

# Women's Access to Justice for Gender-Based Violence

## A Practitioners' Guide



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# **Women's Access to Justice for Gender-Based Violence**

Practitioners' Guide No. 12

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The two Annexes to this Guide on international mechanisms and international legal remedies were taken directly from the ICJ's Practitioners Guide No. 6 on Migration and International Human Rights Law. These annexes were researched and written by Massimo Frigo and Roísín Pillay.

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## CHAPTER I

### INTRODUCTION

#### **A public health problem of epidemic proportions**

The persistence and prevalence of violence against women has been described by UN Women as “a pandemic”<sup>1</sup> and by the World Health Organization as a “public health problem of epidemic proportions”,<sup>2</sup> affecting from 35 to 70 per cent of women and girls globally according to national studies.<sup>3</sup> In 2013, the World Health Organization stated that when more than one in three women worldwide (35.6%) have reported having experienced sexual or physical violence then violence against women evidently “pervades all corners of the globe, puts women’s health at risk, limits their participation in society and causes great human suffering.”<sup>4</sup>

#### **International recognition of human rights implications**

Since at least the early 1990s, across all regions of the world, a widespread understanding has emerged that gender-based violence “impairs or nullifies the enjoyment by women of [their] human rights and fundamental freedoms”.<sup>5</sup> At the international

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<sup>1</sup> UN Women, “Facts and Figures: Ending Violence against Women A pandemic in diverse forms”, URL:

<http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (webpage last updated October 2015).

<sup>2</sup> World Health Organization, “[Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner violence](#)” (Geneva: World Health Organization, 2013), page 35.

<sup>3</sup> Ibid. For individual country information, see full compilation of data in UN Women, 2012, Violence against Women Prevalence Data: Surveys by Country, URL: <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes> (website last updated October 2015).

<sup>4</sup> World Health Organization, “Global and regional estimates of violence against women”, above note 2, page 35.

<sup>5</sup> CEDAW Committee, General Recommendation No 19, “Violence against women”, UN Doc A/47/38 (1992).

level, this understanding is reflected in various authoritative legal and quasi-legal sources. These authorities include United Nations (UN) treaty monitoring bodies, such as the Committee on the Elimination of All Forms of Discrimination against Women (the CEDAW Committee), the Human Rights Committee and the Committee against Torture; independent experts, such as the Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteur on torture; and regional human rights systems, such as the European Court of Human Rights and the Inter-American Court of Human Rights. These sources also stem from political bodies, such as the UN General Assembly and the UN Security Council, which adopt resolutions that recognize and elaborate the detail of international human rights law and standards. International organizations, including the World Health Organization and the UN and its officials and agencies (such as the UN Secretary-General, UN Women and the United Nations Children's Fund (UNICEF)) have added their authoritative commentary and analysis to the body of human rights law.

Across all these authorities, there is a consistent recognition that gender-based violence, whether committed by State agents or non-State actors, can severely infringe the rights of women not to be subjected to torture and ill-treatment, and the right not to be subjected to discrimination. This recognition of gender-based violence as a form of torture and discrimination persists irrespective of the situation in which the violence takes place – whether in armed conflict or peacetime, in the home, the street or in places of detention – or the identity of the perpetrator – whether a family member, member of the community, stranger or State official. There is now a broad and detailed consistency across most of these authorities as to how States must fulfil their obligations under international human rights law to prevent, stop and redress gender-based violence, across a variety of legal and practical initiatives.

## **What does “access to justice for gender-based violence” mean?**

In a broad sense, access to justice for women for acts of gender-based violence means that States must implement a range of measures including, where necessary, amending domestic law to ensure that acts of violence against women are properly defined as crimes and ensuring appropriate procedures for investigations, prosecutions and access to effective remedies and reparation.

Access to justice for individual women is often assumed to reside in a criminal justice response to the perpetrator. However, women may identify other aspirations as their idea of justice for the harm they have experienced: the ability to seek safety through effective protection orders; physical and mental recovery through good quality and accessible health services; and/or the opportunity to seek a divorce and a new life free from the violence of a spouse. Often these forms of justice must be in place before a woman subjected to violence feels able to embark on the process of seeking justice through the criminal law.

### **Victim or survivor?**

Individuals whose rights have been abused or violated are normally described as “victims” of human rights violations or crimes. For example, this is the terminology used in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>6</sup> and it is also used in the practice of the Rome Statute of the International Criminal Court.<sup>7</sup> Women human rights defenders tend to use the term “survivor” instead of “victim” as a way of reflecting the agency, resilience and courage of women and girls subjected to violence. For them,

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<sup>6</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted under General Assembly resolution 40/34 (1985).

<sup>7</sup> For example, see Article 43(6) of the Rome Statute of the International Criminal Court.

the term “victim” is seen as implying passivity and acceptance of the violation. However, sometimes both terms are seen as appropriate – “survivor” celebrates the individual, but “victim” recognises the enormity of the system of gender-based discrimination that women and girls face.<sup>8</sup>

### **Women and girls**

In this document, the term “women” should be read as also including girls under the age of 18. This practice is used in international human rights law, for example as in Article 3(f) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention). Where there are specific standards relating to children under 18, the terms “girl” and “adolescent girl” are used.

### **Are women “vulnerable” or are they targeted because of their identity as women?**

In her report on women in the criminal justice system - as legal professionals, victims, witnesses or offenders - the Special Rapporteur on the independence of judges and lawyers noted that: “Women are not intrinsically vulnerable: it is their particular individual situation, coupled with pervasive societal gender-based discrimination, that facilitates their being threatened and targeted by violence”.<sup>9</sup>

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<sup>8</sup> Rahila Gupta, “‘Victim’ vs ‘Survivor’: feminism and language”, Open Democracy, 16 June 2014, URL: <https://www.opendemocracy.net/5050/rahila-gupta/victim-vs-survivor-feminism-and-language>.

<sup>9</sup> Special Rapporteur on the independence of judges and lawyers, “Gender in the criminal justice system: the role of judges and lawyers”, UN Doc A/66/289 (2011), paragraph 71.

## **The importance and limitations of a legal approach to violence against women**

The present Guide is directed to legal practitioners, who are indispensable to addressing the problem, but with a cautionary note that laws alone are insufficient to address the deep-rooted problem of violence against women. The UN Secretary General's 2006 *In-depth study on violence against women* emphasized both the necessity and insufficiency of a purely legal approach to address the problem. The study stated that whilst laws provide an important framework for addressing the problem in establishing the crime, deterring wrongdoers and providing access to justice and a means of accessing remedies and reparation by victims, these need to be part of a broader public effort, which embraces public policies, education and other services.<sup>10</sup>

In addition, while many of the legal obligations of official actors may be clear, especially in the administration of justice, effective discharge of those obligations is often deficient. Despite the seriousness of the problem, and the mandate in international human rights law to deal with the issues, improvements in this situation have been small and slow. Even though many States have undertaken some initiatives to address gender-based violence, such as legislative reform and national action plans, often such measures have proved to be insufficient to reduce and prevent violence in a meaningful way and change women's lives for the better. This has been demonstrated by successive cases at the international level, where women have brought evidence of violence perpetrated against them either in the face of State passivity or involving the active participation of State agents in inflicting violence.<sup>11</sup>

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<sup>10</sup> UN Secretary-General, "In-depth study on all forms of violence against women", UN Doc A/61/122/Add.1 (2006), paragraph 292.

<sup>11</sup> See for example: *Raquel Martí de Mejía v Peru*, Inter-American Commission on Human Rights Case 10.970, Report No 5/96 (1 March 1996); *Aydın v Turkey*, European Court of Human Rights Application No 57/1996/676/866 (25 September 1997); *Maria Da Penha Maia Fernandes v Brazil*, Inter-American Commission on Human Rights Case

### **Women seeking justice: a catalyst for reform**

Under international human rights law, persons who suffer violations of their human rights have the right to effective remedies and reparation for the harm they have suffered. Gaining access to justice for acts of gender-based violence is important to secure relief at the individual level, but also to promote change at the systemic level in terms of laws and practice. Where women vindicate their right to justice for gender-based violence through international human rights courts and mechanisms, other States and key actors, not only the respondent State in the case, are put on notice that they must act to improve law and practice accordingly. Political and social actors become more aware of some ways in which women's human rights are violated and their obligations in addressing the phenomenon and preventing the reoccurrence of violence. Sometimes a State may commit to certain measures to address the problem after an individual case is held up to scrutiny. In addition, other women facing violence are emboldened to also take action, still often at risk to themselves, in order to seek justice.

If women's human rights are to be realized and States' legal obligations implemented in practice, then justice systems throughout the world will require varying degrees of reform. Currently, seeking justice for gender-based violence can leave women at risk of further violations or abuse of their human rights: for example, being subjected to attacks by police or security officers; shaming and stigma in their communities; and secondary victimization by investigators, lawyers or judges who may blame women for the violence they have suffered. Secondary victimization also stereotypes women with abusive myths about violence being an acceptable way of policing social

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12.051, Report No 54/01 (16 April 2001); *A.T. v Hungary*, CEDAW Communication No 2/2003 (26 January 2005); *González et al. ("Cotton Field") v. Mexico*, Inter-American Court of Human Rights, judgment of 16 November 2009; *Angela González Carreño v Spain*, CEDAW Communication No 47/2012, UN Doc CEDAW/C/58/D/47/2012 (2014).

expectations of how women should behave. In this regard, stereotyping can be, at the same time, a cause and a consequence of gender-based violence.

However, while legal reform is vital for addressing gender-based violence, it is not only laws that need to be reformed but also policies and practices in the administration of justice. As women bring cases of gender-based violence to national legal systems and international human rights adjudicatory mechanisms, the detail of their experiences and the ways that States have failed them may shine a light on how State laws and practices need to be modified. The ways in which gender-based violence impairs women's enjoyment of their human rights are necessarily linked to basic experiences that women have of violence and abuse. There is a growing awareness that, under international law, women have a right to equality and non-discrimination, equal protection of the law and physical and mental integrity, and, where there is a failure to respect and protect these rights, they have a right to justice, including the recognition that laws and the implementation of law needs to change.

International human rights law recognizes a variety of laws and practices as key solutions to gender-based violence and discrimination against women. This Practitioners Guide seeks to assist lawyers and other human rights advocates, but ultimately it is designed to benefit the women on whose behalf lawyers and advocates act and who are seeking justice. This is done by marking out the recognition of all forms of gender-based violence under international law and by showing the strategies adopted by legal advocates and other women's human rights defenders who have worked on behalf of individual women to secure access to justice. It also contains a condensed directory of recommendations made by international and regional human rights mechanisms and procedures to guide reform of domestic laws and practices in order to improve conditions for women seeking justice. Where women can bring cases with greater safety and effectiveness, based on advocacy from around the world, there will hopefully be

broader consequences for the realization of human rights of women.

This Practitioners Guide can be used to support a number of initiatives to promote the rule of law:

- Advising legal practitioners and other human rights defenders (referred to in this Guide as “advocates”) about relevant international human rights law and standards that address the measures that States and State officials are required to take in order to prevent, provide remedies and reparation to victims of, and hold accountable those responsible for acts of gender-based violence. This will facilitate an assessment as to the effectiveness of domestic law and practice through enabling a comparison with international human rights laws and standards.
- Advising practitioners about existing good practice in seeking protection for women who have been subjected to gender-based violence, including through litigation against impunity of perpetrators and to secure effective remedies and reparation for victims. The advice draws on the experience of expert lawyers who have sought justice for women within their own countries and through taking cases to international authorities.
- Advising practitioners and other human rights defenders, as well as legislators and policy makers, about implementing international human rights law in domestic law reform, using the transformative promise of international human rights law as a complement to individual casework. More systemic change can then be sought through changes in law and practice.

Across the regions of the world, the experience of gender-based violence and the reasons for its prevalence and persistence are largely similar – a vicious mix of social attitudes and laws that give women a subordinate, discriminated role in society and permit impunity. Because of these common causes,

jurisprudence from diverse countries at the domestic, regional and international level are important to the objective of law reform everywhere.

### **Methodology and key authorities for this Practitioners Guide**

Chapters II, III, IV and V are based on a review of key global and regional legal standards – including the universal human rights treaties<sup>12</sup> and regional treaties addressing women's human rights from the African, American and European systems,<sup>13</sup> and a brief reference to regional developments in the Arab Charter on Human Rights and ASEAN human rights systems. These chapters also contain condensed references to international and regional jurisprudence on gender-based violence, and some examples of good practice in jurisprudence at the domestic level.

Chapters VI, VII and VIII address the practical situation faced by women survivors of gender-based violence, and the steps that States need to address in order to secure their access to justice in practice. This requires that the justice process deals with women's need for safety and access to services, including medical services, ensuring women's empowerment and access

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<sup>12</sup> International Covenant on Civil and Political Rights (ICCPR), especially Articles 2(1) and 3; International Covenant on Economic, Social and Cultural Rights (ICESCR), especially Articles 2(2) and 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC), especially Articles 2(1), 3, 6, 34, 37 and 39; Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 5, 6, 7, 10, 11, 12, 13, 14, 15 and 16; and especially, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention).

<sup>13</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará) of 9 June 1994; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 11 July 2003, especially Articles 4 and 5; Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011.

to information about their right to justice (Chapter VII). Chapter VIII deals with women's experience of the criminal justice system, ensuring that victims and witnesses can give their evidence in safety and dignity. The substantive and procedural criminal laws must also reflect the rights of victims, and are applied in such a way that impunity is addressed effectively.

These chapters also contain a summary of some leading academic literature and civil society organization commentary and research, particularly references and signposting to existing resources that take an in-depth look at relevant issues, for example, guides on protection of the safety of women human rights defenders and access to asylum for women facing persecution in the form of gender-based violence.

Woven into these accounts is commentary and reflection from legal advocates and women human rights defenders on their experience of seeking justice for women, and their recommendations to legal advocates doing this work.

## CHAPTER II

# **LEGAL ADVOCACY USING APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW – GUIDING PRINCIPLES**

### **Types of legal advocacy for which this Guide is designed**

Legal advocacy may be employed to advance broad changes in law and practice relating to gender-based violence. It may also be used to achieve justice for individuals or change in respect of specific situations of legal frameworks and practices within a State. This Practitioners Guide addresses both areas.

In this Practitioners Guide, legal advocacy includes a variety of activities:

- The professional craft of representing a client or clients in existing domestic legal processes.
  - For example, advocating on behalf of victims for prosecutions of perpetrators or reparation for acts of violence in criminal or civil proceedings or through seeking a divorce or child custody.
- The use of international human rights law in judicial or non-judicial mechanisms to improve the scope of women to seek justice in individual cases.
  - For example, international human rights law is applicable in domestic legal processes. Where a criminal investigation or prosecution has not led to justice for an individual woman, her advocate could bring a case on her behalf to a UN treaty body such as the CEDAW Committee. UN independent expert mechanisms, such as the Special Rapporteur on violence against women or the Special Rapporteur on torture, may be able to intervene in an urgent

case where a woman is at immediate risk of violence.<sup>14</sup>

- The use of international human rights law, standards, jurisprudence and recommendations from individual cases in processes that can change domestic law and practice.
  - For example, through parliamentary advocacy to reform laws and the development of police or prosecutors' policies and procedures.
  - It is particularly important to draw attention to the judgments and recommendations of treaty bodies and regional human rights procedures to these processes in order to show the manner in which other jurisdictions have addressed the issue.
- Securing information and developing analysis of existing law and practice.
  - Complete data on gender-based violence and women's access to justice is often lacking. Gathering such data is an important part of the State obligation to prevent and remedy violence

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<sup>14</sup> See "Special Procedures of the Human Rights Council" on the website of the Office of the High Commissioner for Human Rights which outlines the role of the Special Procedures (which include Special Rapporteurs, Independent Experts and Working Groups). The relevant webpage explains that: "With the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), special procedures undertake country visits; act on individual cases and concerns of a broader, structural nature by sending communications to States and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations, contribute to the development of international human rights standards, engage in advocacy, raise public awareness, and provide advice for technical cooperation": see URL <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

against women.<sup>15</sup> A clear picture of the experiences of women, and the numbers of whom need services and justice, is fundamental to providing an appropriate and adequate response. In the absence of such data, the insights of advocates can be important for indicating how States should respond to violence against women, as advocates tend to have a detailed knowledge about the struggles individual women face in seeking justice in its broad sense.

- Publicizing information about the content of human rights standards in public discourse.
  - This may include the use of social media, commentary on TV and radio on prominent cases where women have been subjected to violence.
  - Cases such as the murder of Jyoti Singh in Delhi in 2012 and the abduction of 276 schoolgirls in Nigeria in 2014 made headlines around the world. In recent years, female genital mutilation (FGM) and sexual violence in conflict have also been examined in the international media. International events such as V-Day and the 16 Days of Activism on gender-based violence bring the stories, the resilience and justice-seeking of women to the forefront of media attention, and emphasize that women are already legally entitled to the right to be free from gender-based violence and that enforcing the right is not an unreasonable demand.

Through such platforms and forums, advocates and practitioners can shine a light on ways in which women have

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<sup>15</sup> In its General Recommendation No 19, the CEDAW Committee said that: "States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence": CEDAW Committee, General Recommendation No 19, "Violence against women", UN Doc A/47/38 (1992), paragraph 24(c).

sought justice around the world, for example by demanding adherence to international law relating to violations of the right to life, the right not to be ill-treated and the right to equality. It is important to show that all States, regardless of whether developed or developing, have a great deal to do in eradicating violence against women.

Advocates and practitioners can show that women's rights can be implemented through taking best practice recommendations from the international and regional levels. This involves not only seeking justice after violence has been committed but also promoting methods of preventing violence, for example by ensuring that all children and young people receive education on equality between men and women, non-violent conflict resolution and age appropriate comprehensive sexuality education.<sup>16</sup>

### **Building cultures of rule of law and equality across all State agencies**

The use of the justice system by legal advocates is critical in upholding the rule of law as the basis for accountability in the

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<sup>16</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, Article 14(1) provides for: "equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity". See also Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará) of 9 June 1994, Article 8(b) under which: "States Parties [undertake 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 inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women". Regarding sexual education, see also CEDAW Committee, General Recommendation No 24, "Women and Health", UN Doc A/54/38 at 5 (1999).

exercise of public authority as well as private power. UNIFEM (the former United Nations Development Fund for Women), one of the predecessor agencies to UN Women, highlighted the critical role that law and justice systems have in protecting women in the private sphere when women are much more likely than men to be susceptible to the arbitrary exercise of power within the relative privacy of family and the community.<sup>17</sup>

The majority of women who are subjected to gender-based violence do not seek justice, frequently because they fear further violence and/or have no confidence in the justice system. Where women do seek justice, the use of international law, standards and jurisprudence can be an important tool in enhancing the responsiveness of domestic justice systems to the human rights infringements that women experience.

The work of legal practitioners and advocates can help to ensure the progressive development of national laws and jurisprudence. As legislatures formulate and adopt new laws relating to women's human rights, legal advocates can bring international law and standards to domestic legal processes. As well as developing domestic law based on international human rights law, legal advocacy can build accountability mechanisms to ensure that equality for women is implemented. This includes ensuring the equal participation of women with men as professionals in justice systems.<sup>18</sup> It could also extend to the

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<sup>17</sup> UNIFEM (former United Nations Development Fund for Women), "Progress of the World's Women 2008/2009: Who answers to women? Gender and accountability", see URL [http://unifem.org/progress/2008/media/POWW08\\_Report\\_Full\\_Text.p](http://unifem.org/progress/2008/media/POWW08_Report_Full_Text.pdf)  
[df](http://unifem.org/progress/2008/media/POWW08_Report_Full_Text.p), page 72.

<sup>18</sup> CEDAW Committee, General Recommendation No 33, "General recommendation on women's access to justice", UN Doc CEDAW/C/GC/33 (2015), paragraph 15(f) of which requires States to: "[c]onfront and remove barriers to women's participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers of justice-related services, and take steps, including temporary special measures, to ensure that women are equally represented in the judiciary and other law implementation

establishment of gender as a standard against which States are held to account. According to a UNIFEM report: “Gender sensitive accountability requires not just women’s participation but institutional reform to make gender one of the standards against which performance of decision makers is assessed”.<sup>19</sup>

Legal advocacy can also address State accountability, including at the highest levels of constitutional authority, through police and prosecutors, other courts and legal systems, such as family courts, for the implementation of policies and procedures and access to services that women who have been subjected to violence often need, including housing, medical care and social services.

Human rights law and standards are also important in advocacy for the fine details of implementation of human rights in practice, such as allocation of tasks and responsibility to various State agencies, ensuring sufficient financial and human resourcing and including effective training. This is most effective when there are specific oversight mechanisms assessing the effectiveness of State action to implement the principles of equality and non-discrimination. Where specific oversight mechanisms are lacking, the CEDAW Committee has indicated that States must:

“...develop effective and independent mechanisms to observe and monitor women’s access to justice in order to ensure that justice systems are in accordance with the principles of justiciability, availability, accessibility, good quality and effectiveness of remedies. This includes the periodical audit/review of the autonomy, efficiency and transparency of the judicial, quasi-judicial

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mechanisms as magistrates, judges, prosecutors, public defenders, lawyers, administrators, mediators, law enforcement officials, judicial and penal officials and expert practitioners, as well as in other professional capacities”.

<sup>19</sup> UNIFEM “Who answers to women? Gender and Accountability”, above note 17, page 3.

and administrative bodies taking decisions affecting women's rights."<sup>20</sup>

### **Initiatives relating to gender-based violence in the Middle East and Asian Regions**

There are regional treaties specifically relating to violence against women in the Americas region, in Europe and in Africa. Women's right not to suffer violence has been recognized in the general human rights treaties in these regions, each of which has now led to a developed jurisprudence.

While the recognition of women's rights in human rights law is not so developed in the Middle East and Asia region, there have been some developments. Article 33(2) of the Arab Charter on Human Rights addresses domestic violence, requiring that "the State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children". The Arab Human Rights Committee, which oversees the implementation of the Arab Charter on Human Rights, has been questioning States on the way they give effect to the prohibition of violence against women in law and in practice - not only in domestic settings, but also in a more general context.

The Arab Women's Organization, a specialized agency of the Arab League, is working to implement the "Arab Strategy for Combatting Violence against Women, 2011-2020", which it developed and adopted. This situates action to eradicate gender-based violence in existing international human rights law and standards, especially the Beijing Declaration of 1995 and the Convention on the Elimination of All Forms of Discrimination against Women. The Arab Women's Organization has also prepared qualitative indicators to assist States in implementing their obligations under the CEDAW Convention.

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<sup>20</sup> CEDAW General Recommendation No 33, above note 19, paragraph 20(a).

There is also a separate Plan of Action for the Arab League concerning violence against women in conflict, using the framework of Security Council Resolution 1325 and the subsequent resolutions.

In the ASEAN (Association of South East Asian Nations) region, two non-binding standards have been adopted: the ASEAN Declaration on the Elimination of Violence Against Women in the ASEAN Region of 2004; and the Declaration on the Elimination of Violence Against Women and the Elimination of Violence Against Children in ASEAN of 2013. At the time of writing this Practitioners Guide, the ASEAN Commission on Women and Children (ACWC) is in the process of negotiating an ASEAN Region Plan of Action on Elimination of Violence Against Women.

### **Human rights law requires women’s empowerment to address discrimination, including gender-based violence**

The prohibition against gender-based discrimination is not only contained in numerous universal and global human rights treaties, it is also a part of customary international law, which binds all States.<sup>21</sup> Gender-based violence has been recognized as a form of discrimination.<sup>22</sup> Therefore States must act to prevent, prohibit, eradicate and remedy gender-based violence.

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<sup>21</sup> Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 8<sup>th</sup> edition, 2012), page 645, which cites: the United Nations Charter, Articles 55 and 56; the practice and organs of the United Nations (including General Assembly resolutions); the Universal Declaration of Human Rights; international and regional human rights conventions, especially the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention), which is widely ratified; and Human Rights Committee, General Comment No 28, “The Equality of Rights between Men and Women (Article 3)”, UN Doc CCPR/C/21/Rev.1/Add.10 (2000).

<sup>22</sup> CEDAW General Recommendation No 19, above note 16, paragraph 6, which provides: “The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”.

On 20 December 1993, all States gave their agreement to the Declaration on the Elimination of Violence against Women.<sup>23</sup> The Declaration recognizes that:

“...violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”<sup>24</sup>

“Every woman has the right to be free from violence in both the public and the private sphere”.<sup>25</sup>

Ensuring women’s access to justice for gender-based violence requires States to develop and actively implement policies to promote gender equality and to eradicate gender inequality.<sup>26</sup> Laws, practices and initiatives to eradicate gender-based violence are unlikely to succeed without an accurate awareness of the limitations of women’s lives, how their freedom of choice and action is limited, and the way that gender-based violence supports discrimination and bring benefits to dominant men. The CEDAW Committee has affirmed that States must “conduct and facilitate qualitative studies and critical gender analysis in collaboration with civil society organizations as well as academic institutions of all justice systems in order to highlight practices, procedures and jurisprudence that promote or limit women’s full access to justice; and systematically apply the findings of this analysis in order to develop priorities, policies,

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<sup>23</sup> UN Declaration on the Elimination of Violence against Women, adopted by the General Assembly under resolution 48/104 (1993).

<sup>24</sup> Ibid, preambular paragraph 6.

<sup>25</sup> Convention of Belém do Pará, above note 16, Article 3.

<sup>26</sup> CEDAW Convention, Article 2.

legislation and procedures to ensure that all components of the justice system are gender-sensitive, user friendly and accountable".<sup>27</sup>

### **What is gender?**

According to the CEDAW Committee, "[t]he term sex refers to biological differences between men and women. The term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men in the distribution of power and rights favouring men and disadvantaging women. This social position of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community."<sup>28</sup>

### **A rights-based understanding of the illegality of gender-based violence against women**

#### ***The rights to life, to be free from torture and ill-treatment, to physical and mental integrity and to equality and non-discrimination***

International human rights law is predicated upon the overarching principle that States must not only respect the human rights of persons, including through the conduct of their officials, they must also ensure protection from impairment of rights of persons under their jurisdiction by third parties, including private actors. Where conduct that impairs rights involves acts of violence, there is a range of preventive and

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<sup>27</sup> CEDAW General Recommendation No 33, above note 18, paragraph 20(e) and (f).

<sup>28</sup> CEDAW General Recommendation No 28, "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), paragraph 5.

protective measures that States must take, including the use of criminal sanction against perpetrators.

When violence is against women, international human rights laws and standards have identified such situations as engaging a number of human rights. These include the right to life,<sup>29</sup> the right to be free from torture and ill-treatment, and the right to equality with men and freedom from gender-based discrimination.<sup>30</sup>

### **Gender-based violence impairs or nullifies women's enjoyment of their human rights**

The CEDAW Committee identified that gender-based violence impairs or nullifies the enjoyment of human rights and freedoms including:

- a) The right to life;
- b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- d) The right to liberty and security of person;
- e) The right to equal protection under the law;
- f) The right to equality in the family;
- g) The right to the highest standard attainable of physical and mental health;
- h) The right to just and favourable conditions of work.<sup>31</sup>

The UN Committee against Torture has further recognized that:

"Being female intersects with other identifying characteristics or status of the person such as race,

<sup>29</sup> Human Rights Committee General Comment No 28, above note 21, paragraph 10.

<sup>30</sup> CEDAW General Recommendation No 19, above note 15, paragraph 7(e); Istanbul Convention, above note 16, Article 3(a); and Convention of Belém do Pará, above note 16, Article 6(a).

<sup>31</sup> CEDAW General Recommendation No 19, above note 15, paragraph 7.

nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes.”<sup>32</sup>

The UN Declaration on the Elimination of Violence against Women describes the term ‘violence against women’ as: “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.<sup>33</sup> Article 2 of the Declaration explains that violence against women must be understood to encompass, but not be limited to, the following:

- a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

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<sup>32</sup> Committee against Torture, General Comment No 2, “Implementation of article 2 by States parties”, UN Doc CAT/C/GC/2 (2008), paragraph 22. See also CEDAW General Recommendation No 19, above note 15, paragraph 7(b).

<sup>33</sup> UN Declaration on the Elimination of Violence against Women, above note 23, Article 1.

- c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

In 1992, the CEDAW Committee, the supervisory body which provides the authoritative interpretation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) identified "[g]ender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".<sup>34</sup> Gender-based violence, said the Committee, is "violence that is directed against a woman because she is a woman or that affects women disproportionately."<sup>35</sup>

The Beijing Platform for Action identified violence against women as "one of the crucial social mechanisms by which women are forced into a subordinate position compared with men".<sup>36</sup>

### **When is an act of violence "gender-based"?**

Amnesty International has suggested that "[s]ome of the elements that may be examined to determine whether an act of violence is gender-based include:

- Cause or motive: for example, distinctly expressed gender insults during violence;
- Circumstances or context: for example, abuse of women of a certain group within an armed conflict;
- The act itself, the form a violation takes: for example, overtly sexual acts, forced nudity, mutilation of sexual parts of the body;
- The consequences of a violation: pregnancy; shame and secondary victimization by the survivor's community

<sup>34</sup> CEDAW General Recommendation No 19, above note 15, paragraph 1.

<sup>35</sup> Ibid, paragraph 6.

<sup>36</sup> Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, UN Doc A/CONF.177/20 Rev.1 (1995), paragraph 117.

- because “honour” has been transgressed; and
- The availability and accessibility of remedies, and difficulties in securing a remedy, for example, difficulties for women in accessing legal remedies because of lack of legal aid, need of male family member support, need to concentrate on care of dependents and lack of appropriate healthcare.<sup>37</sup>

### **‘Intersectionality’: protecting women’s rights for all women in all their diversity**

‘Intersectionality’ is a term developed in international human rights discourse to express the fact that individuals may be subjected to discrimination or treated unequally in a variety of, or compounded, ways according to various facets of their identity. These multiple forms need to be taken into account in order to design methods of implementing rights obligations. Some of the characteristics that have been identified as amounting to grounds for intersectional or compounded discrimination, which may increase the difficulty of women from these groups to access justice, include:

- Ethnicity/race;
- Indigenous or minority status;
- Colour;
- Socio-economic status and/or caste;
- Language;
- Religion or belief;
- Political opinion;
- National origin;
- Marital and/or maternal status;
- Age;
- Urban/rural location and geographical remoteness;
- Health status;
- Disability;

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<sup>37</sup> Amnesty International, “Making Rights a Reality: The Duty of States to Address Violence Against Women”, AI Index ACT/77/049/2004, page 12.

- Property ownership;
- Being a lesbian, bisexual, transgender woman or intersex person;
- Illiteracy
- Being a trafficked woman;
- Armed conflict;
- Seeking asylum, or being subject to internal displacement, statelessness, or migration;
- Women heading households;
- Widowhood;
- Living with HIV/AIDS;
- Deprivation of liberty;
- Criminalization of prostitution;
- Geographical remoteness;
- Stigmatization from fighting for their rights and for the rights of others; and/or
- Pregnancy.<sup>38</sup>

The CEDAW Committee has outlined the need for States to recognize and respond to women's intersectional identities through specific action to eliminate any occurrences of discrimination based upon these identities, including through the adoption and implementation of appropriate policies and programmes.<sup>39</sup> The UN General Assembly, in its Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, has called on States to recognize the particular vulnerabilities faced by different groups of women as a result of intersectional discrimination, requiring them to

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<sup>38</sup> CEDAW General Recommendation No 33, above note 18, paragraphs 8 and 9; Convention of Belém do Pará, above note 16, Article 9. Pregnancy has been associated with the onset of domestic violence: see World Health Organization Information Sheet, "Intimate partner violence during pregnancy" (2011), URL: [http://apps.who.int/iris/bitstream/10665/70764/1/WHO\\_RHR\\_11.35\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/70764/1/WHO_RHR_11.35_eng.pdf).

<sup>39</sup> CEDAW General Recommendation No 28, above note 28, paragraph 18.

adopt special measures for the prevention and protection of these women from violence.<sup>40</sup>

All stages of the legal process need to respond to the needs of women across diverse identities, such that those working in the justice system need to understand how their services appear to women who may not trust the State. Some women may need particularly high levels of service because of social or economic marginalization. This may apply to those with financial constraints and complex legal situations, for example women whose migration permits are dependent on abusive spouses or employers. Some women with children will be particularly anxious about coming into contact with the authorities, in case the State takes their children into care. Other women are particularly marginalized because they are homeless. Women who have previously come into contact with the criminal justice system as offenders, for example because of sex work, must receive an exemplary service from the courts relating to violence committed against them to ensure that they are not disadvantaged. The Inter-American Court of Human Rights cited many authorities in international and regional human rights laws and standards which recognize that sexual orientation is a prohibited form of discrimination,<sup>41</sup> and undertook a profound examination of the ways that discrimination against a lesbian mother was manifested in legal proceedings regarding custody of her daughters and a disciplinary procedure in the course of her employment as a judge.

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<sup>40</sup> Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted under General Assembly resolution 65/228 (2010), paragraph 10.

<sup>41</sup> *Atala Riffo and Daughters v Chile*, Inter-American Court of Human Rights, judgment of 24 February 2012, paragraphs 83-93.

### **Why violence against women should be seen as a distinct human rights category**

In his *In-depth study on all forms of violence against women*,<sup>42</sup> the UN Secretary-General identified a number of reasons why it is important to look at violence against women as a human rights issue, rather than as exclusively a social or criminal law problem. This *In-depth Study*, as well as other work developed over the years by a variety of human rights adjudication procedures and advocates, identifies the following characteristics and advantages of the human rights based approach in addressing violence against women (each of which are explained in further detail below):

- Establishment of legal duties;
- Ensuring access to adjudication and remediation;
- Empowerment of victims and survivors, as well as human rights defenders;
- Visibility of the experiences of women;
- A holistic approach, across a variety of professional and practical dimensions;
- Appraisal of competing claims from victims and perpetrators;
- Legal obligations on States to take specific actions to ensure that girls can claim their human rights in practice;
- Access to education and information;
- Establishing how justice systems should function to implement women's rights; and
- Requiring accountability.

#### ***Establishment of legal duties***

Gender-based violence, when understood as a human rights violation, binds States to prevent such violence, punish perpetrators and provide access to effective remedies and reparation for those subjected to such violence.

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<sup>42</sup> The UN Secretary-General, "In-depth study on all forms of violence against women", UN Doc A/61/122/Add.1 (2006).

Through the establishment of legal duties, a State's responsibility to take appropriate measures to respond to gender-based violence is then understood as a legal entitlement, rather than a discretionary measure.<sup>43</sup>

### ***Ensuring access to adjudication and remediation***

States can be held to account using the tools and mechanisms of human rights frameworks, including treaty bodies, international criminal tribunals and the African, Europe and Inter-American human rights systems.<sup>44</sup>

### ***Empowerment of victims and survivors, as well as human rights defenders***

Recognizing gender-based violence as a rights violation empowers women in becoming rights-holders rather than recipients of benefits. It also engages a wider range of human rights defenders who then have a stake in preventing violence against women as part of a wider effort in building respect for all human rights.<sup>45</sup>

### ***Visibility of the experiences of women***

The human rights discourse can become more inclusive in recognizing the particular experiences of women. This encourages human rights norms to not only encompass a gender perspective but also a wider variety of factors that shape men's and women's experiences of discrimination and violence: including race, ethnicity, age, class, sexual orientation, disability, nationality, religion and culture.<sup>46</sup>

### ***A holistic approach, across a variety of professional and practical dimensions***

Addressing gender-based violence as a human rights issue encourages a holistic and multi-sectoral response that calls for

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<sup>43</sup> Ibid, paragraph 39.

<sup>44</sup> Ibid, paragraph 39.

<sup>45</sup> Ibid, paragraph 40.

<sup>46</sup> Ibid, paragraph 41.

strengthening initiatives to eliminate violence against women in all areas including justice, health, education, development, humanitarian, peace building and security sectors.<sup>47</sup>

***Appraisal of competing claims from victims and perpetrators***

A human rights based appraisal helps to sort through competing claims to human rights, from women victims of violence, violent men who have a sense of entitlement to use violence because of their human rights and States that are unwilling to change domestic laws and practices.

For example, the right to freedom of thought, conscience and religion may sometimes be inappropriately invoked as justification to discriminate against women or use violence against them despite clarifications from the UN General Assembly that: "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination".<sup>48</sup>

The right to cultural life may similarly be raised as a license to engage in discrimination against women in access to housing or property.<sup>49</sup>

The right to property might be claimed as a basis to permit a violent man to have access to his property when the woman he has attacked needs to remain there under the terms of a protection order or an order for division of the marital property. However, in such a situation the CEDAW Committee has said that: "Women's human rights to life and to physical and mental

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<sup>47</sup> Ibid, paragraph 42.

<sup>48</sup> UN Declaration on the Elimination of Violence against Women, above note 24, Article 4.

<sup>49</sup> *Sandra Lovelace v Canada*, Human Rights Committee Communication No. R.6/24, UN Doc Supp. No. 40 (A/36/40) at 166 (1981).

integrity cannot be superseded by other rights, including the right to property and the right to privacy”.<sup>50</sup>

Parental rights of fathers to have contact with their children may be invoked as entitlement of men accused of violence to violate the safety and well being of women and their children. However, in such a situation, the CEDAW Committee has observed that the best interests of the child must be taken into account in the existence of a context of domestic violence.<sup>51</sup>

Relatedly, because legal obligations surrounding violence against women arise under international law, competing domestic law claims cannot be used to override these claims.<sup>52</sup>

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<sup>50</sup> *A.T. v Hungary*, CEDAW Communication No 2/2003 (26 January 2005), paragraph 9.3.

<sup>51</sup> *Angela González Carreño v Spain*, CEDAW Communication No 47/2012, UN Doc CEDAW/C/58/D/47/2012 (2014), paragraph 9.4: “The Committee observes that during the time when the regime of judicially determined visits was being applied, both the judicial authorities and the social services and psychological experts had as their main purpose normalizing relations between father and daughter, despite the reservations expressed by those two services on the conduct of F.R.C. The relevant decisions do not disclose an interest by those authorities in evaluating all aspects of the benefits or harms to the child of the regime applied. It is also noteworthy that the decision which ushered in a regime of unsupervised visits was adopted without a prior hearing of the author and her daughter, and that the continued non-payment of child support by F.R.C. was not taken into account in that context. All of these elements reflect a pattern of action which responds to a stereotyped conception of visiting rights based on formal equality which, in the present case, gave clear advantages to the father despite his abusive conduct and minimized the situation of mother and daughter as victims of violence, placing them in a vulnerable position. In this connection, the Committee recalls that in matters of child custody and visiting rights, the best interests of the child must be a central concern and that when national authorities adopt decisions in that regard they must take into account the existence of a context of domestic violence.”

<sup>52</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, Article 27: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

For example, the CEDAW Committee has said that “judicial institutions must apply the principle of substantive or *de facto* equality as embodied in the [CEDAW] Convention and interpret laws, including national, religious or customary laws, in line with that obligation”.<sup>53</sup>

### **Gender stereotyping and freedom of expression**

Article 5(a) of the CEDAW Convention imposes an obligation on States parties 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”.

This duty requires a transformation of those stereotypes which serve to entrench women’s inferiority, not necessarily all which relate to gender. It implies a duty on States to ensure that their laws and practices do not preserve women’s inequality – for example by ensuring that employment laws promote women’s equal participation in the workforce. Article 5(a) also requires States to engage in a dialogue with civil society, women’s groups, community, religious and traditional leaders, the teaching profession, in advertising and in the media to promote representations of women that respect their dignity and right to equality. This is not in conflict with individuals’ right to freedom of expression.<sup>54</sup>

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<sup>53</sup> CEDAW General Recommendation No 33, above note 18, paragraph 22.

<sup>54</sup> See generally: Marsha Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women. A Commentary* (Oxford: Oxford University Press, 2012), pages 151-167; and Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Pennsylvania: University of Pennsylvania Press, 2009).

***Legal obligations on States to take specific action to ensure that girls can claim their human rights in practice***

A human rights analysis considers women in all their diversity, including the specific rights of girls who face specific barriers to their right to access to justice, particularly where they lack social or legal autonomy. Girls can be forced into marriage and other harmful practices and can lack the capacity to have access to and control over the rights they are entitled to, including education, health and sexual and reproductive rights.<sup>55</sup> The CEDAW Committee has emphasised that States must establish “independent, safe, effective, accessible and child-sensitive complaint and reporting mechanisms which are accessible to girls, and which have the girls’ best interests as a primary consideration”.<sup>56</sup>

***Access to education and information***

A human rights approach requires comprehensive initiatives, especially the right to education. The CEDAW Committee said that States parties have “treaty-based obligations to ensure that all women have access to education and information about their rights and remedies available, and how to access these, and to competent, gender-sensitive dispute resolution systems, as well as equal access to effective and timely remedies”.<sup>57</sup>

There are also legal obligations to provide educational awareness of the rights of women and access to information about these rights. This applies to States parties to one of the regional conventions on the elimination of violence against women: the Convention of Belém do Pará,<sup>58</sup> the Maputo Protocol,<sup>59</sup> and the Istanbul Convention.<sup>60</sup>

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<sup>55</sup> CEDAW General Recommendation No 33, above note 18, paragraph 24.

<sup>56</sup> Ibid, paragraph 25(b).

<sup>57</sup> Ibid, paragraph 11.

<sup>58</sup> Convention of Belém do Pará, above note 16, Article 8(e): “States Parties [undertake to] promote and support governmental and private

***Establishing how justice systems should function to implement women's rights***

Human rights law has developed a number of practical assessments to analyse why and how States fail to ensure that individuals enjoy their human rights in practice, and to describe how human rights obligations should function in practice.

The CEDAW Committee has outlined some of the particular challenges to women's access to justice as including: "the centralization of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to access them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to quality, gender-competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of trainings, delays and

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sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women".

<sup>59</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 11 July 2003, Article 8(c): "the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women".

<sup>60</sup> Istanbul Convention, above note 16, Article 13(1) "Parties shall promote or conduct, on a regular basis and at all levels, awareness-raising campaigns or programmes, including in co-operation with national human rights institutions and equality bodies, civil society and non-governmental organisations, especially women's organisations, where appropriate, to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the scope of this Convention, their consequences on children and the need to prevent such violence" and Article 13(2) "Parties shall ensure the wide dissemination among the general public of information on measures available to prevent acts of violence covered by the scope of this Convention".

excessive length of proceedings, corruption, etc.) all prevent women from accessing justice”.<sup>61</sup>

The CEDAW Committee also outlined six interrelated components that are essential in establishing functional justice systems that implement women’s rights:

1. Justiciability
  - Unhindered access by women to justice.
  - Women’s ability and empowerment to claim their rights as legal entitlements.
2. Availability
  - Establishment and maintenance of courts and other quasi-judicial bodies in urban, rural and remote areas.
3. Accessibility
  - All justice systems must be secure, affordable and physically accessible to women.
  - All justice systems must be adapted to the needs of women, including those subject to intersectional or compounded discrimination.
4. Good quality
  - International standards of competency, efficiency, independence and impartiality must be met.
  - Justice systems must be contextualized, dynamic, participatory, open to innovation and gender-sensitive.
5. Access to remedies
  - Appropriate and effective remedies, including protection from and meaningful redress to the harm suffered, must be provided and enforced in a timely manner.

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<sup>61</sup> CEDAW General Recommendation No 33, above note 18, paragraph 13.

## 6. Accountability

- Monitoring of the justice system, including justice system officials, must be undertaken in accordance with the other assessments outlined above and ensuring the legal responsibility of any justice system officials when they violate the law.<sup>62</sup>

### ***Requiring accountability***

Accountability is particularly important because it demands an on-going appraisal into the effectiveness of justice systems to ensure that they work for women. This is a function that is not normally built into justice systems. Domestic legal institutions tend not to reflect on their performance and assume that they are of good quality.

The CEDAW Committee has recommended that States develop oversight mechanisms which undertake a “periodical audit/review of the autonomy, efficiency and transparency of judicial, quasi-judicial and administrative bodies taking decisions affecting women’s rights”;<sup>63</sup> take disciplinary action against justice professionals who discriminate against women;<sup>64</sup> establish a body to receive “complaints, petitions and suggestions” about personnel supporting the work of justice systems;<sup>65</sup> and gather data which reflects the gender-balance of professionals, the capacity and timeliness of existing services.<sup>66</sup>

The Committee has also recommended that States work with academics and civil society to undertake “qualitative studies and critical gender analysis... in order to highlight practices, procedures and jurisprudence that promote or limit women’s full access to justice”;<sup>67</sup> and act on the recommendations of

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<sup>62</sup> Ibid, paragraph 14.

<sup>63</sup> Ibid, paragraph 20(a).

<sup>64</sup> Ibid, paragraph 20(b).

<sup>65</sup> Ibid, paragraph 20(c).

<sup>66</sup> Ibid, paragraph 20(d).

<sup>67</sup> Ibid, paragraph 20(e).

these analyses to ensure the gender sensitivity, accessibility and accountability of the justice system”.<sup>68</sup>

Specific to the question of access to justice for gender-based violence, the CEDAW Committee has emphasized that States should consult with women’s groups and civil society organizations to develop legislation, policies and programs in the criminal justice system to ensure that states “create supportive environments that encourage women to claim their rights, report crimes committed against them and actively participate in criminal justice processes; and take measures to prevent retaliation against women seeking recourse in justice”.<sup>69</sup>

In order for the principles of justiciability, availability, accessibility, good quality, provision of remedies and accountability to be met, States must ensure the appointment of the necessary highly-qualified human resources; and invest adequate financial and technical resources to fund not only the justice system but also the institutions ensuring accountability, as well as other related organizations such as national human rights institutions and ombudsperson offices.<sup>70</sup>

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<sup>68</sup> Ibid, paragraph 20(f).

<sup>69</sup> Ibid, paragraph 51(d).

<sup>70</sup> Ibid, paragraph 38-39. See also the Maputo Protocol, above note 59, Article 4(2)(i), which requires that States parties “provide budgetary and other resources for the implementation and monitoring of action aimed at preventing and eradicating violence against women”.

### CHAPTER III

## **FORMS OF GENDER-BASED VIOLENCE RECOGNIZED AS ENGAGING INTERNATIONAL HUMAN RIGHTS LAW**

A number of forms of violence against women have been recognized as engaging international human rights law, and may constitute violations of international law, where State agents commit these crimes or when States fail to prevent, investigate, punish and/or provide effective remedies and reparation, including when these crimes are committed by non-State actors. A non-exhaustive list of forms of violence against women includes:

- Murder (also known as “femicide” or “feminicide” in South and Central America).
- Gender-based killings, including sex-selective abortion of female fetuses,<sup>71</sup> infanticide of baby girls,<sup>72</sup> and neglect and inadequate feeding.<sup>73</sup>
- Carrying out of death penalty on pregnant<sup>74</sup> or nursing women.<sup>75</sup>
- Killings and assaults in the name of so-called “honour”.<sup>76</sup>

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<sup>71</sup> Human Rights Committee, General Comment No 28, “The Equality of Rights between Men and Women (Article 3)”, UN Doc CCPR/C/21/Rev.1/Add.10 (2000), paragraph 5.

<sup>72</sup> Committee on the Rights of the Child, General Comment No 7, “Implementing child rights in early childhood”, UN Doc CRC/C/GC/7/Rev.1 (2006), paragraph 11(b)(i).

<sup>73</sup> Ibid, paragraph 11(b)(i).

<sup>74</sup> International Covenant on Civil and Political Rights (ICCPR), Article 6(5).

<sup>75</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 11 July 2003, Article 4(j).

<sup>76</sup> CEDAW General Recommendation No 19, “Violence against women”, UN Doc A/47/38 (1992), paragraph 24(r). See also the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, Article 42 (“Unacceptable justifications for crimes, including crimes

- Forced sterilization.<sup>77</sup>
- Forced abortion.<sup>78</sup>
- Coercive/forced use of contraceptives, female infanticide and prenatal sex selection.<sup>79</sup>
- Rape by State officials (including as a form of torture).<sup>80</sup>

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committed in the name of so-called “honour”), which provides as follows:

“(1) Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.

“(2) Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.”

<sup>77</sup> CEDAW General Recommendation No 19, *ibid*, paragraph 22; Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, UN Doc A/CONF.177/20 Rev.1 (1995), paragraph 115; Rome Statute of the International Criminal Court, Articles 7(1)(g) (crimes against humanity) and Article 8(2)(b)(xxii) and Article 8(2)(c)(vi) (war crimes); *María Mamérita Mestanza Chávez v Peru*, Inter-American Commission on Human Rights Case No 12.191, Report No 71/03 (22 October 2003); and Istanbul Convention, above note 76, Article 39.

<sup>78</sup> CEDAW General Recommendation No 19, above note 76, paragraph 22; Beijing Declaration and Platform for Action, above note 77, paragraph 115; and Istanbul Convention, above note 76, Article 39.

<sup>79</sup> Beijing Declaration and Platform for Action, above note 77, paragraph 115.

<sup>80</sup> *Raquel Martí de Mejía v Peru*, Inter-American Commission on Human Rights Case 10.970, Report No 5/96 (1 March 1996); *Aydin v Turkey*, (1997) ECHR 75, paragraphs 80-88; *Rosendo Cantu v Mexico*, Inter-American Court of Human Rights, 31 August 2010. For an analysis of the crime of rape under international criminal law, including international humanitarian law and international law relating to torture, see Amnesty International, “Rape and sexual violence: Human rights law and standards in the International Criminal Court”, IOR 53/001/2011, March 2011.

- Rape and sexual violence by non-State actors.<sup>81</sup>
- Intrusive physical examinations by prison staff, which may constitute a form of rape and torture.<sup>82</sup>
- Use of restraints during pregnancy, labour and the post-natal period.<sup>83</sup>
- Domestic violence<sup>84</sup> (also known as violence in the family or 'intimate partner violence'), whether physical, sexual, or psychological.<sup>85</sup>

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<sup>81</sup> Human Rights Committee, General Comment No 28, above note 71, paragraphs 8, 11 and 24. Paragraph 24 provides: "A different factor that may affect women's right to marry only when they have given free and full consent is the existence of social attitudes which tend to marginalize women victims of rape and put pressure on them to agree to marriage. A woman's free and full consent to marriage may also be undermined by laws which allow the rapist to have his criminal responsibility extinguished or mitigated if he marries the victim. States parties should indicate whether marrying the victim extinguishes or mitigates criminal responsibility and in the case in which the victim is a minor whether the rape reduces the marriageable age of the victim, particularly in societies where rape victims have to endure marginalization from society." See also Committee against Torture, General Comment No 2, "Implementation of article 2 by States parties", UN Doc CAT/C/GC/2 (2008), paragraph 18.

<sup>82</sup> *Miguel Castro-Castro Prison v Peru*, Inter-American Court of Human Rights, 25 November 2006.

<sup>83</sup> Human Rights Committee, *Concluding Observations: Third Periodic Report of the United States of America*, UN Doc CCPR/C/USA/CO/3/Rev.1 (2006), paragraph 33, which refers to concern at the shackling of detained women during childbirth, citing Articles 7 and 10 of the ICCPR. See also the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the General Assembly under resolution 65/229 (2010), Rule 24 of which provides: "Instruments of restraint shall never be used on women during labour, during birth and immediately after birth".

<sup>84</sup> Human Right Committee, General Comment No 28, above note 71, paragraph 11; and Committee against Torture, General Comment No 2, above note 81, paragraph 18. The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or

- Marital rape,<sup>86</sup> (contrary to legal traditions that may hold that a wife gives constant and on-going agreement to sexual contact with her husband).<sup>87</sup>
- Stalking.<sup>88</sup>
- Sexual assault.<sup>89</sup>
- Sexual harassment at work.<sup>90</sup>

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private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.

<sup>85</sup> UN Declaration on Violence Against Women, adopted by the General Assembly under resolution 48/104 (1993), Article 2(a).

<sup>86</sup> *Ibid*, Article 2(a).

<sup>87</sup> See generally, *S.W. v The United Kingdom*, European Court of Human Rights Application No 20166/92, judgment of 22 November 1995, paragraph 37 onwards. See especially paragraph 44: "[T]he abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom".

<sup>88</sup> The Istanbul Convention, above note 76, Article 34, defines stalking as "the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised".

<sup>89</sup> *Egyptian Initiative for Personal Rights and Interights v Egypt*, African Commission on Human and Peoples' Rights Communication 334/06, in which the victims complained of having their clothes torn and removed, their breasts and genitals groped, being beaten, slapped and having their hair pulled, and being subjected to sexual and gender-based insults such as "slut" and "whore".

- Sexual harassment in the community,<sup>91</sup> including street harassment.<sup>92</sup>
- Sexual harassment<sup>93</sup> in the school context,<sup>94</sup> including during transport between home and school.<sup>95</sup>
- Sexual harassment generally (not limited to a particular place, situation or context).<sup>96</sup>
- Denial of access to sexual and reproductive health services and violation of sexual and reproductive rights.<sup>97</sup>

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<sup>90</sup> UN Declaration on Violence against Women, above note 85, Article 2(b).

<sup>91</sup> Ibid, Article 2(b).

<sup>92</sup> United Nations Commission on the Status of Women, "Agreed conclusions on the elimination and prevention of all forms of violence against women and girls", UN Doc E/CN.6/2013/11, paragraph 23.

<sup>93</sup> Istanbul Convention, above note 76, Article 40: "Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction".

<sup>94</sup> UN Declaration on Violence against Women, above note 85, Article 2(b).

<sup>95</sup> General Assembly resolution 69/147 on "Intensification of efforts to eliminate all forms of violence against women and girls", UN Doc A/RES/69/147 (2015), paragraph 20(o) of which calls on States to "[improve] the safety and security of girls at and on the way to and from school, including by establishing a safe and violence-free environment, by improving infrastructure such as transportation, by providing separate and adequate sanitation facilities in all relevant places and improved lighting, playgrounds and safe environments, and by adopting national policies to prohibit, prevent and address violence against children, especially girls, including sexual harassment and bullying and other forms of violence, through such measures as conducting violence prevention activities in schools and communities and establishing and enforcing penalties for violence against girls".

<sup>96</sup> Istanbul Convention, above note 76, Article 40.

<sup>97</sup> Human Rights Committee, General Comment No 28, above note 71, paragraph 11: "To assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for

- Sexual exploitation of girls.<sup>98</sup>
- Violence against girls, including all forms of physical or mental violence, injury or abuse, neglect or negligent treatment.<sup>99</sup>

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children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape. The States parties should also provide the Committee information on measures to prevent forced abortion or forced sterilization.” See also Committee against Torture, General Comment No 2, above note 81, paragraph 22: “The contexts in which females are at risk [of torture or ill-treatment] include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes”.

<sup>98</sup> Committee on the Rights of the Child, General Comment No 7, above note 72, paragraph 36(g); and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

<sup>99</sup> Committee on the Rights of the Child, General Comment No 13, “The right of the child to freedom from all forms of violence”, UN Doc CRC/C/GC/13 (2011), paragraphs 4 and 72(b). Paragraph 4 provides: “For the purposes of the present general comment, “violence” is understood to mean “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” as listed in article 19, paragraph 1, of the Convention. The term violence has been chosen here to represent all forms of harm to children as listed in article 19, paragraph 1, in conformity with the terminology used in the 2006 United Nations study on violence against children, although the other terms used to describe types of harm (injury, abuse, neglect or negligent treatment, maltreatment and exploitation) carry equal weight. In common parlance the term violence is often understood to mean only physical harm and/or intentional harm. However, the Committee emphasizes most strongly that the choice of the term violence in the present general comment must not be interpreted in any way to minimize the impact of, and need to address, non-physical and/or non-intentional forms of harm (such as, inter alia, neglect and psychological maltreatment).” In addressing the gender dimensions of violence against children, paragraph 72(b) provides: “States parties should ensure that policies and measures take into account the different risks facing girls and boys in respect of various forms of violence in various

- Other “harmful practices”<sup>100</sup> including: dowry-related violence,<sup>101</sup> female genital mutilation,<sup>102</sup> forced<sup>103</sup> and

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settings. States should address all forms of gender discrimination as part of a comprehensive violence-prevention strategy. This includes addressing gender-based stereotypes, power imbalances, inequalities and discrimination which support and perpetuate the use of violence and coercion in the home, in school and educational settings, in communities, in the workplace, in institutions and in society more broadly. Men and boys must be actively encouraged as strategic partners and allies, and along with women and girls, must be provided with opportunities to increase their respect for one another and their understanding of how to stop gender discrimination and its violent manifestations;”.

<sup>100</sup> Article 1(g) of the Maputo Protocol, above note 75, defines ‘Harmful Practices’ as: “all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity”. The Maputo Protocol requires States to “enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women” (Article 2(1)(b)). For a comprehensive approach to all forms of harmful practices, see “Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / general comment No. 18 of the Committee on the Rights of the Child on harmful practices”, UN Doc CEDAW/C/GC/31-CRC/C/GC.18 (2014), especially Part VI. This joint General Comment of the two treaty bodies contains a comprehensive approach to eradicating these harmful practices, which are strongly rooted in social attitudes.

<sup>101</sup> UN Declaration on Violence against Women, above note 85, Article 2(a).

<sup>102</sup> Ibid, Article 2(a); CEDAW General Recommendation No 24, “Women and Health”, UN Doc A/54/38 at 5 (1999), paragraph 12; Committee against Torture, General Comment No 2, above note 81, paragraph 18; Human Rights Committee, General Comment No 28, above note 71, paragraph 11; and Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 20, “Non-discrimination in economic, social and cultural rights”, UN Doc E/C.12/GC/20 (2009), paragraph 35.

<sup>103</sup> Human Rights Committee, General Comment No 28, above note 71, paragraph 24.

early marriage,<sup>104</sup> violence against older women,<sup>105</sup> violence targeted against lesbian, gay, and transgender women,<sup>106</sup> violence targeted against disabled women,<sup>107</sup> and violence targeting indigenous women.<sup>108</sup>

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<sup>104</sup> Committee on Economic, Social and Cultural Rights, General Comment No 16, "The equal right of men and women to the enjoyment of all economic, social and cultural rights", UN Doc E/C.12/2005/4 (2005), paragraph 27.

<sup>105</sup> CEDAW General Recommendation No 27, "Older women and protection of their human rights", UN Doc CEDAW/C/GC27 (2010), paragraphs 37-38: "37. States parties have an obligation to draft legislation recognizing and prohibiting violence, including domestic, sexual violence and violence in institutional settings, against older women, including those with disabilities. States parties have an obligation to investigate, prosecute and punish all acts of violence against older women, including those committed as a result of traditional practices and beliefs"; "38. State parties should pay special attention to the violence suffered by older women in times of armed conflict, the impact of armed conflicts on the lives of older women, and the contribution that older women can make to the peaceful settlement of conflicts and to reconstruction processes. States parties should give due consideration to the situation of older women when addressing sexual violence, forced displacement and the conditions of refugees during armed conflict. States parties should take into account relevant United Nations resolutions on women and peace and security when addressing such matters, including, in particular, Security Council resolutions 1325 (2000), 1820 (2008) and 1889 (2009)."

<sup>106</sup> Report of the Office of the United Nations High Commissioner for Human Rights, "Discrimination and violence against individuals based on their sexual orientation and gender identity", UN Doc A/HRC/29/23 (2015), paragraphs 20-40.

<sup>107</sup> Convention on the Rights of Persons with Disabilities, especially Article 3(g) concerning equality between men and women with disabilities; Article 12 concerning recognition before the law; Article 13 on access to justice; Article 15 on freedom from torture; and Article 16 on freedom from exploitation, violence and abuse. See also the report of the Office of the United Nations High Commissioner for Human Rights, "Thematic study on the issue of violence against women and girls and disability", UN Doc A/HRC/20/5 (2012).

<sup>108</sup> See the inter-agency study (UN Women, UNICEF, UNFPA, ILO and the Office of the Special Representative of the Secretary-General on

### **Trafficking: a complex legal problem**

Article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, recognizes the trafficking in persons as:

- “(a) ...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- “(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- “(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.”

The CEDAW Committee has expressed concern about trafficking not just for the purposes of prostitution, but also for the purposes of other forms of domestic labour, factory work (maquiladoras) and organized marriage between women from developing countries and foreign nationals. The CEDAW

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violence against children), “Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women: A call to action based on an overview of existing evidence from Africa, Asia Pacific and Latin America” (New York: UNICEF Programme Division, 2013).

Committee has noted that these practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity, thereby placing women at special risk of violence and abuse.<sup>109</sup>

The CEDAW Committee observed that there is a gender disparity amongst those migrating for survival, and accepting dangerous arrangements to do so, that has resulted in a “feminization of migration”. This is often as a result of the failure of social structures to provide equal economic, educational and employment opportunities for women as well as protection from harm, including violence against women.<sup>110</sup>

An understanding of trafficking requires a complex analysis and level of detail which is not possible in this Practitioners Guide, as it involves an analysis of trafficking-specific treaties, treaties relating to slavery and the slave trade, forced labour, and criminal justice, as well as an analysis of international human rights law. Within international human rights law, several angles need to be addressed: women’s rights, children’s rights, labour rights and migrant workers’ rights, including rights to citizenship and nationality.

The CEDAW Commentary on Article 6 of the CEDAW Convention contains a detailed analysis of the issue of trafficking of women, and is a good first step for research on the legal issues involved.<sup>111</sup>

### **Sex work/prostitution**

The CEDAW Convention uses the term “prostitution” in Article 6, and refers to the requirement on States to address the “exploitation of prostitution” rather than prostitution in itself.

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<sup>109</sup> Marsha Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women. A Commentary* (Oxford: Oxford University Press, 2012) – hereafter referred to as the ‘CEDAW Commentary’, page 171.

<sup>110</sup> Ibid, pages 171-172.

<sup>111</sup> Ibid, pages 170-196.

Another term commonly used in discussions around commercial sexual activity is “sex work” and this is the term preferred by those advocating for prostitution to be considered as legitimate work and subject to legislation regarding health and safety at work. According to UNAIDS, “[t]he term sex worker has gained popularity over prostitute because those involved feel that it is less stigmatizing and say that the reference to work better describes their experience”.<sup>112</sup>

The difference in terminology reflects a profound disagreement about whether the exchange of sexual acts for payment is a form of sexual slavery or an exercise of adults’ individual liberty. The CEDAW Commentary notes that: “Others acknowledge discomfort with the concept of sex as labour, yet none the less oppose [criminalization of prostitution/sex work] on pragmatic grounds, believing that such policies – even those that seek to decriminalize the prostitute while penalizing all other actors involved in the sex industry – can work to harm prostitutes, for example, by driving the sex industry further underground”.<sup>113</sup> However, under both conceptions of the appropriate criminal law, the sex worker/prostitute should not be subject to the criminal law. This is either because: sex workers/prostitutes are considered to be exercising their right to privacy and sexual autonomy in choosing sex work/prostitution as a form of work, and therefore this is protected behaviour under international human rights law, which should not be subject to the criminal law; or, conversely, that a prostitute/sex worker is a victim of sexual violence and coercion, and should not be criminalized because of her (or his) victimization.

Irrespective of the view taken on whether sex work/prostitution is inherently a form of criminal abuse or inherently a matter of individual choice, there are some general principles of international human rights law that are relevant to the situation of sex workers/prostitutes.

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<sup>112</sup> UNAIDS Technical Update, “Sex work and HIV/AIDS” (June 2002), page 3.

<sup>113</sup> CEDAW Commentary, above note 109, page 178.

CEDAW's General Recommendation No 33 recognizes that being a prostitute/sex worker is in itself a barrier to justice, and that the criminalization of prostitution is a further barrier to access to justice.<sup>114</sup>

Adults engaged in prostitution/sex work, as in every other context, should be freely choosing each and every sexual contact. This is otherwise a form of rape (where the act involves penetration) or sexual assault.<sup>115</sup> States should ensure: that all the concerns and reports that sex workers/prostitutes have about violence they are subjected to - whether by pimps, clients, family members or others, can be raised safely; that women in sex work/prostitution feel able and empowered to report violence, and are treated with the professionalism and dignity deserving of everyone. It is important to acknowledge that sex workers/prostitutes are often targeted for violence and abuse of power by police officers. Violence against sex workers/prostitutes by police is particularly difficult to address, as police are then required to investigate their own colleagues. Within such a context, women sex workers/prostitutes will not be confident to bring their requests for investigation and protection to the attention of police. Attitudes to violence against sex workers/prostitutes show the marginalization of sex workers in society - assumptions that sex workers "cannot be raped" feeds misogynistic views that rape victims "ask for" violence.

No child under 18 should be involved in sex work/prostitution.<sup>116</sup>

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<sup>114</sup> CEDAW General Recommendation No 33, "General recommendation on women's access to justice", UN Doc CEDAW/C/GC/33 (2015), paragraph 9.

<sup>115</sup> To be legal under international human rights law, each and every episode of sexual contact must be freely chosen by individuals exercising sexual autonomy - any other sexual contact is a form of rape or sexual assault. See Chapter V below on rape and sexual violence.

<sup>116</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; see also

States should also be aware of other arising forms of violence against women, including harassment using new technologies for example. The CEDAW Committee has recalled that: "The spirit of the Convention covers other rights that are not explicitly mentioned in the Convention, but that have an impact on the achievement of equality of women with men, which impact represents a form of discrimination against women".<sup>117</sup>

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the Convention on the Rights of the Child, Article 32 (on economic exploitation), Article 34 (on sexual exploitation, including pornography and prostitution), Article 35 (on trafficking) and Article 36 (on exploitation prejudicial to the child's welfare).

<sup>117</sup> CEDAW General Recommendation No 28, "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), paragraph 7.

## CHAPTER IV

**RESPECT, PROTECT, FULFIL: STATE RESPONSIBILITY FOR ITS OWN ACTIONS, AND THE ACTIONS OF NON-STATE ACTORS**

When they ratify or accede to human rights treaties, States undertake to respect, protect and fulfil the rights provisions contained therein. A substantial portion of the body of human rights law is part of general international law and customary law, which bind all States.<sup>118</sup>

**The obligation to respect**

The obligation to respect human rights means that States must desist from conduct (whether acts or omissions) that would interfere with or curtail the enjoyment of human rights. This part of the chapter considers the obligation to respect from the following perspectives: (a) the requirement that State actors must not commit gender-based violence; (b) the need to ensure equal treatment in law and in practice; and (c) State responsibility for the conduct of non-State actors.

***Respect: (a) State actors must not commit gender-based violence***

Failure to desist from conduct that would interfere with or curtail the enjoyment of human rights constitutes a human rights violation. Gender-based violence committed by public authorities breaches the CEDAW Convention and other human rights treaties. For example, unlawful gender-based killings by public officials is a violation of the right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), and analogous provisions of regional human rights treaties.<sup>119</sup> Acts of violence against women causing severe pain and

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<sup>118</sup> Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 8<sup>th</sup> edition, 2012), pages 642-643.

<sup>119</sup> See, for example, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará) of 9 June 1994, Article 7(a).

suffering – for example rape in custody – have been recognized as a form of torture.<sup>120</sup> Torture or cruel, inhuman or degrading treatment or punishment is a violation under Article 7 of the ICCPR, as well as of the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and analogous regional human rights treaties. The balance of this section considers torture and ill-treatment in the context of detention as an example of a State's obligation to respect through non-commission of human rights violations.

“Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.”<sup>121</sup>

Torture and ill-treatment often occur in situations of detention. Conditions of detention may be conducive to violence against women, since they involve an inherent imbalance of power between the detained individual and the detaining authority. This is especially so in the case of women detainees, the CEDAW Committee explained that where penal provisions are discriminatory this can result in “the secondary victimization of women by the criminal justice system [which] has an impact on their access to justice, owing to their heightened vulnerability to mental and physical abuse and threats during arrest, questioning and in detention”.<sup>122</sup>

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<sup>120</sup> *Raquel Martí de Mejía v Perú*, Inter-American Commission on Human Rights Case No 10.970, Report No 5/96; *Aydın v Turkey*, (1997) ECHR 75; *Miguel Castro-Castro Prison v Peru*, Inter-American Court of Human Rights, 25 November 2006.

<sup>121</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 11 July 2003, Article 4(2)(g).

<sup>122</sup> CEDAW General Recommendation No 33, “General recommendation on women's access to justice”, UN Doc CEDAW/C/GC/33 (2015), paragraph 48.

The United Nations Standard Minimum Rules for the Treatment of Prisoners (known as “the Mandela Rules”) affirms that all prisoners have the right to be treated with “the respect due to their inherent dignity and value as human beings” and that, as such, they should not be subjected to torture or other forms of cruel, inhuman or degrading treatment or punishment.<sup>123</sup> This right must be guaranteed to all, without discrimination, including on the grounds of sex.<sup>124</sup>

Prison conditions should not be harsh or punitive. The Mandela Rules recognize that: “Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.”<sup>125</sup>

As recognized by the European Court of Human Rights in *Selmouni v France*, the distinction between torture and other forms of cruel, inhuman or degrading treatment is subject to change over time. The Court took the view that “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”.<sup>126</sup>

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<sup>123</sup> United Nations Standards Minimum Rules for the Treatment of Prisoners (the Mandela Rules), as presented to the Economic and Social Council by the Commission on Crime Prevention and Criminal Justice, UN Doc E/CN.15/2015/L.6/Rev.1 (2015), Rule 1. See also the International Covenant on Civil and Political Rights (ICCPR), Articles 7 and 10, and the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment (CAT), Article 1.

<sup>124</sup> Mandela Rules, *ibid*, Rule 2; ICCPR, Articles 2(1) and 3; CEDAW Convention, Article 1.

<sup>125</sup> Mandela Rules, above note 123, Rule 5.

<sup>126</sup> *Selmouni v France*, European Court of Human Rights, Application 25803/94, 28 July 1999, paragraph 101.

The following is a list of the forms of conduct that have been recognized as amounting to torture or ill-treatment, and in respect of which women prisoners may be especially vulnerable to, and corresponding standards to prohibit and prevent such violations. This is not an exhaustive list, and there may be some overlap between the forms of torture and ill-treatment set out immediately below and breaches of the standards for detention concerning discrimination against women in the penal system under Article 2(g) of the CEDAW Convention (see below, Chapter V).

- Rape and sexual violence in detention
  - Women are often subjected to violence and abuse of all kinds in detention, frequently rape and sexual abuse. These forms of violence and abuse constitute torture or ill-treatment. Interference with privacy and inappropriate touching by male prison guards have been identified as sexual harassment and discrimination within the meaning of Articles 1 and 5(a) of the CEDAW Convention and General Recommendation 19 of the CEDAW Committee.<sup>127</sup>
  - According to the Bangkok Rules, women reporting violence and abuse must be provided with immediate protection, support and counselling. Their allegations must be “investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically risks of retaliation.”<sup>128</sup>
  - The Bangkok Rules further specify that “women prisoners who have been subjected to sexual abuse,

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<sup>127</sup> See also *Inga Abramova v Belarus*, CEDAW Communication 23/2009, UN Doc CEDAW/C/49/D/23/2009 (2011).

<sup>128</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the General Assembly under its resolution 65/229 (2011), Rule 25(1).

and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid".<sup>129</sup>

- Conducting searches of penal institutions
  - In the case of *Miguel Castro-Castro Prison v Peru*, the Inter-American Commission on Human Rights recognized that certain types of searches can constitute torture or ill-treatment, particularly "finger vaginal 'inspections'"<sup>130</sup> and supervision of naked women by male guards.<sup>131</sup>
  - Safety and security searches should be carried out in accordance with international standards,<sup>132</sup> in ways that ensure women's dignity and right to respect, and should only be carried out by properly trained women staff.<sup>133</sup> Women officers should have responsibility for supervising women detainees and prisoners.<sup>134</sup> Alternative screening methods, such as scans, should be developed to replace strip searches and invasive body searches.<sup>135</sup> Searches must not

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<sup>129</sup> Ibid, Rule 25(2).

<sup>130</sup> *Miguel Castro-Castro Prison v Peru*, above note 120, paragraphs 309 and 432(g).

<sup>131</sup> Ibid, paragraph 432(h).

<sup>132</sup> Mandela Rules, above note 123, Rule 51.

<sup>133</sup> Bangkok Rules, above note 128, Rule 19.

<sup>134</sup> See Human Rights Committee, General Comment No 28, "The Equality of Rights between Men and Women (Article 3)", UN Doc CCPR/C/21/Rev.1/Add.10 (2000), paragraph 15, which provides: "As regards articles 7 and 10, States parties must provide all information relevant to ensuring that the right of persons deprived of their liberty are protected on equal terms for men and women. In particular, States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards." See also *Inga Abramova v Belarus*, above note 127, paragraph 7.6.

<sup>135</sup> Bangkok Rules, above note 128, Rule 20.

be used to harass or intimidate anyone and records of searches, the reasons for them, the identities of personnel undertaking the searches and the results of such searches must be kept.<sup>136</sup>

- Intrusive searches, including strip and body cavity searches, must only be undertaken if absolutely necessary and only be carried out by a woman member of staff who has been medically trained on how to carry out such searches hygienically and without causing harm to the prisoner.<sup>137</sup>
- Searches of children in prison and child visitors to prisons must be carried out with professionalism and sensitivity, respecting the dignity of children.<sup>138</sup> Body cavity searches should be avoided and should not be applied to children.<sup>139</sup>
- Shackling during childbirth
  - Instruments of restraint should never be used on women during labour, during birth and immediately after birth.<sup>140</sup> Shackling during labour and birth constitutes a risk to the health of the woman and the foetus,<sup>141</sup> and has been identified by the UN Committee against Torture as a form of ill-treatment that is in violation of the Convention

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<sup>136</sup> Mandela Rules, above note 123, Rule 51.

<sup>137</sup> Ibid, Rule 52.

<sup>138</sup> Bangkok Rules, above note 128, Rule 21.

<sup>139</sup> Mandela Rules, above note 123, Rule 60(2).

<sup>140</sup> Bangkok Rules, above note 128, Rule 24; Mandela Rules, above note 123, Rule 48(2).

<sup>141</sup> American College of Obstetricians and Gynaecologists, "Health Case for Pregnant and Postpartum Incarcerated Women and Adolescent Females", Committee Opinion No 511 (2011), available at URL: <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females>.

against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.<sup>142</sup>

- The Human Rights Committee has further explained that pregnant women who are deprived of their liberty “should receive humane treatment and respect for their inherent dignity at all times surrounding the birth and while caring for their newly-born children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies”.<sup>143</sup>
- Disciplinary sanctions
  - The Mandela Rules clearly prohibit the use of any disciplinary proceedings that constitute torture or ill-treatment:

Rule 43

- “1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
- “(a) Indefinite solitary confinement;
  - “(b) Prolonged solitary confinement;
  - “(c) Placement of a prisoner in a dark or constantly lit cell;

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<sup>142</sup> Committee against Torture, *Concluding Observations: Third to Fifth Combined Periodic Reports of the United States of America*, UN Doc CAT/C/USA/CO/3-5 (2014), paragraph 21: “the Committee notes that 19 states have enacted laws restricting the shackling of pregnant inmates and that such legislation has been under consideration in a number of other states. The Committee is nevertheless concerned at reports that, in certain cases, incarcerated women are still shackled or otherwise restrained throughout pregnancy and during labour, delivery and post-partum recovery (arts. 2, 11, 12, 13, 14 and 16).”

<sup>143</sup> Human Rights Committee, General Comment No 28, above note 134, paragraph 15.

"(d) Corporal punishment or the reduction of a prisoner's diet or drinking water;

"(e) Collective punishment.

"2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.

"3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order."<sup>144</sup>

- Discipline and punishment of women with children
  - Discipline and punishment should not involve isolating or segregating pregnant women, women with babies or breastfeeding mothers.<sup>145</sup> Disciplinary sanctions must not include a prohibition of family contact, especially with children.<sup>146</sup>
- Imposition of sanctions for behaviour related to mental health or developmental problems
  - Prisoners should not be sanctioned for behaviour related to their mental health or developmental problems.<sup>147</sup> The imposition of solitary confinement should be prohibited in the case of prisoners with

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<sup>144</sup> Mandela Rules, above note 123, Rule 43.

<sup>145</sup> Bangkok Rules, above note 128, Rule 22.

<sup>146</sup> Ibid, Rule 23.

<sup>147</sup> Mandela Rules, above note 123, Rule 39(3), which provides: "Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commitment of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability."

mental or physical disabilities when their conditions would be exacerbated by such measures.<sup>148</sup>

- Mental health needs are particularly acute in prison
  - Mental health care is particularly important for women in detention or prison, a high proportion of whom may be survivors of gender-based violence, or come from social groups that are particularly marginalized.<sup>149</sup>
  - The European Court of Human Rights has recognized that denial of mental health services to mentally ill prisoners constitutes inhuman and degrading treatment or punishment within the meaning of Article 3 of the European Convention on Human Rights.<sup>150</sup> The Human Rights Committee has similarly held that the continued detention of a person “when the State party was aware of the [person’s] mental condition and failed to take the steps necessary to ameliorate the [person’s] mental deterioration constituted a violation of his rights under Article 7 [of the ICCPR].”<sup>151</sup>
  - The Bangkok Rules require that “individualised, gender-sensitive, trauma-informed and comprehensive mental health care and rehabilitation

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<sup>148</sup> Mandela Rules, above note 123, Rule 45(2).

<sup>149</sup> UN Women, “Progress of the World’s Women 2010-2011. In pursuit of justice” (UN Publications, 2011), page 62 of which notes that: “Women in prison share many common traits: they are typically young, have low levels of education and dependent children. In Brazil’s largest women’s prison, 87 percent of women prisoners are mothers. Many have histories of mental health problems, alcohol and substance abuse, and a high proportion have experienced violence. A study in Canada found that 82 percent of women in prison have a history of sexual or physical abuse.”

<sup>150</sup> *Keenan v UK* (2001) ECHR 242, paragraphs 111 and 116; and *Dybeku v Albania* (2007) ECHR 1109, paragraphs 48-52.

<sup>151</sup> *C v Australia*, Human Rights Committee Communication 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), paragraph 8.4.

programmes" must be made available to women prisoners with mental health-care needs.<sup>152</sup>

- On admission to prison, physicians should examine prisoners, paying special attention to "[i]dentifying any signs of psychological or other stress brought on by the fact of imprisonment, including, but not limited to, the risk of suicide or self-harm and withdrawal symptoms resulting from the use of drugs, medication or alcohol; and undertaking all appropriate individualized measures or treatment".<sup>153</sup>
- Those suffering from mental health problems must be given the treatment they need including, if necessary, away from the prison environment. The Mandela Rules explain that:

#### Rule 109

- "1. Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.
- "2. If necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialized facilities under the supervision of qualified health-care professionals.

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<sup>152</sup> Bangkok Rules, above note 128, Rule 12.

<sup>153</sup> Mandela Rules, above note 123, Rule 30(c).

- “3. The health-care service shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.”<sup>154</sup>
- Prison officials should be trained in the detection of mental health problems in order to be able to identify prisoners in need promptly.<sup>155</sup> Suicide and self-harm prevention should also be prioritised.<sup>156</sup>
  - Standards for medical care and access to female medical practitioners
    - Denial of medical treatment in prison has been identified as a form of ill-treatment.<sup>157</sup> Women in prison or detention are particularly vulnerable to ill-treatment as a result of being deprived access to necessary healthcare services. Good quality healthcare services should therefore be made available in any kind of detention facility or prison.
    - Healthcare services should, in this regard, be at least equivalent to those available in the community.<sup>158</sup>
    - As far as possible, healthcare services for women should be provided by women professionals. Where this is not possible, a female staff member must be

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<sup>154</sup> Ibid, Rule 109.

<sup>155</sup> Bangkok Rules, above note 128, Rule 35; and Mandela Rules, above note 123, Rule 76(d).

<sup>156</sup> Bangkok Rules, above note 128, Rule 16.

<sup>157</sup> See for example: *Mika Miha v Equatorial Guinea*, Human Rights Committee Communication 414/1990, UN Doc CCPR/C/51/D/414/1990 (1994), paragraph 6.4; *Brown v Jamaica*, Human Rights Committee Communication 775/1997, UN Doc CCPR/C/65/D/775/1997 (1999), paragraph 6.13; *C v Australia*, above note 151, paragraph 8.4; *Mulezi v Democratic Republic of Congo*, Human Rights Committee Communication 962/2001, UN Doc CCPR/C/81/D/962/2001 (2004), paragraph 5.3.

<sup>158</sup> Bangkok Rules, above note 128, Rule 10(1); and Mandela Rules, above note 123, Rule 24(1).

present during the consultation.<sup>159</sup> Medical examinations should only take place with medical professionals present unless, exceptionally, there is a security reason to do otherwise.<sup>160</sup> In such cases, consultations should be carried out in a manner that safeguards privacy, dignity and confidentiality.<sup>161</sup>

- The Mandela Rules further clarify that: "Clinical decisions may only be taken by the responsible health-care professionals and may not be overruled or ignored by non-medical prison staff".<sup>162</sup>

### **Torture and ill-treatment in the context of medical treatment, whether forced, coerced or denied**

#### *Reproductive health treatment denied*

The use of some medical procedures have already been recognized as crimes, especially war crimes, crimes against humanity and genocide, but also in general human rights treaties such as the Istanbul Convention (see Chapter VIII on 'forced abortion and forced sterilization').

Denial of access to abortion has been recognized as a violation of the right not to be subjected to torture and ill-treatment in a case where a 16-year-old was forced to continue an anencephalic pregnancy, where the foetus would have no chance of life;<sup>163</sup> and in a case where a young woman with learning difficulties became pregnant as a result of rape.<sup>164</sup>

The Committee against Torture has also determined that complete legal bans on abortion, including criminalization of

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<sup>159</sup> Bangkok Rules, above note 128, Rule 10(2).

<sup>160</sup> Ibid, Rule 11(1).

<sup>161</sup> Ibid, Rule 11(2).

<sup>162</sup> Mandela Rules, above note 123, Rule 27.

<sup>163</sup> *K.L. v Peru*, Human Rights Committee Communication 1153/2003, UN Doc CCPR/C/85/D/1153/2003 (2005).

<sup>164</sup> *L.M.R. v Argentina*, Human Rights Committee Communication 1608/2007, UN Doc CCPR/C/101/D/1608/2007 (2011).

abortion, may constitute torture or ill-treatment, because such bans put women at increased risk of maternal mortality or morbidity. The Committee has required that access to abortion services be secured where a woman's life or health is at stake, where the pregnancy is the result of rape and sexual violence, or the foetus is not viable. The Committee has also treated as a violation of the Convention against Torture the denial of post-abortion healthcare, including denial of access to pain relief, and the practice of doctors reporting to the police cases where they suspect a woman has sought an abortion.<sup>165</sup>

### *Coerced surgeries*

Human rights experts have also expressed concern that transgender and intersex people are forced or coerced into surgeries that they do not want, such as sterilization, for reasons such as to obtain legal recognition for their chosen gender.<sup>166</sup>

### ***Respect: (b) Ensuring equal treatment in law and practice***

The CEDAW Committee has identified the obligation to respect as requiring that "States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in

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<sup>165</sup> Centre for Reproductive Rights, Briefing Paper: "Reproductive Rights Violations as Torture and Cruel, Inhuman and Degrading Treatment or Punishment: A Critical Human Rights Analysis" (2010), URL: <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/TCIDT.pdf>; and Centre for Reproductive Rights, Fact Sheet: "Reproductive Rights Violations as Torture or Ill-Treatment", URL: [http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Reproductive\\_Rights\\_Violations\\_As\\_Torture.pdf](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Reproductive_Rights_Violations_As_Torture.pdf).

<sup>166</sup> Amnesty International, "The State decides who I am': Lack of legal gender recognition for transgender people in Europe", AI Index EUR 01/001/2014.

the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights".<sup>167</sup>

***Respect: (c) State responsibility for the conduct of non-State actors***

While generally the obligation to respect engages only the conduct of State actors, there are certain occasions in which the conduct of non-state actors may be attributable to the State, and therefore a wrongful act by a non-State actor will mean that the State itself is responsible for the violation. Under international principles of State responsibility, conduct of non-State actors acting on the instructions, or under the direction or control, of the State will be attributable to the State.<sup>168</sup> In addition, the conduct of persons or entities that are not organs of the State, but are empowered by the State to exercise elements of governmental authority, may be attributable to the State.<sup>169</sup> There are situations where such wrongful conduct may amount to violence against women. Thus, acts of violence against women by private military or security agents, contracted by the State to run prisons or conduct security or military operations, may be attributed to the State itself.

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<sup>167</sup> CEDAW General Recommendation No 28, "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).

<sup>168</sup> Articles on Responsibility of States for Internationally Wrongful Acts, adopted under General Assembly resolution 56/83 (2001), Article 8. See also CEDAW General Recommendation No 28, *ibid*, in which the CEDAW Committee said: "In some cases, a private actor's acts or omission of acts may be attributed to the State under international law" (paragraph 13).

<sup>169</sup> Articles on Responsibility of States for Internationally Wrongful Acts, *ibid*, Article 5.

### **The obligation to protect: the challenge of violence by third parties, including private and other non-State actors**

States also undertake to protect human rights: to ensure that private individuals do not interfere with or abuse the human rights of others.<sup>170</sup> States are responsible for acts of gender-based violence committed by private individuals where the State has known – or ought to have known – that women were at risk, and failed to take appropriate steps to prevent, investigate or prosecute.

This may be the case, for example, where family members commit “honour killings” of women, or where men kill their

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<sup>170</sup> CEDAW General Recommendation No 19, “Violence against women”, UN Doc A/47/38 (1992), paragraph 9: “It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights Covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.” See also: Convention of Belém do Pará, above note 119, Article 7(c); and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, Article 5, which provides as follows concerning State obligations and due diligence:

“(1) Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.

“(2) Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.”

wives,<sup>171</sup> children,<sup>172</sup> or relatives<sup>173</sup> after a history of domestic violence.

Most violence against women is neither perpetrated by State actors nor by non-State actors whose conduct is attributable to the State. However, while the State itself will not typically be directly responsible for violence against women that arises from the conduct of non-State actors, it remains responsible for taking measures to ensure that persons under its jurisdiction are protected from threats to the enjoyment of human rights brought about by the conduct of non-State actors.

Under contemporary international human rights law, this obligation is categorized as an obligation to protect. The measures to be employed by States extend to preventing and stopping abuses, but also to ensuring that those subjected to such abuses can access effective remedies and reparation and that those responsible are held to account.

In relation to States parties' obligations under the CEDAW Convention, the CEDAW Committee has explained that the obligation to protect requires that States parties "protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practice that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for

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<sup>171</sup> *Goecke v Austria*, CEDAW Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005 (2007); and *Yildirim v Austria*, CEDAW Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (2007).

<sup>172</sup> *Angela González Carreño v Spain*, CEDAW Communication No 47/2012, UN Doc CEDAW/C/58/D/47/2012 (2014). See also *Jessica Lenahan (Gonzales) et al v the United States*, Inter-American Commission on Human Rights Case No 12.626, Report No. 80/11 (21 July 2011), which relates to the kidnapping and killing of three children, although it is not clear whether the children were killed by their father or by law enforcement officials: however the case outlined in detail the State's obligation to enforce protection orders and therefore prevent killing of children known to be at risk.

<sup>173</sup> *Opuz v Turkey* (2009) ECHR 870.

men and women".<sup>174</sup> The Committee also emphasized that States could be held responsible for private acts if they "fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and for providing compensation".<sup>175</sup>

The UN Human Rights Committee has similarly affirmed the duty to protect in relation to State obligations under the ICCPR. In its General Comment 31, the Human Rights Committee affirmed that, whilst the ICCPR cannot be viewed as a substitute for domestic criminal or civil law, "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."<sup>176</sup> The Committee affirmed that States failing to act with due diligence to "prevent, punish, investigate or redress the harm" that private persons have caused may give rise to

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<sup>174</sup> CEDAW General Recommendation No 28, above note 167, paragraph 9.

<sup>175</sup> CEDAW General Recommendation No 19, above note 170, paragraph 9; and CEDAW General Recommendation No 28, above note 167, paragraph 13: "Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor's acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing."

<sup>176</sup> Human Rights Committee, General Comment No 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc CCPR/C/21/Rev.1/Add.13 (2004), paragraph 8.

State responsibility, and stated that it was "implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power".<sup>177</sup>

In the case of *Yildirim v Austria*,<sup>178</sup> in which the applicant was murdered by her husband after suffering several years of domestic violence, the CEDAW Committee expanded on the content of the standard of positive action required by the State's duty of due diligence for the actions of non-State actors. The CEDAW Committee noted that Austria had "established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness raising, education and training, shelters, counselling for victims of violence and work with perpetrators". These formal measures, while necessary, were nonetheless found to be insufficient by themselves when the political will they expressed, was not supported by State actors in adherence to Austria's due diligence obligations.<sup>179</sup>

The same principles apply to the right not be subjected to torture and cruel, inhuman and degrading treatment or punishment. Unlawful violence, including sexual violence, committed by State agents will generally amount to proscribed ill-treatment; certain conduct, such as rape, can clearly be classified as torture.<sup>180</sup> Violence, particularly sexual violence and rape, committed by private citizens, where the State fails to exercise due diligence to prevent, investigate, and prosecute

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<sup>177</sup> Ibid, paragraph 8.

<sup>178</sup> *Yildirim v Austria*, above note 171, paragraph 12.1.2. See also *Goecke v Austria*, above note 171, paragraph 12.1.2.

<sup>179</sup> *Yildirim v Austria*, above note 171, paragraph 12.1.2.

<sup>180</sup> *Aydin v Turkey*, above note 120; *Raquel Martí de Mejía v Peru*, Inter-American Commission on Human Rights Case 10.970, Report No 5/96 (1 March 1996).

is also a breach of the right not to be subjected to torture and ill-treatment for which the State is responsible.<sup>181</sup>

### **The obligation to fulfil: States must take a variety of measures to ensure human rights in practice**

The obligation to fulfil human rights means that the State must adopt appropriate measures aimed at the full realization of human rights. The jurisprudence of certain treaty bodies and mechanisms uses the “fulfil” terminology.<sup>182</sup> The Human Rights Committee has characterized the obligation in the following terms: that States must “adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”, noting that “it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large”.<sup>183</sup>

The CEDAW Committee has added that the obligation to fulfil requires that States parties “take a wide variety of steps to ensure that women and men enjoy equal rights *de jure* and *de facto*, including, where appropriate, the adoption of temporary special measures in line with Article 4, paragraph 1, of the Convention and General Recommendation 25 on Article 4,

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<sup>181</sup> *M.C. v Bulgaria* (2003) ECHR 651; *Vertido v Philippines*, CEDAW Communication No 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010).

<sup>182</sup> Committee on Economic, Social and Cultural Rights, General Comment No 12, “The right to adequate food”, UN Doc E/C.12/1999/5 (1999), where the Committee defines the obligation to fulfil as the obligation to provide and facilitate (paragraph 15); and Committee on Economic, Social and Cultural Rights, General Comment No 14, “The right to the highest attainable standard of health”, UN Doc E/C.12/2000/4 (2000), where the uses the terms facilitate, provide and promote.

<sup>183</sup> Human Rights Committee, General Comment No 31, above note 176, paragraph 7.

paragraph 1, of the Convention. This entails obligations of means or conduct and obligations of results."<sup>184</sup>

To fulfil a right means to take active steps to put in place laws, policies, institutions, administrative measures and procedures, including the allocation of resources, to enable people to enjoy their rights. It also requires monitoring, the gathering of data on the prevalence of violence against women, and also assessing the effectiveness of remedies and reparation. State agents and officials, such as lawyers, judges, police officers, teachers and medical professionals should be trained to understand discrimination and violence against women, and to promote good practices in dealing with situations where gender-based violence have occurred or may occur. This includes taking a public stand to condemn violence and discrimination and addressing stereotypes that support the persistence of gender-based inequality and violence. Fulfilling the right of women to be free from gender-based violence requires public education, including the education of children from the earliest years, to reject discrimination and violence and to ensure the equality of women.<sup>185</sup>

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<sup>184</sup> CEDAW General Recommendation No 28, above note 167, paragraph 9.

<sup>185</sup> See generally, Committee on Economic, Social and Cultural Rights, General Comment No 16, "The equal right of men and women to the enjoyment of all economic, social and cultural rights", UN Doc E/C.12/2005/4 (2005). Most recently, the UN General Assembly called on States to "[adopt] all appropriate measures, especially in the field of education, from the entry levels of the education system, to modify the social and cultural patterns of conduct of men and women of all ages in order to promote the development of respectful relations and to eliminate prejudices, harmful 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, and raising awareness of the unacceptability of violence against women and girls at all levels, including through schools, educational programmes, teachers, parents, religious leaders, youth organizations and teaching materials sensitized on gender equality and human rights" in its resolution 67/144 (2013), paragraph 18(k).

The UN General Assembly has called on States to adopt all appropriate measures to:

- Modify social and cultural patterns of conduct of men and women to promote the development of respectful relations;
- Eliminate prejudices, harmful customs and other practices based on the idea of the inferiority or superiority of either of the sexes;
- Promote gender equality and human rights; and
- Raise awareness of the unacceptability of violence against women at all levels, including through schools, educational programmes, teachers, parents, religious leaders, youth organizations and teaching materials.<sup>186</sup>

**Promoting freedom from gender-based violence: “Necessary and achievable”**

The CEDAW Committee has said that:

“Developing a holistic and multidisciplinary approach to the challenging task of promoting families, communities and States that are free of violence against women is necessary and achievable. Equality, partnership between women and men and respect for human dignity must permeate all stages of the socialization process. Educational systems should promote self-respect, mutual respect, and cooperation between women and men.”<sup>187</sup>

The State should take effective measures to eradicate gender-based discrimination and violence.

The requirement of States to implement women’s right to physical and mental integrity, right to life, and freedom from torture and ill-treatment, requires that States:

<sup>186</sup> General Assembly resolution 67/144 (2013), paragraph 18(d) and (k).

<sup>187</sup> Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, UN Doc A/CONF.177/20 Rev.1 (1995), paragraph 119.

- Respect those rights, vis-à-vis the conduct of State agents or those whose conduct can be attributed to the State.
- Adopt and implement appropriate legal, policy and practical frameworks addressing State agents and non-state actors.
- Ensure that where a violation or abuse has occurred those responsible are held to account; and, particularly, where the abuse amounts to a criminal offence, that crime is effectively and impartially investigated and the perpetrators are brought to justice through criminal prosecution in fair trials.

### **After violence has occurred: Effective remedies and reparation for violence against women**

"States Parties [undertake to]... establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies."<sup>188</sup>

Women subject to violations of their rights should be afforded the right to an effective remedy and redress. Under general international law, as well under the specific provisions of treaties, States must guarantee the right to a prompt, accessible and effective remedy before an independent authority, including, where necessary, a judicial authority for the violation of human rights.<sup>189</sup>

Remedies and reparation for violence may take different forms. The first is the relatively straightforward situation where a State agent, or actor whose conduct may be attributed to the State (see above), is directly responsible for the abuse of

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<sup>188</sup> Convention of Belém do Pará, above note 119, Article 7(g).

<sup>189</sup> See International Commission of Jurists, Practitioners Guide No 2, "The right to a remedy and to reparation for gross human rights violations" (Geneva: International Commission of Jurists, 2006), URL: <http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/>.

human rights. The second is where the State is responsible for its failure to exercise due diligence in respect of discharging its obligation to protect, for example, where the police fail to take action to protect individual women known to be at risk of violence.<sup>190</sup> The third involves the situation where an administrative or civil action, such as a tort action, is taken directly against an individual who committed the violent act, irrespective of whether or not the State itself bears any responsibility and irrespective of whether the perpetrator has been investigated or prosecuted.

International human rights law and standards on remedies and reparation are set out in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>191</sup> These Principles set out the scope of the obligation for all violations of international human rights law, whether or not they are “gross” violations, as follows:

“The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- “(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- “(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

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<sup>190</sup> See for example, *Jessica Lenahan (Gonzales) et al v United States*, above note 172.

<sup>191</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly under its resolution 60/147 (2005).

- “(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice... irrespective of who may ultimately be the bearer of responsibility for the violation; and
- “(d) Provide effective remedies to victims, including reparation...”.<sup>192</sup>

The Principles then contain more detailed rules with respect to gross human rights violations and serious violations of international humanitarian law, which will be relevant to many instances of violence against women.

These Basic Principles require that victims have access to justice, including through the investigation and prosecution of perpetrators, and that victims “should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families”.<sup>193</sup> The reparation that victims are entitled to include five elements:

- Restitution
  - Restoring the victim, whenever possible, to their original situation prior to the violation of their right.
  - This may include: restoration of liberty, property and employment, and enjoyment of human rights, identity, family life and citizenship.
- Compensation
  - Providing for economically assessable damage, where appropriate.
  - This must take into consideration physical or mental harm, lost opportunities material damages and loss of earnings, moral damage, costs required for legal or other expert assistance.

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<sup>192</sup> Ibid, Guideline 3.

<sup>193</sup> Ibid, Guideline 10.

- Rehabilitation
  - Medical and psychological care and legal and social services.
- Satisfaction, which should include, wherever possible:
  - Effective measures to end continuing violations.
  - Verification of the facts and full public disclosure, provided this will not harm the victim or other individuals concerned in the case.
  - Search for the whereabouts of the disappeared, identities of those abducted and bodies of those killed and assistance in the recovery, identification and reburial of the bodies.
  - Official declaration of a judicial decision restoring the rights of the victims and inclusion of an accurate account of the violations in international human rights law.
  - Public apology, including acknowledgement of the facts.
  - Sanctions against persons responsible for violations.
  - Commemorations and tributes to the victims.
- Guarantees of non-repetition, which should include, where applicable:
  - Effective civilian control of military and security forces.
  - Ensuring civilian and military proceedings abide by international law and standards.
  - Strengthening the independence of the judiciary.
  - Protecting human rights defenders and other persons in legal, medical, health-care, media and other related professions.
  - Providing human rights education and training to all sectors of society.
  - Promoting the observance of codes of conduct and ethical norms.
  - Promoting mechanisms for preventing and monitoring social conflicts and their resolution.

- Reviewing and reforming laws that enable conduct that amounts to gross human rights violations.

The Human Rights Committee,<sup>194</sup> the CEDAW Committee<sup>195</sup> and the Committee against Torture<sup>196</sup> also speak of the obligation of

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<sup>194</sup> Human Rights Committee, General Comment No 31, above note 176, paragraph 16: "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."

<sup>195</sup> CEDAW General Recommendation No 28, above note 167, paragraph 32: "Paragraph 2 (b) contains the obligation of States parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who are subjected to discrimination contrary to the Convention. This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women."

<sup>196</sup> Committee against Torture, General Comment No 3, "Implementation of article 14 by States parties", UN Doc CAT/C/GC/3 (2012), paragraph 6, which explains that the term "redress" is used in Article 14 of the Convention against Torture to include "the following five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Committee recognises the elements of full redress under international and practice as outlined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of

States to make reparation, and refer to these five elements. The regional women's rights conventions also use the term reparation.<sup>197</sup>

It should be noted that the five forms of reparation are not alternatives to one another. Rather an assessment must be made as to which forms will be appropriate in a given case, taken into account the desires and needs of the victim.<sup>198</sup>

### **“Transformative reparation” for gender-based violence: dealing with the root causes of violence**

Various international human rights courts, authorities and legal experts have noted that the principle of “restitution” (being returned to one's situation prior to violation or abuse, even where this situation was in itself discriminatory and gave rise to the gender-based violence) cannot by itself be an adequate remedy for gender-based violence, as it does not deal with the root causes of the violence and maintains discrimination. This awareness has been translated into the concept of “transformative reparation”, by which special measures must be designed to remedy discrimination. These act as “guarantees of non-repetition”.

In the case of *González et al v Mexico*,<sup>199</sup> the Inter-American Court of Human Rights examined in detail a series of cases of sexualized torture and murder of girls and young women.

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International Human Rights Law and Serious Violations of Humanitarian Law. Reparation must be adequate, effective and comprehensive... and the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate in relation to the gravity of the violations committed against them.”

<sup>197</sup> Convention of Belém do Pará, above note 119, Article 7(g); Maputo Protocol, above note 121, Article 4(2)(f); and Istanbul Convention, above note 170, Article 5(2).

<sup>198</sup> International Commission of Jurists, Practitioners Guide No 2, above note 189, especially pages 27-28.

<sup>199</sup> *González et al. (“Cotton Field”) v Mexico*, Inter-American Court of Human Rights, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs).

Investigations had failed to identify perpetrators and bring them to justice, and reports of missing girls and women were met with contempt and indifference by the authorities. The Inter-American Court ruled that Mexico should provide structural reparation to address the situation of gender-discrimination and class discrimination against factory workers living in poverty, which contributed to the torture and murders of the young women and girl who were killed. The Inter-American Court noted that:

“[T]he concept of “integral reparation” (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State, the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.”<sup>200</sup>

In this context, the Inter-American Court required that Mexico improve its investigation and protection processes when families report that a woman or girl has gone missing. The Court stressed that it was necessary that officials who were derelict in their duty should be sanctioned. It required Mexico to undertake initiatives to commemorate the women who were killed, mandating a day of national memory, and to institute memorials to the girls and women who were killed.

Reparations may need to be of a multi-layered and complex nature in order to provide the variety of benefits really needed to transform a situation and empower women. The Special Rapporteur on violence against women, its causes and consequences, in her 2010 report, noted that: “Reparations for women... should strive to have a transformative potential...”

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<sup>200</sup> Ibid, paragraph 450.

should aspire... to subvert instead of reinforce pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience before, during and after the conflict".<sup>201</sup>

In the case of gender-based violence against women, this requires that women have access to remedies for violence that transforms the situation of discrimination and violence that led to the violations of their rights.

The Committee against Torture, in the same vein, recognized that for restitution to be effective, "efforts should be made to address structural causes to the violation, including any kind of discrimination related to, for example, gender, sexual orientation, disability, political or other opinion, ethnicity, age and religion, and all other grounds of discrimination".<sup>202</sup>

Given the prevalence and persistence of violence against women, it has been understood as appropriate to require States to undertake specifically crafted administrative programmes to provide reparation for victims of gender-based violence. While the operation of these programmes can be simplified, to avoid some of the stress and complexity that legal action requires, these should always be able to assess and award compensation with minimal formality, for example, specific medical evidence that would be required in a court process.

### **Civil lawsuits against third parties that failed to protect women or girls at risk of violence**

The State's failure to protect women who are known to be at risk of violence, which leads to harm and even killings by known perpetrators, is a violation of women's human rights and

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<sup>201</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc A/HRC/14/22 (2010), paragraph 85.

<sup>202</sup> Committee against Torture, General Comment No 3, above note 196, paragraph 8.

should be actionable in civil or administrative law. This is a powerful form of legal advocacy that can lead to at least two important outcomes: firstly, seeking compensation as a form of reparation for the victim or her family; and, secondly, allowing a forensic investigation of policing and court practice and a close analysis of where protection has failed. After a case like this, police and other authorities will usually have a strong impetus to improve their service to women, to avoid being held to account and forced to pay compensation in other cases.

The UN Handbook for Legislation on Violence against Women asserts that legislation should enable those women who have been subject to gender-based violence “to bring lawsuits against governmental or non-governmental individuals and entities that have not exercised due diligence to prevent, investigate or punish the violence; and lawsuits on the basis of anti-discrimination and/or civil rights laws”.<sup>203</sup>

The CEDAW Committee has made further recommendations on women’s right to reparation:

- Remedies should be adequate, effective, timely, holistic and proportional to the gravity of the harm suffered;<sup>204</sup>
- Remedies for civil damages and criminal sanctions should not be mutually exclusive;<sup>205</sup> and
- States should create specific funds to ensure that women receive adequate reparation in situations in which the individuals or entities responsible for violating their human rights are unable or unwilling to provide such reparation.<sup>206</sup>

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<sup>203</sup> UN Handbook for Legislation on Violence against Women (New York: Department of Economic and Social Affairs, 2010), page 54.

<sup>204</sup> CEDAW General Recommendation No 33, above note 122, paragraph 19(b).

<sup>205</sup> Ibid, paragraph 19(b).

<sup>206</sup> Ibid, paragraph 19(d).

## **Violence against women in armed conflict and under international criminal law**

Acts of gender-based violence taking place in international armed conflicts (conflicts between States, or involving occupation) will be considered a crime under international law where the conduct is categorized as a grave breach under the 1949 Geneva Conventions or Additional Protocol I of 1977, or a violation of customary international humanitarian law.<sup>207</sup> The Rome Statute of the International Criminal Court (Rome Statute) also codifies, amongst other crimes, the grave breaches offences under the Geneva Conventions. With respect to acts of gender-based violence in non-international armed conflicts (conflicts with or between armed non-State actors), such acts may amount to crimes under customary international law, as well as those reflected in the Rome Statute.

Certain forms of violence against women may also be classed as a crime against humanity, which may take place within or outside of situations of armed conflict, as prohibited under customary international law and the Rome Statute. For such conduct to qualify as a crime against humanity, it must have been "committed as part of a widespread or systematic attack directed against any civilian population",<sup>208</sup> where the

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<sup>207</sup> The International Committee of the Red Cross (ICRC) defines customary international law as consisting of "rules that come from "a general practice accepted as law" and exist independent of treaty law. Customary [international humanitarian law] is of crucial importance in today's armed conflicts because it fills gaps left by treaty law and so strengthens the protection offered to victims.": see the ICRC's database of customary international humanitarian law, URL: <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>.

<sup>208</sup> Rome Statute of the International Criminal Court, Article 7. As of 10 November 2015, there are 123 States parties to the Rome Statute. Of those, 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States: see URL <https://www.icc->

perpetrator knows that his or her action is part of that attack. Genocide is also a crime under the Rome Statute and the Genocide Convention<sup>209</sup> and includes crimes of violence against women that are perpetrated against them with an intent to destroy, in whole or in part, their national, ethnic, racial or religious group.

States have a general obligation to investigate those under their jurisdiction responsible for war crimes, crimes against humanity and genocide; and to prosecute such individuals or transfer them to another jurisdiction for prosecution. The Rome Statute imposes obligations on State parties to incorporate the offences under the Statute in the State's domestic laws, and gives jurisdiction to the International Criminal Court to prosecute the offenses where a State is unable or unwilling to do so.

States are given primary jurisdiction under the Rome Statute where a crime takes place on the territory of that State or where the alleged perpetrator is a national of the State. The crimes under the Rome Statute as well as other crimes under international law fall within the principle of universal jurisdiction. This means that any State, whether or not a party to the Rome Statute or other treaties governing crimes under international law, may assert jurisdiction for a crime under international law committed anywhere and for any purpose. Persons suspected of conduct to which universal jurisdiction attaches may be arrested, investigated, prosecuted and brought to justice anywhere in the world, irrespective of where the crime was committed, or the nationality of the perpetrator or the victim.

Violence against women may be present in a wide number of ICC crimes or grave breaches under the Geneva Conventions. The Rome Statute recognizes crimes of violence against women

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[cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

<sup>209</sup> Convention on the Prevention and Punishment of the Crime of Genocide.

specifically, particularly sexualized violence and crimes related to reproduction, for example forced pregnancy and forced sterilization. However, it is important to recall that other forms of violence can be gender-based, for example, gender-based persecution could include detention of women, transfers of women civilians and denial of civil, political or economic rights of women on the grounds of their failure to abide by social or cultural norms.<sup>210</sup>

Working as an advocate in these situations can lead to highly increased risks for advocates and their clients. Special care should be taken to act ethically, with the safety of victims and survivors as a priority, referring to specialist guides, such as the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict.<sup>211</sup>

Some of the crimes particularly important in the context of violence against women under the Rome Statute include:

- Crimes against humanity, irrespective of whether they are perpetrated within the context of armed conflict;
- War crimes in an international armed conflict; and
- War crimes in a non-international armed conflict.

### ***Crimes against humanity***

Crimes against humanity – acts committed as part of a widespread or systematic attack directed against any civilian population, when the perpetrator has knowledge of that attack – can include crimes of violence against women. These crimes against humanity which may affect women include:

- Murder;

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<sup>210</sup> Valerie Oosterveld, “Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution” (2006) 17 *Duke Journal of Comparative & International Law*, 49-89.

<sup>211</sup> UK Foreign and Commonwealth Office, “International Protocol on the Documentation and Investigation of Sexual Violence in Conflict. Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law” (2014).

- Extermination;
- Enslavement;
- Deportation or forcible transfer of population;
- Enforced disappearance of persons;
- Imprisonment in violation of fundamental rules of international law;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization; and
- Persecution against any identifiable group on political, racial, national, ethnic, cultural, religious, gender or other grounds.<sup>212</sup>

### ***War crimes: international armed conflict***

War crimes are recognized in the Rome Statute as conduct that occurs as part of a systematic plan or policy for widespread commission of these crimes. In the context of international armed conflicts, war crimes that may also amount to crimes against women include:

- Wilful killing;
- Torture or inhuman treatment, including biological experiments;
- Wilfully causing great suffering, or serious injury to body or health;
- Committing outrages upon personal dignity, including humiliating and degrading treatment; and
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence.<sup>213</sup>

### ***War crimes: non-international armed conflict***

In non-international armed conflicts (typically civil wars), the following crimes are recognized:

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<sup>212</sup> Rome Statute of the International Criminal Court, Article 7.

<sup>213</sup> Ibid, Article 8(a) and (b).

- Violence to life and person, including murder of all kinds, mutilation, cruel treatment and torture;
- Committing outrages upon personal dignity, including humiliating and degrading treatment; and
- Rape, sexual slavery, enforced prostitution, forced pregnancy and other forms of sexual violence.<sup>214</sup>

### **Reparations and access to justice post-conflict**

The UN Basic Principles on Remedy and Reparation apply not only to human rights violations, with special provisions applicable to gross human rights violations, but also to serious violations of international humanitarian law.

In his *In-depth study on violence against women*, the UN Secretary-General noted that:

“During and after armed conflict, women in disproportionate numbers may suffer certain forms of violence and they may also be targeted for gender-specific forms of violence. As a result, their physical, psychological and reproductive well-being may be severely compromised. Women have been the targets of sexual violence, including rape, during armed conflict. The consequences of such violence include exposure to sexually transmitted infections, including HIV/AIDS, and unwanted or forced pregnancies. In addition, women who are forcibly displaced or are refugees face a high risk of gender-based violence. The range of services required to assist victims/survivors of violence against women include: comprehensive medical services, including access to safe abortion; counselling; shelter; provision of basic necessities such as food, water and sanitation; and community services and education.”<sup>215</sup>

Women may be targets of post-conflict violence in a variety of ways, as they assume many roles during conflict – as

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<sup>214</sup> Ibid, Article 8(c) and (e).

<sup>215</sup> UN Secretary-General, “In-depth study on all forms of violence against women”, UN Doc A/61/122/Add.1 (2006), paragraph 334.

combatants, as part of organized civil society, human rights defenders, members of resistance movements and/or as active agents in both formal and informal peace-building and recovery processes, including as protestors.<sup>216</sup> They may also be subject to violence in their homes and families, as domestic violence tends to rise during and after conflict.<sup>217</sup>

Women may also be forced, through being subject to gender-based violence such as rape and sexual violence, to participate in armed forces or armed non-State groups and the roles they are required to fulfil can constitute violations of international humanitarian and criminal law. As combatants, they are often subjected to forced contraception and abortion.<sup>218</sup> According to the Optional Protocol to the Convention on the Rights of the Child, no child under 18 should participate in hostilities.

Civilian women frequently face sexual and gender-based violence, unlawful killing and enforced disappearance of

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<sup>216</sup> CEDAW General Recommendation No 30, "Women in conflict prevention, conflict and post-conflict situations", UN Doc CEDAW/C/GC/30 (2013), paragraph 6.

<sup>217</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2001/73 (2001), paragraph 57: "Evidence from around the world seems to suggest that armed conflict in a region leads to an increased tolerance of violence in the society. A growing body of evidence indicates that the militarization process, including the ready availability of small weapons, that occurs leading up to and during conflicts, as well as the process of demobilization of often frustrated and aggressive soldiers after a conflict, may also result in increased violence against women and girls. When a peace agreement has been reached and the conflict brought to an end, women often face an escalation in certain gender-based violence, including domestic violence, rape, and trafficking into forced prostitution. The correlation between domestic violence and violence during war has concerned many scholars and activists in conflict-ridden areas. [...] Unfortunately many of the peace agreements and the processes of reconstruction after the conflict do not take note of these considerations."

<sup>218</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, "Mission to Colombia", UN Doc E/CN.4/2002/83/Add.1 (2002), paragraphs 47-58.

relatives, destruction of homes and property and destruction of the civilian infrastructure that would provide them with assistance.

Amnesty International has identified many forms of deprivation of economic, social and cultural rights that are linked with violence against women in armed conflict, including:

- Denial/withholding of humanitarian assistance;
- Lack of food leading to malnutrition (for example, often by custom women eat last);
- Lack of adequate sanitary conditions/supplies, especially during menstruation and breast-feeding;
- Loss of education or employment (which may particularly affect women);
- Lack of adequate medical care and rehabilitation, including reproductive and maternal health care;
- Increasing burden of care responsibilities (which in most societies fall disproportionately on women);
- “Double burdens” (where women assume new roles in the public sphere, but still keep prior tasks and responsibilities);
- House destruction, demolition or expropriation; and
- Property destruction or confiscation.<sup>219</sup>

### **The end of conflict requires redoubled efforts to address gender-based violence**

In 2001, the UN Special Rapporteur on violence against women, its causes and consequences, noted that:

“Evidence from around the world seems to suggest that armed conflict in a region leads to an increased tolerance of violence in the society. A growing body of evidence indicates that the militarization process, including the ready availability of small weapons, that occurs leading up to and during conflicts, as well as the process of demobilization of often frustrated and

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<sup>219</sup> Amnesty International, “Making rights a reality: The Duty of States to Address Violence Against Women”, AI Index ACT/77/049/2004.

aggressive soldiers after a conflict, may also result in increased violence against women and girls. When a peace agreement has been reached and the conflict brought to an end, women often face an escalation in certain gender-based violence, including domestic violence, rape, and trafficking into forced prostitution. The correlation between domestic violence and violence during war has concerned many scholars and activists in conflict-ridden areas. [...] Unfortunately many of the peace agreements and the processes of reconstruction after the conflict do not take note of these considerations."<sup>220</sup>

After armed conflict, during reconstruction, there may be a moment of change and flux where reform of laws and practices is possible. This is an important moment to deal with crimes affecting women. The CEDAW Committee has in this context recommended that, where sexual violence occurs in conflict or post conflict situations, efforts should be made to address the discriminations that existed prior to the conflict, emphasizing that States parties should "mandate institutional reforms, repeal discriminatory legislation and enact legislation providing for adequate sanctions in accordance with international human rights standards [and d]etermine reparation measures in close participation with women's organizations and civil society".<sup>221</sup>

It is important to reform laws and practices relating to more than just sexual violence. Many other crimes of violence against women are not, by definition, sexual but are still crimes under international law, for example, killings of civilians, torture and ill-treatment and enforced disappearances.

In order to address women's experiences in a holistic way, impunity should not be permitted for crimes against women in conflict. The CEDAW Committee has therefore called on States to ensure that those responsible for gender-based violence in conflict are held accountable; that amnesties for human rights

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<sup>220</sup> Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2001/73 (2001).

<sup>221</sup> CEDAW General Recommendation No 33, above note 122, paragraph 19(e).

violations, including gender-based violence, are not accepted; and that non-judicial remedies, including public apologies and truth and reconciliation committees, are not considered substitutes for investigation, prosecution and punishment of perpetrators.<sup>222</sup>

In the case of reparation for violence against women in armed conflict, the Security Council's Resolution 1325 (2000) and subsequent related resolutions on women, peace and security, requires action to prevent, investigate, prosecute and remedy sexual and gender-based violence. It also requires States to reform justice systems and ensure women's post-conflict political participation so that women can participate in post-conflict peace-making, peace-building and reconstruction.

The requirement for "transformative reparation" is particularly compelling in post-conflict situations, as countries which are at risk of conflict are often those countries where gender-based violence and discrimination is highest. In order to effectively address lack of access to justice, as well as impunity for sexual and gender-based violence, justice system reform is required. The reality is that gender-based violence against women is at high levels whether before conflict, during conflict, post-conflict and in "peace-time". The CEDAW Committee has therefore emphasized that States must "react actively" against all forms of discrimination against women, including gender-based violence.<sup>223</sup>

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<sup>222</sup> Ibid, paragraph 19(f).

<sup>223</sup> CEDAW General Recommendation No 28, above note 167, paragraph 10.

## CHAPTER V

# **THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN AS A DYNAMIC LEGAL FRAMEWORK**

Gender-based violence is both a cause and manifestation of gender discrimination. It is therefore important to take into account access to justice for gender-based violence in the broader context of legal obligations of States, particularly under the CEDAW Convention, with a view to ensuring the enjoyment of freedom from discrimination and equality for women.<sup>224</sup>

While the CEDAW Convention is the main focus of the discussion in this chapter, it is important to be aware of the fact that non-discrimination obligations are contained in all of the international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 2 of these Covenants requires that all of the rights contained therein must be enjoyed without discrimination on the basis of status, including gender (sex). It is important to consider these treaties and corresponding jurisprudence in the context of States that have become parties to the CEDAW Convention, having regard also to whether the State has entered reservations that undermine the protection of women's rights. Article 26 of the ICCPR also guarantees equal protection of the law generally, not only in connection with human rights, guaranteeing that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground

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<sup>224</sup> There are non-discrimination provisions in Article 2 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The duty to ensure equality between men and women in the enjoyment of their human rights is included in Article 3 of both the ICCPR and ICESCR.

such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The first five Articles of the CEDAW Convention set forth the obligations of States to address discrimination against women, including gender-based violence. These articles add to the “respect, protect, fulfil” requirements in that they are drafted expressly to address the practical reasons for the prevalence of gender-based discrimination. For example, because gender stereotyping is a factor that facilitates discrimination, Article 5(a) of the CEDAW Convention requires States to take action to “modify social and cultural codes of conduct”. “Positive discrimination” and “affirmative action” is often politically contentious: Article 4 of the CEDAW Convention deals with such controversies by making it a legal requirement that States undertake “temporary special measures aimed at accelerating *de facto* equality between men and women” (emphasis added).

This chapter considers the content, meaning and practical implications of Articles 1 to 5 of the CEDAW Convention, with reference to relevant international and regional law and standards as appropriate.

### **Article 1: Gender-based violence constitutes a form of discrimination**

Article 1 of the CEDAW Convention defines discrimination, for the purposes of the Convention, as:

“...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

Gender discrimination and gender-based violence are mutually reinforcing. The CEDAW Committee has provided a dynamic interpretation of Article 1 and the general obligation of States

to realize the rights to freedom from discrimination and from torture and ill-treatment:

“The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”<sup>225</sup>

This general principle of non-discrimination under international law can be interpreted dynamically according to local aspects of how discrimination and violence affect women. In this regard, the CEDAW Committee has indicated in its General Recommendation No 28 that States are required to assess the *de jure* and *de facto* situation of women, to evaluate the situation, and then formulate, adopt and implement a policy and other measures targeted to eliminate discrimination against women within the context of that situation.<sup>226</sup>

In developing policies and strategies for addressing discrimination, the role of the advocate/lawyer and other human rights defenders is paramount. States parties to the CEDAW Convention must ensure that women, individually and in groups, are able to have access to information about their rights and are able to promote and claim those rights. In developing policies to eliminate discrimination against women, States should ensure that women are able to participate in the formulation, development and implementation of those policies.<sup>227</sup>

Nonetheless, the practitioner should take into account that the women who experience the injustice of discrimination will have

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<sup>225</sup> CEDAW General Recommendation No 19, “Violence against women”, UN Doc A/47/38 (1992), paragraph 6.

<sup>226</sup> Ibid, paragraph 24.

<sup>227</sup> Ibid, paragraph 27.

their own understandings of what is and is not acceptable. In contributing to the development of policies for the elimination of discrimination, part of the human rights advocate's task is to take into account the lived experiences of their clients and translate those experiences into legal arguments based on the CEDAW Convention and the basic principle of non-discrimination.

**Article 2: States must condemn discrimination and take appropriate and immediate action to eradicate it**

States parties to the CEDAW Convention have legally committed themselves to "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".<sup>228</sup>

Article 2 establishes the obligations of States to:

- Condemn discrimination against women in all its forms, including gender-based violence;
- Agree to pursue, without delay, a policy of eliminating discrimination against women; and
- Do so by all appropriate means.

The CEDAW Committee explains that the language of this obligation is unambiguous and unqualified and the inclusion of the words "without delay" makes it clear that the establishment of a policy to eliminate discrimination against women must be pursued immediately and that delay cannot be justified on any grounds. The Committee adds that if a State faces resource constraints in implementing its obligations, it should seek assistance from the international community.<sup>229</sup>

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<sup>228</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention), Article 2.

<sup>229</sup> CEDAW General Recommendation No 28, "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), paragraph 29.

**Article 2(a): States must enact and enforce in national law the paramount principle of gender equality**

Article 2(a) of the CEDAW Convention requires States: "To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;"<sup>230</sup>

The CEDAW Committee has indicated that the obligation to recognize the right to equality in national law means recognition in the law with an "overriding and enforceable status".<sup>231</sup> Frequently, women's right to equality may be inappropriately subsumed under religious or customary personal status laws. This may be particularly problematic for women who are facing violence in the family, as their ability to make a new life away from an abusive husband may be limited. Often they have a choice between staying in an abusive relationship or walking away from a marriage or other relationship without any fair division of marital, or de facto marital, property and thereby live in destitution. They may also be faced with the prospect of escaping their marriage, but having to leave their children behind with an abusive husband. These inequalities often mean that women choose to remain in violent relationships.

The CEDAW Committee has therefore recommended that States parties:

"Provide explicit constitutional protection for formal and substantive equality and non-discrimination in the public and private spheres, including all matters of personal

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<sup>230</sup> See also the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 11 July 2003, Article 2(1)(a).

<sup>231</sup> CEDAW General Recommendation No 28, above note 229, paragraph 31.

status, family, marriage and inheritance law, and across all areas of law".<sup>232</sup>

### **The role of judges in enforcing the rule of law relating to gender equality**

Legal guarantees of equality should be adjudicated and enforced by a diverse judiciary with an accurate view of what equality and discrimination mean to women. Reporting to the General Assembly about women's representation in the judiciary, the Special Rapporteur on the independence of judges and lawyers has noted that:

"Women are still largely underrepresented in judicial office and in the legal profession throughout the world, in particular in the highest-level positions; this undoubtedly reflects institutionalized gender discrimination within the justice system...

"Women appointed to office also have to face bias and discrimination from their colleagues and society at large on the basis of assumptions about their gender. Their behaviour is scrutinized and harshly criticized, their qualifications are more frequently questioned than those of their male colleagues, and their objectivity is more likely to be challenged. Women are often restricted or pushed to working on "low-profile" cases, in areas of the law that are traditionally associated with women, like family law, or confined to working in the lower courts."<sup>233</sup>

And:

"There are several rationales that exist to explain the importance of increased representation of women in the judiciary. Since a primary function of the judiciary is to

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<sup>232</sup> CEDAW General Recommendation No 33, "General recommendation on women's access to justice", UN Doc CEDAW/C/GC/33 (2015), paragraph 42(a).

<sup>233</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/66/289 (2011), paragraphs 23-24.

promote equality and fairness, the composition of courts and other judicial offices should reflect the State's commitment to equality. The judicial system should also serve, by reflecting their diversity, so as to preserve and improve public trust in its credibility, legitimacy and impartiality.

"...For various reasons, whether historical, cultural, biological, social or religious, women's experiences differ from those of men, and for this reason women can bring different perspectives or approaches to adjudication, while fighting against gender stereotypes. Consequently, a diverse judiciary will ensure a more balanced and impartial perspective on matters before the courts, eliminating barriers that have prevented some judges from addressing certain issues fairly. This reasoning is equally applicable to the matter of encouraging the representation of other underrepresented "groups", like ethnic, racial or sexual minorities, among others."<sup>234</sup>

One benefit of a diverse judiciary, among others, includes the awareness that discrimination is discrimination, even if there was no intention to discriminate; and also, as recognised by the CEDAW Committee, that "identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face".<sup>235</sup>

Judges should be aware of the need for *de facto* as well as *de jure* equality, and also appreciate that often a view of "transformative equality" indicates that profound changes in law and practice must occur.<sup>236</sup>

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<sup>234</sup> Ibid, paragraph 26-27.

<sup>235</sup> CEDAW General Recommendation No 28, above note 229, paragraph 5.

<sup>236</sup> See Chapter IV, above, on "Transformative reparation" for gender-based violence.

UN Women, “Progress of the World’s Women 2010-2011. In pursuit of justice”:

“While law is intended to be a neutral set of rules to govern society, in all countries of the world, laws tend to reflect and reinforce the privilege and the interests of the powerful, whether on the basis of economic class, ethnicity, race, religion or gender. Justice systems also reflect these power imbalances. In all societies, women are less powerful than men and the two areas in which women’s rights are least protected, where the rule of law is weakest and men’s privilege is often most entrenched, are first, women’s rights in the private and domestic sphere, including their rights to live free from violence and to make decisions about their sexuality, on marriage, divorce and reproductive health; and second, women’s economic rights, including the right to decent work and the right to inherit and control land and other productive resources.”<sup>237</sup>

### **Article 2(b): Gender discrimination must face legal sanction**

Article 2(b) of the CEDAW Convention requires States: “To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;”<sup>238</sup>

Article 2(b) complements Article 2(a) by requiring the adoption and implementation of accessible laws that address the actions of those who discriminate against women. The CEDAW Committee has explained that it requires States “to provide legal protection, to abolish or amend discriminatory laws and regulations” so that women can enjoy access to their human

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<sup>237</sup> UN Women, “Progress of the World’s Women 2010-2011. In pursuit of justice” (UN Publications, 2011), page 11.

<sup>238</sup> See also the Maputo Protocol, above note 230, Article 2(1)(b).

rights in practice.<sup>239</sup> The Committee has interpreted this as requiring a general anti-discrimination law, covering both direct and indirect discrimination in all areas of the CEDAW Convention, not just laws in specific areas such as employment.<sup>240</sup>

Reference within Article 2(b) to "other measures" may include national action plans that address all relevant State actors and mandate positive action to implement women's human rights. The Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) places an obligation on States to ensure that they have comprehensive and coordinated policies,<sup>241</sup> supervised and managed by one or more coordinating institutions,<sup>242</sup> and that are provided with appropriate human

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<sup>239</sup> CEDAW General Recommendation No 28, above note 229, paragraph 31.

<sup>240</sup> Marsha Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women. A Commentary* (Oxford: Oxford University Press, 2012) – hereafter referred to as the 'CEDAW Commentary', page 83.

<sup>241</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, Article 7 (Comprehensive and co-ordinated policies):

"1) Parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women.

"2) Parties shall ensure that policies referred to in paragraph 1 place the rights of the victim at the centre of all measures and are implemented by way of effective co-operation among all relevant agencies, institutions and organisations.

"3) Measures taken pursuant to this article shall involve, where appropriate, all relevant actors, such as government agencies, the national, regional and local parliaments and authorities, national human rights institutions and civil society organisations."

<sup>242</sup> Istanbul Convention, *ibid*, Article 10 (Co-ordinating body):

"1) Parties shall designate or establish one or more official bodies responsible for the co-ordination, implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of

and financial resources.<sup>243</sup> The Istanbul Convention also requires that States “recognize, encourage and support... and establish effective cooperation with non-governmental organizations”.<sup>244</sup>

### **Article 2(c): The right to equality must be recognized and enforced by law**

Article 2(c) of the CEDAW Convention requires States parties: “To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;”<sup>245</sup>

The CEDAW Committee has explained that a good quality of justice, to establish legal and equal protection of women’s rights, “requires that justice systems are contextualized,

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violence covered by this Convention. These bodies shall co-ordinate the collection of data as referred to in Article 11, analyse and disseminate its results.

“2) Parties shall ensure that the bodies designated or established pursuant to this article receive information of a general nature on measures taken pursuant to Chapter VIII.

“3) Parties shall ensure that the bodies designated or established pursuant to this article shall have the capacity to communicate directly and foster relations with their counterparts in other Parties.”

<sup>243</sup> Istanbul Convention, *ibid*, (Financial resources): “Parties shall allocate appropriate financial and human resources for the adequate implementation of integrated policies, measures and programmes to prevent and combat all forms of violence covered by the scope of this Convention, including those carried out by non-governmental organisations and civil society.”

<sup>244</sup> Istanbul Convention, *ibid*, Article 9 (Non-governmental organisations and civil society): “Parties shall recognise, encourage and support, at all levels, the work of relevant non-governmental organisations and of civil society active in combating violence against women and establish effective co-operation with these organisations.”

<sup>245</sup> See also, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará) of 9 June 1994, Article 7(c).

dynamic, participatory, open to innovative practical measures, gender-sensitive, and take account of the increasing demands for justice by women".<sup>246</sup> Legal systems need to reform and develop to achieve this good quality of justice. The Committee has therefore called on States to: "Conduct and facilitate qualitative studies and critical gender analysis in collaboration with civil society organizations as well as academic institutions of all justice systems in order to highlight practices, procedures and jurisprudence that promote or limit women's full access to justice; and [s]ystematically apply the findings of this analysis in order to develop priorities, policies, legislation and procedures to ensure that all components of the justice system are gender sensitive, user friendly and accountable".<sup>247</sup>

As discussed above, especially under Chapter IV, all persons have a right to an effective remedy and reparation for human rights violations under general international law, including in the context of discrimination against women and gender-based violence against women. The CEDAW Committee has made it clear that States have an obligation under the CEDAW Convention to provide access to a legal remedy for discrimination, even if the CEDAW Convention does not expressly provide for a right to a remedy.<sup>248</sup> Other United Nations treaty bodies responsible for the oversight of other universal human rights treaties without express remedial provisions have come to a similar conclusion.<sup>249</sup> The CEDAW Committee considers that such a right is implied in the Convention, in particular by Article 2(c) which requires States

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<sup>246</sup> CEDAW General Recommendation No 33, above note 232, paragraph 14(d).

<sup>247</sup> *Ibid*, paragraph 20(e) and (f).

<sup>248</sup> *Vertido v Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), paragraph 8.3.

<sup>249</sup> See, for example: Committee on the Rights of the Child, General Comment No 12, "The right of the child to be heard", UN Doc CRC/C/GC/12 (2009), paragraph 48; and Committee on Economic, Social and Cultural Rights, General Comment No 9, "The domestic application of the Covenant", UN Doc E/C.12/1998/24 (1998), paragraphs 2 and 3.

parties: “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”.

States should take note of individual remedies provided under the Convention and address systemic issues that lead to the violation of the individual’s rights.<sup>250</sup>

Concerning access to remedies and reparation, the CEDAW Committee has said:

- Crimes of violence against women should be dealt with in a fair, impartial, timely and expeditious manner.<sup>251</sup>
- Protection orders must be available (for example, to protect against taking a girl abroad to commit an act of female genital mutilation, or to protect against violent spouses) and enforced in practice. This is a stringent requirement of result.<sup>252</sup>
- States parties must ensure that women are made aware of their rights.<sup>253</sup>
- Free legal services need to be made available so that women have the practical means to seek vindication of their rights.<sup>254</sup>
- All relevant actors in the justice system need to be aware of women’s human rights.<sup>255</sup>

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<sup>250</sup> CEDAW Commentary, above note 240, page 85; and *A.T. v Hungary*, CEDAW Communication No 2/2003 (26 January 2005), paragraph 9.6(I)(a)-(h).

<sup>251</sup> *Vertido v Philippines*, above note 248, paragraph 8.3.

<sup>252</sup> *Angela González Carreño v Spain*, CEDAW Communication No 47/2012, UN Doc CEDAW/C/58/D/47/2012 (2014), paragraph 9.9.

<sup>253</sup> CEDAW Commentary, above note 240, page 84.

<sup>254</sup> *Ibid*, page 84.

<sup>255</sup> *Ibid*, page 85.

### **Article 2(d): Public authorities' role in respecting non-discrimination**

Article 2(d) of the CEDAW Convention requires States to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with this obligation.

The CEDAW Convention requires that States, including all organs of the state and at all levels of government, do not discriminate in their behaviour towards women. In relation to gender-based violence, this means that States must not commit acts of gender-based violence: where State agents perpetrate violence against women, which causes severe pain or suffering, whether physical or mental, the State is guilty of torture.

States are under an obligation, including under the ICCPR and Convention against Torture,<sup>256</sup> to criminalize torture and ill-treatment and bring to justice those responsible.

“Breach of the prohibition against torture and other ill-treatment attracts state responsibility (a) to investigate the facts even, in the case of torture and perhaps also in the case of ill-treatment, in the absence of a specific complaint from the alleged victim; (b) to bring to justice those responsible (including through, at least in the case of torture, criminal proceedings); and (c) to provide reparations to the victim.”<sup>257</sup>

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<sup>256</sup> Human Rights Committee, General Comment No 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), paragraphs 8 and 18; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), Article 4.

<sup>257</sup> Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford: Oxford University Press, 3<sup>rd</sup> Ed, 2009), page 194.

Women are especially vulnerable to torture and ill-treatment when they are detained or imprisoned. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) [see above Chapter IV] were designed with the experience of women in detention in mind. The United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) are also applicable to women in detention.

### **Resources for advocates dealing with torture and ill-treatment**

Torture and ill-treatment of women by State agents are very common forms of gender-based violence. Advocating for survivors of torture and ill-treatment requires a special set of tools to monitor and research cases and to work with survivors. Important guiding materials include:

- The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as “the Istanbul Protocol”);<sup>258</sup> and
- The Torture Reporting Handbook.<sup>259</sup>

States must ensure training of all State agents, so as to ensure that acts of gender-based violence are not committed, especially police, armed forces and those working in institutions where women are detained, whether immigration detention,

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<sup>258</sup> Office of the High Commissioner for Human Rights, “Istanbul Protocol. “Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (Geneva: UN Publications, Professional Training Series No 8/Rev.1, 1999).

<sup>259</sup> University of Essex, Human Rights Centre, “The Torture Reporting Handbook. How to document and respond to allegations of torture within the international system for the protection of human rights” (Second edition, 2015), available at URL: <http://www.essex.ac.uk/hrc/documents/practice/torture-reporting-handbook-second-edition.pdf>.

pre-trial detention, detention in mental health institutions or prisons.

Article 2(d) of the CEDAW Convention also binds judicial and legislative organs of the State. Legislatures must not enact, and courts must not apply, discriminatory rules relating to violence against women.<sup>260</sup>

**Article 2(e): The State must take positive measures against gender-based violence irrespective of the status of the perpetrator as a State official or non-State actor**

Article 2(e) of the CEDAW Convention requires States: "To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise".

As outlined above, States have a duty of due diligence to prevent, investigate, prosecute and punish gender-based violence by private or non-State actors. The CEDAW Committee has explained that the State's due diligence obligation to prevent discrimination by private actors means that in some cases a private actor's conduct (whether by acts or omissions) that have resulted in discrimination could be attributed to the State under international law. States therefore must take appropriate measures, including regulation of private actors in relation to:

- Education, employment and health policies;
- Working conditions and standards; and

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<sup>260</sup> CEDAW Commentary, above note 240, page 86, citing the Articles on Responsibility of States for Internationally Wrongful Acts (adopted under General Assembly resolution 56/83 (2001)), Article 4(1) of which provides: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".

- Other areas of provisions of services or facilities, such as banking and housing.<sup>261</sup>

The CEDAW Committee found, in *Yildirim v Austria*, that even where a State has put in place a comprehensive system of legislation and other measures to address domestic violence, the State cannot avoid responsibility for domestic violence that occurs when it has not acted with due diligence to enforce that system, and has therefore failed to give practical realization to these measures.<sup>262</sup> This emphasizes that the State cannot escape legal responsibility for violence through establishing ineffective procedures, or good procedures that are not implemented and abided by in practice. States must act diligently to implement the human rights of each and every woman.

**Article 2(f): States must ensure that laws, rules and customs do not discriminate against women**

Article 2(f) of the CEDAW Convention requires States: “To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.<sup>263</sup>

The CEDAW Committee clarified this provision in the Convention by explaining that, in order for States to meet the requirements of this Article, they should:

- Identify the nature and extent of attitudes, customs and practices that perpetuate violence against women;

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<sup>261</sup> CEDAW General Recommendation No 28, above note 229, paragraph 13.

<sup>262</sup> *Yildirim v Austria*, CEDAW Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (2007), paragraph 12.1.12.

<sup>263</sup> See also Convention of Belém do Pará, above note 245, Article 7(e) of which requires States to “take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women”.

- Commit to effective measures to overcome these attitudes, customs and practices;
- Report on the measures they have undertaken to overcome violence and the effect of these measures; and
- Introduce education and public information programmes to help eliminate prejudices that hinder women's equality.<sup>264</sup>

Discriminatory laws, particularly those relating to family law, are frequently based on customs and practices that support and foster violence against women and gender-based violence. One typical example is the criminal law principle common within domestic law that a husband cannot be prosecuted for raping his wife because the marital contract implies a life-long and constant agreement on the part of the wife to sexual contact with her husband, and that a husband thereby has "a right" to sexual contact with his wife.<sup>265</sup> Another potentially discriminatory type of practice, often also enshrined in laws or regulations, is that of requiring that a husband automatically has unsupervised access to children, or custody of children in the case of divorce, even where domestic violence is an issue.<sup>266</sup>

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<sup>264</sup> CEDAW General Recommendation No 19, above note 225, paragraph 24(e) and (f).

<sup>265</sup> *S.W. v United Kingdom* (1995) ECHR 52, paragraph 44: "The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment ...What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom".

<sup>266</sup> *González Carreño v Spain*, above note 252, paragraph 3.8.

Advocates representing women will frequently need to address these discriminatory customary rules, which may be recognized in jurisprudence, common law or traditional courts. The CEDAW Committee has called on States parties to “consult with the relevant communities, in particular the women, as part of the process of reforming discriminatory laws and practices”.<sup>267</sup> Legal practitioners should engage in such consultative processes, in addition to working to modify or mitigate the adverse impact of these laws and practices in the course of their professional work.

When a State argues that a discriminatory law is required by custom, one expert, Hilary Charlesworth, has suggested that it may be helpful for advocates preparing arguments to challenging the law to raise the following questions:

1. Who is claiming to speak for a “culture”, religion or a “tradition”? It may be that there is a difference of view about whether, and if so how, the custom applies and may be subject to contested interpretation.
2. What is the formal status of the interlocutor?
3. Who benefits from the custom? Frequently a custom is seen as something that is done because it is agreed to by all, and it is “what has always been done”. Where a lawyer can point to the burden imposed on women by a custom, and the benefits that men enjoy as a result, this can show in plain view that a custom should not persist.<sup>268</sup>

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<sup>267</sup> CEDAW Commentary, above note 240, page 91.

<sup>268</sup> Hilary Charlesworth, 'Two steps forward, one step back?: The field of women's human rights' (2014) 6 *European Human Rights Law Review*, 560-565.

## **Article 2(g): Penal provisions must not discriminate against women**

Article 2(g) of the CEDAW Convention requires States: "To repeal all national penal provisions which constitute discrimination against women".

As outlined in Chapter IV above ('Respect: State actors must not commit gender-based violence'), there will inevitably be some overlap between acts and conditions of detention that are violations of human rights standards relating to detention generally and acts that are recognized as cruel, inhuman or degrading treatment or punishment, or torture.

The European Court of Human Rights recognized the concept of degradation as "[treatment] such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance".<sup>269</sup> Women in prison, or other forms of detention, may be vulnerable to feelings of degradation due to the conditions of detention, for example lack of hygiene facilities, including the means to deal with menstruation in a clean and dignified manner, or being supervised by male staff.

Penal provisions relating to gender-based violence may lead to discrimination against women in three fundamental ways:

1. Where there is a failure to effectively investigate and prosecute acts of violence against women [see above Chapters II and IV];
2. Where States detain and imprison women in a discriminatory and disproportionate manner, for reasons related to their gender or situation; and/or
3. Where conditions of detention lead to disproportionately harsh treatment for women because of their gender.

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<sup>269</sup> *Ireland v UK* (1978) ECHR 1, paragraph 167.

**In recent years, women’s detention and imprisonment across the world has grown disproportionately**

A recent study indicated that:

“The number of women and girls in prison has increased by 50% since about the year 2000. This cannot be explained in terms of the growth in national population levels: United Nations figures for the world population indicate that this rose only by 18% in about the same period... Current indications are that female prison population levels have not only grown sharply; they have grown much faster than male prison population levels. It is provisionally estimated that the total world prison population has increased by around 20% since 2000, compared to the approximately 50% increase in the overall number of imprisoned women and girls.

“Female imprisonment has a high financial and social cost and its excessive use does nothing to improve public safety.”<sup>270</sup>

***Discriminatory criminalization and imprisonment of women***

According to the CEDAW Committee, women tend to be imprisoned disproportionately in a number of ways:

- Where certain forms of behaviour are criminalized for women that are either not criminalized at all, or as harshly, if these same behaviours are performed by men;
- Where behaviours that can only be performed by women, such as abortion, are criminalized;
- Where women are jailed for petty offences and/or they have an inability to pay bail for such offences; and

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<sup>270</sup> World Prison Brief and Institute for Criminal Policy Research, comment on the release of the report “World Female Imprisonment List” (Third Edition, 2015), 22 September 2015, available at URL: <http://www.prisonstudies.org/news/more-700000-women-and-girls-are-prison-around-world-new-report-shows>.

- Where women are disproportionately criminalized as a result of their situation and/or status, such as migrant women, women in prostitution, lesbian, bisexual, transgender and intersex women.<sup>271</sup>

UN Women also observed that women tend to be disproportionately subjected to criminal sanction for non-violent crimes, such as drug trafficking, sex work/prostitution and crimes relating to poverty, for example, failure to pay fines or debts.<sup>272</sup>

***Duties on States relating to detention and imprisonment of women***

The Bangkok Rules address some important aspects of human rights abuses and violence against women in the context of detention and outside of it.<sup>273</sup> They supplement the existing generalized standards on detention and imprisonment, including the recently updated Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules).<sup>274</sup>

States have a number of duties relating to detention and imprisonment of women. Those that are relevant to the elimination of gender-based violence are set out below:

- Monitor courts to ensure that women are not discriminated against in sentencing.
  - States must closely monitor sentencing proceedings and ensure that women are not discriminated against in any of the penal provisions arising from

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<sup>271</sup> CEDAW General Recommendation No 33, above note 232, paragraphs 47-48.

<sup>272</sup> UN Women, "In pursuit of justice", above note 237, page 62.

<sup>273</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the General Assembly under its resolution 65/229 (2011).

<sup>274</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), as presented to the Economic and Social Council by the Commission on Crime Prevention and Criminal Justice, UN Doc E/CN.15/2015/L.6/Rev.1 (2015).

sentencing, including eligibility for parole and early release.<sup>275</sup>

- Maintain accurate data, including relating to accompanying children.
  - This should include:
    - Numbers of women in detention;
    - Reasons for detention;
    - Length of time detained;
    - Access to services, such as health, legal and social services;
    - Whether pregnant or accompanied by a child; and
    - Eligibility for case review, non-custodial alternatives and training possibilities.<sup>276</sup>
- Ensure gender sensitive non-custodial alternatives to detention and use these whenever possible.
  - The CEDAW Committee has highlighted the fact that women suffer from discrimination in criminal cases owing to: a) a lack of gender-sensitive non-custodial alternatives to detention; b) a failure to meet the specific needs of women in detention; and c) an absence of gender-sensitive monitoring and independent review mechanisms.<sup>277</sup>
  - One basic premise of the Bangkok Rules is that wherever possible, in both pre-trial procedures and sentencing after conviction, women should be diverted from detention and imprisonment in favour of community-based alternatives.<sup>278</sup> Diversion from custody is important to women because it allows them to remain close to their families.<sup>279</sup>

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<sup>275</sup> General Recommendation No 33, above note 232, paragraph 51(m).

<sup>276</sup> Ibid, paragraph 51(o).

<sup>277</sup> Ibid, paragraph 48.

<sup>278</sup> Bangkok Rules, above note 273, Rule 57.

<sup>279</sup> Ibid, Rule 58.

- Non-custodial measures should include a therapeutic approach that addresses the reasons why women tend to come into contact with the criminal justice system: being subjected themselves to gender-based violence, suffering from mental ill-health, lacking education and work skills,<sup>280</sup> and substance abuse.<sup>281</sup>
- Sentencing courts should always consider mitigating factors such as “lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women’s caretaking responsibilities and typical backgrounds”.<sup>282</sup> The fact that women frequently have a history of being victimized should also be taken into account.<sup>283</sup>
- Respect dignity and not aggravate the suffering inherent in detention.<sup>284</sup>
  - All prisoners have the right to be treated with “the respect due to their inherent dignity and value as human beings” and as such should not be subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>285</sup> This right must be guaranteed to all, without discrimination, including on the grounds of sex.<sup>286</sup> Measures to protect and promote the rights of prisoners or detainees with special needs – including gender-based needs – are required and must not be discriminatory.<sup>287</sup>
  - Prison conditions should not be harsh or punitive. The Mandela Rules recognize that: “Imprisonment

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<sup>280</sup> Ibid, Rule 60.

<sup>281</sup> Ibid, Rule 62.

<sup>282</sup> Ibid, Rule 61.

<sup>283</sup> Ibid, Rule 57.

<sup>284</sup> General Recommendation No 33, above note 232, paragraph 48.

<sup>285</sup> ICCPR, Articles 7 and 10; Convention against Torture, Article 1; Mandela Rules, above note 274, Rule 1.

<sup>286</sup> ICCPR, Articles 2(1) and 3; CEDAW Convention, Article 1; Mandela Rules, above note 274, Rule 2.

<sup>287</sup> Mandela Rules, above note 274, Rule 3.

and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation."<sup>288</sup>

***Special measures required to ensure there is no discrimination against women in prison***

States should undertake a number of measures to ensure that women are not discriminated against once they have entered the prison system. Any discriminatory conditions within prisons that might enable gender-based violence must be eliminated. To this end, the Bangkok and Mandela Rules speak of the following:

- Separation of prisoners according to gender.
  - Men and women must, so far as possible, be detained in separate institutions. Where that is not possible, the whole of the premises allocated to women must be kept entirely separate.<sup>289</sup> A file for each prisoner must be kept, containing precise information "enabling determination of his or her unique identity, respecting his or her self-perceived gender".<sup>290</sup>
- Supervision of women prisoners by women.
  - To preserve the dignity of women prisoners, and as a precaution against sexual violence by prison officials, women prisoners should never be alone with a male prison official.
  - The Mandela Rules specify that:

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<sup>288</sup> Mandela Rules, above note 274, Rule 5.

<sup>289</sup> Ibid, Rule 11(a).

<sup>290</sup> Ibid, Rule 7(a).

### Rule 81

- "1. In a mixed gender prison, the part that is set aside for women detainees must be under the authority of a woman who should have the custody of the keys for that part of the prison.
- "2. Male staff members must not, unless accompanied by a female staff member, enter the part of the prison set aside for women.
- "3. Women prisoners must be attended and supervised only by women staff members. While male staff members, particularly doctors and teachers, will not be prevented from carrying out their professional duties in prisons or parts of prisons set aside for women, they must be accompanied by female staff."<sup>291</sup>

- Allocation to a prison close to home.
  - Women should be allocated to prisons close to their homes, taking account of caretaking responsibilities, family contact and women's own preferences,<sup>292</sup> and the place where they will undertake their social rehabilitation.<sup>293</sup>
- Assistance on admission.
  - Rule 2 of the Bangkok Rules recognizes that women are particularly vulnerable on admission to detention, and should therefore be provided with:
    - Facilities to contact relatives;
    - Access to legal advice;
    - Information about prison rules and regulations and the prison regime;
    - Advice on where to seek language help when required; and

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<sup>291</sup> Ibid, Rule 81.

<sup>292</sup> Bangkok Rules, above note 273, Rule 4.

<sup>293</sup> Mandela Rules, above note 274, Rule 59.

- For foreign nationals, access to consular representatives.<sup>294</sup>
- Caretaking responsibilities.
  - Women with caretaking responsibility for children must be permitted to make arrangements for them, including the possibility of a reasonable suspension of detention.<sup>295</sup>
- Hygiene.
  - Clean and decent sanitary installations must be available when necessary,<sup>296</sup> including facilities to bathe or take a shower.<sup>297</sup>
  - All parts of a prison regularly used by prisoners must be properly maintained and kept scrupulously clean at all times.<sup>298</sup>
  - Women should have sanitary towels provided free of charge.
  - Water should be available for personal care of women, including women involved in cooking, and those who are pregnant, breastfeeding, or menstruating.<sup>299</sup>
- Duties of medical professionals.
  - As well as the ordinary duties of medical professionals to promote the physical and mental health of patients,<sup>300</sup> they must abide by the principles of informed consent and patient autonomy<sup>301</sup> and ensure confidentiality of medical

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<sup>294</sup> Bangkok Rules, above note 273, Rule 2(1).

<sup>295</sup> Ibid, Rule 2(2).

<sup>296</sup> Mandela Rules, above note 274, Rule 15.

<sup>297</sup> Ibid, Rule 16.

<sup>298</sup> Ibid, Rule 17.

<sup>299</sup> Bangkok Rules, above note 273, Rule 5.

<sup>300</sup> Mandela Rules, above note 274, Rule 32(1)(a).

<sup>301</sup> Ibid, Rule 32(1)(b).

information.<sup>302</sup> Doctors are required to “report to the director whenever he or she considers that a prisoner’s physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment”.<sup>303</sup>

- Range of healthcare services.
  - Every prison should have in place a health-care service consisting of an interdisciplinary team, with sufficiently qualified personnel and expertise in psychology and psychiatry. The service of a dentist should also be available for prisoners.
  - The health care service should be “tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation”.<sup>304</sup>
  - There should be medical screening on entry,<sup>305</sup> which should include: gender specific care, mental health (including post-traumatic stress disorder and risk of suicide and self-harm),<sup>306</sup> evaluation of drug dependency issues<sup>307</sup> and reproductive healthcare.<sup>308</sup>
  - There should be ongoing gender-specialized health care, including mental health care and rehabilitation. All prison staff must be aware of the difficulties of women prisoners’ situation and ensure that they are provided with appropriate mental

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<sup>302</sup> Mandela Rules, above note 274, Rule 32(1)(c). There is a lacuna in this duty of confidentiality, which is if “maintaining confidentiality would result in a real and imminent threat to the patient or to others.”

<sup>303</sup> Mandela Rules, above note 274, Rule 33.

<sup>304</sup> Ibid, Rule 25.

<sup>305</sup> Bangkok Rules, above note 273, Rule 6(a).

<sup>306</sup> Ibid, Rule 6(b).

<sup>307</sup> Ibid, Rule 6(d).

<sup>308</sup> Ibid, Rule 6(c).

health care support;<sup>309</sup> HIV and AIDS prevention, treatment, care and support;<sup>310</sup> substance abuse treatment programmes;<sup>311</sup> prevention of self-harm and suicide;<sup>312</sup> preventive healthcare services;<sup>313</sup> and responses to allegations of rape and other violence and torture,<sup>314</sup> including access to specialized psychological support or counselling.<sup>315</sup>

- Addressing illiteracy.
  - Illiteracy is a problem that disproportionately affects women. As noted by UNESCO’s Institute of Statistics: “For the past two decades, women have accounted for two-thirds of all illiterate adults and the gap is nearly as wide among youth”.<sup>316</sup> Illiteracy of women can prevent women from having access to information and awareness of their rights, making them more susceptible to gender-based violence.
  - Mandela Rule 104(1) is thus particularly important for women: “The education of illiterate prisoners and of young prisoners shall be compulsory and special attention shall be paid to it by the prison administration”.<sup>317</sup>

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<sup>309</sup> Bangkok Rules, above note 273, Rules 12 and 13.

<sup>310</sup> Ibid, Rule 14.

<sup>311</sup> Ibid, Rules 6(d) and 15. See also Mandela Rules, above note 274, Rule 30(c).

<sup>312</sup> Bangkok Rules, above note 273, Rule 16.

<sup>313</sup> Ibid, Rule 17 requires education and information about preventive health-care measures; Rule 18 requires health-care measures of particular relevance to women, for example breast and cervical cancer tests and screening.

<sup>314</sup> Ibid, Rules 6(e) and 7.

<sup>315</sup> Ibid,, Rule 7(2).

<sup>316</sup> UNESCO Institute of Statistics, “Adult and Youth Literacy”, Fact Sheet No 32, September 2015.

<sup>317</sup> Mandela Rules, above note 274, Rule 104(1).

- Ensure gender-sensitive monitoring and independent review mechanisms.<sup>318</sup>
  - Inspectorates, visiting boards and other supervisory mechanisms established to monitor conditions of detention of women must include women members.<sup>319</sup>
  - The CEDAW Committee requires that States: "Conduct and facilitate qualitative studies and critical gender analysis in collaboration with civil society organizations as well as academic institutions of all justice systems in order to highlight practices, procedures and jurisprudence that promote or limit women's full access to justice...".<sup>320</sup>
  - This requirement is supplemented by the Bangkok Rules, which require States to undertake research into women's experience of confronting the criminal justice system, and the effects of this on their children, in order to improve policies and programme development. The aim of such research is to assist women to reintegrate into society and to reduce the stigma and negative impact of women's criminalization on their children.<sup>321</sup>

### **Article 3: A positive guarantee of women's enjoyment of their human rights**

Article 3 of the CEDAW Convention provides that: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures,

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<sup>318</sup> CEDAW General Recommendation No 33, above note 232, paragraph 48.

<sup>319</sup> Bangkok Rules, above note 273, Rule 25(3).

<sup>320</sup> CEDAW General Recommendation No 33, above note 232, paragraph 20(e).

including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.

Article 3 builds on the principles reflected in the Charter of the United Nations, Articles 1(3)<sup>322</sup> and 55,<sup>323</sup> and the preamble to

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<sup>321</sup> Bangkok Rules, above note 273, Rules 67-69: Rule 67 refers to particular research into the offences committed by women, the reasons that trigger women’s confrontation with the criminal justice system, the impact of secondary criminalization and imprisonment on women, the characteristics of women offenders, as well as programmes designed to reduce reoffending by women, as a basis for effective planning, programme development and policy formulation to respond to the social reintegration needs of women offenders; Rule 68 talks of the need to assess how many children are affected by their mothers’ confrontation with the criminal justice system, and the impact of this on children, in order to contribute to policy formulation and programme development, taking into account the best interests of children; Rule 69 requires that “[e]fforts shall be made to review, evaluate and make public periodically the trends, problems and factors associated with offending behaviour in women and the effectiveness in responding to the social reintegration needs of women offenders, as well as their children, in order to reduce the stigmatization and negative impact of those women’s confrontation with the criminal justice system on them”.

<sup>322</sup> United Nations Charter, Article 1(3) identifies one of the purposes of the United Nations: “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

<sup>323</sup> United Nations Charter, Article 55 provides: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

the Universal Declaration of Human Rights.<sup>324</sup> As explained in the CEDAW Commentary, it “[links] the full development and advancement of women with the exercise and advancement of women with the exercise and enjoyment of their human rights, it is purposive and instrumental, providing the legal basis for structural – transformative – change in the lives of women”.<sup>325</sup> While the discharge of the obligations in Article 3 will need to be pursued by the legislative and administrative organs of the State, lawyers and advocates may be in a position to pursue legal remedy for situations where governments have failed to take steps to ensure “women’s full development and advancement”. This could be an important initiative, both in situations where governments are still actively discriminating against women, or where overtly discriminatory laws and practices have been changed, but where women still do not have access to their rights in practice.

**Article 4: Temporary special measures, including quota systems, to increase numbers of women professionals in justices systems, are necessary to achieve equality**

Article 4 of the CEDAW Convention requires:

“1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a

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<sup>324</sup> Universal Declaration of Human Rights, adopted under General Assembly resolution 217(III) (1948), Preamble: “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom”.

<sup>325</sup> CEDAW Commentary, above note 240, page 102. See also Maputo Protocol, above note 230, Article 2(1)(c) of which requires States parties to “integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life”.

consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

"2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."<sup>326</sup>

The CEDAW Convention was drafted and adopted in the knowledge 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",<sup>327</sup> and that securing that change requires effort on the part of States. States and legal systems around the world typically do not provide for an adequate and effective legal framework and practical means to give effect to that framework with respect to the elimination of gender-based violence and discrimination against women. When States ratify or accede to human rights treaties, they are under a legal obligation, of immediate effect, to implement those rights in law and in practice.<sup>328</sup>

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<sup>326</sup> The Maputo Protocol, above note 230, also requires that States "take corrective and positive action in those areas where discrimination in law and in fact continues to exist" (Article 2(d)).

<sup>327</sup> CEDAW Convention, preambular paragraph 14.

<sup>328</sup> CEDAW Convention, Article 2, which includes the following commitment: "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". The duty to ensure equality between men and women in the enjoyment of their human rights is included in Article 3 of both the ICCPR and ICESCR. See also Human Rights Committee, General Comment No 31, above note 256, paragraph 13 of which provides that "States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant." (paragraph 13); and paragraph 14 of which states that "The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference

As explained by the CEDAW Committee, the purpose of temporary special measures is to: "accelerate the improvement in the position of women to achieve their de facto or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation".<sup>329</sup>

Temporary special measures have an important role to play in addressing violence against women. A diverse judiciary, legal profession and police force are extremely important in providing an appropriate and gender-competent service to women. This is particularly important for the enforcement of protection orders and the investigation, prosecution and punishment of those who are guilty of committing acts of violence against women. Other State and non-State actors have an important role in providing medical and psychological assistance to victims of crime, including gathering of medical evidence in a way that preserves victims' sense of dignity and also providing social and practical assistance in seeking accommodation, social services, benefits and the like. For example, to ensure rights-based penal policies for women in any form of detention, there must be sufficient numbers of women officers.

States have an obligation to confront and remove barriers to women's participation as professionals within all bodies and levels of judicial and quasi-judicial systems,<sup>330</sup> to ensure that there are more women participating across all institutions that

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to political, social, cultural or economic considerations within the State."

<sup>329</sup> CEDAW General Recommendation No 25, "Temporary special measures", adopted by the CEDAW Committee during its thirtieth session (2004), paragraph 15.

<sup>330</sup> CEDAW General Recommendation No 33, above note 232, paragraph 15(f).

create or enforce the law, across all forms of law.<sup>331</sup> This means they must take measures with a view to ensuring a greater number of women parliamentarians, judges, lawyers and police, as well as women in oversight positions (for example, in supervising places of detention).<sup>332</sup>

The CEDAW Committee has explained that temporary special measures may include, but are not limited to:

- Outreach/support programmes;
- Allocation and/or reallocation of resources;
- Preferential treatment;
- Targeted recruitment, hiring and promotion;
- Numerical goals connected with time frames; and
- Quota systems.<sup>333</sup>

The CEDAW Committee has also called on States to ensure that women undertake reviews of domestic legal processes.<sup>334</sup> It has rejected excuses for failing to adopt necessary special measures, for example that the State is powerless to intervene or unable to go against predominant market or political forces, such as those inherent in the private sector, private organizations or political parties.

### **Freedom from violence and substantive equality**

The CEDAW Committee has explained the need for temporary special measures:

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<sup>331</sup> Maputo Protocol, above note 230, Article 8(e) of which requires States to “ensure... that women are represented equally in the judiciary and law enforcement organs”.

<sup>332</sup> Bangkok Rules, above note 273, Rule 25(3): “In order to monitor the conditions of detention and treatment of women prisoners, inspectorates, visiting or monitoring boards or supervisory bodies shall include women members”.

<sup>333</sup> CEDAW General Recommendation No 25, above note 330, paragraph 22.

<sup>334</sup> CEDAW General Recommendation No 33, above note 232, paragraph 20(e) and (f).

"Pursuit of the goal of substantive equality... calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women".<sup>335</sup>

"Equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative and/or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence."<sup>336</sup>

### **Article 5: Gender stereotyping should not undermine the rule of law**<sup>337</sup>

Article 5 of the CEDAW Convention requires that States eradicate gender stereotyping. It requires 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;

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<sup>335</sup> CEDAW General Recommendation No 25, above note 330, paragraph 8.

<sup>336</sup> Ibid, paragraph 9.

<sup>337</sup> Regarding gender stereotyping and access to justice, see: Simone Cusack, "Eliminating judicial stereotyping: equal access to justice for women in gender-based violence cases", submitted to the Office of the High Commissioner for Human Rights (9 June 2014), available at URL <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx>; and International Commission of Jurists, "Sexual Violence against Women: Eradicating harmful gender stereotypes and assumptions in law and practice" (April 2015), available at URL <http://www.icj.org/icj-addresses-harmful-gender-stereotypes-and-assumptions/>.

“(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.”

States must take effective measures to address gender stereotyping, a practice that undermines women’s enjoyment of their human rights, particularly the right to equality before the law which is recognized in the ICCPR and the CEDAW Convention.<sup>338</sup> Police, investigators, prosecutors, defence lawyers and judges undermine women’s equality before the law by reaching a view on cases based on pre-conceived beliefs, rather than the facts of the case, and thereby undermine the credibility of victims unfairly.

Women are particularly subject to stereotyping in rape and sexual assault cases. For example, women are blamed for being dressed in a certain manner, socialising, drinking alcohol or being out late at night, so that the proper focus on the criminal responsibility of the perpetrator is missed. Underlying assumptions exist that women should be chaste or have a “good reputation” in order to access the protection of the criminal law.

In its General Recommendation No 33 on access to justice, the CEDAW Committee gave important guidance on the content of States’ obligation not to use gender stereotypes in the justice system:

“Stereotyping and gender bias in the justice system have far-reaching consequences on women’s full enjoyment of their human rights. They impede women’s access to justice in all areas of law, and may particularly impact on women victims and survivors of violence.

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<sup>338</sup> ICCPR, Article 14; CEDAW Convention, Article 15(1); Maputo Protocol, above note 230, Article 8.

Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to these stereotypes. Stereotyping as well affects the credibility given to women's voices, arguments and testimonies, as parties and witnesses. "Such stereotyping can cause judges to misinterpret or misapply laws. This has far reaching consequences, for example, in criminal law where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.

"Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes, undermining the claims of the victim/survivor and simultaneously supporting the defences advanced by the alleged perpetrator. Stereotyping, therefore, permeates both the investigation and trial phases and finally shapes the judgment."<sup>339</sup>

The CEDAW Committee has therefore called on States to ensure all legal and quasi-judicial procedures are free from gender stereotypes and/or prejudice.<sup>340</sup>

"The right of every woman to be free from violence includes, among others... the right to be valued and educated free of

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<sup>339</sup> CEDAW General Recommendation No 33, above note 232, paragraphs 26-27.

<sup>340</sup> Ibid, paragraph 18(e).

stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination."<sup>341</sup>

"Women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. Eliminating judicial stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors."<sup>342</sup>

### ***Forms of violence against women frequently subject to discrimination in the criminal justice system***

The following specific forms of violence against women that are subject to frequent discrimination in the criminal justice system have been recognized in the jurisprudence of the CEDAW Committee:

- Rape and sexual violence.
  - In *Vertido v The Philippines* the CEDAW Committee stressed that stereotyping affects women's right to a fair and just trial and that the judiciary must be cautious not to create inflexible standards of what women should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim, or a victim of gender-based violence in general.<sup>343</sup>
  - In *R.P.B. v The Philippines*, a case of sexual violence against a disabled woman, the CEDAW Committee affirmed that stereotyping affects women's right to

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<sup>341</sup> Convention of Belém do Pará, above note 245, Article 6(b); Maputo Protocol, above note 230, Article 2(2).

<sup>342</sup> CEDAW General Recommendation No 33, above note 232, paragraph 28.

<sup>343</sup> *Vertido v Philippines*, above note 248, paragraph 8.4. See also *R.P.B. v Philippines*, CEDAW Communication 34/2011, UN Doc CEDAW/C/57/D/34/2011 (2014), paragraph 8.8; *V.K. v Bulgaria*, CEDAW Communication 20/2008, UN Doc CEDAW/C/49/D/20/2008 (2011), paragraph 9.11.

a fair trial and urged the State Party to ensure that all criminal proceedings involving rape and other sexual offences are conducted free from prejudices or stereotypical notions regarding the victim's gender, age and disability. The Committee also called on the Philippines to institute effective training of the judiciary and legal professionals to eradicate gender bias from court proceedings and decision-making.<sup>344</sup>

- Domestic violence and the constraints of family law.
  - In the cases of *Isatou Jallow v Bulgaria*<sup>345</sup> and *Ángela González Carreño v Spain*<sup>346</sup> the CEDAW Committee found that the parental right of the father to access to his child had been prioritized over the safety and well-being of the mother and child.
  - In the case of *Isatou Jallow v Bulgaria* the Committee observed that "the authorities based their activities on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men".<sup>347</sup>
  - The case of *Ángela González Carreño v Spain* considered a situation where a child was murdered during a contact visit by her father in the context of a long-term situation of domestic violence. The CEDAW Committee said:

"Based on stereotypes, the right of visitation was seen merely as a right of the father and not as a right of the child as well. The best interests of the child would have required if not eliminating the

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<sup>344</sup> *R.P.B. v. The Philippines*, *ibid*, paragraph 9(b)(iii-iv).

<sup>345</sup> *Jallow v Bulgaria*, CEDAW Communication 32/2011, UN Doc CEDAW/C/52/D32/2011 (2012), paragraph 3.5.

<sup>346</sup> *Carreño v Spain*, above note 252, paragraphs 3.9-3.10.

<sup>347</sup> *Jallow v Bulgaria*, above note 345, paragraph 8.6.

visits, at least limiting them to supervised visits of short duration... The authorities' assessment of the risk to the author and her daughter seems to have been obscured by prejudice and stereotypes that lead to questioning the credibility of women victims of domestic violence."<sup>348</sup>

- Consistency with Article 5 can be achieved through training of judiciaries and lawyers, and by ensuring an on-going process to assess whether learning is implemented in professional practices and working life.

The CEDAW Committee has made the following recommendations to address gender stereotypes in legal systems relating to violence against women:

"(a) Take measures, including awareness-raising and capacity-building for all actors of justice systems and for law students to eliminate gender stereotyping and incorporate a gender perspective in all aspects of the justice system;

"(b) Include other professionals, in particular health professionals and social workers, who can play an important role in cases of violence against women and in family matters, in these awareness raising and capacity building programmes;

"(c) Ensure that capacity-building programmes address in particular:

"(i) The issue of the credibility and weight given to women's voices, arguments and testimonies, as parties and witnesses;

"(ii) The inflexible standards often developed by

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<sup>348</sup> *Carreño v Spain*, above note 252, paragraphs 3.9-3.10.

judges and prosecutors on what they consider as appropriate behaviour for women;

"(d) Consider promoting a dialogue on the negative impact of stereotyping and gender bias in the justice system and the need for improved justice outcomes for women victims and survivors of violence;

"(e) Raise awareness on the negative impact of stereotyping and gender bias and encourage advocacy related to stereotyping and gender bias in justice systems, especially in gender-based violence cases; and

"(f) Provide capacity building to judges, prosecutors, lawyers and law enforcement officials on the application of international legal instruments related to human rights, including the CEDAW Convention and the jurisprudence of the CEDAW Committee, and on the application of legislation prohibiting discrimination against women."<sup>349</sup>

***Duties on States to address the stereotyping in society that is a cause of gender-based violence***

"Effective measures should be taken to ensure that the media respect and promote respect for women."<sup>350</sup>

States have a broader obligation to address stereotyping in the wider community, not just those whose work brings them into contact with victims of gender-based violence. The Convention of *Bélem do Pará* in this context speaks of the need to "encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of

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<sup>349</sup> CEDAW General Recommendation No 33, above note 232, paragraph 29.

<sup>350</sup> CEDAW General Recommendation No 19, above note 225, paragraph 24(d).

violence against women in all its forms, and to enhance respect for the dignity of women”.<sup>351</sup>

The Maputo Protocol calls on States parties to “actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women”.<sup>352</sup>

The Istanbul Convention requires 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”.

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<sup>351</sup> Convention of Belém do Pará, above note 245, Article 8(g).

<sup>352</sup> Maputo Protocol, above note 230, Article 4(2)(d).

## CHAPTER VI

**TRAPS, DEAD-ENDS AND OBSTACLES TO JUSTICE: SOLUTIONS PROPOSED BY HUMAN RIGHTS LAW FRAMEWORKS**

Attaining access to justice for gender-based violence remains difficult in domestic jurisdictions, to varying degrees. Where there is a generally adequate framework of laws and policies, failures of political will, expressed through lack of training, oversight, enforcement and accountability on the part of individual State officials, mean that individual women who have experienced violence, or are at risk of violence, typically do not get the protection and access to justice that they are entitled to under international human rights law.<sup>353</sup>

Practitioners should be aware of these hurdles and develop strategies for circumventing or overcoming them. The reasons for these failures are multiple and complex, depending on the circumstances prevailing in each State or locality. Human rights law and standards have been effective in analysing how States need to improve laws, policies and practical initiatives if the human rights of women are to be ensured. This knowledge can be useful in domestic legal advocacy.

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<sup>353</sup> See, for example, *Goecke v Austria*, CEDAW Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005 (2007), paragraph 12.1.2: "The Committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations". See also: *Yildirim v Austria*, CEDAW Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (2007), paragraph 12.1.2; and *Angela González Carreño v Spain*, CEDAW Communication No 47/2012, UN Doc CEDAW/C/58/D/47/2012 (2014), paragraph 9.9.

**Traps: women facing further denial of their human rights in their search for justice**

Some failures are in the form of traps for victims and survivors where the attempt to achieve an effective remedy instead serves to exacerbate or compound the initial harm. A woman who acts to achieve justice for gender-based violence may put herself at risk of greater violence, either by the initial perpetrator or by family or community members who may be “shamed” if a woman makes a complaint. In this situation, for example, family members may kill women who seek justice for crimes of violence in the name of so-called “honour”. In some places, women risk being subjected to further violence by police when they make a report.

Some women seeking justice may be trapped as they themselves face sanction arising from a situation of violence, while no action is taken against the perpetrator. In some jurisdictions, for example, if a woman cannot prove that she was raped she may herself be prosecuted for crimes related to sexual contact outside marriage. Similarly, some women seeking justice for domestic violence may be charged for assault, or a similar offence, where they admit that they “fought back” in self-defence. Others may face being prosecuted for migration-related offences when they make a complaint about being trafficked. Women may face prosecution for crimes related to sexual and reproductive rights, where they have been raped and subsequently seek or obtain an abortion where they become pregnant as a result. Often women fear being subject to criminal sanction because of their status, especially because of their sexual orientation or gender identity, or because they are sex workers/in prostitution.

Other traps involve the risk by women of losing custody of their children. Others may be from marginalized groups, for example, indigenous women or minority ethnic women, who may fear or not trust State authorities and do not expect to be assisted.

Women may also fear secondary victimization in the criminal justice system, particularly in sexual violence cases, where they are sometimes treated with scepticism or contempt during the investigation and prosecution. This treatment may entail having their previous sexual history raised at trial, so as to suggest the woman is more likely to have consented to sexual contact, or to undermine her character. Rape victims may also face secondary victimization because they are subjected to humiliating and unscientific tests, which in themselves constitute ill-treatment or torture, such as invasive vaginal examinations and the "two finger" test to ascertain whether the woman or girl is accustomed to sexual penetration.

### **Dead ends: the State does not provide a remedy**

Some State failures are in the form of "dead ends". There is either no possible remedy available to women, or the remedies that are available *de jure* are not available *de facto*. There may be no remedy available because certain crimes of violence against women are not recognized in domestic law: for example, rape by a husband, or forcing a child into marriage. Often women cannot seek justice because, where women are deemed not to have full legal personality, any legal action they might pursue would need to be agreed to by a male relative or "guardian". Sometimes a perpetrator will have a legal defence to acts of violence, for example where "provocation" or "honour" is recognized as a defence for men who punish women for their purported transgressions, or to "discipline" them.<sup>354</sup> Often women know that no action will be taken on

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<sup>354</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, Article 42 (Unacceptable justifications for crimes, including crimes committed in the name of so-called "honour"):

"1. Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour."

their complaint, so that making a complaint is considered to be more trouble than it is worth. Similarly, many women know that they have nowhere to go, without any form of protection from further violence as a reprisal, especially in the case of domestic violence.

Additionally, some States have statutes of limitation applicable to certain offences, which means that women may only have a short window of time to make complaints. This is particularly problematic with gender-based violence against girls, who may not be able to bring cases themselves while they are under 18 years old or who are considered to be minors under domestic law. Often girls do not have access to the court, to give their views on contact with, for example, an abusive father.<sup>355</sup> Sexual violence against children may not be seen as criminal where the child is a “prostitute”, in contravention of international standards requiring that no child should be involved in sex work and that the involvement of children (under 18 years of age) in prostitution is a form of child abuse.<sup>356</sup>

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“2. Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.”

<sup>355</sup> See *Carreño v Spain*, above note 353, paragraph 11(b)(i): where the CEDAW Committee ruled that the respondent State should: “Take appropriate and effective measures so prior acts of domestic violence will be taken into consideration when determining custody and visitation rights regarding children and so that the exercise of custody or visiting rights will not endanger the safety of the victims of violence, including the children. The best interests of the child and the child’s right to be heard must prevail in all decisions taken in this regard...”.

<sup>356</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

**Obstacles: victims lack access to money to progress their case**

Some failures of political will are in the form of obstacles, which may be easy or difficult to overcome, depending on a woman's circumstances, particularly her independent access to money. Often women are financially dependent on family members, who may or may not themselves be the perpetrators of abuse. Without control over finances, these women cannot seek justice. Money may be necessary to pay for court fees, representation by lawyers, and for obtaining evidence such as medical reports or scientific testing for physical evidence of blood, or semen in cases of rape. Some needs for money manifest themselves in the form of corruption, where perpetrators may seek to pay off a victim and the victim accepts this rather than pursuing a prosecution.

**Alternative justice systems**

Many States provide or encourage mediation or various other forms of alternative dispute resolution, particularly for domestic violence. These may be religious or secular in character, but frequently are staffed by prominent people in the community, who already have religious, tribal or traditional roles or authority. They tend to be staffed mainly by men, reflecting the stereotypical role of men as authority figures.

Alternative dispute resolution has sometimes been portrayed as positive for women, as it tends to be lower in cost than secular mainstream judicial processes and can be a faster, more flexible process and generally more accessible to women, particularly rural women.

There are many forms of alternative dispute resolution mechanisms and procedures. Describing and evaluating each one individually is beyond the scope of the present Guide. They may range anywhere from quasi-judicial mechanisms, to arbitration to informal mediation or facilitation forum. Given the dysfunctional state of many ordinary or official justice systems as vehicles for effective justice, it is tempting to pursue what may be a more promising, if imperfect, means of redress.

Advocates should nevertheless be cautious in pursuing justice for women in many of these mechanisms, because they often fail to deliver justice in the form of effective remedies and accountability.

Special considerations should be taken into account, with reference to international human rights law, in determining if any alternative dispute resolution is able to provide effective remedies and reparation:

- Women should participate as adjudicators.
  - The lack of participation of women as adjudicators constitutes gender discrimination in itself. It also perpetrates stereotypes that women lack moral worth, are not capable of serious thought and cannot exercise responsibility to adjudicate disputes. It also serves to deny women equality before the law.
- The mechanism should aim to uphold human rights, including women's right to equality.
  - Some alternative justice systems tend to "place high priority on community cohesion or family reputation rather than the rights of victims".<sup>357</sup>
- Women should receive information about their various options for different forums.
  - The CEDAW Committee has called on States to ensure that women are informed "of their rights to use mediation, conciliation, arbitration and collaborative resolution of dispute processes".<sup>358</sup>

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<sup>357</sup> UN Secretary General, "In-depth study on all forms of violence against women", UN Doc A/61/122/Add.1 (2006), paragraph 355.

<sup>358</sup> General Recommendation No 33, "General recommendation on women's access to justice", UN Doc CEDAW/C/GC/33 (2015), paragraph 58(a).

- Women should be free to choose the forum for resolving their dispute.
  - The CEDAW Committee has also called on States to “guarantee that alternative dispute settlement procedures do not restrict access by women to judicial and other remedies in all areas of law, and does not lead to further violations of their rights”.<sup>359</sup>
- There should be equality of arms between the woman and perpetrator using these processes.
  - The CEDAW Committee has expressed concerns at the lack of measures available to ensure equality for women and men in preparing, conducting and responding to the outcomes of cases.<sup>360</sup>

For all these reasons, alternative dispute resolutions tend to a lack of equality of arms. Women and men come to these negotiations with very different levels of power over their situation which means that, in practice overall, they tend to infringe women’s right of access to justice.

### **Plural legal systems: scales weighted against women’s equal participation**

In 2011, UN Women, the United Nations agency tasked with promoting gender equality and the empowerment of women, undertook a far-reaching report into women’s search for justice globally. UN Women made the following reflections on plural legal systems:

“First, non-state justice systems and plural formal laws based on specific interpretations of religious or ethnic identity sometimes contain provisions that discriminate against women. In common with all justice systems, they tend to reflect the interests of the powerful, who have a greater say in shaping and defining laws and values. Second, the practical complexity of legal pluralism can create barriers for women’s access to

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<sup>359</sup> Ibid, paragraph 58(c).

<sup>360</sup> Ibid, paragraph 25(a)(v).

justice by, for example, enabling the powerful to 'forum shop' to gain legal advantage. Third, plural legal systems, defended on the basis of culture and religion can be resistant to reform in favour of women's rights."<sup>361</sup>

***Alternative dispute systems as a method of dealing with the crime of domestic violence***

In the case of domestic violence, the use of alternative dispute resolution processes is particularly problematic. Several aspects of international human rights law and standards – such as in article 48 of the Istanbul Convention, and in CEDAW General Recommendation 33 – explicitly forbid the use of alternative dispute resolution as a method of addressing criminal responsibility for domestic violence.

It has been recognized that it is contrary to the rule of law and women's equality before the law to remove certain serious crimes from the ambit of the ordinary justice system, including those consisting of violence against women. The use of alternative dispute mechanisms to deal with domestic violence, rather than considering such violence as a crime, is typically based on a persistent and damaging stereotype: that in a situation of domestic violence, both the perpetrator and the victim are equally at fault for the violence and that both need to moderate their behaviour in order to resolve the issue.

Making alternative dispute resolution compulsory in cases of gender-based violence has been identified as non-compliant with women's human rights guarantees. Article 48 of the Istanbul Convention thus requires States parties to "prohibit mandatory alternative dispute resolution processes, including mediation and conciliation". Most recently, the CEDAW Committee went further, and called on all States parties to the CEDAW Convention to "ensure that cases of violence against women, including domestic violence, are under no

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<sup>361</sup> UN Women, "Progress of the World's Women 2010-2011. In pursuit of justice" (UN Publications, 2011), page 68.

circumstances referred to any alternative dispute resolution procedures".<sup>362</sup>

Irrespective of whether alternative dispute resolution is mandatory or optional, the State still bears legal responsibility for the actions of these mechanisms, whether they are organs of the State or acting under authority of the State. As affirmed by UN Women: "The State's responsibility for ensuring compliance with human rights standards extends to all justice practices, including... alternative dispute resolution".<sup>363</sup>

Finally, the State remains responsible for the protection and promotion of safety of those subject to or potentially subject to acts of gender-based violence, as well as for the investigation, prosecution and punishment of all acts of gender-based violence, eliminating impunity and ensuring offender accountability.<sup>364</sup> An omission in this general obligation of due diligence, which may result in providing impunity for a certain group of perpetrators just because of their familiar or conjugal relationship with the victim, constitutes a legal breach of a State's obligations. Furthermore, there is developing recognition in international human rights law that violence perpetrated against a family member should be treated as an aggravated crime.<sup>365</sup>

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<sup>362</sup> CEDAW General Recommendation No 33, above note 358, paragraph 58(c).

<sup>363</sup> UN Women, "In Pursuit of Justice", above note 361, page 68.

<sup>364</sup> Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly under its resolution 65/228 (2010), paragraph 12.

<sup>365</sup> Istanbul Convention, above note 354, Article 46 (Aggravating circumstances): "Parties shall take the necessary legislative or other measures to ensure that the following circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences established in accordance with this Convention: a) the offence was committed

***Alternative dispute resolution as a method of dealing with harmful practices against girls***

In their joint General Comment, the CEDAW Committee and the Committee on the Rights of the Child have expressed concerns about harmful practices and girls' access to justice in States parties with plural legal systems, which may include customary, traditional and religious laws that support harmful practices even if other laws explicitly prohibit these same harmful practices.<sup>366</sup> The Committees expressed particular concern over the capabilities of those presiding over alternative dispute resolution mechanisms and the potential prejudices that may exist within these mechanisms to disadvantage girls wanting to realize justice. That these mechanisms may be ineligible for State or judicial scrutiny or review potentially denies or limits the justice that may be available to girls through these traditional systems.<sup>367</sup>

***Alternative dispute resolution as a method of dealing with family law disputes and other civil matters***

Alternative dispute resolution and family law hearings, which are less formal than ordinary courts, have been used frequently as a method of addressing general civil matters: for example, negotiating the terms and conditions of divorce of spouses and separation of partners, division of marital property as well as child custody, contact and maintenance. The CEDAW Committee has expressed concern that such processes may lead to discrimination against women, as women often lack choice over the forum in which their case is brought, and

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against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority...".

<sup>366</sup> "Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / general comment No. 18 of the Committee on the Rights of the Child on harmful practices", UN Doc CEDAW/C/GC/31-CRC/C/GC/18 (2014), paragraph 42.

<sup>367</sup> Ibid, para. 43.

typically religious or custom-based personal status law does not apply equality.<sup>368</sup>

The safety and well-being of women and their children must be prioritized in situations where negotiation and alternative dispute resolution are being used to address civil and family law issues. Where a perpetrator continues to threaten the safety and well-being of women and their children, the safety of those women and their children must be prioritized.<sup>369</sup>

In the case of *Angela González Carreño v Spain*, where a child was murdered by her estranged father after a long history of domestic violence, the CEDAW Committee outlined the human rights principles that family laws should include:

- The best interest of the child is the central concern;<sup>370</sup>
- The child's right to be heard must prevail;<sup>371</sup>

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<sup>368</sup> CEDAW Committee, General Recommendation No 29, "Economic consequences of marriage, family relations and their dissolution", UN Doc CEDAW/C/GC/29 (2013). See: paragraph 14, which states "The Committee has consistently expressed concern that identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems is in itself discriminatory against women. Lack of individual choice relating to the application or observance of particular laws and customs exacerbates this discrimination."; and paragraph 15, which states "States parties should adopt written family codes or personal status laws that provide for equality between spouses or partners irrespective of their religious or ethnic identity or community, in accordance with the Convention and the Committee's general recommendations. In the absence of a unified family law, the system of personal status laws should provide for individual choice as to the application of religious law, ethnic custom or civil law at any stage of the relationship. Personal laws should embody the fundamental principle of equality between women and men, and should be fully harmonized with the provisions of the Convention so as to eliminate all discrimination against women in all matters relating to marriage and family relations."

<sup>369</sup> *Carreño v Spain*, above note 353.

<sup>370</sup> *Ibid*, paragraph 11(b)(i).

<sup>371</sup> *Ibid*, paragraph 11(b)(i).

- When making an assessment of the best interests of the child, decision-makers must take into account the existence of a context of domestic violence;<sup>372</sup>
- There should be effective supervision of the contact between an abusive parent and a child;<sup>373</sup>
- State officials should uphold legal and policy frameworks that aim at the prevention, investigation and prosecution of domestic violence, so that the safety of women and children can be protected in practice (the State should exercise political will to enforce women’s and children’s safety in order to discharge its duty of due diligence);<sup>374</sup> and
- States should investigate the existence of failures, negligence or omissions on the part of public authorities that may have caused victims to be deprived of protection.<sup>375</sup>

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<sup>372</sup> Ibid, paragraph 9.4.

<sup>373</sup> Ibid, Paragraph 9.7.

<sup>374</sup> Ibid, paragraph 9.9.

<sup>375</sup> Ibid, paragraph 9.9.

## CHAPTER VII

# **SAFETY, WELL-BEING, DIGNITY, EMPOWERMENT: BUILDING FIRM FOUNDATIONS FOR THE CRIMINAL JUSTICE PROCESS**

The CEDAW Committee has required that: "Appropriate protective and support services should be provided for victims".<sup>376</sup>

Since the early 1990s, international human rights law and standards have developed in a mutually reinforcing manner alongside a number of promising practices concerning the provision of services to women victims of violence. The result has been the creation of a detailed framework of practices in law, policy, service provision and survivor empowerment. However, in her reflections on good practices to address violence against women, specifically rape, Sylvia Walby noted that "the full set of policies that has been identified as necessary in the literature and by practitioners has never been fully implemented in any society".<sup>377</sup> This area therefore has a lot of potential for legal advocacy.

These good practices are necessary to give effect to the general right to a remedy for discrimination and gender-based violence – respecting, protecting and fulfilling women's rights, and ensuring comprehensive reparation to individual survivors, including the dynamic transformation of gender inequality guaranteed by the CEDAW Convention. These good practices are also a necessary condition for successful criminal justice accountability of perpetrators. Given the dangers of repeated violence, and the shame and stigma often imposed on victims

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<sup>376</sup> CEDAW General Recommendation No 19, "Violence against women", UN Doc A/47/38 (1992), paragraph 24(b).

<sup>377</sup> European Parliament, "Overview of the worldwide best practices for rape prevention and for assisting women victims of rape" (Brussels: European Union, 2013), page 16.

by society as a whole, women are frequently unwilling to seek criminal justice solutions. Therefore these good practices are required as a foundation for criminal justice.

Legal advocacy in this area is important for ensuring access to services and, particularly, taking legal action to challenge financial cuts to services.

### **Making a firm foundation for initiatives to prevent gender-based violence through adequate gathering of data**

A basic requirement for successful action is the collection of accurate statistics about the prevalence of violence against women, and the effectiveness of any actions taken to address the issue. Gathering such data is an important part of the State obligation to prevent and remedy violence against women.<sup>378</sup>

Complete data on gender-based violence and women's access to justice is often lacking. Lawyers and advocates can help to fill these knowledge gaps and often have an important role to play as interlocutors in processes to reform or improve justice systems, as they have a detailed knowledge about individuals' need for justice and the struggles they face in seeking justice.

### **Guiding principles for promising practices in law and the justice system**

In his *In-depth study on violence against women*, the UN Secretary-General noted that:

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<sup>378</sup> CEDAW General Recommendation No 19, above note 376, paragraph 24(c), which requires that "States should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence". See also: Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará) of 9 June 1994, Article 8(h); and Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, Article 11.

"A growing body of experience suggests that when certain principles are followed, laws have greater potential to address violence against women effectively. These principles include:

- "Address violence against women as a form of gender-based discrimination, linked to other forms of oppression of women, and a violation of women's human rights
- "Make clear that violence against women is unacceptable and that eliminating it is a public responsibility
- "Monitor implementation of legal reforms to assess how well they are working in practice
- "Keep legislation under constant review and continue to reform it in the light of new information and understanding
- "Ensure that victims/survivors of violence are not "revictimized" through the legal process
- "Promote women's agency and empower individual women who are victims/survivors of violence
- "Promote women's safety in public spaces
- "Take into account the differential impact of measures on women according to their race, class, ethnicity, religion, disability, culture, indigenous or migrant status, legal status, age or sexual orientation".<sup>379</sup>

### **Ensuring effective laws, policies, practices and procedures**

States have been called on to: "continually review, evaluate and update their national laws, policies, practices and procedures, taking into account all relevant international legal instruments, in order to effectively respond to violence against women, including to ensure that such measures complement and are consistent with the criminal justice systems response to such violence and that civil law decisions reached in marital

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<sup>379</sup> UN Secretary-General, "In-depth study on all forms of violence against women", UN Doc A/61/122/Add.1 (2006), paragraph 293.

dissolutions, child custody decisions and other family law proceedings for cases involving domestic violence or child abuse adequately safeguard victims and the best interests of children".<sup>380</sup>

It is necessary to understand why women do not wish to come forward with complaints which means that women's views about obstacles to justice need to be sought. This could be done through qualitative surveys. For example, the European Union Fundamental Rights Agency undertook a survey on gender-based violence and discovered that it was necessary to reform police cultures, as women tend not to report violence because they do not think the police will believe their accounts of violence or conduct effective investigations and prosecutions. In domestic violence cases, it was noted that arrests of perpetrators and the obtaining of civil protection orders, which rely on the police and justice systems, should be supplemented by specialist victim support services.<sup>381</sup>

Initiatives to address violence against women, in all its forms, are necessarily complex, involving parliamentarians, judges, police, lawyers and medical professionals. In accordance with best practice, government officials should also facilitate the engagement of women's human rights defenders and civil society organizations in designing laws and practices, and supervising and reporting on the measures implemented.<sup>382</sup> Article 7 of the Istanbul Convention requires that States undertake comprehensive and coordinated policies that "place the rights of the victim at the centre of all measures and are implemented by way of effective co-operation among all relevant agencies, institutions and organisations". Article 10 of

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<sup>380</sup> Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly under its resolution 65/228 (2010), paragraph 14(d).

<sup>381</sup> European Union Agency for Fundamental Rights, "Violence against women: an EU-wide survey. Main results" (Luxembourg: Publications Office of the European Union, 2014), page 68.

<sup>382</sup> Istanbul Convention, above note 378, Article 9.

the Istanbul Convention requires States to establish one or more institutions that will be “responsible for the co-ordination, implementation, monitoring and evaluation of policies and measures”.

The CEDAW Committee has called on States parties to the CEDAW Convention to undertake appropriate and supportive measures conducive to women actively participating in the justice process in claiming their rights and reporting any crimes committed against them, safe from any potential retaliation against them for seeking justice.<sup>383</sup> The Committee indicated that: “Consultations with women’s groups and civil society organizations should be sought to develop legislation, policies and programmes in this area”.<sup>384</sup>

The CEDAW Committee has also said that States parties should: “Develop effective and independent mechanisms to observe and monitor women’s access to justice in order to ensure that justice systems are in accordance with the principles of justiciability, availability, accessibility, good quality and effectiveness of remedies.”<sup>385</sup> These mechanisms should include regular reviews of the efficacy all decision-making bodies that affect women’s rights, whether judicial, quasi-judicial or administrative.<sup>386</sup>

Where prevalence studies show that many more crimes are being committed than are being reported to the police, then it is vitally important that States find out why women are not coming forward and reporting violence to the authorities.<sup>387</sup>

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<sup>383</sup> CEDAW General Recommendation No 33, “General recommendation on women’s access to justice”, UN Doc CEDAW/C/GC/33 (2015), paragraph 51(d).

<sup>384</sup> Ibid, paragraph 51(d).

<sup>385</sup> Ibid, paragraph 20(a).

<sup>386</sup> Ibid, paragraph 20(a).

<sup>387</sup> Ibid, paragraph 20(e) and (f).

## **Measures required to implement appropriate rights-based services and support for women seeking justice**

### ***"Dignity and control": Survivors of gender-based violence should be empowered***

Women subjected to violence must be able to make informed decisions about, and how to use, the legal initiatives that would most help their situation and enable them to gain more control over their lives. This process of empowerment incorporates access to legal information, access to lawyers or paralegals and legal aid. It also calls for legal autonomy through a framework of law that permits women to act on their own behalf, rather than being subordinate to male family members.

The UN General Assembly has said:

"Crime prevention and criminal justice responses to violence against women must be focused on the needs of victims and empower individual woman who are victims of violence. They aim to ensure that prevention and intervention efforts are made not only to stop and appropriately sanction violence against women, but also restore a sense of dignity and control to the victims of such violence".<sup>388</sup>

This empowerment of women who have been subjected to violence can be achieved through a multi-disciplinary and co-ordinated "joined up approach". States should develop mechanisms that ensure a comprehensive and sustained response to the problem of gender-based violence in order to "increase the likelihood of successful apprehension, prosecution and conviction of the offender, contribute to the safety and well-being of the victim and prevent secondary victimization".<sup>389</sup>

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<sup>388</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 7.

<sup>389</sup> Ibid, paragraph 16(b).

***Women subjected to violence should be informed of their rights***

The CEDAW Committee has observed, when considering States parties' periodic reports, that States frequently fail to ensure that women are not discriminated against in their ability to access education, information and legal literacy programmes.<sup>390</sup>

Women who are subjected to violence usually know that what has happened to them is deeply wrong. However, unless they are informed about the remedies available to them, it is too easy for women to remain intimidated and castigated by social attitudes that support men's violence against women: social attitudes that identify complaining about violence and seeking justice as unacceptable and a "cause for additional discrimination and/or stigmatization".<sup>391</sup>

Informing women about their human rights and the remedies they can seek to redress and prevent violence is the bedrock of access to justice. Informing women that they have rights and entitlements can change the way that they think about their situation, even if they do not take steps to enforce those rights. Educating everyone – men and women, and children and young people – about women's rights and entitlements can change social attitudes to violence.

The CEDAW Committee has thus noted that educating men about women's rights is essential to ensuring non-discrimination and equality.<sup>392</sup> The Committee has recommended that States:

- Develop gender expertise;
- Inform women about their human rights and mechanisms to access justice, through dissemination of multi-format materials; and

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<sup>390</sup> CEDAW General Recommendation No 33, above note 383, paragraph 32.

<sup>391</sup> Ibid, paragraph 35(d).

<sup>392</sup> Ibid, paragraph 32.

- At all levels of education, integrate educational programmes on women's rights, gender equality and access to justice, which also emphasize the role of men and boys as advocates and stakeholders.<sup>393</sup>

***Women subjected to gender-based violence should have access to legal aid***

"A crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law".<sup>394</sup>

To that end, the CEDAW Committee recommends that States parties to the Convention:

- "a) Institutionalize systems of legal aid and public defense that are accessible, sustainable and responsive to the needs of women; and ensure that these services are provided in a timely, continuous and effective manner at all stages of judicial or quasi-judicial proceedings, including alternative dispute resolution mechanisms and restorative justice processes. Ensure unhindered access to legal aid and public defense providers to all relevant documentation and other information including witness statements;
- "b) Ensure that legal aid and public defense providers are competent, gender-sensitive, respect confidentiality and are granted adequate time to defend their clients;
- "c) Conduct information and awareness-raising programmes for women about the existence of legal aid and public defense and the conditions for obtaining them.

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<sup>393</sup> Ibid, paragraph 33.

<sup>394</sup> Ibid, paragraph 36. See also Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 11 July 2003, Article 8(a) also requires "effective access by women to judicial and legal services, including legal aid".

Information and communications technology should be used effectively to facilitate such programmes;

- "d) Develop partnerships with competent non-governmental providers of legal aid and/or train paralegals to provide women with information and assistance in navigating judicial and quasi-judicial processes and traditional justice systems; and
- "e) In cases of family conflicts or when the woman lacks equal access to the family income, means testing eligibility for legal aid and public defense should be based on the real income or disposable assets of the woman".<sup>395</sup>

### **The right of women to access legal aid**

The 2013 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems require that legal aid should be provided free of charge for those without means (including victims or witnesses) or where the interests of justice so require.<sup>396</sup>

Article 41(f) of the Principles and Guidelines require that where a woman brings a case against a member of her family, her income must be assessed as an individual, taking account of the means that she has access to; her income should not be assessed on the basis of the family's income.

The Principles and Guidelines also require that States include a gender-perspective in their legal aid processes.

Guideline 9 of the Principles and Guidelines concerns implementation of the right of women to access legal aid, paragraph 52 providing:

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<sup>395</sup> CEDAW General Recommendation No 33, above note 383, paragraph 37.

<sup>396</sup> United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly under its resolution 67/187 (2012), paragraph 8.

"States should take applicable and appropriate measures to ensure the right of women to access legal aid, including:

"(a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice;

"(b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims;

"(c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required."

***Women who have been subjected to gender-based violence should be recognized before the law and have full legal autonomy***

Under international human rights law, all persons have the right to recognition before the law.<sup>397</sup> Women must therefore have independent legal personality, and the consequent legal standing to bring their own cases without the need to seek the permission of a male relative or other family members. States are required to ensure that "any attempt to restrict women's legal capacity shall be deemed null and void".<sup>398</sup>

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<sup>397</sup> International Covenant on Civil and Political Rights (ICCPR), Article 16 of which provides that: "Everyone shall have the right to recognition everywhere as a person before the law". See also Convention on the Rights of Persons with Disabilities, Article 5(1) of which states: "States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law".

<sup>398</sup> CEDAW Convention, Article 15(3).

The CEDAW Convention reflects this basic principle of international human rights law, with Article 15 requiring States parties to ensure that women:

- Are equal with men before the law;<sup>399</sup>
- Have a legal capacity identical to that of men, in civil matters;
- Have the same opportunities to exercise that legal capacity;
- Have equal rights to men to conclude contracts and to administer property; and
- Are treated equally in all stages of procedure in courts and tribunals.<sup>400</sup>

***The special situation of girls who are victims of violence***

Domestic legal system needs to have a special awareness of the needs of girls, and the difficulties they have in accessing the legal system, to ensure their protection from, or remedy and reparation for, violence.

The Convention on the Rights of the Child requires that children, without discrimination, be protected from:

- All forms of “physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”.<sup>401</sup>
- Unlawful sexual activity, exploitation of prostitution or pornography.<sup>402</sup>
- All forms of torture or other cruel, inhuman or degrading treatment or punishment (neither capital punishment nor life imprisonment without possibility of release can

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<sup>399</sup> Ibid, Article 15(1).

<sup>400</sup> Ibid, Article 15(2).

<sup>401</sup> Convention on the Rights of the Child, Article 19.

<sup>402</sup> Ibid, Article 34.

be imposed for offences committed by persons below the age of 18.<sup>403</sup>

In making decisions, including those by courts of law and any other forum that takes action relating to children, the best interests of the child must be the primary consideration.<sup>404</sup> The best interests of the child is a dynamic concept,<sup>405</sup> a substantive right, an interpretative legal principle and a procedural right.<sup>406</sup> The best interests of the child includes the right of the child to express her or his own view.<sup>407</sup>

In the context of access to justice, including for gender-based violence, State obligations under the Convention on the Rights of the Child include:

“To establish mechanisms and procedures for complaints, remedy or redress in order to fully realize the right of the child to have his or her best interests appropriately integrated and consistently applied in all implementation measures, administrative and judicial proceedings relevant to and with an impact on him or her”.<sup>408</sup>

Within the body of international human rights law on children, there is a special awareness of the needs of girls. The CEDAW Committee has called on States to give special consideration to the needs of girls who, who lack the legal and/or social capacity to make important decisions about their lives, face specific barriers to access to justice and may be subject to gender-specific harmful practices and violence.<sup>409</sup>

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<sup>403</sup> Ibid, Article 37.

<sup>404</sup> Ibid, Article 3(1).

<sup>405</sup> Committee on the Rights of the Child General Comment No 14, “The right to the highest attainable standard of health”, UN Doc E/C.12/2000/4 (2000), paragraph 11.

<sup>406</sup> Ibid, paragraph 6.

<sup>407</sup> Ibid, paragraphs 89-93.

<sup>408</sup> Ibid, paragraph 15(c).

<sup>409</sup> CEDAW General Recommendation No 33, above note 383, paragraph 24.

The CEDAW Committee has also called on States parties to: "Ensure that independent, safe, effective, accessible and child-sensitive complaint and reporting mechanisms are available to girls".<sup>410</sup> These mechanisms should be staffed with specifically trained persons, work in an effective and gender-sensitive manner and conform to international standards. In their operation, these mechanisms must ensure that the primary consideration at all times is the best interest of the girl in question.<sup>411</sup>

The Committee has also said that States must undertake measures that will avoid marginalization of girls owing to lack of familial or other support for their rights, including the abolishment of any rules, customs or practices that require parental authorization before a girl can access certain services such as legal services, education and healthcare, including reproductive health.<sup>412</sup>

***Undocumented migrant women subjected to violence should be able to seek legal migration status***

Concerning the rights of immigrant women, the United Nations Handbook for Legislation of Violence against Women recommends that legislation should:

- Provide that survivors of violence against women should not be deported or subjected to other punitive actions related to their immigration status when they report such violence to police or other authorities; and
- Allow immigrants who are survivors of violence to confidentially apply for legal immigration status independently of the perpetrator.<sup>413</sup>

The CEDAW Committee has furthermore called on States to: "Refrain from conditioning the provision of support and

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<sup>410</sup> Ibid, paragraph 25(b).

<sup>411</sup> Ibid.

<sup>412</sup> Ibid, paragraph 25(c).

<sup>413</sup> UN Handbook for Legislation on Violence against Women (New York: Department of Economic and Social Affairs, 2010), page 34.

assistance to women, including the granting of residency permits, upon cooperation with judicial authorities in cases of trafficking in human beings and organized crime”.<sup>414</sup>

***Women subjected to violence who cannot read or need translation services***

The CEDAW Committee has called on States to: “Remove linguistic barriers by providing independent and professional translation and interpretation services when needed; provide individualized assistance for illiterate women in order to guarantee their full understanding of the judicial or quasi-judicial processes”.<sup>415</sup>

The Istanbul Convention includes the right to translation of evidence, “providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence”.<sup>416</sup>

***Special outreach measures to particular communities where there is risk of harmful practices***

Some crimes are seen as “cultural” or specific to certain communities or ethnic groups. This can be seen, for example, in the case of female genital mutilation (FGM), forced and early marriage and “honour” crimes. This can be problematic as either such violence is deemed to be “part of the culture” of particular groups, and therefore acceptable, or the prevalence of such violence is used as a discriminatory reason to criticize certain communities, particularly immigrant communities.

The reality is that gender-based violence is prevalent in all communities, all classes, and all backgrounds and that violence is permitted and sanctioned by all cultures. For example, the defence of so-called “honour” is very similar to the defence of “crime of passion” or “provocation” in cases where a man is

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<sup>414</sup> CEDAW General Recommendation No 33, above note 383, paragraph 51(f).

<sup>415</sup> Ibid, paragraph 17(b).

<sup>416</sup> Istanbul Convention, above note 378, Article 56(h).

jealous of this partner, or a wife is discovered to be unfaithful to her husband. The key issue with all communities is to ensure that women are safe to speak out, and seek remedies, about violence that affects them, and that all authorities demand and ensure that women can enjoy their rights to physical and mental integrity.

The most important step is to reach out to women in affected communities. The CEDAW Committee has in this regard required States to:

“Develop targeted outreach activities and distribute information about available justice mechanisms, procedures and remedies in various formats, and also in community languages such as through specific units or desks for women. Such activities and information should be appropriate for all ethnic and minority groups in the population and designed in close cooperation with women from these groups and, especially, women’s and other relevant organizations.”<sup>417</sup>

***Statutes of limitation should not function in such a way that women are denied access to justice***

The CEDAW Committee has required that States parties: “Ensure that the statutory limitation is in conformity with the interest of the victims”.<sup>418</sup>

The Istanbul Convention directly addresses the potential problem of statutes of limitations. It calls for States parties to “take the necessary legislative and other measures to ensure that the statute of limitation for initiating any legal proceedings with regard to the offences established in accordance with Articles 36, 37, 38 and 39 of this Convention [of sexual violence, including rape, forced marriage, FGM, forced abortion and sterilization], shall continue for a period of time that is sufficient and commensurate with the gravity of the offence in

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<sup>417</sup> CEDAW General Recommendation No 33, above note 383, paragraph 17(c).

<sup>418</sup> Ibid, paragraph 51(b).

question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority”.<sup>419</sup>

### ***Ensure women’s awareness of their legal rights***

All States must ensure that women who have been subjected to violence are aware of their rights and the remedies that are available to them if those rights have been violated. The General Assembly has called on States to make available “relevant information on rights, remedies and victim support services and on how to obtain them, in addition to information about their role and opportunities for participating in criminal proceedings”.<sup>420</sup>

The Istanbul Convention also requires that: “Parties shall take the necessary legislative or other measures to ensure that victims receive adequate and timely information on available support services and legal measures in a language they understand”.<sup>421</sup>

In addition, the CEDAW Committee has said that to improve women’s access to justice, States must ensure “access to Internet and other information and communication technologies”.<sup>422</sup>

### ***Effective training of all those coming into contact with women subjected to gender-based violence***

The CEDAW Committee has emphasized that: “Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention”.<sup>423</sup> A number of regional treaties set out specific measures for the education and training

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<sup>419</sup> Istanbul Convention, above note 378, Article 58.

<sup>420</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 18(a).

<sup>421</sup> Istanbul Convention, above note 378, Article 19.

<sup>422</sup> CEDAW General Recommendation No 33, above note 383, paragraph 17(d).

<sup>423</sup> CEDAW General Recommendation No 19, above note 376, paragraph 24(b).

of those involved in the justice administration process of cases relating to gender-based violence, including police and other law enforcement, court personnel and legal and other professionals.<sup>424</sup>

***Service provision should be integrated, including "one-stop shops"***

***Specialized services***

"States Parties... [undertake to]... provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, counselling services for all family members where appropriate, and care and custody of the affected children".<sup>425</sup>

The UN General Assembly has called on States to develop systems and mechanisms that will "ensure a comprehensive, multidisciplinary, coordinated, systematic and sustained response to violence against women".<sup>426</sup> Non-governmental organizations often provide such services, either on behalf of States, or independently.

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<sup>424</sup> Convention of Belem do Para, above note 378, Article 8(c): "States Parties... [undertake to]... promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women". See also Maputo Protocol, above note 394, Article 8(d): "States parties... shall take all appropriate measures to ensure... that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights". See also Istanbul Convention, above note 378, Article 15: "Parties shall provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of this Convention, on the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as on how to prevent secondary victimisation".

<sup>425</sup> Convention of Belem do Para, above note 378, Article 8(d)

<sup>426</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 16(b).

The UN Secretary-General's *In-depth study on all forms of violence against women* noted a number of general principles that indicate good practice in the provision of services to women that have been subject to gender-based violence. Those principles should:

- Promote well-being, physical safety and economic security of women;
- Enable women to overcome the multiple consequences of violence to rebuild their lives;
- Ensure access to appropriate services;
- Ensure that support options are available that take into account the particular needs of women facing multiple discrimination;
- Ensure that service providers are skilled, gender-sensitive, have ongoing training and conduct their work in accordance with clear guidelines, protocols and ethics codes and, where possible, provide female staff;
- Maintain confidentiality and privacy;
- Cooperate and coordinate with all other service providers for women subject to violence;
- Monitor and evaluate services provided;
- Reject ideologies that excuse or justify gender-based violence or blame victims; and
- Empower women to take control of their lives.<sup>427</sup>

Taking into account the most recent understandings of what works in service provision, the Maputo Protocol requires that States parties provide "necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting".<sup>428</sup>

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<sup>427</sup> "In-depth study on violence against women", above note 379, paragraph 321. See also Updated Model Strategies and Practical Measures, above note 380, paragraph 19.

<sup>428</sup> Maputo Protocol, above note 394, Article 5(c).

The Istanbul Convention requires States to ensure access to general support services,<sup>429</sup> which can then refer women to specialist services,<sup>430</sup> including rape crisis centres.<sup>431</sup> It includes the following requirements on standards for service provision:

- A gendered understanding of violence against women and domestic violence that focuses on the human rights and safety of women;
- An integrated approach, taking into account the relationship between victims, perpetrators, children and the wider social environment;
- Avoiding secondary victimisation;
- The empowerment and economic independence of women victims of violence;
- A range of protection and support services to be located on the same premises, where appropriate;

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<sup>429</sup> Istanbul Convention, above note 378, Article 20: "(1) Parties shall take the necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence. These measures should include, when necessary, services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment. (2) Parties shall take the necessary legislative or other measures to ensure that victims have access to health care and social services and that services are adequately resourced and professionals are trained to assist victims and refer them to the appropriate services."

<sup>430</sup> Ibid, Article 22 (Specialist support services): "(1) Parties shall take the necessary legislative or other measures to provide or arrange for, in an adequate geographical distribution, immediate, short- and long-term specialist support services to any victim subjected to any of the acts of violence covered by the scope of this Convention. (2) Parties shall provide or arrange for specialist women's support services to all women victims of violence and their children."

<sup>431</sup> Ibid, Article 25 (Support for victims of sexual violence): "Parties shall take the necessary legislative or other measures to provide for the setting up of appropriate, easily accessible rape crisis or sexual violence referral centres for victims in sufficient numbers to provide for medical and forensic examination, trauma support and counselling for victims."

- Availability of appropriately tailored services that address the specific needs of vulnerable persons, including child victims; and
- Availability of services do not depend on a woman's willingness to pursue judicial proceedings against any perpetrators of violence.<sup>432</sup>

One important initiative, which has been replicated in many countries, is the concept of the "one-stop shop": an institution, often based in a health centre, which provides a variety of important services for women. Such institutions include the provision of medical care for immediate injuries; access to emergency contraception and HIV prophylaxis in cases of rape; medico-legal evidence gathering and reporting; counselling; referrals to other service provision, for example shelters in cases of domestic violence; and assistance with making reports to the police.

The CEDAW Committee has endorsed the role of "one-stop centres". In order to reduce the number of steps that a woman must undertake before she can access justice, such centres should be accessible to all women regardless of financial circumstances or geographical location. The Committee has therefore called for States parties to establish such centres, which "could provide legal advice and aid, start the legal proceedings and coordinate support services for women across such areas as violence against women, family matters, health, social security, employment, property and immigration".<sup>433</sup>

Women often find it difficult to access justice because of burdens of work for payment, lack of transport, and shouldering the burdens of child-care and taking care of the family and the home. The CEDAW Committee has therefore called on States to "ensure access to financial aid, crisis

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<sup>432</sup> Ibid, Articles 18(3) and (4).

<sup>433</sup> CEDAW General Recommendation No 33, above note 383, paragraph 17(f).

centres, shelters, hotlines, and medical, psychosocial and counselling services".<sup>434</sup>

### ***Shelters and women's centres***

Shelters are often associated with domestic violence but can be places of refuge and support for other women who have been subjected to, or are at risk of, other forms of violence.

The UN General Assembly has called on States to "establish, fund and coordinate a sustainable network of accessible facilities and services for emergency and temporary residential accommodation, health services, including counselling and psychological care, legal assistance and other basic needs for women and their children who are victims of violence or who are at risk of becoming victims of violence".<sup>435</sup>

Shelters should be available in sufficient numbers to serve all women at risk. The United Nations has recommended that there should be "one shelter/refuge place for every 10,000 inhabitants, providing safe emergency accommodation, qualified counselling and assistance in finding long-term accommodation".<sup>436</sup> Shelters should be accessible and sufficiently staffed and funded to be able to reach out proactively to victims.<sup>437</sup>

In the case of *A.T. v Hungary*, the CEDAW Committee recalled that failure to provide shelters is a breach of Article 2(a)(b) and (c) of CEDAW.<sup>438</sup> In the same case, CEDAW found that shelters

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<sup>434</sup> Ibid, paragraph 16(b).

<sup>435</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 19(a).

<sup>436</sup> UN Handbook for Legislation on Violence against Women, above note 413, page 31.

<sup>437</sup> Istanbul Convention, above note 378, Article 23.

<sup>438</sup> In the case of *A.T. v Hungary*, CEDAW Communication No. 2/2003 (26 January 2005), the CEDAW Committee "[recalled] its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state '... [T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific

should be equipped to provide accommodation to children with disabilities or special needs.<sup>439</sup>

***Medical services and the right to the highest attainable standard of health***

In order to recover from violence, and take steps towards seeking justice, women who have been subjected to gender-based violence need to be safe and healthy, as well as legally empowered. The State should provide accessible, available, affordable, good quality<sup>440</sup> services,<sup>441</sup> and such access to

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legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence'. Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person." (paragraph 9.3). The Committee went on to find a violation of Article 5(a) and 16 in paragraph 9.4 of its views: "For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated."

<sup>439</sup> Ibid.

<sup>440</sup> Committee on Economic, Social and Cultural Rights, General Comment No 14, "The right to the highest attainable standard of health", UN Doc E/C.12/2000/4 (2000), paragraph 12(a)-(d).

<sup>441</sup> Ibid, paragraph 8: "The entitlements [inherent to the right to the highest attainable standard of health] include the right to a system of

services should not be dependent on the victim reporting the violence to the police.<sup>442</sup>

The right to the highest attainable standard of health includes a requirement to address gender-based violence and to ensure a holistic approach to health for women. The Committee on Economic, Social and Cultural Rights has noted that, in order to eliminate discrimination against women, it is necessary for States to implement comprehensive strategies to promote women's right to health throughout all stages of their life. These strategies should include:

- Preventing and treating diseases affecting women;
- Providing access, and/or where required removing barriers, to a full range of affordable and quality healthcare, including sexual and reproductive services;
- Educating and providing information about a full range of healthcare, including sexual and reproductive services; and
- Reducing women's health risks, including lowering maternal morbidity rates and protecting women from gender-based violence.<sup>443</sup>

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health protection which provides equality of opportunity for people to enjoy the highest attainable level of health".

<sup>442</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 15(i): "Member States are urged to review, evaluate and update their criminal procedures, as appropriate and taking into account all relevant international legal instruments, in order to ensure that... [inter alia] (i) [c]omprehensive services are provided and protection measures are taken when necessary to ensure the safety, privacy and dignity of victims and their families at all stages of the criminal justice process, without prejudice to the victim's ability or willingness to participate in an investigation or prosecution, and to protect them from intimidation and retaliation, including by establishing comprehensive witness and victim protection programmes." See also Istanbul Convention, above note 378, Article 18(4).

<sup>443</sup> Committee on Economic, Social and Cultural Rights, General Comment No 14, above note 440, paragraphs 20 and 21.

Reflecting on the right to the highest attainable standard of health for girls, the Committee on Economic, Social and Cultural Rights has found that “the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services”.<sup>444</sup> The Committee has also called for necessary measures to eliminate harmful traditional practices that discriminate against and affect the health of girls, including “early marriage, female genital mutilation, preferential feeding and care of male children”.<sup>445</sup>

While many women who have been subjected to violence are often unwilling to disclose the violence committed against them to State officials, or even to their friends and family, many are much more willing to seek medical assistance and disclose what has happened to them to medical professionals.<sup>446</sup>

All medical professionals therefore need to be trained to understand:

- Various forms of violence that affect women;
- Prevention and detection of such violence;
- Equality between women and men;
- Needs and rights of victims; and
- How to prevent secondary victimization.<sup>447</sup>

The World Health Organization has noted that healthcare professionals are able to “provide assistance by facilitating disclosure; offering support and referral; providing the

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<sup>444</sup> Ibid, paragraph 22.

<sup>445</sup> Ibid, paragraph 22.

<sup>446</sup> World Health Organization, “Responding to intimate partner violence and sexual violence against women. WHO clinical and policy guidelines” (Geneva: World Health Organization, 2013), page 1: “Statistics show that abused women use health-care services more than non-abused women do. They also identify health-care providers as the professionals they would most trust with disclosure of abuse.”

<sup>447</sup> Istanbul Convention, above note 378, Article 15.

appropriate medical services and follow-up care; or gathering forensic evidence, particularly in cases of sexual violence".<sup>448</sup>

All medical professionals need to know how to treat injuries and health conditions caused by violence; how to give an appropriate medical service, especially sexual and reproductive health services (including, in cases of rape, pregnancy testing, emergency contraception and abortion) and sexually transmitted infection testing, prophylaxis and treatment. Psychosocial counselling should also be available. Some forms of violence, especially FGM, lead to complex sexual and reproductive health conditions that may persist through the life of the woman.

Many forms of gender-based violence do not cause physical injuries, but nonetheless may adversely affect women's emotional and psychological health. Medical professionals should be trained to be aware of how women subjected to gender-based violence present psychological difficulties, and how to ask women whether they have experienced violence in a way that supports them and does not subject them to secondary victimization.

Once they are aware that a patient has been subjected to gender-based violence, medical professionals should record a detailed history of the violence, even if they do not undertake a full medico-legal examination. Independent records of when and what kind of violence was perpetrated, and the resulting physical and psychological symptoms, might later be able to be used as evidence for a subsequent criminal investigation.

Medical professionals should be able to refer women subjected to gender-based violence to other appropriate service providers. States should provide access to general services, which can then refer to specialist services, especially rape crisis centres. It is also useful for medical professionals to display information about specialist services for survivors of gender-based violence in their waiting rooms and toilet facilities.

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<sup>448</sup> WHO clinical and policy guidelines, above note 446, page 1.

### **Guidelines for health-care providers working with women subject to gender-based violence**

The World Health Organization has provided the following guidance on appropriate medical services for victims of gender-based violence:

“Women who disclose any form of violence by an intimate partner (or other family member) or sexual assault by any perpetrator should be offered immediate support. Health-care providers should, as a minimum, offer first-line support when women disclose violence. First-line support includes:

- “being non-judgemental and supportive and validating what the woman is saying
- “providing practical care and support that responds to her concerns, but does not intrude
- “asking about her history of violence, listening carefully, but not pressuring her to talk (care should be taken when discussing sensitive topics when interpreters are involved)
- “helping her access information about resources, including legal and other services that she might think helpful
- “assisting her to increase safety for herself and her children, where needed
- “providing or mobilizing social support.

“Providers should ensure:

- “that the consultation is conducted in private
- “confidentiality, while informing women of the limits of confidentiality (e.g. when there is mandatory reporting)

“If health-care providers are unable to provide first-line support, they should ensure that someone else (within their health-care setting or another that is easily accessible) is immediately available to do so.”<sup>449</sup>

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<sup>449</sup> Ibid, page 3.

### ***Helplines and advice services***

Best practice requires that helpline advice services be available 24 hours a day, 7 days a week and free of charge. They should also ensure special protection for the confidentiality of those who use it, so that a perpetrator cannot learn that the victim has been seeking help. For example, technology can be used to ensure that the telephone number of the helpline is not recorded on a user's phone.<sup>450</sup>

#### **When are services adequate?**

States should establish at least the following minimum standards of availability of support services for complainants/survivors:

- One national women's phone hotline where all complainants/survivors of violence may get assistance by phone around the clock and free of cost and from where they may be referred to other service providers;
- One shelter/refuge place for every 10,000 inhabitants, providing safe emergency accommodation, qualified counselling and assistance in finding long-term accommodation;
- One women's advocacy and counselling centre for every 50,000 women, which provides proactive support and crisis intervention for complainants/survivors, including legal advice and support, as well as long-term support for complainants/survivors, and specialized services for particular groups of women (such as specialized

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<sup>450</sup> Istanbul Convention, above note 378, Article 24: "Parties shall take the necessary legislative or other measures to set up state-wide round-the-clock (24/7) telephone helplines free of charge to provide advice to callers, confidentially or with due regard for their anonymity, in relation to all forms of violence covered by the scope of this Convention". See also the Updated Model Strategies and Practical Measures, above note 380, paragraph 19, especially paragraph 19(b).

services for immigrant survivors of violence, for survivors of trafficking in women or for women who have suffered sexual harassment at the workplace), where appropriate;

- One rape crisis centre for every 200,000 women;
- Access to health care, including reproductive health care and HIV prophylaxis; and
- Services should be run by independent and experienced women's non-governmental organizations providing gender-specific, empowering and comprehensive support to women survivors of violence, based on feminist principles.<sup>451</sup>

### **Policing: basic principles**

Legal advocacy in this area is extremely important, for example, using standards to raise complaints regarding police failures, or showing negligence on the part of the police.

As women subjected to violence often tend to fear or distrust police services, a priority should be placed on reform of policing laws and practice and the training of police officers on all aspects of providing a service to women who are victims of gender-based violence.<sup>452</sup> This should include a robust confrontation of police attitudes that foster, justify or tolerate

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<sup>451</sup> UN Handbook for Legislation on Violence against Women, above note 413, page 31.

<sup>452</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 16(c) of which urges States to "promote the use of specialized expertise in the police, among prosecution authorities and in other criminal justice agencies, including through the establishment, where possible, of specialized units or personnel and specialized courts or dedicated court time, and to ensure that all police officers, prosecutors and other criminal justice officials receive regular and institutionalized training to sensitize them to gender and child-related issues and to build their capacity with regard to violence against women".

violence against women.<sup>453</sup> Good practice requires such training to be systematic and mandatory.<sup>454</sup>

Appropriate expertise is necessary for police to cooperate effectively with other agencies in multi-disciplinary teams working to ensure victim safety.<sup>455</sup> Police should be held to account through appropriate oversight and accountability mechanisms that are responsible for implementing procedures and enforcing these under codes of conduct.<sup>456</sup>

Police services should aim to recruit women at all levels of seniority, and increase numbers of women officers working on front-line services so that women who are victims of gender-based violence can speak to a woman officer.<sup>457</sup>

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<sup>453</sup> Ibid, paragraph 16(d) of which urges States to “ensure that attitudes of criminal justice officials that foster, justify or tolerate violence against women are held up to public scrutiny and sanction”.

<sup>454</sup> In-depth study on all forms of violence against women, above note 379, paragraph 296.

<sup>455</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 16(b) of which urges States to “develop mechanisms to ensure a comprehensive, multidisciplinary, coordinated, systematic and sustained response to violence against women in order to increase the likelihood of successful apprehension, prosecution and conviction of the offender, contribute to the well-being and safety of the victim and prevent secondary victimization”.

<sup>456</sup> Ibid, paragraph 16(a) of which urges States to “ensure that the applicable provisions of laws, policies, procedures, programmes and practices related to violence against women are consistently and effectively implemented by the criminal justice system and supported by relevant regulations as appropriate”. See also paragraph 16(j) which urges States to “ensure that the exercise of powers by police, prosecutors and other criminal justice officials is undertaken according to the rule of law and codes of conduct and that such officials are held accountable for any infringement thereof through appropriate oversight and accountability mechanisms”.

<sup>457</sup> Ibid, paragraph 16(k) of which urges States to “ensure gender-equitable representation in the police force and other agencies of the justice system, particularly at the decision-making and managerial levels.” See also paragraph 16(n), which urges States to “provide

The establishment of police units that specialize in gender-based violence is typically often extremely effective.<sup>458</sup> “Women’s desks” or “gender desks” are common in South American States.<sup>459</sup> The CEDAW Committee has said that States parties should in this regard consider “establishing specialized gender units within law enforcement, penal and prosecution systems”.<sup>460</sup>

The UN Handbook for Legislation on Violence against Women makes a number of recommendations for good practice when attending an initial call from a victim, especially when dealing

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victims of violence, where possible, with the right to speak to a female officer, whether it be the police or any other criminal justice official”.

<sup>458</sup> Ibid, paragraph 16(c) of which urges States to “promote the use of specialized expertise in the police, among prosecution authorities and in other criminal justice agencies, including through the establishment, where possible, of specialized units or personnel and specialized courts or dedicated court time, and to ensure that all police officers, prosecutors and other criminal justice officials receive regular and institutionalized training to sensitize them to gender and child-related issues and to build their capacity with regard to violence against women”.

<sup>459</sup> In-depth study on violence against women, above note 379, paragraph 316: “Specialized police units aim to provide a safe environment for women who report violence and to enhance the police response to violence against women through specialized officers. The first women’s police unit was established in Sao Paulo, Brazil in 1985. The practice then spread throughout Latin America, including to Argentina, Ecuador, Peru and Uruguay. In the Dominican Republic, domestic violence legislation is enforced by six prosecutor’s offices working exclusively with domestic violence cases; six police squads specifically charged with protecting women from violence; and a magistrate’s court and a criminal court dealing exclusively with cases of domestic violence. In Belgium, the Human Trafficking Unit is tasked with detecting cases of human trafficking, sending early warnings to the authorities and serving as an operational focal point within the country’s police forces.”

<sup>460</sup> CEDAW General Recommendation No 33, above note 383, paragraph 51(c). See also paragraph 17(e): “The creation of gender units as components of justice institutions should be considered”.

with a domestic violence case, which require a number of basic steps to be established in policing laws and regulations:

- "Interviewing the parties and witnesses, including children, in separate rooms to ensure there is an opportunity to speak freely;
- "Recording the complaint in detail;
- "Advising the complainant/survivor of her rights;
- "Filling out and filing an official report on the complaint;
- "Providing or arranging transport for the complainant/survivor to the nearest hospital or medical facility for treatment, if it is required or requested;
- "Providing or arranging transport for the complainant/survivor and the complainant/survivor's children or dependents, if it is required or requested; and
- "Providing protection to the reporter of the violence".<sup>461</sup>

This level of detail is important to lay down a record of evidence about the concerns of the victim and reports of the violence so far, and also for allowing the victim to make choices to take action about previous assaults at a later date. This is especially important in the situation of domestic violence. Often women subject to gender-based violence take some time to gain sufficient confidence with the police to be able to progress an investigation. If a thorough investigation takes place at the beginning of a woman's engagement with the police, then she can show a longer term pattern of violence.

Proactive policing requires that police officers have the expertise to advise women on how State agencies and officials can secure their safety and access to justice and reparation, including referrals to appropriate service-providers.

### ***Policing: ensuring safety***

Good practice requires the police to attend reports of gender-based violence promptly and to offer immediate protection to

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<sup>461</sup> UN Handbook for Legislation on Violence against Women, above note 413, page 36.

victims.<sup>462</sup> This may involve the police providing, on the spot, an emergency protection order that can be confirmed in due course by the courts.<sup>463</sup> Risk assessment and management is also an important process. This should ensure “that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support”.<sup>464</sup> The risk assessment should also take into account whether the perpetrator possesses or has access to firearms.<sup>465</sup>

## **Requirements of protection orders**

### ***Parameters of protection orders***

“States Parties condemn all forms of violence against women... and undertake to... adopt legal measures to require the perpetrator to refrain from harassing, intimidating, or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property”.<sup>466</sup>

A variety of protection orders must be available to address situations of danger, whether immediate or longer term, and should be available to protect women and girls from all forms of violence, using a variety of powers according to the victim’s need. For example, a girl at risk of being taken abroad for the purposes of being subjected to FGM or a forced marriage may require special arrangements.<sup>467</sup>

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<sup>462</sup> Istanbul Convention, above note 378, Article 50.

<sup>463</sup> Ibid, Article 52 refers to “the competent authorities” being granted the power to make emergency orders.

<sup>464</sup> Ibid, Article 51(1).

<sup>465</sup> Ibid, Article 51(2).

<sup>466</sup> Convention of Belem do Para, above note 378, Article 7(d).

<sup>467</sup> Information to UK residents at risk of forced marriage indicates that: “Each [forced marriage protection] order is unique, and is designed to protect you according to your individual circumstances. For example, the court may order someone to hand over your passport or reveal where you are. In an emergency, an order can be

“Go” orders, requiring a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time, are an important measure.<sup>468</sup> Other orders prohibit the perpetrator from entering the residence of or contacting the victim or person at risk, and requiring perpetrators to stay away from places the victim goes to regularly.<sup>469</sup> Measures taken must give priority to the safety of victims or persons at risk. For example, the perpetrator’s property rights over a shared home should not take precedence over the safety of the victim.<sup>470</sup>

***The priority of women’s rights to physical and mental integrity***

The CEDAW Committee has said:

“Women’s human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy”.<sup>471</sup>

Protection or restraining orders should be available for all forms of violence against women, not just domestic violence.<sup>472</sup> According to the Istanbul Convention, these orders must be:

- Available for immediate protection;
- Without undue financial or administrative burdens on the victim;
- Issued for a specified period, or until modified or discharged;

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made to protect you immediately.” See ‘Forced marriage’, at URL: <https://www.gov.uk/stop-forced-marriage>.

<sup>468</sup> For example, see Istanbul Convention, above note 378, Article 52.

<sup>469</sup> For example, see Istanbul Convention, above note 378, Article 53.

<sup>470</sup> *A.T. v Hungary*, above note 438, paragraph 9.3.

<sup>471</sup> *Ibid*, paragraph 9.3. See also *Opuz v Turkey* (2009) ECHR 870, paragraph 144: “the national authorities’ interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts”.

<sup>472</sup> Istanbul Convention, above note 378, Article 53.

- Available for issue on an *ex parte* basis with immediate effect;
- Available irrespective of, or in addition to, any other legal proceedings; and
- Allowed to be introduced in subsequent legal proceedings.<sup>473</sup>

The CEDAW Committee has called on States parties to the CEDAW Convention to: “Take steps to guarantee that women are not subjected to undue delays in applications for protection orders and that all cases of gender-based discrimination under criminal law, including violence, are heard in a timely and impartial manner”.<sup>474</sup>

Where the police cannot issue such orders, “measures must be taken to ensure timely access to court decisions in order to ensure swift action by the court”.<sup>475</sup> The availability of such orders must not be dependent on the initiation of a criminal case,<sup>476</sup> or divorce proceedings.<sup>477</sup> Prosecutors should act on their own initiative and when considering evidence relating to a prosecution, should reach out to the victim to ascertain her protection needs; the onus for seeking a protection order should not lie on the woman at risk.<sup>478</sup>

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<sup>473</sup> Ibid, Article 53(2).

<sup>474</sup> CEDAW General Recommendation No 33, above note 383, paragraph 51(j).

<sup>475</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 15(h).

<sup>476</sup> Ibid, paragraph 15(h).

<sup>477</sup> UN Handbook for Legislation on Violence against Women, above note 413, page 45.

<sup>478</sup> *Opuz v Turkey*, above note 471, paragraph 148: “Furthermore, in the light of the State’s positive obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting the applicant’s mother. To that end, the local public prosecutor or the judge at the Diyarbakır Magistrate’s Court could have ordered on his/her initiative one or more of the protective

Courts must be aware of the increased risk that women face when they seek official assistance from the authorities. The Inter-American Commission on Human Rights noted that women may need increased legal protection from the State when a protection order has been issued, recognizing that: "Restraining orders may aggravate the problem of separation violence, resulting in reprisals from the aggressor directed towards the woman and her children".<sup>479</sup>

When assessing whether a protection order should be granted, the courts should take account of all forms of violence against women, not just life-threatening violence.<sup>480</sup>

The standard of proof that an applicant must discharge in order to be awarded with an order should not be the standard of criminal proof, "beyond reasonable doubt".<sup>481</sup> Emergency orders should be available on the sworn statement or live evidence of the victim. To seek further evidence may lead to delays that put the victim at further risk.<sup>482</sup>

Courts should also be aware that many forms of violence, particularly domestic violence, are courses of conduct which

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measures enumerated under sections 1 and 2 of Law no. 4320 (see paragraph 70 above). They could also have issued an injunction with the effect of banning H.O. from contacting, communicating with or approaching the applicant's mother or entering defined areas (see, in this respect, Recommendation Rec(2002)5 of the Committee of the Ministers, paragraph 82 above). On the contrary, in response to the applicant's mother's repeated requests for protection, the police and the Diyarbakır Magistrate's Court merely took statements from H.O. and released him (see paragraphs 47-52 above). While the authorities remained passive for almost two weeks apart from taking statements, H.O. shot dead the applicant's mother."

<sup>479</sup> *Jessica Lenahan (Gonzales) et al v the United States*, Inter-American Commission on Human Rights Case No 12.626, Report No. 80/11 (21 July 2011), paragraph 166.

<sup>480</sup> *V.K. v Bulgaria*, CEDAW Communication 20/2008, UN Doc CEDAW/C/49/D/20/2008 (2011), paragraph 9.9.

<sup>481</sup> *Ibid*, paragraph 9.9

<sup>482</sup> UN Handbook for Legislation on Violence against Women, above note 413, page 48.

take place over time,<sup>483</sup> and should not therefore impose strict time-based restrictions on access to protection orders.<sup>484</sup>

***Should third parties be able to seek protection orders on behalf of women at risk?***

A key issue to consider is whether a third party should be able to apply for a protection order: will this act to empower a woman who has been subjected to violence? Seeking an order on her behalf may compromise her interests or her safety, or put her more at risk. Women are usually the best judges of their own safety.

Third parties should therefore only be empowered to seek protection orders where:

- The woman is legally incompetent (for example, due to mental illness or impairment) in which case, a legal guardian may apply; or
- To allow other actors, such as State actors, family members, and relevant professionals to have standing in such applications, while ensuring that the agency of the complainant is respected.<sup>485</sup>

Courts that rule on applications for protection orders must be well trained in the realities of the various forms of gender-based violence, as well as the relevant law and policies.<sup>486</sup>

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<sup>483</sup> *V.K. v Bulgaria*, above note 481, paragraph 9.9.

<sup>484</sup> *Ibid*, paragraph 9.9.

<sup>485</sup> UN Handbook for Legislation on Violence against Women, above note 413, page 48.

<sup>486</sup> *V.K. v Bulgaria*, above note 480, paragraph 9.16(b)(iv), where the CEDAW Committee recommended that Bulgaria: "Provide mandatory training for judges, lawyers and law enforcement personnel on the application of the Law on Protection against Domestic Violence, including on the definition of domestic violence and on gender stereotypes, as well as appropriate training on the Convention, its Optional Protocol and the Committee's general recommendations, in particular general recommendation No. 19".

### ***Protection orders that rely on stereotypes constitute secondary victimization***

In some jurisdictions, certain restraining orders may require the perpetrator to desist from his behaviour but may at the same time also seek to control the victim's "provocative behaviour". Such orders may violate women's right to equality and access to justice since they are predicated on stereotypical assumptions that a woman is responsible for the violence committed against her, rather than holding the man to account. These 'mutual' orders tend to deny women their equality of access to the court, because if women go back to court complaining of further violence, the assumption is made that she has continued to be "provocative" leading to a failure of the courts and the authorities to protect her.<sup>487</sup>

### ***Enforcement of protection orders***

Protection orders are only effective if they are diligently enforced in cases of breach.<sup>488</sup> The enforcement of protection orders must be made a mandatory, not discretionary, duty of police and other State officials concerned with such orders.<sup>489</sup> Effective implementation mechanisms should be created,<sup>490</sup> for example through the establishment of a registration system for judicial protection, restraining or barring orders that enable police or criminal justice officials to quickly determine whether such an order is in force.<sup>491</sup> Adequate resources must be invested to ensure implementation; training for police and justice system officials must be undertaken; and model protocols and directives that can be followed by police should be designed and implemented.<sup>492</sup>

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<sup>487</sup> UN Handbook for Legislation on Violence against Women, above note 413, page 49.

<sup>488</sup> *Lenahan (Gonzales) v USA*, above note 479, paragraph 163.

<sup>489</sup> *Ibid*, paragraph 215(4).

<sup>490</sup> *Ibid*, paragraph 215(4).

<sup>491</sup> Updated Model Strategies and Practical Measures, above note 380, paragraph 15(h).

<sup>492</sup> *Lenahan (Gonzales) v USA*, above note 479, paragraph 215(4).

Breaches of orders must be criminalized. In countries where legislation does not criminalize the violation of a civil protection order, “prosecutors and police have expressed frustration about their inability to arrest the perpetrator”.<sup>493</sup>

As women seek protection through enforcement of protection orders, police should treat them in a dignified manner that respects their rights. For example, in the case of *Lenehan (Gonzales) v USA*, a mother feared for the safety of her children who had been taken by their father outside the normal visiting regime. When she sought enforcement of her protection order, she was patronized and treated dismissively by police. The Inter-American Commission identified this unprofessional and discriminatory behaviour as a form of “mistreatment... [that] results in a mistrust that the State structure can really protect women and girl-children from harm, which reproduces the social tolerance toward these acts. The Commission also underscores the internationally-recognized principle that law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons in the performance of their duties.”<sup>494</sup> The Commission reiterated that State inaction in cases of violence against women and indifference towards women subjected to violence creates an environment that tacitly condones and promotes further acts of violence and impunity by perpetrators who perceive a State’s unwillingness to engage with the issue.<sup>495</sup>

### **Access to legal assistance and courts that can comprehensively deal with a variety of issues**

Women subjected to violence, particularly domestic violence, tend to have complex and inter-related legal concerns, for example, divorce and child contact (family law), access to

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<sup>493</sup> UN Handbook for Legislation on Violence against Women, above note 380, page 50.

<sup>494</sup> *Lenehan (Gonzales) v USA*, above note 479, paragraph 167.

<sup>495</sup> Ibid, paragraph 168 (citing *Maria da Penha v Brazil*, Inter-American Commission on Human Rights, Case No 12.051, Report No 54/01 (16 April 2001), paragraph 56). *Maria da Penha v Brazil* was also cited in *Opuz v Turkey*, above note 471, paragraph 86.

marital property, either owned or leased (family law and property law), employment law, access to social support and financial benefits, and migration issues. The CEDAW Committee has called on States parties to: "Consider the creation of gender-sensitive family judicial or quasi-judicial mechanisms dealing with issues such as property settlement, land rights, inheritance, dissolution of marriage and child custody within the same institutional framework".<sup>496</sup>

### **Affordability: access to legal aid**

"A crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law".<sup>497</sup>

The CEDAW Committee has recommended that States parties:

- (a) "Institutionalize systems of legal aid and public defense that are accessible, sustainable and responsive to the needs of women; and ensure that these services are provided in a timely, continuous and effective manner at all of judicial or quasi-judicial proceedings, including alternative dispute resolution mechanisms and restorative justice processes. Ensure unhindered access to legal aid and public defense providers to all relevant documentation and other information including witness statements;
- (b) "Ensure that legal aid and public defense providers are competent, gender-sensitive, respect confidentiality and are granted adequate time to defend their clients".<sup>498</sup>

Furthermore, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems require that: "Without

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<sup>496</sup> CEDAW General Recommendation No 33, above note 383, paragraph 46(b).

<sup>497</sup> Ibid, paragraph 36.

<sup>498</sup> Ibid, paragraph 37.

prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime”.<sup>499</sup>

The rules relating to appropriateness of providing legal aid to victims are provided for in Guideline 7 (Legal aid for victims):

“Without prejudice to or inconsistency with the rights of the accused and consistent with the relevant national legislation, States should take adequate measures, where appropriate, to ensure that:

- (a) “Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization;
- (b) “Child victims receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;
- (c) “Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation;
- (d) “Victims are promptly informed by the police and other front-line responders (i.e., health, social and child welfare providers) of their right to information and their entitlement to legal aid, assistance and protection and of how to access such rights;
- (e) “The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so require;
- (f) “Victim services agencies and non-governmental organizations can provide legal aid to victims;

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<sup>499</sup> Principles and Guidelines on Access to Legal Aid, above note 396, Principle 4, paragraph 24.

(g) "Mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e., health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs."<sup>500</sup>

### **Family law and gender-based violence**

In situations of domestic violence, divorce or other forms of legally-recognized separation is often an important form of justice, but not complete in itself.

In the context of gender-based violence, there are several important issues relating to discrete areas of law.

#### ***Priority: The best interests of the child***

In a situation of gender-based violence where children are affected – either as witnesses of violence against a woman, especially where their mother is subjected to domestic violence, or subjected to violence themselves – the best interests of the child is the overriding principle for courts to consider:

"The [CEDAW] Committee recalls that in matters of child custody and visiting rights, the best interests of the child must be a central concern and that when national authorities adopt decisions in that regard they must take into account the existence of a context of domestic violence".<sup>501</sup>

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<sup>500</sup> Ibid, Guideline 7, paragraph 48.

<sup>501</sup> *Angela González Carreño v Spain*, CEDAW Communication No 47/2012, UN Doc CEDAW/C/58/D/47/2012 (2014), paragraph 9.4. See also Committee on the Rights of the Child, General Comment No 14, above note 440.

The UN Handbook on Legislation on Violence against Women recommends that, in the context of protection order proceedings, legislation should include the following provisions concerning child custody and visitation rights:

- "Presumption against award of custody to the perpetrator;
- "Presumption against unsupervised visitation by the perpetrator;
- "Requirement that, prior to supervised visitation being granted, the perpetrator must show that at least three months has passed since the most recent act of violence, that he has stopped using any form of violence, and that he is participating in a treatment programme for perpetrators; and
- "No visitation rights are to be granted against the will of the child."<sup>502</sup>

### **Family law: divorce or separation generally**

The UN Handbook for Legislation on Violence against Women has identified best practice in family law as follows:

- "Divorce from a violent husband and adequate alimony to women and children;
- "The survivor's right to stay in the family dwelling after divorce;
- "Social insurance and pension rights of survivors who divorce the perpetrator;
- "Expedited distribution of property, and other relevant procedures;
- "Careful screening of all custody and visitation cases so as to determine whether there is a history of violence;
- "A statutory presumption against awarding child custody to a perpetrator;

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<sup>502</sup> UN Handbook for Legislation on Violence against Women, above note 413, page 49.

- "Availability, in appropriate cases, of professionally run supervised visitation centres;
- "A survivor of violence who has acted in self-defence, or fled in order to avoid further violence, should not be classified as a perpetrator, or have a negative inference drawn against her, in custody and visitation decisions; and child abuse and neglect proceedings should target the perpetrators of violence and recognize that the protection of children is often best achieved by protecting their mothers."<sup>503</sup>

### **Employment Law**

Legislation should protect the employment rights of women subjected to gender-based violence, including from discrimination or abuse from other employees as a result of the woman's abuse. Women should not be penalized where the violence has impacted on their work, for example where work has been missed because of healthcare, legal proceedings or access to other services.<sup>504</sup>

### **Housing Law**

Women subjected to violence are often forced to remain in situations where they are vulnerable to abuse due to an inability to find appropriate alternative accommodation. Legislation should prohibit discrimination in housing against survivors of violence, including by prohibiting landlords from evicting a tenant, or refusing to rent to a prospective tenant, because she is a survivor of violence. The law should permit a survivor to break her lease without penalty in order to seek new housing. States should consider providing specialized assistance, for example, access to affordable housing, to women victims of violence.<sup>505</sup>

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<sup>503</sup> Ibid, page 55.

<sup>504</sup> Ibid, page 32

<sup>505</sup> Ibid, page 33.

## CHAPTER VIII

# IMPROVING CRIMINAL JUSTICE SYSTEMS AND FIGHTING IMPUNITY

**Each link in the criminal justice chain must incorporate the principle of non-discrimination**

### **Laws must enforce respect for women’s integrity and dignity**

The CEDAW Committee has stressed that “States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity”.<sup>506</sup>

Generally, States categorize assaults and unlawful killings<sup>507</sup> as crimes in their criminal codes. The persistent passivity shown by States in failing to investigate and prosecute assaults and killings of women by men has often been seen primarily as a failure of criminal justice.

A critique sometimes made of certain criminal laws and procedures, and the justice systems through which they are administered, is that they are often predicated on assumptions that men are entitled to “discipline” a spouse, intimate partner or female relative – or in some cases, any woman or girl – using violent means. When such assumptions are present, impunity for the violent conduct is, unsurprisingly, often the consequence. Similar assumptions may also underpin attitudes within the law and its administration whereby men are seen as entitled to eradicate “the shame” of a wife or female relative who has sex or other intimate contact outside marriage, or is

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<sup>506</sup> CEDAW General Recommendation No 19, “Violence against women”, UN Doc A/47/38 (1992), paragraph 24(b).

<sup>507</sup> Such acts have a variety of terms under domestic criminal laws, for example, homicide, murder, manslaughter, assault, wounding, causing bodily harm and the like.

perceived to have done so. With such attitudes present, the killing of a woman by a man can result in him being excused through the defences of "honour" or "provocation."

Similarly, in many places the assumed entitlement of men to sexual contact under all circumstances, unless a woman or girl is "respectable" and has physically fought back against severe physical force, is reflected in the attrition rate and minute number of rape investigations that end with conviction.

Many legal advocacy initiatives have challenged the misuse of law in a manner that reinforces gendered hierarchies, stereotypes and assumptions and helps perpetuate the cycle of violence. The CEDAW Convention expressly recognizes the legal paradigm as a method of breaking down gendered hierarchies:

Article 2 provides that States have an obligation to:

- (a) "embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- ...
- (f) "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) "repeal all national penal provisions which constitute discrimination against women."

The plain language of Article 2 makes clear that States must act to make changes in laws where definitions of crimes or criminal procedural law discriminate or serve to facilitate discrimination against women. However, legislative change is not enough. Women are more likely to come forward with reports and pursue justice through the criminal justice system if they are safe, able to access healthcare services for the mental and physical injuries they have sustained, and secure in their confidence that they will be treated with dignity and respect and will not be subjected to secondary victimization by officials in the criminal justice system.

Therefore, the services outlined in the previous chapter are a vital first step and foundation for effective criminal justice to ensure the rule of law. Ensuring that police, prosecutors and judges give a professional and effective service to women – and do not subject them to further violence, negligence and contempt – relies on the delivery of comprehensive and regular training of these State officials, benchmarked against practice to ensure that the training is effective.

### **Understanding trauma of women subjected to violence, providing a professional service**

According to the European Agency for Fundamental Rights: "Police officers and other authorities who intervene in cases of intimate partner violence against women need to understand the impact that living in a violent relationship has on the mindset and mental status of victims. For example, a victim may refuse intervention by the police or support services. Lack of understanding of these situations can add to a victim's trauma instead of supporting the victim to overcome the consequences of victimisation. It is suggested that EU Member States ensure that police officers and others – ranging from lawyers and judges to victim support services – are trained to understand the consequences of partner violence, and

accompanying abusive and controlling behaviour, on the mindset and reactions of victims."<sup>508</sup>

### **Definitions of crimes**

The most recent iteration of international human rights law on gender-based violence, the Istanbul Convention, has identified the scope of forms of conduct that are required to be criminalized as follows:

“‘violence against women’ is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.<sup>509</sup>

### **Domestic violence**

The criminal law needs to be able to address domestic violence

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<sup>508</sup> European Agency for Fundamental Rights, “Violence against women: an EU-wide survey. Main results” (Luxembourg: Publications Office of the European Union, 2014), page 80.

<sup>509</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, Article 3(a). In the Explanatory Report of the drafting process, the antecedents of the definition in international human rights law have been set out: “40. The definition of “violence against women” makes clear that, for the purpose of the convention, violence against women shall be understood to constitute a violation of human rights and a form of discrimination... The second part of the definition is the same as contained in Council of Europe Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence, the CEDAW Committee General Recommendation 19 on violence against women (1992) as well as in Article 1 of the UN Declaration on the Elimination of All Forms of Violence against Women.”

as a repeat offence, comprising of various forms of violence over time.<sup>510</sup>

The UN Handbook for Legislation on Violence against Women recommends that domestic violence should be criminalized, and legislation should include “a comprehensive definition of [the crime of] domestic violence, including physical, sexual, psychological and economic violence”.<sup>511</sup>

### **Psychological violence**

Psychological forms of violence, particularly in the context of family or intimate partner violence, are not only harmful in themselves and should therefore be criminalized, but also function to make women more at risk of other forms of gender-based violence.

Examples of psychological violence are numerous and varied, but typical forms include:

- Restricting a woman’s contact with friends or family, isolating her and making it harder for her to seek help;
- Following a woman’s movements, forcing her to explain where she is at all times;
- Intruding on a woman’s personal correspondence, mobile phone or internet use, which may be motivated, for example, by jealousy or suspicions of infidelity;

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<sup>510</sup> Sylvia Walby, “Tackling the gaps in research and the lack of data disaggregated by sex concerning women’s equal access to justice”, Seminar of the Council of Europe Gender Equality Commission, Paris, France, 26 and 27 June 2014, URL: [www.coe.int/equality-Paris2014](http://www.coe.int/equality-Paris2014): Identifying domestic violence as a repeat offence is particularly important for the purposes of tracking data on domestic violence, because if the “course of conduct” of multiple acts of harms by male perpetrators is not reflected, perceptions of one violent offender will be balanced by one act of self-defence by a victim, resulting in a false perception of symmetry between men and women’s violence in violent relationships.

<sup>511</sup> UN Handbook for Legislation on Violence against Women (New York: Department of Economic and Social Affairs, 2010), page 24. See also Istanbul Convention, above note 509, Article 3(b).

- Forbidding women from leaving the home, locking women up in the home or taking away car keys;
- Threats of violence to the woman or people she cares about, especially threats to harm her children or threats to “take the children away” from their mother; and
- Acts of intimidation, including shouting, verbal abuse, and destroying property.

A form of psychological violence that impacts the enjoyment of economic rights by women is sometimes referred to as “economic” violence. This is recognized as a specific form of violence in the Istanbul Convention,<sup>512</sup> typical forms of which include:

- Forbidding a woman from earning her own money;
- Forbidding a woman from leaving the house for the purposes of employment;
- Controlling the household’s finances; and
- Forbidding the woman from making financial decisions independently.

### **Stalking**

Like domestic violence, stalking is a “course of conduct” crime. Stalking is defined in the Istanbul Convention as “the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety”. The Istanbul Convention obliges States parties to make stalking a criminal offence.<sup>513</sup>

The EU Agency for Fundamental Rights survey identified a number of methods of stalking:

- Sending offensive emails or texts;
- Sending offensive letters or cards;
- Making offensive, threatening or silent telephone calls;

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<sup>512</sup> European Agency for Fundamental Rights Report, above note 508, page 75. See also Istanbul Convention, above note 509, Article 3(a).

<sup>513</sup> Istanbul Convention, above note 509, Article 34.

- Making offensive comments about the victim on the internet;
- Sharing intimate photographs or video footage without permission;
- Loitering/waiting by the victim's home, school or workplace;
- Following the victim around; and
- Interfering with or damaging the victim's property.

Stalking can sometimes last a number of years.<sup>514</sup> It is often combined with other forms of violence, for example, sexual violence and domestic violence.

### **Sexual harassment**

The Istanbul Convention defines sexual harassment as unwanted behaviour that has the purpose or effect of:

- Violating a person's dignity; or
- Creating for that person an intimidating, hostile, degrading, humiliating or offensive environment.<sup>515</sup>

Under the Istanbul Convention, sexual harassment must be made "subject to criminal or other legal sanction."<sup>516</sup> Other forms of harassment, such as those related to the victim's race, sexual orientation and age, are also the subject of legal sanction in many jurisdictions, for example in the context of labour law.<sup>517</sup> Although sexual harassment law has been traditionally associated with labour-related offences, States have over time recognized the harms caused by analogous behaviour in a variety of situations, resulting legislation in

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<sup>514</sup> European Agency for Fundamental Rights Report, above note 508, page 93.

<sup>515</sup> Istanbul Convention, above note 509, Article 40.

<sup>516</sup> Ibid, Article 40.

<sup>517</sup> See, for example, Equality and Human Rights Commission of England and Wales, "Avoiding and dealing with harassment", URL: <http://www.equalityhumanrights.com/your-rights/employment/equality-work/managing-workers/avoiding-and-dealing-harassment>.

other areas, such as equality and anti-discrimination law and criminal law, being adopted.<sup>518</sup>

The UN Handbook for Legislation on Violence against Women notes that sexual harassment takes place in a variety of situations and should be made a criminal offence or subject to other sanction in all situations, including educational institutions, employment, receipt of goods/services, renting accommodation, buying or selling land, sport, administration of public office and provision of public services.<sup>519</sup>

***Sexual harassment in public places: "street harassment" or "harassment on the street"***

Sexual harassment in public places has received relatively little attention in human rights standards and jurisprudence, but several recent initiatives have highlighted the adverse human rights effects of street harassment. Important initiatives using internet applications to record acts of street harassment have brought attention to the way that sexual harassment on the street threatens women and leads to them limiting their activities.<sup>520</sup>

In the case of the *Egyptian Initiative for Personal Rights and Interights v Egypt*, the African Commission on Human and Peoples' Rights identified sexual harassment of various kinds as gender-based violence, in violation of Article 2 and Article 18(3) of the African Charter (a form of discrimination and gender-based discrimination):

"Firstly, when looking at the verbal assaults used against the Victims, such as 'slut' and 'whore,' it is the opinion of the African Commission that these words are

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<sup>518</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 28.

<sup>519</sup> Ibid, page 28

<sup>520</sup> Hollaback, a web-based initiative active in many countries globally, describes street harassment as "a gateway crime" that makes other forms of gender-based violence acceptable. <http://www.ihollaback.org/#>.

not usually used against persons of the male gender, and are generally meant to degrade and rip off the integrity of women who refuse to abide by traditional religious, and even social norms.

“Secondly, the physical assaults described above are gender-specific in the sense that the Victims were subjected to acts of sexual harassment and physical violence that can only be directed to women. For instance, breasts fondling and touching or attempting to touch ‘private and sensitive parts’. There is no doubt that the Victims were targeted in this manner due to their gender.”<sup>521</sup>

In its Agreed Conclusion of 2013, the Commission on the Status of Women expressed “deep concern about violence against women and girls in public spaces, including sexual harassment, especially when it is being used to intimidate women and girls who are exercising any of their human rights and fundamental freedoms”.<sup>522</sup> The Commission recommended that States act to:

- Improve the safety of girls at, and on the way to and from, school;
- Establish a safe and violence-free environment by improving infrastructure such as transportation;
- Provide separate and adequate sanitation facilities and improved lighting, playgrounds and safe environments;

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<sup>521</sup> *Egyptian Initiative for Personal Rights and Interights v Egypt*, African Commission on Human and Peoples’ Rights, Communication 323/06 (12 October 2013), paragraphs 143-144.

<sup>522</sup> UN Women, “Elimination and Prevention of All Forms of Violence against Women and Girls”, (2013 Commission on the Status of Women, Agreed Conclusions), paragraph 23. Agreed conclusions contain an analysis of the priority theme and a set of concrete recommendations for governments, intergovernmental bodies and other institutions, civil society actors and other relevant stakeholders, to be implemented at the international, national, regional and local level.

- Adopt national policies to prohibit, prevent and address violence against children, especially girls, including sexual harassment and bullying and other forms of violence;
- Conduct violence prevention activities in schools and communities, and establishing and enforcing penalties for violence against girls;
- Increase measures to protect women and girls from violence and harassment, including sexual harassment and bullying, in both public and private spaces; and
- Address security and safety, through:
  - Social and interactive media;
  - Awareness-raising and involvement of local communities;
  - Adoption of crime prevention laws and policies;
  - Adoption of programmes such as the Safe Cities Initiative of the United Nations; and
  - Improved urban planning, infrastructures, public transport and street lighting.<sup>523</sup>

## **Rape and other forms of sexual violence**

### **Prohibit unwanted or forced sex in public and in private**

"Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited. States Parties shall take appropriate and effective measures to... enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex whether the violence takes place in private or public".<sup>524</sup>

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<sup>523</sup> Ibid, paragraphs XX and ZZ.

<sup>524</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) of 11 July 2003, Articles 4(1) and (2)(a).

When addressing the crime of rape and other forms of sexual violence, two assumptions often manifest themselves in legal approaches that can undermine women's human rights, particularly their right to equality before the law:

- Assumption regarding "consent".
  - A frequently observed tendency is that: "Sexual violence has often been addressed in the problematic [legal] framework of morality, public decency and honour, and as a crime against the family or society, rather than a violation of an individual's bodily integrity".<sup>525</sup> This approach assumes that rape and sexual violence is only a problem if the victim is perceived as having satisfactorily conformed with socially acceptable norms, for example, acting as a chaste wife or daughter. Women who have sex outside marriage, especially sex workers/women in prostitution may be considered effectively to be in a state of constant agreement to sexual contact. Women who have sex outside the socially accepted boundaries of heterosexual marriage may be considered to no longer have a right worth protecting by the law.
  - In some States, such assumptions may inform the way legislation is interpreted. For example, an assumption may be made that, irrespective of what a victim may actually have said, an alleged perpetrator is entitled to think that she was really consenting. Often this occurs because previous sexual history evidence is raised at trial to give the impression that a victim is the sort of woman who regularly consents to (illicit) sexual contact and therefore is most likely to have consented in the situation subject to prosecution.

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<sup>525</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 26

- Assumptions that all sexual contact is legal, unless it is carried out using overwhelming physical force.
  - Another assumption that undermines the equal protection of women's rights to physical and mental integrity is a common view that all sexual contact is legal unless an abusive male uses overwhelming physical force and the woman fights back physically, with all possible effort. This is typically manifested in judicial proceedings in assessing whether or not the woman victim has "consented". This often leads to defence lawyers aggressively seeking to portray a victim as having "consented" to sex because "she allowed it to happen" by not "fighting back" and "defending herself", or because other aspects of her behaviour, demeanour or clothing indicated that she was available for sexual contact. This implied agreement to sex is assumed, even where there was implicit or overt threat or abuse of power.
  - International human rights law has addressed this discriminatory assumption in at least two ways: in recognizing a right to sexual autonomy and identifying that rape can be committed - and the right to sexual autonomy violated - through threats or coercion as well as force.

### ***Recognition of the right to sexual autonomy***

"The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.

"Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and

shared responsibility for sexual behaviour and its consequences."<sup>526</sup>

The State must establish and implement a legal framework that respects equality between individuals in freely agreeing to sexual conduct. Some argue that true "consent" can only be established by an expressly manifested affirmation by both parties, especially women. For example, in the case of *M.C. v Bulgaria*, Interights submitted a third party intervention arguing that:

"The equality approach starts by examining not whether the woman said 'no', but whether she said 'yes'. Women do not walk around in a state of constant consent to sexual activity unless and until they say 'no', or offer resistance to anyone who targets them for sexual activity. The right to physical and sexual autonomy means that they have to affirmatively consent to sexual activity."<sup>527</sup>

In this case, the European Court of Human Rights noted that:

"[T]he evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.

"...Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy.

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<sup>526</sup> Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, UN Doc A/CONF.177/20/Add.1 (1995), paragraph 96.

<sup>527</sup> Submission of Interights to the European Court of Human Rights in the case of *M.C. v Bulgaria*, 12 April 2003, paragraph 12.

"[Any] rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim."<sup>528</sup>

### ***Committing rape through coercion and threat***

Sexual acts performed via coercion and the threat of violence, without the actual use of physical violence, can amount to the crime of rape. In this regard, ensuring justice for women who have been subjected to rape in situations of armed conflict led to a profound practical examination of the conditions under which rape is perpetrated. Following the widespread use of rape and sexual violence against women in armed conflict in Rwanda and the former Yugoslavia in the 1990s, a number of women's rights advocates worked to ensure that rape could be prosecuted in the *ad hoc* international criminal tribunals as war crimes and crimes against humanity, in procedures that were fair to women who were victims and witnesses, avoiding the stereotyping and secondary victimization in criminal trials at the domestic level. Developments in gender-competent procedures and jurisprudence in the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda were affirmed and developed further in the negotiation of the Rome Statute of the International Criminal Court, its Elements of Crimes and its Rules of Procedure and Evidence.

Because of the constant threat of violence in situations of armed conflict, the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances

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<sup>528</sup> *M.C. v Bulgaria* (2003) ECHR 651, paragraphs 164-166.

which are coercive”: the definition did not make it necessary for a rapist to use force.<sup>529</sup> Building on this, when the Rome Statute of the International Criminal Court was elaborated in 1998, the Elements of Crimes in the Statute recognized that rape is present where the perpetrator uses “force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.<sup>530</sup>

Rule 70 of the Rules of Procedure and Evidence of the International Criminal Court recognized that a main point of inquiry for the Court in rape trials is whether a perpetrator used “force, threat of force, coercion” or was “taking advantage

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<sup>529</sup> *Prosecutor v Akayesu*, Case No ICTR-96-4, Trial Judgment 2 September 1998, paragraph 596-598.

<sup>530</sup> The non-contextual elements of the definition of rape as a crime against humanity and a war crime in the Elements of Crimes are the same. The only differences in the elements of these two crimes are the legal contextual ones distinguishing rape as a crime against humanity from rape as a war crime. The common elements are: 1) The perpetrator invaded [A footnote here reads: ‘The concept of “invasion” is intended to be broad enough to be gender-neutral’] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. [A footnote here reads: ‘It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity’]. See International Criminal Court, “Elements of Crimes” (2011), Elements 1 and 2 of the Elements of Crimes relating to the crime against humanity of rape under Article 7(1)(g)-1 (page 8) and the war crime of rape in international and non-international armed conflicts under Article 8(2)(b)(xxii)-1 (page 28) and Article 8(2)(e)(vi)-1 (pages 36-37).

of a coercive environment". In the presence of such force, threat of force or coercion, or taking advantage of a coercive environment, consent cannot be inferred by reason of any words or conduct of a victim.<sup>531</sup> Neither can consent be inferred from silence or lack of resistance of a victim.<sup>532</sup>

The Elements of Crimes also used the term "genuine consent", which a victim cannot give "if affected by natural, induced or age-related incapacity".<sup>533</sup> Thus the legal term "consent" was limited by important parameters so that the law could instead recognize "voluntary and genuine consent".

Again in the case of *M.C. v Bulgaria*, the European Court of Human Rights drew on several precedents from international criminal law relating to the prosecution of rape to conclude that where rapists deliberately misled the applicant in order to take her to a deserted area, this created an environment of coercion<sup>534</sup> and that this was sufficient to overcome the sexual autonomy of the victim. The Court noted that:

"In international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The International Criminal Tribunal for the former Yugoslavia has found that, in international criminal law, any sexual penetration without the victim's consent constitutes rape and that consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances. While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a

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<sup>531</sup> International Criminal Court, "Rules of Procedure and Evidence", UN Doc ICC-ASP/1/3 (2002), Rule 70(a).

<sup>532</sup> Ibid, Rule 70(c).

<sup>533</sup> Elements of Crimes, above note 530, Article 7(1)(g)-1, footnote 16.

<sup>534</sup> *M.C. v Bulgaria*, above note 528, paragraph 180.

universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.”<sup>535</sup>  
(emphasis added)

In the case of *Karen Tayag Vertido v the Philippines*, the CEDAW Committee reflected these developments by making the recommendation that the respondent State enact a definition of sexual assault that either:

- a. Requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or
- b. Requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.<sup>536</sup>

The Istanbul Convention also reflects these developments in defining rape as:

1. “(a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;  
“(b) engaging in other non-consensual acts of a sexual nature with a person;  
“(c) causing another person to engage in non-consensual acts of a sexual nature with a third person.
2. “Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”<sup>537</sup>

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<sup>535</sup> Ibid, paragraph 163.

<sup>536</sup> *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), paragraph 8.9(b)(ii).

<sup>537</sup> Istanbul Convention, above note 509, Article 36.

### **Rape and sexual violence against men and boys**

Rape of men and boys is a very under-reported phenomenon, but it is estimated that it is far from a rare phenomenon, especially in the context of armed conflict and in prisons. Reports indicate that the overwhelming majority of rapists of men and boys are other men. Improving services for women and working with women and girls to address stigma caused by rape may lead to increased confidence for men and boy victims to come forward to seek justice and reparation.<sup>538</sup>

### ***Distinctions between "rape", "sexual assault" and other forms of sexual violence***

Rape is a form of sexual violence. It is distinguished from other forms of sexual violence in that the violence results in sexual penetration. Sexual violence generally, however, can be any abuse or assault of a sexual nature, even if it does not involve physical contact – for example, forcing a woman or girl to strip naked in the presence of men.<sup>539</sup>

Many domestic legal systems have recognized an act of rape only where there has been complete penetration of the vagina by the penis of the perpetrator.

This restrictive understanding from the criminal law omits various other forms of conduct which logically must constitute rape, such as partial penetration of the vagina with the penis; oral penetration; anal penetration using the perpetrator's

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<sup>538</sup> For an overview of the issues, see Sandesh Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality' (2005) 27(4) *Human Rights Quarterly* 1274-1306; Roger Dobson, 'Sexual torture of men in war-time Croatia was common' (2004) *British Medical Journal* 29 May 2004; Pauline Oosterhoff, Prisca Zwanikken and Evert Ketting, 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret' (2004) 12(23) *Reproductive Health Matters* 68-77; and Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18(2) *European Journal of International Law* 253-276.

<sup>539</sup> *Miguel Castro-Castro Prison v Peru*, Inter-American Court of Human Rights, 25 November 2006, paragraph 306.

penis; vaginal or anal penetration of the victim with another body part of the perpetrator such as fingers or fists; or penetration of the victim's anus or vagina with an object. These are significant omissions as they also tend to leave out rape of men and boys from the definition in criminal law.

Avoiding this restrictive approach, the International Criminal Court regime defines rape as an:

“[invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”.<sup>540</sup> (emphasis added)

This definition also covers situations where a male victim is forced to penetrate another victim. A practice often used in armed conflict is to force family members to rape each other.

### ***Rape in detention as a form of torture***

Where the perpetrator is a State agent, such as a police officer or member of the security forces, rape has been recognized as a form of torture,<sup>541</sup> whether or not the conduct is perpetrated in custody or outside of a custodial situation.<sup>542</sup> In the case of *Prosecutor v Kunarac, Kovac and Vukovic*,<sup>543</sup> the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia noted that “such detentions amount to circumstances that were so coercive as to negate any possibility of consent”. The Rome Statute Elements of Crimes

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<sup>540</sup> Elements of Crimes, above note 530, relating to Article 7(1)(g)-1, Article 8(2)(b)(xxii)-1 and Article 8(2)(e)(vi)-1.

<sup>541</sup> *Aydin v Turkey* (1997) ECHR 75, paragraphs 74-76: rape in itself was identified as a form of torture in paragraph 86. See also *Miguel Castro-Castro Prison v Peru*, above note 539, paragraph 310-312.

<sup>542</sup> *Raquel Martí de Mejía v. Peru*, Inter-American Commission on Human Rights Case 10.970, Report No 5/96 (1 March 1996).

<sup>543</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY Case IT-96-23 & IT-96-23/1-A (12 June 2002), paragraph 132.

similarly recognize that detention is one of the situations where a victim cannot freely consent to sexual contact. Rape in detention by a State official is always a form of torture.

State responsibility will also be engaged if a rape in custody is committed by another prisoner or private person but the officials failed to exercise due diligence in undertaking preventive and protective measures.

Women are subjected to many forms of gender-based violence while in State custody, including police cells, prisons, health and social welfare institutions and immigration detention centres. When these forms of violence cause severe pain or suffering, whether physical or mental, these acts constitute torture. Other forms of gender-based violence include inappropriate surveillance during showers or undressing, strip searches conducted by or in the presence of men and verbal sexual harassment.<sup>544</sup>

### **Forced and early marriage**

Most child marriages may be considered forced marriages. Early marriage, or child marriage, has come to be recognized as purported marriage involving children under 18 years, although there are exceptions. The majority of child marriages involve girls, although sometimes their spouses may also be under the age of 18 years.<sup>545</sup> Forced and early marriage affects boys and girls, but girls tend to be targeted more frequently than boys for exploitation.<sup>546</sup>

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<sup>544</sup> For more information about gender-based violence in detention see above Chapter IV: "The obligation to respect".

<sup>545</sup> "Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / general comment No. 18 of the Committee on the Rights of the Child on harmful practices", UN Doc CEDAW/C/GC/31-CRC/C/GC18 (2014), paragraph 20.

<sup>546</sup> Marsha Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women. A Commentary* (Oxford: Oxford University Press, 2012) – hereafter referred to as the 'CEDAW Commentary', page 438.

A joint General Recommendation and Comment on harmful practices, from the Committee on the Rights of the Child and the CEDAW Committee, said that:

“A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent. As a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.”<sup>547</sup>

The joint General Recommendation and Comment proposed a detailed regime of laws to address forced and early marriage, including raising awareness, addressing root causes, ensuring proper registration of births and marriages, protection orders, and ensuring access to remedies and reparations, including using the criminal law.<sup>548</sup>

Forced marriage, in relation to adults and children, is recognized as a crime in the Istanbul Convention, which also recognizes the frequent cross-border nature of this crime and calls on States parties to “take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised”.<sup>549</sup>

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<sup>547</sup> Joint general recommendation, above note 544, paragraph 20.

<sup>548</sup> Ibid, paragraph 55.

<sup>549</sup> Istanbul Convention, above note 509, Article 37 (Forced marriage).

## Female genital mutilation

The World Health Organization defines female genital mutilation (also known as FGM) as “all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons”.<sup>550</sup>

Like forced and early marriage, female genital mutilation has been identified as a “harmful traditional practice”, or simply a “harmful practice” as a method of rejecting purported traditional or customary justifications for such practices.

The UN Secretary-General’s *In-depth study on violence* has underscored that over 130 million women alive today have undergone FGM. These women are primarily from countries in Africa and the Middle East, but the practice also commonly occurs among a number of immigrant communities in Europe, North America and Australia.<sup>551</sup>

FGM is recognized internationally as a practice which necessarily impairs the enjoyment of human rights of women, including rights to health, security and physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death. It reflects deep-rooted inequality between the sexes and constitutes an extreme form of discrimination against women.

Female genital mutilation is classified into four major types:

- Clitoridectomy: partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).

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<sup>550</sup> World Health Organization, “Female genital mutilation’, Fact sheet No 241, updated February 2014, available at URL: <http://www.who.int/mediacentre/factsheets/fs241/en/>.

<sup>551</sup> UN Secretary-General, “In-depth study on all forms of violence against women”, UN Doc A/61/122/Add.1 (2006), paragraph 119.

- Excision: partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (the labia are “the lips” that surround the vagina).
- Infibulation: narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris.
- Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

### **Defining the crime of female genital mutilation**

The Istanbul Convention defines the crime of FGM as follows:

“a) excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris;

“b) coercing or procuring a woman to undergo any of the acts listed in point a;

“c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a.”<sup>552</sup>

### ***No health benefits, only harm***

FGM has no discernible benefits to health or well-being and it harms women in many ways. It involves removing and damaging healthy and normal female genital tissue and interferes with the natural functions of women’s bodies.

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<sup>552</sup> Istanbul Convention, above note 509, Article 38.

Immediate complications can include:

- Severe pain;
- Shock;
- Haemorrhage (bleeding);
- Tetanus or sepsis (bacterial infection);
- Urine retention;
- Open sores in the genital region; and
- Injury to nearby genital tissue.

Long-term consequences can include:

- Recurrent bladder and urinary tract infections;
- Cysts;
- Infertility;
- Increased risk of childbirth complications and newborn deaths; and
- The need for later surgeries.

For example, the FGM procedure that seals or narrows a vaginal opening (infibulation) needs to be cut open later to allow for sexual intercourse and childbirth. Sometimes it is stitched again, including after childbirth, hence the woman goes through repeated opening and closing procedures, further increasing and repeating both immediate and long-term risks.<sup>553</sup>

The Maputo Protocol requires States to undertake legislative measures, supported by sanctions, to prohibit "all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices, in order to eradicate them".<sup>554</sup>

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<sup>553</sup> World Health Organization, Fact sheet No 241, above note 550.

<sup>554</sup> Maputo Protocol, above note 524, Article 5(b).

## Forced sterilization

The Istanbul Convention recognizes forced sterilization and forced abortion as crimes.

### Article 39 – Forced abortion and forced sterilization

“Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

- “a performing an abortion on a woman without her prior and informed consent;
- “b performing surgery which has the purpose or effect of terminating a woman’s capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.”

Using forced sterilization against women to control the reproductive behaviours of certain women or groups of women is a form of violence against women. Cases of forced sterilizations of specific ethnic groups of women in Europe, the United States and Canada have been reported.<sup>555</sup> A case in Peru against an indigenous woman has also been brought to the Inter-American Commission,<sup>556</sup> and a criminal prosecution regarding a policy of forced sterilization of indigenous women in Peru is still on-going.

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<sup>555</sup> In-depth study on violence against women, above note 551, paragraph 142: “The use of sterilization to control the reproductive behaviour of the female population or a particular subgroup, constitutes violence against women. While there are no systematic quantitative studies, the practice of forced sterilization has been confirmed and condemned in regional and national courts. Cases of forced or coerced sterilizations of certain populations such as Roma women and girls in Europe and indigenous women in the United States and Canada have been reported.”

<sup>556</sup> *María Mamérita Mestanza Chávez v Peru*, Inter-American Commission on Human Rights Case No 12.191, Report No 71/03 (22 October 2003).

The European Court of Human Rights, in the cases of two Roma women, has identified forced sterilization, taking place without proper consent, as breaches of the right not to be subjected to torture and ill-treatment.<sup>557</sup>

### **Crimes relating to commercial sexual exploitation of children**

The Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography require that all children be protected from all forms of:

- Physical or mental violence, injury or abuse;
- Neglect or negligent treatment; and
- Maltreatment or exploitation, including sexual abuse and commercial sexual exploitation.<sup>558</sup>

The UN General Assembly has called on States to ensure that the law also protects children from “sexual harassment, including crimes committed through the use of new information technologies, including the Internet”.<sup>559</sup>

### **Defences in criminal law relevant to violence against women**

Under international human rights law and standards, all persons accused of a crime are entitled to a fair trial by a competent, independent and impartial tribunal established by law,<sup>560</sup> and the right to defend themselves in person or through legal counsel.<sup>561</sup> In cases involving the prosecution of crimes of

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<sup>557</sup> *V.C. v Slovakia* (2011) ECHR 1101, paragraphs 100-120; *N.B. v Slovakia* (2012) ECHR 991, paragraphs 71-73.

<sup>558</sup> Convention on the Rights of the Child (CRC), Articles 19(1) and 34.

<sup>559</sup> Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly under its resolution 65/228 (2010), paragraph 14(c)(iv).

<sup>560</sup> International Covenant on Civil and Political Rights (ICCPR), Article 14(1); and Convention on the Rights of the Child, Article 40(2)(b)(ii).

<sup>561</sup> ICCPR, Article 14(3)(d); CRC, Article 40(2)(b)(ii).

violence against women, the purported exercise of these rights may create particular tensions with ensuring access to justice for women and the equal protection of the law. Courts need to be aware of the competing demands in balancing access to justice for women subjected to gender based violence and maintaining the fair trial standards of those accused of crimes.

Courts need to be able to assess whether a purported defence is in fact a form of victim-blaming or stereotyping.

There are three forms of defence:

- Complete defences (for example, self-defence);
- Partial defences, which may result in charges of a lesser crime (accepting a charge of manslaughter rather than murder, for example); and
- The production of evidence in order to obtain a mitigation of sentence.

While some defences may be appropriate under certain circumstances, practitioners should be aware that the application of certain defences may constitute a form of discrimination against women.

### ***Discriminatory defences that justify violence against women***

“Traditional 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, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.”<sup>562</sup>

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<sup>562</sup> CEDAW General Recommendation No 19, above note 506, paragraph 11.

Many complete or partial defences to crimes of violence against women rely on gendered stereotypes of what is acceptable behaviour for men. For example, in some jurisdictions men are permitted to rely on defences where they have killed or injured women who have "dishonoured" them in some way, or are suspected of "dishonouring" them. For example, it may be considered a "crime of passion", which may constitute a lesser form of homicide than murder, to kill a woman because of jealousy if she is suspected by her community of being unchaste or if she is found in the act of adultery with another person.

The implicit justification of "culture" lies behind a number of crimes, for example FGM, forced marriage and crimes in the name of "honour".

Since the Declaration on Violence against Women<sup>563</sup> and the CEDAW Committee's General Recommendation No 19 on violence against women,<sup>564</sup> international standards have emphasized that traditional and cultural practices must not be offered as justifications, excuses or defences to negate individual criminal responsibility for crimes of violence against women. This obligation under international human rights law and standards requires that defences that arise from or effectively result in discrimination against women should be unavailable or appropriately modified in a human rights compliant manner.<sup>565</sup>

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<sup>563</sup> UN Declaration on Violence against Women, adopted by the General Assembly under resolution 48/104 (1993), Article 4: "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination".

<sup>564</sup> CEDAW General Recommendation No 19, above note 506, paragraph 11.

<sup>565</sup> Istanbul Convention, above note 509, Article 42(1): "Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts. This covers, in particular, claims that the

### ***Self-defence as a defence for women accused of violence***

When women defend themselves from violence, they are often denied access to the defence of self-defence. Sometimes this may be because fighting back physically in the heat of a physical attack is only considered an appropriate recourse for men and boys. When courts assess whether or not a woman acted in self-defence, they should make a proper assessment of what sort of violence the woman was experiencing and how she considered that she needed to protect herself.

Relating to this is the development of ideas about the psychological effects of domestic violence and how this leads to women using violence to protect themselves because of the stresses of being victimized. Battered women syndrome has been described as being “suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or accept offers of support”.<sup>566</sup>

The Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted under a resolution of the UN General Assembly, draws on international best practice in making a variety of suggestions of how domestic law and practice can be improved, including that: “Claims of self-defence by women who have been victims of violence, particularly in cases of battered woman syndrome, are taken into account in investigations, prosecutions and sentences against them”.<sup>567</sup>

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victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.”

<sup>566</sup> Updated Model Strategies and Practical Measures, above note 559, footnote 23 to paragraph 15(k).

<sup>567</sup> Ibid, paragraph 15(k).

### **Marital rape and impunity through marriage of rapist and victim**

Achieving access to justice for marital rape may be rendered difficult or impossible in jurisdictions that do not recognize marital rape as a crime, or where marital status is recognized as a defence to rape. The underlying assumption for this is a particularly tenacious cultural premise that it is impossible for a man to rape his wife, as the institution of marriage implies a constant and on-going agreement of the wife to sexual contact with her husband at any time. In some States, this is also expressed in legal rules that allow a rapist to avoid prosecution if he marries his victim after having raped her.

The European Court of Human Rights has denounced the notion of marital immunity as incompatible with human rights principles. In the case of *S.W. v the United Kingdom*, where a man sought to rely on the legal tradition that rape of a wife was not possible in the law, the European Court of Human Rights declared that:

“The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.”<sup>568</sup>

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<sup>568</sup> *S.W. v UK* (1995) 52, paragraph 44.

## **Investigations and prosecutions**

### ***Evidence gathering and investigation: policing***

Witness evidence alone, at least as confined only to the accused and the victim, is often not sufficient to establish a sustainable criminal case. Therefore, in conducting investigations it is important that witness evidence be supplemented with other information, for example photographic documentation of injuries and video footage of the victim when the police are first called to attend, which can show the shocked or frightened demeanour of the victim. Emergency calls to the police should be recorded, and emergency telephone operators must be trained to take calls in detail and communicate effectively with victims. It is also important for investigators to take photographs of potentially relevant material conditions or objects, such as the disorder in a room where violence took place, or the destruction of property.<sup>569</sup>

As well as witness statements from the victim and the perpetrator, it is important to take witness statements from family and friends and professionals dealing with the victim and perpetrator, such as social workers and doctors.<sup>570</sup> The CEDAW Committee has called on States to “develop protocols for police and healthcare providers for the collection and preservation of forensic evidence in cases of violence against women; and train sufficient numbers of police and legal and forensic staff to competently conduct criminal investigations”.<sup>571</sup>

In cases of domestic violence alleged to have been perpetrated as part of a long-term pattern of practice, police should be trained to take details of the history of violence and to be especially aware of any patterns of abusive conduct characterized by coercion or control imposed on the victim by

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<sup>569</sup> CEDAW General Recommendation No 33, “General recommendation on women’s access to justice”, UN Doc CEDAW/C/GC/33 (2015), paragraph 51(i).

<sup>570</sup> Ibid, paragraph 51(i).

<sup>571</sup> Ibid, paragraph 51(k).

the perpetrator. A detailed recording of each and every complaint from the victim should be ensured, so that any evidence of a pattern of assaults and control or coercive behaviour over time can be made available. Police should be trained to take account of evidence of trauma and mental health issues of victims as the potential result of abuse rather than a reason to dismiss the victim's reports of violence.

Investigators must make a "context-sensitive assessment" of the evidence they have, for example by questioning witnesses whose accounts contradict each other, taking a close account of timing of events and allowing the victim's representative to put questions to witnesses.<sup>572</sup> Investigators must also assess surrounding circumstances, such as that the alleged perpetrators "had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion" in order to carry out rape.<sup>573</sup> It should be recalled here that the definition of rape in the Istanbul Convention specifies that: "Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances," a definition which is based on the findings in the case of *M.C. v Bulgaria*.<sup>574</sup>

### ***Evidence-gathering: medical reports***

In his *In-depth study on all forms of violence against women*, the UN Secretary-General noted that victims of violence need access to treatment and also medico-legal examinations that might support an eventual prosecution:

"Victims of sexual violence, including rape, require immediate health care and support and evidence for any resulting legal case also needs to be collected. Physical examinations following sexual violence may be experienced as further violence, or at least as invasive. Lack of timely access to such services can prevent

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<sup>572</sup> *M.C. v Bulgaria*, above note 528, paragraph 177.

<sup>573</sup> *Ibid*, paragraph 180.

<sup>574</sup> Istanbul Convention, above note 509, Article 36(2).

women from getting the evidence needed to bring a rape charge. Protocols and guidelines on forensic examinations in cases of sexual violence are therefore important, as is women's access to such services."<sup>575</sup>

The UN General Assembly has called on States to "ensure that adequate medical, legal and social services sensitive to the needs of victims are in place to enhance the criminal justice management of cases involving violence against women".<sup>576</sup>

Important guidelines for medico-legal reporting of violence are contained in the Istanbul Protocol (the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)<sup>577</sup> and the WHO Guidelines for medico-legal care for victims of sexual violence.<sup>578</sup>

Gathering of medico-legal evidence should take place in a context of therapeutic assistance to the victim. Victims of rape may prefer to speak with a medical professional rather than a non-medical investigator, even if the investigator is a woman and the medical professional a man, especially since they may often have questions about possible physical and psychological consequences of the assault.<sup>579</sup> The Istanbul Protocol notes that in the context of evaluations conducted for legal purposes "the necessary attention to detail and precise questioning about

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<sup>575</sup> In-depth study on violence against women, above note 551, paragraph 323.

<sup>576</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 19(g).

<sup>577</sup> Office of the United Nations High Commissioner for Human Rights, "Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", UN Doc. HR/P/PT/8Rev.1 (2004).

<sup>578</sup> World Health Organization, *Guidelines for medico-legal care for victims of sexual violence* (Geneva: World Health Organization, 2003).

<sup>579</sup> Istanbul Protocol, above note 577, paragraph 270.

history are easily perceived as a sign of mistrust or doubt on the part of the examiner".<sup>580</sup>

The aim in gathering medical evidence should be to provide "an objective service without sacrificing sensitivity or compassion".<sup>581</sup> In prosecuting cases, impartiality is an essential element in giving medical evidence, and medical professionals must resist any direct or indirect pressures that investigators may knowingly or unknowingly place upon them to produce decisive evidence that can conclude a case.<sup>582</sup>

Medical examiners must address their own personal attitudes, particularly in cultures of victim-blaming or that are generally discriminatory towards women, to avoid any form of judgemental questioning or conduct that might impair their objectivity, such as leading questions about the victims attire or actions prior to assault.<sup>583</sup> Health workers must also ensure they do not let any personal preferences, principles or prejudices affect their conduct towards or discriminate against women subjected to violence.<sup>584</sup>

The UN Handbook for Legislation on Violence against Women has specified the following requirements for medico-legal evidence. Legislation should:

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<sup>580</sup> Ibid, paragraph 270.

<sup>581</sup> WHO Guidelines, above note 578, page 20.

<sup>582</sup> Ibid, page 20: "Investigators, consciously or unconsciously, may bring considerable pressure to bear on health care practitioners to provide an interpretation that would resolve an issue. These forces may be direct and forceful, or subtle and insidious, and are likely to be particularly strong in situations where the practitioner has a formal relationship with an investigating authority, where a close personal relationship has developed between the investigator and the practitioner, or when the individual roles of the investigator and the practitioner become blurred. Fairness may also be compromised when the practitioner develops an unconscious or misplaced desire to help investigators."

<sup>583</sup> Ibid.

<sup>584</sup> Ibid.

- “Mandate proper collection and submission to court of medical and forensic evidence, where possible;
- “Mandate the timely testing of collected medical and forensic evidence;
- “Allow a complainant to be treated and/or examined by a forensic doctor without requiring the consent of any other person or party, such as a male relative;
- “Ensure that multiple collections of medical and forensic evidence are prevented so as to limit secondary victimization of the complainant;
- “State that medical and forensic evidence are not required in order to convict a perpetrator; and
- “Provide the possibility of prosecution in the absence of the complainant/survivor in cases of violence against women, where the complainant/survivor is not able or does not wish to give evidence.”<sup>585</sup>

***Evidence-gathering: expert evidence on the psychological state of victims***

Gender-based violence, including rape, very frequently leads to impairment of psychological health.<sup>586</sup> Expert evidence on psychological health problems and needs of those subjected to violations can be useful for a variety of reasons:

“Psychological evaluations provide useful evidence for medico-legal examinations, political asylum applications, establishing conditions under which false confessions may have been obtained, understanding regional practices of torture, identifying the therapeutic needs of victims and as testimony in human rights investigations. The overall goal of a psychological evaluation is to assess the degree of consistency between an individual’s account of torture and the psychological findings observed during the course of the evaluation. To this end, the evaluation should provide a detailed description

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<sup>585</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 41.

<sup>586</sup> Istanbul Protocol, above note 577, paragraphs 260-315.

of the individual's history, a mental status examination, an assessment of social functioning and the formulation of clinical impressions. A psychiatric diagnosis should be made, if appropriate. Because psychological symptoms are so prevalent among survivors of torture, it is highly advisable for any evaluation of torture to include a psychological assessment."<sup>587</sup>

"If an evaluation of the credibility of an individual's report of torture is requested within the framework of a judicial procedure by a State authority, the person to be evaluated must be told that this implies lifting medical confidentiality for all the information presented in the report. However, if the request for the psychological evaluation comes from the tortured person, the expert must respect medical confidentiality."<sup>588</sup>

### **Self-care and the role of legal and health-care professionals**

Working with those who have suffered gender-based violence can be stressful and lead to psychological harm for those hearing testimonies and examining victims. It is therefore important for health professionals to have appropriate supervision by another professional.<sup>589</sup> The same principle of self-care applies to advocates, including women human rights defenders, and encapsulates care to avoid psychological and physical burnout.<sup>590</sup>

While the general norm is for all medical practitioners to maintain strict confidentiality, the rule is not absolute and may allow for exceptions, particularly where breaching

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<sup>587</sup> Ibid, paragraph 261.

<sup>588</sup> Ibid, paragraph 264.

<sup>589</sup> Ibid, page 51-52.

<sup>590</sup> Women Human Rights Defenders International Coalition, "Our Right to Safety: Women Human Rights Defenders' Holistic Approach to Protection" (Association for Women's Rights in Development, 2014), pages 13-15.

confidentiality could prevent further violent abuses. The Istanbul Convention sets out its position on this as follows:

“Parties shall take the necessary measures to ensure that the confidentiality rules imposed by internal law on certain professionals do not constitute an obstacle to the possibility, under appropriate conditions, of their reporting to the competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention, has been committed and further serious acts of violence are to be expected”.<sup>591</sup>

### **The role of experts, including social workers and psychologists, in advising criminal justice processes about the realities of gender-based violence**

While medico-legal reporting tends to focus on physical and psychological injuries to individual victims, guidance from other professionals, for example, social workers, can help those working in justice systems to understand better how gender-based violence is perpetrated and how such violence affects women. The CEDAW Committee has recommended that “other professionals, in particular health professionals and social workers... can play an important role in cases of violence against women and in family matters, in awareness-raising and capacity-building”.<sup>592</sup>

### **Duties of prosecutors: prosecution of crimes of violence against women**

For women to maintain confidence and their active participation in the justice system, particularly in cases involving prosecution of violence against them, it is important that “responsibility for prosecuting violence against women lies with prosecution

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<sup>591</sup> Istanbul Convention, above note 509, Article 28.

<sup>592</sup> CEDAW General Recommendation No 33, above note 569, paragraph 29(b).

authorities and not with complainants/survivors of violence, regardless of the level or type of injury".<sup>593</sup>

Women often know and live in the same community as the perpetrator, where both the perpetrator and his family and friends could put either coercive or threatening pressure on the woman or girl to withdraw a complaint. Where the lead is taken by authorities, once probative evidence of a crime comes to their attention, they should persist in investigating and prosecuting as a matter of the rule of law and the public interest, even if the victim withdraws her evidence.

In the European Court of Human Rights case of *Opuz v Turkey*, the Court observed a lack of consensus amongst States parties as to how to proceed when a victim withdraws the complaint. The Court nevertheless noted "an acknowledgement of the duty on the part of the authorities to strike a balance between a victim's Article 2 [right to life] Article 3 [prohibition of torture and cruel, inhuman or degrading treatment or punishment] or Article 8 [right to respect for private and family life] rights in deciding on a course of action".<sup>594</sup>

The European Court in that case elaborated some areas for consideration in assessing when it is in the public interest for a prosecution to continue, even without the participation of the victim:

- How serious was the offence?
- Are the victim's injuries physical or psychological?
- Did the defendant use a weapon?
- Have any threats been made by the defendant since the attack?
- Did the defendant plan the attack?
- What was the effect (including psychological) on any children living in the household?
- What are the chances of the defendant offending again?

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<sup>593</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 36.

<sup>594</sup> *Opuz v Turkey* (2009) ECHR 870, paragraphs 138-139.

- Is there a continuing threat to the health and safety of the victim?
- Is there a continuing threat to the health and safety of anyone else involved?
- What is the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes?
- Has there been any other violence in the history of the relationship?
- Does the defendant have a criminal history, particularly in relation to any previous violence?<sup>595</sup>

The areas for consideration indicate that if the offence was of a serious nature and there is a continuing risk of further violence, then it is more likely that prosecution should continue, even where this is contrary to the wishes of the victim.

### **Conflicts regarding the initiation of prosecutions**

Violence against women typically entails serious criminal conduct and it is an important expression of the rule of law for the police and prosecutors to investigate and, where admissible evidence exists, to prosecute criminal conduct. In some jurisdictions, violence that is seen as "minor" can only be prosecuted if the victim presses charges. However, international standards require that police and other prosecution authorities have the primary responsibility for initiating prosecutions in cases of violence against women "regardless of the level or form of violence".<sup>596</sup>

Judicial review for police and/or prosecutors who fail to prosecute should be available.<sup>597</sup> EU Member States are

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<sup>595</sup> Ibid.

<sup>596</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 15(b).

<sup>597</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, "establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 11.

encouraged to develop a mechanism in the State's criminal procedure code where victims can ask for a review of any decisions made not to prosecute. Such a mechanism should be "clear and transparent and not overly bureaucratic to ensure that victims can request the review without legal representation".<sup>598</sup> At the very least, legislation should require "that any prosecutor who discontinues a case of violence against women explain to the complainant/survivor why the case was dropped".<sup>599</sup>

### **Access to judicial proceedings treating gender-based violence in a holistic manner**

Women need accessible justice that deals with violence against women as a holistic legal problem, where criminal, civil and family law problems are all inter-related.

The UN General Assembly has called on States to undertake regular reviews of laws, policies and procedures in the light of international human rights law and standards, to ensure consistency across criminal law and family law, so that victims and their children can be kept safe and the best interests of children prioritized.<sup>600</sup> Promising practices include having criminal courts where the judges and other members of staff are familiar with addressing violence against women and have particular expertise in dealing with victims and witnesses relating to these offences. Other promising practices include specialist integrated courts, which can deal with all relevant legal issues regarding an individual woman's situation, for

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<sup>598</sup> European Commission, DG JUSTICE GUIDANCE DOCUMENT, "related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, December 2013, page 31.

<sup>599</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 36.

<sup>600</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 14(d).

example, divorce and child custody issues and access to shared homes and marital property.

In order to avoid patchy provision, such specialist courts should be centres of expertise that can be used as models for all courts to improve their services. Women living in rural areas should have access to courts as much as those living in cities and the use of mobile courts or modern IT solutions should be considered to ensure quality of access to justice for those in even the most remote locations.<sup>601</sup>

### **Women's rights during court proceedings**

#### ***Access to information***

The UN General Assembly has called on States to ensure that women subject to violence are guaranteed access to and availability of "information on rights, remedies and victim support services and on how to obtain them, in addition to information about their role and opportunities for participating in criminal proceedings".<sup>602</sup>

Article 56(1) of the Istanbul Convention makes this a legal duty on States parties.

#### ***Free or low-cost legal aid and other support services***

The CEDAW Committee has called on States to "remove economic barriers to justice by providing legal aid and by ensuring that fees for issuing and filing documents as well as court costs are reduced for women with low income and waived

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<sup>601</sup> CEDAW General Recommendation No 33, above note 569, paragraph 16(a): "Ensure the creation, maintenance and development of courts, tribunals and additional entities, as needed, that guarantee women's right of access to justice without discrimination on the whole territory of the State party, including in remote, rural and isolated areas. The establishment of mobile courts, particularly for women living in those areas, should be considered, as well as the creative use of modern IT solutions when feasible."

<sup>602</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 18(a).

for women living in poverty".<sup>603</sup> Some standards require free legal aid to women victims of violence.<sup>604</sup>

The CEDAW Committee has provided guidance to ensure good quality, accessible legal aid,<sup>605</sup> which is set out in full in Chapter VII of this Guide under the heading 'Women subjected to gender-based violence should have access to legal aid'.

The UN Handbook for Legislation for Violence against Women recommends that States provide "free court support, including the right to be accompanied and represented in court by a specialized complainants/survivors' service and/or intermediary, free of charge, and without prejudice to their case, and access to service centres in the courthouse to receive guidance and assistance in navigating the legal system".<sup>606</sup>

The Istanbul Convention requires that States provide "victims with appropriate support services so that their rights and interests are duly presented and taken into account".<sup>607</sup>

### ***Right to be heard***

The basic principles of victim and witness participation in criminal cases are set out in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>608</sup> especially paragraph 6(b) which requires States to allow "the views and

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<sup>603</sup> CEDAW General Recommendation No 33, above note 569, paragraph 17(a).

<sup>604</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 18(h) calls on States to "ensure that women subjected to violence have full access to the civil and criminal justice systems, including access to free legal aid, where appropriate, "court support and interpretation services."

<sup>605</sup> CEDAW General Recommendation No 33, above note 569, paragraph 37(a)-(e).

<sup>606</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 39.

<sup>607</sup> Istanbul Convention, above note 509, Article 56(1)(e).

<sup>608</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly under its resolution 40/34 (1985).

concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system”.

Article 56(1)(d) of the Istanbul Convention requires that States “[enable] victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered”.

The UN Handbook for Legislation on Violence against Women suggests that women subjected to violence should be able to decide if and how they submit evidence to court proceedings. In cases of violence against women, States should enable women to be able to submit evidence in person or via alternative means, including “drafting a sworn statement/affidavit, requesting that the prosecutor present relevant information on her behalf, and/or submitting taped testimony”.<sup>609</sup>

### ***Interpretation and translation of documents***

The UN Handbook for Legislation on Violence against Women suggests that States provide free access to a qualified and impartial interpreter and the translation of legal documents, where requested or required.<sup>610</sup> Under the Istanbul Convention, States parties must “[provide] victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence”.<sup>611</sup>

Translating for women who have been subject to violence is a specific skill requiring particular sensitivity, thoroughness and absolute confidentiality. Standards that have been developed more generally for victims of torture under the Istanbul

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<sup>609</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 40.

<sup>610</sup> Ibid, page 39; Istanbul Convention, above note 509, Article 56(1)(h).

<sup>611</sup> Istanbul Convention, above note 509, Article 56(1)(h).

Protocol on the Investigation of Torture may be helpful to consider in this context.

The Istanbul Protocol standards explored two different approaches that can be used, each with their own pros and cons, for interpretation of legal services and interviews:

- Literal, word-for-word translation.
  - Such translation must exclusively represent what the victim has said without being subject to interpreter's influence.
- Bicultural approach to linguistic interpretation that facilitates an understanding of cultural meanings attached to events, experience, symptoms and idioms.
  - This adds a depth of understanding to the exchange that may otherwise be missing.<sup>612</sup>

The same standards also highlight a number of other considerations, including:

- The interpreter's identity and ethnic, cultural and political affiliation as important considerations in the choice of an interpreter, as the person being interpreted must be able to trust that what she is saying is being communicated in the way she wished it to be said;
- The interpreter should never be a law enforcement official or government employee to ensure there are no potential conflicts of interest; and
- The interpreter should never be a family member in order to respect the person's privacy.<sup>613</sup>

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<sup>612</sup> Istanbul Protocol, above note 577, paragraph 274.

<sup>613</sup> Ibid, paragraph 274.

## Protection for victims and witnesses

### Principles for protection

"Women subjected to violence are enabled to testify in criminal proceedings through adequate measures that facilitate such testimony by protecting the privacy, identity and dignity of the women; ensure safety during legal proceedings; and avoid 'secondary victimization'. In jurisdictions where the safety of the victim cannot be guaranteed, refusing to testify should not constitute a criminal or other offence".<sup>614</sup>

Secure and user-friendly courts.

- The CEDAW Committee has called on States parties to: "Ensure that the physical environment and location of judicial and quasi-judicial institutions and other services are welcoming, secure and accessible to all women".<sup>615</sup> The Committee has stressed the need for special measures to "protect women's privacy, safety, and other human rights",<sup>616</sup> and also the need for those reporting on cases to protect "the dignity, emotional condition and security of women".<sup>617</sup>
- Avoid victims and witnesses encountering alleged perpetrators in court premises.
  - The UN Handbook for Legislation on Violence against Women has suggested that there should be separate access to court for defendants and witnesses, and protection within the court structure, including separate waiting areas for complainants

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<sup>614</sup> Updated Model Strategies and Practical Measures, above note 578, paragraph 15(c).

<sup>615</sup> CEDAW General Recommendation No 33, above note 569, paragraph 17(e).

<sup>616</sup> Ibid, paragraph 18(f).

<sup>617</sup> Ibid, paragraph 18(f).

- and defendants, separate entrances and exits, police escorts and staggered arrival and departure times.<sup>618</sup>
- Similarly, the Istanbul Convention requires that States ensure that “contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible”.<sup>619</sup>
  - Use of technology to facilitate safe testimony for victims.
    - The CEDAW Committee has recommended that women subject to violence should be able to give testimony remotely or via communication equipment when this is necessary to protect her privacy, safety and other human rights, provided that this is in accordance with the defendants rights to fair trial proceedings.<sup>620</sup>
    - The Istanbul Convention also requires that States enable “victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available”.<sup>621</sup>
  - Use of closed court proceedings.
    - The CEDAW Committee has recommended that court proceedings, including the testimony of women subject to violence, can be held completely or partially in privacy, where this is necessary to

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<sup>618</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 40.

<sup>619</sup> Istanbul Convention, above note 509, Article 56(1)(g).

<sup>620</sup> CEDAW General Recommendation No 33, above note 569, paragraph 18(f).

<sup>621</sup> Istanbul Convention, above note 509, Article 56(1)(i).

protect her privacy, safety and other human rights.<sup>622</sup>

- Measures to secure privacy and anonymity of witnesses.
  - The Istanbul Convention requires that States ensure “that measures may be adopted to protect the privacy and the image of the victim”.<sup>623</sup>
  - The UN Handbook for Legislation on Violence against Women suggests that courts should be able to place a “gag on all publicity regarding individuals involved in the case, with applicable remedies for non-compliance”.<sup>624</sup>
- Protection orders for victims and witnesses, and their families, participating in court proceedings.
  - The Istanbul Convention requires that States ensure “protection orders for victims and witnesses: providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation”.<sup>625</sup>
- Taking the safety of victims into account while reviewing the liberty of accused and convicted persons.
  - The General Assembly has called on all States to ensure that when considering the granting of bail, conditional release, parole or probation of offenders that safety risks towards and the vulnerability of victims are taken into account. This is particularly relevant for repeat offenders of dangerous crimes.<sup>626</sup>

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<sup>622</sup> CEDAW General Recommendation No 33, above note 569, paragraph 18(f)

<sup>623</sup> Istanbul Convention, above note 509, Article 56(1)(f).

<sup>624</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 40.

<sup>625</sup> Istanbul Convention, above note 509, Article 56(1)(a).

<sup>626</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 15(j).

- The Istanbul Convention also requires that States ensure “that the victim/survivor is informed about liberty of alleged perpetrators (whether bail, permanent or temporary release or escape)”.<sup>627</sup>
- Special protection for the rights of girls.
  - International law and standards require that children, particularly girls, be given effective support in accessing justice, including being provided with special protection measures.<sup>628</sup>

### **Victim-blaming and stereotyping in procedural law**

Women frequently fear coming forward with complaints about gender-based violence because of the fear of “secondary victimization” by the criminal justice system. In particular, they may be prone to adverse treatment from State authorities in accessing justice which may compound the harm that they have already experienced.

These concerns are particularly pronounced in respect of women at risk of intersectional or compounded discrimination.<sup>629</sup> Where women are subject to compounded discrimination they are less likely to report any crimes of

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<sup>627</sup> Istanbul Convention, above note 509, Article 56(1)(b).

<sup>628</sup> CEDAW General Recommendation No 33, above note 569, paragraph 24: “Special consideration is to be given to girls (including the girl child and adolescent girls, where appropriate) because they face specific barriers to access to justice. They often lack the social or legal capacity to make significant decisions about their lives in areas relating to education, health and sexual and reproductive rights. They may be forced into marriage or subjected to other harmful practices and various forms of violence.” See also Istanbul Convention, above note 509, Article 56(2), which requires States to ensure “a child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.”

<sup>629</sup> See above, Chapter II, “‘Intersectionality’: protecting women’s rights for all women in all their diversity”.

violence against them “for fear that they will be humiliated, stigmatized, arrested, deported, tortured or have other forms of violence inflicted upon them, including by law enforcement officials”.<sup>630</sup>

The CEDAW Committee has underscored that States parties should act to prevent such abuses and should “promote a culture and a social environment whereby justice-seeking by women is viewed as both legitimate and acceptable rather than as cause for additional discrimination and/or stigmatization”.<sup>631</sup>

An extra level of persecution of victims occurs in situations where a failure to convict a perpetrator for rape leaves the victim open to criminal charges relating to sex outside marriage.

### **Delays in reporting should not undermine the credibility of victims**

The UN General Assembly has called on States not to draw any adverse inference from any delays between the alleged offence and the reporting of that offence.<sup>632</sup>

The UN Handbook on Legislation for Violence against Women highlights a number of potential reasons for delays in reporting violence, including:

- Fear of stigmatization;
- Fear of humiliation;
- Fear of not being believed;
- Fear of retaliation;
- Financial or emotional dependence on the perpetrator;
- Distrust in criminal justice mechanisms;

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<sup>630</sup> CEDAW General Recommendation No 33, above note 569, paragraph 10. See also paragraphs 8-10 for intersectional forms of discrimination and situations that women find themselves in that cause a factual obstacle to their enjoyment of their human rights.

<sup>631</sup> Ibid, paragraph 35(d).

<sup>632</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 15(e).

- Lack of access, including geographical, to responsible institutions; and
- Lack of specialized criminal justice personnel.<sup>633</sup>

The UN Handbook notes that despite “legitimate concerns [for women reporting offences], delays in the reporting of violence against women are often interpreted as demonstrating that the complainant/survivor is unreliable”.<sup>634</sup> The Handbook recommends that States enable legislation to prevent courts and other justice review mechanisms, judicial officers, juries and any other assessors from drawing any adverse inference in reporting delays or holding any delays against the complainant.<sup>635</sup>

### **Rape and sexual violence: significance of evidence of previous sexual history**

In the practice of the International Criminal Court, Rule 70(d) International Criminal Court Rules of Procedure and Evidence states that:

“Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness”.<sup>636</sup>

In trials relating to rape or sexual violence, the defendant may often seek to raise evidence of the victim’s previous sexual history, which is humiliating for the victim and, usually, irrelevant in respect of its probative value in establishing guilt or innocence of the crime for which the person is accused.

Previous sexual history with persons other than the accused will sometimes be entered as a means of impugning the character of the victim, which should be impermissible. It may

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<sup>633</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 42.

<sup>634</sup> Ibid.

<sup>635</sup> Ibid.

<sup>636</sup> ICC Rules of Procedure and Evidence, above note 531, Rule 70(d).

serve as a method of undermining the good character of a witness and the perception of the victim's reliability and credibility due to stereotypes that women should be "chaste" and not sexually active. When sexual history involving the accused is admitted in narrow circumstances, courts will need to take care in the weight to which it ascribed, since the mere fact that a women has agreed to the sexual activity in the past in no way means she has done so in the instance[s] at issue. Each episode of sexual contact must be agreed to and previous agreements to engage in sexual contact should not justify assumptions on the part of an alleged perpetrator that such agreement will always be given.

The UN Handbook for Legislation on Violence against Women has noted that: "In many countries, complainant/survivor's prior sexual history continues to be used to deflect attention away from the accused onto the complainant".<sup>637</sup> In such instances, a woman's previous sexual history may be used as an attempt to discredit her and call into question the legitimacy of her complaint and so undermine the prosecution. Women subject to violence "have often been 're-victimized' when questioned by defence attorneys about details of their private sexual conduct".<sup>638</sup>

Sometimes a woman's previous sexual history has also been taken into account during the sentencing of an offence and, regardless of the fact the perpetrator was found guilty of the offence, may be used as mitigating factor to reduce the sentence of the perpetrator.<sup>639</sup>

The Istanbul Convention requires that: "Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when

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<sup>637</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 44.

<sup>638</sup> Ibid.

<sup>639</sup> Ibid.

it is relevant and necessary".<sup>640</sup> An example where sexual history of the complainant may be relevant could be where the complainant claimed never to have known the defendant despite a previous consensual sexual relationship between them. In such circumstances the omission, rather than the previous sexual history itself, could indicate a lack of reliability of the complainant.

The UN General Assembly has recommended that "the credibility of a complainant in a sexual violence case [should be] understood to be the same as that of a complainant in any other criminal proceeding; the introduction of the complainant's sexual history in both civil and criminal proceedings is prohibited when it is unrelated to the case".<sup>641</sup>

### **Rape and sexual violence: challenging use of the corroboration rule**

The corroboration rule, also known as the cautionary warning, is where a court warns itself or the jury that convicting the defendant on uncorroborated evidence of the complainant can be dangerous. It is based on an assumption that women are inherently untrustworthy and continues to be implemented in a number of jurisdictions based on common or Sharia law.<sup>642</sup>

Amnesty International has pointed out that assuming that a victim is lying is "a particularly irrational stereotype as women and girl complainants usually have very little to gain and everything to lose by making allegations of rape, there is rarely an incentive for them to lie; many complainants pursue their search for truth and justice at enormous cost to themselves, in

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<sup>640</sup> Istanbul Convention, above note 509, Article 54.

<sup>641</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 15(e).

<sup>642</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 43.

terms of stigma and rejection by their families and communities".<sup>643</sup>

These harmful assumptions of a woman's untrustworthiness often puts an unreasonable emphasis on the need for additional evidence to corroborate the woman's evidence, such as medical evidence and independent witness testimony. This sets the burden of proof in establishing the offence much higher for women subjected to rape and sexual violence than persons subject to other kinds of offences.

The CEDAW Committee has recommended that States parties abolish "corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or to seek a remedy".<sup>644</sup>

States should abolish the corroboration rule in legislation by:

- Indicating that requiring corroboration of the complainant's evidence in sexual violence cases is unlawful;
- Creating an assumption of the complainant's credibility in sexual violence cases;
- Stating that the complainant's credibility in a sexual violence case is the same as in any other criminal proceeding.<sup>645</sup>

### **Torturous and unscientific "tests" for sexual experience or "virginity"**

An examination by a doctor to prove either "virginity", or that the woman was accustomed to sexual intercourse, is common in some jurisdictions. This involves either a visual examination

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<sup>643</sup> Amnesty International, "Rape and sexual violence: Human rights law and standards in the International Criminal Court", 1 March 2011, AI Index IOR 53/001/2011, page 36.

<sup>644</sup> CEDAW General Recommendation No 33, above note 569, paragraph 25(a)(iii).

<sup>645</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 43.

to ascertain that the hymen is still present, or the insertion of two fingers into the vagina (known as the “two finger” test) to assess whether the vagina has a laxity which proves that the woman or girl is accustomed to sexual intercourse.

These tests are used in a variety of ways. For example, in India and Bangladesh, these tests are used to ascertain whether a woman has been raped. However, they have also been used as a means of social control and to deter the exercise of other rights. This allegedly occurred during the popular protests of the “Arab Spring” in 2011. While the tests were purportedly administered as a safeguard to “prove” that the women were not raped in custody, they also served to threaten the women that they would be prosecuted for prostitution if they “failed” the test and to stereotype and marginalize women protesters in an attempt to deter these women, and other Egyptian women, from participating in public life.<sup>646</sup>

These alleged “tests” are unscientific and do not prove anything about the sexual experiences of the woman. In addition to being profoundly psychologically humiliating, and physically very painful, their administration constitutes a form of discrimination, which is unlawful under the CEDAW Convention and other standards. Forcing a woman or girl to undergo such a procedure as a requirement of the criminal justice system is a form of torture and ill-treatment.

**Virginity tests: no scientific value, discriminatory and violating the rule against torture or cruel, inhuman or degrading treatment**

The Independent Forensic Expert Group (IFEG), consisting of thirty-five independent forensic experts from eighteen countries, released a statement on the practice of “virginity testing” in December 2014.

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<sup>646</sup> See Amnesty International, “Egypt: A year after ‘virginity tests’, women victims of army violence still seek justice”, 9 March 2012, URL: <https://www.amnesty.org/en/latest/news/2012/03/egypt-year-after-virginity-tests-women-victims-army-violence-still-seek-justice/>.

The IFEG defined “virginity testing” as “a gynaecological examination that is intended to correlate the status and appearance of the hymen with previous sexual contact to determine whether a female has had or is habituated to sexual intercourse”.<sup>647</sup> These are practiced in many countries in a number of contexts, including:

- In places of detention;
- On women who allege rape;
- On women accused of prostitution; and
- As part of public or social policies to control sexuality.

The IFEG found that these tests were:

- Medically unreliable with no clinical or scientific value;
- Inherently discriminatory;
- Result in significant physical and mental pain and suffering;
- Where committed by healthcare professionals may be a violation of the ethics governing the profession;
- Where committed forcibly and involving vaginal penetration can constitute sexual assault or rape; and
- Where committed forcibly can constitute torture or cruel, inhuman and degrading.<sup>648</sup>

### **Sentencing of convicted perpetrators of gender-based violence**

According to the UN Handbook: “Sentences imposed in cases of violence against women within countries have varied, been inconsistent and often informed by discriminatory attitudes... Experience shows that the introduction of sentencing guidelines

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<sup>647</sup> Independent Forensic Expert Group, (2015) 33 *J Forensic Leg Med* 121-124, page 1.

<sup>648</sup> *Ibid*, page 5.

may contribute to the normalization of sentences imposed in cases of violence against women."<sup>649</sup>

The UN General Assembly has called on all States to adopt appropriate sentencing guidelines for crimes of violence against women to ensure that sanctions are commensurate with the severity of the crime. It has urged States to ensure sentencing policies and procedures relating to gender-based violence:

- Hold offenders accountable for their acts;
- Denounce and deter violence;
- Stop violent behaviour;
- Promote victim and community safety;
- Consider impact on victims and their family members;
- Provide sanctions that ensure sentencing of perpetrators in a manner proportionate to the severity of the offence;
- Provide reparations for harm caused; and
- Promote the rehabilitation of the perpetrator.<sup>650</sup>

**Removal or discriminatory exceptions and reductions of sentences based on social "value" of women subject to violence**

As outlined in the section above on defences, certain practices discriminate against women subject to violence due to the woman's perceived "value" – that is, perceptions of her chastity. This includes absolving the perpetrator if he "restores" chastity by marrying the victim. It also includes imposing lighter sentences on perpetrators if a woman had little or no "value" as understood in relation to perceptions of her sexual experience.

The UN Handbook for Legislation on Violence against Women suggests that States' legislation should remove any provisions that:

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<sup>649</sup> UN Handbook for Legislation on Violence against Women, above note 511, pages 50-51.

<sup>650</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 17.

- Reduce penalties and/or absolve perpetrators in cases of so-called honour crimes;
- Acquit a perpetrator of violence if he subsequently marries the woman; and
- Impose lesser penalties in cases involving particular women, perceived as less socially “valuable”, such as sex workers or non-virgins.<sup>651</sup>

### **Aggravating circumstances for the purposes of sentencing**

Sentencing should be tailored to be commensurate with harm inflicted on women subjected to violence. Some of the factors to be taken into account in determining appropriate sentences include whether the violent conduct:

- Consisted of repeated acts;<sup>652</sup>
- Entailed abuse of a position of trust or authority;<sup>653</sup>
- Was committed against a partner, spouse, or member of the family;<sup>654</sup>
- Was committed against, or in the presence of, a child;<sup>655</sup>
- Was committed against a person made vulnerable by particular circumstances;<sup>656</sup>
- Was committed by two or more people acting together;<sup>657</sup>
- Was preceded or accompanied by extreme levels of violence;<sup>658</sup>

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<sup>651</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 51.

<sup>652</sup> Updated Model Strategies and Practical Measures, above note 559, paragraph 17(b); Istanbul Convention, above note 509, Article 46(b).

<sup>653</sup> Updated Model Strategies and Practical Measures, above note 511, paragraph 17(b); Istanbul Convention, above note 509, Article 46(a).

<sup>654</sup> Updated Model Strategies and Practical Measures, above note 511, paragraph 17(b); Istanbul Convention, above note 509, Article 46(a).

<sup>655</sup> Updated Model Strategies and Practical Measures, above note 511, paragraph 17(b); Istanbul Convention, above note 509, Article 46(d).

<sup>656</sup> Istanbul Convention, above note 509, Article 46(c).

<sup>657</sup> Ibid, Article 46(e).

<sup>658</sup> Ibid, Article 46(f).

- Was committed with the use or threat of a weapon;<sup>659</sup>
- Resulted in severe physical or psychological harm for the victim;<sup>660</sup> and
- Was committed by a perpetrator who had previously been convicted of offences of a similar nature.<sup>661</sup>

***Aggravating circumstance: abuses by professionals in the context of harmful practices***

The Committee on the Rights of the Child and the CEDAW Committee have made specific reflections on the role of professionals in reporting harmful practices.

The Committees observed that certain individuals, including medical professionals and teachers, are well placed to identify actual or potential victims of violence. Some individuals may encounter a conflict between rules of confidentiality and obligations to report suspected offences, however these conflicts can be overcome by regulations making it mandatory to report suspected incidents of violence.<sup>662</sup>

Where certain professionals in a position of authority, such as medical or legal professionals or State employees, abuse their position in either engaging in or covering up harmful practices, this should be seen as an aggravating factor for sentence. In addition to the normal sentencing, such aggravation could also be subject to the imposition of additional sanctions, such as suspension of a professional license or termination of a contract.<sup>663</sup>

**Limitation of the use of fines as sole sanctions for domestic violence**

Fines, by themselves, are generally not a suitable sentencing option for domestic violence. Where custodial sentence is not

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<sup>659</sup> Ibid, Article 46(g).

<sup>660</sup> Ibid, Article 46(h).

<sup>661</sup> Ibid, Article 46(i).

<sup>662</sup> Joint general recommendation, above note 544, paragraphs 49.

<sup>663</sup> Ibid, paragraphs 49 and 50.

imposed there should still be a minimum level of mandatory treatment and supervisory probation of the perpetrator.

The UN Handbook points out that fines should not be imposed if doing so will result in financial hardship for the woman subject to violence and her children, if, for example, the perpetrator was the spouse or partner of the woman and she is still reliant on their assets for her own or her children's needs.<sup>664</sup> The Handbook also explains that if fines are imposed, these should be combined with treatment and supervision of the perpetrator.<sup>665</sup>

### **Reliance on intervention programmes for perpetrators must not put women's safety at risk**

Intervention programs for perpetrators are common methods of dealing with perpetrators of domestic violence. In order to ensure their effectiveness – and to avoid a false sense of security being given to women who may still be at risk – these programs need to be effective.

The drafting committee of the Istanbul Convention made the following observations about the necessary requirement for intervention programmes, which may be court-ordered as part of sentencing or voluntary, in order for these programmes to meet standards of best practice:

- Encourages perpetrators to take responsibility for their actions;
- Encourages perpetrators to evaluate their attitudes and beliefs towards women;
- Uses skilled facilitators, trained in psychology and nature of domestic violence;
- Uses facilitators with a range of cultural and linguistic skills to match the perpetrators they work with;
- Programmes are set up in collaborations with women's support services, law enforcement and probation

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<sup>664</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 52.

<sup>665</sup> Ibid.

- agencies, the judiciary and children's protection services; and
- Priority consideration is given to the needs and safety of women subject to violence.<sup>666</sup>

Legislation should clarify that the use of alternative sentencing, including sentences in which the perpetrator is mandated to attend an intervention programme for perpetrators and no other penalty is imposed, are to be approached with serious caution and only handed down in instances where there will be continuous monitoring of the sentence by justice officials and women's non-governmental organizations to ensure the safety of the woman who has been subject to violence and the effectiveness of the sentence.<sup>667</sup>

The UN Handbook on Legislation on Violence against Women recommends that legislation should ensure that careful review and monitoring of intervention programmes is provided for and involves women's non-governmental organizations and women that have been affected by violence. The Handbook also recommends that if "limited funding is available, services for survivors should be prioritized over programmes for perpetrators, and that such sentences should only be imposed following an assessment to ensure that there will be no risk to the safety of the survivor".<sup>668</sup>

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<sup>666</sup> Council of Europe, "Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence", paragraph 104.

<sup>667</sup> Istanbul Convention, above note 509, Article 16(3) requires that States: "In taking the measures referred to in paragraphs 1 and 2, Parties shall ensure that the safety of, support for and the human rights of victims are of primary concern and that, where appropriate, these programmes are set up and implemented in close co-ordination with specialist support services for victims".

<sup>668</sup> UN Handbook for Legislation on Violence against Women, above note 511, page 53.

## CHAPTER IX PRACTICAL CONSIDERATIONS

### **Finding and preparing cases**

#### ***Safety and well-being of practitioners and clients***

A priority in any case is to ensure the safety and well being of both the practitioner and client. Often advocating for a remedy for women or girls who have been targeted for violence brings their situation to the public attention in a way that can leave them open to harassment, threats and possibly further violence.

Seeking measures to ensure the anonymity of woman subjected to violence by a court order is often a first step. If this proves ineffective, it may become necessary to seek further measures from the State, for example, relocation and witness protection. This may also become ineffective, and the only option is to seek safety abroad, through refugee and asylum processes. More detail can be found in two publications from the Women Human Rights Defenders Coalition, "Our right to safety" and "claiming rights, claiming justice."<sup>669</sup>

#### ***Working with civil society***

Working with civil society groups who provide services to women who have been subject to violence can be an effective

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<sup>669</sup> Association for Women's Rights in Development, "Our Right to Safety: Women Human Rights Defenders' Holistic Approach to Protection" (March 2014), URL: [http://defendingwomen-defendingrights.org/wp-content/uploads/2014/03/Our-Right-To-Safety\\_FINAL.pdf](http://defendingwomen-defendingrights.org/wp-content/uploads/2014/03/Our-Right-To-Safety_FINAL.pdf); and Asia Pacific Forum on Women, Law and Development (APWLD), "Claiming Rights, Claiming justice: A guidebook on women human rights defenders" (2007) URL: <http://defendingwomen-defendingrights.org/wp-content/uploads/2014/03/book3NeoWithCovereng.pdf> (also available in French, Spanish, Thai and Arabic at URL: <http://www.defendingwomen-defendingrights.org/our-work/resources/>).

way of identifying and garnering support for appropriate cases. Maintaining a long-term relationship with individual civil society organizations helps to build trust between civil society and advocates about the right way of dealing with women subject to violence. Service providing non-governmental organizations can also ensure comprehensive care for their well-being, to complement legal advocacy.

Trainings and workshops about international human rights law and standards can be a way of making connections with appropriate civil society organizations. However, often a more sustained relationship with their work – for example, assisting in the long term with advice-giving or casework assistance – can present new ways of looking at cases, for the non-governmental organization and the advocate. An important example of this is where women are targeted for prosecution themselves, for example, for drug use or sex work. While advocates may initially address the criminal defence aspect, sometimes a women may disclose information about violence to which they have been subjected, for example, rape and domestic violence. It may also suggest the need for psychological support and assistance. Where a civil society organization is dealing with a heavy caseload of similar cases, then this may indicate that legal intervention, such as strategic litigation, could be an effective means of addressing access to justice for a wider range of similarly effective women.

Where women have come to terms with the violence committed against them and are seeking safety and a dynamic change in their situation this may be a good time to approach them with information about whether they wish to pursue access to justice. Often survivors are extremely motivated to ensure that what happened to them is not repeated, they wish their experience to lead to “lessons learned.”

### ***Maintaining client care while developing strategic litigation***

Undertaking litigation on behalf of individual women, or group actions, can be an important method of securing broader

change for all women, transforming abusive or negligent laws, justice systems and policies. However, undertaking strategic litigation effectively and ethically can be difficult.

Addressing violence against women necessarily means a challenge to discriminatory social attitudes. Taking a case forward can lead to a lot of pressure, critical observation and invasion of privacy, both for lawyers and their clients.

As in any strategic litigation, there can be a disconnect between an advocates professional responsibility to advocate for the interests of an individual client, who may wish to withdraw from a case, and the wider advocacy objective that may be sought in the litigation. If a client does wish to withdraw from pursuing a case, it is important that the advocate respect the woman's wishes, even if this may be frustrating for the advocate involved, especially where the case has the potential to affect broad change. Important methods of avoiding such an outcome is to ensure that open communication about the case continues, as the case continues, sometimes over a period of several years between starting the case and final judgement at the international level. If communication is severed or sporadic over a long period during which litigation may drag on, it is very easy for clients to lose patience, to feel unsupported, and withdraw from the case. As a matter of professional ethics, but also for well-being of the applicant, it is important to ensure that they are closely involved in decisions about strategy and advocacy messages in the case, and are not disempowered by control of their cases being "taken away from them."

### ***Third party interventions***

The use of third party interventions, in the form of amicus curiae briefs and others types of expert submissions to courts or lawyers representing the parties to a case, can be an effective means of advancing justice without committing to the range of responsibilities that direct legal representation may entail. Many international and domestic courts, administrative tribunals and quasi-judicial mechanisms have formal

procedurals in place for such submissions. In other instances, it may be necessary to make a request to the bodies on an ad hoc basis. Providing a legal opinion to the lawyers acting in the case for their use in submissions may be a means of contributing where it is not possible to intervene directly with the adjudicative authority.

Whether or not intervening as a third party is appropriate in an individual case, and how to plan strategy, may depend not only the formal rules and procedures but also on the culture and customary practices of the authority that is being addressed. Third party interventions may exhaust time and resources of the court and the parties involved. What might be seen as a demonstration of political weight in favour of a particular development in the law in one jurisdiction may be seen as inappropriate in another court.

Generally a third party intervention will only be useful if the intervener can bring an expertise to the case that the parties are unable to bring, whether for lack of expertise, owing to resource limitations or for strategic reasons involving the particularities of a case. For international human rights advocates seeking to intervene in domestic courts, the most appropriate briefs tend to be those that highlight international or comparative law on an issue, in an area where a domestic court may be unfamiliar with developments at the international level or in other countries. Alternatively, an expert opinion may be less concerned with the law, but may have factual research that highlights the extent of a problem domestically. This may be useful when it comes to addressing how the definition, investigation and prosecution of rape is often informed by stereotyping and engenders secondary victimization of victims and witnesses, and how this stops victims from coming forward.<sup>670</sup>

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<sup>670</sup> Three important and influential amicus briefs are to be found in the following cases: *M.C. v Bulgaria* (2003) ECHR 651; *Vertido v Philippines*, CEDAW Communication No 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010); and *Angela González Carreño v*

### ***Working with media***

Addressing violence against women necessarily means a challenge to discriminatory social attitudes, and media can play a role both in reinforcing or, alternatively, changing these attitudes. Dealing with the media, however, may engender harassment, contempt and inappropriate interference into the private lives of victims. In such situations, a practitioner may counsel against engagement with the media.

However, media is not monolithic and some outlets can be used to good effect. Social media and internet platforms may be used to put forward a considered piece, which reflects the concerns and views of your client and your aims in bringing the case. Advocacy and awareness raising using internet platforms can be a good way of bringing solidarity of other women, sharing stories, and advocating for change.<sup>671</sup> However, advocates must be careful to avoid contempt of court issues and refrain from commenting on specific cases in a way that may be seen as trying to influence the outcome of any specific cases that are currently active before the courts. Reporting restrictions that may apply to major media outlets in specific cases can also be applicable to individual users on social media platforms.

Another strategy is to work with media covering international or major national stories about violence against women. It can be useful to work with journalists to draw out the similarity between cases in the news and the particular cases of practitioners. This mix of the global news and the local appraisal of violence against women works because violence against women tends to have common characteristics wherever

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*Spain*, CEDAW Communication No 47/2012, UN Doc CEDAW/C/58/D/47/2012 (2014).

<sup>671</sup> For good examples of empowering campaigning, solidarity and activism see, Hollaback, a web-based initiative active in many countries globally, on street harassment, URL: <http://www.ihollaback.org/#>; and Everyday Sexism on discrimination more generally and forms of gender-based violence, URL: <http://everydaysexism.com/>.

this take place. In some rare cases, the desperate story of one woman or girl can lead to an outcry that ends in changing laws and practices.

### **Laying the foundations for international accountability**

Using this manual is predicated on the idea that international human rights law and standards should, both as a matter of legal obligation and to ensure effective enjoyment of human rights in real terms, be implemented in national law and practice.

Each national jurisdiction has its own practice regarding the implementation of international law. In "monist" States, where international and national law are viewed in unity, international legal obligations of a state are directly incorporated into national law and can typically be applied in national courts. This is the case even in the absence of implementing legislation, although even monist States usually will adopt such legislation. Dualist States, on the other hand, require that international legal obligations be incorporated into the body of domestic law via national legislation. It may be that such dualist States fail to do so, which will place limits on how international law may be invoked in judicial procedures. Even where international laws have not been so incorporated, or have been only partially or incorrectly incorporated, lawyers may be able to raise international law before courts as an interpretive aid to analogous or related domestic provisions, with the argument that it should be presumed that State authorities are not seeking to act in contravention of their international legal obligations. In this regard, it should be recalled that on the international plane, domestic law may not be invoked as an excuse for failure to discharge international legal obligations. The Vienna Convention on the Law of Treaties provides in article 26 that treaties (including human rights treaties) must be performed in good faith, and Article 27 recognizes that failure to perform a treaty obligation cannot be justified by reference to national law.

Laying the foundations for bringing a case at the international level should be planned from the start. In order to ensure that domestic remedies are exhausted – generally a requirement for proceedings with international courts and treaty bodies – it is important to ensure a clear evidentiary path of the various attempts at seeking a domestic remedy. In respect of human rights treaty bodies, communication shall not be considered by the relevant committee unless it has ascertained that all available domestic remedies have been exhausted, but this rule is subject to exceptions, particularly where the application of such remedies is unreasonably prolonged or unlikely to give effective relief.<sup>672</sup>

At this stage, it is also important to emphasize that the case concerns gendered discrimination in the form of gender-based violence. The CEDAW Committee's rules of procedure require this, in order to give the respondent state an opportunity to rectify their domestic legal system.<sup>673</sup> Including a documentation of cases of other individuals who are not the subject of the litigation, but to show that there is a pattern or trend in the violation of the rights of women, not just the individual applicants in a case, can make an important difference to how the case develops. This can be especially helpful where the authority makes general comments or recommendations for law and policy reforms, as well as reparation for individual applicants. This level of documentation can also be very useful for training the judiciary and for raising

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<sup>672</sup> Marsha Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women. A Commentary* (Oxford: Oxford University Press, 2012) – hereafter referred to as the 'CEDAW Commentary', page 634; and more detailed referencing in Annex II 'International legal remedies and their use', extract from International Commission of Jurists Practitioners Guide No. 6, Migration and International Human Rights Law (updated edition, 2014) URL: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>.

<sup>673</sup> CEDAW Commentary, page 636.

awareness among media professionals and also National Human Rights Institutions.

Many women have used the international human rights framework to seek “transformative reparation” – changes in law and practice, so that what has happened to her will not happen to others. Therefore as well as individual awards of reparation, including compensation, restitution of losses and physical and mental rehabilitation, she may seek measures of satisfaction (for example, apology) as well as guarantees of non-repetition – for example, changes to laws and practices, especially regarding impunity for perpetrators and the possibility of civil remedies against States that fail to discharge their duty to protect individuals known to be at risk of violence.

Further information on the international mechanisms available and how to use these is set out in Annexes I and II of this Guide.

### **Enforcing judgements**

A court pronouncing a judgement that vindicates rights may seem like the end of the process, but for individual applicants this is usually rather more like a penultimate stage in the journey. Unless State authorities are highly diligent in ensuring that the court’s directions are enforced, then more action may need to be taken to ensure that the state implements the judgement.

In respect of international judgements, the international human rights procedures are usually the concern of the ministry of foreign affairs. When the decision is from a treaty body, such as the CEDAW Committee or Human Rights Committee, other government ministries and agencies may not take it seriously, viewing it as just a “recommendation” and not binding. So further advocacy may be necessary to ensure that government agencies, if domestic litigation is pursued, take it seriously. Practitioners must be prepared to argue that in accepting the competency of the treaty bodies to consider individual communications, the State was bound to take account of the judgement in good faith.

Advocacy necessary to implement the judgement may require action from ministries' agencies across government, such as ministry of the interior (policing), ministry of justice (criminal justice system, lawyers and judges), ministries of health and social services (rehabilitation of victims) and ministries of education and equality. Promising practice indicates that there could be established an authoritative centre coordinating the execution of judgements, for example, a parliamentary monitoring group.<sup>674</sup> A national human rights institution may also have the expertise to assist initiatives of the executive in implementing judgments. The Istanbul Convention mandates the establishment of comprehensive and co-ordinated policies<sup>675</sup> and a coordinating body<sup>676</sup> to ensure "co-ordination,

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<sup>674</sup> Open Society Justice Initiative, "From Judgment to Justice: Implementing International and Regional Human Rights Decisions"(November 2010), page 42.

<sup>675</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, Article 7(1) Parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention and offer a holistic response to violence against women; Article 7(2) Parties shall ensure that policies referred to in paragraph 1 place the rights of the victim at the centre of all measures and are implemented by way of effective co-operation among all relevant agencies, institutions and organisations; and Article 7(3) Measures taken pursuant to this article shall involve, where appropriate, all relevant actors, such as government agencies, the national, regional and local parliaments and authorities, national human rights institutions and civil society organisations.

<sup>676</sup> Ibid, Article 10(1) Parties shall designate or establish one or more official bodies responsible for the co-ordination, implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of violence covered by this Convention. These bodies shall co-ordinate the collection of data as referred to in Article 11, analyse and disseminate its results; Article 10(2) Parties shall ensure that the bodies designated or established pursuant to this article receive information of a general nature on measures taken pursuant to Chapter VIII; and Article 10(3) Parties shall ensure that the bodies designated or established pursuant to this article shall have the

implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of gender based violence: this may be a good option to oversee the implementation of judgements. Parliamentary oversight is also encouraged by the Istanbul Convention, given the huge numbers of women affected by gender-based violence this may provide an important democratic representation.

Where the State fails to implement a judgement, particularly when it fails to ensure protection of the applicant, it may be useful to report this to the international human rights procedure which awarded judgement, in order for them to intervene directly with the State to remind them of their obligations. Where an international human rights procedure has mandated a number of actions, the victims' groups can give an appraisal of whether the recommendations have been implemented effectively. For example, victims' groups may seek to make the appraisal of whether "Justice Centres", established as a form of transformative reparation, are working efficiently, or whether the priority for the State should be renewing investigations and prosecutions of perpetrators and negligent state agents, or establishing memorials.<sup>677</sup>

Further information about enforcing judgments is available in Annex II under the heading 'What next? Enforcement system and follow-up'.

### **What will change look like?**

Advocates and survivors seeking justice will lead to the creation of new norms of acceptability, where children and young people are raised to reject gender discrimination and violence.

"The proof of accountability is in the experiences of women going about their normal lives. Are they living lives free of fear

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capacity to communicate directly and foster relations with their counterparts in other Parties.

<sup>677</sup> See generally, Caroline Bettinger-Lopez, 'The Challenge of Domestic Implementation of the International Human Rights Law in the Cotton Field Case' (2012) 15 CUNY. L. Rev., 315-334.

of violence? Can they profit from their own hard work? Can they access services that are responsive to their needs as women, mothers, workers, rural dwellers or urban residents? Are they free to make choices about how to live their lives, such as whom to marry, how many children to have, where to live, and how to make a living? Where accountability systems are rid of gender biases, they can ensure that states provide women with physical and economic security, access to basic services, and justice systems to protect their rights."<sup>678</sup>

A real test of gender-responsive accountability is a reduction in violence against women."<sup>679</sup>

"Effective access to justice optimizes the emancipatory and transformative potential of the law."<sup>680</sup>

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<sup>678</sup> UNIFEM (former United Nations Development Fund for Women), "Progress of the World's Women 2008/2009: Who answers to women? Gender and accountability", see URL [http://unifem.org/progress/2008/media/POWW08\\_Report\\_Full\\_Text.pdf](http://unifem.org/progress/2008/media/POWW08_Report_Full_Text.pdf), page 115.

<sup>679</sup> Ibid, pages 114-15.

<sup>680</sup> CEDAW General Recommendation No 33, "General recommendation on women's access to justice", UN Doc CEDAW/C/GC/33 (2015), paragraph 2.

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## **ANNEX 1: THE CHOICE OF AN INTERNATIONAL MECHANISM: A CHECKLIST<sup>681</sup>**

### **I. Which mechanism you can use**

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#### **a) Applicability of international obligations**

1. What human rights treaties is the relevant State party to?
2. Have any reservations or interpretative declarations been made by the State concerned?
3. Are all such reservations and declarations valid and permissible (i.e. is it permitted by the treaty; is it contrary to the object and purpose of the treaty?)

#### **b) Temporal jurisdiction**

1. Have the relevant treaties already entered into force?
2. Had the treaty entered into force before the facts of the case took place?
3. If separate ratification or agreement is necessary for the individual or collective complaints mechanism relevant to the treaty, has this taken place?

#### **c) Territorial jurisdiction**

1. Did the acts complained of take place within the territory of the State concerned, or otherwise come under its authority or control so as to fall within its jurisdiction?
2. Does the human rights body to which the complaint is to be sent have jurisdiction over the State concerned?

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<sup>681</sup> Extract from ICJ Practitioners Guide No. 6, Migration and International Human Rights Law (updated edition, 2014) URL: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>

**d) Material jurisdiction**

1. Do the facts on which the complaint is based constitute violations of human rights treaty provisions?
2. Which mechanisms are competent to hear complaint on these human rights claims?

**e) Standing**

1. Does the proposed applicant have standing to bring a case under the individual or collective complaints mechanism concerned?

**f) Time-limits**

1. Is the case lodged within permitted time limits for the particular international mechanism concerned? If not, are other international mechanisms still available?

**II. Choice of mechanism: strategy**

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**a) One or more bodies?**

1. Is it possible to submit the case to one or more mechanisms?
2. Do any of the mechanisms exclude complaints that have been or are being considered by others?
3. Can different elements of the same case be brought before different bodies?

**b) Which body is more convenient?**

1. Under which mechanism has the case strongest chances of success?
2. Which treaty or mechanism includes the strongest or most relevant guarantees, or the strongest jurisprudence on the relevant point?

3. Which mechanism provides the strongest system of interim measures if the case requires it? Are the interim measures of one or another mechanism more respected by the State?
4. Which mechanism can provide the strongest remedies to the applicant?
5. Which mechanism assures the strongest system of enforcement of final decisions?

**c) Effect in the domestic system**

1. Are the decisions of the court or tribunal concerned binding or non-binding?
2. What is the effect of the mechanism's decisions on the national system? Is there any possibility of re-opening national proceedings following the decision of the international tribunal?
3. What is the political impact of the mechanism's decision in the State concerned?

## ANNEX 2: INTERNATIONAL LEGAL REMEDIES AND THEIR USE<sup>682</sup>

### I. Using international mechanisms and remedies

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There are a number of international mechanisms, judicial and non-judicial, that may be available to migrants seeking remedies to violations of legal venues to enforce rights.

International human rights mechanisms allowing individual petitions include:

- **Judicial mechanisms:** International courts receive individual petitions or applications, and have competence to interpret and apply human rights instruments, declare whether the treaty has been violated, and prescribe appropriate remedies in the individual case considered. Their decisions are binding, and must be executed by the concerned State. International human rights judicial mechanisms include: the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights.
- **Quasi-judicial mechanisms:** These bodies have all the characteristics of the judicial mechanisms, except that their decisions are not binding. They include: the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee on Elimination of Racial Discrimination (CERD), the Committee against Torture (CAT), the European Committee on Social Rights (ECSR), the Inter-American

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<sup>682</sup> Extract from ICJ Practitioners Guide No. 6, Migration and International Human Rights Law (updated edition, 2014) URL: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>

Commission on Human Rights (IACHR), the African Commission on Human and Peoples' Rights (ACHPR), the Committee on Migrant Workers (CMW), the Committee on the Rights of the Child (CRC), the Committee on the Rights of Persons with Disabilities (CRPD), the Committee on Enforced Disappearances (CED) and the Committee on Economic, Social and Cultural Rights (CESCR).

- **Non-judicial mechanisms:** Non-judicial mechanisms are bodies or organs that have no specific mandate to supervise a particular treaty and whose decisions or views are not binding. Their legitimacy generally derives from the treaty establishing the international or regional organisations from which they emanate, rather than from a particular human rights treaty. This is the case with the Special Procedures established by the UN Human Rights Council.

## 1. Preliminary requirements

### a) Jurisdiction (Temporal, material and territorial)

International judicial and quasi-judicial bodies can adjudicate on any alleged violation according to the law subject to their jurisdiction. This concept is not to be confused with the "competence" of a court or tribunal to hear a particular case. In international law, jurisdiction of an international body equates with the reach of international responsibility of a State. It divides, therefore, into three categories: temporal jurisdiction (jurisdiction *ratione temporis* - concerning the period of time within which the State is bound by the international obligation); material jurisdiction (jurisdiction *ratione materiae* - concerning the limits of the subject-matter of the State obligation), and territorial jurisdiction (jurisdiction *ratione loci* - concerning the territorial reach of the State's responsibility).

*i) Temporal jurisdiction ("ratione temporis")*

The basic principle of international law is that an international mechanism has jurisdiction to adjudicate on alleged violations of international law that occurred after the obligation to respect the obligation entered into force for the State concerned.<sup>683</sup> This principle applies equally to international human rights mechanisms, so that they have jurisdiction only over facts or acts that arose only after the entry into force of the relevant treaty for the State Party.<sup>684</sup>

However, the principle applies differently to different situations:

- **Instantaneous fact/act:** the simplest situation occurs when the fact or act to be contested is an instantaneous one. In this case, it suffices to check whether the act occurred before or after the entry into force of the relevant treaty;<sup>685</sup>
- **Continuous fact/act:** when the breach of the obligation has a continuing character, then the wrongful fact or act continues until the situation of violation is ended. Examples include enforced disappearances or arbitrary detentions, when the person continues to be disappeared (his whereabouts continue to be unknown) or detained even after the entry into force of the treaty,

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<sup>683</sup> See, Article 13, *ILC Draft Articles on State Responsibility*. See, *inter alia*, *Island of Palmas* (Netherlands/USA), UNRIIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928); *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C.H. White et Kate and Anna*, UNRIIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902). See also, *Northern Cameroons (Cameroon v. United Kingdom)*, ICJ, Preliminary Objections, 2 December 1963, ICJ Reports 1963, p. 15, at p. 35; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ, Preliminary Objections, 26 June 1992, ICJ Reports 1992, p. 240, at pp. 253-255, paras. 31-36.

<sup>684</sup> See, *X v. Germany*, ECommHR, Application No. 1151/61, *Recueil des decisions*, p. 119 (1961).

<sup>685</sup> See, Article 14.1, *ILC Draft Articles on State Responsibility*.

regardless of whether the situation originated from an act/fact that occurred before that date.<sup>686</sup> This case must be distinguished from breaches of international obligations which occurred and ended before the entry into force of the treaty but still have effects after the entry into force of the treaty. In such cases, the mechanism will however be able to adjudicate collateral violations: for example the lack of investigation into responsibility for violations of human rights law, if the State did not remedy it before the entry into force of the treaty.<sup>687</sup>

- **Breach of obligation to prevent:** this situation occurs when the State has an obligation to prevent a given event, but fails to do so. The breach extends over the entire period during which the event continues and remains in violation of that obligation.<sup>688</sup>

*ii) Material jurisdiction ("ratione materiae")*

This kind of jurisdiction relates to the treaty or the international obligation of which the international mechanism is the "guardian". It means that it is not possible to raise before an international mechanism human rights violations that are not covered by the relevant treaty.

In assessing whether there is material jurisdiction, it should be borne in mind that evolutive interpretation has led to an

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<sup>686</sup> See, *Blake v. Guatemala*, IACtHR, Series C No. 36, Judgment of 24 January 1998, para. 67; *X v. Switzerland*, ECommHR, Application No. 7601/75, Admissibility Decision, 12 July 1976. On continuing violations in the context of enforced disappearances, see, *Serrano Cruz Sisters v. El Salvador*, IACtHR, *op. cit.*, fn. 853, paras. 100 and 105.

<sup>687</sup> See, Article 14.2, *ILC Draft Articles on State Responsibility*. See, *Lovelace v. Canada*, CCPR, Communication No. R.6/24, Views of 30 July 1981. See, *Moldovan and others (2) v. Romania*, ECtHR, *op. cit.*, fn. 937, paras. 104-106.

<sup>688</sup> See, Article 14.3, *ibid.*

expansion of the scope of certain human rights. For example, it is possible to argue against a forced eviction under the ICCPR and the ECHR claiming a violation of the right to respect for the home and for private and family life. Also, the creation of conditions of life leading to a situation of destitution might constitute a violation of the right to life (see, Box No. 14, and Chapter 5, Section II.1(c)(iii)). The boundaries between civil and political and social, economic and cultural rights, and among different treaties must not be viewed strictly and a careful analysis of the mechanisms' jurisprudence is recommended.

The "Human Rights Committee" (HRC) is competent *ratione materiae* for breaches of the *International Covenant on Civil and Political Rights* (ICCPR); the "Committee against Torture" (CAT) for the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); the "Committee on the Elimination of Racial Discrimination" (CERD) for the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD); the "Committee on the Elimination of Discrimination against Women" (CEDAW) for the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); and the "Committee on Migrant Workers" (CMW) for the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW); the "Committee on the Rights of the Child" (CRC) for the *Convention on the Rights of the Child* (CRC), the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (OP-CRC-SC), and the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts* (OP-CRC-AC); the "Committee on the Rights of Persons with Disabilities" (CRPD) for the *Convention on the Rights of Persons with Disabilities* (CRPD); the "Committee on Enforced Disappearances" for the *International Convention on the Protection of All Persons from*

*Enforced Disappearance*; and the “Committee on Economic, Social and Cultural Rights” (CESCR) for the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

At a regional level, the European Court of Human Rights (ECtHR) is competent to hear complaints referring to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. The European Committee on Social Rights (ESCR) is competent for collective complaints against the States Parties to the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (“Additional Protocol of 1995”) and those who accepted the collective complaint mechanism through a declaration under Article D of the *European Social Charter (revised)*. The ESCR is competent to consider complaints only against those rights of the European Social Charter by which the State Party has undertaken to be bound.<sup>689</sup>

The Inter-American Commission on Human Rights (IACHR), established by the OAS Charter,<sup>690</sup> is competent<sup>691</sup> to consider

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<sup>689</sup> See, Article 11, *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (AP-ESC); and Article A (Part III), ESC(r).

<sup>690</sup> Article 106, *Charter of the Organisation of American States* (OAS Charter).

<sup>691</sup> See, Article 23, *Rules of Procedure of the Inter-American Commission on Human Rights*, approved by the Commission at its 137<sup>th</sup> regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147<sup>th</sup> Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on August 1st, 2013 (IACHR Rules of Procedure). Other human rights treaties of IACHR competence are the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, the *Inter-American Convention to Prevent and Punish Torture*, the *Inter-American Convention on Forced Disappearance of Persons*, and/or the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belém do Pará”*.

alleged violations of *American Declaration of the Rights and Duties of Man*, the *American Convention on Human Rights* and of the right to establish and join trade unions and the right to education under the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"*.<sup>692</sup> The Commission has found also that Articles 26 and 29 ACHR may allow this body to consider violations of economic, social and cultural rights contained in the Protocol of San Salvador.<sup>693</sup> The Inter-American Court of Human Rights (IACtHR) has subject-matter jurisdiction for violations of the *American Convention on Human Rights* (ACHR) only against States that have accepted it through a declaration done under Article 62 ACHR. It can also adjudicate on violations of the right to establish and join trade unions and the right to education under the "*Protocol of San Salvador*".<sup>694</sup>

The African Commission on Human and Peoples' Rights (ACHPR) is competent to hear individual complaints for violations of the *African Charter on Human and Peoples' Rights* (ACHPR) against the States Parties.<sup>695</sup> The African Court on Human and Peoples' Rights has the competence to hear

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<sup>692</sup> See, Article 19.6, *Protocol of San Salvador*. See, *National Association of Ex-Employees v. Peru*, IACHR, *op. cit.*, fn. 892, para. 69; *Pensioners of the National Agricultural Development Bank (BANDESA) v. Guatemala*, IACHR, Petition No. 1380-06, Report No. 102/09, Admissibility Decision, 29 October 2009, para. 24; *Tena Colunga et al. v. Mexico*, IACHR, Petition No. 2582/02, Report No. 44/04, Admissibility Decision, 13 October 2004, paras. 39-40; *Meneses de Jiménez v. Colombia*, IACHR, Petition No. 2779-02, Report No. 50/10, Admissibility Decision, 18 March 2010, paras. 45-46.

<sup>693</sup> See, *Sanchez Villalobos and Others v. Costa Rica*, IACHR, Petition No. 12.361, Report No. 25/04, Admissibility Decision, 11 March 2004, para. 52; *Meneses de Jiménez v. Colombia*, IACHR, *op. cit.*, fn. 1259, para. 46.

<sup>694</sup> See, Article 19.6, *Protocol of San Salvador*. See, *Baena-Ricardo et al. v. Panama*, IACtHR, *op. cit.*, fn. 1236, para. 97.

<sup>695</sup> Article 55 ACHPR.

complaints for breach of the *African Charter* and of any other human rights instrument ratified by a State Party to the Protocol establishing the Court.<sup>696</sup>

iii) *Territorial jurisdiction* (“*ratione loci*”)

The jurisdiction *ratione loci* establishes the geographical reach of the State’s human rights obligations. Most of the time, an alien will have clearly entered the State’s jurisdiction when he or she accesses its territory. It is indisputable that States must guarantee, secure and protect the human rights of everyone who is on their territory.<sup>697</sup> This also occurs when the alien is present in an “international zone” or “*zone d’attente*” of an airport.<sup>698</sup>

However, States do not only have the obligation to secure and protect human rights to everyone that is present on their territory, but also to all persons under their jurisdiction. The term “jurisdiction” has a wider reach than the national territory of the State. It applies to all persons who fall under the authority or the effective control of the State’s authorities or of other people acting on its behalf, and to all extraterritorial zones, whether of a foreign State or not, where the State exercises effective control.<sup>699</sup> Furthermore, where persons or groups acting under State authority act outside their State’s territory, so as to bring victims of violations under their authority, bring the person or the property concerned by the acts within the State’s jurisdiction, regardless of the territory in

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<sup>696</sup> Article 3, *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights* (P-ACHPR on African Court).

<sup>697</sup> Article 2.1 ICCPR; Article 2.1 CRC; Article 7 ICRMW; Article 1 ECHR; Article 1.1 ACHR; Article 3.1 ArCHR.

<sup>698</sup> *Amuur v. France*, ECtHR, *op.cit.*, fn. 45, paras. 52-53.

<sup>699</sup> See, fn. 46.

which the acts took place or where the person or the property were present.<sup>700</sup>

For example, the European Court of Human Rights has found that jurisdiction had extraterritorial reach in various situations,

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<sup>700</sup> See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, *op. cit.*, fn. 46, para. 109; *Lopez Burgos v. Uruguay*, CCPR, *op. cit.*, fn. 46, paras. 12.1-12.3; *Ciliberti de Casariego v. Uruguay*, CCPR, *op. cit.*, fn. 46; *General Comment No. 31*, CCPR, *op. cit.*, fn. 46, para. 10; *Issa and Others v. Turkey*, ECtHR, *op. cit.*, fn. 46, para. 71; *Öcalan v. Turkey*, ECtHR, *op. cit.*, fn. 47, para. 91; *Ramirez v. France*, ECommHR, *op. cit.*, fn. 47; *W.M. v. Denmark*, ECommHR, Application No. 17392/90, Admissibility Decision, 14 October 1992, paras. 1-2; *Drozd and Janousek v. France and Spain*, ECtHR, Plenary, Application No. 12747/87, 26 June 1992, para. 91; *Loizidou and Others v. Turkey*, ECtHR, GC, Application No. 15318/89, 23 March 1995, para. 62; *Ilascu and Others v. Moldova and the Russian Federation*, ECtHR, GC, Application No. 48787/99, 4 July 2001; *Freda v. Italy*, ECommHR, Plenary, Application No. 8916/80, Admissibility Decision, 7 October 1980 para. 3; *X. v. United Kingdom*, ECommHR, Application No. 7547/76, Admissibility Decision, 15 December 1977, para. 81; *X. v. Federal Republic of Germany*, ECommHR, Application No. 1611/62, Admissibility Decision, 25 September 1965; *Cyprus v. Turkey*, ECommHR, Plenary, Applications nos. 6780/74-6950/75, 26 May 1975, paras. 8 and 10; *Hess v. United Kingdom*, ECommHR, Application No. 6231/73, Admissibility Decision, 28 May 1975; *X and Y v. Switzerland*, ECommHR, Applications nos. 7289/75-7349/76, Admissibility Decision, 14 July 1977, para. 2; *W. v. United Kingdom*, ECommHR, Application No. 9348/81, 28 February 1983, para. 5; *Victor Saldaño v. Argentina*, IACHR, *op. cit.*, fn. 46, para. 17; *Coard et al. v. United States*, IACHR, *op. cit.*, fn. 46, para. 37; *Al-Skeini and Others v. United Kingdom*, ECtHR, GC, Application no. 55721/07, Judgment of 7 July 2011, paras. 133-142; *Hirsi Jamaa and Others v. Italy*, ECtHR, *op. cit.*, fn. 46, paras. 73-82. See also, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 29 February 2012, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf>; and their commentary available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf>.

even outside the territory of States Parties to the European Convention of Human Rights - including in northern Iraq,<sup>701</sup> Kenya,<sup>702</sup> Sudan,<sup>703</sup> Iran,<sup>704</sup> in a UN neutral buffer zone,<sup>705</sup> and in international waters.<sup>706</sup> Human rights obligations apply in unmodified form to a State exercising extra-territorial jurisdiction – for example, an occupying power, a military base abroad or a state operating an extra-territorial detention centre - as has been authoritatively affirmed regarding comparable obligations under CAT, the ICCPR, the ECHR,<sup>707</sup> by the Inter-American Commission on Human Rights<sup>708</sup> and the Refugee Convention.<sup>709</sup>

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<sup>701</sup> *Issa and Others v. Turkey*, ECtHR, *op. cit.*, fn. 46

<sup>702</sup> *Öcalan v. Turkey*, ECtHR, *op. cit.*, fn. 47.

<sup>703</sup> *Ramirez v. France*, ECommHR, *op. cit.*, fn. 47.

<sup>704</sup> *Pad and Others v. Turkey*, ECtHR, *op. cit.*, fn. 47.

<sup>705</sup> *Isaak and Others v. Turkey*, ECtHR, *op. cit.*, fn. 47.

<sup>706</sup> *Khavara and Others v. Italy and Albania*, ECtHR, *op. cit.*, fn. 46;

and, *Women on Waves and Others v. Portugal*, ECtHR, *op. cit.*, fn. 46.

<sup>707</sup> See, *inter alia*, *Al-Sadoon and Mufti v. United Kingdom*, ECtHR, *op. cit.*, fn. 391; *Al-Skeini and Others v. United Kingdom*, ECtHR, *op. cit.*, fn 1267, paras. 133-142.

<sup>708</sup> See, *Haitian Interdictions Case*, IACHR, *op. cit.*, fn. 46, paras. 163, 168 and 171.

<sup>709</sup> *Concluding Observations on USA*, CAT, *op. cit.*, fn. 46, para. 20; *Concluding Observations on USA*, CCPR, *op. cit.*, fn. 323; UNHCR, *The Scope and Content of the Principle of Non-Refoulement*, Opinion, Sir Elihu Lauterpacht CBE QC, Daniel Bethlehem, Barrister, paras. 62-67, concludes that: “the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.” See also, para. 242. See further, UNHCR, *Advisory Opinion on the Extraterritorial Application*, *op. cit.*, fn. 293; CAT, General Comment No. 2, *op. cit.*, fn. 31, paras 7, 16 and 19; Nowak and McArthur, *op. cit.*, fn. 391, p.129, para.4; p.147, para.72 and p.199, para. 180-1; CCPR, *General Comment No. 31*, *op. cit.*, fn. 46, para. 10-11; *Concluding Observations on United Kingdom*, CAT, *op. cit.*, fn. 391, paras. 4(b) and 5(e).

Of particular relevance for migrants is the fact that the State's jurisdiction may extend in certain situations to international waters. The IACHR has found that the interception and return of asylum-seekers, on the high seas, to their country of origin constituted a violation of their right to seek asylum in a foreign country, as granted by the ADRDM and the ACHR.<sup>710</sup> The Grand Chamber of the European Court of Human Rights has clearly stated that measures of interception of boats, including on the high seas, fall within the jurisdiction of the State implementing the interception. From the moment of effective control of the boat, all the persons on it fall within the jurisdiction of the intercepting State, which must secure and protect their human rights.<sup>711</sup> The Committee against Torture has also held that the seizure of a boat in international waters, and even the control over the passengers in foreign territory in order to proceed with their identification and repatriation, attracted the jurisdiction of the State which had control over them.<sup>712</sup> The same principles apply in the context of rescue operations at sea, analysed in Chapter 1.

In a case concerning human trafficking, the European Court of Human Rights has held that there jurisdiction was established for the State of origin of the person trafficked in so far as its obligations to protect the concerned person from trafficking were engaged.<sup>713</sup>

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<sup>710</sup> *Haitian Interdictions Case*, IACHR, *op. cit.*, fn. 46, paras. 156,157 and 163.

<sup>711</sup> See, *Hirsi Jamaa and Others v. Italy*, ECtHR, *op. cit.*, fn 46, paras. 73-82; *Medvedyev and Others v. France*, ECtHR, *op. cit.*, fn. 51, paras. 62-67.

<sup>712</sup> *J.H.A. v. Spain*, CAT, *op. cit.*, fn. 266, para. 8.2.

<sup>713</sup> *Rantsev v. Cyprus and Russia*, ECtHR, *op. cit.*, fn. 236, paras. 206-208.

## b) Standing

The terms “*locus standi*” or “standing” address the question of who is entitled to enter an application or submit a complaint for a human rights violation before an international mechanism. Whilst some international mechanisms with a judicial or quasi-judicial character provide for standing for individuals to bring complaints, others allow for “collective complaints” by groups.

- **Individual Complaints:** some mechanisms allow only for the victims of a violation, or for those petitioning on his or her behalf to lodge a complaint. Certain mechanisms allow for general human rights NGOs to lodge a complaint on behalf of victims, even without their direct authorisation, although it must be demonstrated that it would have been impossible or very difficult to obtain authorisation for reasons independent from the victims themselves.
- **Collective Complaints:** This mechanism allows organisations to challenge a general legal or factual situation which gives rise to or has the potential to give rise to human rights violations, without naming individual complaints.

### *i) Standing to bring individual application: the meaning of “victim”*

In individual complaints mechanisms, standing is generally accorded to persons who are “victims” of a human rights violation. Victims may be either direct or indirect. A victim is generally a person directly affected by the violation of the human rights concerned.<sup>714</sup> However, particular cases might arise when the direct cause and effect is more blurred. For example, the existence of a law that potentially impedes the

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<sup>714</sup> Companies might be victims too, but due to the scope of this Guide we will deal only with individuals.

individual in asserting his or her rights, although the person has not yet breached the law, may put the individual in the situation of "victim", if the risk of the law being applied when the action contrary to it is taken is more than a theoretical possibility.<sup>715</sup> Furthermore, laws might violate the individual's right even when the individual cannot be aware of it, because the law makes such awareness impossible, for example in the case of some types of surveillance.<sup>716</sup> Individuals may also be indirect victims of a violation or might suffer from what could be called "collateral violations". It is recognised, for example, that the relatives of a victim of torture or disappearance might find their right not to be subject to ill-treatment violated by the mere fact of having been exposed to this situation.<sup>717</sup> Finally, in cases of expulsion which might infringe a State's human rights obligations, because they could be contrary to the principle of *non-refoulement* or disproportionately interfere with the right to respect for family life, an individual can be a victim despite the fact that potential and not actual violations are at issue (see, Chapter 2).

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<sup>715</sup> See, *Mauritian Women Case*, CCPR, *op. cit.*, fn. 55; *Toonen v. Australia*, CCPR, Communication No. 488/1992, Views of 31 March 1994, paras. 8.2 and 9. See, *Dudgeon v. United Kingdom*, ECtHR, Plenary, Application No. 7525/76, Judgment of 22 October 1981; *Norris v. Ireland*, ECtHR, Plenary, Application No. 10581/83, Judgment of 26 October 1988; *Open Door and Well Woman v. Ireland*, ECtHR, Plenary, Applications nos. 14234/88 ; 14235/88, Judgment of 29 October 1992; *Campbell and Cosans v. United Kingdom*, ECommHR, Applications nos. 7511/76; 7743/76, Report of 16 May 1980.

<sup>716</sup> *Klass and Others v. Germany*, ECtHR, Plenary, Application No. 5029/71, Judgment of 6 September 1978.

<sup>717</sup> See, *Quinteros Almeida v. Uruguay*, CCPR, Communication No. 107/1981, Views of 21 July 1983, para. 14; *Staselovich and Lyashkevich v. Belarus*, CCPR, Communication No. 887/1999, Views of 3 April 2003, para. 9.2. See, *Kurt v. Turkey*, ECtHR, *op. cit.*, fn. 724.

*ii) Mechanisms for individual complaints*

**Universal treaty bodies** do not provide for collective complaints. The general rule is that complaints may be submitted by individuals who claim to be victims of a violation by the State Party of any of the rights set forth in human rights treaty for which the treaty body has competence.<sup>718</sup> If the violation concerns a group of people, they can submit as a group.<sup>719</sup> The complaint may be submitted by the individual

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<sup>718</sup> See, Article 1, *Optional Protocol to the International Covenant on Civil and Political Rights* (OP-ICCPR); Article 2 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted by General Assembly resolution No. 63/117, UN Doc. A/RES/63/117, 10 December 2008 (OP-ICESCR); Article 2, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (OP-CEDAW); Rule 113(a), *Rules of Procedure of the Committee against Torture*, UN Doc. CAT/C/3/Rev.6, 13 August 2013 (CAT Rules of Procedure); Rule 91(b), *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* (CERD Rules of Procedure). See also, Rule 68.1, *Rules and Procedures of the Committee on the Elimination of Discrimination against Women*, UN Doc. A/56/38 (SUPP), as amended by A/62/38 (SUPP, Chapter V) (CEDAW Rules of Procedure); Article 5, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, (OP-CRC-CP); Rule 13, *Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, UN Doc. CRC/C/62/3, 16 April 2013 (CRC Rules of Procedure); Rule 4, *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/49/3, 15 January 2013 (CESCR Provisional Rules of Procedure); Article 1, *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (OP-CRPD); Rule 69, *Rules of Procedure of the Committee on the Rights of Persons with Disabilities*, UN Doc. CRPD/C/4/2, 13 August 2010 (CRPD Rules of Procedure); Rule 68, *Rules of Procedure of the Committee on Enforced Disappearances*, UN Doc. CED/C/1, 22 June 2012 (CED Rules of Procedure).

<sup>719</sup> This requirement, valid for all treaty bodies, is made explicit in Article 2 OP-ICESCR and Article 2 OP-CEDAW. See also, Rule 68.1, *CEDAW Rules of Procedure*; Article 5, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*,

personally or by a third party acting on behalf of the individual or groups alleging to be victims, with their authorisation.<sup>720</sup> Another issue is whether third persons or entities may act on behalf of the individuals or groups claiming to be victims, without their authorisation. Treaty bodies generally allow for this on condition that the person or entity applying must justify the absence of authorisation, for example, because the victim is in a particular situation of risk or vulnerability which prevents him or her from availing of the communication procedure, or

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not yet into force (OP-CRC-CP); Rule 13, *Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, UN Doc. CRC/C/62/3, 16 April 2013 (CRC Rules of Procedure); Rule 4, *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/49/3, 15 January 2013 (CESCR Provisional Rules of Procedure); Article 1, *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (OP-CRPD); Rule 69, *Rules of Procedure of the Committee on the Rights of Persons with Disabilities*, UN Doc. CRPD/C/4/2, 13 August 2010 (CRPD Rules of Procedure).

<sup>720</sup> See, Rule 96(b), *Rules of Procedure of the Human Rights Committee*, UN Doc. CCPR/C/3/Rev.10, 11 January 2012 (CCPR Rules of Procedure); Article 2 OP-ICESCR; Rule 113(a), *CAT Rules of Procedure*; Rule 91(b), *CERD Rules of Procedure*; Article 2 OP-CEDAW. See also, Rule 68(1), *CEDAW Rules of Procedure*; Article 5, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, not yet into force (OP-CRC-CP); Rule 13, *Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, UN Doc. CRC/C/62/3, 16 April 2013 (CRC Rules of Procedure); Rule 4, *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/49/3, 15 January 2013 (CESCR Provisional Rules of Procedure); Article 1, *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (OP-CRPD); Rule 69, *Rules of Procedure of the Committee on the Rights of Persons with Disabilities*, UN Doc. CRPD/C/4/2, 13 August 2010 (CRPD Rules of Procedure); Rule 68, *Rules of Procedure of the Committee on Enforced Disappearances*, UN Doc. CED/C/1, 22 June 2012 (CED Rules of Procedure).

because the violation is so massive that it is impossible to obtain the authorisation of all the people affected.<sup>721</sup>

The **European Court of Human Rights** receives applications from various entities – individual persons, NGOs, or group of individuals – who claim to be a victim (either direct or indirect) of the alleged violation.<sup>722</sup> Applications cannot be anonymous, but the Court may grant leave to anonymity of the claim in its communication to other parties or the public, when the applicant has adduced sufficient reasons to justify this departure from the rule.<sup>723</sup>

As for the **Inter-American Commission on Human Rights**, any person or group of persons, or any non-governmental entity legally recognised in one or more Member States of the Organization of American States (OAS), may lodge petitions containing complaints of violation of this Convention by a State.<sup>724</sup> In practice, however, the IACHR frequently requests that the author of any complaint be either a victim or a relative of a victim or have a mandate to act by the victim or by a relative of the victim. The Commission has clearly stated that “[t]he applicant must claim to be a victim of a violation of the Convention, or must appear before the Commission as a

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<sup>721</sup> See, Rule 96(b), *CCPR Rules of Procedure*; Article 2 OP-ICESCR; Rule 91(b), *CERD Rules of Procedure*; and Article 2, OP-CEDAW. See also, Rule 68.1, *CEDAW Rules of Procedure*. See, Rule 13, *CRC Rules of Procedure*: “communications may be submitted on behalf of the alleged victim(s) without such express consent, provided that the author(s) can justify her/his/their action and the Committee deems it to be in the best interests of the child. If possible, the alleged victim(s) on whose behalf the communication is presented may be informed of the communication and her/his/their views shall be given due weight in accordance with her/his/their age and maturity”.

<sup>722</sup> Article 34 ECHR.

<sup>723</sup> Rule 47.4, *Rules of the Court*, ECtHR, 1 January 2014, Strasbourg (ECtHR Rules of Procedure). See for details of applications, the entire Rule 47.

<sup>724</sup> Article 44 ACHR.

representative of a putative victim of a violation of the Convention by a State Party. It is not sufficient for an applicant to claim that the mere existence of a law violates her rights under the American Convention, it is necessary that the law has been applied to her detriment."<sup>725</sup>

*iii) Mechanisms for collective complaints: ECSR*

The collective complaints system of the **European Committee on Social Rights** does not provide for a right of individual application. It does confer the standing to make a complaint on certain organisations, namely:

- International organisations of employers and trade unions;
- Other international non-governmental organisations which have consultative status with the Council of Europe and have been placed on a list established for this purpose by the Governmental Committee;
- Representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint;
- National non-governmental organisations with competence in the matters governed by the Charter, which have been allowed by the Contracting State of origin to lodge complaints against it.<sup>726</sup>

*iv) Individual and collective complaints: the ACHPR*

Article 55 ACHPR does not place any restrictions on who can submit cases to the **African Commission on Human and Peoples' Rights**. The Commission has interpreted this provision as giving *locus standi* to victims and their families, as well as NGOs and others acting on their behalf, even when they

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<sup>725</sup> *Montoya González v. Costa Rica*, IACHR, Case 11.553, Report No. 48/96, Admissibility Decision, 16 October 1996, para. 28.

<sup>726</sup> Articles 1 and 2, AP-ESC.

are not representatives of the victims. Indeed, for the African Commission, “the African Charter does not call for the identification of the victims of a Communication. According to the terms of Article 56(1), only the identification of the author or authors of the Communication is required.”<sup>727</sup> This position is an established principle of the African Commission’s jurisprudence.<sup>728</sup>

The *African Charter on the Rights and Welfare of the Child* (ACRWC) has established an African Committee of Experts on the Rights and Welfare of the Child to monitor its implementation by State Parties.<sup>729</sup> Article 44 ACRWC provides that the Committee “may receive communication, from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.”<sup>730</sup> The Committee is therefore competent to hear both individual and collective complaints.

#### v) *Mechanisms of indirect access*

Individuals cannot directly bring a complaint to the Inter-American Court of Human Rights or the African Court on Human and Peoples’ Rights. They generally take cases brought by a lower human rights mechanism (IACHR or ACHPR) or by a State.

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<sup>727</sup> FIDH, *National Human Rights Organisation (ONDH) and Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) v. Senegal*, ACommHPR, Communication No. 304/2005, 40<sup>th</sup> Ordinary, 15-29 November 2006, para. 40.

<sup>728</sup> See, as reference, *Malawi African Association and Others v. Mauritania*, ACommHPR, *op. cit.*, fn. 1006. See also, *Mgwanga Gunme et al. v. Cameroon*, ACommHPR, Communication No. 266/2003, 45<sup>th</sup> Ordinary Session, 13 – 27 May 2009, para. 67.

<sup>729</sup> Article 32 ACRWC.

<sup>730</sup> Article 44.1 ACRWC.

For the **Inter-American Court of Human Rights** only a State Party and the Inter-American Commission have the right to submit a case to the Court.<sup>731</sup> However, in cases before the Court, alleged victims, their next of kin or their duly accredited representatives are allowed to participate in the proceedings by submitting pleadings, motions and evidence, autonomously, throughout the proceedings. They may also request the adoption of provisional measures.<sup>732</sup>

The **African Court on Human and Peoples' Rights** accepts only cases submitted to the Court by the Commission, the State Party which has lodged a complaint to the Commission, the State Party against which the complaint has been lodged at the Commission, the State Party whose citizen is a victim of human rights violation, and by African Intergovernmental Organisations. The Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute the cases directly before it.<sup>733</sup> NGOs will therefore need to have previous approval by the African Commission, while individuals will have to ask the permission of the Court, most probably on a case-by-case basis. The Interim Rules of Procedures do not say that the Court "may entitle", but that these last two kind of applicants "are entitled" to submit cases to the Court, suggesting that, in its work, the Court will not unfavourably exercise discretion on granting *locus standi* to

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<sup>731</sup> Article 61.1 ACHR.

<sup>732</sup> See, Article 27, *Rules of Procedure of the Inter-American Court of Human Rights*, approved by the Court during its LXXXV Regular Period of Sessions, held from 16 to 28 November 2009 (IACtHR Rules of Procedure).

<sup>733</sup> Article 5, *P-ACHPR on African Court*.

individuals.<sup>734</sup> The provisions will not change in the new *Statute of the African Court of Justice and Human Rights*.<sup>735</sup>

## **2. Admissibility requirements**

Admissibility requirements must be fulfilled before a complaint is examined on the merits. They are contained in the human rights treaty establishing the competence of the human rights body to hear individual or collective complaints. Generally, these requirements are very similar for all human rights bodies and, even when some are not specifically provided for in the treaty, they are usually upheld by the competent human rights body on the basis of the uniform interpretation of international human rights law. As for the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, since these bodies do not hear individual complaints directly, the admissibility criteria are the same as those of their lower bodies, the IACHR and the ACHPR.

### **a) Exhaustion of domestic remedies**

It is a general standard of international human rights law that, before bringing a case before an international legal mechanism, an applicant must have first exhausted the domestic remedies available. The rationale of the principle lies in the fact that, as it is the international responsibility of the State as a whole that is challenged, the State must have had the possibility to redress that human rights violation domestically, before an international forum should be made available. However, only those remedies that are effective need to be exhausted. If

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<sup>734</sup> Article 33, *Interim Rules of the Court*, done at Arusha, Tanzania, 20 June 2008, entered into force on 20 June 2008 (ACtHPR Rules of Procedure).

<sup>735</sup> Article 30, *Protocol on the Statute of the African Court of Justice and Human Rights*, adopted by the 11<sup>th</sup> Ordinary Session of the Assembly of the African Union in Sharm El-Sheikh, Egypt, 1 July 2008 (not yet in force) (ACJHR Statute).

several effective and adequate remedies are available, it is sufficient to exhaust only one of them.<sup>736</sup>

A domestic remedy is “adequate” only when it is able to address that particular human rights violation according to international human rights law standards.<sup>737</sup> A complaint under a substantial provision containing a right under international human rights law must be arguable before the domestic remedial mechanism.<sup>738</sup> It is not necessary that the specific article of the human rights treaty be used as a ground of judicial review. It is sufficient that the substance of the human rights claim be arguable.<sup>739</sup>

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<sup>736</sup> See, *T. W. v. Malta*, ECtHR, GC, Application No. 25644/94, Judgment of 29 April 1999, para. 34; *Iatridis v. Greece*, ECtHR, GC, Application No. 31107/96, Judgment of 25 March 1999, para. 47. A comprehensive restatement of the European Convention’s admissibility criteria together with the European Court’s jurisprudence is available in the *Practical Guide on Admissibility Criteria* produced by the Research Division of the European Court of Human Rights, and available at [http://www.echr.coe.int/NR/ronlyres/91AEFEBBC-B90F-4913-ABCC-E181A44B75AD/0/Practical\\_Guide\\_on\\_Admissibility\\_Criteria.pdf](http://www.echr.coe.int/NR/ronlyres/91AEFEBBC-B90F-4913-ABCC-E181A44B75AD/0/Practical_Guide_on_Admissibility_Criteria.pdf).

<sup>737</sup> See, *Danyal Shafiq v. Australia*, CCPR, *op. cit.*, fn. 687, para. 6.4; *Vélez Looor v. Panama*, IACHR, Case 92-04, Report No. 95/06, Admissibility Decision, 23 October 2006, para. 36; *Velasquez Rodriguez v. Honduras*, IACtHR, *op. cit.*, fn 799, para. 64; *Godínez Cruz v. Honduras*, IACtHR, Series C No. 5, Judgment of 20 January 1989, para. 67; *Garbi and Corrales v. Honduras*, IACtHR, Series C, No. 6, Judgment of 15 March 1989, para. 88; *Salah Sheekh v. the Netherlands*, ECtHR, *op. cit.*, fn. 317, para. 121; *Soldatenko v. Ukraine*, ECtHR, *op. cit.*, fn. 361, para. 49; *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 434, para. 446.

<sup>738</sup> *Muminov v. Russia*, ECtHR, *op. cit.*, fn. 343, para. 99.

<sup>739</sup> See, *Fressoz and Roire v. France*, ECtHR, GC, Application No. 29183/95, Judgment of 21 January 1999, paras. 33-37; *Castells v. Spain*, ECtHR, Application No. 11798/85, Judgment of 23 April 1992, paras. 24-32.

The domestic remedy must also be “**effective**”, i.e. able to ascertain and redress the potential violation once this is established. It must have the power to give binding orders that reverse the situation of violation of the person’s rights or, if that is impossible, provide adequate reparations. Reparation includes, as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>740</sup> Remedies whose decisions do not have binding force or whose decisions or the implementation of them are at the discretion of a political body are not deemed to be effective.<sup>741</sup> Furthermore, particularly in cases of expulsions, the remedy must have the power to suspend the situation of potential violation when the lack of suspension would lead to irreparable harm/irreversible effects for the applicant while the case is being considered.<sup>742</sup>

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<sup>740</sup> Articles 19-23, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*. See also, ICJ, *Practitioners Guide No. 2, op. cit.*, fn. 480, Chapters VI and VII.

<sup>741</sup> See, *Madafferi and Madafferi v. Australia*, CCPR, *op. cit.*, fn. 460, para. 8.4; *C. v. Australia*, CCPR, *op. cit.*, fn. 350, para. 7.3; *L. Z. B. v. Canada*, CAT, Communication No. 304/2006, Views of 15 November 2007, para. 6.4; *L. M. V. R. G. and M. A. B. C. v. Sweden*, CAT, Communication No. 64/1997, Views of 19 November 1997, para. 4.2; *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 434, para. 446. However, there must be evidence in practice that the discretion of the political power does not lead to a predictable decision according to legal standards. It must be evident that the discretion is absolute. Otherwise, the applicant has a duty to try to exhaust also that remedy. See, *Danyal Shafiq v. Australia*, CCPR, *op. cit.*, fn. 687, para. 6.5. See also, Article 22.5(b) CAT; Article 4.1 OP-CEDAW; Article 77.3(b) ICRMW.

<sup>742</sup> See, *Dar v. Norway*, CAT, Communication No. 249/2004, Views of 16 May 2007, paras. 6.4-6.5; *Tebourski v. France*, CAT, *op. cit.*, fn. 353, paras. 7.3-7.4; *Na v. United Kingdom*, ECtHR, *op. cit.*, fn. 309, para. 90; *Jabari v. Turkey*, ECtHR, Application No. 40035/98, Admissibility Decision, 28 October 1999; *Bahaddar v. the Netherlands*, ECtHR, Application No. 25894/94, Judgment of 19 February 1998, paras. 47 and 48; *Soldatenko v. Ukraine*, ECtHR, *op. cit.*, fn. 361,

The remedy must also have certain characteristics of **due process of law**.<sup>743</sup> It must be independent, which means that it must not be subject to interference by the authorities against which the complaint is brought.<sup>744</sup> It must afford due process of law for the protection of the right or rights alleged to be violated, must be accessible by everyone, and must not constitute a denial of justice.<sup>745</sup> This will require the provision of free legal advice, where necessary to ensure access to the procedure.<sup>746</sup> The remedy must afford the applicant sufficient time to prepare the case, so as to allow a realistic possibility of using the remedy.<sup>747</sup>

A particular situation arises under the **Committee on Elimination of Racial Discrimination** (CERD). Under the ICERD, any State Party may establish a national body to consider petitions regarding violation of ICERD rights.<sup>748</sup> In countries where such bodies exist, before his or her communication can be considered as admissible, the

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para. 49; *Muminov v. Russia*, ECtHR, *op. cit.*, fn. 343, para. 101; *Gebremedhin v. France*, ECtHR, *op. cit.*, fn. 602, paras. 66-67.

<sup>743</sup> See, Article 46 ACHR; and Article 31, *IACHR Rules of Procedure*.

<sup>744</sup> See, CCPR, *General Comment No. 31*, *op. cit.*, fn. 46, para. 15; *Keenan v. United Kingdom*, ECtHR, *op. cit.*, fn. 769, para. 122; *Muminov v. Russia*, ECtHR, *op. cit.*, fn. 343, para. 101; *Judicial guarantees in states of emergency*, IACtHR, Advisory Opinion OC-9/87, 6 October 1987, para. 24.

<sup>745</sup> See, *Vélez Loor v. Panama*, IACHR, *op. cit.*, fn. 1304, para. 36. On access, see also, *Concluding Observations on Mexico*, CMW, *op. cit.*, fn. 491, paras. 25-26; *Concluding Observations on Egypt*, CMW, *op. cit.*, fn. 1074, paras. 22-23; *Concluding Observations on Bolivia*, CMW, *op. cit.*, fn. 502, paras. 23-24; *Airey v. Ireland*, ECtHR, Application No. 6289/73, Judgment of 9 October 1979.

<sup>746</sup> *Ibid.*, para. 45.

<sup>747</sup> See, *Muminov v. Russia*, ECtHR, *op. cit.*, fn. 343, para. 90; *Bahaddar v. the Netherlands*, ECtHR, *op. cit.*, fn. 1309, para. 45; *Alzery v. Sweden*, CCPR, *op. cit.*, fn. 364, para. 8.2.

<sup>748</sup> Article 14.2 ICERD. However, this provision is not utilised in practice.

complainant must first demonstrate that he or she did not obtain satisfaction from this body.<sup>749</sup>

*i) Exceptions to the principle*

There are situations in which an applicant is not required to exhaust domestic remedies. In general, this arises where the remedy lacks effectiveness, adequateness, or due process of law characteristics. Below we list the most typical cases of exception to the rule of the exhaustion of domestic remedies, although other situations may also arise where exhaustion of domestic remedies is not required. A remedy need not be pursued:

- if it can be incontrovertibly proven that it was **bound to fail**.<sup>750</sup> This might occur when the remedy is subject to a consistent practice or jurisprudence, or the legal system has a normative framework, which makes it virtually impossible for the individual case to succeed.<sup>751</sup>
- If the **legal system as such fails to provide conditions for the effectiveness** of the remedy, e.g. because of lack of effective investigation, or where it is a consistent practice not to follow or implement court orders in particular situations, or where there is a

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<sup>749</sup> Article 14.5 ICERD. See also, Rule 91(e), *CERD Rules of Procedure*.

<sup>750</sup> See, *Na v. United Kingdom*, ECtHR, *op. cit.*, fn. 309, para. 89; *Kleyn and others v. the Netherlands*, ECtHR, GC, Applications nos. 39343/98-39651/98-43147/98-46664/99, Judgment of 6 May 2003, para. 156; *Salah Sheekh v. the Netherlands*, ECtHR, *op. cit.*, fn. 317, paras. 121-124;

<sup>751</sup> See, *Salah Sheekh v. the Netherlands*, ECtHR, *op. cit.*, fn. 317, paras. 121-124; *Kleyn and others v. the Netherlands*, ECtHR, *op. cit.*, fn. 1317, para. 156; *Johnston and others v. Ireland*, ECtHR, Plenary, Application No. 9697/82, Judgment of 18 December 1986, para. 44; *Open Door and Well Woman v. Ireland*, ECtHR, *op. cit.*, fn. 1282, paras. 47-52; *Keegan v. Ireland*, ECtHR, *op. cit.*, fn. 200, para. 39.

situation of conflict or impunity.<sup>752</sup> The European Court has held that remedies where the granting of relief is purely discretionary need not be exhausted.<sup>753</sup>

- If the process to obtain or access to the remedy is **unreasonably prolonged**.<sup>754</sup>
- If the victim does **not have access to the remedy** due to a lack of legal representation, whether because of the unavailability of legal aid, threat of reprisals, or restrictions on access to lawyers in detention. This doctrine has been developed by the European Court of

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<sup>752</sup> See, *Akdivar and Others v. Turkey*, ECtHR, *op. cit.*, fn. 937, paras. 69-77; *Isayeva, Vusupova and Bazayeva v. Russia*, Applications nos. 57947/00-57948/00-57949/00, Judgment of 24 February 2005, paras. 143-153; *A.B. v. the Netherlands*, ECtHR, Application No. 37328/97, Judgment of 29 January 2002, paras. 63-74; *Velasquez Rodriguez v. Honduras*, IACtHR, *op. cit.*, fn. 799, para. 68; and, *IHRDA v. Republic of Angola*, ACommHPR, *op. cit.*, fn. 395, para. 39, where the swift execution of the expulsion which did not even allow the applicant to gather their belonging was enough evidence of the impossibility to seize and exhaust domestic remedies. See also, *ZLHR and IHRD v. Zimbabwe*, ACommHPR, *op. cit.*, fn. 395, para. 56. See also, Article 46 ACHR, and Article 31, *IACHR Rules of Procedure*.

<sup>753</sup> *Buckley v. United Kingdom*, ECommHR, Application No. 20348/92, Admissibility decision, 3 March 1994.

<sup>754</sup> See, *Zundel v. Canada*, CCPR, *op. cit.*, fn. 503, para. 6.3; *Z.U.B.S. v. Australia*, CERD, Communication No. 6/1995, Views of 25 January 2000, para. 6.4; *Vélez Loor v. Panama*, IACHR, *op. cit.*, fn. 1304, para. 36; *Velasquez Rodriguez v. Honduras*, IACtHR, *op. cit.*, fn. 799, para. 93; *Tanli v. Turkey*, ECommHR, Plenary, Application No. 26129/95, Admissibility Decision, 5 March 1996. See also, Articles 2 and 5.2(b) OP-ICCPR; Article 3.1 OP-ICESCR; Article 22.5(b) CAT; Rule 113(e), *CAT Rules of Procedure*; Article 14.7(a) ICERD; Rule 91(e), *CERD Rules of Procedure*; Article 4.1 OP-CEDAW; Article 77.3(b) ICRMW; Article 7(e) OP-CRC-CP; Rule 16, *CRC Rules of Procedure*; Article 2(d) OP-CRPD; Article 31.2(d) CED; Article 46 ACHR; Article 31, *IACHR Rules of Procedure*; and Article 56.5 ACHPR.

Human Rights,<sup>755</sup> the Inter-American Court of Human Rights<sup>756</sup> and the African Commission on Human and Peoples' Rights.<sup>757</sup> The ACHPR has also found a remedy to be inaccessible for a group of Sierra Leonean refugees expelled by Guinea because they would have been in "constant danger of reprisals and punishment", they constituted an "impractical number of potential plaintiffs" for the capacity of the judicial system, and the exhaustion of Guinean remedies would have required them to return to a country where they suffered persecution.<sup>758</sup>

Whenever there are doubts as to the effectiveness, adequateness, impartiality or independence of a remedy, "mere doubts about the effectiveness of local remedies or the prospect of financial costs involved"<sup>759</sup> do not absolve the applicant from pursuing them. However, "where an applicant is advised by counsel that an appeal offers no prospects of

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<sup>755</sup> *Airey v. Ireland*, ECtHR, *op. cit.*, fn. 1312; *Reed v. United Kingdom*, ECommHR, Plenary, Application No. 7630/76, Admissibility Decision, 6 December 1979; *Öcalan v. Turkey*, ECtHR, GC, *op. cit.*, fn. 47.

<sup>756</sup> See, *Exceptions to the exhaustion of domestic remedies*, IACtHR, Advisory Opinion OC-11/90, 10 August 1990, paras. 30-35. See also, Article 46 ACHR, and Article 31, *IACHR Rules of Procedure*.

<sup>757</sup> *Dr. Curtis Francis Doebbler v. Sudan*, ACommHPR, Communication No. 235/2000, 46<sup>th</sup> Ordinary Session, 11-25 November 2009, paras. 116-117.

<sup>758</sup> *AIHRD v. Republic of Guinea*, ACommHPR, *op. cit.*, fn. 578, paras. 32-36.

<sup>759</sup> *A v. Australia*, CCPR, *op. cit.*, fn. 656, para. 6.4; *Na v. United Kingdom*, ECtHR, *op. cit.*, fn. 309, para. 89; see, *inter alia*, *Pellegrini v. Italy*, ECtHR, Application No. 77363/01, Admissibility Decision, 26 May 2005; *MPP Golub v. Ukraine*, ECtHR, Application No. 6778/05, Admissibility decision of 18 October 2005; and *Milosevic v. the Netherlands*, ECtHR, Application No. 77631/01, Admissibility decision of 19 March 2002.

success, that appeal does not constitute an effective remedy".<sup>760</sup>

### **b) Time limitations**

The **Human Rights Committee** provides no time limits for the communication of the complaint. However, in case of a prolonged delay from the exhaustion of domestic remedies, the Committee will require a reasonable justification for it. Otherwise, it will declare the complaint inadmissible for abuse of the right of submission.<sup>761</sup> It has recently restated this approach in its *Rules of Procedure* where it is established that "a communication may constitute an abuse of the right of submission, when it is submitted after 5 years from the exhaustion of domestic remedies (...), or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication".<sup>762</sup> The **Committee against Torture** does not apply a specific time limit, but has stated that it will not admit communication received after an "unreasonably prolonged" period.<sup>763</sup> Neither the **OP-CEDAW**, the **Committee on Enforced Disappearance** nor the **OP-CRPD** impose a time limit, but it is likely that it will follow the Human Rights Committee's jurisprudence. The **OP-ICESCR** and the **OP-CRC-CP** will require a time limit of one year after the exhaustion of the domestic remedies, unless the applicant can demonstrate that it was not possible to submit the

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<sup>760</sup> *Na v. United Kingdom*, ECtHR, *op. cit.*, fn. 309, para. 89; *Selvanayagam v. United Kingdom*, ECtHR, No. 57981/00, Admissibility decision of 12 December 2002; *McFeeley v. United Kingdom*, ECommHR, *op. cit.*, fn. 4061, p. 44.

<sup>761</sup> Article 3 OP-ICCPR. See, *Gobin v. Mauritius*, CCPR, Communication No. 787/1997, Views of 20 August 2001, para. 6.3.

<sup>762</sup> Rule 96(c), *CCPR Rules of Procedure*.

<sup>763</sup> Rule 113(f), *CAT Rules of Procedure*.

communication within that time.<sup>764</sup> **CERD** provides that the communication must be submitted within six months of the exhaustion of domestic remedies, including the “national CERD body”, “except in cases of duly verified exceptional circumstances”.<sup>765</sup>

The **European Court of Human Rights** may only deal with the matter if it is submitted to the Court within a period of six months after exhaustion of domestic remedies.<sup>766</sup> The date of submission is “the date on which an application form satisfying the [formal] requirements of [Rule 47] is sent to the Court. The date of dispatch shall be the date of the postmark. Where it finds it justified, the Court may nevertheless decide that a different date shall be considered to be the date of introduction”.<sup>767</sup> The **Inter-American Commission on Human Rights** requires that the petition or communication must be lodged within a period of six months from the date on which the party alleging violation of his or her rights has been notified of the decision that exhausted the domestic remedies. In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time. For this purpose, the Commission considers the date on which the alleged violation of rights occurred and the circumstances of each case.<sup>768</sup> The **African Commission on Human and Peoples’ Rights’** rules provide that the communications must be submitted within a reasonable period from the time local

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<sup>764</sup> Article 3.2(a) OP-ICESCR; Article 7(h), OP-CRC-CP.

<sup>765</sup> Article 14.5 ICERD; Rule 91(f), *CERD Rules of Procedure*.

<sup>766</sup> Article 35.1 ECHR. Where there are no available domestic remedies, the case should be submitted within six months of the facts complained of. For an extensive explanation of the six month requirement, see *Lutete Kemevuako v. the Netherlands*, ECtHR, Application No. 65938/09, Admissibility decision of 1 June 2010.

<sup>767</sup> Rule 47.6, *ECtHR Rules of Procedure*. See rule 47 below at fn 1354.

<sup>768</sup> See also, Article 46.2, ACHR, and Article 32, *IACHR Rules of Procedure*.

remedies are exhausted or from the date the Commission is seized of the matter.<sup>769</sup>

### c) Duplication of procedures or similar requirements

Generally, a complaint will be inadmissible if the same matter has already been examined by the human rights body or has been or is being examined under another procedure of international investigation or settlement.<sup>770</sup> This requirement must however be interpreted restrictively. A complaint can be introduced if the case submitted to another body was submitted by a third party without authorisation by the victim or a family member, if the human rights violations claimed were different, if it raised different factual allegations than the ones presented, or if the complaint was sent to a non-judicial body, such as a Special Rapporteur.<sup>771</sup>

There is an exception for the Human Rights Committee, which applies this rule only to complaints **pending** before another international procedure. If the other procedure has ended, it is still possible for the Human Rights Committee to hear the same

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<sup>769</sup> Article 56.6 ACHPR.

<sup>770</sup> Article 5.2(a) OP-ICCPR; Rule 96(e), *CCPR Rules of Procedure*; Article 3.2(c) OP-ICESCR; Article 22.5(a) CAT; Rule 113(d), *CAT Rules of Procedure*; Article 4.2(a) OP-CEDAW; Article 77.3(a) ICRMW; Article 7(d), OP-CRC-CP; Article 2(c), OP-CRPD; Article 31.2(c), CED; Article 35.2(b) ECHR; Articles 46 and 47 ACHR; Article 33, *IACHR Rules of Procedure*; Article 56.7 ACHPR.

<sup>771</sup> See, in treaty law, Article 56.7 ACHPR. See also, on identity of applicants, *Folgero and others v. Norway*, ECtHR, Application No. 15472/02, Judgment of 29 June 2007; on difference of human rights complaints, *Smirnova and Smirnova v. Russia*, ECtHR, Application No. 46133/99 and 48183/99, Judgment of 24 July 2003. See also, *Baena-Ricardo et al. v. Panama*, IACtHR, Series C No. 61, Preliminary Objections, Judgment of 18 November 1999, para. 53; *Durand and Ugarte*, IACtHR, Series C No. 50, Preliminary Objections, Judgment of 28 May 1999, para. 43 (on different applicants for same case).

case.<sup>772</sup> Article 31.2(c) also refers only to pending complaints, which suggests that the Committee on Enforced Disappearances may align its approach to that of the Human Rights Committee.<sup>773</sup>

#### **d) Significant disadvantage**

Protocol 14 to the ECHR introduced a new admissibility requirement for the European Court of Human Rights: that of “significant disadvantage”. Protocol 14 to the ECHR now allows the Court to declare inadmissible an application when “the applicant has not suffered a **significant disadvantage**, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal”.<sup>774</sup>

Applying the new criterion, the European Court of Human Rights has held cases inadmissible for lack of significant disadvantage where alleged violations of fair trial guarantees or the right to property had led to pecuniary losses of 150, 90 or 1 euros and the financial situation of the applicant was not “such that the outcome of the case would have had a significant effect on his personal life”.<sup>775</sup> The Court held that it must take into consideration “both the applicant's subjective perceptions and what is objectively at stake in a particular case”,<sup>776</sup> and it

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<sup>772</sup> *Correia de Matos v. Portugal*, CCPR, Communication No. 1123/2002, Views of 18 April 2006, para. 6.2.

<sup>773</sup> Article 31.2(c), CPED.

<sup>774</sup> Article 35.3(b) ECHR (emphasis added). The requirement has been interpreted up to now in *Petrovich Korolev v. Russia*, ECtHR, Application No. 25551/05, Admissibility decision of 1 July 2010; *Mihai Ionescu v. Romania*, ECtHR, Application No. 36659/04, Admissibility decision of 1 June 2010; *Rinck v. France*, ECtHR, Application No. 18774/09, Admissibility decision of 19 October 2010.

<sup>775</sup> *Mihai Ionescu v. Romania*, ECtHR, *op. cit.*, fn. 1341, para. 35.

<sup>776</sup> *Petrovich Korolev v. Russia*, ECtHR, *op. cit.*, fn. 1341.

recognised that "a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interest".<sup>777</sup>

Furthermore, the Court will also have to ascertain whether the examination is, nonetheless, required by the respect for human rights as defined in the Convention and the Protocols. The Court has found this not to be the case when "the relevant law has changed and similar issues have been resolved in other cases before it".<sup>778</sup> Finally, the Court will verify whether the case has not been duly considered by a domestic tribunal, which has been interpreted as a duty to ascertain that no denial of justice occurred at the domestic level.<sup>779</sup>

According to the OP-ICESCR, the CESCR "may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a **clear disadvantage**, unless the Committee considers that the communication raises a serious issue of general importance".<sup>780</sup> However, this provision does not constitute an admissibility criterium. The wording "if necessary" means that the "clear disadvantage" test is discretionary and likely to be used by the Committee on Economic, Social and Cultural Rights only in exceptional circumstances.

### e) Other grounds

All UN Treaty Bodies, the ECtHR, the IACHR, and the ACHPR will reject as inadmissible petitions which are anonymous, which constitute an abuse of right of submission, or that are incompatible with the provisions of the human rights treaty of their concern.<sup>781</sup> CAT, CEDAW, CESCR, the European Court, and

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<sup>777</sup> *Ibid.*

<sup>778</sup> *Mihai Ionescu v. Romania*, ECtHR, *op. cit.*, fn. 1341, para. 37.

<sup>779</sup> *Petrovich Korolev v. Russia*, ECtHR, *op. cit.*, fn. 1341.

<sup>780</sup> Article 4 OP-ICESCR (emphasis added).

<sup>781</sup> Article 3 OP-ICCPR; Rule 96(a), (c) and (d), *CCPR Rules of Procedure*; Article 3.2(d) to (g) OP-ICESCR; Article 22.2 CAT; Rule

the IACHR explicitly exclude from admissibility complaints which are manifestly unfounded or insufficiently substantiated,<sup>782</sup> although this requirement will be considered also by the other treaty bodies.

The OP-ICESCR excludes, moreover, complaints which are exclusively based on reports disseminated by mass media.<sup>783</sup> The ACHPR will not consider communications written in disparaging or insulting language directed against the State concerned or its institution or to the Organisation of African Unity.<sup>784</sup>

The ECSR provides two specific grounds of inadmissibility, due to the collective complaint system:

- **Subject-matter:** non-governmental organisations may lodge a complaint only in respect of those matters regarding which they have been recognised as having particular competence.<sup>785</sup>
- **Other Grounds:** complaints must be lodged in writing, relate to a provision of the Charter accepted by the State Party and indicate in what respect the State Party has not ensured the satisfactory application of the provision.<sup>786</sup>

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113(b) and (c), *CAT Rules of Procedure*; Rule 91, *CERD Rules of Procedure*; Article 4.2 OP-CEDAW; Article 77.2 ICRMW; Article 7(a), (b), (c) OP-CRC-CP; Article 2(a) and (b) OP-CRPD; Article 31.2(a) and (b) CED; Articles 35.2(a) and 35.3(a) ECHR; Article 47 ACHR; Article 34, *IACHR Rules of Procedure*; Article 56.1 ACHPR.

<sup>782</sup> Article 4.2(c) OP-CEDAW; Article 22.2 CAT; Rule 113(b) and (c), *CAT Rules of Procedure*; Article 3.2(d) to (g) OP-ICESCR; Article 7(f) OP-CRC-CP; Article 2(e) OP-CRPD; Articles 35.2(a) and 35.3(a) and (b) ECHR; Article 47 ACHR; Article 34, *IACHR Rules of Procedure*.

<sup>783</sup> Article 3.2(d) to (g) OP-ICESCR.

<sup>784</sup> Article 56.3 ACHPR.

<sup>785</sup> Article 3 AP-ESC.

<sup>786</sup> Article 4 AP-ESC.

Although it is not properly an admissibility ground, the European Court of Human Rights has modified its Rule 47, with effect from 1 January 2014, according to which, from now on, the Court will have the power to refuse to examine an application that does not satisfy all the formal requirements of this Rule. As noted above, the six months time limit of Article 35 ECHR will stop running from the moment of receipt of an application fully compliant with these formal requirements.<sup>787</sup>

### **3. Interim measures**

Interim, precautionary or provisional measures are orders issued by the international mechanism in the preliminary phase of the international dispute in order to assure that a situation of potential violation does not lead to irreparable harm from before the case can be adjudicated on the merits. Interim or provisional measures are often indicated in situations of expulsions, where the international body requests the State to stay the expulsion measure until a final decision is reached. Interim measures might also be prescribed for a situation of forced eviction, where a stay of the eviction is ordered before the final ruling.

Interim measures are a corollary of the right to international petition and have therefore been held to be binding on the States which have accepted the international individual complaints mechanism.<sup>788</sup>

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<sup>787</sup> See, Rule 47, *ECtHR Rules of Procedure*. Under Article 4 of the new Protocol No. 15 to the ECHR, the time limit for applications to the Court is reduced to four months. The Protocol, approved on 24 June 2013, is not yet into force and requires the ratification of all Contracting Parties to the ECHR.

<sup>788</sup> See, *LeGrand (Germany v. United States of America)*, ICJ, *op. cit.*, fn. 837, at p. 503, para. 103; *Zhakhongir Maksudov and Others v. Kyrgyzstan*, CCPR, *op. cit.*, fn. 324, paras. 10.1-10.3; *Dar v. Norway*, CAT, *op. cit.*, fn. 1309, paras. 16.3-16.5; *Brada v. France*, CAT, Communication No. 195/2002, Views of 24 May 2005, para. 13.4; *Pelit*

They are an essential element of procedure before international tribunals, with particular significance for tribunals that adjudicate on human rights, and are widely recognised as having binding legal effect. The binding nature of interim measures has its roots in both procedure and substance: it is necessary, first, to preserve the rights of the parties from irreparable harm, protecting against any act or omission that would destroy or remove the subject matter of an application, would render it pointless, or would otherwise prevent the Court from considering it under its normal procedure;<sup>789</sup> and second, to permit the Court to give practical and effective protection to the Convention rights by which the Member States have undertaken to abide.<sup>790</sup>

The binding nature of interim measures has been recognised by the International Court of Justice,<sup>791</sup> the European Court of Human Rights,<sup>792</sup> the Inter-American Court of Human Rights,<sup>793</sup>

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*v. Azerbaijan*, CAT, *op. cit.*, fn. 339, para. 10.2; *Tebourski v. France*, CAT, *op. cit.*, fn. 353, paras. 8.2-9; *Singh Sogi v. Canada*, CAT, *op. cit.*, fn. 334, paras. 10.2-10.11; *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 434, paras. 470-473; *Mamatkulov and Askarov v. Turkey*, ECtHR, *op. cit.*, fn. 441, paras. 100-112; *Al-Sadoon and Mufti v. United Kingdom*, ECtHR, *op. cit.*, fn. 439, paras. 160-161.

<sup>789</sup> *Mamatkulov and Askarov v. Turkey*, ECtHR, *op. cit.*, fn. 441, paras. 101- 108; *Paladi v. Moldova*, ECtHR, Application No 39806/05, Judgment of 10 March 2009, para. 87; *Ben Khemais v. Italy*, ECtHR, *op. cit.*, fn. 361, para. 81.

<sup>790</sup> *Ibid.*, para. 125; *Aloumi v. France*, ECtHR, Application No. 50278/99, Judgment of 17 January 2006, para. 103.

<sup>791</sup> *LeGrand (Germany v. United States of America)*, ICJ, *op. cit.*, fn. 837, at p. 503, para. 102.

<sup>792</sup> *Mamatkulov and Askarov v. Turkey*, ECtHR, *op. cit.*, fn. 441; *Shamayev and Others v. Georgia and Russia*, ECtHR, *op. cit.*, fn. 434; *Aloumi v. France*, ECtHR, *op. cit.*, fn. 1260; *Paladi v. Moldova*, ECtHR, *op. cit.*, fn. 1356; *Aleksanyan v. Russia*, ECtHR, *op. cit.*, fn. 769; *Shtukaturov v. Russia*, ECtHR, Application No.44009/05, Judgment of 27 March 2008; *Ben Khemais v. Italy*, ECtHR, *op. cit.*, fn. 361,

the Inter-American Commission on Human Rights,<sup>794</sup> the African Commission on Human and Peoples' Rights,<sup>795</sup> the

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*Savridin Dzhurayev v. Russia*, ECtHR, Application No. 71386/10, Judgment of 25 April 2013, para. 213: "The crucial significance of interim measures is further highlighted by the fact that the Court issues them, as a matter of principle, in truly exceptional cases on the basis of a rigorous examination of all the relevant circumstances. In most of these, the applicants face a genuine threat to life and limb, with the ensuing real risk of grave, irreversible harm in breach of the core provisions of the Convention. This vital role played by interim measures in the Convention system not only underpins their binding legal effect on the States concerned, as upheld by the established case-law, but also commands the utmost importance to be attached to the question of the States Parties' compliance with the Court's indications in that respect [...]. Any laxity on this question would unacceptably weaken the protection of the Convention core rights and would not be compatible with its values and spirit [...]; it would also be inconsistent with the fundamental importance of the right of individual application and, more generally, undermine the authority and effectiveness of the Convention as a constitutional instrument of European public order [...]".

<sup>793</sup> *Chunimá v. Guatemala*, IACtHR, Series E, Order of the Court of 15 July 1991; *James v. Trinidad and Tobago*, IACtHR, Series E, Order of the Court of 24 November 2000; *Loayza Tamayo v. Peru*, IACtHR, Series E, Order of the Court of 13 December 2000; *Haitians and Dominican nationals of Haitian origin in the Dominican Republic v. the Dominican Republic*, IACtHR, Order of the Court of 14 September 2000. See further the extrajudicial comments of Asdrúbal Aguiar, former judge of the Inter-American Court of Human Rights, "Apuntes sobre las medidas cautelares en la Convención Americana sobre Derechos Humanos", in *La Corte y el sistema Interamericano de Derechos Humanos*, Rafael Nieto Navia, Editor, 1994, p.19.

<sup>794</sup> See, Letter to Center for Constitutional Rights and Centro por la Justicia y el Derecho Internacional (CEJIL) from the Inter-American Commission on Human Rights, Ref: *Djamel Ameziane, Precautionary Measures No. 211-08, United States*, 20 August 2008, available at <http://ccrjustice.org/files/2008-08-20%20IACHR%20Initial%20Response.pdf>.

<sup>795</sup> *International Pen and Others v. Nigeria*, ACommHPR, Communications nos. 137/94, 139/94, 154/96 and 161/97, 24<sup>th</sup> Ordinary Session, 31 October 1998, para. 114.

Human Rights Committee<sup>796</sup> and the Committee against Torture.<sup>797</sup> Given the uniformity of the jurisprudence on this issue, other bodies such as the CESC, CERD and CEDAW, which have the power to issue interim measures, are also likely to uphold their binding nature.

The European Court has stated that, “[w]hilst the formulation of the interim measure is one of the elements to be taken into account in the Court’s analysis of whether a State has complied with its obligations [to follow interim measures], the Court must have regard not only to the letter but also to the spirit of the interim measure indicated [...] and, indeed, to its very purpose”.<sup>798</sup> In particular, the Court “cannot conceive [...] of allowing the authorities to circumvent an interim measure such as the one indicated in the present case by using another domestic procedure for the applicant’s removal to the country of destination or, even more alarmingly, by allowing him to be arbitrarily removed to that country in a manifestly unlawful manner.”<sup>799</sup>

Interim measures can be issued by the human rights body invested by the case from the moment of the communication of

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<sup>796</sup> *Piandiong v. the Philippines*, CCPR, Communication No. 869/1999, Views of 19 October 2000, para. 5.1; *Khalilov v. Tajikistan*, CCPR, Communication No. 973/2001, Views of 13 April 2005, para. 4.1; *Mansaraj and others v. Sierra Leone*, CCPR, Communications nos. 839/98, 840/98 and 841/98, Views of 16 July 2001, para. 5.1; *Ashby v. Trinidad and Tobago*, CCPR, Communication No. 580/1994, Views of 19 April 2002, para. 4.11.

<sup>797</sup> *Brada v. France*, CAT, *op. cit.*, fn. 1355; *Pelit v. Azerbaijan*, CAT, *op. cit.*, fn. 339; *Dar v. Norway*, CAT, *op. cit.*, fn. 1309; *Nuñez Chipana v. Venezuela*, CAT, Communication no.110/1998, Views of 16 December 1998, para. 8; *T.P.S. v. Canada*, CAT, Communication No. 999/1997, Views of 4 September 2000, para. 15.6.

<sup>798</sup> *Savridin Dzhurayev v. Russia*, ECtHR, *op. cit.*, fn 1359, para. 216.

<sup>799</sup> *Ibid.*, para. 217

the case until the reaching of a final decision.<sup>800</sup> The Inter-American system allows for the Commission to issue precautionary measures and to ask the Inter-American Court for provisional measures even in cases of which the Court is not yet seized.<sup>801</sup>

#### 4. The effective exercise of the right to petition

When a State hinders or prohibits the applicant from applying to a competent international body in order to seek protection for his or her rights, that State may be in violation of the provision of the treaty which grants the applicant the right to petition.<sup>802</sup>

In treaty law, the European Convention on Human Rights establishes that the "High Contracting Parties undertake not to

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<sup>800</sup> See, Rule 92, *CCPR Rules of Procedure*; Article 5.1 OP-ICESCR; Rule 114, *CAT Rules of Procedure*; Rule 94.3, *CERD Rules of Procedure*; Article 5.1 OP-CEDAW; Rule 63, *CEDAW Rules of Procedure*; Article 6 OP-CRC-CP; Article 4 OP-CRPD; Article 31.4 CED; Rule 39, *ECtHR Rules of Procedure* (the obligation to comply with interim measures arises under Article 34 ECHR and also related to obligations under Articles 1 and 46 ECHR); Article 25, *IACHR Rules of Procedure*; Article 63.2 ACHR; Article 27, *IACtHR Rules of Procedure*; Article 111, *Rules of Procedures of the African Commission on Human and Peoples' Rights*, adopted on the 6<sup>th</sup> October 1995 (ACHPR Rules of Procedure); Article 27.2, *P-ACHPR on African Court*; Article 51, *ACtHPR Rules of Procedure*. Similar provisions are included in Article 35, *ACJHR Statute*.

<sup>801</sup> See, Article 76, *IACHR Rules of Procedure*.

<sup>802</sup> Articles 1 and 2 OP-ICCPR; Articles 1 and 2 OP-CEDAW; Article 14 ICERD; Articles 1 and 2 OP-ICESCR; Article 76 ICRMW; Article 34 ECHR; Article 44 ACHR. See, *Alzery v. Sweden*, CCPR, *op. cit.*, fn. 364, para. 11.11; *Agiza v. Sweden*, CAT, *op. cit.*, fn. 332, para. 13.9; *Poleshchuk v. Russia*, ECtHR, Application No. 60776/00, Judgment of 7 October 2004; *Cotlet v. Romania*, ECtHR, Application No. 38565/97, Judgment of 3 June 2003; *Akdivar and Others v. Turkey*, ECtHR, *op. cit.*, fn. 937; *Kurt v. Turkey*, ECtHR, *op. cit.*, fn. 724; and *Ilascu and Others v. Russia and Moldova*, ECtHR, *op. cit.*, fn. 406.

hinder in any way the effective exercise” of the right to submit individual applications.<sup>803</sup> Furthermore, many States Parties to the ECHR are also parties to the *European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights*, which provides for certain protections and immunities.<sup>804</sup>

The OP-ICESCR also requires the State Party to “take all appropriate measures to ensure that individuals under its jurisdiction are not subject to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol”.<sup>805</sup> These measures include positive obligations to protect against a wide range of “ill-treatment and intimidation”, such as undue interference and pressure against physical, moral and psychological integrity of the person who communicated the case or of all persons that can suffer adverse consequences as a result of the presentation of the communication.<sup>806</sup> States Parties to the OP-CEDAW undertake to “take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee”.<sup>807</sup> Where the Committee, receives reliable information that a State Party has breached these obligations it may request written explanations or clarification.<sup>808</sup>

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<sup>803</sup> Article 34 ECHR.

<sup>804</sup> See, *European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights*, Strasbourg, 5 March 1996.

<sup>805</sup> Article 13 OP-ICESCR. See also, Rule 4, *CRC Rules of Procedure*.

<sup>806</sup> Inter-American Institute of Human Rights and International Commission of Jurists, *Commentary to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, English edition, 2010, p. 100.

<sup>807</sup> Article 11 OP-CEDAW.

<sup>808</sup> Rule 91.2, *CEDAW Rules of Procedures*.

The European Court of Human Rights has found violations of this obligation when a prison administration refused to post the applicant's letter to the Court itself or interfered with it,<sup>809</sup> or when the applicant was directly asked by the national authorities about the petition,<sup>810</sup> or when the applicant was pressured or intimidated by the national authorities not to file or to withdraw the application.<sup>811</sup>

The Committee against Torture determined that a State had violated the applicant's right to petition where it did not grant a reasonable period of time before the execution of the final decision to remove him from the national territory, so as to not allow him to consider whether to petition the Committee itself.<sup>812</sup>

## 5. Third party interventions

The **universal treaty bodies** – HRC, CESCR, CAT, CERD and CEDAW – do not provide expressly for the presentation of formal third party interventions in individual cases.<sup>813</sup> It may however be possible to intervene in the case by asking the applicant to include the third party interventions in his or her application, or to petition the treaty body on an *ad hoc* basis.

As for the **European Court of Human Rights**, according to Article 36 ECHR, in all cases before Chambers or the Grand Chamber, the "President of the Court may, in the interest of the proper administration of justice, invite any High Contracting

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<sup>809</sup> *Poleshchuk v. Russia*, ECtHR, *op. cit.*, fn. 1369; *Cotlet v. Romania*, ECtHR, *op. cit.*, fn. 1369.

<sup>810</sup> *Akdivar v. Turkey*, ECtHR, *op. cit.*, fn. 937.

<sup>811</sup> See, *Kurt v. Turkey*, ECtHR, *op. cit.*, fn. 724; and *Ilascu and Others v. Russia and Moldova*, ECtHR, *op. cit.*, fn. 406.

<sup>812</sup> *Agiza v. Sweden*, CAT, *op. cit.*, fn. 332, para. 13.9.

<sup>813</sup> The rules of procedure of the Human Rights Committee or the OP-ICCPR do not mention third party interventions. See also, Article 8.1 OP-ICESCR; Rule 118.2, *CAT Rules of Procedure*; Rule 95.2, *CERD Rules of Procedure*; Rule 72.2, *CEDAW Rules of Procedures*.

Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.”<sup>814</sup> NGOs may also make submissions. The same Article gives standing as third party interveners to other Contracting States and the Council of Europe Commissioner for Human Rights. The request for leave to be invited to send written third party observations must be duly reasoned and submitted in writing in one of the Court’s official languages no later than twelve weeks after notice of the application has been given to the State Party concerned. In cases before the Grand Chamber the time runs from the date of relinquishment of jurisdiction by the Chamber or of acceptance of the case by the Grand Chamber’s Panel.<sup>815</sup>

The requirements are more restrictive for the **European Committee on Social Rights**, due to the collective nature of the complaint mechanism. According to the rules of procedure, States Parties to the collective complaint mechanisms are automatically invited to submit their views on the complaint, as are the international organisations of employers and trade unions, but the international organisations may only make submissions on complaints lodged by national organisations of employers and trade unions or by NGOs.<sup>816</sup> However, the recently adopted Rule 32A gives to the President the possibility to “invite any organisation, institution or person to submit observations”.<sup>817</sup>

In the Inter-American system, neither the ACHR nor the Rules of Procedure provide for the consideration of third-party briefs by the **Inter-American Commission on Human Rights**.

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<sup>814</sup> Article 36.1 ECHR.

<sup>815</sup> Rule 44.3-4, *ECtHR Rules of Procedure*.

<sup>816</sup> Rule 32, *Rules of the European Committee of Social Rights*, adopted during the 201<sup>st</sup> session on 29 March 2004 and revised during the 207<sup>th</sup> session on 12 May 2005 and during the 234<sup>th</sup> session on 20 February 2009 (*ECSR Rules of Procedure*).

<sup>817</sup> Rule 32A, *ECSR Rules of Procedure*.

However, in practice, the Commission will accept the submission of *amicus curiae* briefs without any particular formal requirements. The **Inter-American Court of Human Rights** has institutionalised the submission of third party interventions in its rules of procedures, according to which any person or institution seeking to act as *amicus curiae* may submit a brief, signed in order to ensure authenticity, to the Court in person, by courier, facsimile, post or electronic mail, in a working language of the Court, and bearing the names and signatures of its authors. If the brief is transmitted by electronic means and not subscribed, or is not accompanied by its annexes, the original document or missing annexes must be received by the Court within seven days from its transmission, otherwise it will be archived, without having been taken into consideration. The interventions may be submitted at any time during the contentious proceedings for up to 15 days following the public hearing. If the hearing is not held, they must be submitted within 15 days following the Order setting the deadlines for the submission of final arguments. The interventions are transmitted to the parties. They may also be submitted during proceedings to monitor the compliance of judgments and on provisional measures.<sup>818</sup>

In the **African system**, the rules of procedure of the African Commission on Human and Peoples' Rights do not mention the submission of third party intervention. Conversely, Article 49(3) of the new *Statute of the African Court of Justice and Human Rights* seems to give space for third party interventions.<sup>819</sup> However, the Statute has not yet entered into force and that the rules of the Court might still provide otherwise.

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<sup>818</sup> See, Article 44, *IACtHR Rules of Procedure*.

<sup>819</sup> Article 49.3 *ACJHR Statute*.

## II. Procedures of international mechanisms

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### 1. Universal Treaty Bodies<sup>820</sup>

The procedures of the UN treaty bodies, while rather similar, have not been harmonised.<sup>821</sup> Differences arise in the most recently established bodies. Procedures are set out both in their constituting treaties and in their rules of procedures. The communications must be presented in one of the official languages of the United Nations, which are Arabic, Chinese, English, French, Russian and Spanish.

#### a) Preparatory Stage

The rules related to the preparatory phase of the procedure are similar for all the four human rights treaty bodies that receive individual communications and have established rules of procedure. The UN Secretariat receives the communication and verifies that all formal requirements have been satisfied. The Secretariat may ask for clarifications on these requirements and on the intention of the complainant effectively to seize the Committee of the communication. Once these preliminary steps are satisfied, the communication is registered with and transmitted to the Committee.<sup>822</sup>

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<sup>820</sup> Further practical information on how to submit a petition to the UN treaty bodies may be found at <http://www2.ohchr.org/english/bodies/petitions/index.htm>

<sup>821</sup> A process of harmonisation of the procedures of UN treaty bodies under the initiative of the United Nations is undergoing. For more information see, <http://www2.ohchr.org/english/bodies/treaty/reform.htm>.

<sup>822</sup> See, Rules 84-87, *CCPR Rules of Procedure*; Rules 103-105, *CAT Rules of Procedure*; Rules 83-84, *CERD Rules of Procedure*; Rules 56-58, *CEDAW Rules of Procedure*. In this section we address the procedures of universal human rights mechanisms which have been tested in individual communications. For procedures of the most recently established treaty bodies see their rules of , available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.asp](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.asp)

## b) Admissibility stage

**Who decides?** While it is generally the Committee as a whole which determines whether the communication satisfies the formal requirements for admissibility, it is possible for it to establish an internal Working Group (WG) for decisions on admissibility.<sup>823</sup> For CERD and CEDAW, the WG can only make recommendations on admissibility.<sup>824</sup>

**How?** The Committee always takes the decision on admissibility by a simple majority vote. When a Working Group is established, the systems vary. For the Human Rights Committee, the WG may take a decision on admissibility only by unanimous vote, although an inadmissibility decision will have to be ratified by the Committee as a whole; while for the Committee against Torture the Working Group can declare a communication admissible by majority vote or inadmissible by unanimity.<sup>825</sup>

**Communications and Replies:** The Committee requests information of both the complainant and the State Party, fixing the appropriate time-limits.<sup>826</sup> The HRC requests the concerned State to provide a written reply to the communication within six months on the admissibility and merits, unless the Committee

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/62/3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/62/3&Lang=en) (CRC);  
<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (CMW);  
<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (CRPD);  
[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/1&Lang=en) (CED).

<sup>823</sup> See, Rules 111-112, *CAT Rules of Procedure*; Rules 93-98, *CCPR Rules of Procedure*.

<sup>824</sup> Rule 87, *CERD Rules of Procedure*; Rule 62, *CEDAW Rules of Procedure*.

<sup>825</sup> Rules 93-98, *CCPR Rules of Procedure*; Rules 111-112, *CAT Rules of Procedure*.

<sup>826</sup> See, Rule 115, *CAT Rules of Procedure*; Rule 92, *CERD Rules of Procedure*.

specifies that only observations on admissibility are needed. Then, the Committee may request the applicant or the State to submit further observations. Each party must be afforded an opportunity to comment on the observations of the other.<sup>827</sup>

**Revision of admissibility decision:** A decision of inadmissibility may be reviewed by the Committee at a later date where it is established that the reasons for inadmissibility no longer apply.<sup>828</sup>

**Decisions on admissibility and merits:** In practice, the Committees may decide together the admissibility and the merits of the communication when the information given to them is already sufficient for reaching a final decision.

### c) Merits

**Closed Meetings:** The Committees will examine the communication, both at the admissibility and merit stage, in closed meetings.<sup>829</sup> CERD and CAT may invite the parties to participate in a closed oral hearing in order to answer to questions and provide additional information.<sup>830</sup>

**Communications:** The general rule is that a Committee will transmit the information to the State Party and inform the complainant,<sup>831</sup> and may request additional information on the

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<sup>827</sup> Rules 93-98, *CCPR Rules of Procedure*.

<sup>828</sup> Rule 116, *CAT Rules of Procedure*; Rule 93.2, *CERD Rules of Procedure*; Rule 70, *CEDAW Rules of Procedure*.

<sup>829</sup> Rules 88 and 102, *CCPR Rules of Procedure*; Article 8 OP-ICESCR; Article 22.4-6 CAT; Rule 88, *CERD Rules of Procedure*; Article 7 OP-CEDAW, and Rule 72, *CEDAW Rules of Procedure*; Article 77.6-7 ICRMW.

<sup>830</sup> Rule 94.5, *CERD Rules of Procedure*; Rule 117, *CAT Rules of Procedure*.

<sup>831</sup> Rule 117, *CAT Rules of Procedure*; Article 8 OP-ICESCR; Rules 99-100, *CCPR Rules of Procedure*; Rule 94.1, *CERD Rules of Procedure*; Article 7 OP-CEDAW; Rule 72, *CEDAW Rules of Procedure*.

merits.<sup>832</sup> The Human Rights Committee provides that the State Party has six months to submit to the Committee written explanations or statements clarifying the matter under consideration and the remedy, if any, that may have been taken by the State. Any explanations or statements submitted by the State Party will be communicated to the author of the communication, who may submit any additional written information or observations within fixed time-limits.<sup>833</sup> For CERD, the State has three months from then to submit its reasons. These will be transmitted to the complainant who may oppose further observations.<sup>834</sup>

**Material:** The Committee will take into consideration all the information made available to it by the parties.<sup>835</sup> The CESC also explicitly includes all relevant documentation from other UN bodies, specialised agencies, funds, programmes and mechanisms, and other international organisations, including from regional human rights systems.<sup>836</sup>

**Decision:** The Committees will adopt their decision (Views) on the case and forward them to the parties.<sup>837</sup> The Human Rights Committee's rules of procedure explicitly say that this body's decisions are public.<sup>838</sup>

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<sup>832</sup> *Ibid.*

<sup>833</sup> Rules 99-100, *CCPR Rules of Procedure*.

<sup>834</sup> Rule 94.2-4, *CERD Rules of Procedure*.

<sup>835</sup> Rules 99-100, *CCPR Rules of Procedure*; Article 8 OP-ICESCR; Article 22.4-6 CAT; Rule 118.1, *CAT Rules of Procedure*; Article 14.7(a) ICERD; Article 7 OP-CEDAW; Rule 72, *CEDAW Rules of Procedure*; Article 77.5 ICRMW.

<sup>836</sup> Article 8 OP-ICESCR.

<sup>837</sup> Rules 99-100, *CCPR Rules of Procedure*; Article 22.7 CAT; Article 14.7(b) ICERD; Article 7 OP-CEDAW; Rule 72, *CEDAW Rules of Procedure*; Article 77.6-7 ICRMW.

<sup>838</sup> Rule 102(5), *CCPR Rules of Procedure*.

### **d) Friendly Settlement**

The CESCR is the only Committee which expressly provides for the possibility of reaching a friendly settlement. The settlement must be on the basis of the respect for the obligations set forth in the Covenant and closes the communication procedure.<sup>839</sup> While other UN human rights treaties and corresponding rules of procedure do not expressly provide for a procedure of friendly settlement, in practice the Committees may provide their good offices for reaching this kind of agreement if the parties so desire.<sup>840</sup>

### **e) Interim Measures**

Interim measures can be issued by the human rights body to which the case has been submitted, when they are desirable to avoid irreparable damage to the victim of the alleged violation from the moment of the communication of the case until the reaching of a final decision.<sup>841</sup> The Human Rights Committee<sup>842</sup> and the Committee against Torture<sup>843</sup> have confirmed in their jurisprudence the binding nature of interim measures. Given

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<sup>839</sup> Article 7 OP-ICESCR.

<sup>840</sup> See, Catarina de Albuquerque, *Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical paper by the Chairperson-Rapporteur*, Open-ended working group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/2006/WG.23/2, 30 November 2005, para. 14; and CESCR, *Report to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.4/1997/105, 18 December 1996, para. 38.

<sup>841</sup> See, Rule 92, *CCPR Rules of Procedure*; Article 5.1 OP-ICESCR; Rule 114, *CAT Rules of Procedure*; Rule 94.3, *CERD Rules of Procedure*; Article 5.1 OP-CEDAW; Rule 63, *CEDAW Rules of Procedure*.

<sup>842</sup> See, fn. 1363.

<sup>843</sup> See, fn. 1364.

the uniformity of the jurisprudence on this issue, other bodies such as the CESC, CERD and CEDAW, which have the power to issue interim measures, are also likely to uphold their binding nature.

## 2. European Court of Human Rights

**Application:** An application to the European Court of Human Rights should normally be made by completing and sending the application form that can be found on the Court's website, to be filled out in one of the official languages of the Court (English or French), together with copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.<sup>844</sup> It is also possible to first introduce the complaint through a letter containing the subject matter of the application, including the Convention articles claimed to be breached.<sup>845</sup> This letter will stop the running of the six months time limit (see, *supra*). In this case, or in the case of an incomplete application form, the Court will request the provision of additional information within eight weeks from the date of the information's request.<sup>846</sup> On receipt of the first communication setting out the subject-matter of the case, the Registry will open a file, whose number must be mentioned in all subsequent correspondence. Applicants will be informed of this by letter. They may also be asked for further information or documents.<sup>847</sup>

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<sup>844</sup> Application form may be found at <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Application+pack/>. See, Article 47.1, *ECtHR Rules of Procedure*.

<sup>845</sup> *Institution of Proceedings*, Practice Direction, Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 1 November 2003 and amended on 22 September 2008 and on 24 June 2009, para. 3.

<sup>846</sup> *Ibid.*, para. 4.

<sup>847</sup> *Ibid.*, para. 7.

**Preparatory Stage:** The President of the Court will assign the case to a designated Chamber of the Court, which is composed of seven judges.<sup>848</sup>

**Admissibility stage:** When the application is on its own sufficient to determine its inadmissibility or to be struck out of the list, it will be considered by a single judge, whose decision is final. Otherwise, the single judge will forward the case to a Chamber or a Committee from among whose members the President of the Chamber of the Court will appoint a Judge Rapporteur to deal with the case. The Judge Rapporteur may request additional information from the parties, decide whether the case may be considered by a single judge, a Committee or a Chamber and may submit reports, drafts or documents to the Chamber or Committee or the President.<sup>849</sup> At this stage, the case will pass to the Committee, which is composed of three judges of the Chamber and whose decision is final. The Committee will give notice of the application to the State concerned and request additional information from both the parties. The Committee may by unanimous vote declare the case inadmissible or strike it out of the list, or declare it admissible and immediately reach a decision on the merits when the underlying question in the case is already the subject of well-established case-law of the Court. Otherwise, the Committee will forward the case to the Chamber.<sup>850</sup> The Chamber will also be able to notify the decision to the State and request information from the parties. It may also decide to declare the application inadmissible or strike it out of the list at once. Before taking a decision, it may consider holding a hearing at the request of a party or of its own motion, and, if

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<sup>848</sup> Rule 52.1, *ECtHR Rules of Procedure*.

<sup>849</sup> Articles 27 ECHR; Rules 49 and 52A, *ECtHR Rules of Procedure*.

<sup>850</sup> Article 28 ECHR; Rule 53, *ECtHR Rules of Procedure*.

considered appropriate, to decide the admissibility and merits of the application at the same time.<sup>851</sup>

**Friendly Settlement:** At any stage of the proceedings, the Court may be at the disposal of the parties with a view of securing a friendly settlement of the dispute. In this case, proceedings are confidential and are conducted by the Registry under instruction of the Chamber or its President. If the settlement is reached, the case will be struck off the list and the decision of the Court will be limited to a brief statement of the facts and solution reached, which will be transmitted to the Committee of Ministers for supervision of its execution.<sup>852</sup>

**Striking Out of the List:** At any stage of the proceedings, the Court may decide to strike the application out of its list of cases when the applicant does not intend to pursue his application; the matter has been resolved; or when, for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, "the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires",<sup>853</sup> and it can also decide to restore an application previously struck out.<sup>854</sup> The case will also be struck out when a friendly settlement between the parties has been reached<sup>855</sup> or when a unilateral declaration by the respondent State is accepted by the Court. In this last case, the Court may strike the case out of the list even if the applicant wishes the case to continue.<sup>856</sup> It will depend, however, on whether

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<sup>851</sup> Article 29 ECHR; Rules 54 and 54A, *ECtHR Rules of Procedure*.

<sup>852</sup> Article 39 ECHR; Rule 62, *ECtHR Rules of Procedure*.

<sup>853</sup> Article 37.1 ECHR.

<sup>854</sup> See, Article 37 ECHR; Rule 43, *ECtHR Rules of Procedure*.

<sup>855</sup> See, Rule 43.3, *ECtHR Rules of Procedure*.

<sup>856</sup> See, *Akman v. Turkey*, ECtHR, Application No. 37453/97, Admissibility Decision, 26 June 2001, paras. 28-32; and, *Tahsin Acar v. Turkey*, ECtHR, Application No. 26307/95, Judgment of 8 April 2004, paras. 75-76.

respect for human rights as defined in the Convention and the Protocols requires otherwise. The Court held that in order to establish this it will consider “the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at issue”.<sup>857</sup>

**Examination of merits:** Once an application has been declared admissible, the Chamber may invite the parties to submit further evidence and observations and hold a hearing. The Court in the form of a Chamber will examine the case.<sup>858</sup> Hearings are public, as are the documents deposited with the Registrar of the Court, although access may be restricted where the Court finds particular reasons in the interest of morals, public order or national security in a democratic society, or where the interests of the juveniles or the protection of private life of the parties so require, or in special

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<sup>857</sup> *Tahsin Acar v. Turkey*, ECtHR, *op. cit.*, fn. 1423, para. 76. The Court also added that “[i]t may also be material whether the facts are in dispute between the parties, and, if so, to what extent, and what prima facie evidentiary value is to be attributed to the parties’ submissions on the facts. In that connection it will be of significance whether the Court itself has already taken evidence in the case for the purposes of establishing disputed facts. Other relevant factors may include the question of whether in their unilateral declaration the respondent Government have made any admission(s) in relation to the alleged violations of the Convention and, if so, the scope of such admissions and the manner in which they intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation (as, for example, in some property cases) and the respondent Government declare their readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application”. The list is not exhaustive. This practice is now reflected in Rule 62A, *ECtHR Rules of Procedure*.

<sup>858</sup> Article 38 ECHR.

circumstances where publicity would prejudice the interests of justice.<sup>859</sup> Judgments of the Chamber are final, when the parties declare that they will not request referral to the Grand Chamber, or when three months have passed from the date of the judgment, without this referral being asked, or the Grand Chamber rejected the request of referral.<sup>860</sup>

**Just satisfaction:** If the Court finds a violation, it will afford just satisfaction to the injured party.<sup>861</sup> To make the award, the Court will need to receive from the applicant a specific claim of just satisfaction, and the submission of items particular to the claim, together with any relevant supporting document, within the time-limits set by the President for submission of the applicant's observations on the merits.<sup>862</sup> Additionally, "[i]n certain particular situations, [...] the Court may find it useful to indicate to the respondent State the type of measures that might be taken in order to put an end to the – often systemic – situation that gave rise to the finding of a violation [...]. Sometimes the nature of the violation found may be such as to leave no real choice as to the measures required [...]".<sup>863</sup> In the case of *Hirsi Jamaa and Others v. Italy*, since "the transfer of the applicants exposed them to the risk of being subjected to ill-treatment in Libya and of being arbitrarily repatriated to Somalia and Eritrea",<sup>864</sup> the European Court ordered the Italian Government to "take all possible steps to obtains assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated."<sup>865</sup>

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<sup>859</sup> Article 40 ECHR. See, Rules 33 and 63, *ECtHR Rules of Procedure*.

<sup>860</sup> Article 44 ECHR.

<sup>861</sup> Article 41 ECHR.

<sup>862</sup> Rule 60, *ECtHR Rules of Procedure*.

<sup>863</sup> *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, *op. cit.*, fn 46, para. 209. The measures are ordered under Article 46 ECHR.

<sup>864</sup> *Ibid.* para. 211.

<sup>865</sup> *Ibid.*, para. 211.

**Referral or relinquishment to the Grand Chamber:** A Chamber may relinquish its jurisdiction to the Grand Chamber, composed of seventeen judges, when the case before it “raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where a resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court”,<sup>866</sup> unless one of the parties to the case objects within one month from the relinquishment decision.<sup>867</sup> Furthermore, any party may request the case to be referred to the Grand Chamber within three months from the Chamber’s judgment. The request will be examined by a five judge Panel appointed by the Grand Chamber, which will accept the case only if it raises a serious question affecting the interpretation of the Convention or the Protocols, or a serious issue of general importance.<sup>868</sup> The rules of procedure before the Chambers apply also to the Grand Chamber proceedings, including the designation of a Judge Rapporteur.<sup>869</sup>

*i) Legal Representation and legal aid*

Applications may be initially presented directly by the victim or through a representative.<sup>870</sup> However, the European Court system requires mandatory representation after the application has been notified to the Contracting State.<sup>871</sup> The applicant may require leave to present his or her own case, which can be granted by the President of the Chamber only “exceptionally”.

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<sup>866</sup> Articles 30-31 ECHR.

<sup>867</sup> See also, Rule 72, *ECtHR Rules of Procedure*.

<sup>868</sup> Article 43 ECHR. See also, Rule 73, *ECtHR Rules of Procedure*.

<sup>869</sup> Rules 50 and 71, *ECtHR Rules of Procedure*.

<sup>870</sup> Rules on representation are enshrined in Rule 36, *ECtHR Rules of Procedure*.

<sup>871</sup> A constant failure, through a long period of time, of the applicant to contact his representative might lead the Court to rule that s/he has lost interest in the proceedings and to strike the case off the list. See, *Ramzy v. the Netherlands*, ECtHR, Application No. 25424/05, Admissibility Decision, 20 July 2010.

The representative must be an advocate "authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber".<sup>872</sup> He or she must have an adequate understanding of one of the Court's languages, unless leave to use a different language is given by the President of the Chamber, who can also remove an advocate if he or she considers that, because of the circumstances or the conduct, the advocate can no longer represent his or her client.

Conscious of its own jurisprudence and of the costs of legal representation, the European Court of Human Rights provides for a legal aid system. The decision to grant legal aid is made by the President of the Chamber only when it is deemed necessary for the proper conduct of the case and the applicant has insufficient means to meet all or part of the costs entailed. The decision to grant legal aid is made either following the applicant's request or *proprio motu*, from the moment when the State concerned has submitted its observations in writing on the admissibility of the case, or when that deadline has passed. Legal aid, once granted, will cover all stages of the proceedings before the Court, unless the President finds that the conditions for it are no longer present. Applicants who request legal aid must complete a form of declaration, certified by national authorities, stating their income, capital assets, and any financial commitments in respect of dependants, or any other financial obligations.<sup>873</sup>

### **3. European Committee on Social Rights**

**Preparatory phase:** The complaint must be addressed to the Executive Secretary acting on behalf of the Council of Europe Secretary General who will acknowledge receipt, notify it to the State Party concerned and transmit it to the European

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<sup>872</sup> Rule 36.4(a), *ECtHR Rules of Procedure*.

<sup>873</sup> See, Rules 100 to 105, *ECtHR Rules of Procedure*.

Committee of Social Rights (ECSR).<sup>874</sup> The complaints must be submitted in one of the Committee's working language, English or French.

**Admissibility phase:** For each case, the President of the Committee will appoint one of its members as Rapporteur. The Rapporteur will prepare a draft decision on admissibility, followed by, where appropriate, a draft decision on the merits.<sup>875</sup> The Committee may request additional information from the parties on the admissibility of the complaint. If it finds it admissible, the Committee notifies the Contracting Parties to the Charter through the Secretary General.<sup>876</sup> The Committee may declare the complaint admissible or inadmissible without having invited the government concerned to submit observations when it considers that the admissibility conditions are either manifestly fulfilled or manifestly unfulfilled.<sup>877</sup>

**Examination of the merits:** The Committee may request additional information from the parties and may organise a hearing, at the request of one of the parties or at the Committee's initiative.<sup>878</sup> The Committee will draft a report containing its conclusions on the State's violation of the Charter, if it existed, and will transmit it confidentially to the Committee of Ministers and the parties, under prohibition of publication.<sup>879</sup> Thereafter, the members of the Committee of Ministers which are States Parties to the Charter adopt the report with a resolution by a majority vote. If the ECSR found a violation of the Charter, the Committee, in the same composition, can adopt a recommendation to the State

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<sup>874</sup> Article 5, AP-ESC. See, Rule 23, *ECSR Rules of Procedure*.

<sup>875</sup> Rule 27, *ECSR Rules of Procedure*.

<sup>876</sup> Articles 6 and 7.1, AP-ESC. See also, Rules 29 and 30, *ECSR Rules of Procedure*.

<sup>877</sup> Rule 29.4, *ECSR Rules of Procedure*.

<sup>878</sup> Article 7, AP-ESC. See also, Rules 31 and 33, *ECSR Rules of Procedure*.

<sup>879</sup> Article 8, *ibid*.

concerned with a two-thirds majority vote.<sup>880</sup> The ESCR report will be published immediately after the Committee of Minister's adoption of a resolution, or, in any case, not later than four months after its transmission to the Committee.<sup>881</sup>

#### **4. Inter-American Commission on Human Rights**

The exact nature of the procedure for consideration of the petition/communication depends on whether the petition/communication is based upon an alleged violation of the American Convention on Human Rights or the American Declaration on the Rights and Duties of Man.

##### **a) Petitions referring to the American Convention on Human Rights**

**Preparatory Stage:** The Executive Secretariat of the Commission undertakes an initial processing of petitions lodged before the Commission. If a petition or communication does not meet the requirements set out in Article 28 Rules of Procedure (formal requirements of the application), the Executive Secretariat may request that the petitioner or his or her representative satisfy those requirements that have not been fulfilled. In particular cases, the Commission has also the power to expedite the examination of the petition or communication.<sup>882</sup>

**Admissibility Procedure:** The Executive Secretariat of the Commission forwards the relevant parts of the petition to the State in question with a request for information within three months. Prior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing. Once the observations have been received or the period set has elapsed

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<sup>880</sup> Article 9, *ibid.*

<sup>881</sup> Article 8.2, *ibid.*

<sup>882</sup> See, Articles 26, 27, 29, *IACHR Rules of Procedure.*

with no observations received, the Commission verifies whether the grounds for the petition exist or subsist.<sup>883</sup> The Commission establishes a working group of three or more of its members to study, between sessions, the admissibility of the complaint and make recommendations to the plenary.<sup>884</sup> Once the Commission has considered the positions of the parties, it makes a decision as to admissibility. The Commission's reports on admissibility are public and are included in its Annual Report to the General Assembly of the OAS. When an admissibility report is adopted, the petition is registered as a case and proceedings on the merits are initiated.<sup>885</sup>

**Procedure on the merits:** Upon opening the case, the Commission sets a period of four months for the petitioner(s) to submit additional observations on the merits. The pertinent parts of those observations are transmitted to the State in question so that it may submit its observations within a further four months.<sup>886</sup> The Commission asks whether the parties are interested in a friendly settlement. The Commission may carry out on-site investigations and may call for a hearing.<sup>887</sup> The Commission then deliberates on the merits of the case. If the Commission establishes that there has been no violation in a given case, it indicates this in its report on the merits. The report will be transmitted to the parties, and published in the Commission's Annual Report to the OAS General Assembly. If the Commission establishes one or more violations, it prepares a preliminary report with the proposals and recommendations it deems pertinent and transmits it to the State in question. In so doing, the Commission sets a deadline by which the State in question must report on the measures adopted to comply with

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<sup>883</sup> See, Article 30, *IACHR Rules of Procedure*.

<sup>884</sup> See, Article 35, *ibid*.

<sup>885</sup> See, Article 36, *ibid*.

<sup>886</sup> See, Article 37, *ibid*. Procedure for the hearings is in Articles 61-69, *ibid*.

<sup>887</sup> See, Articles 39 and 43, *ibid*.

the recommendations. The State is not authorised to publish the report until the Commission has adopted a decision in this respect. The Commission notifies the petitioner of the adoption of the report and its transmission to the State. In the case of States Parties to the American Convention that have accepted the contentious jurisdiction of the Inter-American Court, upon notifying the petitioner, the Commission gives him or her one month to present his or her position as to whether the case should be submitted to the Court.<sup>888</sup>

**Friendly settlement:** The American Convention provides that “the Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention”.<sup>889</sup> However, in the period after the initial submissions on the merits, the Commission gives a time for the parties to express their interest in using the friendly settlement procedure.<sup>890</sup> All friendly settlements must be based on respect for the human rights recognised in the ACHR, the ADRDM, and other relevant instruments.<sup>891</sup> If a settlement is reached, the Commission adopts a report with a brief statement of the facts and the solution reached, which it shall transmit to the parties and publish.<sup>892</sup>

**Referral of the case to the Court:** If the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it refers the case to the

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<sup>888</sup> Article 50-51 ACHR. See, Articles 43 and 44, *IACHR Rules of Procedure*.

<sup>889</sup> Article 48.1(f) ACHR. See also, Article 40, *IACHR Rules of Procedure*.

<sup>890</sup> See, Article 37.4, *IACHR Rules of Procedure*.

<sup>891</sup> See, Article 40.5, *IACHR Rules of Procedure*.

<sup>892</sup> Article 49 ACHR. See, Article 40.5, *IACHR Rules of Procedure*.

Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.<sup>893</sup>

**Publication of the Report:** If within three months from the transmission of the preliminary report to the State in question the matter has not been resolved or, for those States that have accepted the jurisdiction of the Inter-American Court, has not been referred by the Commission or by the State to the Court for a decision, the Commission, by an absolute majority of votes, may issue a final report that contains its opinion and final conclusions and recommendations. The final report will be transmitted to the parties, who, within the time period set by the Commission, are required to present information on compliance with the recommendations. The Commission will evaluate compliance with its recommendations based on the information available, and will decide on the publication of the final report by the vote of an absolute majority of its members.<sup>894</sup>

**b) Petitions concerning States that are not parties to the American Convention on Human Rights**

The Commission may receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the *American Declaration of the Rights and Duties of Man* in relation to the Member States of the OAS that are not parties to the American Convention on Human Rights.<sup>895</sup> The procedure applicable to these petitions is substantially the same as the one explained above with the

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<sup>893</sup> See, Article 45, *IACHR Rules of Procedure*.

<sup>894</sup> See, Article 47, *ibid*.

<sup>895</sup> These States are Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, and United States of America. See, Article 51, *IACHR Rules of Procedure*.

exception of the referral to the Inter-American Court of Human Rights.<sup>896</sup>

## 5. Inter-American Court of Human Rights

**Preparatory Stage:** As noted above, the Inter-American Commission and States Parties are the only entities that can file a case with the Court. Once the case is received in an official language of the Court, its President conducts a preliminary review of the application, asking the parties to correct any deficiency within 20 days, if the President finds that the basic requirements have not been met.<sup>897</sup> If the applicant is acting without duly accredited representation, the Court may appoint an Inter-American Defender as representative during the proceedings.<sup>898</sup> The Secretary of the Court notifies the application to the President and the judges of the Court, the respondent State, the Commission, when it is not the applicant, the alleged victim, his or her representatives or the Inter-American defender, if applicable.<sup>899</sup> When the application has been notified to the alleged victim, or his or her representatives, they have a non-renewable period of two months to present their pleadings, motions and evidence to the Court.<sup>900</sup> The State will also have a non-renewable term of two months to answer.<sup>901</sup>

**Preliminary Objections Stage:** The State's preliminary objections may only be filed in the response to the first application. The document setting out the preliminary objections must set out the facts on which the objection is based, the legal arguments, and the conclusions and supporting documents, as well as any evidence which the party

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<sup>896</sup> See, Article 52, *IACHR Rules of Procedure*.

<sup>897</sup> See, Articles 34-36 and 38, *IACtHR Rules of Procedure*.

<sup>898</sup> See, Article 37, *ibid*.

<sup>899</sup> See, Article 39, *ibid*.

<sup>900</sup> See, Article 40, *ibid*.

<sup>901</sup> See, Article 41, *ibid*.

filing the objection may wish to produce. Any parties to the case wishing to submit written briefs on the preliminary objections may do so within 30 days of receipt of the communication. When the Court considers it indispensable, it may convene a special hearing on the preliminary objections, after which it shall rule on the objections. The Court may decide on the preliminary objections and the merits of the case in a single judgment, under the principle of procedural economy.<sup>902</sup>

**Additional written pleadings:** Once the application has been answered, and before the opening of the oral proceedings, the parties may seek the permission of the President to enter additional written pleadings. In such a case, the President, if he sees fit, shall establish the time limits for presentation of the relevant documents.<sup>903</sup>

**Hearing and Merits Phase:** The hearings of the IACtHR are public, although when exceptional circumstances warrant it, the Court may decide to hold a hearing in private.<sup>904</sup> The date of the hearings will be announced by the Presidency of the Court and follow the procedure indicated by Articles 45 to 55 of the Rules of Procedure.<sup>905</sup> After the hearings, the victims or their representatives, the State and the Commission may submit their final written arguments.<sup>906</sup>

**Friendly Settlement:** If the victims, their representatives, the State or the Commission inform the Court that a friendly settlement has been reached, the Court will rule on its

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<sup>902</sup> See, Article 42, *ibid.*

<sup>903</sup> See, Article 43, *ibid.*

<sup>904</sup> See, Article 15, *ibid.*

<sup>905</sup> See, Articles 45-55, *ibid.* See also, Articles 57 – 60 on admission of evidence.

<sup>906</sup> See, Article 56, *ibid.*

admissibility and juridical effects. It may also decide to continue the case, nonetheless.<sup>907</sup>

**Judgement:** If the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of the right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>908</sup> The judgments of the Court are final and the States Parties to the Convention are bound to comply with them. Compensatory damages provided with by the Court are executive in the State Party.<sup>909</sup>

**Interpretative Rulings:** The Court may accept request of interpretation of its previous judgments by any of the parties within 90 days from the notification of the judgment.<sup>910</sup>

## 6. African Commission on Human and Peoples' Rights

**Preparatory Stage:** The Secretary of the Commission transmits to the Commission for its consideration any communication submitted to him. The Commission, through the Secretary, may request the author of a communication to furnish clarifications on the communication.<sup>911</sup>

**Admissibility Stage:** Communications are examined by the Commission in private.<sup>912</sup> The Commission may set up one or more working groups of maximum three members to submit

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<sup>907</sup> See, Article 63 and 64, *ibid.*

<sup>908</sup> Article 63.1 ACHR. See, Articles 65 - 67, *IACtHR Rules of Procedure.*

<sup>909</sup> Articles 67-68 ACHR.

<sup>910</sup> Article 67 ACHR. See, Article 68, *IACtHR Rules of Procedure.*

<sup>911</sup> See, Articles 102-105, *ACHPR Rules of Procedure.*

<sup>912</sup> See, Article 106, *ibid.* See also, Article 59.1 ACHPR.

recommendations on admissibility.<sup>913</sup> The Commission determines questions of admissibility pursuant to Article 56 of the Charter.<sup>914</sup> The Commission or a working group may request the State Party concerned or the author of the communication to submit in writing additional information or observations relating to the issue of admissibility of the communication. If the Commission decides that a communication is inadmissible under the Charter, it must make its decision known as early as possible, through the Secretary to the author of the communication and, if the communication has been transmitted to a State Party concerned, to that State. If the Commission decides that a communication is admissible under the Charter, its decision and text of the relevant documents shall, as soon as possible, be submitted to the State Party concerned, through the Secretary. The author of the communication shall also be informed of the Commission's decision through the Secretary.<sup>915</sup>

**Merits:** The State Party to the Charter concerned, within the three following months, must submit in writing to the Commission, explanations or statements elucidating the issue under consideration and indicating, if possible, measures it has taken to remedy the situation. All explanations or statements submitted by a State Party must be communicated, through the Secretary, to the author of the communication who may submit in writing additional information and observations within a time limit fixed by the Commission.<sup>916</sup>

**Final decision:** If the communication is admissible, the Commission must consider it in the light of all the information that the individual and the State Party concerned has submitted in writing; it shall make known its observations on this issue. To this end, the Commission may refer the communication to a working group, which submits

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<sup>913</sup> See, Article 115, *ibid.*

<sup>914</sup> See, Article 116, *ibid.*

<sup>915</sup> See, Articles 117-119, *ibid.*

<sup>916</sup> See, Article 119, *ibid.*

recommendations to it. The observations of the Commission must be communicated to the Assembly through the Secretary General and to the State Party concerned. The Assembly or its Chairman may request the Commission to conduct an in-depth study on these cases and to submit a factual report accompanied by its findings and recommendations, in accordance with the provisions of the Charter. The Commission may entrust this function to a Special Rapporteur or a working group.<sup>917</sup>

## 7. African Court on Human and Peoples' Rights

The 1998 *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, which came into force on 25 January 2004, established the Court. On 1 July 2008, the Assembly of the African Union adopted a *Protocol on the Statute of the African Court of Justice and Human Rights*, which will merge the African Court of Justice and the African Court on Human and Peoples' Rights. The Protocol has at the time of writing been ratified by only three States and will enter into force after the fifteenth ratification.

**Preparatory Stage:** The applicant must file with the Court Registry one signed copy of the application containing a summary of facts and of the evidence he or she intends to adduce. It must specify the alleged violation, the evidence of exhaustion of domestic remedies, and the orders or injunctions sought, plus the request for reparations, if sought.<sup>918</sup> The Registrar transmits a copy to the President and the members of the Court and, unless the Court decides otherwise, to the other parties which might be potential applicants or respondents.<sup>919</sup> The State Party must respond within 60 days, unless extension

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<sup>917</sup> See, Article 120, *ibid.*

<sup>918</sup> Article 34, *ACTHPR Rules of Procedure.*

<sup>919</sup> Article 35, *ibid.*

is granted by the Court.<sup>920</sup> The Court may dismiss the application because there is no merit in it at the preparatory stage, and will give reasons for it.<sup>921</sup>

**Admissibility Stage:** The Court conducts preliminary examinations on its jurisdiction and admissibility of the complaint, and may request further information to the parties.<sup>922</sup> The admissibility conditions are the same as for the Commission. The Court may also request an opinion of the Commission on admissibility or consider transferring the case to the Commission itself.<sup>923</sup>

**Friendly Settlement:** The parties may bring to the attention of the Court that a settlement has been reached. The Court will render a judgment stating the facts and the solution adopted. It may also decide to proceed with the case. The Court will also put itself at the disposal of the parties with a view to reaching a friendly settlement.<sup>924</sup>

**Merits Stage:** The President of the Court will fix the date of the hearing if applicable, which shall be public as a rule, unless it is in the interest of public morality, safety or public order to conduct *in camera* hearings. In the hearing evidence can be presented.<sup>925</sup>

**Judgement:** If the Court finds that there has been violation of a human or peoples' right, it must make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. The Court must issue a judgment

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<sup>920</sup> Article 37, *ibid.* See also, Article 52, *ibid.*, on preliminary objections.

<sup>921</sup> Article 38, *ibid.*

<sup>922</sup> Article 39, *ibid.*

<sup>923</sup> Article 6, *P-ACHPR on African Court*. See also, Article 40, *ACTHPR Rules of Procedure*.

<sup>924</sup> Article 9, *ibid.* See also, Articles 56-57, *ACTHPR Rules of Procedure*.

<sup>925</sup> Articles 10 and 26, *ibid.* See also, Articles 42-50, *ACTHPR Rules of Procedure*.

within 90 days from the date of completion of the deliberations.<sup>926</sup> Judgments are binding on the parties. States are bound by the treaty establishing the Court to execute the judgment.<sup>927</sup> Any party may apply to the Court within twelve months from the date of the judgment to request an interpretation of it for the purpose of execution.<sup>928</sup> The Court can review its own judgments in light of new evidence, which was not within the knowledge of the party at the time of the judgment, when so requested by a party.<sup>929</sup>

### **III. What next? Enforcement system and follow-up**

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After having obtained a judgment or opinion by an international body establishing a violation, the applicant should be entitled to reparation. Judicial remedies provide for enforceable reparation: the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights may order compensation or other measures of reparation, with which States are obliged to comply.

Quasi-judicial international bodies may recommend, but cannot enforce, reparations. A good-faith application of the treaty by State Parties entails that States should carry out the recommendations of the competent body.

Once it has reached a final judgment, the **European Court of Human Rights** transmits it to the Council of Europe Committee of Ministers which supervises its execution. Article 46(1) ECHR states that "the High Contracting Parties undertake

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<sup>926</sup> Articles 27 and 28.1, *ibid.* See also, Articles 59-61, *ACtHPR Rules of Procedure*.

<sup>927</sup> Articles 28 and 30, *ibid.* See also, Article 61, *ACtHPR Rules of Procedure*.

<sup>928</sup> Article 28.4, *ibid.* See also, Article 66, *ACtHPR Rules of Procedure*.

<sup>929</sup> Article 28.3, *ibid.* See also, Article 67, *ACtHPR Rules of Procedure*.

to abide by the final judgment of the Court in any case to which they are parties".<sup>930</sup> The Court's judgments are therefore binding. The Committee of Ministers will examine whether the State Party has paid the awarded just satisfaction and the potential default interests,<sup>931</sup> whether "individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention [, and/or] general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations".<sup>932</sup> If the Committee of Ministers considers that a State Party has refused to abide by the final judgment, it may, after formal notice and with a two-thirds absolute majority decision, refer the case to the Court for lack of implementation of the judgment. The Court can then rule on the violation of Article 46 ECHR and refer the case to the Committee for measures to be taken.<sup>933</sup> Exceptionally, where new facts come to light within a year of a judgment, a party may request revision of the judgment.<sup>934</sup>

The American Convention on Human Rights does not establish any institutional role for the political organs of the Organisation of American States to supervise enforcement of the **Inter-American Court of Human Rights'** rulings. According to Article 65 ACHR, the Court is obliged to submit an Annual Report to each regular session of the General Assembly of the OAS for its consideration. In this report, the Court will specify the cases in which a State has not complied with its judgments,

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<sup>930</sup> Article 46.1 ECHR.

<sup>931</sup> Rule 6.2(a), *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies (CMCE Rules for execution of judgments).

<sup>932</sup> Rule 6.2(b), *CMCE Rules for execution of judgments*.

<sup>933</sup> See, Article 46 ECHR.

<sup>934</sup> Rules 79-80, *ECTHR Rules of Procedure*.

making any pertinent recommendations. However, the Rules of Procedure provide that the Court may follow up on its judgments and monitor its execution through reports of the State Party and observations of the victims or their representatives. The Court may request additional information from other sources and, if it deems it appropriate, convoke a hearing with the State and the victims' representatives in order to monitor the compliance with its decisions. At the hearing, the Court will hear also the opinion of the Commission. After the hearing, the Court may determine the state of compliance and issue appropriate orders.<sup>935</sup>

In the African system, the Committee of Ministers of the African Union is mandated by the treaty establishing the Court to monitor the execution of the judgments of the **African Court on Human and Peoples' Rights**, once the Court is operational.<sup>936</sup>

The other bodies, whether universal or regional, apart from the Human Rights Committee and the CERD, have procedures to assure follow-up on the implementation of their recommendations.

The **Committee against Torture** and the **CERD** invite the State, when communicating their decision, to provide information on their implementation and may appoint one or more Special Rapporteur(s) to follow up and report on it.<sup>937</sup> **CESCR** and **CEDAW** establish an obligation of the State to report within six months, in writing, any action taken in light of the views and recommendations, and specifically provide that

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<sup>935</sup> See, Article 69, *IACtHR Rules of Procedure*.

<sup>936</sup> Article 29, *P-ACHPR on African Court*.

<sup>937</sup> Rules 118.5 and 120, *CAT Rules of Procedure*; new Rule 95, paras. 6 and 7, *CERD Rules of Procedure*, adopted on 15 August 2005, available at:

<http://www2.ohchr.org/english/bodies/cerd/docs/newruleprocedure-august05.pdf> .

the State Party may be invited to include further information in its periodic report to the Committee.<sup>938</sup>

The **Inter-American Commission on Human Rights**, once it has published a report on a friendly settlement or on the merits in which it has made recommendations, may adopt any follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations. The Commission will report on progress in complying with any such agreements and recommendations as it deems appropriate.<sup>939</sup>

The **European Committee on Social Rights** will require the concerned State to provide information about the implementation of the Committee of Ministers' recommendation in the periodic report it submits on the implementation of the Charter.<sup>940</sup>

#### **IV. Reporting procedures**

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International reporting mechanisms do not bar the applicants from bringing cases to quasi-judicial or judicial mechanisms. Although they do not have the capacity to address an individual situation, their use might be important in light of a case brought under them. This may be because reports by these bodies might inform a judicial or quasi-judicial mechanism on the country situation, or because it will be possible to signal the case to these bodies both to exercise political pressure on the national authorities and contribute to their analysis of the country situation. This last outcome is particularly significant given that individual cases might take some years to be resolved in an international venue, and that reports on country

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<sup>938</sup> See, Article 7.4-5 OP-CEDAW. See also, Rule 73, *CEDAW Rules of Procedure*; Article 9 OP-ICESCR.

<sup>939</sup> See, Article 48, *IACHR Rules of Procedure*.

<sup>940</sup> Article 10 AP-ESC.

situations or diplomatic interventions on the individual case might be quicker, therefore providing useful material for the contentious case.

## **1. United Nations Treaty Bodies**

The UN Treaty Bodies are those mechanism established by international human rights treaties, most of which we have considered in the previous paragraphs, because they also have a quasi-judicial procedure to consider individual cases. Each of them also has a procedure under which States periodically report on their human rights situation and are examined by the relevant Committee. These are:

- The Human Rights Committee (ICCPR);
- The Committee for the Elimination of Racial Discrimination (ICERD);
- The Committee for the Elimination of Discrimination against Women (CEDAW);
- The Committee on Economic, Social and Cultural Rights (ICESCR);
- The Committee against Torture (CAT);
- The Committee on the Rights of the Child (CRC);
- The Committee on the Rights of Migrant Workers and Their Families (ICMW);
- The Committee on the Rights of Persons with Disabilities (CRPD);
- The Committee on Enforced Disappearance (CED).

All these Committees accept submissions from NGOs. These submissions might also include some cases as example of human rights violations occurring in the country. Contacting a national or international NGO in order to take into consideration the case in their report, might increase the chances that the relevant Committee will address the general human rights situation concerning it. An appropriate finding of the Committee might be of help in the individual case.

## 2. Non-judicial mechanisms taking individual petitions

Many of the Special Procedures established by the UN Human Rights Council to address particular issues (“thematic mandates”), to which independent experts are appointed as “mandate-holders”, will receive and address individual “communications”. Once a communication is received, they will take it into consideration, and then, at their discretion, they will decide whether to contact the concerned State requesting an answer to the allegations. The communications will generally be published in the Annual Report of the relevant Special Procedure. These communications do not depend on whether the State concerned is a party to a particular human rights treaty, and domestic remedies do not need to be exhausted. Furthermore, Special Procedures are not bound by the prohibition of duplication of complaints, so that it is possible to present the same communication to more Special Procedures or to Special Procedures and one judicial or quasi-judicial human rights body. In addition to these Special Procedures, there also exists the Human Rights Council Complaint Procedure established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.<sup>941</sup>

### a) Basic Procedural Standards of Special Procedures

The UN Special Procedures follow in the consideration of communications some basic procedural standards that are enshrined in the *Manual of Operations of the Special Procedures of the Human Rights Council*<sup>942</sup> and in the *Code of*

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<sup>941</sup> See <http://www2.ohchr.org/english/bodies/chr/complaints.htm>.

<sup>942</sup> *Manual of Operations of the Special Procedures of the Human Rights Council*, adopted at the 15<sup>th</sup> Annual Meeting of Special Procedures, June 2008, available at

*Conduct for Special Procedures Mandate-Holders of the Human Rights Council.*<sup>943</sup> These standards are not mandatory but inform a harmonised procedure for mandate-holders and are generally enforced by them.

**Who can submit a communication:** Communication may be submitted by a person or group of persons claiming to be victim of violations or by any person or group of persons, including, non-governmental organisations, acting in good faith in accordance with the principles of human rights, and free from politically motivated stands or contrary to, the provisions of the Charter of the United Nations, and claiming to have direct or reliable knowledge of these violations substantiated by clear information.<sup>944</sup>

**How the communication must be submitted:** The communication must be in written, printed or electronic form and include full details of the sender's identity and address, and full details of the relevant incident or situation. Anonymous communications are not considered.<sup>945</sup> Most Special Procedures provide *questionnaires* in different language to be completed in order to present a communication.<sup>946</sup> While the presentation of a communication through these forms is not mandatory, it is highly recommended.

**Which violations can be submitted for consideration:** The kind of violation that can be submitted to a Special Procedure

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[http://www2.ohchr.org/english/bodies/chr/special/docs/Manual\\_August\\_FINAL\\_2008.doc](http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_August_FINAL_2008.doc) (Manual of Operations).

<sup>943</sup> *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, in Resolution 5/2 of the UN Human Rights Council, Annex (Code of Conduct).

<sup>944</sup> Article 9.d, *ibid.*; *Manual of Operations*, *op. cit.*, fn. 1509, para. 38.

<sup>945</sup> *Manual of Operations*, *op. cit.*, fn. 1509, para. 38. Other formal requirements which may ideally be included are listed in para. 39.

<sup>946</sup>

See:

<http://www2.ohchr.org/english/bodies/chr/special/questionnaires.htm>.

depends on the subject-matter which the mandate-holder is charged to consider.<sup>947</sup>

**Conformity criteria:** The communications (1) should not be manifestly unfounded or politically motivated; (2) should contain a factual description of the alleged violations of human rights; (3) the language of the communication should not be abusive; (4) and the communication should not be exclusively based on reports disseminated by mass media.<sup>948</sup> There is no need to exhaust domestic remedies.<sup>949</sup>

**Channels of communication:** Mandate-holders address all their communication to the concerned government through diplomatic channels, unless otherwise agreed between the individual government and the Office of the High Commissioner for Human Rights.<sup>950</sup> Mandate-holders are not required to inform those who provide information about any subsequent measure they have taken. They may, however, acknowledge receipt of the information and provide an indication of outcomes and follow-up, and may choose to provide some information, although normally not involving disclosure of the specific contents of communication with governments, unless an issue has been definitively dealt with by the government in question.<sup>951</sup>

**Confidentiality:** Mandate-holders take all feasible precautions to ensure that sources are not subject to retaliation.<sup>952</sup> In communications sent to governments, the source is normally kept confidential. An information source may, however, request

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<sup>947</sup> *Ibid.*, para. 28.

<sup>948</sup> Article 9(a), (b), (c) and (e), *Code of Conduct, op. cit.*, fn. 1510.

<sup>949</sup> *Manual of Operations, op. cit.*, fn. 1509, para. 42.

<sup>950</sup> Article 14, *Code of Conduct, op. cit.*, fn. 1510; *Manual of Operations, op. cit.*, fn. 1509, para. 28.

<sup>951</sup> *Manual of Operations, op. cit.*, fn. 1509, para. 25.

<sup>952</sup> *Ibid.*, para. 27.

that its identity be revealed.<sup>953</sup> The text of all communications sent and the responses to them are confidential until they are published in the relevant reports of the mandate-holders or the mandate-holders determine that the specific circumstances require action to be taken before the time of publication.<sup>954</sup> The names of alleged victims are normally reflected in the reports, although exceptions may be made in relation to children and other victims of violence in relation to whom publication of names would be problematic.<sup>955</sup>

**Action:** The response to communication by mandate-holders may take the form of letters of allegation or of urgent appeals. The decision to take action is at the discretion of the mandate-holder.<sup>956</sup>

- **Letters of allegations:** Letters of allegations are used to communicate violations that are alleged to have already occurred and in situations where urgent appeals are not needed.<sup>957</sup> In this case, governments have two months to provide a substantive response. Some mandate-holders forward the substance of the replies received to the sources of information.<sup>958</sup>
- **Urgent appeal:** mandate-holders may resort to urgent appeals in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure of letters of allegation.<sup>959</sup> In the case of urgent appeals,

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<sup>953</sup> *Ibid.*, para. 35.

<sup>954</sup> *Ibid.*, para. 37.

<sup>955</sup> *Ibid.*, para. 37.

<sup>956</sup> *Ibid.*, para. 40.

<sup>957</sup> *Ibid.*, para. 6.

<sup>958</sup> *Ibid.*, para. 48.

<sup>959</sup> Article 10, *Code of Conduct, op. cit.*, fn. 1510; *Manual of Operations, op. cit.*, fn. 1509, para. 43.

governments are generally requested to provide a substantive response within thirty days. In appropriate cases, mandate-holders may decide to make public an urgent appeal.<sup>960</sup>

**Follow-up:** The summaries of communications and of the government's replies are published in reports submitted to the Human Rights Council. The general practice is for the mandate-holder to provide some response to, or evaluation of, the exchange of information, although this practice varies from one Special Procedure to the other.<sup>961</sup>

**Box 17. Special Procedures most relevant to migrants and refugees**

Special Procedure	Communications information
Special Rapporteur on the human rights of migrants	<a href="http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Communications.aspx">http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Communications.aspx</a>
Working Group on Arbitrary Detention	<a href="http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx">http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx</a>
Special Rapporteur on the sale of children, child prostitution and child pornography	<a href="http://www.ohchr.org/EN/Issues/Children/Pages/IndividualComplaints.aspx">http://www.ohchr.org/EN/Issues/Children/Pages/IndividualComplaints.aspx</a>

<sup>960</sup> *Manual of Operations, op. cit.*, fn. 1509, para. 45.

<sup>961</sup> *Manual of Operations, op. cit.*, fn. 1509, para. 91.

<p>Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context</p>	<p><a href="http://www.ohchr.org/EN/Issues/Housing/Pages/IndividualComplaints.aspx">http://www.ohchr.org/EN/Issues/Housing/Pages/IndividualComplaints.aspx</a></p>
<p>Working Group on Enforced or Involuntary Disappearances</p>	<p><a href="http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx">http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx</a></p>
<p>Special Rapporteur on the right to education</p>	<p><a href="http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/IndividualComplaints.aspx">http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/IndividualComplaints.aspx</a></p>
<p>Working Group on the issue of discrimination against women in law and in practice</p>	<p><a href="http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx">http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx</a></p>
<p>Special Rapporteur on extrajudicial, summary or arbitrary executions</p>	<p><a href="http://www2.ohchr.org/english/issues/executions/complaints.htm">http://www2.ohchr.org/english/issues/executions/complaints.htm</a></p>
<p>Special Rapporteur on the right to food</p>	<p><a href="http://www.ohchr.org/EN/Issues/Food/Pages/Complaints.aspx">http://www.ohchr.org/EN/Issues/Food/Pages/Complaints.aspx</a></p>
<p>Special Rapporteur on freedom of religion or belief</p>	<p><a href="http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Complaints.aspx">http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Complaints.aspx</a></p>
<p>Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression</p>	<p><a href="http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Complaints.aspx">http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Complaints.aspx</a></p>
<p>Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health</p>	<p><a href="http://www.ohchr.org/EN/Issues/Health/Pages/IndividualComplaints.aspx">http://www.ohchr.org/EN/Issues/Health/Pages/IndividualComplaints.aspx</a></p>

Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance	<a href="http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/IndividualComplaints.aspx">http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/IndividualComplaints.aspx</a>
Special Rapporteur on Contemporary forms of slavery	<a href="http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SubmittingInformation.aspx">http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SubmittingInformation.aspx</a>
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	Letters of allegations: <a href="http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Alligation.aspx">http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Alligation.aspx</a> Urgent appeals: <a href="http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Appeals.aspx">http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Appeals.aspx</a>
Special Rapporteur on trafficking in persons, especially in women and children	<a href="http://www.ohchr.org/EN/Issues/Trafficking/Pages/complaints.aspx">http://www.ohchr.org/EN/Issues/Trafficking/Pages/complaints.aspx</a>
Special Rapporteur on violence against women, its causes and consequences	<a href="http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx">http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx</a>
Special Rapporteur on the independence of judges and lawyers	<a href="http://www.ohchr.org/EN/Issues/Judiciary/Pages/Complaints.aspx">http://www.ohchr.org/EN/Issues/Judiciary/Pages/Complaints.aspx</a>
Special Rapporteur on extreme poverty and human rights	<a href="http://www.ohchr.org/EN/Issues/Poverty/Pages/Individualcomplaints.aspx">http://www.ohchr.org/EN/Issues/Poverty/Pages/Individualcomplaints.aspx</a>

## **b) The Working Group on Arbitrary Detention**

The Working Group on Arbitrary Detention (WGAD) is the only UN Special Procedure whose mandate expressly provides for consideration of individual 'complaints' rather than merely 'communications', thereby recognising a right of petition of individuals anywhere in the world.<sup>962</sup> The WGAD may also take up cases on its own initiative.<sup>963</sup>

**The Law:** The WGAD bases its decisions on individual complaints on the *Universal Declaration of Human Rights*, the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, the *International Covenant on Civil and Political Rights* for States Parties to it, the *Standard Minimum Rules for the Treatment of Prisoners*; the *UN Rules for the Protection of Juveniles Deprived of Their Liberty*, and the *UN Standard Minimum Rules for the Administration of Juvenile Justice*, as well as any other relevant standard.<sup>964</sup>

**Who may submit a complaint:** Complaints may be sent by the individuals directly concerned, their families, their representatives or non-governmental organisations for the protection of human rights, although the Group may also receive complaints by governments and inter-governmental organisations.<sup>965</sup>

**How the complaint must be submitted:** The complaint must be submitted in writing and addressed to the Secretariat, including at least the family name and address of the sender. As far as possible, each case should include a presentation indicating names and any other information making it possible

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<sup>962</sup> See, Resolutions 1991/42 and 1997/50 of the UN Commission on Human Rights; Decision 2006/102 of the UN Human Rights Council; and Resolution 6/4 of the UN Human Rights Council.

<sup>963</sup> *Revised Methods of Work, WGAD, in Fact Sheet No. 26, The Working Group on Arbitrary Detention*, OHCHR, Annex IV, para. 13.

<sup>964</sup> *Ibid.*, para. 7.

<sup>965</sup> *Ibid.*, para. 12.

to identify the person detained. A *questionnaire* is provided for by the WGAD website.<sup>966</sup>

**Procedure.** The consideration of individual complaints involves a four-stage procedure.

- **Stage 1:** The WGAD receives the complaint, which should contain the minimum information highlighted above.<sup>967</sup>
- **Stage 2:** The WGAD forwards the complaints to the government through diplomatic channels, inviting it to reply with comments and observations within 90 days. If the government communicates that it desires an extension, this may be granted for a further period of a maximum of two months.<sup>968</sup>
- **Stage 3:** The replies by the government are brought to the attention of the complainant, which can further comment on them.<sup>969</sup>
- **Stage 4:** The WGAD may adopt one of the following decisions on the complaint:
  - (a) If the person has been released, for whatever reason, following the reference of the case to the WGAD, the case is filed; the Group, however, reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned;

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<sup>966</sup> *Ibid.*, paras. 9-11. See *questionnaire* at [http://www2.ohchr.org/english/issues/detention/docs/WGADQuestionnaire\\_en.doc](http://www2.ohchr.org/english/issues/detention/docs/WGADQuestionnaire_en.doc).

<sup>967</sup> *Ibid.*, paras. 9-14.

<sup>968</sup> *Ibid.*, paras. 15-16.

<sup>969</sup> *Ibid.*, para. 15.

- (b) If the WGAD considers that the case is not one of arbitrary deprivation of liberty, it shall render an opinion to this effect;
- (c) If the WGAD considers that further information is required from the government or the source, it may keep the case pending until that information is received;
- (d) If the WGAD considers that it is unable to obtain sufficient information on the case, it may file the case provisionally or definitively;
- (e) If the WGAD decides that the arbitrary nature of the deprivation of liberty is established, it shall render an opinion to that effect and make recommendations to the government.

The opinion adopted by the WGAD is sent to the government concerned together with the recommendations of the WGAD. Three weeks later, the opinion is sent to the complainant.

**Follow-up:** The WGAD inserts the opinion in its annual report to the UN Human Rights Council.<sup>970</sup> The WGAD must also take all the appropriate measures to ensure that governments inform it of follow-up actions taken on the recommendations made.<sup>971</sup>

**Review:** In exceptional circumstances, the WGAD may reconsider an already adopted opinion: (a) if the facts on which the request is based are considered by the Group to be entirely new and such as to have caused the Group to alter its decision had it been aware of them; (b) if the facts had not been known or had not been accessible to the party originating the request;

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<sup>970</sup> *Ibid.*, para. 19.

<sup>971</sup> *Ibid.*, para. 20.

or (c) when the request comes from a government which has respected the delays for replies.<sup>972</sup>

**Urgent Action Procedure:** This procedure may be resorted to by the WGAD (a) in cases in which there are sufficiently reliable allegations that a person is being arbitrarily deprived of his liberty and that the continuation of such deprivation constitutes a serious threat to that person's health or even to his life; or (b) in cases in which, even when no such threat is alleged to exist, there are particular circumstances that warrant an urgent action. The urgent action procedure does not prejudge any opinion that the WGAD may later adopt on the arbitrariness of the deprivation of liberty.<sup>973</sup>

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<sup>972</sup> *Ibid.*, para. 21.

<sup>973</sup> *Ibid.*, paras. 22-23.

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February 2016 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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