

General Recommendation of the
Committee of Experts of the MESECVI (No. 3):

THE CONCEPT OF CONSENT **in cases of Gender-Based** **Sexual Violence Against Women**



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General Recommendation of the MESECVI Committee of Experts (No.3)

THE CONCEPT OF CONSENT IN CASES OF SEXUAL VIOLENCE AGAINST WOMEN FOR GENDER REASONS.

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Introduction

In memory of Paola Guzmán and every woman, adolescent and girl who have had to silence sexual violence to which they have been subjected.

The Follow-up Mechanism of the Convention to Prevent, Punish and Eradicate Violence against Women, better known as the Convention of Belém do Pará (MESECVI), is managed by a Committee of Experts (CEVI) responsible for the analysis and evaluation of the implementation process of the Convention in the States Parties.

Throughout its existence, the CEVI has recognized that violence against women in the region is an alarming reality and that the efforts that have been made to prevent and eradicate it are insufficient given the magnitude of the violence experienced by women and girls in Latin America and the Caribbean.

This violence can take place in many different contexts and forms. As the CEVI pointed out in the Second Follow-up Report on the Implementation of the Recommendations of the Committee of Experts of the MESECVI:

Violence against women has come to be identified as a real and systematic problem that violates the right of women to live without violence and hinders the realization of civil, political, economic, social and cultural rights, all of which are key to their full development in conditions of equality with men.¹

This violence against women, for reasons of gender, is based on cultural and social perspectives that seek to justify aggressive behaviors. Probably one of the most damaging types of violence for women is sexual violence, since with it, the aggressor reduces the woman to an object of desire and use for his own satisfaction, in order to reflect dominance and exercise torture.

International and national organizations have advocated for the development of standards and public policies that allow for the protection of victims of sexual violence. They have also promoted the development of laws and public policies within the framework of domestic law to ensure the prevention, support, investigation, punishment and reparation of victims of sexual violence. The CEVI, has also insisted on the importance of generating a national law harmonized with the Convention of Belém do Pará, on the classification of the criminal type of human trafficking, on the strengthening of State actions to punish harassment and sexual violence, as well as on the need to take necessary actions to eradicate violence against women.²

In this regard, the Committee has pointed out the high rates of reported violence and the low levels of case prosecution. In this respect, the Committee has identified the role played by the public officials within the law enforcement and administration of justice systems and the weight of gender stereotypes in the investigation and prosecution of these causes.³

The Committee has highlighted that all the States of the Latin America and the Caribbean have laws that sanction some of the manifestations of sexual violence⁴, but has also pointed out the obstacles and barriers that women face in accessing justice in these cases.

The CEVI has also referred to the importance of addressing intersectionality as an analysis tool that allows for addressing the multiple causes of discrimination faced by the diversity among women. Thus, the Committee has drawn attention to the way in which other intersectionalities affect, particularly women and girls, when it comes to accessing specialized services and filing complaints of violence against them based on gender, and, especially, sexual violence.⁵

For this reason, the Committee recognizes that, despite the progress that has been made in this area, it is still necessary to continue to build knowledge on the phenomenon of sexual violence, the areas in which it occurs and the rights that are affected.

At the same time, the Committee considers that a review of the constituent elements of sexual violence and how they are viewed by administrators of justice systems in the Latin-American and Caribbean region is not only essential for the understanding of the phenomenon, but also to contribute to the prevention of this violence, the punishment of those responsible as well as reparation for victims and avoid their revictimization.

A critical component of all of the above, is a clear understanding of the concept of consent in cases of sexual violence, understood as the ability of women to indicate a willingness to engage in the act. This concept constitutes the distinction between a consensual act and an act of abuse or violation.

The Committee considers it particularly important to draw attention to the concept of sexual consent in cases of sexual violence, given that this legal concept, as commonly used, has been an exculpation mechanism of criminal responsibility of the accused, as well as, to stigmatize the victim.

In this sense, the CEVI understands that States must create comprehensive measures that allow for the recognition of the elements of inequality that trigger situations of sexual violence and, above all, to conceptualize consent as a fundamental element that allows for the differentiation between a freely exercised sexuality and an act of violence.

Thus, it helps to address the situation of sexual violence not only in terms of structures of inequality but also in terms of ideologies and the stereotypes held by administrators that determine women's access to justice processes. It is also essential to build a transparent framework of protection in the matter of gender-related sexual violence that is reflected in public policies for the prevention, care, punishment, eradication and reparation for victims and which takes into account all appropriate measures, including measures to: modify or abolish existing laws and regulations; and, modify legal or customary practices that support the persistence or tolerance of violence against women.⁶

1. Sexual Violence

A. Introduction: general aspects of violence against women

The situation of violence against women is a problem that affects all societies in the world. According to the World Health Organization: “35% of the world’s women have suffered intimate partner violence or sexual violence by third parties at some point in their life.”⁷ In addition, 30% of women experienced a relationship where the partner has been the aggressor.⁸

In the Latin American region, 26% of women are not able to freely decide about their body, because of laws and policies that limit their rights and liberties.⁹

In the study *Estimates of the prevalence of violence against women*, the World Health Organization reports that in Latin America the following data on the prevalence of physical and sexual violence in a lifetime by country are observed: Bolivia 42%, Peru 38%, Ecuador 33%, Colombia 30%, Argentina 27%, United States of America 26%, Mexico 24%, Uruguay 18%.¹⁰ UN Women estimates that in the Americas, 25% of women have suffered gender-based violence at some point in their lives.¹¹

These data are underestimates of the situation when we consider that there is a serious problem of unreported cases that prevent us from knowing the precise magnitude of the situation. Consequently, it is not always possible to have access to data that can be disaggregated on the basis of the full range of intersecting factors, including socio-economic status, race, ethnicity, location gender orientation, among other factors, that allow us to use a multivariate analytical framework to fully understand how gender intersects with other axes of inequality in relation to women’s experience of gender-based violence.

In the case of crimes of sexual violence, these are not reported due to gender stereotypes held by law enforcement officers, and general lack of trust in the judicial systems. Authorities frequently blame victims for the violence experienced on the basis of, *inter alia*, inappropriate clothing, their social condition or state of mind, resulting in re-victimization and a lack of sensitivity on the part of players in the justice system who generate value judgments on the situation of the violence experienced by women.

This represents a tortuous process that leaves victims defenseless and with serious consequences in all areas of their lives additionally resulting in high levels of impunity. As already pointed out in the Second Report issued by the CEVI, stereotypes fuel violence and favor impunity.¹²

In cases of sexual violence, authorities often hold the victim responsible for the violent situation, which can generate a climate of institutional discrimination violence that violates the

human rights of women and leaves them defenseless. In these cases, it is argued that the victim caused the attack or that she accepted and consented to the act, hence the authority refrains from investigating the report. In other cases, the victim is not blamed but the authorities normalize violence when it occurs within a relationship. For this reason, the CEVI, has stressed the need to sensitize the authorities¹³ of the ways in which entrenched stereotypes are unwittingly used to normalize violence against women and justify impunity.

Thus, the analysis and conceptualization of consent in cases of sexual violence has become increasingly important to guarantee the rights of women, adolescents, and girls who are victims of sexual violence. Due to structural discrimination for reasons of gender, the limits on this issue have become blurred and are often erroneously based on a flawed understanding of consent.

Probably, the most frequent cases are those in which sexual abuse occurs when relationships are marked by asymmetrical power which is used by the dominant partner to subdue the victim through acts committed in institutional settings, the workplace, educational settings and through economic deprivation, among others. In these situations, it is likely that there is no physical violence and that the victim does not expressly reject the sexual act, but the violation occurs because consent is assumed in situations of unequal power.

This is precisely why the way in which consent is conceptualized becomes relevant because, when clearly understood it implies acceptance of the free and voluntary exercise of sexuality, and, therefore, the central distinction between an act of freedom and a forced act involving harassment, abuse and violence. Hence the concept of consent should be analyzed and established by law and properly interpreted by all functionaries in the justice system.

B. Regional and international normative framework on sexual violence

According to the Declaration of the MESECVI Committee on violence against girls, women, and adolescents and their sexual and reproductive rights, sexual violence is defined as “actions of a sexual nature that are committed on a person without their consent, which, in addition to physical invasion of the human body also include acts that do not involve penetration or even any physical contact.”¹⁴

The World Health Organization defines sexual violence as: “the attempt to consummate a sexual act, unwanted sexual comments or advances, or actions to commercialize or use in any other way the sexuality of a person through coercion by another person, regardless of their relationship with the victim, in any area.”¹⁵

Sexual violence includes, *inter alia*, coerced relationships in marriage, with a partner and in dating; sexual assaults or rapes by acquaintances or strangers; the systematic violations that

occur in armed conflicts; sexual harassment, sexual favors in exchange for work, food and/or humanitarian aid; sexual abuse of minors; forced prostitution; human trafficking; early marriages or early unions; and violent acts against the sexual integrity of women, such as genital mutilation and mandatory virginity inspections.¹⁶

Furthermore, sexual violence is not limited to situations like harassment, rape or abuse, it also includes all those practices in which a woman is prevented to decide over her body, as is the case of forced sterilization. Other forms or practices of sexual violence can occur in psychiatric hospitals, or when they are in certain situations of disability.

Frequent practices in which State agents or criminal groups sexually assault women are also noted. In this sense, in the Guide for the application of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, the Committee of Experts pointed out that the protection of violence against women perpetrated by the State is increasingly relevant, since the number of cases of violence against women, in particular sexual violence, including rape, committed by state agents in hospitals, educational centers and centers of deprivation of liberty, among others, is continuously increasing.

Likewise, the proliferation of sexual violence in armed conflicts, social crises and massive human rights violations in Latin America and the Caribbean demonstrates its use as a weapon of war and a means of subjugating the bodies and lives of women. In turn, we must not fail to note that there have been cases of sexual violence in which workers in charge of providing humanitarian aid, in conflict zones¹⁷, request sexual favors in exchange for food, shelter, school, and other services that they are obliged to provide within the framework of their functions. This highlights the use of power as a mechanism of submission and control of the woman's body.

Taking into account the gender aspects of forced displacement and the risks displaced women face, the Committee also notes that sexual violence more acutely affects displaced women, who require protection in accordance with their special and unique needs.¹⁸ It is imperative to address the situation of migrant women, particularly in the Central and south America regions, who, being far from their family networks, are in a situation of greater vulnerability. It is noted, for example, that about 70% of migrant women that are on the border of Mexico and Guatemala have been victims of violence and of these 60% have been victims of sexual violence.¹⁹ This reveals the serious problem of violence that women face when forced to leave their country because of threats to their lives and those of their children.

The situation of organized crime has also increased the levels of violence in some Latin American countries²⁰ and, this also generates a systematic increase in the violation of human rights of women who are in a vulnerable situation. In this sense, the CEVI is aware that in order to guarantee women's human rights, it is essential to address the problem of public

security and establish protection measures which address the situation of insecurity and violence in which women are immersed.

However, not all countries adequately criminalize²¹ all manifestations of sexual violence, that is why the CEVI has repeatedly stated the importance of the establishment of:

laws that protect the rights of women accompanied by public policies to eradicate violence, taking into account the reality of the diversity of women in the region and the persistence of sociocultural patterns that enthrone the perspective of hegemonic power through historically accepted discriminatory practices and behaviors.²²

The Committee of Experts of the MESECVI has indicated that as part of its obligations regarding due diligence to prevent, punish and eradicate violence against women, States should be committed to developing and effectively applying a framework of legal norms and policies to fully protect and promote the human rights of women. As a first step, States must criminalize, in their domestic law, all manifestations of violence against women, including sexual violence in the conjugal context and other forms of domestic violence.²³

The CEVI pointed out in the Second Hemispheric Report that there is a great disparity in the legislation in the States Parties, which prevents women from having full access to effective protection. Thus, for example, the CEVI found that in the matter of rape some:

States include provisions to prevent or punish this crime, they still regulate it with some limitations. For example, some States criminalize rape within marriage but restrict rape to oral, anal, or vaginal access. In other cases, it is rape but not sexual violence or other sexual abuse within marriage. Some States sanction such violation when it occurs within marriage without including de facto unions; or the criminalization of this violation when it occurs in separation or divorce proceedings and not in cases of existing marriages or de facto unions.²⁴

International instruments establish a frame of reference in this regard. *The Convention of Belém do Pará* refers in its first article the following:

For the purposes of this Convention, violence against women should be understood as any action or conduct, based on gender, that causes death, damage or physical, sexual or psychological suffering to women, both in the public and private spheres.²⁵

For its part, the Declaration on the elimination of violence against women of the UN General Assembly indicates that violence against women includes physical, sexual and psychological violence that occurs in the family, in the community in general or that is perpetrated or tolerated by the State (Art. 2):

[...] Any act of violence based on belonging to the female sex that has or may result in physical, sexual or psychological harm or suffering for the woman, as well as threats of such acts, coercion or arbitrary deprivation of the freedom, whether they occur in public life or in private life.²⁶

International jurisprudence establishes that sexual violence is not an isolated phenomenon but is related to inequality between men and women; has to do with the domination of man through the use of the body and is the result of structural gender violence and sociocultural patterns that discriminate against women.

In the regard, the Inter-American Court of Human Rights has considered that sexual violence is configured with actions committed against a person without their consent. In particular, it has established that rape constitutes a paradigmatic form of violence against women whose consequences transcend the person of the victim.²⁷ For these reasons, it is important to understand the elements of the sexual violence, identify them, and establish public policies and legislative actions to promote, respect, protect and guarantee the human rights of women.

Thus, from the point of view of the Law, there is a wide interpretive range regarding sexual violence. However, one of the most complete interpretations is found in the jurisprudence issued by the Inter-American Court of Human Rights in the cases *Penal Castro and Castro*²⁸, *Rosendo Cantú et al.*, and *Inés Fernández Ortega et al.*²⁹, in which it is determined, as already mentioned, that sexual violence is made up of the actions of a sexual nature committed against a person without their consent and may involve physical invasion of the human body acts that do not necessarily include penetration or physical contact.

Some national laws of the countries of Latin America and the Caribbean contemplate as crimes of a sexual nature, in addition to rape and statutory rape, assault and sexual harassment, incest, pornography, the promotion of tourism for the purpose of sexual exploitation, pimping, abduction and obscene displays.

However, in the area of prosecution and administration of justice, the man is usually protected for himself and his “honor”, more than the freedom of decision of the woman herself (hence, for example, many criminal codes in the world still do not have legislation that addresses the crime of marital rape or sexual harassment). For that, the CEVI in the Second Report urges States to criminalize sexual violence and rape “within marriage or union of fact and review the rules of criminal procedure to remove the obstacles that could prevent women from obtaining justice in such cases.”³⁰

C. Effects on victims

The traumatic events of sexual violence have a decisive impact on the psyche of the victims and are capable of producing a feeling of loss in their belief in themselves and in their own identity; in the safety of the world; and, in trust towards others. In addition to this, serious problems are generated in the consolidation of personal identity, family life, work or school activity, and the ability to thrive in social environments.

Also “at the time of trauma, the victim is defenseless against an overwhelming force.”³¹ In the face of trauma, different responses are produced, which “mobilize the person to carry out an action, fight or flight.”³² However, when the person realizes that any form of resistance is useless, they can reach a point of abandonment where they escape from the situation “not by an action in the real world, but by altering their state of consciousness.”³³ This results in a sense of dullness, which in turn causes a kind of paralysis.

Regarding the effects on victims of sexual violence, the Inter-American Court has indicated that this is a highly traumatic experience that can have severe consequences and cause great physical and psychological damage, leaving the victim “physically and/or emotionally humiliated”; situation difficult to overcome even by the passage of time.

Women victims of rape experience severe psychological and social damage and consequences. Thus, in general terms, rape, like torture, has the effect of, among others, intimidating, degrading, humiliating, punishing or controlling the person who subjected to that experience.³⁴ Therefore, in many ways, sexual violence, constitutes torture.

The International Criminal Tribunal for Rwanda has held that:

[...] Like torture, rape is used for purposes such as threat, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity and rape, in effect, constitutes torture when it is committed by a public official or other person in an official position or when it is instigated or given consent by someone else.³⁵

On the other hand, the Inter-American Court established that rape also constitutes a violation of the right to privacy, contemplated in Article 11 of the American Convention on Human Rights. In this way, it violates essential values and aspects of private life, supposes an interference in sexual life and nullifies the right of the victim to freely make decisions regarding who to have sexual relations with, completely losing control over their more personal and intimate decisions on basic bodily functions.³⁶ Therefore, it is common to find withdrawal and silence in victims of sexual violence.

This type of experience damages the psycho-emotional development of the victim. In this

regard, the CEVI has established that some of the serious consequences are psychological effects, such as lack of volitional autonomy, fear, anguish, depression, post-traumatic stress, anxiety and an increased risk of suicide. The CEVI emphasized the importance of:

Incorporating professional personnel, in the fields of medical legal care and in the processing of judicial cases, dedicated to the care of victims, whatever the level of the severity of their offense, that address violations of women's rights.³⁷

The Manual for professional assistance personnel put out by the Pan American Health and the World Health Organizations together identify twelve major changes suffered by the victim that can occur approximately from the first day and up to three months later: denial of what has happened; changes in belief systems; changes in "control belief"; changes in the "just world belief"; negative feelings; breakdown of everyday life; loss of self-esteem; desires for self-destruction and psychophysiological effects such as alterations in eating, loss of appetite, alterations in sleep processes, insomnia and nightmares, among many others.³⁸

In addition to the psychological effects, there are also various physical effects that can generate serious health consequences, since they can range from an unwanted pregnancy to the acquisition of a sexually transmitted disease. Thus, according to the WHO, in the short term, women can present mild or serious injuries; in case of rape, there can be vaginal bleeding or pelvic pain may appear, which would indicate some internal injury.

Another consequence is the acquisition of sexually transmitted diseases, among which of significance are, *inter alia*, the acquired immunodeficiency syndrome (HIV), human papilloma, syphilis and hepatitis B.³⁹

For these reasons, States have the obligation to grant enhanced protection in access to certain rights, such as reproductive health, since, due to the sexual violence experienced, they are in a situation of special vulnerability.

D. Conceptualization of the figure of consent in cases of sexual violence in the international framework

The concept of consent in cases of sexual violence constitutes, as mentioned, a legal concept that makes it possible to discern between a criminal act carried out against a person's sexual freedom and the performance of a consensual act.

From the point of view of criminal theory, Claus Roxin, warns that when reference is made to consent, "the legal right that would have justified force from the customary legal point of

view is renounced as a consequence of the right of individual self-determination or on the legal-constitutional basis of freedom of action.”⁴⁰

In recent years, the concept of consent has been used as an exoneration from criminal liability to avoid investigations related to crimes committed against women, adolescents and girls for gender reasons, which has allowed, together with other circumstances, a high range of impunity for crimes against sexual freedom in the Americas and the Caribbean. This is because the legal conceptualization of the concept in Criminal Codes, is conceived from a vision where violence is only conceived through the exercise of force and physical violence, which generates a limited vision of what free choice of the exercise of a sexual act represents. Thus, the lack of a conceptualization of situations such as psychological violence or intimidation makes it difficult to investigate violations because, as such, the concept of lack of consent is not fully understood.

For this reason, the CEVI recommends that the criteria that have been developed from criminal dogmatic and international jurisprudence, which make it possible to determine the absence of consent in a sexual act, be included in the Penal Codes⁴¹ including:

Use of or threat to use force. The use of force or the threat of force is the most obvious circumstance in which sexual autonomy is not exercised: it is a “clear indication of non-consent”.

Coercion or fear of violence or of the consequences. Sexual coercion is any type of pressure that is exerted on someone to oblige them to perform a sexual act against their will. This includes fear, intimidation, detention, psychological oppression and abuse of power.

The fear of violence or its consequences refers to the impact that the situation of violence generates in the life of the victim. Being under an imminent state of submission, the victim modifies her behavior and agrees to certain acts or situations for fear of the consequences that derive from not accepting. In the case of a violent relationship with a partner, for example, the victim will try to contain the partner and agree to threats or requests with the expectation that a violent episode will not be generated.

Thus, victims submit to sexual acts, with flawed consent or without consent, for fear of the consequences or that the perpetrator will engage in coercive behaviors and more violence if they do not agree.

Intimidation is usually interpreted as conduct or circumstance that represents a threat to the life or safety of the victim or a third party. Intimidation can include extortion and can be direct or indirect.

Arrest and/or deprivation of liberty. This refers to any act of sexual violence that is carried out in the context of a detention perpetrated by security elements or any other authority.

Psychological oppression occurs when, for example, there is a relationship between the victim or the perpetrator and there are emotional or psychological ties between both parties (teachers, students, doctors, patients, religious leaders and believers, family members and children, among others), which generate an abuse in relation to the victim's psychological state.

Abuse of power occurs in situations of compulsion, arrest, or psychological oppression, but fundamentally it relates to the influence that one person can generate on another when they are in a position of power.

Inability to understand sexual violence. In cases of rape or other sexual crimes the victim often does not understand the act that is being carried out or is incapable to freely and voluntarily give consent.

It is precisely for this reason that UN Women highlights the importance of defining consent as a voluntary and unequivocal agreement to sexual contact of both parties to the contact, free from any kind of coercion.⁴² Thus, for example, according to the UN report *Rape as a serious and systematic violation of human rights and gender-based violence against women*, the lack of consent is the central element to be able to differentiate between a situation of violation or an act of freedom. States Parties, therefore, have an obligation to clearly conceptualize and analyze the concept of consent in relevant legislation.

However, it is noted that many criminal laws do not adjust their definition of rape and sexual violence based on sexual consent, which creates a problem in the conceptualization of all crimes related to this type of violence.⁴³

In this regard, it is worth mentioning the case of Paola del Rosario Guzmán Albarracín who, as a teenager, was impregnated by the vice-rector of her school.⁴⁴ The defendant's defense alleged the existence of a consensual relationship between Paola and the perpetrator. However, due to the victim's age and the unequal power relationship of dominant administrator/subordinate student in the educational setting in which the incident was framed, a defect in consent was noticed and the act clearly translated into a sexual crime that ended with the loss of life of the victim.

Faced with this situation, although the vice-rector was accused of harassment, rape and incitement to suicide, the criminal investigation was not carried out diligently. Despite the fact that preventive detention was issued for the accused, it was never enforced. Furthermore,

the process was suspended since he failed to appear for court hearings, and, in fact, never showed up at any time. The State also did not take the necessary actions to bring him to justice, therefore the crime prescribed. Additionally, the case was fraught with gender stereotypes that operated to “support” the version of the aggressor without analyzing the defect in consent and circumstantial evidence. This led the Inter-American Court to establish that: “harmful gender stereotypes, Tending to blame the victim, [considering her ‘provocative’] facilitated the exercise of power and the use of the relationship of trust, to naturalize acts that were undue and contrary to the rights of the adolescent.”⁴⁵ Additionally, the Court pointed out that these stereotypes influenced the judicial processes because they did not apply the gender perspective, as provided for by the Convention of Belém do Pará.⁴⁶

Thus, during the development of the case, and before the statute of limitations, the Supreme Court of Ecuador reclassified the crime from rape to statutory rape because it was considered that the relationship between the vice-rector and the adolescent was consensual. This situation reveals ways in which legal interpretations of consent can be totally misguided and erroneous and, therefore, the imminent need to establish a regulation that addresses consent in the context of unequal power relations that involve domination and submission based on age and position. In this instance, the relationship began when Paola was 14 years old and was established under a situation of domination, where, due to both age and power relationship, there was no possibility that she could consent. In the case, the submission alluded to a rape given the unequivocal fact in which there was no possibility of consent.

The Court concluded that “Paola del Rosario Guzmán Albarracín was subjected, for a period of more than one year, to a situation that included harassment, abuse and carnal access by the vice-rector of her school, which led to the exercise of serious acts of sexual violence against her in the educational institutional environment. The foregoing took place by taking advantage of a power relationship by the state official and a situation of vulnerability in which the victim was, which impaired Paola’s right, as an adolescent woman, to live a life free of violence as well as to claim her right to education in an environment free of sexual harassment and violence.”⁴⁷

Taking into consideration the amicus curiae presented by the CEVI in the reference case and taking as a basis what is established by the International Criminal Court, it is recommended that in order to establish the lack of consent, various elements are included in the legislation, investigation rules and in judicial interpretation, such as the following:

- a) Consent may not be inferred from any word or conduct of the victim when force, threat of force, coercion or taking advantage of a coercive environment have diminished their ability to give voluntary and free consent.

- b) Consent may not be inferred from any word or conduct of the victim when she is unable to give free consent.
- c) Consent cannot be inferred from silence or the victim's lack of resistance to sexual violence.
- d) Consent may not be inferred when there is a power relationship that forces the victim to act out of fear of the consequences thereof, taking advantage of an environment of coercion.

In this regard, the Appeals chamber of the International Criminal Tribunal for the former Yugoslavia has interpreted 'consent' in the following way:

[T]hen, the lack of consent does not have to be proven by the Prosecutor as an element of the type [...]. [The existence of] circumstances that may cause that consent cannot be expressed may be sufficient to presume the absence of consent.⁴⁸

For its part, in the Kunarac judgment it was considered that "all the jurisdictions examined by the Trial Chamber require an element of force, coercion, threat or act without the consent of the victim."⁴⁹

Given this, the CEVI considers that once any type of coercive circumstance is found, it is no longer necessary to establish overt consent because the circumstance undoubtedly eliminated the possibility of consent. Accordingly, international bodies have reiterated that sexual violence occurs when a person is subjected to an act that they do not freely want.⁵⁰

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia made two important clarifications, when it expressly ruled out that the absence of resistance on the part of the victim would automatically imply that she had consented to the sexual relationship. In this sense, the court held that:

[A]lthough the use or threat of force is evident proof of the absence of consent on the part of the victim, the use or threat of force is not a defining element of the crime of rape, since the concurrence of other factors can make sexual penetration a non-consensual or non-voluntary act on the part of the victim.⁵¹

The court supplemented its own definition through a resolution, basing the *actus reus* of the crime not on «compulsion, force, or threat of the use of force», but on the absence of consent: "in which said penetration occurs without the consent of the victim. The victim must give her consent for these purposes to be carried out voluntarily, as a result of his

will, and this consent must be evaluated within the context of the circumstances surrounding the act.”⁵²

Thus, taking up the *amicus curiae* presented by this Committee in the *Guzmán Albarracín et al.* case, it is clear that the conceptualization of consent is more complex, than can be addressed at a cursory glance. In this case, the asymmetry of age and the situation of an unequal power relationship where there is subordination, as well as the lack of sexual and reproductive education, among other factors, constitute central elements that contribute to gender-based violence and a state of submission that does not allow for free decision and, therefore, must be understood as disregarding the essential element of ‘consent’.

The CEVI has warned that, within the framework of the conceptualization of consent in crimes against sexual freedom, girls and adolescents are especially vulnerable in Latin America and the Caribbean.⁵³ In this way, the CEVI emphasizes that the existence of physical evidence is not necessary to affirm an act of sexual violence, since, as happened in the case of Paola Guzmán, when situations of power and domination are encountered, accentuated by factors such as the difference of age or a coercive context, the lack of consent is clearly evident.

In this way, in the case of Paola Guzmán, where the mutual relationship was alleged, it is noted that it is not possible to establish that there was consent simply because the victim was not in a position of equality with her perpetrator. Therefore, during a criminal investigation into sexual violence, physical evidence should not be necessary to prove the case. The crime may exist without any sign of physical violence being found. For this reason, the European Court of Human Rights has stated that when physical evidence is used as a mechanism to indicate the existence of a sexual violation, it opens the possibility of leaving acts of violence unpunished and endangering the victim.⁵⁴

159. [I]t is important to emphasize that in jurisprudence and legal theory, it is the lack of consent, not force, that is considered the element that constitutes the crime of rape.

163. In international criminal law, it has recently been recognized that force does not constitute an element of rape and that taking advantage of coercive circumstances to carry out a sexual act can also be penalized. The International Criminal Court for the former Yugoslavia found that in international criminal law, any sexual penetration without the consent of the victim constitutes the crime [...].⁵⁵

The Inter-American Court of Human Rights in various resolutions has also sought to conceptualize the situation of consent.⁵⁶ Thus, in the case *J. v. Peru*, the Court established that the circumstances of the act make it feasible to determine the existence or not of consent. That

is why the victim's statements and the context in which the sexual assaults occurred must be taken into account.

In the document, *Elements of Crime*, complementary to the Rome Statute, it is stated that one of the characteristics of forced prostitution is:

That the perpetrator has caused one or more persons to carry out one or more acts of a sexual nature by force, or through the threat of force or through coercion, such as that caused by fear of violence, intimidation, arrest, psychological oppression or abuse of power against that person(s) or another person, or taking advantage of a coercive environment or the inability of that person(s) to give their free consent.⁵⁷

The Inter-American Court, therefore, has stated that no reference can be made to the consent of the victim to have sexual relations when the perpetrator, in any way, represents an authority figure. This is because an inequality of power is generated that is aggravated by the age difference between the victim and the perpetrator.⁵⁸ Although what appears to be consent, by the victim, may be established, it is not valid precisely because of the inequalities of power in the relationship that results in submission by the victim.

The Inter-American Court has indicated that, in cases of sexual violence, once the facts are known, the State must provide immediate and professional assistance, both medical and psychological and/or psychiatric, by a professional specifically trained in the care of victims of this type of crime and with a gender and childhood perspective. Regarding the physical examination, the Court held that the authorities should avoid, as far as is possible, that victims are subjected to more than one physical evaluation, since this could be experienced as re-victimization. The medical examination in these cases must be carried out by a professional with extensive knowledge and experience in cases of sexual violence against girls, boys, and adolescents, who will seek to minimize and avoid causing additional trauma or revictimizing them. It is recommended that the victim, or, if applicable, their legal representative, be able to choose the sex of the professional and that the examination be carried out by a health professional specialized in gynecology, with specific training to perform forensic medical examinations in cases of abuse and rape. Likewise, the medical examination must be carried out after the informed consent of the victim or their legal representative, according to their degree of maturity, in an appropriate place, and their right to intimacy and privacy must be respected, allowing the presence of a companion, trusted by the victim.⁵⁹

The Court has also established that it is a human right to receive education regarding the reproductive health, right to autonomy and informed consent as part of their human rights.⁶⁰

With regard to girls and adolescents, the CEVI, in the Hemispheric Report on sexual violence and child pregnancy, has indicated that sexual abuse of girls under 14 years of age constitutes a serious crime. Every pregnancy in a girl under 14 years of age, therefore, must be considered as non-consensual and a product of sexual violence, except in cases where consensual sexual relations occur between peers.

The absence of public policies aimed at consistently addressing the right for girls to exercise their sexual and reproductive rights free from violence has resulted in a high rate of maternal mortality; as well as serious consequences in the lives of women and girls who did not have access to health or education services aimed at caring for them freely and informing them about their sexual and reproductive rights.

E. Accreditation of sexual violence

Cases of sexual violence usually occur in contexts in which a relationship of power and subordination is established between victims and perpetrators. The central element to such criminal acts is related to the control of and dominance over the victim. In addition, since they are situations of a sexual nature, they are usually perpetrated in conditions of isolation, which makes it difficult to obtain credible evidence.

This is precisely why, as mentioned above, one of the central elements that must be insisted on is the establishment of an investigation that provides for and analyzes the victim's testimony, the context in which the events occurred and the existence or not of consent, including the existence of coercive circumstances as in unequal power relations.

It is common for the victim's testimony in cases of sexual violence to be minimized or questioned. When the authorities are not sensitized, often they draw on established gender stereotypes that detract from the victim's story and instead blame her for the sexual violence she has experienced. Hence, it is essential to have trained and sensitized people who start from the veracity of the victim's testimony for the initiation and development of the investigations and the trial of these cases, with the understanding that the testimony, by itself, is the central test of criminal intent.

In this regard, the Inter-American Court has indicated that in investigations related to sexual violence against women there are many prejudices that violate the human rights of victims. Hence, various criteria have been identified that allow for the recognition of indicators of sexual violence, and, therefore the establishment of an appropriate investigation of the incident.

Thus, one of the first elements that the Court has indicated has to do with avoiding the re-victimization or re-experiencing of the traumatic event.⁶¹ To achieve this, the authority must

attend to the victim with respect and must inform her of the actions to be taken, obtaining informed consent at all times.

The Court also establishes that a gynecological examination must be carried out by an expert as soon as possible and a report prepared within the first 72 hours of the reported event.⁶² In addition, the CEVI states, in the Second Hemispheric Report, that “the specialized personnel should not be limited to those who interact with the victim when the complaint is being presented or those who administer justice, but should also include forensic experts who collect and analyze the evidence of violence, especially in cases of sexual violence and femicides, as well as expert psychologists who can assess and report on the mental state of the victim at all stages of the process.”⁶³

But as previously noted, the act of sexual violence is not the only essential piece of evidence, even more so when the evidence does not always reveal all the innuendos of the situation which are decisive to an accurate assessment of the incident and for determining the presence or absence of consent. As mentioned, the testimony of the victim and the context in which the events occurred must be taken into account.

The UN Human Rights Committee, therefore, states that particular attention should be paid to the expressions used by the plaintiff, because this allows addressing the situation of sexual violence⁶⁴. In this sense, the first determination is to take the testimony properly, avoiding prejudices and gender stereotypes. Likewise, the Inter-American Court considers that is important to highlight that a guarantee of access to justice for women victims of sexual violence must be in the forefront of rules for the evaluation of evidence that avoids biased statements, insinuations and stereotyped allusions.⁶⁵

Likewise, the Inter-American Court considers it pertinent to highlight that a guarantee for access to justice for women victims of sexual violence must to foresee rules for the evaluation of evidence that avoid statements, insinuations and stereotyped allusions.

It should also be noted that the International Criminal Court has established a series of rules focused on procedure and evidence which indicates that:

[...] The credibility, good repute or sexual availability of the victim or a witness cannot be inferred from the sexual nature of the prior or subsequent behavior of the victim or a witness.⁶⁶

In accordance with the foregoing, one of the central elements in the investigation is the victim’s word on which the process should focus. It is essential to proceed on the premise that it is true and seek to prove it. For this, it must be accompanied by psychological and gynecological expert opinions provided that the victim explicitly accepts the medical examination and that it is necessary for the specific case.

It should be noted that the victim's testimony is often discredited because it can present inconsistencies, which does not mean that the information provided by is unreliable. Rather, the inconsistencies in the testimony have to do with post-traumatic stress situations and other types of affectations derived from their condition as a victim. Hence, even with such situations, the investigation must always start from the veracity of the testimony, making irrelevant the expected inconsistencies that arise as a consequence of sexual violence.

The Inter-American Court, therefore, has established that rape is a particular type of aggression that, in general, is characterized by occurring in the absence of other people beyond the victim and the aggressor or aggressors. Given the nature of this form of violence, the existence of graphic or documentary evidence cannot be expected and, therefore, the victim's statement constitutes fundamental evidence of the fact. Without prejudice to the legal classification of the facts [...], the Court considers that this standard is generally applicable to sexual assaults.⁶⁷

Regarding consent, it is established, that it cannot be inferred, but must always be given expressly and freely, prior to the act and that it can be reversible.

Conclusions and recommendations

As has been noted, the *Declaration on violence against girls, women and adolescents and their sexual and reproductive rights*, issued by the Experts Committee of the MESECVI, warns that sexual violence constitutes all “actions of a sexual nature that are committed on a person without their consent, which in addition to understanding the physical invasion of the human body, may include acts that do not involve penetration or even any physical contact.”⁶⁸

Sexual violence constitutes a form of violence that seriously affects women, not only because it is an attack on the rights to integrity, life, sexual freedom and the free development of the personality, but also because such acts are strictly linked to unequal power relationships. These types of acts are based on the principle of transforming victims into an object of use and pleasure for others; Perpetrators strip victims of any possibility of decision and build a relationship of submission that hurts the integrity of the person.

Precisely for these reasons, sexual violence is considered as all those acts that violate people and that is why it is essential to respect and protect women’s freedom of choice. In this sense, the CEVI recognizes that there are still many stereotypes and prejudices that subject women to sexual and institutional violence when they are victims of it.

The patriarchal system that supports and justifies violence is perpetuated in the justice systems and other State structures such as health services, which continue to blame victims for the situation of violence experienced and discourage complaints of sexual violence.

In this sense, the CEVI calls on States to develop public policies and legislative actions that allow building egalitarian societies. One of these policies should be aimed at taking into account the elements to expressly regulate consent and the lack of attention to it in the Criminal Codes, taking into account power relations, coercion and other contexts that eliminate consent:

- **Intimidation** is usually interpreted as conduct or circumstance that represents a threat to the life or safety of the victim or a third party. Intimidation can include extortion and can be direct or indirect.
- **Arrest and/or deprivation of liberty.** This refers to any act of sexual violence that is carried out in the context of a detention perpetrated by security elements or any other authority.
- **Psychological oppression** occurs when, for example, there is a relationship between the victim or the perpetrator and there are emotional or psychological ties between both parties

(teachers, students, doctors, patients, religious leaders and believers, family members and children, among others), which generate an abuse in relation to the victim's psychological state.

- **Abuse of power** occurs in situations of compulsion, arrest, or psychological oppression, but fundamentally it relates to the influence that one person can generate on another when they are in a position of power.

- **Inability to understand sexual violence.** In cases of rape or other sexual crimes the victim often does not understand the act that is being carried out or is incapable to freely and voluntarily give consent.

Likewise, the concept of consent must be regulated and interpreted as one of the fundamental elements for evaluating evidence in the framework of crimes against sexual freedom, taking into account the standards and reflections established in this recommendation.

This goes hand in hand with the generation of policies that guarantee these criteria to be applied, in practice, under the standard of the best interests of women, adolescents and girls, with a view to closing the paths that allow two categories of human beings: men, with all the privileges of protection under the law, and women, adolescents and girls who, due to gender stereotypes and a patriarchal vision, do not have this protection. Women and girls, therefore, are perceived as being responsible for the aberrant sexual assaults they suffer throughout their lives.

It is highly relevant that this broad concept of consent be included in educational curricula on matters of sexual and reproductive health and rights at all levels of education systems. In this sense, in addition to the foregoing, it is recommended that States Parties:

a) Generate legislative and procedural changes and jurisprudential development so that, in the terms of this recommendation, the definition of consent for crimes of sexual violence is introduced and take into account, at the very least, that:

- 1) Consent may not be inferred from any word or conduct of the victim when force, threat of force, coercion or taking advantage of a coercive environment have diminished their ability to give voluntary and free consent.
- 2) Consent may not be inferred from any word or conduct of the victim when she is unable to give free consent.
- 3) Consent may not be inferred from silence or from the victim's lack of resistance to sexual violence.

- 4) Consent cannot be inferred when there is a power relationship due to undue influence.

In all cases, it has to be acknowledged that the consent is reversible.

b) Generate or adapt the protocols for the investigation of sexual crimes so that, in addition to the rules established in this recommendation, the investigations are based on the principle of credibility of the first testimony of the alleged victims of sexual violence and, in the evaluation of the evidence, the lack of consent or what is assumed to be consent is analyzed, in the terms of this recommendation. Likewise, that the lack of consistency in the various testimonies of victims of sexual violence is understood as a factor associated with post-traumatic stress and not as reliable evidence of the victim's lack of credibility.

c) Train and sensitize justice operators to avoid gender stereotypes associated with these cases, in which elements have traditionally been used to conclude that the victim's lack of resistance is proof of consent of the sexual act or give relevance to the alleged previous sexual behavior of the victim, their way of dressing or any other stereotyped element, attribute to an assumed consent to the abuse or rape.

d) Ensure that in the investigation or prosecution of cases of sexual violence a context analysis is carried out that explores the unequal power relations between men and women to analyze, in all cases, the possible lack of consent or other contributory factors, such as, *inter alia*, age difference, hierarchical superiority, influence of religious or other leaders, economic need, etc., as well as the use of force or the threat of using it, compulsion, fear of violence or consequences, intimidation, detention, psychological oppression, abuse of power or disability or age of the victim, in the terms of this recommendation.

e) Provide tools to the entire population and especially to girls, adolescents and women to be able to identify and, based on this, report events or risks that could constitute a risk to sexual violence.

f) Establish all the necessary measures to provide age appropriate, comprehensive education on sexual and reproductive rights including the importance of consent in sexual relationships.

Endnotes

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