

Addressing Violence
Against Women in
the Commonwealth
Within States'
Obligations under
International Law



The Commonwealth

Commonwealth Secretariat
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Pall Mall
London SW1Y 5HX
United Kingdom

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Addressing Violence Against Women in the Commonwealth Within States' Obligations under International Law

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¹ This paper was prepared for the Commonwealth Secretariat by Dr Christine Chinkin, Professor of International Law at the London School of Economics and Political Science

Executive Summary

1. The paper examines international human rights standards with respect to redressing violence against women. It first sets out the international and regional instruments and jurisprudence relevant to determining international standards. It notes that, while there is no single convention explicitly on violence against women, the consistent language is such that these instruments in conjunction with the work of expert bodies (notably the Committee on Elimination of All Forms of Discrimination against Women (CEDAW Committee) and the UN Special Rapporteur on Violence against Women) provide a blueprint of recommended actions and strategies for governments, inter-governmental organisations and NGOs to ensure the human rights of women free from violence. The paper then discusses the widely accepted understanding of gender-based violence against women as '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'. Violence against women is 'a manifestation of historically unequal power relations between men and women', rooted in discrimination against women. States' obligations are with respect to both gender-based violence and sexual violence against women. The paper adopts the framework of understanding states' obligations through the typology of the obligations to respect, protect and fulfil women's right to be free from violence. In particular, the obligation to exercise due diligence to prevent such violence, to protect women against such violence, to prosecute and punish the perpetrators of such violence and to provide reparation to the victims of such violence. These layers of obligation are analysed primarily through the identification of the obstacles that prevent women's equal access to justice through civil and criminal processes and some of the steps that are needed to redress this inequality. The paper illustrates the difficulties and possible responses from the practice of Commonwealth member states and from the recommendations of international bodies, notably the CEDAW Committee. It recognises the importance of legislation that defines violence against women and criminalises its various manifestations. However, it also recognises that legal reform is not of itself an adequate approach and that legislation must operate in an effective system. This requires legal provisions to be accompanied by an understanding of the basic concepts and obligations by personnel across all relevant agencies at all levels, by an effective system of implementation, by the political will to ensure the provision of adequate resources, by a shared commitment within the relevant institutions, by an allocation of responsibilities and resources, and by accountability for the exercise of responsibility. It thus highlights the importance of a holistic, multisectoral and comprehensive national strategy that includes addressing the ways that law enforcement personnel, judges and prosecutors are influenced adversely by gender stereotypes and prejudices. The paper finally makes recommendations.

Introduction

2. The meeting of Senior Officials of Commonwealth Law Ministries in September 2013 endorsed recommendations that violence against women should be an item on the agenda of the 2014 Law Ministers Meeting and that ministers be advised to express their support for gender mainstreaming of the law, and therefore, the need for closer cooperation between law ministries, the judiciary and national women's machineries. This paper, therefore, seeks to assist ministers in discussing this agenda item and in making appropriate recommendations.

3. At the meeting of Commonwealth Heads of Government in Colombo, Sri Lanka in November 2013, Heads, among other things, underscored the urgent need for policy attention on violence against women. They also agreed to encourage, support and protect the efforts of stakeholders to improve the monitoring and documentation of cases of sexual violence in armed conflict without fear of reprisal and empower victims to access justice.

4. Following the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979² it has been increasingly accepted that achievement of the Convention's objectives is undermined by inadequate attention by states to the prevention,

² Adopted UNGA Resolution 34/180, 18 December 1979; 1249 UNTS 13.

prosecution and punishment of violence against women. Previously, such violence was often perceived as a private act that is as the deviant behaviour of an individual, rather than as rooted in systemic inequalities and acquiesced in by the organisational structures of society (for example, prisons, police stations, courts, religious institutions). This recognition entailed a holistic response from states in the framework of international human rights law and incurring state responsibility for its continuance.

5. This paper analyses the international human rights standards with respect to violence against women that have been developed by international and regional institutions, global summit meetings and the work of individual experts. It emphasises in particular the work of the CEDAW Committee and domestication processes, in order to suggest what is required by national legal systems with respect to the substance and procedure of law, access to justice, and redressing prejudicial practices.

The international legal framework

6. There is no international treaty on the prevention and prosecution of violence against women, although there have been calls for such a treaty to be negotiated. Commonwealth member states' obligations in this regard, therefore, arise under a range of international and regional human rights treaties, which are supplemented by multiple 'soft law' instruments and the jurisprudence of national and regional human rights institutions. Even in the absence of a comprehensive treaty, state and institutional practice demonstrates the acceptance of international legal obligations with respect to elimination of violence against women. The following section briefly outlines some of the most significant sources of these obligations.

7. The most important legal instrument is the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol (OP). One hundred and eighty-seven states are parties to the Convention, including the vast majority of the Commonwealth member states. Article 2 of the Convention condemns discrimination against women and requires parties 'to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.' The CEDAW Committee has confirmed that the Convention also applies to girls since they 'are part of the larger community of women'.³ It does not explicitly address violence against women (apart from the obligation to 'take all appropriate measures [...] to suppress all forms of traffic in women and exploitation of prostitution of women'). In 1989, the CEDAW Committee asserted that states parties are required 'to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life'.⁴

8. In its 1992 General Recommendation No. 19 on violence against women,⁵ the Committee went further, interpreting the definition of discrimination in CEDAW Article 1 to include gender-based violence 'that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men' and set out states' obligations in this regard. The Committee reiterated this position in its 2010 General Recommendation No. 28 and has delivered a growing number of opinions on the subject in response to complaints made under the OP, Article 2. Although General Recommendations and opinions are not of themselves legally binding, the International Court of Justice has recognised that the opinion of a UN human rights treaty body - 'an independent body established specifically to supervise the application of that treaty' - should be given 'great weight'.⁶ Similarly, while decisions of the CEDAW Committee are directed towards a particular respondent state, they provide details of how the Committee understands states' obligations under the Convention and what constitutes violation of those obligations. As illustrated below, courts in Commonwealth states have referred to CEDAW and other instruments in reaching their decisions on issues relating to violence against women.

³ CEDAW Committee, General Recommendation No. 28, Equality of rights between men and women (article 3), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para 21.

⁴ CEDAW Committee, General Recommendation No. 12 (eighth session, 1989), Violence against women, citing CEDAW, articles 2, 5, 11, 12 and 16 in support.

⁵ CEDAW Committee, General Recommendation No.19, 29 January, 1992, UN Doc. HRI\GEN\1\Rev.1 at 84 (1994).

⁶ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep., para 66. The ICJ was referring to the Human Rights Committee.

9. Supplementing CEDAW are a number of 'soft law' instruments, including the Beijing Declaration and Platform for Action and the subsequent five, 10 and 15 year follow-up processes, resolutions of the United Nations (UN) General Assembly (GA), Human Rights Council and Commission on the Status of Women (CSW). Especially important are the 1993 GA Declaration on the Elimination of Violence against Women (DEVAW)⁷ and the adoption by CSW in 2013 of a detailed and comprehensive set of conclusions on "The elimination and prevention of all forms of violence against women and girls".⁸ The latter affirms that gender-based violence is a 'form of discrimination'. The reiteration of the basic principles in these international instruments, typically adopted by consensus or overwhelming majorities, affirms that they create expectations of compliance. This is supported by the behaviour of states in reporting the steps taken to address violence against women in their periodic reports to the CEDAW Committee and the regular inclusion of recommendations on the subject in the concluding observations of the Committee.

10. Further, through the Universal Periodic Review process before the Human Rights Council, data about states' practices and expectations has been amassed. Many of states' recommendations to their peers relate to the importance of prevention and prosecution of violence against women. The special procedures of the Human Rights Council, notably the work of the Special Rapporteur on violence against women, further strengthen the understanding of legal measures required to address the issue.

11. In addition to the international norms, regional human rights systems have adopted treaties on violence against women. A number of Commonwealth member states are parties to the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of *Belém do Pará*),⁹ or to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (PRWA).¹⁰ Violence against women is mainstreamed throughout the latter Convention, for instance, in Articles 1, 3, 4, 5, 11, 20, 22 and 23. No Commonwealth member state has yet become a party to the Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted for signature in 2011 (Istanbul Convention).¹¹ Nevertheless, as it is the most recently negotiated text on the subject, it provides some indication as to how thinking has evolved since the pioneer 1994 Convention of Belém do Pará and its criminal law focus provides a model for good practice.

12. Violence against women has also been integrated (or 'mainstreamed') into the general human rights treaties. For instance, the Inter-American (IACtHR) and European Courts of Human Rights (ECtHR) have found states in violation of the provisions of the Inter-American and European Conventions on Human Rights, respectively, relating to the right to life and to be free from torture, cruel, inhuman and degrading treatment with respect to inadequate responses to domestic¹² or sexual¹³ violence. The UN Human Rights Committee and Committee on Economic, Social and Cultural Rights have also recognised the applicability of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, respectively to situations of violence against women.¹⁴ Taken together, these international and regional instruments provide a

⁷ UNGA Resolution 48/104, *Declaration on the Elimination of Violence against Women*, 20 December 1993.

⁸ UN Commission on the Status of Women, *The elimination and prevention of all forms of violence against women and girls*, E/CN.6/2013/L.5, March 2013.

⁹ Adopted by the 24th Regular Session of the General Assembly to the Organisation of American States, 6 September 1994.

¹⁰ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, Mozambique, 21 July 2003, CAB/LEG/66.6 (Sept. 13, 2000).

¹¹ *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Istanbul, 11 May 2011, CETS No. 210. The Convention is open by invitation of the Committee of Ministers of the Council of Europe to accession by non-member states.

¹² E.g. *Maria Gíves Penha Maia Fernandes v Brazil*, (IACtHR) Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000); *Opuz v Turkey*, (ECtHR) (Application no. 33401/02), 9 June 2009.

¹³ E.g. *González et al. ('Cotton Field') v Mexico*, (IACtHR) (Preliminary Objection, Merits, Reparations, and Costs), 16 November 2009; *MC v Bulgaria*, (Application No. 39272/98), 3 December 2003.

¹⁴ Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000); CESCR, 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, 11 August 2005.

blueprint of recommended actions and strategies for governments, inter-governmental organisations and NGOs to ensure the human rights of women free from violence.

Gender-based and Sexual Violence

13. The CEDAW Committee has defined gender-based violence as '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'.¹⁵ DEVAW has similarly defined 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'.¹⁶ DEVAW has recognised violence against women as 'a manifestation of historically unequal power relations between men and women'. Violence does not just happen to occur to women, but is motivated by gender,¹⁷ such as the assertion of male power and control in both the public and private spheres, enforcement of assigned social gender roles and the punishment of perceived deviant behaviour. It is thus deeply rooted in cultural and social norms and is often perpetuated by a culture of denial and silence.

14. Forms of violence that affect women "disproportionately" are those that occur most often against women or which have a disparate impact upon women's lives. For example, while men also experience rape, 'women have always been and remain the primary target of rape'.¹⁸ Its consequences impact disproportionately upon women through the possibility of pregnancy or of being pressured by authority figures, such as the police or magistrates, to forgive or to marry the rapist (who is pardoned or given a reduced sentence). Men who have been raped are not subjected to these potential outcomes. Similarly, while men also experience domestic violence, it is more frequently inflicted upon women and has disparate economic and social consequences. Women may be urged by those in authority to return to their abusive partners. The Constitutional Court of South Africa has noted: 'To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form'.¹⁹

15. Violence against women has multiple forms in addition to domestic violence. It occurs in the family (understood in an extended sense), the community (for instance in work, educational and religious establishments) and the state (military institutions, welfare institutions, prisons, social agencies etc). The GA DEVAW lists forms of violence as: 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. Other forms of violence against women have been subsequently addressed by the GA and other bodies (for instance violence committed in the name of 'honour', violence against migrant workers, trafficking, forced marriage, stalking) but there is no comprehensive list. Some forms of violence against women are rooted in custom and cultural traditions or are maintained through enduring stereotypes defining women's roles and responsibilities. However, these are discriminatory and perpetuate their subordination in the family and in society. The CEDAW Committee has expressed its concern to Commonwealth member states about particular forms of violence that occur in their countries that constitute violations of women's human rights, for example, to Pakistan about child and forced marriages, 'karo-kari', stove burning and acid throwing, marriage to the Koran, polygamy and honour

¹⁵ Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No.19, above note 4.

¹⁶ UNGA Resolution 48/104, *Declaration on the Elimination of Violence against Women*, 20 December 1993, Article 1.

¹⁷ The CEDAW Committee has defined 'gender' as distinct from sex: it is the '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 and in the distribution of power and rights favouring men and disadvantaging women'. Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, above note 2, para 5.

¹⁸ *Masiya v Director of Public Prosecutions*, [2007] ZACC 9; 2007 (5) SA 30, Constitutional Court, South Africa.

¹⁹ *The State v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425, Constitutional Court, South Africa.

killing.²⁰ Concerns have been expressed to India about dowry, 'sati', the 'devadasi' system, and witch hunting.²¹ This extends to Zimbabwe about polygamy, bride price (*lobola*) virginity testing and witch hunting²² and to Ghana about widowhood rites and 'Trokosi' (ritual slavery).²³ Concerns have also been expressed to many countries about female genital mutilation, describing the practice as injurious to the physical and psychological well-being of girls.²⁴

16. Definitions of gender-based violence in the regional treaties and other instruments have largely followed that of the CEDAW Committee, although there is less agreement about whether it encompasses economic violence. This is included in the PRWA, 2003, Article 1(j) and the 2011 Istanbul Convention, Article 3(a). The latter also includes economic violence in its definition of domestic violence, which is understood as being related to psychological violence. The CEDAW Committee has indicated a broad interpretation of gender-based violence, which should be preferred. In a complaint against Bulgaria, it criticised the local courts for applying 'an overly restrictive definition of domestic violence' that took into account only the direct and immediate threat to the life or health of the complainant and neglected her emotional and psychological suffering.²⁵ The complainant had alleged that her husband 'decided on the spending of the family's income and provided the author with money only for the basic needs of the family. She had no additional money for herself and was not allowed to spend money given to her for other purposes than those strictly specified; nor was she informed about how the rest of her husband's income was spent. As a result, she was economically entirely dependent on her husband'. The Committee determined the state to be in violation of its obligations under CEDAW. In a case concerning divorce and application for maintenance on the grounds of cruelty, the Malawi High Court found that the respondent had committed acts of psychological and physical violence against the petitioner.²⁶ Violent acts included the husband going out and drinking until four or five in the morning, his refusing to provide for his wife and child, taking money from the wife and spending it on beer and becoming angry at the suggestion of seeking counselling. Citing the definition of violence against women in the DEVAW the Court had 'no doubt' that the husband took advantage of the unequal power relations between himself and his wife 'which resulted in psychological suffering'. The evidence shows that he had no respect for equal rights in the marriage by subjecting his wife to conditions that did not enable her to attain the highest standard of physical and mental health. It noted that acts of domestic violence 'occur in secret and, if left unchecked could even result in the death, ill health or mental disorder of the disadvantaged spouse.' Verbal violence is included in the PRWA, Article 3.

17. Gender-based violence is distinguished from sexual violence. There is no generally accepted definition of sexual violence in international law. One suggested definition is 'any violence, physical or psychological, carried out through sexual means or by targeting sexuality', which includes 'both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts'.²⁷ Sexual violence includes such actions as the insertion of wooden and metal objects into genitals²⁸ and unwanted sucking of a girl's breasts by an older man.²⁹ The Elements of Crimes, agreed by the Assembly of States Parties to the International Criminal Court (ICC), emphasise the sexual nature of the crimes of sexual violence that are included in the jurisdiction of the Court: 'Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence

²⁰ CEDAW Committee, Concluding Observations, Pakistan, 2013.

²¹ CEDAW Committee, Concluding Observations, India, 2007.

²² CEDAW Committee, Concluding Observations, Zimbabwe, 2012.

²³ CEDAW Committee, Concluding Observations, Ghana, 2006.

²⁴ CEDAW Committee, General Recommendation No. 14, (ninth session, 1990), Female Circumcision; CEDAW Committee, General Recommendation No. 19, above note 4; Concluding Observations, Cameroon, 2000; Concluding Observations, United Kingdom, 2013.

²⁵ *V.K. v Bulgaria*, Communication No. 20/2008, CEDAW /C/49/D/20/2008, 17 August 2011.

²⁶ *Peng Aichun Vaux v John Vaux*, Case No. 9 of 2006, [2007] MWHC 127, 28 December 2007, High Court Malawi, Lilongwe District Registry.

²⁷ Final report, Gay J McDougall, Special Rapporteur, *Contemporary forms of slavery: systematic rape, sexual slavery and slavery-like practices during armed conflict*, E/CN.4/Sub.2/1998/13, 22 June 1998.

²⁸ CEDAW Committee, Concluding Observations, India, 2010 in the context of communal violence in Gujarat.

²⁹ E.g., *State v Sorpapelu*, HAA151.05S, 7 March 2006, Court of Appeal, Fiji.

of comparable gravity'.³⁰ The Supreme Court of Canada has determined that sexual assault comprises sexual touching and lack of consent to such touching.³¹ Sexual violence does not necessarily imply sexual penetration or even physical contact. Harms caused through sexual violence often incur particular social stigma, ostracism and isolation and entail an especially sensitive response.

States' obligations

18. Under the dualist legal systems of Commonwealth member states, international obligations must be incorporated into national law. Many Commonwealth member states have adopted legislation on domestic or other forms of violence against women. However, in order for women 'to enjoy the practical realisation of the principle of equality between women and men and of her human rights and fundamental freedoms, the political will that is expressed in such specific legislation must be supported by all state actors, including the courts, which are bound by the obligations of the state party.'³² The IACtHR in the landmark decision of *Velasquez Rodrigues v Honduras*³³ recognised that it is not sufficient for a state to have an adequate legal framework for legislation must operate in an effective system. This requires legal provisions to be accompanied by an understanding of the basic concepts and obligations by personnel across all relevant agencies at all levels, by an effective system of implementation, by the political will to ensure the provision of adequate resources, by a shared commitment in the relevant institutions, by an allocation of responsibilities and resources, and by accountability for the exercise of responsibility.

Respect, protect, fulfil

19. In order to clarify states' obligations, the CEDAW Committee has adopted the human rights typology of layered obligations to: 'respect, protect, promote and fulfil' women's right to be free from gender-based violence."³⁴ The obligation to respect requires the state to organise its governmental apparatus and all the structures through which public power is exercised so that they provide an effective legal framework for combating violence against women. It must also ensure that public officials, whose acts and omissions are directly attributable to the state, do not commit such violence and that it takes appropriate action against any public official who does so. It covers, for example, acts of violence in state institutions such as prisons, police stations and detention centres, including gender-specific acts such as vaginal searches. Furthermore, since violence against women is rooted in women's social and economic inequality and itself constitutes a form of discrimination, the obligation to respect women's right to be free from violence includes the duty to ensure that all laws - criminal, civil, administrative and labour - are not discriminatory. The CEDAW Committee has reiterated to many Commonwealth member states the need to incorporate in legislation a definition of discrimination in line with CEDAW, Article 1. A gender audit of all legislation is required to identify whether laws are directly or indirectly discriminatory (that is have the purpose or effect of discrimination against women), to repeal any discriminatory laws and not to make or continue laws, policies, regulations, programmes, administrative procedures or institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their human rights.³⁵

20. The obligation to protect or to guarantee is the second level obligation to ensure the enjoyment of human rights to all individuals within the state's jurisdiction. It requires the state to take appropriate positive measures to prevent violence against women by public officials and by non-

³⁰ E.g., Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B, article 7 (1) (g) -6, Crime against humanity of sexual violence.

³¹ *R v Park*, [1995] 2 S.C.R. 836.

³² *V.K. v Bulgaria*, Communication No. 20/2008, CEDAW /C/49/D/20/2008, 17 August 2011.

³³ *Velasquez Rodrigues v Honduras*, (IACtHR) (Ser. C) No. 4, 29 July 1988.

³⁴ CEDAW Committee, General Recommendation No. 28, above note 2, para. 9

³⁵ CEDAW Committee, General Recommendation No. 28, above note 2, para. 9.

state actors (for instance family members, acquaintances, community officials, religious leaders, or other persons). The duty to fulfil is the state's third level obligation to take positive, forward-looking, holistic and long-term measures for the actual enjoyment of human rights. States 'should consider that they have to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.'³⁶ A holistic and multidisciplinary national plan of action must encompass all social and economic agencies, as well as those relating to law enforcement.

Due diligence

21. States' obligations to respect, protect and fulfil women's right to be free from violence have been conceptualised and made more concrete through the duty and standard of due diligence. This standard has long been accepted in international law with respect to attributing state responsibility for the wrongful acts of non-state actors. Thus, states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.'³⁷ This duty of due diligence is widely recognised. It has been reiterated in treaty law;³⁸ by the CEDAW Committee;³⁹ in the Beijing Platform for Action;⁴⁰ by the UN Human Rights Council;⁴¹ by the European Court of Human Rights;⁴² and by the Inter-American Court of Human Rights.⁴³ In 2013, CSW reaffirmed that 'all States [...] must exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women and girls and end impunity, and to provide protection as well as access to appropriate remedies for victims and survivors.'⁴⁴ Thus, even if the violent behaviour is not directly attributable to the state, because the wrongdoer is unknown or is not a state agent, the state may be held responsible under international law for the wrongdoing, not because of the act itself, but because of its lack of due diligence to prevent the violation or to respond to it appropriately. It is through the concept of due diligence that structural and social shortcomings are addressed in international law.

22. The standard of due diligence is not one of strict liability but requires the state to act with the means at its disposal. Law enforcement officials must respond to violence against women with the same level of commitment to prevent, prosecute and punish it as they would to all other crimes, whether committed by private actors or public officials. Violence against women must not be trivialised as 'domestic', 'private', or a waste of police time. In *V.K. v Bulgaria*, the CEDAW Committee noted the local courts' lack of gender sensitivity and the reliance on stereotypes in interpreting legislation in accordance with a 'preconceived notion that domestic violence is to a large extent a private matter falling within the private sphere which, in principle, should not be subject to State control.'⁴⁵ Victims must be recognised as victims of serious crimes in accordance with the 1985 GA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁴⁶ The duty of due

³⁶ CEDAW Committee, General Recommendation No. 28, above note 2, para 9.

³⁷ DEVAW, above note 15, article 4(c)).

³⁸ Convention of Belém do Pará, article 7; Istanbul Convention, article 5.

³⁹ E.g., *Fatma Yildirim (deceased) v Austria*, Communication No. 6/2005, 6 August, 2007, CEDAW/C/39/D/6/2005, para 12.1.2; *Şahide Goecke v Austria*, Communication No. 5/2005, 6 August, 2007, CEDAW/C/39/D/5/2005, para. 12.1.2; CEDAW, General Recommendation No. 28, above note 2, para. 13.

⁴⁰ Fourth World Conference on Women, Declaration and Platform for Action, UN Doc. A/CONF.177/20, 15 September 1995, para 124 (b).

⁴¹ UN Human Rights Council Resolution 17/11, 17 June 2011, accelerating efforts to eliminate all forms of violence against women.

⁴² *Opuz v Turkey* (ECtHR) (Application no. 33401/02), 9 June 2009.

⁴³ *González et al. ('Cotton Field') v Mexico*, (IACtHR) (Preliminary Objection, Merits, Reparations, and Costs), 16 November 2009.

⁴⁴ UN Commission on the Status of Women, *The elimination and prevention of all forms of violence against women and girls*, E/CN.6/2013/L.5, March 2013, para 16.

⁴⁵ *V.K. v Bulgaria*, above note 24.

⁴⁶ UNGA Resolution 40/34, 29 November 1985, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

diligence has been applied by the CEDAW Committee and by the institutions of the regional human rights systems in the context of domestic violence and the commission of rape. The different manifestations of gender-based violence require flexibility on the part of public officials and responsiveness to the particularities of the case in question. The Special Rapporteur on violence against women has stated that the due diligence requirements to prevent, protect against, prosecute and punish gender-based violence are linked and, taken together, constitute the obligation to ensure access to justice to all victims and to transform the societal values and institutions that sustain gender inequality.⁴⁷

The Obligation to Prevent Violence against Women

23. The obligation to exercise due diligence to prevent acts of gender-based violence against women is part of a general international law obligation, that has been explained as: 'best effort obligations requiring states to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.'⁴⁸ The UN has defined three levels of prevention: primary, such as preventing violence from happening in the first place; secondary, which corresponds to the immediate response after violence has occurred to limit its consequences; and tertiary, or the longer-term care and support for those who have suffered violence.⁴⁹

24. A primary-level prevention strategy requires an informed assessment of risk of death or serious injury, both in general and specific to particular incidents or individuals, of which the authorities are aware, or should be aware. The former requires an evaluation by the relevant authorities across state agencies of the situation and the factors that incur the risk of violence. For example, structural discrimination and stereotyping of women, the heightened risk of violence faced by some women made especially vulnerable by their circumstances (such as those from rural communities who migrate to seek employment in towns), living in conditions of poverty or extreme poverty, prevailing community violence, having a physical or mental disability, being a member of an indigenous or minority population, older women, or women of sexual or gender minority.⁵⁰ The CEDAW Committee has recommended that a state 'increase its efforts to protect women, including black and ethnic minority women, against all forms of violence, including domestic violence, and so-called "honour killings"'.⁵¹ It urged the implementation of 'specific strategies within the national plan to address violence against Aboriginal and Torres Straits Islander women, including funding culturally appropriate indigenous women's legal services in urban, rural and remote areas of Australia'⁵² and to 'recruit and train more aboriginal women to provide legal aid to women from their communities'. It recommended a review of the legal aid system to ensure that aboriginal women, victims of domestic violence, have effective access to justice⁵³ and to ensure 'effective protection against violence and discrimination against all groups of women, including lesbian, bisexual and transgender women.'⁵⁴

25. The duty to prevent also applies in individual cases where attention must be paid to the specific circumstances in which a woman might find herself that have been brought to the attention of the authorities. This point is well illustrated by a decision of the CEDAW Committee. In *Fatma Yildirim v Austria*,⁵⁵ the wife had obtained an interim injunction prohibiting her husband from

⁴⁷ Special rapporteur on violence against women, Annual Report, 2006, *Standard of Due Diligence*, E/CN.4/2006/61, 20 January 2006; Special rapporteur on violence against women, Annual Report 2013, *State responsibility for eliminating violence against women*, A/HRC/23/49, 14 May 2013.

⁴⁸ J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press, 2002) 140.

⁴⁹ Report of the Secretary-General, *In-depth study on all forms of violence against women*, A/61/122/Add.1, 6 July 2006, para. 336.

⁵⁰ PRWA, above note 9, article 22 (elderly women); PRWA, article 23, (women with disability).

⁵¹ CEDAW Committee, Concluding Observations, UK, 2013.

⁵² CEDAW Committee, Concluding Observations, Australia, 2010.

⁵³ *Kell v Canada*, Communication 19/2008, CEDAW/C/51/D/19/2008, 27 April 2012.

⁵⁴ CEDAW Committee, Concluding Observations, Zimbabwe, 2012.

⁵⁵ *Fatma Yildirim v Austria*, CEDAW, Communication No. 6/2005, 6 August, 2007.

returning to the couple's apartment, the immediate surroundings, and her workplace. Fatma Yildirim's husband continued to contact her and threatened to kill her, which he finally did. There had been regular police interventions. Another factor that heightened the danger was that the husband stood to lose his residence permit in Austria if the marriage was terminated. The failure of the authorities to detain him breached the due diligence obligation to protect Fatma Yildirim; they did not take the decisive steps when the facts showed that they knew, or should have known, of the extreme danger which she faced. In another domestic violence case, the European Court of Human Rights held that the lack of adequate psychiatric treatment in prison for the perpetrator of domestic violence and the failure to undertake an assessment of the risk to his wife and daughter immediately prior to his release constituted a violation of due diligence.⁵⁶ A common feature of a number of these cases is that the authorities have, at some point, recognised the risk presented by the perpetrator (for example by issuing protection or restraining orders, arrest and detention of the violent individual, assisting the victim in filing complaints and instituting criminal proceedings) but have failed to follow up diligently to ensure her ongoing protection. A prevention strategy should be comprehensive in providing for risk assessment, mitigating risk factors, and strengthening the institutions that can provide an effective response.

26. In addition to the criminal justice system for prosecution of offenders, states must ensure that the legal system makes available to women victims of violence some form of restraining or protective orders that may be variously called injunctions, barring, eviction, restraining or protective orders. These should be speedily obtainable, offer immediate protection, not impose any financial or administrative burden on the victim, not require lengthy court proceedings and be available after normal working hours for all victims of violence.⁵⁷ Restrictive time limits should not be imposed, for instance requiring that a request for a protection order be submitted within a certain time after the date on which the act of domestic violence occurred. Imposition of court fees may deter women from accessing the court system and the Committee has noted, with concern, reports that these limitations may push women into informal community arbitration systems, including faith-based tribunals, which may not comply with CEDAW. This may be especially relevant to ethnic minority groups.⁵⁸

27. Effective legal sanctions for breaches of court-issued protective orders should be provided for and applied. Such orders must take into account the human rights of the alleged perpetrator. In a good example of how the two objectives - the right of the woman to protection and that of the respondent to due process rights - must be balanced, the South African Constitutional Court upheld the constitutionality of allowing an interim protection order to be issued without notice of proceedings being given to the respondent in order to protect the victim from further abuse by him. The court noted that the person against whom the order is issued is able, subsequently, to show the court why a final protection order should not be granted and, therefore, he is not denied access to the courts. Breach of a protection order may lead to an arrest warrant if the complainant states in an affidavit to the courts that this has occurred; if the victim makes a false allegation, she is criminally liable. The police officer who has to arrest the respondent has to discern whether there are reasonable grounds to believe that imminent harm to the complainant may result from the alleged breach. The court concluded that the possibility of the legislation being 'maliciously manipulated is by far outweighed by its potential to afford protection by the police to the victims of domestic violence.'⁵⁹

28. Obstacles to securing civil law protection orders must be identified and addressed. These may be practical (unavailability of services in remote areas, linguistic barriers, illiteracy, lack of knowledge or the means of acquiring reliable and timely information about who to contact or how to do so, the costs of proceedings and lack of financial and other resources); or cultural (conflicting social policies, for example, a social emphasis on family unity and reconciliation rather than on women's safety, a tolerance of violence against women, an attitude that 'she brought it on herself', provoked or

⁵⁶ *Branko Tomasic v Croatia* (ECTHR) (Application No. 46598/06), 15 January, 2009.

⁵⁷ CEDAW Committee, Concluding Observations, Cook Islands, 2007.

⁵⁸ CEDAW Committee, Concluding Observations, UK, 2013.

⁵⁹ *Omar v Government of South Africa*, Commonwealth Human Rights Law Digest Volume 6 Number 1.

deserved it).⁶⁰ Civil orders should not depend upon the institution of any further court proceedings, for instance criminal proceedings.

29. Access to justice depends upon the availability and accessibility of courts, and their affordability. The CEDAW Committee has been receptive to the problem of affordability. It advised Hungary to provide 'victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation.'⁶¹ It has also been wary of the impact of reforms to legal aid programmes on the protection of women's rights and has urged continual evaluation.⁶² The Judiciary Transformation Framework in Kenya 2012-16 has, as one of its four pillars, 'people focused delivery of service', seeking 'effective steps to reduce the obstacles that hinder public access to information; ensure proximity and physical access to courts; and simplify court procedures so that all litigants can understand and effectively participate in court processes.' Initiatives include the establishment of a 'help desk' in each court station, making available information about organisations providing legal aid and collaboration with other justice sector actors to increase access to legal aid. Gender dimensions of access to justice are not explicitly mentioned in the framework, making it important that the increased access to legal assistance is available to women victims of violence. In other instances, civil society organisations provide legal assistance or aid. However, legal assistance is secured, quality control of lawyers' work is important. Information in the form of guides and manuals to improve access to justice should be prepared, made available in multiple venues (for instance, shopping centres, markets, housing authorities, through different media sources) and in local languages. The authorities should be aware that women cannot always access remedies for themselves and should make available step-by-step guidance throughout the entire civil or criminal law process. 'One-stop' centres providing medical, legal, psychological, investigative, welfare and other services, or links to such services, in a single location are good practice.⁶³ When required by the gravity of the situation, judicial authorities need to be prepared to impose measures themselves, for instance to issue an injunction or other protective measure even if not sought by the victim.⁶⁴ The competence to issue an appropriate order may be found in the constitution where there is no express legislative provision, for instance a constitutional obligation to act fairly.⁶⁵ The case of *Fatma Yildrin* demonstrates that having systems in place is not in itself sufficient, it must be put into effect by state officials who understand and adhere to the obligation of due diligence. This must be ensured through appropriate training and monitoring.

30. A particular issue is whether an order should be issued against an alleged perpetrator of violence against women preventing him from entering his own dwelling. The CEDAW Committee has been clear that women's right to be free from violence as integral to their human right to life and to physical and mental integrity cannot be superseded by perpetrators' claims to other rights, including rights to property and privacy, freedom of movement and fair trial.⁶⁶ The constitutionality of the Family Protection Bill in Vanuatu was questioned, *inter alia*, on the grounds that it allowed for a protection order to prohibit a person from being in or near specified premises or to grant exclusive occupancy of a place of work or residence, thereby potentially impinging upon property and privacy rights. The Supreme Court rejected this argument. Property and other rights are subject to other legitimate interests - 'the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health.' The grant of a protection order comes within such

⁶⁰ The CEDAW Committee has made many observations about the obstacles to justice, e.g. CEDAW, Concluding Observations, Papua New Guinea, 2010; Kenya, 2011.

⁶¹ *A.T. v Hungary*, CEDAW, Communication No. 2/2003, 26 January 2005.

⁶² CEDAW Committee, Concluding Observations, UK, 2013.

⁶³ E.g. Malaysia has established 'one-stop' centres; see also the Saartjie Baartman Centre in South Africa which provides a 'one-stop' partnership approach; Report of the Office of the United Nations High Commissioner for Human Rights on good practices in efforts aimed at preventing violence against women, A/HRC/17/23, 19 April 2011, paras 29-31.

⁶⁴ *Opuz v Turkey*, above note 11.

⁶⁵ *Taleo v Taleo*, Civil Appeal 83/96, unreported, SRM Court Vanuatu.

⁶⁶ *A.T. v Hungary*, above note 60; *Şahide Goecke v Austria*, above note 38 ; *Fatma Yildirim (deceased) v Austria*, above note 38.

legitimate interests.⁶⁷ This balance of rights has been expressly adopted by the European Court of Human Rights.⁶⁸ On the other hand, a woman must not be denied her property rights, or access to the family home, because she left while escaping from violence and seeking protection in a shelter.⁶⁹

31. Other preventive measures are 24-hour free of charge, operational hotlines connected to emergency services and early warning and emergency search mechanisms for cases involving missing women and girls. The CEDAW Committee has recently reminded many Commonwealth member states of the need to 'provide adequate assistance and protection to women victims of violence, in particular social rehabilitation and an adequate number of shelters, including by strengthening its cooperation with and support to non-governmental organisations offering shelter and other forms of support to victims of domestic violence'.⁷⁰ Inadequate provision of safe places of refuge may inhibit women from reporting violence committed against them. Additional methods that states might adopt in furtherance of their obligation to prevent violence against women have been suggested by the Special Rapporteur on violence against women: widespread and accessible media campaigns for zero tolerance of violence against women; a 'no drop' policy with regard to charges of domestic violence; involvement of men and boys in prevention activities; mandatory and ongoing training in gender-based violence, human rights, equality between women and men, and non-discrimination for all relevant professionals, including police, prosecutors and members of the judiciary. Training must also include the link between domestic violence and often fatal violence against the children of the relationship, inflicted by a parent. Quality training programmes with respect to secondary level prevention, such as how to respond to emergency calls and implement restraining and protection orders, must be purpose designed and delivered, updated and repeated regularly so that newcomers do not miss out. Adequate and effective prevention strategies are also part of the third layer of obligation for the long-term fulfilment of human rights obligations.

The obligation to protect: access to justice

32. Legal measures directed towards prevention are accessed primarily through civil or administrative courts. Criminal prosecution of perpetrators is also important. In the words of the Constitutional Court of South Africa: 'Domestic violence brutally offends the values and rights enshrined in the Constitution including non-sexism, the right to freedom and security of the person, dignity, life, equality and privacy. This country also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights'.⁷¹

33. The CEDAW Committee has also emphasised that the obligation to protect women against violence includes combating a climate of impunity and silence whereby violence is socially legitimated and women suffer extreme violence without criminal accountability for perpetrators. Such impunity feeds further spirals of violence. Combating impunity requires prompt, thorough, impartial and serious investigation of allegations of violence against women and effective access to justice. The CEDAW Committee has commended many Commonwealth member states on their adoption of relevant legislation, but has also noted shortcomings and inadequate implementation. Such shortcomings include legislative gaps,⁷² restrictive definitions of offences,⁷³ insufficient allocation of financial and

⁶⁷ *President of the Republic of Vanuatu v Speaker of Parliament*, Supreme Court, [2008] VUSC 77.

⁶⁸ *Opuz v Turkey*, above note 11.

⁶⁹ *Kell v Canada*, above note 52.

⁷⁰ E.g., CEDAW Committee, Concluding Observations, Cyprus 2013; Bahamas 2012; Mauritius, 2011; Zimbabwe, 2012; Pakistan 2012; Singapore, 2011; Sri Lanka 2011.

⁷¹ *Omar v Government of South Africa*, above note 58, citing *State v Baloyi*, above note 18 and *Carmichele v Minister of Safety and Security and another* (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938, Constitutional Court, South Africa.

⁷² E.g., CEDAW Committee, Concluding Observations, Grenada 2012; Bahamas, 2012 (legislation not comprehensive).

⁷³ E.g., CEDAW Committee, Concluding Observations, Grenada 2012 (restrictive definition of rape).

human resources for effective implementation,⁷⁴ the limited number of recorded investigations and prosecutions in comparison with the cases reported,⁷⁵ cases excluded by short periods in Statutes of Limitation,⁷⁶ inadequate training of those responsible for implementation of the legislation,⁷⁷ and failure to include minorities in the scope of relevant programmes.⁷⁸

34. States must ensure victims' and potential victims' access to justice. This means their engagement with law enforcement and judicial bodies from their first encounter, thus encompassing seeking protection, filing complaints, dealings with those collecting forensic and medical evidence, proceedings in civil and criminal courts, and enforcement processes. Access to justice demands identifying and redressing obstacles that prevent women from reporting violence committed against them, receiving protection and redress. It also includes criminalisation of relevant behaviours; enforcement of existing laws; securing prosecutions and avoiding secondary victimisation; and adequate reparations. At the core of obligations with respect to access to justice are the rights to a fair trial and to equality before the law.⁷⁹ Also important is equality in access to and delivery of economic, social and cultural rights (including healthcare, accommodation, employment, education, social security) through national legal frameworks in accordance with international standards and to facilitate women's economic independence and empowerment. Economic subordination lessens the ability or willingness of victims to participate in legal processes.

35. Failure to ensure victims of such violence *de jure* and *de facto* access to justice is both a consequence of sex- and gender-based discrimination and constitutes further discrimination. While the focus is on law enforcement officials, states' obligations with respect to access to justice cannot be isolated from all other state obligations. Adequate response to gender-based violence that is compliant with international standards must be state-wide, comprehensive, integrated and correlated across all relevant departments, agencies and stakeholders. The Human Rights Council has noted that this encompasses multiple stakeholders, including women's organisations, religious and community leaders, youth, men and boys, victim services, law, health, education and social services professionals.⁸⁰

Reporting and investigation

36. There are many elements to successful prosecution. It must be made easy and safe for women to report incidents of gender based and sexual violence to law enforcement officials. This requires 'de-stigmatising victims and raising awareness about the criminal nature of such acts.'⁸¹ Law enforcement authorities must initiate a serious, impartial and effective investigation *ex officio* and without delay into complaints of violence 'using all available legal means'.⁸² This is not a matter of private interest but of public interest - an essential pre-requisite to the right of access to criminal, civil or administrative courts and to providing an effective remedy, whether civil or criminal. Weakness in an investigation that may give rise to state responsibility may be caused by negligence, by police unwillingness to investigate the actions of someone known to them, or inattention to ensuring that evidence is properly collected, analysed and collated. All of these may be a consequence of the low priority given to cases of violence against women or inexperience in determining what

⁷⁴ E.g., CEDAW Committee, Concluding Observations, Zimbabwe, 2012.

⁷⁵ E.g., CEDAW Committee, Concluding Observations, Cyprus, 2013.

⁷⁶ E.g., CEDAW Committee, Concluding Observations, Nepal, 2011.

⁷⁷ E.g., CEDAW Committee, Concluding Observations, Singapore, 2012 (recommending mandatory training for judges, police, prosecutors on the strict application of the legal provisions relating to violence against women).

⁷⁸ E.g., CEDAW Committee, Concluding Observations, Cyprus, 2013.

⁷⁹ CEDAW, article 15 (1): 'States Parties shall accord to women equality with men before the law.' See also PRWA, article 8.

⁸⁰ UN Human Rights Council Resolution 17/11, 17 June 2011, accelerating efforts to eliminate all forms of violence against women, para 3.

⁸¹ CEDAW, Concluding Observations, Zimbabwe, 2012.

⁸² See ECOSOC Resolution, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 24 May 1989.

constitutes relevant evidence in such cases. An excessive focus on what the woman says (which may in any case be treated with scepticism or disbelief) may be to the detriment of securing forensic evidence. Women victims of violence must be treated with sensitivity during medical and forensic examination by staff trained in the trauma caused by commission of these offences. Unscientific procedures such as 'finger testing' deny women's rights to privacy, health and safety⁸³ and inhibit women from reporting. The reception of a survivor in the police station impacts whether the crime is reported and a hostile or insensitive atmosphere (or worse, treating her as the wrongdoer) may deter reporting. Focusing on the woman's sexual experience or sexuality instead of on the purpose of the investigation constitutes secondary victimisation, is humiliating, and distorts the process. It is essential that an accurate and full file is kept and written records properly maintained. If this is not done, the chances of a successful trial are greatly reduced. A failure to discipline investigating officials who are negligent or act inappropriately allows for a climate of sloppiness and even corruption to become tolerated across the relevant agencies.

37. The form and incidence of violence will determine the parameters of the investigation into particular cases and what constitutes inadequacy. In cases of 'stranger', wide-scale or communal violence, requirements relating to immediate investigation, recording the initial reports of violence, the collection, preservation and recording of evidence and pursuit of all relevant lines of inquiry are all essential.⁸⁴ Victims and witnesses must not be subject to intimidation. In the context of a rape investigation, the ECtHR found that inadequacies such as the failure to test witness evidence, not allowing the applicant to question witnesses, and not considering the credibility of the accused all meant that the investigation fell short of the required international standard.⁸⁵ In cases of domestic violence, the perpetrator will be known, nevertheless, an adequate investigation requires such specific actions as the police accepting and registering the applicant's criminal complaint, launching a criminal investigation (including a search of premises or vehicles where weapons might be concealed), keeping a proper record of emergency calls, and advising the next police shift of the ongoing situation. The duty to investigate includes ongoing research into the causes of violence against women as well as responding to specific allegations in particular cases. It also requires trained police forces who take women's allegations seriously.

Criminal prosecution: combatting impunity

38. Following investigations, the state must ensure that accused perpetrators are vigilantly prosecuted in a timely fashion and on appropriate charges. The CEDAW Committee has cautioned against informal forms of dispute resolution and mediatory procedures that favour reconciliation in situations of violence, for example in the family.⁸⁶ It has recommended that states scrutinise such processes closely. Lack of awareness of gender-based violence may lead prosecutors to present weak cases which allow the accused persons to be acquitted. Effective prosecution requires legislation that identifies the relevant offences, defines and criminalises them, does not allow for discriminatory defences that exonerate the accused, or lead to reduced sentences. Criminal procedures must not allow for the secondary victimisation of women where the victim suffers further harm through the response of institutions and individuals to the victim's situation, for instance through aggressive and intrusive questioning about the details of the sexual assault or her own sexual activity. Legislation that is adopted must be applied. For instance, although female genital mutilation is criminalised in the United Kingdom, there have been no prosecutions.⁸⁷ In countries that have criminalised marital

⁸³ *Human Rights Watch, Dignity on Trial: India's Need for Sound Standards for Conducting and Interpreting Forensic Examinations of Rape Survivors (2010)*.

⁸⁴ Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, CEDAW, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO; *Cottonfield Case*, above note 12; CEDAW Committee, Concluding Observations, India, exceptional report 2010.

⁸⁵ *MC v Bulgaria* (ECtHR) (Application No. 39272/98), 3 December 2003.

⁸⁶ CEDAW Committee, Concluding Observations, Sri Lanka, 2011.

⁸⁷ CEDAW Committee, Concluding Observations, United Kingdom, 2013.

rape there are rarely prosecutions.⁸⁸ The reasons for such lack of prosecutions are unclear and may vary from place to place. Some possible explanations are victims' unawareness that such behaviours are criminalised, apprehension of ostracism in light of the social acceptance of such actions, or unwillingness to report family members. Police or prosecutors may also be unwilling to pursue reports of violative behaviours that confront cultural norms.

39. A controversial issue is whether prosecution may be effectuated in the absence of a complaint by the victim, or where the victim has withdrawn her complaint. On the one hand, her cooperation may be instrumental to securing a conviction, while on the other, the commission of any crime of violence is contrary to the public interest and prosecution of the perpetrator has symbolic and deterrent effect. It is important that authorities seek to inform themselves about the reasons for a victim's withdrawal of her complaint, which may have been due to threats, pressure and fear and be an indicator of risk.

Definition of criminal offences

Domestic violence

40. Crimes of violence against women must be subject to the specific legislation that is applied. Defining the crime of domestic violence is not easy and there is no international law definition. It is possible to charge violence against women under existing criminal laws relating to assault, battery, wounding or grievous bodily harm. However, this makes invisible the incidence and systemic nature of violence against women. Domestic violence may also be understood as intimate partner violence or familial violence. It is important that the definition does not depend upon marriage between the victim and the perpetrator, nor that the violence occurs in the common residence. The definition should encompass violence committed by a current or previous partner and by other members of the domestic unit regardless of any biological or legal family ties. Special attention and provision must be made for inter-generational violence against children and against elderly women. The Istanbul Convention provides a helpful guide whereby domestic violence encompasses 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.'⁸⁹

41. There can be no defence of violence against women based upon tradition or custom. In *Police v Piuilā*, the court observed that there appeared to be an accepted view in Samoa that failure by the wife to perform her 'wifely duties' (in this instance, not ensuring that the children were quiet) justified assaulting her. The court said: 'this sort of conduct is no longer acceptable and will not be tolerated.'⁹⁰ Attitudes that accept chastisement of women family members are rooted in discriminatory constructions of gender. Deviation from assigned gender roles may result in social ostracism and be pointed to as a justification for a punitive response,⁹¹ as for example where it is claimed that killing a woman who has transgressed social norms is a legitimate act in defence of the family's honour. Acceptance of this argument may lead to charges not being brought, the accused being acquitted, or low sentences being imposed. Laws that allow perpetrators of so-called honour crimes to negotiate pardon with victims' families must be repealed and laws criminalising offenses committed in the name of honour be given full effect thereby ensuring that perpetrators do not benefit from legal concessions, are not pardoned and escape punishment.⁹² The CEDAW Committee has repeated its concern about rape being criminalised under a Criminal Code 'Of crimes against the Peace

⁸⁸ E.g., CEDAW Committee, Concluding Observations, Belize, 2007.

⁸⁹ *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Istanbul, article 3 (b).

⁹⁰ *Police v Piuilā*, [2010] WSSC 21, Supreme Court, Samoa.

⁹¹ CEDAW Committee, Concluding Observations, Bangladesh, 2011 (concern at shalish rulings which punish "anti-social and immoral behaviour").

⁹² CEDAW Committee, Concluding Observations, Pakistan, 2013.

and Honour of Families and against Morals' rather than as a crime against the physical and mental integrity of women and as a form of sex and gender based-discrimination.⁹³

Harassment

42. Legislation against sexual harassment in the workplace and public places is required. Some forms of work create particular vulnerability to violence and harassment, for example domestic work, especially for women migrant workers who 'are scarcely ever out of sight of their employers' and may be unable to register with their embassies or file complaints.⁹⁴ Migrant workers remain the concern of their state of origin which should have appropriate mechanisms to respond to abuses of its national women working abroad. An especially serious case of sexual violence at work occurred in the case of *Vishakha v State of Rajasthan*, which also demonstrates the use of CEDAW in constructing an appropriate response.⁹⁵ A woman social worker was employed to go to rural areas to educate the population about such issues as dowry and child marriage. She was allegedly gang raped. In civil proceedings, there was no relevant domestic legislation on sexual harassment at work. Laying down detailed guidelines for safeguarding women's rights at work, the Supreme Court of India asserted the significance of international conventions and norms, in particular CEDAW, Article 11 and General Recommendation No. 19. The guidelines were approved in a subsequent case of workplace harassment.⁹⁶ The Supreme Court described the message of the Convention as 'loud and clear': 'sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.' The guidelines have now been superseded by statute, which in its preamble also affirms that 'protection against sexual harassment and the right to work with dignity are universally recognised human rights by international conventions and instruments such as Convention on the Elimination of all Forms of Discrimination against Women.'⁹⁷

Rape

43. Sexual offences must be defined in a way that gives effect to the reality of women's experiences of the acts of violence committed against them. The definition of rape has been subject to law reform initiatives in many Commonwealth countries, such as the United Kingdom, Canada, South Africa and Australia. As recognised by the South African Constitutional Court: 'The object of the criminalisation of this act [rape] is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights - a cornerstone of our democracy.' It reflects the unequal power relations between men and women in our society.⁹⁸

44. Controversial issues include: whether rape and sexual assault are 'gender-neutral' offences, or whether they may only be committed by a man against a woman; the criminalisation of marital rape; the minimum age of consent for sexual activity; and whether the important issue is lack of consent by the victim, or use of force by the perpetrator. There is a growing consensus in international criminal and human rights law around some of these areas. For instance, the International Criminal Tribunals for Yugoslavia⁹⁹ and Rwanda¹⁰⁰ have rejected legal definitions of rape that limit the offence to where the rapist has used force or threats of force, or where the woman must show physical

⁹³ CEDAW Committee, Concluding Observations, Malta, 2010.

⁹⁴ CEDAW Committee, General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R, 5 December 2008.

⁹⁵ *Vishakha v. State of Rajasthan* (1997) 6 SCC 241, Supreme Court, India.

⁹⁶ *Apparel Export Promotion Council v A.K. Chopra*, (1999) 1 SCC 759, Supreme Court, India.

⁹⁷ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

⁹⁸ *Masiya v Director of Public Prosecutions* [2007] ZACC 9; 2007 (5) SA 30, Constitutional Court, South Africa.

⁹⁹ E.g., *Prosecutor v Furundzja*, IT-95-17/1-T, 10 December 1998, especially paras 183- 185; *Prosecutor v Kunarac and others*, IT-93-23-T, paras 440-460; *Prosecutor v Kunarac and others* IT-96-23/1-A, 12 June 2002, paras 128-33.

¹⁰⁰ *Prosecutor v Jean-Paul Akayesu* ICTR-96-4, 2 September 1998, para 598. *Gacumbitsi v Prosecutor* ICTR-01-64 -A, 7 July 2006, paras 147-157.

resistance. Such a requirement puts women at risk of further violence. The ECtHR has also concluded that states' positive obligations under the ECHR '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.'¹⁰¹ The PRWA, Article 4 (2) (a) requires steps to legislate to prohibit 'unwanted or forced sex'. The CEDAW Committee has clarified that rape is to be understood as violating a woman's right to 'personal security and bodily integrity'.¹⁰² It has recommended a legislative definition of rape that places 'the lack of consent at its centre' and removes requirements that sexual assault be committed by force of violence and that penetration be proved.¹⁰³ The definition of rape must incorporate all non-consensual sex and sex where the accused is reckless as to whether the woman was consenting. For example, in *S v Bechu* the accused admitted he was drunk and pleaded not guilty on the grounds that he believed the victim to be consenting to sexual intercourse.¹⁰⁴ The court considered a man's behaviour to be reckless when 'he is aware that the other party may not consent but proceeds anyway either knowing that none exists or not caring whether it does or not. In determining whether he actually did believe the other person was consenting a jury may take account of the presence or absence of reasonable grounds for such belief.' The CEDAW Committee has recommended that a definition '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.'¹⁰⁵

45. The notion of consent is not free from difficulty as women may feel coerced into agreeing to sexual intercourse through fear of physical harm, economic dependence, or other reasons. The concept of 'coercive circumstances', whereby the victim's ability to give genuine consent is negated, has been used in international criminal law in an attempt to address this. Thus, the elements of rape as a war crime or crime against humanity under the Statute of the ICC have been defined in terms of the perpetrator negating the victim's ability to give free and uncoerced agreement to sexual contact, through use of force, threat of force, or coercion, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment. A coercive environment does not only exist in armed conflict; gang rape, social and economic circumstances which are exacerbated by gendered expectations can also be coercive and the international criminal law approach provides a model for domestic legislation.¹⁰⁶

46. Marital rape is a form of domestic violence that is little acknowledged. Failure to criminalise marital rape presents the wife as the property of her husband and denies her equality in the marriage, contrary to CEDAW, Article 16. 'The belief that women are inferior to men or part of their personal property is obsolete and unacceptable.'¹⁰⁷ The CEDAW Committee has expressed its concern to a number of Commonwealth member states at the absence of legislation criminalising marital rape, or restriction of its application to situations where the spouses are living apart, for example Pakistan, The Bahamas, Mauritius, Singapore, Zambia and Ghana. Where marital rape has been criminalised, few cases are brought to court and where there are prosecutions judges may not convict accepting the husband's defence of 'honest but mistaken belief' in consent to intercourse.¹⁰⁸

47. Other manifestations of violence against women should also be criminalised and defined, ensuring that those prevalent in the particular society are included. For example, responding to what were perceived as significant forms of violence against women on the continent, the 2011 Istanbul Convention on violence requires criminalisation of psychological violence, stalking, physical violence, sexual violence and rape, forced marriage, female genital mutilation, forced abortion, forced

¹⁰¹ *MC v Bulgaria (ECtHR)* (Application No. 39272/98), 3 December 2003.

¹⁰² *Vertido v The Philippines*, Communication No 18/2008, 1 September 2010, CEDAW/C/46/18/2008.

¹⁰³ E.g., CEDAW Committee, Concluding Observations, Malta, 2010.

¹⁰⁴ *S v Bechu* (1999) 3 CHRLD 155, Magistrate's court, Fiji.

¹⁰⁵ *Vertido v The Philippines*, above note 101.

¹⁰⁶ *Vertido v The Philippines*, above note 101.

¹⁰⁷ *S v Bechu*, above note 103.

¹⁰⁸ E.g., *R v T.V.* (2006) OJ No. 4089, (2006) ONCJ 338.

sterilisation, sexual harassment, as well as aiding and abetting and attempting the commission of these crimes.¹⁰⁹

Criminal procedures

48. Delay in bringing cases to court, slowness, and length of procedures in cases involving violence against women all amount to a denial of access to justice. Where the justice system regularly fails to deal promptly and effectively with such cases there is a structural violation of the standard of due diligence. Specialised bodies such as victim-friendly or family violence courts, domestic violence and sex crimes units in law enforcement agencies, or increasing the number of women in law enforcement roles, are all practical measures that have been introduced in some Commonwealth member states and recommended by the CEDAW Committee with respect to others.

49. Failure to deal with evidentiary issues in a gender-sensitive way can deter women from reporting and thus hinder women's access to justice. An example is whether corroborative evidence is needed for a successful prosecution of rape or sexual violence. By the nature of the offence there may be no witnesses other than the victim, and forensic or other evidence may not have been secured. However, requiring corroborative evidence is discriminatory in that it 'place[s] victims of sexual offences in a special category of suspect witnesses with convictions solely supported on their evidence as being regarded as unsafe and unsatisfactory.' It rests upon an assumption that women's evidence is 'intrinsically unreliable'.¹¹⁰ A requirement that the court delivers a cautionary statement that this may be the case and warns against the dangers of convicting without corroboration is also discriminatory. Different courts have taken different approaches. An important statement that rests upon the principle of assessment of the credibility and reliability of the victim is the following: 'The testimony of a victim of sexual assault is vital, and unless there are compelling reasons which necessitate corroboration of her statement, the court should find no difficulty in convicting an accused on her testimony alone if it inspires confidence and is found to be reliable. Evidence on a point is to be judged not by the number of witnesses produced but its inherent truth; one credible witness outweighs the testimony of a number of other witnesses of indifferent character. It is also improper and undesirable to treat the victim's testimony with suspicion and for her to be considered an accomplice.'¹¹¹

50. The Fiji Court of Appeal has outlawed the practice, holding it to be both discriminatory and demeaning of women and to serve little practical purpose.¹¹² The court considered that adopting this approach was in conformity 'with many other, if not most common and civil law jurisdictions' and the relevant international instruments. It also noted the decision of the Eastern Caribbean Court of Appeal (Grenada) in *Regina v Gilbert*.¹¹³ The judge retains the discretion to give a cautionary warning 'wherever there is some particular aspect of the evidence calling into question its reliability, e.g. where the complainant has been previously found to be unreliable or to have a grudge against the accused, or where there has been substantial delay in the making of the complaint or where her veracity could be doubted due to age or mental disability.'¹¹⁴ Importantly this approach places 'victim evidence in rape cases on the same basis, not only with the evidence of victims in other cases of criminality, but generally, that is subject to a caution where some aspect of unreliability arises justifying a caution particular to that case.' In contrast, a Solomon Islands court considered that removal of a requirement to give a cautionary warning about the dangers of convicting on uncorroborated evidence in rape cases should be achieved through legislation. Failing such a

¹⁰⁹ *Council of Europe Convention on preventing and combating violence against women* and domestic violence, Istanbul, 2011, articles 33-41.

¹¹⁰ *Balelala v State*, [2005] 5 LRC 365, Court of Appeal, Fiji, referring to *R v Seaboyer* [1993] 1 LRC 465, Supreme Court, Canada.

¹¹¹ *Al Amin v the State* 51 DLR (1999) 154, 19 BLD (HCD) (1999) 307, (1998) 2 CHRLD 453), High Court, Bangladesh.

¹¹² *Balelala v State*, above note 109.

¹¹³ *Regina v. Gilbert* (2002) 2 AC 531, Eastern Caribbean Court of Appeal (Grenada).

¹¹⁴ *R v Daniels* [1986] 2 NZLR 106, Court of Appeal, New Zealand.

legislative step, the courts could act.¹¹⁵ Nevertheless, reliance upon judicial discretion as to when a cautionary statement is appropriate emphasises the need for judicial training in gender sensitivity and possible gender bias.

51. There are a number of issues that reduce the effectiveness of criminal proceedings for conveying the message that such offences are serious crimes and not to be tolerated. One is reduction of charges. For instance, in *State v Sorpapelu* a married man with four children was accused of 'indecent assault' after he had sucked the breast of a sleeping 16-year-old family member.¹¹⁶ The Magistrate's Court reduced the charge from 'indecent assault' to that of 'indecently insulting or annoying a female', which carried a lower sentence. The High Court of Fiji did not accept the reduced charge, but for a technical legal reason. It did, however, note that no force was applied, no weapon used and no penetrative assault attempted. While welcoming the retention of the more serious charge, it is unfortunate that the court did not take the opportunity to emphasise the seriousness of any such commission of sexual violence. In *Sorpapelu*, a suspended sentence was imposed despite retention of the more serious charge.

52. The failure of courts to pass a sentence appropriate to the seriousness of the offence and commensurate with other acts of violence undermines equality before the law.¹¹⁷ A welcome example of this was from the Court of Appeal in Kiribati. The case involved violent beatings and other assaults by the husband which caused permanent disfigurement to his wife. The Chief Justice emphasised that domestic violence was not a private matter, that it was shameful, that it was to be severely punished and that it was a serious crime no matter who the victim; indeed, that the violence was against the offender's wife aggravated the offence.¹¹⁸ He sentenced the husband to three years imprisonment. The Court of Appeal upheld the sentence, also observing that assaults on wives were to be treated as serious matters of public concern.¹¹⁹ Despite these welcome statements of the seriousness of the violence, it may be questioned whether a three years custodial sentence adequately conveyed the message.

53. In a number of cases, the Botswana courts have grappled with the difficult issue of ensuring a sufficiently severe sentence to deter the commission of violence against women, while leaving room for extenuating circumstances. 'Given the increasing prevalence in the jurisdiction of crimes of violence that were perpetrated against women, the courts were called upon to impose sentences which served to deter the commission of such crimes.'¹²⁰ In *Sekoto v The Director of Public Prosecutions*, extreme violence causing his girlfriend's death was committed by a man when she finished their relationship. Ramodibedi JA started his judgment with the words: 'The growing phenomenon of jilted lovers killing their partners is fast becoming a nightmare in this country'.¹²¹ It was emphasised that any woman has the right to end a relationship. In a similar case, the Court of Appeal considered the crucial question to be the determination of the appropriate sentence for murder. Lord Coulsfield JA stated that: 'Any judge who has to deal with a case of this kind would do well to start by thinking of a sentence in the region of 15-17 years, subject, of course to adjustment upwards or downwards, in the light of any particularly significant circumstances in the case before him.' He continued saying that: 'In a case of this kind, the factors which are likely to weigh most heavily with the court are, on the one hand, the vital need to protect the lives of members of society, and particularly women, [...] and, on the other the natural impulse to show such mercy as is possible to a young person who has committed a crime, albeit a heinous one, under extreme emotional pressure.'¹²²

¹¹⁵ *Teikamata v R* Court of Appeal Solomon Islands [2007] SBCA 3.

¹¹⁶ *State v Sorpapelu*, HAA151.05S, 7 March 2006, Court of Appeal, Fiji.

¹¹⁷ CEDAW Committee, General Recommendation No. 19, above note 4, para 24 (g) and (t) (i)).

¹¹⁸ In *Police v Piuilu* the Supreme Court of Samoa also considered the fact that the assault was committed by a husband against his wife to be an aggravating factor.

¹¹⁹ *Toakarawa v The Republic*, Court of Appeal Kiribati 2006] KICA 9, 26 July 2006.

¹²⁰ *Kefakae v The State* [2011] 1 BLR 143 Court of Appeal, Botswana.

¹²¹ *Sekoto v The Director of Public Prosecutions* [2007] 1 B.L.R. 392, Court of Appeal, Botswana.

¹²² *Ntesang v The State* [2007] 1 B.L.R. 387, Court of Appeal, Botswana.

54. In a further case, the lower courts imposed the death sentence on a man who murdered his former lover.¹²³ The accused (who was 28 years old) raised a number of issues that he claimed in mitigation, including that he had a good relationship with the deceased, they parented their children together, his estrangement from the deceased was aggravated by her supplanting him with another man, and was worsened by the obstacles she put in the way of him seeing his children. The Court of Appeal concluded that the unlawful killing of an innocent [woman] going about her lawful occasions merits a heavy sentence and commuted the death sentence to 18 years imprisonment.

55. A particular issue is whether sentences should be reduced because of expressions of regret by the perpetrator or claims of reconciliation that may be made through traditional practices, such as those that are frequent in cases of sexual violence in the Pacific region. The CEDAW Committee has, for instance, expressed concern about the 'practice of reconciliation and forgiveness ceremonies such as *bulubulu*, forced on victims of violence so that they remain in abusive and violent relationships'.¹²⁴ It has been commented that these practices are discriminatory because the overwhelming majority of offenders are males, because the victim is not brought into the process, and the arrangement resembles 'an engagement between the heads of the families affected to preserve social relations in the community or the village. The remorse of the perpetrator usually plays little or no part in the process.'¹²⁵ It is, however, difficult to assess what weight is given to such traditions in some cases where courts have other mitigating factors presented to them. For instance, in *Sorrapelu*, the accused made such claims and it is not apparent whether this was a factor in the comparatively low sentence.¹²⁶ There have been statements in the international instruments and by courts that aggravating circumstances be taken into account (or at least set against any extenuating or mitigating factors). The Istanbul Convention, Article 46 lists aggravating circumstances as including the severity of the injuries, the relationship between the victim and perpetrator, repeated offences, the presence of a child, and the use of a weapon. This does not mean that rehabilitation or therapeutic programmes for offenders should never be considered, but rather that the interests and opinion of the victim must be given the greatest weight.

Negative attitudes and stereotypes

56. In many jurisdictions, a major barrier to access to justice for women in cases of sexual and gender-based violence is the negative attitude towards women and girl victims from law enforcement officials, including police, magistrates, judges, law clerks, prosecutors and defence counsel. These are rooted in stereotyping, prejudice and attitudes as to the proper behaviour of women in the home and in public places. The CEDAW Committee constantly expresses its serious concern about the persistence of harmful norms, practices and traditions, patriarchal attitudes and deep-rooted stereotypes, regarding the roles and responsibilities of women and men in all spheres of life, as well as inadequate efforts to address such discriminatory practices directly and effectively and thus in violation of their obligations under the Convention, Article 5.¹²⁷ The Committee has, for instance, linked the unavailability of appropriate shelters and civil protection orders to traditional attitudes that regard women as subordinate to men.¹²⁸ Stereotypes of women as passive and obedient may foster an unacceptable assumption that a woman who does not fit this mould has provoked the violence committed against her.

57. Some gender-based myths and stereotypes are specific to the particular locale but others are repeated across societies. One is a culture of disbelief whereby women reporting violence are assumed to be lying with respect to its incidence and seriousness. This engenders contempt towards women

¹²³ *Kefakae v The State* [2011] 1 BLR 143 Court of Appeal, Botswana.

¹²⁴ CEDAW Committee, Concluding Observations, Fiji, 2010.

¹²⁵ Editorial comment, Pacific Human Rights Law Digest, vol 2 (2008).

¹²⁶ *State v Sorrapelu*, HAA151.05S, 7 March 2006, Court of Appeal, Fiji.

¹²⁷ See also PRWA, articles 2 (2); 4 (2) (d); Convention of *Belém do Pará*, articles 7 (e), 8; *Istanbul Convention*, article 12(1).

¹²⁸ *A.T. v Hungary*, Communication No. 2/2003, 26 January 2005, para 9.4 (finding a violation of CEDAW, article 5 and 16).

complainants of violence, disregard of their evidence and a lack of assistance to them, imposing a burden upon women in the justice system that is not shared by men and is thus discriminatory. In *Vertido v The Philippines* the complainant listed seven such myths and misconceptions that founded her claim that she had been re-victimised by the state in the criminal proceedings, which had acquitted her alleged rapist - an acquaintance who had taken her home following a meeting they had both attended. The CEDAW Committee explained the general principle that 'stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls 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.'¹²⁹ For instance, an expectation that the complainant should have resisted her attacker reinforces 'the myth that women must physically resist the sexual assault' and thus that there 'should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.'¹³⁰ Other concerns included: 'Stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim' and the weight given to the fact that the author and the accused knew each other. The presence of a gender ombudsperson in courts to ensure gender sensitivity might be one way of addressing this issue.

58. The media is one part of changing attitudes. States should introduce innovative education and public information programmes to help eliminate prejudices that hinder women's equality. The CEDAW Committee's General Recommendation No. 19 reaffirms its earlier General Recommendation No. 3, which urges the adoption of education and public information programmes, to help eliminate prejudices and current practices that hinder women's enjoyment of social equality.¹³¹ The Committee has recommended awareness campaigns, in conjunction with civil society and the media, and capacity building for public officials.

Duty to make reparation

59. As well as punishment of perpetrators, there has been an increasing focus on states' obligations to ensure that victims of gender-based violence receive reparation.¹³² Reparations awarded in response to violence against women should reflect the realities of that violence and its gendered impact. The Special Rapporteur on violence against women has stated that: 'The obligation to provide adequate reparations involves ensuring the rights of women to access both criminal and civil remedies and the establishment of effective protection, support and rehabilitation services for survivors of violence. The notion of reparation may also include elements of restorative justice and the need to address the pre-existing inequalities, injustices, prejudices and biases or other societal perceptions and practices that enabled violations to occur, including discrimination against women and girls.'¹³³

The obligation to fulfil

60. The obligation to fulfil requires states to be forward looking and to adopt short-, medium- and long-term policies to combat violence against women in all its forms and manifestations, aiming at the eventual fulfilment of its elimination. Strategies and policies must vary according to the nature of violence, its incidence, and the social and economic context. Accordingly, there must be multiple strategies involving a range of government agencies, NGOs and other civil society institutions.

¹²⁹ *Vertido v The Philippines*, above note 101.

¹³⁰ *Vertido v The Philippines*, above note 101.

¹³¹ CEDAW Committee, General Recommendation no. 3, sixth session, 1987 education and public information programmes.

¹³² PRWA, articles 4 (2) (f), 25; Istanbul Convention, article 30; CEDAW, General Recommendation No. 28, above note 2, para 32. .

¹³³ Special rapporteur on violence against women, Annual Report, 2010, *Reparations for women subjected to violence*, A/HRC/14/22, 19 April 2010, p. 2.

61. Many Commonwealth member states have adopted a national plan or strategy for addressing violence against women and instituted national machinery, such as a Taskforce for Action. The CEDAW Committee has approved a National Taskforce that brings together stakeholders from the government, law enforcement and civil society.¹³⁴ A national strategy should be comprehensive, concerted, long term, multidisciplinary, coordinated and include legal, educational, financial and social components. It must also be implemented, regularly monitored and evaluated. Sufficient budgetary and other resources must be allocated for its implementation and should not be allowed to be depleted, including for NGO services. A close relationship with civil society involving dialogue and information sharing in the development and implementation of national policies is recommended.

62. Long-term fulfilment of states' obligations encompass social, educative and technical measures, including coordination between different branches of government and between law enforcement and judicial officers in addressing gender-based violence; regular gender training to, and sensitisation of, all public officials, in particular judges, lawyers, law enforcement officials, parliamentarians, teachers and social workers; public awareness campaigns on all forms of violence against women and girls and its impact, that address men and boys as well as women and girls, religious and community leaders and young people; CEDAW and General Recommendation No. 19 to be made known and adhered to by health professionals; rehabilitation programmes; programmes in non-violent conflict resolution for perpetrators; ensuring autonomy and independence of forensic departments and experts in their investigation of crimes of violence against women.

63. Information and data on gender-based violence remain inadequate in many cases and sex disaggregated statistical data on violence against women, prosecution and conviction rates should be collected and collated. 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' is encouraged.¹³⁵ The CEDAW Committee has called upon states to study data on the incidence of different types of violence disaggregated by sex, age, ethnicity, urban/rural setting and the relationship of the perpetrator with the victim, as well as quantitative research to make findings in order to address violence against women.

Conclusions

64. The international community has expended considerable energy in ensuring that violence against women is understood as a violation of women's human rights and is a matter of global concern. The core principles relating to its prevention and criminalisation in all its diverse forms have been reiterated in global and regional institutions, as well as the recommendation of measures for protection of women from such violence and their subsequent recovery from its occurrence through a combination of legal and social measures. Legislative and judicial bodies, law enforcement, health and social welfare personnel in many Commonwealth member states have responded and introduced some relevant reforms, both legal and through training and oversight of relevant agencies. Nevertheless much remains to be done to ensure a holistic and comprehensive approach, for instance through maximising the input from educational and media networks. Commonwealth member states are urged both to comply with existing international standards with respect to violence against women and to recognise the continuous need to strengthen norms and standards for preventing and addressing all forms of violence against women and girls, at global, regional and national levels.

Recommendations

65. The following recommendations are made that Commonwealth member states should, where they have not already done so, consider:

- Adoption of a legislative definition of violence against women based on those adopted by the CEDAW Committee and the UN General Assembly

¹³⁴ CEDAW, Concluding Observations, New Zealand, 2007.

¹³⁵ CEDAW Committee, General Recommendation No. 19, para 24 (c).

- Including economic, verbal and psychological violence in the definition of violence against women, including domestic violence
- Addressing the problem of early and forced marriage and female genital mutilation
- Adoption of a legislative definition of rape that places the lack of consent at its centre and criminalises all non-consensual sex, including marital rape and sex where the accused is reckless as to whether there is consent. This removes requirements that sexual assault be committed by force and that penetration be proved
- Ensuring that all state laws, including criminal, civil, administrative and labour laws are neither directly nor indirectly discriminatory
- Incorporation into national legislation a definition of discrimination in accordance with CEDAW, Article 1
- Carrying out a gender audit of national legislation to identify laws that are directly or indirectly discriminatory; to repeal any discriminatory laws; discontinue laws, policies, regulations, programmes, administrative procedures or institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their human rights
- Including measures for the prevention of violence against women in national legislation
- Making provision for an assessment of risk of violence against women, both in specific instances of which the authorities are aware, or should be aware, and more generally, in order to manage and contain the risk
- Making provision for evaluation by the relevant authorities of the heightened risk of violence faced by women made especially vulnerable by their circumstances, for example, women migrants, women living in conditions of extreme poverty, women with disabilities, indigenous or ethnic minority women, older women, lesbian, and transgender women
- Making provision for civil remedies for women victims of violence that are speedily obtainable, offer immediate protection, do not impose any financial or administrative burden on the victim, and are available after normal working hours
- Identifying and addressing obstacles to securing civil law protection orders against perpetrators of violence against women
- Providing for effective legal sanctions against perpetrators of breaches of court issued protective orders
- Adoption of a comprehensive law on violence against women, criminalising all acts of such violence
- Ensuring that the criminal law does not allow for defences that exonerate the accused, or lead to reduced sentences based upon social or cultural normalisation of violence against women
- Adoption of a comprehensive law on sexual harassment
- Ensuring access to courts for victims of violence against women, not to compulsory informal community dispute resolution systems
- Identifying and redressing obstacles that prevent women from reporting acts of violence committed against them

- Ensuring equality of access to and delivery of economic and social rights for women in accordance with CEDAW and the Covenant on Economic, Social and Cultural Rights, 1966
- Introduction of educational measures to de-stigmatise victims of violence against women and raise awareness about the criminal nature of such acts
- Ensuring prompt, impartial and effective investigations into complaints of violence, using all available legal means
- Ensuring that women victims of violence are treated with sensitivity during medical and forensic examination by staff trained in the trauma caused by commission of these offences
- Ensuring that an accurate and full file of a criminal investigation is kept and written records are properly maintained
- Supporting ongoing research into the causes of violence against women and wide dissemination of the findings of such research
- Ensuring that accused perpetrators are vigilantly prosecuted in a timely fashion and on appropriate charges
- Providing for criminal procedures that do not allow the secondary victimisation of women through aggressive and intrusive questioning about the details of the sexual assault or her sexual activity
- Taking steps to eradicate harmful norms, practices and traditions, patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in all spheres of life in accordance with CEDAW, Article 5
- Ensuring training of police, prosecutors and judges in understanding the pervasiveness of gender stereotypes and how they deny equality before the law and access to justice
- Ensuring that sentencing for crimes of violence against women reflects the seriousness of the offence
- Ensuring legal provision for adequate reparation for women victims of violence that reflect the realities and seriousness of that violence and its gendered impact
- Implementation of a national strategy for the prevention, prosecution and punishment of violence against women that is comprehensive, concerted, long term, multidisciplinary, coordinated and includes legal, educational, financial and social components; ensure regular monitoring and evaluation
- Ensuring allocation of responsibility at a senior level for the effective implementation of the national strategy, as well as sufficient budgetary and human resources
- Ensuring ongoing dialogue and information sharing with civil society, in particular women's groups, in the development and implementation of national policies for the prevention, prosecution and punishment of violence against women
- Ensuring the collection and collation of gender disaggregated data with respect to violence against women, including within the justice, health and social sectors of government.

Commonwealth Secretariat
Marlborough House, Pall Mall
London SW1Y 5HX
United Kingdom

thecommonwealth.org

