressions, and sounds suggest to me is sexual excitement”²⁷⁷.

He ensures that “depending on the circumstances, in a real sexual assault may occur that the woman still experiences purely physical pleasure at some point”, and goes so far as to suggest a spurious motive from the complainant due to the unsatisfactory character of the act “the way in which the five defendants left the portal, leaving the complainant alone in the manner in which they did, constitutes an act that can provoke, without the need for further argument, a whole flood of feelings and also resentment in those who suffer it, which, together with the rest of the circumstances that have been exposed, effortlessly feeds the doubt as to whether an unsatisfactory and emotionally traumatic sexual relationship, maintained by a single woman with five strangers in a portal, with an alcohol rate at that time higher than 1g/l in blood and which concludes with the abandonment of the woman in the portal, leaving her alone and half-naked, as well as the subtraction of her mobile phone, even if she had not refused to keep it, could be a reasonable explanation for her emotional state after the events and, in her case, the alleged post-traumatic stress...”. This is a small excerpt from the many humiliating and vexatious expressions that throughout the sentence attack the dignity of the victim, even women as a group²⁷⁸.

Continuing with the international standards, States must ensure financial assistance, legal aid, and medical and psychosocial care to victims. Considering the nature of sexual violence, those services must be offered with a particularly sensitive response by trained and specialized staff to avoid secondary victimization. That said, it is difficult to obtain the information about the providing of these services from the Spanish authorities to make a value judgment on compliance with this standard. Regarding the case of *La Manada*, we can only subtract from the sentence a little information on how the procedure was

²⁷⁷ España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia núm. 38/2018 de 20 de marzo de 2018. p. 94.

²⁷⁸ Themis Asociación de Mujeres Juristas, ‘Manifiesto sobre líneas de reforma del Código Penal en materias de delitos contra la libertad sexual’ (20 July 2018) <<https://www.lrmcidii.org/themis-manifiesto-sobre-lineas-de-reforma-del-codigo-penal-en-materias-de-delitos-contra-la-libertad-sexual/>> accessed 5 August 2020.

after the authorities got knowledge of the sexual assault. We know that the victim was moved by police officers from the place of the facts until the Emergency Service of the Hospital Complex of Navarra where a gynecological and forensic report was carried out following the protocols and without investigating the facts. It should be noted that the victim had to be carried back to the hospital later for further medical tests, contrary to what is recommended, but there is no further information about in the sentence²⁷⁹.

Regarding comprehensive services offered to the victim, we know that after going to the Hospital she was received by the Pamplona City Council social worker on duty which provided her with a municipal telephone number and accommodation. We also know that she has received psychological treatment administered by a Centre for Comprehensive Care of Women Victims of Sexual Assault. But in essence, we cannot know whether in this case, the professionals have carried out their functions with due consideration, or if on the contrary, they have exercised institutional violence as the judicial process.

Apart from this case, several studies have exemplified the systematic mistreatment of victims of sexual violence by police, health, and forensic personnel, beyond the judiciary²⁸⁰. Besides, we verified in the previous chapter that there is no national legislative framework that governs the actions of these authorities, differing from one Community to another. In conclusion, the attention that victims of sexual violence receive in Spain is a matter of chance.

The last standard for States to fulfill the due diligence obligation is the provision of appropriate reparation. Following what has been established by the CEDAW Committee, reparation may include measures of remedies such as monetary compensation; measures of satisfaction such as public apologies; changes in relevant laws and practices; and ultimately, bring to justice the perpetrators.

²⁷⁹ España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia núm. 38/2018 de 20 de marzo de 2018. p. 15.

²⁸⁰ Amnistía Internacional España, 'Ya es hora de que me creas. Un sistema que cuestiona y desprotege a las víctimas' (2018) <<https://doc.es.amnesty.org/ms-opac/>> accessed 13 May 2020; Maria Barcons; Encarna Bodelón; M. Jimena Martínez (et al), 'Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial' (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2020; Carla Vall i Duran (coord.), 'Violència institucional i revictimització en el sistema judicial i de denúncia de violències sexuals' (2018) Iridia <https://iridia.cat/wp-content/uploads/2018/12/Violencia-despres-de-la-violencia_WEB.pdf> accessed 14 August 2020.

The monetary compensation in cases of sexual violence shows a great disparity of amounts according to the case, without being able to identify a real pattern or scale. The Courts generally consider both physical and moral damage. But the debate arises as to this latter. In cases of sexual violence, the moral damage “is inscribed in the very nature of the crimes committed not requiring additional evidentiary material to be granted”²⁸¹. Although according to case law no evidentiary material is required for its award, in practice, the provision of evidence does influence the consideration of moral damages. For example, evidence of posttraumatic stress, or any burden on the enjoyment of life planes. See for instance in the case (SAP M 15188/2017) in which the Court quantified the moral damages at 9,000€ “given the post-traumatic stress disorder the victim suffered and the period of sick leave to which it gave rise”²⁸².

By contrary, in the case (SAP T 1660/2017), even though the Public Prosecutor's Office asked for 12,000 euros in compensation, the Court decided on 3,000 euros because “beyond the breakdown in her sense of calm and security, it has not been possible to identify a serious affectation in Ms. Francisca's personal sphere as a result of the facts”²⁸³.

Moreover, since moral damage is not legally quantified or standardized, their evaluation is limited to the judges' criteria which normally have a very high subjective component, influenced by stereotypes²⁸⁴. In the case (SAP M 911/2017) in which the aggressor is convicted of the crime of sexual assault, the compensation is reduced to 2000 euros because “Although the victim's profession may harden people, there is no alteration or reactive psychopathological panel, the more freedom and privacy is infringed, the easier it is”²⁸⁵. This decision exemplifies the many stereotypes that may condition the Court's criterion. To mention: first the fact of expecting the victim to be “stronger” because she is a prostitute, second the fact of requiring alteration or psychopathological panel to

²⁸¹ España. Audiencia Provincial de Madrid (Sección 15ª). Sentencia núm. 107/2017 de 12 de febrero de 2017. p 7.

²⁸² España. Audiencia Provincial de Madrid (Sección 4ª). Sentencia núm. 478/2017 de 23 de noviembre de 2017. p. 6.

²⁸³ España. Audiencia Provincial de Tarragona (Sección 4ª). Sentencia núm. 403/2017 de 13 de noviembre de 2017. p.10.

²⁸⁴ María Barcons; Encarna Bodelón; M. Jimena Martínez (et al), ‘Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial’ (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002.

²⁸⁵ España. Audiencia Provincial de Madrid (Sección 5ª). Sentencia núm. 10/2017 de 7 de febrero de 2017. p.4.

understand the damage, and third the fact of assuming that the damage will be more visible the greater the infringement of freedom and privacy as if there was a sliding scale.

Regarding our case study, in *La Manada* ruling, the Court considered “reasonable and proportionate, to fix the amount of compensation for the exclusive concept of moral damage, in the sum of 50,000 euros”. This is in addition to the compensation, to the Navarre Health Service, for the expenses incurred for the health care provided to the complainant (1,531.37 Euros)²⁸⁶. In this case, The monetary compensation is considerable in terms of quantity since generally convictions for sexual assault and abuse are regarded as miserable. In a recent study that analyzes 167 cases, between 58% and 60% of the sexual assaults and sexual abuses have recognized compensation for moral damages of less than 6,000 euros, with almost 42% of them being less than 3,000 euros²⁸⁷.

It should be noted however that when the Supreme Court reviewed the case of *La Manada* recognized insufficient compensation to the victim in the first instance ruling. The Supreme Court stated that the amount was set without taking into account other moral damages arising from the crime: the anxiety that overwhelmed her after learning that there were videos and the fear that anyone could identify her, the media impact of the case, the negative mood of the victim upon learning that she had been followed by private detectives, and the fact that the victim was concerned about her freedom and safety. Especially relevant is the fact that the Court recognized the secondary victimization to which the victim has been subjected: "In highly mediatized cases such as the one analyzed, secondary victimization occurs because the news appears repeatedly in the mass media. Furthermore, in this case, it is proven, not only by the statements of the denouncer, but by the very account of proven facts, that there were videos in which the sexual attacks on the victim had been recorded, and that even one of the defendants went so far as to send messages to two groups of WhatsApp..."²⁸⁸. Considering the above, the Court assessed delayed damage to 50,000 Euros.

²⁸⁶ España. Audiencia Provincial de Navarra (Sección 2ª). Sentencia núm. 38/2018 de 20 de marzo de 2018. p. 53.

²⁸⁷ Maria Barcons; Encarna Bodelón; M. Jimena Martínez (et al), ‘Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial’ (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002.

²⁸⁸ España. Tribunal Supremo (Sala de lo Penal, Sección 1ª). Sentencia num. 344/2019 de 4 de julio de 2019. p. 42.

The “correction” exercised by the Court in terms of reparation should be valued positively. However, monetary compensation is only one of the possible forms of reparation. Specifically considering this case, other additional forms of reparation would have been appropriate. On one hand, the secondary victimization to which the victim was subjected, recognized by the Court itself, has also been a consequence of the judicial process. Hence a specified remedy for the institutional violence exercised over the victim would have been required. Even that this may not have been possible to apply in this case since it is not currently covered by Spanish legislation, clearly shows the need for it.

On the other hand, any measure beyond the individual reparation towards a structural transformation would have been the less appropriate, not to say necessary. To mention, a change in the legislation or any initiative towards judicial practice could have been an additional form of remedy. Specifically, as a guarantee of non-repetition, as it has been encouraged by international jurisprudence²⁸⁹. By not including such remedies, Spain lost the opportunity to overturning the patterns of structural discrimination, subordination, and stereotypes that act as root causes of sexual violence.

4.3. Repercussion

By way of recapitulation, we have been able to verify through the case of *La Manada*, and others, that Spain does not comply with the international standards that should govern the prosecution of sexual violence. It is by the omission of its responsibilities, that the state exercises institutional violence.

Starting with, the judicial practice does not incorporate any sensitive approach at all, which is the basic standard for the prosecution of this type of crime. Not applying it prevents sexual violence from being understood and effectively judged.

The androcentric conception of sexual assault in which the criminal law is built is reflected as well in the judiciary. Existing prejudices of a type of sexual assault, and stereotypical behavior attributed to the victims, hand down the judgments, instead of the alleged facts. The court procedure is experienced by victims as a constant undermining of their credibility²⁹⁰. The behavior of the victim before, during, and after the aggression

²⁸⁹ See for instance, the measures the IACtHR required as a guarantee of non-repetition in *Cotton field* case: “Standardization of protocols, federal investigation criteria, expert services and provision of justice to combat the disappearances and murders of women and the different types of violence against women”, “Training with a gender perspective for public officials and the general public of the state of Chihuahua”.

²⁹⁰ *ibid.*

is put on trial, losing sight on the fact that the punishable conduct is not the victim's behavior but the aggressors²⁹¹. In *La Manada* case, at none point, the aggressors were questioned on the actions they took, while the victim had to explain any simple act as to why took one street rather than others.

It is urgently necessary to identify, denaturalize, and tackle the roles and stereotypes that are present in the task of judging to approach the concept of sexual freedom and indemnity without prejudices. The basis for this lies not only in the international standards we have identified but on the social impact that we have pointed out at the beginning of this thesis. Specifically, the jurisprudential application of norms contributes to the construction of gender roles and stereotypes in the social imaginary. Judicial stereotyping reaches particular importance because, by using stereotypes, judges confer the weight and authority of the law and even the State's legitimacy²⁹².

Beyond the judicial stereotyping, in general, criminal prosecutions have a symbolic impact on society. As some experts point out, judgments have a unique power on the recognition of wrongful conduct. Hence, depending on how the Courts rule on sexual violence, it sends a message to society telling whether it is acceptable or unacceptable²⁹³.

If States do not ensure access to justice for victims, prosecute the crime, investigate the facts, punish the responsible and provide full reparation to the victims, it suggests tacit permission or encouraging to commit this type of crime, what is called a "culture of impunity", or here we could say a "culture of rape"²⁹⁴.

As previously stated, in cases of sexual violence, reparation is particularly important at both individual and collective levels. At the individual level is obvious and refers to the

²⁹¹ Maria Barcons; Encarna Bodelón; M. Jimena Martínez (et al), 'Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial' (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002.

²⁹¹ España. Tribunal Superior de Justicia de Castilla y León (Sala de lo Civil y Penal) Sentencia núm. 50/2019 de 10 de septiembre de 2019.

²⁹² Simone Cusack, 'Eliminating judicial stereotyping: Equal access to justice for women in gender based violence cases' Submitted to the Office of the High Commissioner for Human Rights on 9 June 2014 <<https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/Documentation.aspx>> accessed 14 August 2020.

²⁹³ Michelle Madden, 'Toward a Feminist State: What Does 'Effective' Prosecution of Domestic Violence Mean?' (2007) *The Modern Law Review* 70 (6) 908 <www.jstor.org/stable/4543184> accessed 31 May 2020.

²⁹⁴ Amnistía Internacional España, 'Ya es hora de que me creas. Un sistema que cuestiona y desprotege a las víctimas' (2018) <<https://doc.es.amnesty.org/ms-opac/>> accessed 13 May 2020.

ability of the victim/survivor to overcome the consequences of the violence suffered²⁹⁵. Victim-blaming, questioning of the credibility, and perpetuating gender roles and stereotypes prevent the victims from doing it. Institutional violence can arrive to reinforce what is called “the pact of silence” by victims not explaining nor denouncing the violence just to avoid this second wave of violence by institutions²⁹⁶. For instance, according to one report about the sexual violence-perception in Spain, the most cited reasons for not reporting, after “Fear of the aggressor” and “Shame”, were the “Fear of not being believed” (26.3 %), and “Fear of being found guilty of what happened” (15.2 %) ²⁹⁷.

In words of Kerstin Adolfsson, secondary victimization “is a consequence of society’s ability to cope with the offense”²⁹⁸. (I will better say non-ability). And here is where it comes to the collective dimension of reparation. For society to be able, it is the State the first that has to know how to cope with it, and reparation measures are the ultimate example of how the state does it. That is why it is so important that reparative measures have a transformative vocation to drive changes in the socio-cultural norms, patterns, and practices that cause such violence²⁹⁹.

On balance, the treatment, punishment, and reparation given to cases of sexual violence have an undisputable social impact by reaffirming or denying the legitimacy of the aggressors. This can explain the unprecedented reaction of Spanish society to the ruling of *La Manada* case when society felt that justice was granting somehow legitimacy to the aggressors, and consequently, to sexual violence itself. In other words, perpetuating rape culture³⁰⁰.

²⁹⁵ Amnistía Internacional España, 'Ya es hora de que me creas. Un sistema que cuestiona y desprotege a las víctimas' (2018) <<https://doc.es.amnesty.org/ms-opac/>> accessed 13 May 2020

²⁹⁶ Carla Vall i Duran (coord.), ‘Violència institucional i revictimització en el sistema judicial i de denúncia de violències sexuals’ (2018) Iridia <https://iridia.cat/wp-content/uploads/2018/12/Violencia-despres-de-la-violencia_WEB.pdf> accessed 14 August 2020.

²⁹⁷ Ministry of the Presidency, Relations with Parliament and Equality: Government Office for Gender-Based Violence, ‘The social perception of sexual violence’ (2018) <https://violenciagenero.igualdad.gob.es/en/violenciaEnCifras/estudios/colecciones/estudio/Libro25_Violencia_Sexual.htm> accessed 19 July 2020.

²⁹⁸ Kerstin Adolfsson, ‘Blaming victims of rape: Studies on rape myths and beliefs about rape’ (2018) University of Gothenburg, p. 25 <<http://hdl.handle.net/2077/57769>> accessed 12 May 2020.

²⁹⁹ Amnistía Internacional España, 'Ya es hora de que me creas. Un sistema que cuestiona y desprotege a las víctimas' (2018) <<https://doc.es.amnesty.org/ms-opac/>> accessed 13 May 2020.

³⁰⁰ For instance: Ana Rojas Martín, 'The Institutionalization of rape culture: The case of "La Manada" in Spain' (2019), Universidad Autónoma de Madrid <https://www.researchgate.net/publication/336122929_The_Institutionalization_of_rape_culture_La_Manada_in_Spain> accessed 10 May 2020.

5. CONCLUSION

As in other countries, in Spain a ruling (*La Manada* case) raised the alarm about the institutional response given to sexual violence, motivating the present thesis. The objective was to analyze the compliance of Spain with its obligations, not only because of the international responsibility by which it is bound but also because of the social impact associated with the matter.

Starting with, Spain does not comply with the obligation to establish an appropriate legislative framework that properly criminalizes rape and offers protection to victims. The way rape is criminalized by the Spanish Penal Code does not conform to the international standards, being the former element of the crime the existence of violence rather than the absence of consent as required. Furthermore, the criminalization is very exclusive, accommodating only a few of the ways in which sexual violence can occur, leaving many victims impossible to be acknowledged as such. On the other hand, the national legislative framework on gender-based violence does not address sexual violence as such since it is primarily focused on violence committed on the partner scope (domestic violence), leaving the other forms unattended. Moreover, many competencies on gender-based violence belong to regional or even local competence, which results in territorial inequalities and differences regarding the assistance to victims. This problem extends to the area of prevention, whose measures regarding sexual violence are precarious. Among other things, there are no data on the subject to guide social awareness measures, the common educational framework does not include any subject in the fight against gender stereotypes and attitudes, and the media continue to play an ambiguous role, informing at the same time than reinforcing the root causes of that violence.

This leads us to the conclusion that Spain does not prevent nor criminalizes rape, and neither assist the victims, according to the international standards by which it is bound; what made it clear the need for a legislative reform. But, as stated before, a legislative reform will not be sufficient if attitudes, myths, and stereotypes about rape and its victims prevent its practical application. And that is where Spain also fails. The case of *La Manada*, supported by some others, has exemplified the institutional violence exercised by the judicial authorities when omitting the international standards established for the investigation, prosecution, and reparation of rape. The lack of a context-sensitive approach, the judicial stereotyping, the influence of rape myths on the understanding of violence, victim-blaming, or the use of sexual history and behavior of the victim, among

others, lead the trial to be experienced as a constant questioning of victims, and ultimately, a revictimization process that prevents victims from accessing justice and holding perpetrators accountable.

When States, as it is the case of Spain, do not ensure access to justice, prosecute the crime, punish the responsible and provide full reparation to victims, it suggests tacit permission to the crime, which, to the case, can be translated in a perpetuation of the culture of rape.

Considering that any law or act that normalizes or reduces the severity of sexual violence contributes to the configuration of rape culture, we can easily conclude that Spain is doing it since neither its law nor its practical application properly condemns rape.

La Manada case presented an opportunity for Spain to overturn this, but it did not result. The policy initiatives have resulted in none change in the national framework, and not even the reparation measures in the Supreme ruling of *La Manada* have incorporated a transformative vocation to combat those elements that configure the roots of rape.

It is therefore urgent that Spain assumes the international obligations by which it is bound, that is, ensuring that its authorities exercise the due diligence in the prevention, investigation, prosecution, and redress in cases of sexual violence. Being the main responsible in the fight against sexual violence, the Spanish State needs to review itself internally to not act as an ally on the perpetuation of the culture of rape. Although it should also take into consideration those agents that may contribute to it, such as the media, the primary responsibility ultimately lies with itself.

As mentioned at the beginning, the full eradication of rape may be utopian. Yet it is certainly possible to combat the status quo in which it is rooted, which is precisely what Spain must do. This is in essence what this thesis came to argue in an attempt to make rape no longer the only crime for which the victim is forced to prove his or her innocence.

BIBLIOGRAPHY

BOOKS

- Bourke, J, *Rape. A History from 1860 to the Present* (Virago 2007).
- Brownmiller, S, *Against Our Will. Men, Women and Rape* (Simon and Schuster, 1975).
- Buchwald, E; Fletcher, P; and Roth, M, *Transforming a rape culture* (1st ed. Milkweed Editions, 1993).
- Bumiller, K, *In an Abusive State. How neoliberalism appropriated the feminist movement against sexual Violence* (Durham, Duke University Press, 2008).
- Cahill, A, *Rethinking rape* (1sted. Cornell University Press, 2001).
- Charlotte Hänel, H. *What is Rape?: Social Theory and Conceptual Analysis* (Bielefeld: transcript Verlag. 2018).
- Eriksson, M, *Defining rape: Emerging obligations for states under international law* (Martinus Nijhoff Publishers, 2011).
- Freedman, E, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Harvard University Press 2013).
- Gittos, L, *Why Rape Culture is a Dangerous Myth: From Steubenville to Ched Evans* (Andrews UK Ltd., 2015).
- Projansky, S, *Watching rape: Film and television in postfeminist culture* (New York University Press, 2001).
- Rodríguez, L (direct), *Código Penal. Comentado y con Jurisprudencia* (3rd ed Wolkers Kluwer, Madrid 2009).
- Sanyal, M, *Violación: Aspectos de un crimen, de Lucrecia al #MeToo* (1st ed. Reservoir Books, 2019).
- Smith, O, *Rape trials in England and Wales* (Palgrave Macmillan, 2018).
- Sosa, L, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (Cambridge University Press, 2017).
- Stiebert J, *Rape myths, the Bible and #MeToo* (1st ed. Routledge Focus 2020).

CONTRIBUTIONS TO EDITED BOOKS

Asúa, A, 'El significado de la violencia sexual contra las mujeres y la reformulación de la tutela penal en este ámbito. Inercias jurisprudenciales' (2008) in Patricia Laurenzo, María Luisa Maqueda, Ana María Rubio (eds.), *Género, violencia y derecho* (Valencia: Tirant lo Blanch).

Bohner, G; Eyssel, F; & Pina,P (et.al), 'Rape myth acceptance: affective, behavioural, and cognitive effects of beliefs that blame the victim and exonerate the perpetrator', 17, in Olivia Smith, *Rape trials in England and Wales* (Palgrave Macmillan, 2018) 55.

Charlesworth, H, 'Human Rights as Men's Rights'. In Julie Peters & Andrea Wolper (eds.) *Women's Rights, Human Rights: International Feminist Perspectives* (London: Routledge,1995).

Henry, N & Powell, A, 'Framing Sexual Violence Prevention: What Does It Mean to Challenge a Rape Culture?' in Nicola Henry & Anastasia Powell, *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014).

Henry, N & Powell, A, 'The Dark Side of the Virtual World Towards a Digital Sexual Ethics' in *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014).

Jones, J, 'The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)' in Rashida Manjoo and Jackie Jones (eds), *The legal protection of women from violence: normative gaps in International Law* (1st ed Routledge, 2018).

Larcombe, W, 'Limits of the Criminal Law for Preventing Sexual Violence' in Nicola Henry and Anastasia Powell, *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014).

Mardorossian, C, 'Toward a New Feminist Theory of Rape' (2002) 27(3) Signs,743 in Nicola Henry & Anastasia Powell, *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture* (1st ed. Palgrave Macmillan, 2014).

Peterson, L, 'The not-rape epidemic'. In J. Friedman & J. Valenti, *Yes means yes: Visions of female power and a world without rape* (Berkeley, CA: Seal., 2008)

CASE LAW

European Court of Human Rights

X and Y v. The Netherlands App no 8978/80 (ECtHR, 26 March 1985).

Aydın v. Turkey App no 23178/94 (ECtHR, 25 September 1997).

M.C. v. Bulgaria App no 39272/98 (ECtHR, 4 December 2003).

W. v. Slovenia App No 24125/06 (ECtHR, 23 January 2014).

Y. v. Slovenia App no 41107/10 (ECtHR, 28 May 2015).

E.B. v. Romania App no 49089/10 (ECtHR, 19 March 2019).

Mraovic v. Croatia App no 30373/13 (ECtHR, 14 May 2020).

E. and others v. the United Kingdom App no 33218/96 (ECtHR, 2 July 1996).

Inter-American Commission on Human Rights

Ana, Beatriz and Celia González Pérez v. Mexico, Report N° 129/99 Case 11.565 (IACHR 19 November 1999).

Raquel Martín de Mejía v. Peru, Report N° 5/96 Case 10.970 (IACHR 1 March 1996).

Inter-American Court of Human Rights

Penal Miguel Castro Castro Vs. Perú (IACtHR 24 November 2006).

González et al. (Cotton Field) v. Mexico, (IACtHR 16 November 2009).

Fernández Ortega y otros Vs. México (IACtHR 30 August 2010)

Rosendo Cantú and other vs. México (IACtHR 31 August 2010).

International Court

Prosecutor v Akayesu, ICTR-96-4-T (2 September 1998).

Spanish Courts

Audiencia Provincial de Barcelona (Sección 7ª). Sentencia núm. 726/2017 de 14 de noviembre de 2017.

Audiencia Provincial de Girona (Sección 3ª). Sentencia núm. 588/2017 de 8 de noviembre de 2017.

Audiencia Provincial de Girona (Sección 4ª). Sentencia núm.94/2016 de 15 de febrero de 2016.

Audiencia Provincial de Madrid (Sección 15ª). Sentencia núm. 107/2017 de 12 de febrero de 2017.

Audiencia Provincial de Madrid (Sección 4ª). Sentencia núm. 478/2017 de 23 de noviembre de 2017.

Audiencia Provincial de Madrid (Sección 5ª). Sentencia núm. 10/2017 de 7 de febrero de 2017.

Audiencia Provincial de Navarra (Sección 2ª). Sentencia num. 38/2018 de 20 de marzo de 2018.

Audiencia Provincial de Santa Cruz de Tenerife (Sección 6ª) Sentencia núm. 284/2019 de 11 de octubre de 2019.

Audiencia Provincial de Tarragona (Sección 4ª). Sentencia núm. 403/2017 de 13 de noviembre de 2017.

Tribunal Superior de Justicia de Castilla y León (Sala de lo Civil y Penal) Sentencia núm. 50/2019 de 10 de septiembre de 2019.

Tribunal Supremo (Sala de lo Penal, Sección 1ª). Sentencia num. 344/2019 de 4 de Julio.

Treaty bodies

Karen Tayag Vertido v. The Philippines (22 September 2010) Communication No. 18/2008 CEDAW C/46/D/18/2008.

S.V.P v. Bulgaria (24 November 2012) Communication No. 31/2011 UN Doc CEDAW/C/53/D/31/2011.

R. P. B. vs. The Philippines (21 February 2014) Communication No. 34/2011 CEDAW/C/57/D/34/2011, para 8.10.

Mrs. A v. Bosnia and Herzegovina (22 August 2019) Communication No. 854/2017 UN Doc. CAT/C/67/D/854/2017.

LEGAL SOURCES

Spanish legislation

España Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito. Boletín Oficial del Estado de 28 de abril de 2015, núm. 101.

España. Ley 35/1995, de 11 de diciembre, de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual. Boletín Oficial del Estado de 12 de diciembre de 1995, núm. 296.

España. Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género. Boletín Oficial del Estado «BOE» núm. 313, de 29/12/2004. <<https://www.boe.es/eli/es/lo/2004/12/28/1/con>> accessed 20 July 2020.

España. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. Boletín Oficial del Estado «BOE» núm. 281, de 24/11/1995 <<https://www.boe.es/eli/es/lo/1995/11/23/10/con>> accessed 20 July 2020.

España. Proposición de Ley de Protección Integral de la Libertad Sexual y para la erradicación de las violencias sexuales. Boletín Oficial de las Cortes Generales, Serie B Núm. 297-1 (20 Julio 2018) <http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-297-1.PDF> accessed 20 July 2020.

Law 4/2015 of 27 April, of the Statute of the Crime Victim and, in particular, by Royal Decree 1109/2015 of 11 December implementing Law 4/2015 of 27 April on the Statute of the Crime Victim and regulating the Crime Victims' Support Offices.

Ley Orgánica 8/2013, de 9 de diciembre, para la mejora de la calidad educativa). Boletín Oficial del Estado, de 10 de diciembre de 2013, núm.295.

OFFICIAL DOCUMENTS

Council of Europe

Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 12 April 2011, entered into force 1 August 2014) CETS 210.

Council of Europe, ‘Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence’ (Istanbul, 11 May 2011) CETS 210.

Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), ‘Report submitted by Spain pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report)’ (19 February 2019), 48 <<https://rm.coe.int/state-report-from-spain/16809313e0>> accessed 15 July 2020.

International Criminal Court

ICC, ‘Rules of Procedure and Evidence’ (2013) Rule 70 <<https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>> accessed 11 July 2020.

Organization of American States

Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women “Convention of Belém do Pará” (Adopted at the Twenty-fourth Regular Session of the General Assembly of the Organization of American States, Belém do Pará, Brazil, 9 June 1994).

UN Documents

CAT, ‘General Comment No. 2 Implementation of article 2 by States parties’ (24 January 2008) UN Doc CAT/C/GC/2.

CAT, ‘General comment No. 3 (2012): Implementation of article 14 by States parties’ (13 December 2012) UN Doc CAT/C/GC/3.

CEDAW Committee, ‘Communication No. 47/2012. Decision adopted by the Committee at its fifty-eighth session’ (15 August 2014) UN Doc CEDAW/C/58/D/47/2012.

CEDAW Committee, ‘Concluding observations on the combined seventh and eighth periodic reports of Spain’ (29 July 2015) UN Doc CEDAW/C/ESP/CO/7-8.

CEDAW Committee, ‘General recommendation No. 19: Violence Against Women’ (1992) UN Doc A/47/38

CEDAW Committee, ‘General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) UN Doc CEDAW/C/GC/28.

CEDAW Committee, ‘General recommendation No. 33 on women’s access to justice’ (3 August 2015) UN Doc CEDAW/C/GC/33.

CEDAW Committee, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (26 July 2017) UN Doc CEDAW C/GC/35.

ECOSOC, ‘General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2 May 2016) UN Doc E/C.12/GC/22.

ECOSOC, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk’ (20 January 2006) UN Doc E/CN.4/2006/61.

Human Rights Committee, ‘General Comment No. 28. Article 3 (The equality of rights between men and women)’ (29 March 2000) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

Nairobi Declaration of the Right to A Remedy and Reparation for Women and Girls Victims of Sexual Violence (2007), International Meeting on Women's and Girl's Right to a Remedy and Reparation, Nairobi.

OHCHR, ‘Summary report on the recommendations of the panel discussion on gender stereotyping and on women’s human rights in the context of sustainable development agenda’ (16 September 2014) UN Doc A/HRC/27/73.

OHCHR; UN Women, ‘Guidance note of the Secretary-General: Reparations for Conflict-Related Sexual Violence’ (June 2014), <https://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>> accessed 10 July 2020.

Report of the Secretary General: ‘In-depth study of all forms of gender-violence against women’ (6 July 2006) UN Doc A/61/122/Add., 1

UN Human Rights Council, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo’ (10 June 2015) UN Doc A/HRC/29/27.

UNGA, 'Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence' (25 June 2013) UN Doc A/HRC/RES/23/25.

UNGA, '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' (21 March 2006) UN Doc A/RES/60/147.

UNGA, 'Declaration on the Elimination of Violence against Women' (20 December 1993) UN Doc A/RES/48/104.

UNGA, 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' (23 April 2010) UN Doc A/HRC/14/22.

UNGA, 'Universal Declaration of Human Rights' (10 December 1948) UNGA Res 217 A(III).

United Nations Security Council, 'Resolution 1325 (2000) Adopted by the Security Council at its 4213th meeting, on 31 October 2000. UN Doc S/RES/1325.

United Nations Security Council, Resolution 2467 (2019) Adopted by the Security Council at its 8514th meeting, on 23 April 2019. UN Doc S/RES/2467.

United Nations, 'Beijing Declaration and Platform of Action', adopted at the Fourth World Conference on Women (27 October 1995).

JOURNAL ARTICLES

Angulo, M, ' Subjetividad y violación social. El caso de La Manada' (2019), 31 Tropelías: Revista de Teoría de la Literatura y Literatura Comparada, 86 <<https://papiro.unizar.es/ojs/index.php/tropelias/article/view/3197>> accessed 12 May 2020.

Benedict,H, 'The language of rape' (1993) in Lily K. Thacker, 'Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System'(2017) 1(1) Article 8 Kentucky Journal of Undergraduate Scholarship 92 <<https://encompass.eku.edu/kjus/vol1/iss1/8>> accessed 12 June 2020.

Berns, N, 'Framing the victim: Domestic violence, media, and social problems' (2004) Hawthorne, N.Y.: Aldine. In Lily K. Thacker, 'Rape Culture, Victim Blaming, and the

Role of Media in the Criminal Justice System' (2017) 1(1) Article 8 Kentucky Journal of Undergraduate Scholarship 89 <<https://encompass.eku.edu/kjus/vol1/iss1/8>> accessed 12 June 2020.

Bieneck, S & Krahe, B, 'Blaming the victim and exonerating the perpetrator in cases of rape and robbery: Is there a double standard?' (2011) 26 Journal of Interpersonal Violence <<https://doi.org/10.1177/0886260510372945>> accessed 11 August 2020.

Burt, M, 'Cultural myths and supports for rape' (1980) 38 Journal of personality and social psychology, 217 in Olivia Smith, *Rape trials in England and Wales* (Palgrave Macmillan, 2018).

Dinos, S; Burrowes, N; Hammond, K; and Cunliffe, C, 'A systematic review of assessment of rape victims: Do rape myths impact on juror decision making?' (2015) 43 (1) International Journal of Law, Crime and Justice <<https://doi.org/10.1016/j.ijlcj.2014.07.001>> accessed 9 June 2020.

Edwards, K; Turchik, J; Dardis, J; Reynolds, N; Gidycz, C; 'Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change' (2011) 65 Sex Roles (2011),76 <<https://doi.org/10.1007/s11199-011-9943-2>> accessed 9 June 2020

Gaer,F, 'Rape as a Form of Torture: The Experience of the Committee Against Torture' (2012) 15 (2) CUNY L 293 <<https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1301&context=clr>> accessed 25 June 2020.

Goldberg-Ambrose, C, 'Unfinished Business in Rape Law Reform' (1992) 48(1) Journal of Social Issues 179 <https://www.academia.edu/2760244/Unfinished_Business_in_Rape_Law_Reform> accessed 13 June 2020.

Madden,M, 'Toward a Feminist State: What Does 'Effective' Prosecution of Domestic Violence Mean?' (2007) The Modern Law Review 70 (6) 908 <www.jstor.org/stable/4543184> accessed 31 May 2020.

Pateman, C, 'Women and Consent' (1980) 8(2) Political Theory,164 <<http://www.jstor.org/stable/190792>> accessed 30 May 2020.

Peterson, Z, & Muehlenhard, C, 'Was it rape? the function of women's rape myth acceptance and definitions of sex in labelling their own experiences' (2004) 51 *Sex Roles*, 129 <<https://doi.org/10.1023/B:SERS.0000037758.95376.00>> accessed 9 June 2020.

Ryan, K, 'The Relationship between Rape Myths and Sexual Scripts: The Social Construction of Rape' (2011) 65 *Sex Roles*, 774 <<https://doi.org/10.1007/s11199-011-0033-2>> accessed 8 June 2020.

Thacker, L, 'Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System' (2017) 1(1) *Article 8 Kentucky Journal of Undergraduate Scholarship* 89 <<https://encompass.eku.edu/kjus/vol1/iss1/8>> accessed 12 June 2020.

Thornton, J, 'Myths of aging or ageist stereotypes' (2002) 28 (4) *Educational Gerontology*, 301.

Timmer, A, 'Gender Stereotyping in the case law of the EU Court of Justice' (2016) *European Equality Law Review* (1) 37 <<https://www.equalitylaw.eu/downloads/3867-european-equality-law-review-1-2016>> accessed 25 August 2020.

Vidu, A and Martínez, G, 'The Affirmative "Yes". Sexual Offense Based on Consent. Masculinities and Social Change' (2019) 8(1) <https://www.researchgate.net/publication/331262804_The_Affirmative_Yes_Sexual_Offense_Based_on_Consent> accessed 5 June 2020.

West, R, 'Jurisprudence and Gender' (1988) 55(1), *The University of Chicago Law Review* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846810> accessed 3 June 2020.

RESEARCH PAPERS, WORKING PAPERS, POLICY PAPERS, STUDIES

Adolfsson, K 'Blaming victims of rape: Studies on rape myths and beliefs about rape' (2018) University of Gothenburg, p. 25 <<http://hdl.handle.net/2077/57769>> accessed 12 May 2020

Albertín, P, 'A Feminist Law Meets an Androcentric System: Gender-Based Violence in Spain' (2018), Universitat de Girona <<https://www.researchgate.net/publication/326718807>> accessed 12 May 2020.

Amnesty International, 'Human Rights in Europe: Review of 2019' (2020) <<https://www.amnesty.org/en/documents/eur01/2098/2020/en/>>, accessed 23 May 2020.

Amnesty International, 'Right to be free from rape: overview of legislation and state of play in Europe and International Human Rights' (2018) <<https://www.amnesty.org/en/documents/eur01/9452/2018/en/>> accessed 8 May 2020.

Amnistía Internacional España, 'Ya es hora de que me creas. Un sistema que cuestiona y desprotege a las víctimas' (2018) <<https://doc.es.amnesty.org/ms-opac/>> accessed 13 May 2020

Barcons, M; Bodelón, E; Martínez, J (et al), 'Las violencias sexuales en el Estado español: marco jurídico y análisis jurisprudencial' (2018) Grupo de Investigación Antígona, Creación Positiva (coord.) <<https://creacionpositiva.org/banco-de-recursos/index.html>> accessed 11 August 2002.

Bodelón, E, 'Violencia institucional y violencia de género' (2014) Universidad Autónoma de Barcelona <<https://revistaseug.ugr.es/index.php/acfs/article/view/2783>> accessed 4 August 2020.

Brown, S, 'Rape Culture or a Culture of Rape? American Rape Culture Compared to South African Rape Accommodating' (2018) Senior Honors Theses 223 <<https://digitalcommons.brockport.edu/honors/223>> accessed 12 June 2020.

Carla Vall i Duran (coord.), 'Violència institucional i revictimització en el sistema judicial i de denúncia de violències sexuals' (2018) Iridia <[https://iridia.cat/wp-content/uploads/2018/12/Violencia-despres-de-la-violencia WEB.pdf](https://iridia.cat/wp-content/uploads/2018/12/Violencia-despres-de-la-violencia_WEB.pdf)> accessed 14 August 2020.

Consejo General del Poder Judicial, 'Guía de buenas prácticas para la toma de declaración de víctimas de violencia de género' (2018) <<http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Guias-y-Protocolos-de-actuacion/Guias/Guia-de-buenas-practicas-para-la-toma-de-declaracion-de-victimas-de-violencia-de-genero>> accessed 31 July 2020.

Council of Europe, 'Preventing and combating domestic violence against women: A learning resource for training law-enforcement and justice officers' (2016) <<https://rm.coe.int/16805970c1>> accessed 15 June 2020.

Cusack, S, 'Eliminating judicial stereotyping: Equal access to justice for women in gender based violence cases' Submitted to the Office of the High Commissioner for Human Rights on 9 June 2014 <<https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/Documentation.aspx>> accessed 14 August 2020.

ECtHR Press Unit, 'Factsheet-Violence against women' (May 2020) <https://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf> accessed 28 June 2020.

Guarnizo, D, 'Acceso a la justicia' para Mujeres víctimas de violencia sexual. Cuarto Informe de Seguimiento al Auto 092 de la Corte Constitucional' (Comisión Colombiana de Juristas, 2011) <https://www.coljuristas.org/documentos/libros_e_informes/acceso_a_la_justicia_para_mujeres.pdf> accessed 10 July 2020.

International Committee of the Red Cross (ICRC), 'Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts' Legal factsheet (11 March 2015) <<https://www.icrc.org/en/document/prevention-and-criminal-repression-rape-and-other-forms-sexual-violence-during-armed>> accessed 25 June 2020.

Maffia, D & Moretti, C, 'Violencia mediática y simbólica'. Observatorio de Justicia y Género <http://www.psi.uba.ar/academica/carrerasdegrado/psicologia/sitios_catedras/practicas_profesionales/825_rol_psicologo/material/descargas/unidad_3/obligatoria/violencia_mediatica.pdf> accessed 13 August 2020.

Martín, A, 'The Institutionalization of rape culture: The case of "La Manada" in Spain' (2019), Universidad Autónoma de Madrid <https://www.researchgate.net/publication/336122929_The_Institutionalization_of_rape_culture_La_Manada_in_Spain> accessed 10 May 2020.

Ministerio de Justicia, 'Informe sobre la evaluación periódica del sistema de atención a las víctimas del delito' (2017) <https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/oficinas-asistencia-victimas#id_1288805872702> accessed 19 August 2020.

Ministerio de la Presidencia, Relaciones con las Cortes e Igualdad, ‘Documento refundido de medidas del Pacto de Estado en materia de Violencia de Género. Congreso+Senado’ (13 de mayo de 2019) <https://violenciagenero.igualdad.gob.es/pactoEstado/docs/Documento_Refundido_PE_VG_2.pdf> accessed 20 July 2020.

Ministerio de Sanidad, Servicios Sociales e Igualdad, ‘Protocolo común para la actuación sanitaria ante la Violencia de Género’ (2012) p. 65 <<http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Guias-y-Protocolos-de-actuacion/Protocolos/Protocolo-comun-para-la-actuacion-sanitaria-ante-la-violencia-de-genero---2012>> accessed 31 July 2020.

OHCHR: ‘Gender Stereotyping as a Human Rights Violation’ (2013) <<https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx>> accessed 26 May 2020.

Plataforma CEDAW Sombra ‘Informe Sombra sobre la aplicación en España 2015-2018 de la CEDAW’ (2019) <<https://cedawsombraesp.wordpress.com/2019/05/15/informe-sombra-sobre-la-aplicacion-en-espana-2015-2018-de-la-cedaw/>> accessed 29 July 2020.

Plataforma Estambul Sombra ‘Spanish Istanbul Shadow Report’ (2018) <<https://plataformaestambulsombra.wordpress.com/>> accessed 3 August 2020.

UN Women, ‘Handbook for Legislation on Violence against Women’ (2012) New York, <<https://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>> accessed 9 July 2020.

United Nations, Department of Peacekeeping Operations, ‘Review of the sexual violence elements of the judgments of International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820’ (2010) <<https://www.unwomen.org/en/docs/2010/1/review-of-the-sexual-violence-elements-of-the-judgments-of-international-criminal-tribunals>> accessed 13 July 2020.

REPORTS, STATISTICAL DATA

European Union Agency for Fundamental Rights, 'Violence against women: an EU-wide survey' (2014) <<https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>> accessed 25 May 2020.

European Women's Lobby, 'EWL Barometer on Rape in the EU in 2013' (2013) <<https://www.womenlobby.org/2013-EWL-Barometer-on-Rape-Report?lang=en>> accessed 27 May 2020.

International Women's Day, 'Global attitudes towards gender equality' (2019) <<https://www.kcl.ac.uk/giwl/research/global-attitudes-towards-gender-equality>> accessed 21 May 2020.

Ministerio del Interior, 'Informe sobre delitos contra la Libertad e Indemnidad Sexual en España' (2018) <<http://www.interior.gob.es/prensa/balances-e-informes/2018>> accessed 19 July 2020.

Ministry of health, social services, and equality: Government Office against Gender based Violence 'Survey on violence against women 2015. Main results' (2015) <https://violenciagenero.igualdad.gob.es/en/violenciaEnCifras/macroencuesta2015/Avance_Resultados2015/home_valida.htm> accessed 20 July 2020.

Ministry of the Presidency, Relations with Parliament and Equality: Government Office for Gender-Based Violence, 'The social perception of sexual violence' (2018) <https://violenciagenero.igualdad.gob.es/en/violenciaEnCifras/estudios/colecciones/estudio/Libro25_Violencia_Sexual.htm> accessed 19 July 2020.

World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, 'Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence' (2013) <<https://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>> accessed 21 May 2020.

PRESS RELEASES

Badcok, J, 'Spain 'wolf pack' case: Thousands protest over rape ruling' BBC (Madrid, 26 April 2018) <<https://www.bbc.com/news/world-europe-43915551>> accessed 25 May 2020.

BBC, 'Spain 'wolf pack' case: Thousands protest over rape ruling' (26 April 2018) <<https://www.bbc.com/news/world-europe-43915551>> accessed 5 August 2020.

Borraz, M & Ordaz, A, 'Las denuncias por violencia sexual han crecido un 60% en los últimos seis años' elDiario.es (19 marzo 2019) <https://www.eldiario.es/sociedad/denuncias-agresion-sexual-aumentaron_1_1646195.html> accessed 19 July 2020.

Consejo General del Poder Judicial, 'El CGPJ abre una investigación sobre la filtración de datos personales de la sentencia 38/2018 de la Sección Segunda de la Audiencia de Navarra' (2018) <<http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunales-Superiores-de-Justicia/TSJ-Navarra/Sala-de-prensa/Archivo-de-notas-de-prensa/-El-CGPJ-abre-una-investigacion-sobre-la-filtracion-de-datos-personales-de-la-sentencia-38-2018-de-la-Seccion-Segunda-de-la-Audiencia-de-Navarra>> accessed 8 August 2020.

Delgado, L, 'Rita Segato: "Hay que demostrar a los hombres que expresar la potencia a través de la violencia es una señal de debilidad"' 'El Salto (26 October 2019) <<https://www.elsaltodiario.com/feminismos/rita-segato-hay-que-demostrar-hombres-expresar-potencia-violencia-senal-debilidad>> accessed 19 August 2020.

Gimeno, B, '¿A quién estamos juzgando?' (2017), CTXT <<https://ctxt.es/es/20171115/Firmas/16201/cultura-violacion-juicio-san-fermin-feminismo-beatriz-gimeno.htm>> accessed 12 May 2020.

McGowan, C, 'Chilean anti-rape anthem becomes international feminist phenomenon' (2019) *The Guardian* <<https://www.theguardian.com/world/2019/dec/06/chilean-anti-rape-anthem-becomes-international-feminist-phenomenon>> accessed 21 May 2020.

Ortega, P, 'La Manada se libra de la violación' El País (Madrid, 24 April 2018) <https://elpais.com/politica/2018/04/26/actualidad/1524732098_409166.html> accessed 25 May 2020.

Pacheco, R 'Un vecino de Barcelona difundió los datos de la víctima de 'La Manada'' Crónica Global (22 November 2018) <https://cronicaglobal.lespanol.com/vida/vecino-barcelona-datos-victima-manada_193658_102.html> accessed 11 August 2020.

Poder Judicial España, 'El CGPJ pone en marcha el primer curso de formación obligatoria en perspectiva de género para los jueces que quieran acceder a cualquier especialidad' (8 March 2019) <<http://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/El-CGPJ->

[pone-en-marcha-el-primer-curso-de-formacion-obligatoria-en-perspectiva-de-genero-para-los-jueces-que-quieran-acceder-a-cualquier-especialidad](#)> accessed 19 August 2020.

RTVE, 'La sentencia de La Manada abre el debate en el Parlamento Europeo sobre la violencia sexual y llega a la ONU' (2 May 2018) <<https://www.rtve.es/noticias/20180502/sentencia-manada-abre-debate-parlamento-europeo-sobre-violencia-sexual-llega-onu/1725897.shtml>> accessed 5 August 2020.

Sección cuarta. Penal: "Informe que analice los delitos de agresión y abuso sexual, acompañando, en su caso, texto articulado de una propuesta legislativa de reforma del Código Penal" (2018) <<https://www.mjusticia.gob.es/cs/Satellite/Portal/es/actividad-legislativa/comision-general-codificacion/propuestas>> accessed 16 July 2020.

Sietecase, R, 'Rita Segato: "La violación es un acto de poder y de dominación"', La Vanguardia (14 April 2017) <<http://www.lavanguardia.com.ar/index.php/2017/04/14/rita-segato-la-violacion-es-un-acto-de-poder-y-de-dominacion/>> accessed 6 June 2020.

Vizzi, F, and Ojeda, A, 'Rita Segato: "Una falla del pensamiento feminista es creer que la violencia de género es un problema de hombres y mujeres"', La tinta (22 September 2017) <<https://latinta.com.ar/2017/09/rita-segato-falla-pensamiento-feminista-violencia-genero-problema-hombres-mujeres/>> accessed 6 June 2020.

WEB PAGES, BLOGS

Campaign "If you do not understand a No, you're a potential sex offender. No is No. Respect the limits yes or yes". Available on the website of the Government Delegation against Gender Violence: <<https://violenciagenero.igualdad.gob.es/sensibilizacionConcienciacion/campañas/violenciaGobierno/violenciaSexual/home.htm>> accessed 18 August 2020.

Campaign "We are one, against sexual violence". Available on the website of the Government Delegation against Gender Violence: <<https://violenciagenero.igualdad.gob.es/sensibilizacionConcienciacion/campañas/violenciaGobierno/somosUna/home.htm>> accessed 18 August 2020.

General Council of the Judiciary:
<<http://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Guias-y-Protocolos-de-actuacion/Protocolos/?perfil=3>>

Geoviolenciasexual, ‘Agresiones sexuales múltiples en España desde 2016: casos actualizados’ <<https://geoviolenciasexual.com/agresiones-sexuales-multiples-en-espana-desde-2016-casos-actualizados/>> accessed 17 July 2020.

Information regarding the Observatory of the Image of Women can be consulted here <<http://www.inmujer.gob.es/observatorios/observImg/home.htm>> accessed 21 August 2020.

Marshall University’s Women’s Center, ‘Rape culture’ <<https://www.marshall.edu/wcenter/sexual-assault/rape-culture/>> accessed 10 June 2020.

Ministerio de Justicia, ‘Oficinas de asistencia a las víctimas de delitos violentos y contra la libertad sexual’ (Last updated 24/01/2020) <https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/oficinas-asistencia-victimas#id_1288784221142> accessed 30 July 2020.

Office of the High Commissioner for Human Rights (OHCHR), ‘International Day on the Elimination of Violence against Women 25 November 2019: Absence of consent must become the global standard for definition of rape’ (Geneve, 22 November 2019) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25340&LangID=E>> accessed 22 June 2020.

The campaigns of the Autonomous Communities for gender-based violence can be consulted here:<<https://violenciagenero.igualdad.gob.es/sensibilizacionConcienciacion/campannas/otroMaterial/campannas/home.htm>> accessed 18 August 2020.

The Rape, Abuse & Incest National Network (RAINN), ‘RAINN Urges White House Task Force to Overhaul Colleges’ Treatment of Rape’ (February 28, 2014) <<https://www.rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf>> accessed 11 June 2020.

Themis Asociación de Mujeres Juristas, ‘Conclusiones de la Asociación de Mujeres Juristas Themis sobre líneas de reforma del código penal en materias de delitos contra la

libertad sexual' <<https://www.mujeresjuristasthemis.org/prensa/noticias/193-manifiesto-sobre-lineas-de-reforma-del-codigo-penal-en-materias-de-delitos-contra-la-libertad-sexual> > accessed 17 July 2012.