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Ángela González Carreño v. Spain

CEDAW Communication No. 47/2012:
Amicus Curiae Brief

2 February 2014

Part I - Overview

1. Introduction

1. *Ángela González Carreño v. Spain* raises important questions about the role of gender stereotyping in domestic violence and child custody matters. The views of the Committee on the Elimination of Discrimination against Women will therefore have significance not only for the immediate outcome of the communication, but also the development of international norms and jurisprudence related to stereotyping.
2. This *amicus curiae* brief accordingly focuses on how gender stereotyping can facilitate gender-based violence against women and how it can undermine the ability of survivors to access justice, including in child custody matters. The brief also highlights key obligations under international human rights law, including the *Convention on the Elimination of All Forms of Discrimination against Women*,¹ to address stereotyping.
3. The brief is submitted in a personal capacity and at the request of Women's Link Worldwide, the legal representatives of the communication's author and her deceased daughter. The brief is of a general nature and does not address the specific facts of the communication.

2. Interest in *Ángela González Carreño v. Spain*

4. The author has substantial legal expertise in international women's rights law, including as it relates to stereotyping. The author has published several scholarly works on stereotyping² and authored reports on the issue for the Office of the High Commissioner for Human Rights.³ The author has acted as an expert third-party intervener in several international cases that address stereotyping⁴ and presented widely on the issue, including at the UN Human Rights Council⁵ and before the CEDAW Committee.⁶ The author has sought to aid the normative development and implementation of international human rights obligations related to stereotyping, through this work.

¹ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13

² See, e.g., Simone Cusack, "CEDAW as a Legal Framework for Transnational Discourses on Gender Stereotyping," in Anne Hellum and Henriette Sinding Aasen, eds., *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013), 124; Simone Cusack and Alexandra Timmer, "Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in *Vertido v The Philippines*" (2011) 11(2) *Human Rights Law Review* 329; Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010).

³ Simone Cusack, *Gender Stereotyping as a Human Rights Violation: Research Report*, Prepared for the UN Office of the High Commissioner for Human Rights (2013); Simone Cusack, *Strategies for Addressing Gender Stereotyping: Policy Paper*, Prepared for the UN Office of the High Commissioner for Human Rights (2013).

⁴ See, e.g., Simone Cusack and Rebecca J. Cook, *Gender Stereotyping and Manila City Executive Order No. 003*, Legal memo prepared for the Centre for Reproductive Rights for submission to the Committee on the Elimination of Discrimination against Women in relation to its request for an inquiry under article 8 of the Optional Protocol (2008); Simone Cusack *et al.*, *González et al. ('Cotton Field') v. Mexico*, Amicus brief submitted to the Inter-American Court of Human Rights (International Reproductive and Sexual Health Law Programme and CEJIL, 2008).

⁵ Simone Cusack, "Effective Approaches to Addressing Gender Stereotyping related to Violence against Women" (Speech delivered at the UN Human Rights Council, 23rd session, Annual Full-Day Discussion on Women's Human Rights, Geneva, 5 June 2013).

⁶ Simone Cusack, "State Obligations under CEDAW to Eliminate the Social Barriers that Undermine Women's Access to Justice" (Speech delivered at the Committee on the Elimination of Discrimination against Women, 54th session, General Discussion on Access to Justice, Geneva, 18 February 2013).

Part II - Gender stereotyping as a human rights violations

5. Gender stereotyping – the practice of ascribing attributes, characteristics, or roles to individuals based on their membership in the social group of women or men – has been identified as a “significant challenge to the practical realization of women’s human rights.”⁷ It has been identified as such because it is both a root cause and consequence of discrimination⁸ and a broad range of other human rights violations.⁹ Part II of this brief explores some of the challenges gender stereotyping presents with respect to gender-based violence against women and women’s equal access to justice. Given the nature of the communication under consideration, it focuses mainly on the role that gender stereotyping can play in facilitating domestic violence and undermining women’s access to justice in child custody matters.

3. Gender stereotyping is a root cause of gender-based violence against women

6. It is widely accepted that gender stereotyping is a root cause of gender-based violence against women, including domestic violence.
7. The CEDAW Committee has been a leader in identifying the linkages between gender stereotyping and gender-based violence against women. In its much celebrated *General Recommendation No. 19*, the Committee acknowledged that “[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse....”¹⁰ It also recognised that “[w]ithin family relationships women of all ages are subjected to violence of all kinds..., which are perpetuated by traditional attitudes.”¹¹
8. The Committee continues to recognise the linkages between stereotyping and domestic violence, through its ever-expanding jurisprudence. In *A.T. v. Hungary*, for example, the Committee noted that “traditional attitudes by which women are regarded as subordinate to men contribute to violence against them” and reiterated its concern that “entrenched stereotypes regarding the role and responsibilities of women and men in the family” are a root cause of domestic violence in Hungary.¹² In a further example, in *Şahide Goekce v.*

⁷ Commission on the Status of Women, *Commemorating 30 Years of the Convention on the Elimination of All Forms of Discrimination against Women: Moderator’s Summary*, UN Doc. E/CN.6/2010/CRP.12 (2010), paras. 10-11.

⁸ *R.K.B. v. Turkey*, Communication No. 28/2010, UN Doc. CEDAW/C/51/D/28/2010 (2012), para. 8.8.

⁹ See, e.g., Magdalena Sepúlveda Carmona, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UN Doc. A/68/293 (2013) (examining, *inter alia*, the linkages between stereotyping, unpaid caring work and the entrenchment of women’s poverty); Olivier De Schutter, *Report of the Special Rapporteur on the Right to Food*, UN Doc. A/HRC/22/50 (2012) (analysing, *inter alia*, the impact of stereotyping on women’s right to food); *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010) (concluding, *inter alia*, that judicial stereotyping had violated the right to a fair trial, read in conjunction with the right to non-discrimination).

¹⁰ CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc. A/47/38 (1992), para. 11. See also para. 21.

¹¹ *Ibid.*, para. 23.

¹² *A.T. v. Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005), para. 9.4.

Austria, the Committee affirmed “that there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence.”¹³

9. Recognition of the linkages between stereotyping and gender-based violence against women is not limited to the CEDAW Committee. A number of UN human rights mechanisms concur that stereotyping is a contributor factor in the prevalence and nature of gender-based violence against women. The UN Special Rapporteur on violence against women has explained, for instance, that “[w]omen with disabilities are at high risk of violence based on social stereotypes and biases that attempt to dehumanize or infantilize, exclude or isolate them, and target them for ... violence.”¹⁴ In addition, the UN Special Rapporteur on the situation of human rights defenders has identified stereotyping as one reason why women defenders are more at risk than their male counterparts of certain forms of violence. According to her expert view, “women defenders are perceived as challenging accepted socio-cultural norms, traditions, perceptions and stereotypes about femininity, sexual orientation, and the role and status of women in society” and “[t]heir work is often seen as challenging ‘traditional’ notions of the family which can serve to normalize and perpetuate forms of violence and oppression of women.”¹⁵
10. Recognition of the linkages between stereotyping and gender-based violence against women extends to the regional and national levels and is even codified in several regional human rights treaties. This includes the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, both of which acknowledge that stereotyping legitimizes and exacerbates gender-based violence against women.¹⁶ Applying these treaties, regional human rights bodies have further highlighted the role that stereotyping plays in facilitating violence against women. For example, in *González et al. (“Cotton Field”) v. Mexico*, the Inter-American Court of Human Rights explained that “[t]he creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.”¹⁷ It also explained that “the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in

¹³ *Şahide Goekce v. Austria*, Communication No. 5/2005, UN Doc. CEDAW/C/39/D/5/2005 (2007), para. 12.2.

¹⁴ Rashida Manjoo, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, UN Doc. A/67/227 (2012), para. 32.

¹⁵ Margaret Sekaggya, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, UN Doc. A/HRC/16/44 (2010), para. 23 [citations omitted].

¹⁶ *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, opened for signature 11 July 2003, OAU Doc CAB/LEG/66.6 (entered into force 25 November 2005), art. 4(2)(d) (providing: “States Parties shall take appropriate and effective measures to actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women”); *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, opened for signature 9 June 1994 (entered into force 5 March 1995), art. 8(2) (providing that States Parties must undertake “progressively specific measures,” including programs “to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women”).

¹⁷ *González et al. (“Cotton Field”) v. Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs) (IACtHR), para. 401.

policies and practices and, particularly, in the reasoning and language of the judicial police authorities....”¹⁸

11. There are many different stereotypes that play a role in facilitating gender-based violence against women, including domestic violence. The most common stereotypes identified by UN human rights mechanisms are those relating to the roles and responsibilities of women and men within marriage and family relations, especially those that have the effect of subordinating and/or disadvantaging women within those roles.¹⁹ An example is the stereotype that “men are/should be heads of households.” Determining which are the operative stereotypes in any given case requires an examination of the particular attributes, characteristics and/or roles assigned to affected individuals.²⁰ This will require a careful analysis of the facts to “determine what the law, policy, or practice provides, either explicitly or implicitly, about men or women and the nature and hierarchy of gender relations.”²¹
12. Once it has been determined which stereotype or stereotypes are at play, consideration needs to be given to how the operative stereotype or stereotypes contributed to a woman’s experiences of gender-based violence. In other words, it is not enough simply to identify a particular stereotype; it must also be explained *how* the stereotype facilitated gender-based violence. This requires an analysis of the inferences intended to be drawn, based on the generalised views and related assumptions about women and men. The stereotype that “men are/should be heads of households” may, for instance, perpetuate the view of men as holding ultimate power within interpersonal and family relations and ultimately subordinate women within those relations. This view may, in turn, effectively give men so-called “permission” to discipline women through violence if they do not obey them.

4. Gender stereotyping undermines women’s access to justice

13. In addition to being a root cause of violence, gender stereotyping can undermine women’s ability to access justice at all stages of the legal process. This includes cases where women seek protection orders against violent perpetrators in an effort to ensure their physical and mental integrity and cases where women seek custody of their children to protect them from violent perpetrators.
14. Stereotyping can affect whether or not gender-based violence, including domestic violence, is perceived to have occurred and can be a determining factor in deciding the extent of a women’s legal rights and protections. An example is where the sexual life of a woman – specifically, her non-conformity with sexual stereotypes, mostly commonly related to chastity

¹⁸ Ibid.

¹⁹ See, e.g., CEDAW Committee, *Concluding Observation: Colombia*, UN Doc. CEDAW/C/COL/CO/7-8 (2013), para. 13; CEDAW Committee, *Concluding Observation: Republic of Moldova*, UN Doc. CEDAW/C/MDA/CO/4-5 (2013), para. 17; *A.T. v. Hungary*, *supra* note 12, para. 9.4.

²⁰ Cook and Cusack, *supra* note 2, 45-54.

²¹ Ibid., 46.

and modesty norms – is “taken into consideration in deciding the extent of her legal rights and protections, including protection against rape.”²²

15. Stereotyping may influence how survivors are treated when they report violence and, based on survivors’ negative perceptions of how they will be treated, may even discourage reporting by some women. It may also affect whether or not law enforcement officials investigate allegations of gender-based violence made by women. In *Isatou Jallow v. Bulgaria*, the CEDAW Committee determined that the stereotype of men as heads of households and the related assumption of male superiority had influenced the decision of the State Party to investigate allegations of domestic violence made by Jallow’s partner, but not to investigate the allegations of violence that Jallow made. According to the Committee, the authorities based their actions “on a stereotyped notion that the husband was superior and that his opinions should be taken seriously...”²³ In a further example, in *González et al. (“Cotton Field”) v. Mexico*, the Inter-American Court of Human Rights highlighted how stereotyping affected the handling and investigation of complaints of gender-based violence:

the comments made by officials that the victims had gone off with a boyfriend or that they led a disreputable life, and the use of questions about the sexual preference of the victims constitute stereotyping. In addition, both the attitude and statements of the officials reveal that, at the very least, they were indifferent towards the next of kin of the victims and their complaints.²⁴

The Inter-American Commission on Human Rights has also considered the impact of gender stereotyping on the legal process:

The influence exerted by discriminatory socio-cultural patterns may cause a victim’s credibility to be questioned in cases involving violence, or lead to a tacit assumption that she is somehow to blame for what happened, whether because of her manner of dress, her occupation, her sexual conduct, relationship or kinship to the assailant and so on. The result is that prosecutors, police and judges fail to take action on complaints of violence. These biased discriminatory patterns can also exert a negative influence on the investigation of such cases and the subsequent weighing of the evidence, where stereotypes about how women should conduct themselves in interpersonal relations can become a factor.²⁵

16. Stereotyping can affect the prosecution of gender-based violence cases, such as where “[p]rocedures and rules of evidence in the criminal justice system are ... infiltrated by strong gender stereotypes which can result in engagement in gender-biased behaviour by court officials and discrimination against women by the criminal system in general.”²⁶ They can also influence whether or not: courts issue and enforce protection orders; perpetrators are held to account for their violent acts; and survivors receive reparations for those acts. For example, in *Karen Tayag Vertido v. The Philippines*, a majority of the CEDAW Committee expressed grave concerns about the trial judge’s decision to acquit the accused, which it considered was based on gender stereotypes and myths about rape rather than on law and

²² Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)*, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 20.

²³ *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012), para. 8.6.

²⁴ *González et al. (“Cotton Field”) v. Mexico*, *supra* note 17, para. 208.

²⁵ Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II. Doc. 68 (2007), para. 155.

²⁶ Gabriella Knaul, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc. A/66/289 (2011), para. 46.

fact. The majority determined that, because of her reliance on stereotypes and myths, the trial judge formed a favourable view of the accused's credibility and a negative view of Vertido's credibility, particularly as she had not responded how an "ideal" victim was expected to respond in a rape situation.²⁷

17. In some cases, gender stereotyping may even result in the prioritisation by States Parties of the rights of perpetrators over the rights to life and physical and mental integrity of victims/survivors and their children. This is a particular concern where the rights of domestic violence perpetrators are prioritised, including in relation to the ongoing care and custody of children. For instance, stereotypes related to the so-called "inherent" and "natural" differences between women and men are sometimes relied upon in support of the claim that women and men make unique contributions to childrearing. The inference intended to be drawn from such stereotypes is that the involvement of both parents in the care and custody of a child is important to his or her overall development and well-being.²⁸ Stereotypes about the roles of women and men within marriage and family relations may also be relied upon at times,²⁹ including the stereotype that men are heads of households, which implies that their wishes and desires should be prioritised over those of women and their children. When such stereotypes are relied upon in determinations concerning the care and custody of children where there has been a history of domestic violence, there is a risk that the rights of the perpetrator will be prioritised over the rights to life and physical and mental integrity of the female victim/survivor and the best interests of her child.

Part III - State obligations to address wrongful gender stereotyping

18. States are required under international human rights law to adopt measures to address wrongful gender stereotyping; that is to say, gender stereotyping that violates human rights and fundamental freedoms.
19. Several human rights treaties contain express obligations concerning stereotyping. CEDAW is one such treaty. It was the first international human rights treaty to introduce express obligations concerning gender stereotyping. These obligations are expressly enumerated in the preamble³⁰ and in articles 2(f),³¹ 5³² and 10(c)³³ of the treaty. In general terms, these

²⁷ *Karen Tayag Vertido v. The Philippines*, *supra* note 9, paras. 8.5-8.6.

²⁸ Deborah A. Widiss *et al.*, "Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence" (2007) 30 *Harvard Journal of Law & Gender* 461, at 487-488.

²⁹ *Ibid.*

³⁰ CEDAW, preambular para. 14 (providing that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.")

³¹ CEDAW, art. 2(f) (providing that "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.")

³² CEDAW, art. 5 (providing that "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.")

provisions require States Parties to adopt all appropriate measures to modify or transform harmful gender stereotypes and eliminate wrongful gender stereotyping.³⁴ In the expert view of the Committee, these obligations are central to the achievement of substantive equality and the full implementation of CEDAW.³⁵

20. In addition to the express obligations referred to above, many judicial and quasi-judicial bodies have recognised an implied obligation in the rights to non-discrimination and equality to address stereotyping. Numerous bodies have also acknowledged that there are implied obligations to address stereotyping in a range of other human rights and fundamental freedoms, by reading the rights to non-discrimination and equality together with the substantive rights and freedoms guaranteed by the treaties for which they are responsible for monitoring. Articles 2(f) and 5 of CEDAW, for instance, must be read in conjunction with articles 6 to 16 and in light of the definition of “discrimination against women” in article 1 and the remaining provisions of the Convention’s interpretive framework. They should also be read together with rights not explicitly guaranteed by CEDAW, but which are recognised under other treaties or customary international law and have an impact on the elimination of discrimination against women and the achievement of substantive equality.³⁶
21. Part III briefly outlines the obligations of States Parties, including Spain, to address stereotyping in gender-based violence and child custody matters.

5. Obligation to eliminate stereotyping that facilitates violence against women

5.1 CEDAW

22. The CEDAW Committee has explained that CEDAW requires States Parties to modify or transform harmful gender stereotypes, and eliminate wrongful gender stereotyping, which play a role in facilitating gender-based violence against women. In its expert view, addressing stereotypes and the practice of stereotyping is a key element in preventing gender-based violence, including domestic violence.
23. In its *General Recommendation No. 19*, the Committee urged States Parties to identify and report on “the nature and extent of attitudes, customs and practices that perpetuate violence against women, and the kinds of violence that result.”³⁷ It also stressed that “[e]ffective

³³ CEDAW, art. 10(c) (providing that “States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.”)

³⁴ *R.K.B. v. Turkey*, *supra* note 8, para. 8.8.

³⁵ *Ibid.*; CEDAW Committee, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc. A/59/38 (2004), para. 7.

³⁶ CEDAW, arts. 2-3, 24. See also 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*, UN Doc. CEDAW/C/GC/28 (2010), para. 7; Andrew Byrnes, “Article 1” in Marsha A Freeman, Christine Chinkin and Beate Rudolf, eds., *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012), 51, at 62 (arguing that the Committee appears to understate the position of these other rights under CEDAW, since they are covered by the letter of CEDAW, in particular articles 2, 3 and 24).

³⁷ CEDAW Committee, *General Recommendation No. 19*, *supra* note 10, para. 24(e).

measures should be taken to overcome these attitudes and practices” and, accordingly, urged States Parties to “introduce education and public information programmes to help eliminate prejudices which hinder women’s equality.”³⁸ In addition, the Committee explained that States Parties should take “[p]reventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women.”³⁹

24. The Committee has since repeatedly affirmed the obligation of States Parties to take steps to modify or transform harmful gender stereotypes and eliminate wrongful gender stereotyping, as a way to prevent gender-based violence against women. By way of illustration, in *A.T. v. Hungary*, the Committee condemned the failure of the State Party to address wrongful gender stereotyping and, in doing so, stressed the importance of taking steps to eliminate this particular structural cause of domestic violence.⁴⁰ In a further example, in its report on the *Ciudad Juárez inquiry* into the abduction, rape and murder of Mexican women, the Committee “emphasize[d] that, because what is involved is a structural situation and a social and cultural phenomenon deeply rooted in the consciousness and customs of the population, it requires a global and integrated response, a strategy aimed at transforming existing sociocultural patterns, especially with regard to eradicating the notion that gender violence is inevitable.”⁴¹

5.2 Other instruments and jurisprudence

25. The obligations in CEDAW to address stereotypes and stereotyping that play a role in facilitating gender-based violence are reinforced in other international and regional human rights instruments. They are further reinforced in the jurisprudence of the human rights bodies responsible for overseeing the implementation of those instruments.
26. The UN *Declaration on the Elimination Violence against Women*⁴² was one of the earliest human rights instruments to introduce obligations to address stereotyping in the context of gender-based violence against women. The Declaration requires states to “[a]dopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.”⁴³
27. Around the same time, the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*⁴⁴ codified human rights obligations concerning gender stereotyping related to gender-based violence against women. Article 6(2) of the Inter-

³⁸ Ibid., para. 24(f).

³⁹ Ibid., para. 24(t)(ii).

⁴⁰ *A.T. v. Hungary*, *supra* note 12, paras. 9.3-9.4.

⁴¹ CEDAW Committee, *Report on Mexico Produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico*, UN Doc. CEDAW/C/2005/OP.8/MEXICO (2005), para. 287.

⁴² *Declaration on the Elimination of Violence against Women*, UN Doc. A/48/49 (1993).

⁴³ Ibid., art. 4(j).

⁴⁴ *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, opened for signature 9 June 1994 (entered into force 5 March 1995).

American Convention provides that “[t]he right of every woman to be free from violence includes ... [t]he right ... to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.” Article 7(e) requires States Parties to “take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations to modify legal or customary practices which sustain the persistence and tolerance of violence against women.”⁴⁵ And article 8(b) further obligates States Parties

to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.⁴⁶

28. The *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* also imposes obligations on States Parties to address harmful stereotypes and wrongful stereotyping, including in the context of gender-based violence against women. The Protocol requires States Parties to “take appropriate and effective measures” to “eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women.”⁴⁷ And, more generally, it imposes a freestanding, overarching obligation, which requires States Parties to eliminate “harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”⁴⁸
29. Most recently, the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* imposed an overarching obligation on States Parties to “take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.”⁴⁹ It also imposed a specific obligation to take the steps necessary to incorporate teaching material on stereotyping and gender-based violence at all levels of the education curricula.⁵⁰

6. Obligation to eliminate stereotyping that undermines women’s equal access to justice

6.1 CEDAW

30. According to the expert view of the CEDAW Committee, States Parties are required to take steps to ensure that gender stereotyping does not impair or nullify equal access to justice for victims/survivors of gender-based violence, including domestic violence. This means, *inter*

⁴⁵ Ibid., art. 7(e).

⁴⁶ Ibid., art. 8(b).

⁴⁷ African Protocol, art. 4(2)(d).

⁴⁸ Ibid., art. 2(2).

⁴⁹ *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, Council of Europe Treaty Series No. 210, 2011, art. 12(1).

⁵⁰ Ibid., art. 14(1).

alia, that relevant legal actions and decisions at all stages of the legal process must be fair and impartial and based on law and fact and not on harmful gender stereotypes or other biases or prejudices. These obligations incorporate all relevant actors in the legal system, including law enforcement officials, prosecutors and judges.

31. The CEDAW Committee has emphasised the importance of taking steps to ensure police investigations into allegations of gender-based violence are impartial and not influenced by stereotypes or the practice of stereotyping. In *V.K. v. Bulgaria* and *Isatou Jallow v. Bulgaria*, for instance, the Committee stressed the importance of States Parties providing appropriate, regular and gender-sensitive training for law enforcement personnel (as well as other legal authorities) on CEDAW, including its application to gender stereotyping, in order to ensure that complaints of domestic violence are received and are considered and investigated adequately.⁵¹
32. The Committee has also emphasised the importance of ensuring that judges exercise their judicial powers in a fair and impartial way, free of harmful gender stereotypes. In *Karen Tayag Vertido v. The Philippines*, for example, a majority of the Committee affirmed that States Parties must ensure that allegations of violence against women are “dealt with in a fair, impartial, timely and expeditious manner”⁵² and that their judiciaries “take caution not to create inflexible standards of what women or girls should be or what they should have done ... based merely on preconceived notions of what defines ... a victim of gender-based violence....”⁵³ In *V.K. v. Bulgaria*, the Committee similarly explained that “stereotyping affects women’s right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence.”⁵⁴ In that case, the Committee was critical of the State Party’s reliance on an “overly narrow concept”⁵⁵ and “stereotyped interpretation”⁵⁶ of what constitutes domestic violence and urged the State Party to “[p]rovide mandatory training for judges, lawyers and law enforcement personnel ... on gender stereotypes.”⁵⁷
33. The obligation to ensure that judges exercise their powers in a fair and impartial way, free of harmful gender stereotypes, includes matters concerning the adjudication of child custody arrangements. A joint reading of articles 2(d), 2(f), 5(a), 15(1),⁵⁸ 16(1),⁵⁹ 16(1)(d)⁶⁰ and

⁵¹ *V.K. v. Bulgaria*, Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011), para. 9.16(b)(iv); *Isatou Jallow v. Bulgaria*, *supra* note 23, para. 8.8(2)(c).

⁵² *Karen Tayag Vertido v. The Philippines*, *supra* note 9, para. 8.3.

⁵³ *Ibid.*, para. 8.4.

⁵⁴ *V.K. v. Bulgaria*, *supra* note 51, para. 9.11.

⁵⁵ *Ibid.*, para. 9.12.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, para. 9.16 (b)(iv).

⁵⁸ CEDAW, art. 15(1) (providing: “States Parties shall accord to women equality with men before the law.”).

⁵⁹ CEDAW, art. 16(1) (providing: “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women.”).

⁶⁰ CEDAW, art. 16(1)(d) (providing: that “States Parties ... shall ensure, on a basis of equality of men and women [t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.”).

16(1)(f)⁶¹ of CEDAW, as well as *General Recommendation No. 19*, suggests that States Parties are required to take all appropriate measures to ensure gender stereotyping does not impair or nullify the rights of women in decisions concerning the care and custody of a child, especially in cases where one parent is or is alleged to be a domestic violence perpetrator. Consistent with the Committee's earlier jurisprudence on domestic violence,⁶² it is essential that gender stereotyping does not lead authorities to prioritise the visitation and custody rights of male perpetrators over the rights of women and their children to life and physical and mental integrity.

34. The CEDAW Committee's views in *Isatou Jallow v. Bulgaria*⁶³ are illustrative in this regard. In that case, the Committee determined that Bulgaria had failed, *inter alia*, to protect Jallow's rights to equality within marriage and as a parent, in violation of articles 5(a), 16(1)(c), 16(1)(d) and 16(1)(f) of CEDAW. The Committee determined that Bulgaria's actions, including issuing Jallow's partner an emergency protection order and disregarding her own allegations of domestic violence, were based on stereotypes concerning the roles of women and men within marriage, according to which men are perceived to be superior to women. It explained that both Jallow and her daughter were

victims of gender-based discrimination because the State party failed to protect [her] equal rights in marriage and as a parent and to regard her daughter's interests as paramount. That the emergency protection order that separated [Jallow] from her daughter was issued without due consideration of earlier incidents of domestic violence and of [Jallow's] claim that she and her daughter were in fact the ones in need of protection against domestic violence, and that the emergency protection order was not removed by the Sofia Regional Court when a permanent protection order was rejected, lead the Committee to conclude that the State party failed to take all appropriate measures under article 5, paragraph (a), and article 16, paragraphs 1 (c), (d), and (f), of the Convention.⁶⁴

35. Determinations concerning the care and custody of a child must be based on the best interests of the child.⁶⁵ Such determinations must be informed by an assessment of individual parental capabilities and behaviour as well as the particular benefits and risks of placing a child in the care and custody of either or both of his or her parents. It is important to ensure that, in cases where there is a history of domestic violence, the relevant decision-maker applies a nuanced understanding of domestic violence and considers the potential risk that the perpetrator may use the custody arrangement to further abuse and/or victimise the victim/survivor and to threaten the life and physical and mental integrity of her and her children. This is consistent with recommendations of the CEDAW Committee that States Parties take domestic violence and the vulnerable position of an abused partner into account when deciding on the appropriateness of care and custody of children.⁶⁶ It is also imperative

⁶¹ CEDAW, art. 16(1)(f) (providing: that "States Parties ... shall ensure, on a basis of equality of men and women [t]he same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount").

⁶² *A.T. v. Hungary*, *supra* note 12, para. 9.3; *Yildirim (deceased) v. Austria*, Communication No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005 (2007), para. 12.1.5; *Goekce (deceased) v. Austria*, *supra* note 13, para. 12.1.5.

⁶³ *Isatou Jallow v. Bulgaria*, *supra* note 23.

⁶⁴ *Ibid.*, para. 8.6.

⁶⁵ CEDAW, art 16.

⁶⁶ CEDAW Committee, *Concluding Observations: Czech Republic*, UN Doc. CEDAW/C/CZE/CO/5 (2010), para. 23; CEDAW Committee, *Concluding Observations: Germany*, UN Doc. CEDAW/C/DEU/CO/6 (2009), para. 42; CEDAW Committee, *Concluding Observations: Canada*, UN Doc. CEDAW/C/CAN/CO/7 (2008), para. 30.

that States Parties ensure that stereotypes concerning the attributes and characteristics of women and men and/or their roles within marriage and family relations do not result in the prioritisation of the rights of perpetrators (usually men) over the rights of victims/survivors (usually women) and their children in child custody matters.

36. Although the Committee has not yet specifically considered how stereotypes of men (as fathers) may adversely affect determinations concerning the care and custody of children, including in domestic violence situations, the preamble and article 5 of CEDAW make it clear that States Parties are required to address harmful stereotypes of men as well as stereotypes of women. Moreover, the Committee has shown that it is willing to consider the impact of stereotypes of men on the rights of women, through cases such as *Karen Tayag Vertido v. The Philippines* and *Isatou Jallow v. Bulgaria*.

6.2 Other instruments and jurisprudence

37. A number of international and regional human rights instruments protect the right to equal access to justice and other related rights. In addition, a number of treaties contain specific obligations related to equal access to justice for victims/survivors of gender-based violence against women. Some of those later obligations are highlighted here.
38. One example is the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. Article 2(2) of the Protocol imposes a freestanding, overarching obligation, which requires States Parties to eliminate “harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”⁶⁷ Like article 5 of CEDAW, article 2(2) of the African Protocol should be read together with other articles of the Protocol, including article 8 on women’s access to justice and equal protection before the law. This would include matters pertaining to the care and custody of children and domestic violence cases.
39. The *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* requires States Parties to take necessary measures to ensure that domestic violence is taken into account in the determination of custody and visitation rights of children⁶⁸ and to ensure that the exercise of those rights “does not jeopardise the rights and safety of the victim or children.”⁶⁹ These obligations should also be read together with article 12(1) of that Convention, which, as explained above, contains an overarching obligation to address wrongful stereotyping in the context of gender-based violence against women.
40. The Inter-American Court of Human Rights has had occasion to consider the impact of wrongful stereotyping on access to justice in cases concerning the care and custody of

⁶⁷ African Protocol, art. 2(2) (providing: “States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”).

⁶⁸ *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, art. 31(1).

⁶⁹ *Ibid.*, art. 31(2).

children. In *Atala Riffo and Daughters v. Chile*,⁷⁰ the Inter-American Court of Human Rights determined that the State Party violated the rights to non-discrimination and equality before the law (among other rights) when it removed Karen Atala Riffo's daughters from her custody because she entered into a relationship with a woman. The Court determined that the State Party's decision to deny Atala custody of her daughters was based on harmful stereotypes about lesbians (i.e., compounded gender and sexual orientation stereotypes) and was not supported by evidence indicating that she was unfit to care for her children. In doing so, the Court clarified that decisions related to the care and custody of a child must be based not on stereotypes, but rather on the best interests of the child, having regard to the specific situation at hand. It explained:

the Court finds that the determination of the child's best interest in cases involving the care and custody of minors must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child's well-being and not those that are speculative or imaginary. Therefore, *speculations, assumptions, stereotypes, or generalized considerations regarding the parents' personal characteristics or cultural preferences regarding the family's traditional concepts are not admissible.*⁷¹

It further explained that

[a] determination based on unfounded and stereotyped assumptions about the parent's capacity and suitability to ensure and promote the child's well-being and development is not sufficient to guarantee the legitimate goal of protecting the child's best interest. The Court finds that considerations based on stereotypes of sexual orientation, that is, preconceptions regarding the attributes, behaviors or characteristics of homosexuals or the impact these may have on children is not admissible.⁷²

41. The Court concluded that although the State Party had sought to protect the best interests of the three girls, it had "used abstract, stereotyped, and/or discriminating arguments to justify their decisions ..., for which reason said decisions constitute discriminatory treatment against Ms. Atala."⁷³

7. Obligation to remedy wrongful gender stereotyping

42. Articles 2(b) and 2(c) of CEDAW contain an implied obligation to remedy violations of women's human rights.⁷⁴ When these articles are read in conjunction with articles 2(f) and 5 of the Convention, it is clear that the obligation to provide effective remedies for violations of women's human rights extends to wrongful gender stereotyping. Accordingly, where States Parties have engaged in wrongful gender stereotyping (e.g., when determinations concerning child custody are based on gender stereotypes) or have failed to address gender stereotyping (e.g., stereotyping that facilitates violence against women), they are required under CEDAW

⁷⁰ *Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs) (IACtHR).

⁷¹ *Ibid*, para. 109 [citations omitted] [emphasis added].

⁷² *Ibid*, para. 111 [citations omitted].

⁷³ *Ibid*, para. 146 [citations omitted].

⁷⁴ *Karen Tayag Vertido v. The Philippines*, *supra* note 9, para. 8.3; CEDAW Committee, *General Recommendation No. 28*, *supra* note 36, para. 32.

to remedy their violation. “Without reparation,” the Committee has explained, “the obligation to provide an appropriate remedy is not discharged.”⁷⁵

43. To be effective, remedies to address wrongful gender stereotyping should “contain both individual and structural dimensions.”⁷⁶
44. *Individual remedies* should aim, as far as is possible, to restore a woman to the position she was in before she was wronged as a result of gender stereotyping and may, for instance, include an acknowledgement that relevant actions/decisions were based on stereotypes and not law or fact, an apology and reparation for the material harm of wrongful gender stereotyping.⁷⁷
45. *Structural remedies* should aim to modify or transform harmful stereotypical beliefs and de-institutionalise gender stereotypes from the laws, policies, and practices of the State Party to prevent further harm to women and girls.⁷⁸ They should also aim to build capacity to identify wrongful gender stereotyping, name operative gender stereotypes and understand and articulate the harm caused by such gender stereotypes/stereotyping. Structural remedies might include the revision of policies and procedures concerning decisions related to the care and custody of children in domestic violence situations to ensure those policies and procedures are not based on gender or other types of stereotypes. They might also include measures, such as training and education for members of the judiciary and other key decision-makers, including law enforcement officials, to ensure that all legal procedures in cases involving child custody matters and domestic violence “are impartial and fair, and not affected by prejudices or stereotypical gender notions.”⁷⁹ In *González et al. (‘Cotton Field’) v. Mexico*, the Inter-American Court urged the State Party to implement gender-sensitive training to “enable all officials to recognize the effect on women of stereotyped ideas and opinions in relation to the meaning and scope of human rights.”⁸⁰ It ordered the State “to continue implementing permanent education and training programs and courses in elimination of stereotypes of women’s roles in society.”⁸¹

⁷⁵ CEDAW Committee, *General Recommendation No. 28*, *ibid.*, para. 32.

⁷⁶ Cook and Cusack, *supra* note 2, 94.

⁷⁷ *Ibid.*, 93-96.

⁷⁸ *Ibid.*, 93-95, 96-98.

⁷⁹ *Karen Tayag Vertido v. The Philippines*, *supra* note 9, para. 8.9(b).

⁸⁰ *González et al. (‘Cotton Field’) v. Mexico*, *supra* note 17, para. 540.

⁸¹ *Ibid.*, para. 541.