



INTERNATIONAL COMMISSION OF JURISTS

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LEGAL OPINION BY THE INTERNATIONAL COMMISSION OF JURISTS

PRESENTED TO BANGLADESH LEGAL AID AND SERVICES TRUST (BLAST), BANGLADESH MAHILA PARISHAD, AIN O SALISH KENDRA(ASK), BRAC AND NIJERA KORI

I. Introduction

1. This legal opinion is provided by the International Commission of Jurists (ICJ) for use by the petitioners¹ in the matter before the Supreme Court of Bangladesh (High Court Division) concerning the imposition in Bangladesh, by order of traditional village tribunals, of extra-legal penalties amounting to beating and whipping.
2. The instances of concern described by the petitioners entail the use of violence (in the form of beating, lashing and whipping) by groups of private individuals, meeting at the local or community level, to sanction or punish individuals for perceived transgressions. The petitioners note that such sanctions are predominantly imposed on women. The petitioners also note that the violence involved is contrary to Bangladeshi national criminal law and that the groups of private individuals imposing the sanctions are acting without legal or judicial power. However the petitioners do specify that at times local government ("Union Parishad") representatives have been present at gatherings where these sanctions have been imposed and/or executed. Meanwhile the petitioners outline that despite widespread knowledge within the communities concerned that such sanctions will be imposed, the police have not intervened to prevent the incidents from occurring, although in some cases they have investigated events after the fact and arrested and charged a number of individuals.
3. The ICJ is of the view that a range of Bangladesh's international human rights obligations are relevant to this matter. However in this legal opinion the ICJ will focus on the international obligation on Bangladesh to ensure that no one within its jurisdiction be subject to torture, cruel, inhuman or degrading treatment or punishment (hereinafter torture or other ill-treatment). The ICJ will not give an opinion as to whether, with reference to the facts outlined above, Bangladesh has failed to comply with the requirements of this obligation. Rather it will provide the petitioners and Court with an overview of the particular legal content and consequences of this obligation that may be of specific relevance to the current case.
4. In Part II below the ICJ will briefly underscore that the prohibition on torture and other ill-treatment is binding on Bangladesh under international law. In Part III it will outline that the type of violence involved in this case falls within the prohibition, as do other forms of corporal punishment. In Part IV it will address the ways in which State responsibility in relation to such torture and other ill-treatment may arise. First, it will outline that States are responsible under international law for torture and other ill-treatment in which State actors are implicated and will explain which actors may constitute State actors for this purpose. Second, it will underline that even in cases where ill-treatment is inflicted by private actors State responsibility will arise if the State fails to exercise due diligence to prevent, investigate and punish such conduct.

II. The International Legal Prohibition of Torture or Other Ill-Treatment is Binding on Bangladesh

5. Bangladesh has an obligation under international law to prevent, prohibit and punish torture and other cruel, inhuman or degrading treatment or punishment. This obligation is contained

¹ Bangladesh Legal Aid and Services Trust (BLAST), Bangladesh Mahila Parishad, Ain o Salish Kendra(ASK), BRAC and Nijera Kori

in a number of international treaties binding on Bangladesh.² The universally recognized prohibition of torture or other ill-treatment is also a basic principle of customary international law.³

6. Article 7 of the **International Covenant on Civil and Political Rights** (ICCPR)⁴ provides that, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This provision enshrines an absolute proscription, which cannot be limited in any circumstances, and from which no derogation is possible. In the words of the **Human Rights Committee**, “article 7 allows of no limitation...even in situations of public emergency...no derogation from the provision of article 7 is allowed...no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons.”⁵
7. Moreover, Articles 2 and 16 of the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (CAT)⁶ outline that States must prevent acts of torture and other ill-treatment. Article 2(2) of the Convention provides that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” The **UN Committee Against Torture** has affirmed that the prohibition of such conduct is absolute and non-derogable.⁷ Notably in respect of the instant case, the Committee has underscored that “any religious or traditional justification that would violate this absolute prohibition” must be rejected.⁸
8. Additionally, in respect of children, Article 37 of the **Convention on the Rights of the Child** (CRC)⁹ specifies that, “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” This protective guarantee is complemented by Article 19 of the Convention, which obliges States to, “protect the child 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.”
9. The **Convention on the Elimination of all forms of Discrimination against Women** (CEDAW)¹⁰ does not explicitly refer to the prohibition of torture and other ill-treatment. Nonetheless, the **Committee on the Elimination of Discrimination against Women** has held that *violence against women* “impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law ... [including] the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.”¹¹ The Committee has defined violence against women as “violence that is directed against a woman because she is a woman or *that affects women disproportionately*”¹² and has held that such violence is a form of discrimination that “may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”¹³

III. Corporal Punishment is Subject to the Prohibition of Torture and Other Ill-Treatment

² It is also enshrined in provisions of several regional human rights treaties including Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 5(2) of the American Convention on Human Rights (ACHR), and Article 5 of the African Charter on Human and Peoples Rights (ACHPR).

³ See e.g. Human Rights Committee, General Comment No. 24, Para.8

⁴ Acceded to by Bangladesh on 6 September 2000

⁵ Human Rights Committee, General Comment No.20, Para.3; See also, Article 4, ICCPR & Human Rights Committee, General Comment No. 29, Para.7

⁶ Acceded to by Bangladesh on 5 October 1998

⁷ Committee Against Torture, General Comment No. 2, Paras.1,3,5; Statement of the Committee against Torture, 22 November 2001, CAT/C/XXVII/Misc.7

⁸ Committee Against Torture, General Comment No. 2, Para 5

⁹ Acceded to by Bangladesh on 3 August 1990

¹⁰ Acceded to by Bangladesh on 6 November 1984

¹¹ Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, Para.7

¹² Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, Para.6

¹³ Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, Para.6

10. Corporal punishment, which involves the imposition of physical force intentionally against someone as a sanction in order to cause pain and/or humiliation and degradation, may take several forms. However it is clear that it encompasses the conduct at issue in the instant case - namely the imposition of penalties and sanctions involving violence such as beating, canning and whipping. Furthermore, no matter what its form, corporal punishment contravenes the international prohibition of torture and other ill-treatment, whether or not it is imposed by State actors or private individuals, and whether or not it is legal or illegal under a State's national law.
11. The **Human Rights Committee** in its **General Comment No. 7** has stressed that the prohibition on torture and other ill-treatment, "must extend to corporal punishment."¹⁴ The Committee has repeated this finding in a number of individual cases involving punishment in the form of beating or whipping, such as in **Osbourne v. Jamaica**, and **Sooklal v. Trinidad and Tobago**, holding in both cases that "corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant."¹⁵
12. Meanwhile the **Committee Against Torture** has held that corporal punishment, for example in the form of flogging, is contrary to the Convention Against Torture¹⁶ and has noted that a State must "ensure that legislation banning corporal punishment is strictly implemented."¹⁷
13. In the specific context of children and juveniles the **Committee on the Rights of the Child** has specified that corporal punishment is contrary to the Convention on the Rights of the Child. In the words of the Committee in its **General Comment No. 8**, "There is no ambiguity...corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them."¹⁸ Notably, the Committee has specifically addressed the situation in Bangladesh regarding the kind of corporal punishments at issue in the present case expressing "its deep concern at the reported inhuman and degrading punishment carried out by order of traditional village councils ("shalishes")."¹⁹
14. Similarly, although for the most part it has not used the term corporal punishment, the **Committee on the Elimination of all forms of Discrimination against Women** has addressed corporal punishment practices that predominantly effect women through the lens of violence against women, which as noted above in paragraph 9 infringes women's right to freedom from torture and other ill-treatment. In this context the Committee has repeatedly condemned domestic violence²⁰ (which may include corporal punishment)²¹ and has also

¹⁴ Human Rights Committee, General Comment No.7, Para.5

¹⁵ Human Rights Committee, Case of Osbourne v. Jamaica, 13 April 2000, Para.9.1; Case of Sooklal v. Trinidad and Tobago, 25 October 2001, Para.4.6

¹⁶ Committee Against Torture, Conclusions and Recommendations on Saudi Arabia, 12 June 2002, U.N. Doc. CAT/C/CR/28/5. The Committee's findings underscore the fact corporal punishment can never be considered to constitute a lawful punishment as conceived of by Article 1(1) of the Convention, which notes that "torture...does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." The fact that corporal punishment is not a form of lawful punishment has also been highlighted by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See, Interim Report of the Special Rapporteur, 30 August 2005, U.N. Doc. A/60/316 Paras.27-28 and Report of the Special Rapporteur 10 January 1997, U.N. Doc. E/CN.4/1997/7 which explains that corporal punishment cannot "be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment had been duly promulgated under the domestic law of a State."

¹⁷ Committee Against Torture, Conclusions and Recommendations on South Africa, 7 December 2006, U.N. Doc. CAT/C/ZA/CO/1, Para.25

¹⁸ Committee on the Rights of the Child, General Comment No. 8, Para.18

¹⁹ Committee on the Rights of the Child, Concluding Observations on Bangladesh, 27 October 2003, CRC/C/15/Add.221, Para.41

²⁰ See for example: Committee on the Elimination of All Forms of Discrimination Against Women, Case of A.T v. Hungary, 26 January 2005, U.N. Doc. A/60/38 and General Recommendation No. 19

²¹ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Para.37

addressed the use of violence against women in the broader community as a form of sanction or penalty for women's perceived transgressions. Indeed it too has explicitly expressed its concern that in Bangladesh "fatwa-instigated violence... continues."²²

15. The regional human rights courts have also held that corporal punishment transgresses the human rights of individuals. For example in **Tyrer v. the United Kingdom**²³ the **European Court of Human Rights** held corporal punishment in the form of birching following a judicial order was contrary to the prohibition on torture and other ill-treatment. While in **A v. the United Kingdom**²⁴ the Court found that corporal punishment by a private individual in a family context was also contrary to the prohibition. For its part the **Inter-American Court of Human Rights** has held, in the **Case of Caesar v. Trinidad and Tobago**, which concerned court-ordered corporal punishment in the form of flogging, that States are under an obligation "to abstain from imposing corporal punishment as well as to prevent its administration."²⁵ While the **Inter-American Commission on Human Rights** has specified that a State that permits or tolerates the use of corporal punishment as a form of discipline by private citizens...could be in violation of its international obligations to ensure the enjoyment and exercise of the right to humane treatment."²⁶
16. On numerous occasions the current **United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** and his predecessors have held that "any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment."²⁷ Most recently in his **2010 Report to the United Nations Human Rights Council** the Special Rapporteur noted that, "corporal punishment must...without exception be considered to amount to cruel, inhuman or degrading punishment or torture in violation of international treaty and customary law."²⁸ While one year earlier, in his **2009 Report to the United Nations Human Rights Council** he specified that "since corporal punishment in all its forms ... whether imposed by State authorities or by private actors ... has been qualified by all relevant intergovernmental human rights monitoring bodies as cruel, inhuman or degrading punishment, it follows that, under present international law, corporal punishment can no longer be justified."²⁹

IV. State Responsibility may be Engaged in Relation to Torture and Other Ill-Treatment by Both State and Non-State Actors

17. International human rights law not only requires States to respect human rights and refrain from violating those rights but also obliges them to *ensure* human rights.³⁰ This means that States have both negative and positive obligations in regard to human rights. Among other things they must (a) prevent and address human rights violations in the sphere of activity by State authorities and agents, *and* (b) exercise due diligence to protect rights in the context of conduct by private actors that may impair those rights.
18. Although the violence at issue in the current case is imposed by groups of private individuals acting contrary to Bangladesh national law, the petitioners have indicated that on occasion representatives of local government (who have devolved powers under national legislation in respect of maintenance of law and order and prevention of crime) may have been present

²² Committee on the Elimination of Discrimination against Women, Concluding Observations on Bangladesh, Adopted at the 31st Session of the Committee, Para.241

²³ European Court of Human Rights, *Tyrer v. the United Kingdom*, 25 April 1978, Application No. 5856/72

²⁴ European Court of Human Rights, *Case of A v. the United Kingdom*, Judgement 23 September 1998

²⁵ *Case of Caesar v. Trinidad and Tobago*, Judgment 11 March 2005, Para.70

²⁶ Inter-American Commission on Human Rights, Report on Corporal Punishment and Human Rights of Children and Adolescents, 5 August 2009, Para.79

²⁷ Interim Report of the Special Rapporteur, 30 August 2005, U.N. Doc. A/60/316; Report of the Special Rapporteur 10 January 1997, U.N. Doc. E/CN.4/1997/7, Para.6

²⁸ Report of the Special Rapporteur, 9 February 2010, A/HRC/13/39, Para. 63

²⁹ Report of the Special Rapporteur, 14 January 2009, U.N. Doc. A/HRC/10/44, Para. 37

³⁰ See e.g. Article 2(1), ICCPR; Article 2(1) CRC; Article 1, ACHR; Article 1, ECHR;

and participated at the community meetings in which individuals have been subject to beating and whipping as a form of extra-legal sanction.

19. Accordingly, in the following paragraphs the ICJ will first address the nature of state responsibility for the conduct of state actors and indicate which actors may be considered state authorities or agents for the purpose of state responsibility. It will then outline the due diligence obligations of States in relation to conduct by private actors.

(a) State Responsibility for Acts of Torture and other Ill-treatment by State Actors

20. Where a State actor is implicated in acts of torture or other ill-treatment the State will have violated its obligation under international law to respect the prohibition of such treatment.
21. Indeed in the words of the **Committee Against Torture**, in its **General Comment No. 2**, where State “officials ... agents ... and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law,” commit, instigate, incite, encourage, acquiesce or otherwise participate in acts of torture or other ill-treatment, the State will bear responsibility.³¹
22. While the normative proscriptions against torture have their source in the human rights treaties and customary law principles identified above, rules governing the application of those norms, including questions as to attribution of responsibility, are found both in the treaties themselves and in principles under the international law of state responsibility. The **Articles on Responsibility of States for Internationally Wrongful Acts, which constitutes a codification of these international rules and principles by the International Law Commission**, provides that a State will bear responsibility under international law for the acts of a person or entity that is an *organ of the State*³² or that is empowered by law to exercise elements of governmental authority.³³
23. Meanwhile, regional Courts have made similar findings. For example the **Inter-American Court of Human Rights** has specified that “whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth... any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State.”³⁴
24. It is clear that local government actors are included within the range actors whose conduct may give rise to State responsibility in this way.
25. For example the **Human Rights Committee** has explicitly held that, with respect to the obligations outlined in the ICCPR, “all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State.”³⁵
26. The **International Law Commission**, in its commentary to the Articles on State Responsibility, has emphasized that “the reference to State organ ... is not limited to the organs of the central government ... it extends to organs of government whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.”³⁶

³¹ Committee Against Torture, General Comment No. 2, Paras.15 and 17

³² Article 4, Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission;

³³ Article 5, Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission;

³⁴ Inter-American Court of Human Rights, Case of Velasquez Rodriguez v. Honduras, Judgment of 29 July 1988, Paras.169-172

³⁵ Human Rights Committee, General Comment No.31, Para.4

³⁶ International Law Commission, Commentary on Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, Para.6.

27. The **International Law Commission** has also underscored that State responsibility may be engaged whether or not the conduct of the person or entity empowered to exercise governmental authority is undertaken contrary to national law, or contrary to instructions, or in abuse of power.³⁷ The regional human rights courts have expressed similar views. For example in the words of the **Inter-American Court of Human Rights**, “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”³⁸
28. It may also be relevant to the situation at issue in the instant case to note that additionally State responsibility may arise under international law where an actor who has carried out ill-treatment “is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”³⁹ In the words of the **International Law Commission** three conditions must be present for State responsibility to be engaged in this way: “first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.”⁴⁰ In the instant case understanding whether these criteria are met would involve establishing whether or not the acts of the private actors in prescribing and administering the acts of ill-treatment concerned were tantamount to the exercise of police and adjudicatory powers normally associated with the administration of justice by a State and whether the groups of individuals were doing so “in an absence or default of elements of state authority.”
29. Where torture or other ill-treatment does take place the State is also obliged to investigate the conduct with a view to prosecution. The content of this obligation is briefly outlined below in paragraphs 41-45 below.

(b) State Responsibility for Failure to Exercise Due Diligence in Respect of Conduct by Private Actors which Infringes the Prohibition of Torture and other Ill-Treatment

30. Where State actors fail to exercise due diligence to prevent, investigate, and punish conduct by private actors amounting to torture and other ill-treatment the State will have violated its international obligation to protect against and to ensure the prohibition of such ill-treatment. These due diligence obligations have been repeatedly underlined by international and regional judicial and quasi-judicial bodies. The obligations in this respect exist independently of one another: where a State fulfils some of the requirements but not others it will be considered to have failed to comply with the obligation to exercise sufficient due diligence.
31. In regard to States’ obligations under the **Convention Against Torture**, the **Committee against Torture** has affirmed in its **General Comment No. 2** 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 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.”⁴¹

³⁷ International Law Commission, Commentary on Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, Para.13; Article 7, Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission.

³⁸ Inter-American Court of Human Rights, Case of Velasquez Rodriguez v. Honduras, Para.170

³⁹ Article 9, Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission

⁴⁰ International Law Commission, Commentary on Article 9 of the Articles on Responsibility of States for Internationally Wrongful Acts, Para.3

⁴¹ Committee Against Torture, General Comment No.2, Implementation of Article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2, Para.18; See also, Report of the Special Rapporteur on Torture, 15 January 2008, A/HRC/7/3, Paras.31, 32, 44

32. Moreover, **the Human Rights Committee** has held in its **General Comment No. 20**, that States must “afford everyone protection ... as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity... or in their private capacity.”⁴² The Committee has also specified in its **General Comment No. 31**, that it is “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,”⁴³ and that “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 [...] there may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”⁴⁴
33. The **Committee on the Elimination of Discrimination against Women** in the case of **A.T. v. Hungary** has held that CEDAW requires that States take preventative and protective measures in relation to violence against women.⁴⁵ Moreover in its **General Recommendation No. 19** the Committee has specified that “under general international law and specific human rights covenants States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”⁴⁶ and that they should “take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.”⁴⁷ The **United Nations Special Rapporteur on Violence Against Women**, and the **United Nations Secretary General**, have echoed these findings. For example the Special Rapporteur has expressed the view that “both customary and conventional international law establish that States have due diligence obligations for preventing, responding to, protecting against and providing remedies for acts of violence against women whether such acts are committed by State or non-State actors,”⁴⁸ while the Secretary General has noted that “States’ obligations to respect, protect, fulfil and promote human rights with regard to violence against women encompasses the responsibility to prevent, investigate and prosecute all forms of, and protect women from, such violence.”⁴⁹
34. The **European Court of Human Rights** has held that the obligation to protect the right to freedom from torture, inhuman and degrading treatment “requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture, or inhuman or degrading treatment, including such ill-treatment administered by private individuals.”⁵⁰ The Court has repeated this finding in numerous cases, including for example **A v. the United Kingdom**⁵¹ (which concerned corporal punishment within the family) and in **M.C. v. Bulgaria**⁵² (which concerned the rape of a woman). The Court has outlined that this

⁴² Human Rights Committee, General Comment No. 20, Para.2

⁴³ Human Rights Committee, General Comment No.31, Para.8

⁴⁴ Human Rights Committee, General Comment No.31, Para.8

⁴⁵ Committee on the Elimination of Discrimination Against Women, *Case of A.T. v. Hungary*, 26 January 2005, Paras.9.2 - 9.3

⁴⁶ Committee on the Elimination of Discrimination Against Women, General Recommendation No.19, Para.9

⁴⁷ Committee on the Elimination of Discrimination Against Women, General Recommendation No.19, Para.24(a)

⁴⁸ Special Rapporteur on Violence Against Women, Report to the Commission on Human Rights, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, 20 January 2006, U.N. Doc. E/CN.4/2006/61, Para. 30.

⁴⁹ Report of the Secretary General: In Depth Study on all Forms of Violence Against Women, 6 July 2006, U.N. Doc. A/61/122/add.1, Para.254.

⁵⁰ European Court of Human Rights, *Case of Z. and Others v. The United Kingdom*, Judgment 10 May 2001, Application No. 29392/95, Para.73; *Case of E and Others v. The United Kingdom*, Judgment 26 November 2002, Application No. 33218/96, Para.88; *Case of Opuz v. Turkey*, Judgment 9 June 2009, Application No. 33401/02, Para.159. See also *Case of M.C. v. Bulgaria*, Judgment 4 December 2003, Application No. 39272/98, Para. 149.

⁵¹ European Court of Human Rights, *Case of A v. the United Kingdom*, Judgment 23 September 1998, Para.22

⁵² European Court of Human Rights, *Case of M.C. v. Bulgaria*, Judgment 4 December 2003, Application No. 39272/98, Para. 149.

obligation requires States to, “maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals,”⁵³ to take “steps to prevent ill-treatment,”⁵⁴ and where violence and ill-treatment does occur, “to conduct an official investigation.”⁵⁵ For example the Court has held that States are obliged “to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.”⁵⁶ It has also held that vulnerable individuals, including women at risk of violence, “are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity,”⁵⁷ and that State authorities must take all reasonable measures to prevent such ill-treatment.⁵⁸

35. For its part the **Inter-American Court of Human Rights** has specified that an “illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State ... because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention [...] the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment.”⁵⁹

Due Diligence to Prevent Torture and Other Ill-Treatment

36. The obligation to prevent harm and protect an individual who is at risk of acts of torture or other ill-treatment comes into play when a State knows, or should know, of the existence of the risk. Assessing whether or not State authorities know, or should know, of such a risk will turn on the specific facts of the particular situation in question. International and regional judicial and quasi-judicial bodies will consider the circumstances leading up to the events in question, including the specific situation of the individual at risk and the extent to which the contours of this particular situation were known to the authorities. They will also consider whether, in light of more general circumstances at play, the authorities were on notice as to a general risk facing a particular group or class of persons, to which the individual in question belonged.⁶⁰
37. In order to adequately protect an individual who the State knows or should know is at risk it must take legal and operational preventative measures consonant with the gravity of the situation. The question to ask is whether the authorities have done all that could be reasonably expected of them to avoid a real and immediate risk. Sometimes the situation will require the State to undertake specific policing or administrative measures and/or targeted protective legal measures (such as issuing injunctions, launching a criminal investigation). Sometimes a State will be obliged to take steps that enable it to discover the exact extent of the problem. Moreover, the timeliness and potential effectiveness of the authorities’ follow-up will be highly important factors in terms of compliance with due-diligence requirements.⁶¹

⁵³ European Court of Human Rights, *Case of Bevaqua and S v. Bulgaria*, Judgment 12 June 2008, Application No. 71127/01, Judgment 12 June 2008, Para. 65.

⁵⁴ European Court of Human Rights, *Case of Z. and Others v. The United Kingdom*, Judgment 10 May 2001, Application No. 29392/95, Para.73; *Case of E and Others v. The United Kingdom*, Judgment 26 November 2002, Application No. 33218/96, Para.88.

⁵⁵ European Court of Human Rights, *Case of M.C. v. Bulgaria*, Judgment 4 December 2003, Application No. 39272/98, Para.151.

⁵⁶ European Court of Human Rights, *Case of M.C. v. Bulgaria*, Judgment 4 December 2003, Application No. 39272/98, Para. 153.

⁵⁷ European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment 9 June 2009, Application No. 33401/02, Para.159.

⁵⁸ European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment 9 June 2009, Application No. 33401/02, Para.162

⁵⁹ Inter-American Court of Human Rights, *Case of Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, Para. 172.

⁶⁰ See for example: Committee on the Elimination of Discrimination Against Women, *Case of Yildirim v. Austria*, 1 October 2007, Para.12.1.4; *Case of Goekce v. Austria*, 6 August 2007, Para.12.1.4.

⁶¹ See for example: Committee on the Elimination of Discrimination Against Women, *Case of Goekce v. Austria*, 6 August 2007, Para 12.1.4; European Court of Human Rights, *Case of E and Others v. The United Kingdom*, Judgment 26 November 2002, Application No. 33218/96, Para. 97; *Case of Osman v. The United Kingdom*,

38. Additionally, it will be necessary to consider whether or not the general approach of the authorities towards a particular problem, situation or group or class of persons, in fact removed a level of protection from the individual victim concerned. While questions as to whether or not an effective criminal law framework is in place will be asked in this regard, an equally important factor will be whether any such framework had a meaningful and tangible impact on the situation of the concerned individual.⁶² For example in reaching the conclusion that States have failed to exercise sufficient due diligence to prevent violence against women the **Committee on the Elimination of Discrimination Against Women** has considered whether a legal framework in place is in fact supported and implemented in practice by the relevant State actors.⁶³ Among other things, the Committee has taken into account the fact that cases concerning violence against women did “not enjoy high priority in court proceedings,”⁶⁴ and has noted the need for States to “vigilantly and in a speedy manner prosecute”⁶⁵ violence against women “in order to convey to offenders and the public that society condemns”⁶⁶ such violence.
39. Moreover the State will need to take general community and society based measures to prevent such conduct. Such measures not only include putting an effective criminal law framework in place and ensuring that this framework is meaningful in practice to the situation of individuals at risk of violence and that acts of violence against women are investigated and prosecuted, but also require States to: provide appropriate training to judges, lawyers and law enforcement officials, ensure enhanced coordination among law enforcement and judicial officers, provide for sanctions for state authorities’ failure to prevent and respond appropriately to violence against women provide victims with safe and prompt access to justice and remedies and rehabilitation, undertake public education programmes and collect accurate information and statistics on violence against women.⁶⁷

Due Diligence to Investigate & Prosecute Torture & Ill-Treatment

40. Where individuals are subject to acts of torture or other ill-treatment States are obliged to carry out an effective official investigation, which is capable of leading to prosecution and punishment of those responsible. Failure to do so will lead to a violation of the State’s international obligations.
41. An investigation must fulfill certain criteria in order to meet the requirements of international law.
42. Article 12 of the **Convention Against Torture** specifies that States must “ensure that its competent authorities proceed to a *prompt and impartial* investigation.” The **Committee Against Torture** has also noted that investigation must be effective and that it aim to “determine the nature of and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein.”⁶⁸

Judgment 28 October 1998, Application No. 23452/94, Paras. 115 – 116; Case of Bevaqua and S v. Bulgaria, Judgment 12 June 2008, Application No. 71127/01, Para. 83.

⁶² Committee on the Elimination of Discrimination Against Women, *Case of A.T. v. Hungary*, 26 January 2005, Para.9.3; *Case of Yildirim v. Austria*, 1 October 2007, Para.12.1.2; *Case of Goekce v. Austria*, 6 August 2007, Para.12.1.2.; European Court of Human Rights, *Case of Mahmut Kaya v. Turkey*, Judgment 28 March 2000, Application No. 22535/93, Paras.93- 99.

⁶³ Committee on the Elimination of Discrimination Against Women, *Case of Yildirim v. Austria*, 1 October 2007, Para.12.1.2; *Case of Goekce v. Austria*, 6 August 2007, Para.12.1.2

⁶⁴ Committee on the Elimination of Discrimination Against Women, *Case of A.T. v. Hungary*, Commu26 January 2005, Para.9.3

⁶⁵ Committee on the Elimination of Discrimination Against Women, *Case of Yildirim v. Austria*, 1 October 2007, Para.12.3(b); *Case of Goekce v. Austria*, 6 August 2007, Para.12.3(b).

⁶⁶ Committee on the Elimination of Discrimination Against Women, *Case of Yildirim v. Austria*, 1 October 2007, Para.12.3(b); *Case of Goekce v. Austria*, 6 August 2007, Para.12.3(b).

⁶⁷ Committee on the Elimination of Discrimination Against Women, *Case of A.T. v. Hungary*, 26 January 2005, Para.9.6(II); *Case of Yildirim v. Austria*, 1 October 2007, Para.12.3(d); *Case of Goekce v. Austria*, 6 August 2007, Para.12.3(d).; Report of the Secretary General: In Depth Study on all Forms of Violence Against Women, Para.284

⁶⁸ Committee Against Torture, *Case of Blanco Abad v. Spain*, 28 April 1997, Para.8.2

43. Meanwhile the **Committee on the Elimination of Discrimination Against Women** has held that in order to comply with the obligation to exercise due diligence in respect of violence against women, States should investigate allegations of such violence “promptly, thoroughly, impartially and seriously,”⁶⁹ and should “vigilantly and in a speedy manner”⁷⁰ prosecute those responsible.
44. The criteria of promptness, impartiality and effectiveness have also been held to be crucial by the two regional human rights courts⁷¹ and both the **European Court of Human Rights** and the **Inter-American Court of Human Rights** have specified that although undertaking such an investigation may be difficult, neither this, nor difficult conditions generally at play in the Country in question, will liberate the State from its obligation to investigate.⁷² They have underlined that although the obligation is one of means rather than result, and does not require that the investigation be successful, the investigation must be capable of leading to proceedings against those responsible for unlawful acts, pertinent punishments being imposed, and the truth about what happened being revealed, all of which must take place within a reasonable time.⁷³

⁶⁹ Committee on the Elimination of Discrimination Against Women, *Case of A.T. v. Hungary*, 26 January 2005, A/60/38, Para.9.6(II)(f)

⁷⁰ Committee on the Elimination of Discrimination Against Women, *Case of Yildirim v. Austria*, 1 October 2007, Para.12.3(b); *Case of Goekce v. Austria*, 6 August 2007, Para.12.3(b)

⁷¹ Inter-American Court of Human Rights, *Case of Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, Para.177;

⁷² Inter-American Court of Human Rights, *Case of Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, Paras.146 and 177; European Court of Human Rights, *Case of M.C. v. Bulgaria*, Judgment 4 December 2003, Application No. 39272/98, Para. 184; *Case of Angelova and Iliev v. Bulgaria*, Judgment 26 July 2007, Application No. 55523/00, Para. 96

⁷³ Inter-American Court of Human Rights, *Case of the 19 Tradesmen v. Colombia*, Judgment of 5 July 2004, Paras. 187 – 188; European Court of Human Rights, *Case of Opuz v. Turkey*, Judgment 9 June 2009, Application No. 33401/02, Para. 151