THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN GUIDING THE INTERPRETATION OF WOMEN'S RIGHT TO BE FREE FROM VIOLENCE UNDER THE SOUTH AFRICAN CONSTITUTION

HELéNE COMBRINCK

A thesis submitted in fulfilment of the requirements for the degree of Doctor Legum in the Faculty of Law, University of the Western Cape

PROMOTER: PROFESSOR JULIA SLOTH-NIELSEN

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KEYWORDS

right to freedom from violence

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ABSTRACT

THE ROLE OF INTERNATIONAL LAW IN GUIDING THE INTERPRETATION OF WOMEN'S RIGHT TO BE FREE FROM VIOLENCE UNDER THE SOUTH AFRICAN CONSTITUTION

H COMBRINCK

LLD Thesis, Faculty of Law, University of the Western Cape

The South African Constitution expressly guarantees the right to freedom from all forms of violence from either public or private sources. The government has in recent years made significant advances in its response to violence against women, including the enactment of progressive legislation such as the Domestic Violence Act of 1998. However, the levels of violence against women remain disconcertingly high.

South African courts have dealt with a number of cases relating to women's right to freedom from violence and concomitant State obligations to respond to such violence when committed by private actors. The emerging body of jurisprudence may be criticised for its inadequate consideration of the full scope of this right in international law – as required in terms of section 39(1)(b) of the Constitution. This study accordingly sets out to examine how the development of women's right to freedom from violence in international human rights law may guide the interpretation of the right under the South African Constitution.

The thesis firstly looks at how women's right to freedom from violence has developed in international (global) human rights law since the early 1990s. In this regard, the study finds that while the issue of violence against women (and women's rights generally) was barely on the international human rights agenda at the beginning of this period, an enormous degree of development has subsequently taken place. Through the adoption of documents such as *General Recommendation No. 19* by the Committee on the Elimination of Discrimination against Women, the *Declaration on Elimination of Violence against Women* and the *Beijing Declaration and Platform of Action*, international norms and standards were set regarding role of the State in providing women with

protection against violence.

These standards have subsequently been clarified and refined further through events at regional level. The thesis also investigates the human rights instruments and jurisprudence of regional bodies, and finds that the normative framework has been advanced through instruments such as the inter-American *Convention of Belém do Pára* and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, as well as recent judgments of the Inter-American Court of Human Rights and the European Court of Human Rights relating to violence against women.

Turning next to the question of how women's right to freedom from violence has been dealt with in South African case law, the thesis finds that although South African courts initially (at the beginning of this line of judgments) took international law into consideration, this analysis has been watered down in more recent judgments. Drawing on practical examples from the investigation into international human rights law, the conclusion is reached that South African law must be given the benefit of a more nuanced and in-depth reading of women's right to freedom from violence. This will only be possible if the courts engage in a more considered analysis of the normative framework provided by international human rights.

8 July 2010

DECLARATION

I declare that '*The Role of International Human Rights Law in Guiding the Interpretation of Women's Right to be Free from Violence under the South African Constitution'* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: **Heléne Combrinck** **Date: 8 July 2010**

Signed: **.....**

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I have been fortunate to enjoy the encouragement and support of a warm circle of colleagues, friends and family while completing this thesis. Unfair as it may be to single out anyone, certain persons do deserve special mention: Lillian Artz, Japie Combrinck, Jacqui Gallinetti, Sonja Pithey and Lorenzo Wakefield, who all helped me to get this wall into the plane (in the words of Bob Dylan).

Finally, I am indebted to the many women I have met in the past years who lived through gender-based violence and chose to relate their experiences. Their resilience (often in the face of inconceivable brutality) remains inspiring.

ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
CAHVIO	Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CIM	Inter-American Commission on Women
CSW	Commission on the Status of Women
ECOSOC	Economic and Social Council
EU	European Union
HIV	Human Immuno-deficiency Virus
IACHR	Inter-American Commission on Human Rights
IACrtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICERD	International Convention on the Elimination of Discrimination of All Forms of Racial Discrimination
ICESR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and Communication Technologies
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
MDG	Millennium Development Goal
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organisation
NWC	National Women's Coalition
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	Office of the [UN] High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
SAPS	South African Police Service
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
USA	United States of America

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CHAPTER 1

INTRODUCTION AND RATIONALE

1. ORIGIN OF THIS STUDY

Violence against women[1] is a global phenomenon, transcending all distinctions of geography, race and class. This is not a recent development – violence against women has been part of human existence as long as has patriarchy.[2] So, too, has women's resistance to such violence.[3] This resistance, which grew increasingly visible and more organised with the general expansion in feminist campaigns in the 1960s and 1970s,[4] received enormous support in the past fifteen years from the burgeoning recognition of women's rights in international law[5]. Moreover, the entrenchment of women's right to freedom from violence in international

1 This thesis adopts the definition of violence against women as set out in Art 1 of the Declaration on the Elimination of Violence against Women, i.e. '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' - Declaration on the Elimination of Violence against Women GA Res 48/104 UN Doc A/48/104 (adopted 20 December 1993) [hereafter 'the Violence Declaration'].

2 See in this regard S Brownmiller *Against Our Will* (1975) 16-30, 31-113 for a description of rape during various historical periods; also L Fryer 'Law versus prejudice: Views on rape through the centuries' (1994) 1 *SACJ* 61 at 64 *et seq*.

3 Brownmiller *op cit note* 2 at 14-15.

4 See A Gruber 'The feminist war on crime' (2007) 92 *Iowa Law Review* 741 at 748-749.

5 Strydom & Hopkins explain that 'international law' is traditionally defined as 'that body of law which binds or regulates states in terms of their relationships with other states' – H Strydom & K Hopkins 'International law' in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2 ed (Original Service 2005) 30-1; see also J Dugard *International Law: A South African Perspective* 3 ed (2005) 1. A distinction should be made between *public* international law (which seeks to govern the relations between states) and *private* international law (which concerns the relations between individuals whose legal relations are governed by the laws of different states) – Dugard *op cit* at 2. This study focuses on *public* international law; however, in the interest of brevity, the term 'international law' will be used.

human rights law[6] contributed to shifting the issue of violence against women from secret shame to a priority on the worldwide human rights agenda.

This study originated against the background of this growing recognition of violence against women as a 'legitimate' international human rights concern, and more specifically in research relating to violence against women conducted by the candidate at the Gender Project of the Community Law Centre[7] at the University of the Western Cape from 1997 to 2009.[8] At the beginning of this period, the 'new' South African Constitution[9] with its express guarantee of the right to freedom from all forms of violence[10] came into operation and within

6 Brownlie points out that many lawyers refer to an entity described as 'International Human Rights Law', which is assumed to be a separate body of norms – I Brownlie *Principles of Public International Law* 7 ed (2008) 554. He explains that while this is a convenient category of reference, it is also a source of confusion: human rights problems occur in many contexts. The issues may arise in domestic law, or within the framework of a standard-setting convention, or within general international law. But there must be reference to the specific and relevant applicable law. There is thus 'the law of a particular State', or 'the relevant principles of general international law'. He notes that in the real world of practice and procedure, there is no such entity as 'International Human Rights Law'. Brownlie's persuasive viewpoint notwithstanding, the concept is used in this study for ease for reference.

7 The Community Law Centre is a human rights research, education and advocacy institute forming part of the Faculty of Law at the University of the Western Cape, Cape Town.

8 This work included *inter alia* participation in the drafting of new domestic violence legislation; research on the reform of sexual assault legislation (including several submissions to the South African Law Reform Commission and parliamentary portfolio committees); the determination of bail in sexual assault cases; a comparative analysis of sexual assault legislation in selected African jurisdictions; monitoring the implementation of the Domestic Violence Act by the South African Police Service; promoting access to justice of women experiencing domestic violence; exploring the intersections between HIV/AIDS and violence against women; research on the right of women experiencing domestic violence to have access to adequate housing; and research on violence against marginalised women, including commercial sex workers and women with disabilities.

9 Constitution of the Republic of South Africa Act 108 of 1996 [hereafter 'the Constitution']. This Act came into effect on 4 February 1997.

10 Art 12(1)(c) of the Constitution.

three years, the Constitutional Court was called on to consider the ambit of this right in the context of violence against women in *S v Baloyi*.[11] At the same time, the case of *Carmichele*, which would prove to be a watershed moment in South African law, was making its inexorable way towards the Constitutional Court via the High Court and the Supreme Court of Appeal. These events naturally influenced the work of the Gender Project and the candidate.[12]

Significant advances were simultaneously unfolding at the international level.[13] In 1994, the Organisation of American States accepted the influential Inter-

11 2000 (1) SACR 81 (CC).

12 See H Combrinck 'Positive state duties to protect women from violence: Recent South African developments' (1998) 20 *Human Rights Quarterly* 666-690; B Pithey *et al Legal Aspects of Rape* (1999); H Combrinck 'The right to freedom from violence and the reform of sexual assault law in South Africa' in J Sarkin & W Binchy (eds) *The Citizen and the State – South African and Irish Perspectives* (2001) 184-194; H Combrinck '"He's out again": the role of the prosecutor in bail for persons accused of sexual offences'(2001) 5 *Law, Democracy and Development* 31-44; H Combrinck & Z Skepu *Bail in Sexual Assault Cases: Victims' Experiences* (2003); R Barday & H Combrinck *Implementation of Bail Legislation in Sexual Assault Cases: First Research Report* (2002); H Combrinck & L Artz '"A wall of words": Redefining the offence of rape in South African law' (2003) *Acta Juridica* 72-91; H Combrinck 'The dark side of the rainbow: Violence against women in South Africa after ten years of democracy' (2005) *Acta Juridica* 171-199; H Combrinck & L Chenwi *The Role of Informal Community Structures in Ensuring Women's Rights to Have Access to Adequate Housing in Langa, Manenberg and Mfuleni* (2007); H Combrinck & L Wakefield *At the Crossroads: Linking Strategic Frameworks to Address Gender-Based Violence and HIV/AIDS in Southern Africa* (2007); H Combrinck & L Artz 'Sexual Assault' in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 298-320; H Combrinck 'Claims, entitlements or smoke and mirrors? Victims' rights in the Sexual Offences Act' in L Artz & D Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) 262-282; H Combrinck & L Wakefield *Training for Police on the Domestic Violence Act* (2009)*;* H Combrinck *Living in Security Peace and Dignity: The Right to Have Access to Housing of Women Who Are Victims of Gender-Based Violence* (2009); H Combrinck 'Rape law reform in Africa: "More of the same" or new opportunities?' in C McGlynn & VE Munro (eds) *Rethinking Rape Law* (2010) 122-135.

13 R Coomaraswamy *Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences* UN Doc E/CN.4/1995/42 (dated 22 November 1994).

American Convention on the Prevention, Punishment and Eradication of Violence against Women (known as 'the Convention of Belém do Pará'),[14] which expressly entrenches women's right to freedom from violence.

The year 1995 saw the Fourth UN World Conference on Women in Beijing, China, and the adoption of the Beijing Platform for Action. This document, which identified violence against women as one of its twelve critical areas of concern, consolidated several of the standards set out in the General Recommendation adopted by the committee monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women[15] and the Violence Declaration. The newly-appointed UN Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, also published her first thematic report (addressing domestic violence) in 1995. Closer to home, in September 1998 the Southern African Development Community ('SADC') approved an Addendum,[16] aimed at addressing violence against women and children, to its *Declaration on Gender and Development*.[17]

I posed the question in 1998 as to how the right to freedom from violence, which was now guaranteed in the South African Constitution, would take shape in

14 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) OAS/Ser.L.V/II.92/doc31 rev.3 (1994), signed 9 June 1994, entered into force 3 March 1995.

15 Adopted 18 Dec 1979, GA Res 34/180, UN GAOR, 34th Session, UN DOC A/34/46 (1980), entered into force 3 September 1981 [hereafter 'the Women's Convention'].

16 The Addendum on the Prevention and Eradication of Violence against Women and Children set out detailed commitments from signatory States regarding measures to address violence against women and children. This Addendum was adopted at Grand Baie, Mauritius on 14 September 1998 - reprinted in (1999) 26 *Review of African Political Economy* 415-417.

17 Adopted on 8th September 1997. Text available at official SADC website at [www.sadc.int/index/browse/page/174]. (Accessed 17 May 2010.)

practice in South Africa in the light of the standards emerging in international law.[18] At the time, the question was formulated mainly with reference to measures to be taken on legislative and executive level, rather than interpretation by the courts. However, the way in which the right to freedom from violence has subsequently been interpreted by the Constitutional Court and the Supreme Court of Appeal ('SCA') led to the identification of the research problem addressed in this thesis. A preliminary assessment indicated that this interpretation could benefit from a closer investigation of the norms and standards emerging in international human rights law. In addition, the Constitutional Court and the SCA are courts of precedent, and thus hold the potential to effect important structural changes to State practice on a broad level.

2. RATIONALE

2.1 Current position in South Africa

Gender-based violence[19] has been described as 'one of the most extreme manifestations of power inequality between women and men'.[20] Given this imbalance of power, it is not surprising that women have in recent times increasingly looked to the influence of the State for intervention (both *responsive*, in the sense of punishing perpetrators, and *proactive*, in a preventive

18 H Combrinck 'Positive state duties to protect women from violence: Recent South African developments' (1998) 20 *Human Rights Quarterly* 688-690.

19 This term is defined in Section 3.2.1 below.

20 A Obando 'How effective is a human rights framework in addressing gender-based violence?' (2004) *WHRnet* [www.awid.org/eng/Issues-and-Analysis/Library/How-Effective-is-a-Human-Rights-framework-in-addressing-Gender-based-Violence]. (Accessed on 5 May 2010.)

sense) to address violence against women.[21] This strategy, while not unproblematic from a feminist perspective,[22] has resulted in major reforms in the response of the legal systems of many jurisdictions worldwide to domestic violence, sexual violence, marital rape, female genital cutting and other forms of violence against women. These reforms not only relate to the substantive legal provisions, but also the practices of those State officials responsible for implementation, including police, prosecutors and judicial officers.

The efforts of South African women's rights activists since the 1970s have similarly focused on challenges to the State's response to violence against women.[23] From the early 1990s onwards, these efforts began to pay off as the South African government increasingly made efforts to improve its response to such violence. In the past fifteen years, important advances have accordingly been made in the areas of legal reform, policy development and the introduction of 'structural' reform projects such as specialised sexual offences courts and multi-discipinary centres for victims[24] of sexual violence.[25]

21 R Coomaraswamy & LM Kois 'Violence against women' in KD Askin & DM Koenig (eds) *Women and International Human Rights Law* (1999) 177 at 178-179.

22 Increased levels of state intervention in the lives of women are not necessarily beneficial. For example, mandatory arrest and mandatory prosecution policies in domestic violence cases have been criticised for removing women's decision-making capabilities from the legal process, thus undermining individual agency and ultimately leaving victims disempowered yet again. See eg Miccio, who observes that 'the anxiety [among feminists] associated with mandatory arrest is emblematic of the paradox inherent in working with systems that have been the source of the problem'. - GK Miccio 'If not now, then when? Individual and collective responsibility for male violence' (2009) 15 *Wash. & Lee Journal Civil Rights & Social Justice* 405 at 414; also Gruber *op cit note* 4 at 758-759; 804-806.

23 See eg D Hansson 'Interim reflections on the Cape Attorney General's task group on rape' in S Jagwanth *et al* (eds) *Women and the Law* (1994) 411 at 415.

24 There is a long-standing debate among feminists as to whether the term 'victim' of violence should be abandoned in favour of 'survivor' – the latter often being preferred as one denoting empowerment and agency rather than powerlessness and vulnerability. Although I recognise the validity of this argument, I have opted to use 'victim' for

In respect of law reform, two legislative initiatives have been particularly significant: the enactment of the Domestic Violence Act[26] and the Criminal Law (Sexual Amendment and Related Matters) Amendment Act,[27] which address domestic violence and sexual violence respectively. However, these initiatives have not yet had a demonstrable impact on reducing the incidence of violence in South Africa,[28] and it is arguable whether they have succeeded in uniformly reducing the levels of secondary victimisation[29] experienced by victims at the hands of the criminal justice system.[30]

Contemporary research studies show that the South African Government's attempts to effect changes in its approach to violence against women regularly fail on the level of *implementation*.[31] These failures may consist of 'systemic'

purposes of this thesis, given that it is an accepted and familiar term in areas closely related to the central inquiry, such as the criminal justice system.

25 See eg L Vetten 'Violence against women in South Africa' in S Buhlungu *et al* (eds) *State of the Nation: South Africa 2007* (2007) 425 at 426-438.

26 Act 116 of 1998 [hereafter 'the Domestic Violence Act']. This Act replaced the Prevention of Family Violence Act 113 of 1993. The candidate was a member of the South African Law Reform Committee's subcommittee tasked with considering the drafting of new domestic violence legislation during 1997-1998, which culminated in the adoption of the Domestic Violence Act.

27 Act 32 of 2007 [hereafter 'the 2007 Sexual Offences Act']. This Act aims to reform various aspects of the law relating to sexual violence.

28 See discussion of the levels of violence against women in South Africa in Chapter 2, Section 2.1.

29 'Secondary victimisation' can be described as the unsympathetic, disbelieving and inappropriate responses that victims of sexual assault experience at the hands of society in general and at each stage of the criminal justice process – S Stanton & M Lochrenberg *Justice for Sexual Assault Survivors?* (1997) 1.

30 See eg H Combrinck & Z Skepu *Implementation of Bail in Sexual Offence Cases: Second Report* (2003) 18-19.

31 See eg P Parenzee et al *Monitoring the Implementation of the Domestic Violence Act: First Report* (2001); L Vetten & D Motelow 'Creating state accountability to rape survivors: A case study of the Boksburg Regional Court' (2004) 62 *Agenda* 45-52; L Artz & D Smythe 'Case attrition in rape cases: a comparative analysis' (2007) 20 *SACJ* 158-181; L Vetten *et al Tracking Justice: The Attrition of Rape Cases through the*

failure to conduct sufficient training of state officials, or to allocate sufficient budgetary and other resources to ensure effective implementation, but may also consist of individual instances of failure to comply with existing policies or directives.[32] In practice, these failures often expose women (either the 'original' victim, as would typically happen in cases of domestic violence, or other identifiable victims), to further acts of violence by the perpetrator.

The South African courts have been presented with a number of opportunities to evaluate the consequences of failure on the part of the State to respond to acts of (private) violence, and a progressive body of jurisprudence on State liability for such failure has evolved. It is apparent that the line of judicial interpretation exploring the scope of women's right to freedom from violence and concomitant State liability for failure to secure this right has not yet reached its final point. This study accordingly sets out to establish how the standards and norms emerging in international law may guide this development and thus lead to a clearer understanding of the nature and extent of women's right to freedom from violence in South African law.

Criminal Justice System in Gauteng (2008); R Sigsworth *et al Tracking Rape Case Attrition in Gauteng: the Police Investigation Stage* (2009).

32 The SAPS and National Prosecuting Authority have issued national instructions and policy directives setting out how cases of sexual assault and domestic violence should be dealt with. In addition, the Domestic Violence Act imposes specific duties on police officials and clerks of the court.

2.2 Significance of this study

The employment of a human rights paradigm to address violence against women is one that it is in need of considerable development in South Africa.[33] As is the case with many other areas of legislation and policy, drawing on rights-based arguments to motivate challenges to State responses is a strategy that has emerged only relatively recently, and much remains to be done to develop and enforce this approach in the context of violence against women.

The right to freedom from violence, as guaranteed in section 12(1)(c) of the Constitution, is one that has received remarkably little attention from legal academic commentators, both in South Africa and in the broader international environment. This is unfortunate, given the relevance of this right especially to women who are victims of violence. This study accordingly aims to make a contribution to the currently available body of knowledge on the right to freedom from violence, with specific reference to the interpretation of this right in the context of violence against women. Particular attention is paid to recent developments in regional human rights systems, including the African human rights system, and in this way, the study aims to also make also make a contribution to the broader field of women's rights in Africa.

[33] See H Combrinck 'Claims, entitlements or smoke and mirrors? Victims' rights in the Sexual Offences Act' in L Artz & D Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) 262 at 279-282.

3. SCOPE OF THE STUDY

3.1 Substantive scope

The study considers the broad area of gender-based violence committed against adult[34] women by private actors. While it is not necessary for purposes of this delineation to compile a comprehensive list of the various manifestations of violence that fall in the ambit of this study (for example, domestic violence, sexual violence, etc.), it is important to note that certain phenomena are specifically excluded.

The first exclusion is *human trafficking*. Although the Women's Convention clearly denotes human trafficking as a form of discrimination against women, [35] and trafficking has also been identified as a human rights violation,[36] this issue has developed into an area of specialisation of its own, especially since the adoption of the so-called 'Palermo Protocol'[37] as one of the additional protocols to the Convention of Transnational Organised Crime.[38] Because of the singular dynamics of human trafficking, the norms and standards that are emerging in international law in relation to human trafficking can be described as *sui generis*, bearing characteristics of a strong law enforcement approach with certain human

34 'Adult' means a woman over the age of eighteen years. Children have been excluded from the study, firstly because of the particular characteristics and consequences of violence against children, and secondly because of the specialised human rights protection framework in place in respect of children.

35 Art 6.

36 R Coomaraswamy *Report of the Special Rapporteur on Violence against Women,its Causes and Consequences* UN Doc E/CN.4/1997/47 (dated 12 February 1997) Part IV.

37 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime UN Doc A/55/383, Annex II).

38 GA Res 55/25, Annex I of 15 November 2000, entered into force on 29 September 2003.

rights protections for victims of trafficking. More importantly, because of the separate implementation mechanisms for the Palermo Protocol and regional instruments, the inclusion of human trafficking would have taken this study beyond manageable proportions.

A second exclusion is that of (voluntary) *commercial sex work* or prostitution.[39] (Forced prostitution and the exploitation of prostitution,[40] on the other hand, do fall within the ambit of the study.)

[39] Two broad schools of thoughts on sex work/ prostitution can be distinguished, i.e. those who view it as *work*, and those interpreting it as *exploitation.* Commentators who view sex work as work believe women have a right to choose to engage in the activity, as in any other form of work, and they should therefore have the same rights as other workers. This perspective - with which I align myself - aims to construct (voluntary) sex work as a legitimate occupation, and argues that where some adult sex workers make a 'free' decision to go into sex work, they should be able to do so. A fundamental premise here is that not all sex work is forced or coerced. There is, however, a recognition that the choice to enter sex work may be one choice exercised within a limited range of options, as is generally the case for women in the context of neo-liberal capitalist economies.
On the other end of the spectrum is the view that sex work is inherently exploitative, and that domination and violence are its essential features. Proponents of this view challenge the notion that sex work is a victimless crime, relying on studies and interviews with current and former sex workers documenting the fear and violence they experienced while in the industry. They reject the claim that sex work is a valid employment opportunity for women, arguing instead that it is one of the most graphic examples of men's domination of women. This school of thought also refutes the notion of women freely choosing to enter sex work, claiming that most women are coerced or physically forced into sex work and cannot escape. Such coercion may consist in 'direct' coercion, or may consist in the economic marginalisation of women through educational deprivation and job discrimination, which ultimately render them vulnerable to recruitment into sex work - South African Law Commission *Project 107 Issue Paper: Adult Prostitution* (2002) paras 4.9-4.26; see also generally S Schwarzenbach 'Contractarians and feminists debate prostitution' (1990-1991) 28 *Review of Law and Social Change* 103 at 104 *et seq*;. V Jenness *Making It Work: The Prostitutes' Rights Movement in Perspective* (1993) 34-36; M Levick *A Feminist Critique of the Prostitution / Sex Work Debate* (1996) 1.

[40] As referred to in Art 6 of the Women's Convention.

3.2 Key concepts

3.2.1 *'Gender-based violence'*

The study employs the definition of the term 'gender-based violence' as set out in General Recommendation No 19 adopted by the UN Committee on the Elimination of Discrimination against Women, i.e. 'violence that is directed at a woman because she is a woman or that affects women disproportionately'.[41] This definition is broad enough to also include violence committed against *men* based on their gender[42] - although it is generally accepted that the vast majority of victims of gender-based violence are women.

3.2.2 *'Violence against women'*

As noted above, the definition as set out in Article 1 of the Declaration on the Elimination of Violence against Women is employed, i.e. 'any act of gender-based violence that results is, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats or such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.[43]

41 CEDAW *General Recommendation No 19: Violence against Women* UN GAOR 11th Sess UN Doc CEDAW/C/1992/L/1/Add.15 (1992) para 1; see also Chapter 3, Section 2.3.2 .

42 Mitchell provides the vivid example of sexual violence committed against the male Iraqi prisoners at Abu Ghraib prison – DS Mitchell 'The prohibition of rape in international humanitarian law as a norm of jus cogens: Clarifying the doctrine' (2005) 15 *Duke Journal of Comparative and International Law* 219 at 219-220.

43 See note 1 above.

Because of the particular focus of this study (i.e. gender-based violence against adult *women*), the term 'violence against women' will be the operative phrase used, except where the context requires otherwise.

3.2.3 *'Domestic violence'*

The Domestic Violence Act contains a comprehensive definition of 'domestic violence':[44] it includes a range of acts, for example, physical abuse, economic abuse, intimidation, and stalking, each of which is given further content in the definition section of the Act.

3.2.4 *'Rape', 'sexual assault' and 'sexual violence'*

These concepts will be given the meaning accorded to them in current South African legislation, with specific reference to the 2007 Sexual Offences Act. These definitions are as follows:

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[44] According to s 1, these acts include:
(a) physical abuse;
(b) sexual abuse;
(c) emotional, verbal and psychological abuse;
(d) economic abuse;
(e) intimidation;
(f) harassment;
(g) stalking;
(h) damage to property;
(i) entry into the complainant's residence without consent, where the parties do not share the same residence; or
(j) any other controlling or abusive behaviour towards a complainant,
where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

(a) 'Sexual violence'

The 2007 Sexual Offences Act does not make provision for an offence or category of offences such as 'sexual violence'. However, the term is used in this study to indicate the broad category of violence, consisting of rape (penetrative) and sexual assault (non-penetrative) combined. It should be noted that these definitions often differ across jurisdictions, which means that references (eg to rape) arising from particular contexts or drawing on direct citations should be treated with some caution: terminological equivalence is almost impossible to achieve in this regard.

(b) 'Rape'

Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B,[45] is guilty of the offence of rape.[46] Sexual penetration, which is the determining component of this definition, is defined as follows:

> [A] ny act which causes penetration to any extent whatsoever by -
> (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
> (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
> (c) the genital organs of an animal, into or beyond the mouth of another person;[47]

[45] S 1(2) provides that 'consent', for purposes of this definition, means 'voluntary' or 'uncoerced agreement'. S 1(3) provides a list of circumstances in respect of which the complainant does not voluntarily or without coercion agree to an act of sexual penetration as contemplated in s 3.

[46] S 3 of the 2007 Sexual Offences Act.

[47] S 1(1) of the Act.

(c) 'Sexual assault'

According to Section 5 of the 2007 Sexual Offences Act -

(1) A person ('A') who unlawfully and intentionally sexually violates[48] a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault.

(2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault.

3.2.5 *'Femicide'*

'Intimate femicide' has been defined as the 'killing of a female person by an intimate partner' (i.e. her current or ex-husband or boyfriend, same-sex partner, and so forth).[49] Femicide constitutes the killing of a woman by a person other than an intimate partner.

[48] S 1(1) provides an expansive definition of 'sexual violation', which covers a range of 'sexual' acts of a non-penetrative nature. This category of offences broadly captures the common law offences that previously resorted under indecent assault and *crimen iniuria*, but without an element of sexual penetration.

[49] S Mathews *et al* 'Every six hours a woman is killed by her intimate partner' *MRC Policy Brief* (June 2004) 1.

4. A FEMINIST READING OF INTERNATIONAL HUMAN RIGHTS LAW

This study provides a feminist[50] reading of international human rights law. It does not set out to conduct a feminist critique or analysis of international human rights law: this project has already been undertaken. Feminist commentators have long expressed ambivalent views on international law. In a pioneering article published in 1991, Charlesworth, Chinkin and Wright posed the question why international law had until then largely resisted feminist analysis,[51] and analysed the organisational and normative structures of international law in order to address this question. In this short overview, I draw on this piece, as well as later articles by these authors, to develop an understanding of the feminist comments on international law.[52]

In terms of its *organisational* structure, the authors pointed out that the primary subjects of international law are States (and, increasingly, international organisations). They expressed the view that in both States and international

50 The term 'feminism' has taken on such expansive and varied meanings across academic disciplines that to provide a single definition is almost an impossible task – see in this regard generally K van Marle & E Bonthuys 'Feminist theories and concepts' in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 15 at 15-17. Broadly, I subscribe to MacKinnon's view of feminism as theory 'impelled by the realities of women's situation' – CA MacKinnon *Are Women Human?* (2006) 44. I do not find it useful to categorise this understanding into a particular 'school' of feminism: apart from the fact that the boundaries between the different categories can be relatively fluid, the practical value of these classifications in this context is dubious.

51 H Charlesworth *et al* 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613 at 614.

52 In my view this is a helpful method of tracking the gradient of developments in both international law and feminist analysis, as Charlesworth *et al* review progress at various points subsequent to their original 1991 piece. One also finds that much of the subsequent analysis is built on the foundational work of Charlesworth *et al*.

organisations, women were invisible in the sense that they were either unrepresented or under-represented in decision-making processes.[53] On a *normative* level, Charlesworth *et al* explained that international law principles, which do affect individuals (and not only States) are not universally applicable and neutral, as is generally assumed. It is often overlooked that these principles may impinge differently on men and women, and consequently, women's experiences of the operation of these laws may be discounted.[54]

The normative structure of international law also allows for the reproduction of various distinctions between the public and the private sphere.[55] The impact of this public/ private dichotomy in excluding women from international law can be seen in the international prohibition on torture.[56] The right to freedom from torture and other forms of cruel, inhuman or degrading treatment is broadly accepted as a fundamental civil and political right, and is included in all international civil and political rights instruments. It also forms the subject of specialised treaties.[57] The right to freedom from torture is further regarded as a norm of customary international law.

53 Charlesworth *et al op cit* note 51 at 621-625. I recount the authors' argument here briefly, at the risk of oversimplification. Certain of these themes are also explored in H Charlesworth & C Chinkin *The Boundaries of International Law* (2000) 201-249.

54 *Idem* note 51 at 625.

55 *Ibid*. See in this regard also C Romany 'State responsibility goes private: A feminist critique of the public/ private distinction in international human rights law' in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 85 at 85; K Mahoney 'Theoretical perspectives on women's human rights and strategies for their implementation' (1996) 21 *Brooklyn Journal of International Law* 799 at 842-843; UA O'Hare 'Realizing human rights for women' (1999) 21 *Human Rights Quarterly* 364 at 368-370; B Meyersfeld *Domestic Violence and International Law* (2010) 100-102.

56 I return to the definition of torture again in Chapter 2, Section 5.1.

57 Charlesworth *op cit* note 51 at 627-628.

Charlesworth *et al* pointed out that the international definition of torture requires that it takes place in the public realm: a public official or person acting officially must be implicated.[58] The rationale for this limitation is that private acts of brutality would be 'ordinary' criminal offences, which national law enforcement is expected to address. However, this excludes the acts of torture that many women are subjected to – with the only difference that these acts are committed not in the most public context of the state, but rather in the home, committed by private persons.[59]

The 1991 article concluded that there was a need for further study of traditional areas of international law 'from a perspective that regards gender as important'.[60] While admitting that modern international law is both androcentric and Eurocentric and relies for its implementation on fundamentally patriarchal institutions and principles, the authors did express the belief that a feminist challenge to this system could result in meaningful development and change.[61] Examples of this would be a focus on structural abuse and the revision of the notions of state responsibility.

Writing in 1998, Charlesworth pointed out that there was now a significant body of literature critiquing the international system for the protection of human rights from a feminist perspective.[62] She listed the main themes of this work, elaborating on certain of the points made in the 1991 article,[63] and concluded that

58 *Idem* at 628, citing Art 1(1) of the Convention against Torture.
59 *Idem* at 629.
60 *Idem* at 643.
61 *Idem* at 644-645.
62 H Charlesworth 'The mid-life crisis of the Universal Declaration of Human Rights' (1998) 55 *Washington and Lee Law Review* 781 at 785 fn 26 and authorities cited there.
63 *Idem* at 786-788.

the human rights system's responses to the criticisms of feminist activists have been very mixed.[64] Although the international community seems to have accepted 'the rhetoric of women's rights',[65] the human rights system has generally only recognised claims of women that involve claims akin to those that men might sustain. This means that the recognition of rights violations in the private sphere is still the exception.[66]

In conclusion, the author again raises the feminist debate, which was also touched on the original 1991 piece, about whether human rights discourse is a useful strategy.[67] Many feminists have argued that civil and political rights are manipulable, individualistic and unlikely to respond to the more general structural disadvantages that women face. Charlesworth is however of the opinion that the significance of human rights discourse outweighs its disadvantages, since it allows women to claim specific entitlements from the specified holder of an obligation. Moreover, there are international, regional, and national systems in place that can be invoked to protect human rights.

In 2005, the three authors took another joint look at international law.[68] In the *interim*, the world had again seen major shifts, with perhaps the most fundamental changes in global politics brought about by the events of 11 September 2001, and the concomitant 'war on terror'. Their assessment, as before, is a varied one. They observe that because of the significant scholarly

64 *Idem* at 794.
65 *Idem* at 791.
66 *Idem* at 794.
67 *Ibid*. See in this regard also C Smart *Feminism and the Power of Law* (1989) 139-146.
68 C Chinkin, S Wright and H Charlesworth 'Feminist approaches to international law: Reflections from another century' in D Buss & A Manji (eds) *International Law: Modern Feminist Approaches* (2005) 17-45.

literature produced in this area over the last 15 years, some feminist ideas have now been absorbed in the rhetoric of international law and its institutions. In many areas, however, progress has been limited, in the sense that feminist issues have either been marginalised or 'rendered so bland that they have no transformative bite'.[69] Moreover, many of the tensions and contradictions regarding the use of feminist ideas in international law remain.

The feminist analysis briefly sketched above demonstrates that although important inroads have been made, international law remains far from ideal when viewed through a feminist lens. This is especially true on the *organisational* level mentioned by Charlesworth *et al*.[70]

However, as Engle pointed out in the early years of feminist critique of international human rights law, as much as women's rights advocates express their doubts about this system, they keep returning to it:

> The literature and movement surrounding women's human rights has possibly challenged the human rights core more than any other literature or movement. At the same time, it has become one of the core's staunchest defenders. Even as every author identifies and conveys difficulties with the discourse, they all make it somehow work for them.[71]

69 *Idem* at 44.

70 See also generally A Gallagher 'Ending the marginalization: Strategies for incorporating women into the United Nations human rights system' (1997) 19 *Human Rights Quarterly* 283-333; RL Johnstone 'Feminist influences on the United Nations human rights treaty bodies' (2006) 28 *Human Rights Quarterly* 146 at 180-185.

71 K Engle 'International human rights and feminism: When discourses meet' (1992) 13 *Michigan Journal of International Law* 517 at 610. The author's 'follow-up' article, published in 2005, is also of interest: see K Engle 'International human rights and feminisms: When discourses keep meeting' in D Buss & A Manji (eds) *International Law: Modern Feminist Approaches* (2005) 47-66.

I accordingly argue that significant progress has been made on the level of *normative* development, as seen in the adoption on international and regional level of numerous instruments relating to women's rights generally and violence against women specifically. This normative development has further been enhanced by the judgments and opinions of courts and other bodies. Importantly, the notions of both State accountability for non-state actors and individual accountability (for example, in armed conflict) have been revised, as called for by feminists, leading to greater protection of women's rights.

The standards and norms emerging in international law, while perhaps still constituting an imperfect paradigm, therefore offer a persuasive basis for interpretation of rights on domestic level in South Africa, and will accordingly form the basis of closer scrutiny in Chapters 3, 4 and 5.

5. CHAPTER OUTLINE

Chapter 2 below presents the *research design and the framework of analysis* that will be used for purposes of the study. It commences by setting out the broad problem statement underlying the thesis, and then distils the central research questions from this formulation. The framework for analysis is outlined, consisting of three components: the role of international law in South African law, the nature of State obligations generated by human rights and the standard of 'due diligence' as applied to violence against women. Finally, I narrow down the scope of the study by considering certain thematic exclusions.

Chapter 3 examines the development of women's right to freedom from violence in international law (in the 'global' sense), *with specific reference to the*

Women's Convention. It pays specific attention to the nature of State obligations arising from the recognition of this right, drawing on the typology of duties set out in Chapter 2 above, and also looks at the interpretation of the Convention in communications relating to violence against women considered by the Committee on the Elimination of Discrimination against Women.

Chapter 4 continues this *investigation of international law*, with reference to the international documents adopted subsequent to the introduction of CEDAW's General Recommendation No. 19 in 1992.

Chapter 5 considers *women's right to freedom from violence in the three regional human rights systems*, i.e. the Inter-American, European and African systems. The investigation of each system commences with an examination of the applicable human rights instruments, with specific emphasis on documents addressing the right to freedom from violence, and briefly looks at the implementation mechanisms for these instruments. It then moves on to the relevant jurisprudence.

Chapter 6 looks at the *right to freedom from violence in South African law*. It first examines the right as guaranteed in the Constitution, and then investigates its treatment by the Courts around certain broad themes, including the duty to enact legislative measures to address domestic violence and sentencing proceedings in rape matters.

Chapter 7 draws together the central research questions and the findings from each of the above chapters into a set of *conclusions*.

CHAPTER 2

RESEARCH DESIGN AND FRAMEWORK OF ANALYSIS

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1. INTRODUCTION

This chapter presents the research design and the framework of analysis that will be used for purposes of the study. To begin with, the problem statement is set out, and then the central research questions are formulated. I then sketch the framework that will be used for analysis in subsequent chapters, with specific reference to the key aspects of international law in the South African context, the nature of obligations generated by human rights and the standard of due diligence. Finally, the scope of the study is outlined with further precision by means of a brief thematic exploration of international human rights law.

2. PROBLEM STATEMENT

2.1. Violence against women: The global, regional and South African picture[1]

Violence against women, as noted in Chapter 1, is a universal phenomenon – in the sense that there is no region worldwide in which women's freedom from violence has been secured.[2] The United Nations (UN) Secretary-General, reporting on an in-depth study on all forms of violence against women, has noted

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1 This section is based on the chapter published as H Combrinck 'Rape law reform in Africa: "More of the same" or new opportunities?' in C McGlynn & VE Munro (eds) *Rethinking Rape Law* (2010) 122 at 122-124.

2 UN Secretary General (2006) *In-Depth Study on Violence against Women* UN Doc A/61/122/Add.1 (dated 6 July 2006) para 69.

that the pervasiveness of violence against women points to its roots in patriarchy, i.e. the systemic domination of women by men. The report identified a number of explanations for violence against women, that is, patriarchy and other relations of dominance and subordination, cultural[3] norms and practices and economic inequalities. It also identified certain specific causal factors such as the use of violence in conflict resolution, State inaction and the doctrine of privacy well as individual or family behavioural patterns, which create a higher risk of violence.[4]

At the risk of generalisation, it is among the broader systemic factors identified above, such as cultural norms and economic inequalities, prevailing in African societies that one finds the explanation for the high levels of violence against women that have been observed in the region. For example, 50-70 per cent of Ethiopian women experience gender-based violence in their lifetime, among the highest levels globally.[5] A South African study published in 2004 reported the highest rate of intimate femicide noted in international research, amounting to a woman being killed by her intimate partner every six hours.[6] While unacceptable anywhere, in developing[7] countries, particularly in sub-Saharan Africa and Asia, gender-based violence has greater negative impacts on human development than elsewhere because of its high prevalence, limited access to legal services,

3 It is acknowledged that the notion of 'culture', how it is constructed (and by whom) and its perceived role in limiting women's rights are all highly contested in the African context. For two interestingly divergent views, see M Ssenyonjo 'Culture and the human rights of women in Africa: Between light and shadow' (2007) 51 *Journal of African Law* 39 at 51-64; S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 47 at 56-62.

4 UN Secretary General *op cit* note 1 paras 69-91.

5 M Philpart *et al* 'Prevalence and risk factors of gender-based violence committed by male college students in Awassa, Ethiopia' (2009) 24 *Violence and Victims* 123.

6 S Mathews et al 'Every six minutes a woman is killed by her intimate partner' *MRC Policy Brief 5* (June 2004) 4.

7 It is acknowledged that the terms 'developed' and 'developing' countries are not unproblematic; however, they will be used in this thesis for ease of reference.

insensitivity of law enforcement, and limited constitutional efforts to address gender inequality.[8]

It has been said that contemporary Africa finds itself 'poised between tradition and modernity'.[9] While important strides have been made across the region in terms of changing the role of women from that of a perpetual minor, restricted to the home with the duties of childrearing, to an independent, equal partner with choices in terms of entering the public sphere, the 'ideology of domesticity' is still in many respects the persistent reality.[10]

For example, in 2002, Specioza Kazibwe, then the Vice-President of Uganda, made public the fact that she had, over a number of years, been subjected to physical violence by her husband. While she did receive some support, mainly from women's groups, the majority of people felt that she had been wrong to make public what had happened within the privacy of her home. Her husband responded in public that he had 'only' slapped her and that this was to correct her, because he felt that she needed to know that her public role ended at the gate – when she entered the home, she was his wife and not the Vice-President. In her role as his wife, she had to submit to him and not be impertinent.[11]

As Banda observes, this incident underlines the resilience of the traditional notion of 'the good wife': one who is obedient and who does not challenge accepted gender roles.[12] It also illustrates how strongly the division between the

8 Philpart *et al op cit* note 5 at 122-123.

9 F Viljoen *International Human Rights Law in Africa* (2007) 268.

10 S Tamale 'Gender trauma in Africa: Enhancing women's links to resources' (2004) 48 *Journal of African Law* 51-53; see also Viljoen *op cit* note 9 at 268-269.

11 F Banda *Women, Law and Human Rights: An African Perspective* (2005) 159; see also Anonymous 'Uganda Tackles Wife-Beating Taboo' *BBC News* (19 March 2002).

12 *Ibid.*

public and private still operates in African societies – by no means unique to Uganda.[13]

Adjetey, cautioning against oversimplification and essentialism, observes that because traditional African institutions are broadly diverse, the articulation of women's rights varies from one society to another.[14] However, it can be stated as a general rule that women's sexuality remains a deeply contested area. In some parts of Africa, marriage results in a woman's physical person, including her sexuality, becoming part of her husband's property.[15] Unsurprisingly, customary law regards all sex within a marriage as consensual. This has, for instance, resulted in marital rape proving to be a major area of controversy in virtually every Anglophone[16] African country where women's rights activists have advocated for law reform.[17] The conceptual impossibility of a man raping his wife, originating in customary law, has been reinforced by the 'marital rape exemption' from common law.[18]

The confluence of women's inequality with various structural factors implies, in real terms, that women are often coerced into having sex without being in a

13 See also eg LV Martin (ed) 'Domestic violence in Ghana: The open secret' (2006) 7 *Georgetown Journal of Gender & Law* 531 at 539-542.

14 FN Adjetey 'Reclaiming the African woman's individuality: The struggle between women's reproductive autonomy and African society and culture' (1995) 44 *American University Law Review* 1355-1356.

15 *Idem* at 1359-1360; Banda *op cit* note 11 at 172; KSA Ebeku 'Considering the Protocol on the Rights of Women in Africa' (2006) 36 *Africa Insight* 24 at 26.

16 The candidate's review of African jurisdictions was limited by language constraints.

17 For example, the passage of the Ghanaian Domestic Violence Act in 2007 was almost derailed by the inclusion of a provision that could criminalise marital rape (see A Charnock 'Confusion over marital rape following passage of Domestic Violence Act' *The Statesman* (24 February 2007); N Oye Lithur 'See how far we've come' *Modern Ghana News* (10 March 2009).

18 See eg N Zondi 'When marriage as an institution ceases to be a partnership: Contested issues of rape and other forms of sexual abuse as condoned by culture' (2007) 74 *Agenda* 20 at 20-22.

position to protect themselves against sexually transmitted diseases, including HIV/AIDS. In 2009, sub-Saharan Africa remained the region most heavily affected by HIV. Women, accounting for approximately 60 per cent of estimated HIV infections in this region, bear a disproportionate burden in the pandemic.[19]

Moving to the South African situation, it is disconcerting to note that the levels of violence against women have consistently remained high.[20] According to the most up to date police statistics, 71,500 cases of sexual violence were reported during the 2008/2009 period.[21] Statistics on the number of domestic violence incidents reported to the South African Police Service only recently started becoming available, which makes the identification of trends somewhat difficult;[22] however, community-based prevalence studies have shown that domestic violence, in one form or another, affects as many as one in two women in South Africa.[23]

Various explanations have been advanced for the high levels of violence against women currently experienced in South Africa. In this regard, it is useful to consider that the incidence of violence directed at women in a particular society

19 UNAIDS *2009 AIDS Epidemic Update* (2009) 21-22.

20 The following section is based on L Artz & H Combrinck 'Sexual assault' in E Bonthuys & C Albertyn (eds) (2007) *Gender, Law & Justice* 298 at 300-301.

21 South African Police Service *2009 Annual Report* (2009) 5. These numbers represent child and adult, as well as male and female, victims in the broad category of 'sexual violence' (which includes rape and sexual assault as defined in terms of the Criminal (Sexual Offences and Related Matters) Amendment Act 32 of 2007 [hereafter the '2007 Sexual Offences Act']'. See Chapter 1, Section 3.2.4 for definitions of these offences.

22 These statistics are contained in reports submitted to parliament on a six-monthly basis by the National Commissioner of the South African Police Service in terms of s 18(5)(d) of the Domestic Violence Act 116 of 1998. The reports are included in the minutes of the National Assembly portfolio committee on Safety and Security, accessible through the website of the Parliamentary Monitoring Group (www.pmg.org.za).

23 L Vetten 'Violence against women in South Africa' in S Buhlungu *et al* (eds) *State of the Nation: South Africa 2007* (2007) 425 at 429.

tends to reflect the general level of violence expressed in such society.[24] In spite of fifteen years of democracy and the development of a human rights culture, South African society is still, at the time of writing, characterised by extraordinarily high levels of inter-personal violence.[25]

If one accepts that violence against women cannot be divorced from the broader social context, it is further to be expected that the power imbalances inherent within patriarchal relations will intersect with those arising from class and race structures, especially in a society such as South Africa, which is highly structured along class and race lines.[26] Researchers have therefore proposed that in the South African environment, where working class (and particularly, black) men, daily experience themselves as 'oppressed and impotent', their frustration arising from the public domain is likely to take expression in domination in the private realm in the form of dominating women.[27] It is posited that the emasculation brought about by high unemployment levels (given the traditional expectation of

24 L Vogelman & G Eagle 'Overcoming endemic violence against women' (1991) 18 *Social Justice* 209 at 215-216.

25 Hamber traces the 'culture of violence' still prevalent in South Africa from the State and political violence of the apartheid era (with the 1980s as one of the most violent periods in South African history) to the 1990s, when political violence gradually gave way to 'criminal' violence. He notes that social inequality and the enormous deprivation caused by the apartheid system are at the root of most violence in South Africa. However, violent crime has other multiple causal factors, including (*inter alia*) the historical development of a culture of violence, where violence was seen by all significant political parties as a legitimate means to achieve their goals; the deregulation of state control during the period of negotiation in the early 1990s; an ineffective criminal justice system and the perception that there will be no serious consequences for criminal activity - see B Hamber '"Have no doubt it is fear in the land": An exploration of the continuing cycles of violence in South Africa' (2000) 5 *South African Journal of Child and Adolescent Mental Health* 9-13. Analysts writing more recently have posited that the root causes of violence have not changed much since the apartheid era: see eg C Njoki 'Why so much violence in South Africa' *ISS Today* (10 October 2006).

26 Vogelman & Eagle *op cit* note 24 at 214.

27 *Idem* at 214-215.

men as principal breadwinners) is also likely to result in assertions of power in relation to women.[28]

Economic dependence on men has been identified as the most fundamental structural constraint that South African women face.[29] One consequence of this material dependence is the perception by men that women and their children are in some sense owned by them. This objectification or view of women as property in turn results in a view on the part of men that they are entitled to use violence against 'their' women.[30]

Another consequence is that women remain in abusive relationships due to a lack of real alternatives, such as access to adequate housing. It has been noted that a lack of access to safe housing alternatives is often a major factor in keeping women 'trapped' in violent relationships.[31] This is said to be true for women all over the world, regardless of whether they are living in developing or developed countries; in our experience, it certainly holds true in the South African context.[32]

Sanday draws a distinction between so-called 'rape-prone' and 'rape-free' societies, and in her attempt to identify some of the correlates associated with

28 L Vetten *Race, Gender, and Power in the Face of Social Change* in J Park *et al* (eds) (2000) *Reclaiming Women's Spaces* 47 at 67-68.

29 Vogelman and Eagle *op cit* note 24 at 216; L Artz 'The weather watchers: Gender, violence and social control' in Van Zyl, M & Steyn, M (eds) *The Prize and the Price: Shaping Sexualities in South Africa* (2009) 169 at 177; D Smythe & P Parenzee 'Acting against domestic violence' in B Dixon & E Van der Spuy (eds) *Justice Gained? Crime and Crime Control in South Africa's Transition* (2004) 140-162.

30 Vogelman and Eagle *loc cit;* see also AK Wing 'A Critical Race Feminist conceptualization of violence: South African and Palestinian Women' (1997) 60 *Albany Law* Review 943 at 958.

31 Centre on Housing Rights and Evictions (COHRE) *Sources No 5: Women and Housing Rights* 2 ed (2008) 34.

32 See H Combrinck & L Chenwi *The Role of Informal Community Structures in Ensuring Women's Rights to Have Access to Adequate Housing in Langa, Manenberg and Mfuleni* (2007) at 1-2.

each type, observes that in rape-prone societies women hold limited power and authority, and males express contempt for women as decision makers.[33] In such societies, 'masculinity' is predicated on an ideology of toughness and an acceptance of interpersonal violence.[34] In the case of South Africa, sexual assault can therefore be said to reflect the substantial gender power inequalities that pervade our society. These inequalities are multiplied where different forms of domination intersect, for example, race and gender, resulting in the particularly brutal sexual assault of women who are perceived to be non-compliant with 'acceptable' norms of sexual behaviour, such as black lesbian women.[35]

In terms of the profile or characteristics of sexual violence, it is estimated that in South Africa 60 per cent of sexual violence victims know their assailants.[36] This goes contrary to the often-held perception that sexual violence is usually committed by a 'stranger'. The range of relationships in which such violence occurs includes marital[37] and dating relationships. The extent of sexual violence in marriage or dating relationships is difficult to assess, as it is even more underreported than sexual assault by strangers. Significantly, many women who are assaulted in the context of dating or marriage do not in fact view themselves as victims of sexual violence. In dating relationships, sex is often viewed as a

33 PR Sanday *Rape and the Silencing of the Feminine* (1986) cited in L Vetten 'Roots of a Rape Crisis' (1997) 8 *Crime & Conflict* 9-12. See also D Greene *Gender Violence in Africa: African Women's Responses* (1999) 95-97.

34 Vetten *loc cit*.

35 See A Martin *et al Hate Crimes: The Rise of Corrective Rape in South Africa* (2009) 12.

36 S Usdin & L Ramafoko 'Callous normality of rape in South Africa' *Mail & Guardian* (7 May 1999). See also R Hirschowitz et al *Research Findings on Rape* (2000) 13.

37 Until 1993, a husband could not be charged under South African law with raping his wife. This so-called 'marital rape exemption' was abolished by s 5 of the Prevention of Family Violence Act 133 of 1993.

sign of love even where it is accompanied by assault or violence:

> Assault is described as a regular feature of sexual relationships and some respondents said this is the main reason they continue to have sex. Physical assault is so commonplace, women said, that many of their peers actually see it as an expression of love.[38]

This phenomenon attests to both the normalisation of sexual violence and perceptions of 'ownership' of women's sexuality on the part of men in South Africa.[39]

An additional aspect that must be factored into a consideration of violence against women in South Africa is the extent of the HIV epidemic here. According to the 2008 UNAIDS Global Report, the estimated total of 5.7 million South Africans living with HIV in 2007 makes this the largest HIV epidemic in the world.[40] It is now increasingly accepted that gender-based violence is a key factor in increasing women's risk of contracting HIV.[41] For example, because rape is by definition non-consensual, it has a higher risk of leading to HIV infection by virtue of physical injury to the women's genitalia or anus. Dunkle *et al* report that experience of violent and controlling behaviour from male partners is associated with increased risk of HIV infection for women.[42] Women in

38 Usdin & Ramafoko *op cit* note 36.

39 See in this regard also M Motsei *The Kanga and the Kangaroo Court* (2007) 49, 67.

40 UNAIDS *loc cit*. Although HIV data from antenatal clinics in South Africa suggest that the country's epidemic might be stabilising, there is no evidence yet of major changes in HIV-related behaviour – UNAIDS *2008 Report on the Global AIDS Pandemic* (2008) 40. See however TM Rehle et al 'A decline in new HIV infections in South Africa: Estimating HIV incidence from three national HIV surveys in 2002, 2005 and 2008' (2010) 5(6) *PLoS ONE* 1 at 4-5.

41 See eg Y Ertürk *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: The Intersections of Violence against Women and HIV/AIDS* UN Doc Ref E/CN.4/2005/72 (dated 17 January 2005) paras 26-54.

42 K Dunkle *et al* 'Gender-based violence, relationship power, and risk of HIV infection in women attending antenatal clinics in South Africa' (2004) 363 *The Lancet* 1415 at

violent relationships may also be at risk more indirectly by being unable to negotiate the use of safer sex methods, such as condoms.[43] This means that where women are vulnerable to gender-based violence (such as domestic violence), their risk of HIV infection also increases exponentially.

The highly-publicised criminal trial of (then) deputy president Jacob Zuma[44] on charges of rape[45] during the early months of 2006 brought together and amplified many of the elements that make up the complex picture of violence against women in South Africa: gender stereotypes, rape myths, HIV/AIDS (un)awareness and disputed cultural practices.[46] Although feminist commentators agreed that the prosecution had not succeeded in proving its case beyond

1419. See also R Jewkes *et al* 'Understanding men's health and use of violence: Interface of rape and HIV in South Africa *MRC Policy Brief* (June 2009) 2.

43 See H Combrinck & L Wakefield *At the Crossroads: Linking Strategic Frameworks to Address Gender-Based Violence and HIV/AIDS in Southern Africa* (2007) 18 fn 56 and authorities cited there.

44 President of South Africa at the time of writing.

45 Briefly: Jacob Zuma was charged with the rape of one 'Khwezi', a 31-year old woman living with HIV. It was common cause that the complainant, who was well known to the accused, had visited his home on the date in question, and that later that evening unprotected sexual intercourse took place between them. The details of the events leading up to the intercourse were disputed to a greater or lesser extent, but the material difference between the state and defence versions lay in whether or not the complainant had consented to the intercourse – see *S v Zuma* 2006 2 SACR 191 (W) 191f-192b. One of the contentious aspects of the trial was a ruling by the Court (*per* Van der Merwe J) allowing the defence to cross-examine the complainant on her past sexual history and also to lead evidence in connection with this history – see *S v Zuma* (above) 198f *et seq*. The Court ultimately accepted the defence version of the complainant's history of false rape allegations, resulting in the acquittal of the accused (223e).

46 For discussion of these elements, see eg Motsei *op cit* note 39 at 145-171; S Robins 'Sexual rights and sexual cultures: Reflections on "the Zuma affair" and "new masculinities" in the new South Africa' (2006) 12(26) *Horizontes Antropológicos* 149-183; P Govender 'You have struck a woman, you have struck a rock' *Mail & Guardian Online* (17 March 2006).

reasonable doubt, they were also greatly disturbed by the gender divisions in South African society laid bare by this case.[47]

2.2 Practical implications of women's right to freedom from violence

In response to the phenomenon of violence against women, the South African Government has put in place a relatively elaborate legislative and policy framework, consisting of the Domestic Violence Act, the 2007 Sexual Offences Act and various supporting policy measures.[48] These initiatives should also be understood in the light of the constitutional protection of the rights to freedom to violence, dignity and gender equality.

Given this response, the first question that arises is what women who are victims of violence can realistically expect from the State.[49] Or to put this differently, to what extent do the constitutional rights in practice translate into specific 'benefits' for women experiencing violence? I have posed the question elsewhere whether, for example, the right to equality implies that the victim and accused are entitled to an equal number of supporters to be present in court during the

47 See eg N Naylor 'The socio-political eunuch called an impartial judge' *Pambazuka News* (11 May 2006); S Ndashe 'Can I speak please!' *Pambazuka News* (11 May 2006).

48 See eg Vetten *op cit* note 23 at 426-438.

49 The emphasis placed on the role of the State in this thesis should not be taken as an assumption that violence against women can only be addressed through State action – see in this regard eg P Scully 'Should we give up on the State? Feminist theory, African gender history and transitional justice' (2009) 2 *African Journal on Conflict Resolution* 29 at 37-38. Similarly, I hold the view that recourse to 'the legal system' (in its various aspects) is not necessarily an appropriate solution for all victims under all circumstances.

rape trial?[50] Does the right to privacy entail that the victim may refuse to answer defence questions about her previous sexual history, even after the court has ruled in favour of the defence in an application brought in terms of section 227 of the Criminal Procedure Act?[51] Does the right to bodily integrity imply that a sexual assault victim has the 'right' to know the HIV status of the person who allegedly assaulted her? These are some of the practical questions that arise when considering the scope of victims' constitutional rights in the context of the 2007 Sexual Offences Act.

Going beyond the Sexual Offences Act, what is the position of a victim of domestic violence upon finding that the perpetrator, charged with breaching the protection order that she obtained against him, has been acquitted – can she 'force' the prosecution to appeal against this finding?[52] What happens where the police forensic laboratory misplaces the medico-legal samples taken in a rape

50 This question may appear to be a facile one. However, it is interesting to note that in the Zuma rape trial, the presiding officer allowed the following arrangement: the victim's evidence was given in camera, and she and the accused were both allowed fifteen supporters in the courtroom during her testimony. The accused had to identify his supporters in advance and the victim had a 'veto right' if she didn't want a specific person to be present. In addition, accredited media reporters were allowed in court - see H Combrinck 'Claims, entitlements or smoke and mirrors? Victims' rights in the Sexual Offences Act' in L Artz & D Smythe (eds) (2008) *Should We Consent? Rape Law Reform in South Africa* 262 at 265. I questioned whether this arrangement served to protect the victim's dignity or privacy in any meaningful way.

51 *Ibid*.

52 In terms of current South African law, the simple answer is 'no'. The prosecution may not appeal against an acquittal, unless it is on a point of law – see s 310 of the Criminal Procedure Act 51 of 1977. Furthermore, the victim is not a party to the criminal trial and therefore has no standing; this means that she has no right to appeal either against a finding on the merits or, in the case of conviction, against the sentence. If the prosecution decides not to appeal against the latter, the victim has no rights, procedural or otherwise, in terms of criminal procedure. Her remedies against the prosecution may lie in administrative law; however, this would not change the outcome of the criminal case.

case, resulting in the matter being permanently withdrawn without any prospect of a prosecution – can the rape victim hold the state accountable for this?[53]

The above examples have focused on the position of individual women. Perhaps one should broaden the scope, and consider a group of marginalised women, such as lesbian women, who are victims of sexual violence in the form of so-called 'corrective rape',[54] and find it difficult to get the criminal justice system to devote serious attention to these cases. Can they compel the police and prosecutors to conduct diligent and timely investigations and prosecutions, based on their right to freedom from violence? Even more broadly, can they expect the State to address the damaging gender stereotypes underpinning these crimes?

These examples do not constitute an exhaustive list of the practical questions that may arise for consideration under women's right to freedom from violence. However, they begin to indicate the broad range of issue that may fall to be decided by the Courts in terms of this right. I will accordingly return to these examples following the examination of international law in the chapters below.

53 Assume that identification is in dispute, and that the only way of potentially linking the accused to the offence would be through DNA analysis of bodily fluid. The loss of the samples, apart from scuppering the criminal prosecution, therefore also implies that the victim is deprived of any opportunity of taking action against the alleged perpetrator in civil law.

54 'Corrective rape' is the prejudiced notion that a lesbian woman can be raped to 'correct' her lesbian sexuality. 'Corrective rape' seeks to justify the rape of those people who are perceived to not conform - or to disrupt - expected gender roles, behaviour and/or presentation. Misogyny and homophobia underpin the prejudice associated with 'corrective rape' - JA Nel & M Judge 'Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses' (2008) 21 *Acta Criminologica* 19 at 24 fn 2.

3. RESEARCH QUESTIONS

Against this backdrop, I have formulated the following central research questions:

1. Do women have a right to be free from violence under international human rights law? If so, what understanding has been given to this right under international human rights law?

2. To what extent and in what way has women's right to be free from violence under the South African Constitution been guided by international human rights law?

3. Given the experience thus far, how should international human rights law guide women's right to be free from violence under the South African Constitution in future?

This study will proceed from the central hypothesis that a more in-depth and nuanced understanding of the nature and scope of women's right to freedom from violence, as it has recently emerged in international human rights law, is essential for a correct and comprehensive interpretation of women's right to freedom from all forms of violence as guaranteed in the South African Constitution.

In addition to the feminist understanding of international human rights law referred to in Chapter 1, the broad approach adopted in this study is one of transformative constitutionalism as critique.[56]

4. FRAMEWORK OF ANALYSIS

4.1 International law as interpretative guide in the South African Constitution

4.1.1 Background

It has been observed that before the introduction of the 1993 Constitution,[57] international law did not play a prominent role in the development of human rights jurisprudence in South Africa.[58] This was in part due to certain of the consequences of South Africa's international isolation during the apartheid regime, such as the fact that the country was party to only one document with human rights provisions, i.e. the United Nations Charter.[59]

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56 I find Van Marle's description of transformative constitutionalism as critique to be an appealing one: 'an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general' - K Van Marle 'Transformative constitutionalism as/ and critique' (2009) *Stell LR* 286 at 288.

57 Constitution of the Republic of South Africa Act 200 of 1993 [hereafter 'the 1993 Constitution'].

58 J Dugard 'The role of international law in interpreting the Bill of Rights' (1994) 10 *South African Journal of Human Rights* 208 at 208.

59 Dugard explains that since the UN Charter was not incorporated into domestic law, no direct effect could be given to the relevant provisions (Articles 55 and 56) – J Dugard *International Law: A South African Perspective* 3 ed (2005) 336. Various attempts to persuade the courts to draw on these clauses as a guide to statutory interpretation were by and large unsuccessful. For a comprehensive discussion of these attempts, see

According to Dugard, the failure of South African courts to make greater use of the limited opportunities they had to apply human rights norms can furthermore be ascribed to an unfamiliarity with international law, a lack of awareness of the importance attached to international human rights norms in other jurisdictions, and an antipathy to the international human rights movement, which had succeeded in isolating South Africa from the international community.[60]

The 1993 Constitution already made it clear that the approach towards international law would change, with the inclusion of a Bill of Rights strongly influenced by the major international human rights instruments.[61] The document also contained provisions firstly explaining how international law should be incorporated to become part of our substantive domestic law,[62] and secondly directing how international law should be considered in the interpretation of South African law.[63] At the same time, the advent of the new political dispensation saw a willingness on the part of the South African government to become party to the major international human rights agreements.[64]

The 1996 Constitution[65] confirmed the above provisions, with minor changes.[66] The sections relating to interpretation are of specific importance to this discussion.

J Dugard 'The South African judiciary and international law in the apartheid era' (1998) *SAJHR* 110 at 113-125.

60 Dugard *op cit* note 58 at 210.

61 *Idem* at 211-212.

62 Ss 231(2) - (4).

63 Ss 35(1) and 232 of the 1993 Constitution.

64 See in this regard ME Olivier 'South Africa and international human rights agreements: Procedure, policy and practice' (Part 1) (2003) *TSAR* 293 at 293.

65 Constitution of the Republic of South Africa Act 108 of 1996 [hereafter 'the Constitution'].

4.1.2 Constitutional Provisions

Section 39(1)(b) of the Constitution provides as follows:

> When interpreting the Bill of Rights, a court, tribunal or forum:
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) *must consider international law*; and
> (c) may consider foreign law.[67]

The formulation of this section raises two distinct questions regarding the role of international law in the interpretation of the Bill of Rights, i.e. which sources of international law a court may consult and secondly, the extent to which a court is bound by the principles of international law.

(a) Sources of international law to be considered

The question here is whether a court's inquiry is limited to international treaties or conventions to which South Africa is a party and to the rules of customary international law that have been accepted by the courts. Dugard ventured an early opinion in 1994, in respect of section 35(1) of the 1993 Constitution,[68] that South

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66 Ss 231 and 232 of the Constitution deal with the incorporation of international law into domestic law. S 233 states that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

67 Emphasis added.

68 S 35(1) of the 1993 Constitution provided as follows:
'In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.'

African courts would be required to consult all sources of international law recognized by Article 38(1) of the Statute of the International Court of Justice, i.e. international conventions, international custom, the general principles of law recognized by civilised nations, judicial decisions, and the teachings of publicists.[69]

Dugard points out that such a broad approach has the advantage that it does not require the more traditional inquiry by a court into whether a particular principle contained in one or more human rights conventions is backed by sufficient state practice and *opinio juris* to qualify as a customary rule binding on South Africa. Instead, guidance may be sought in a wider range of (persuasive, but non-binding) sources, for example, the opinions of convention-interpreting bodies.[70] These sources are often referred to as 'soft law'.[71]

His view was soon endorsed by the Constitutional Court in *S v Makwanyane*,[72] where Chaskalson P made the following statement:

> In the context of section 35(1) public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, the European Court of Human Rights and in appropriate cases, reports of specialized agencies such as the International Labour Organisation may

69 Dugard *op cit* note 58 at 212-213.
70 *Idem* at 213-214.
71 Dugard *op cit* note 59 at 37-38.
72 1995 (6) BCLR 665 (CC) at 686D-F.

> provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].[73]

Although this *dictum* does clarify the point that courts may also have regard to 'non-binding law', the judgment unfortunately leaves open the important question of which sources should be included under this heading. The matter was taken (somewhat) further in *Government of the RSA v Grootboom*,[74] where Yacoob J held that the relevant international law can be a guide to interpretation, 'but the weight to be attached to any particular principle or rule of international law will vary'.[75] He further noted that where the relevant principle of international law binds South Africa, it 'may be directly applicable'. In a footnote, sections 231-235 of the 1996 Constitution are cited as reference.

The judgment is unfortunately not entirely clear in terms of its application of the principles drawn from international law,[76] and commentators appear divided as to what to make of the above *dictum*. Strydom and Hopkins, for example, are of

73 Para 35. The text includes a footnote after the phrase 'binding law', with Dugard's view on the sources of 'public international law', for purposes of s 35(1), cited as the reference.

74 2001 (1) SA 46 (CC).

75 Para 26.

76 At issue in the *Grootboom* matter was the opinion of the UN Committee tasked with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') on the obligation resting on state parties to fulfil a 'minimum core obligation' in respect of socio-economic rights, including the right to housing. The *amici curiae* in the matter relied on the ICESCR, which South Africa at the time had signed but not yet ratified, amplified by General Comment 3 issued by the Committee on Economic, Social and Cultural Rights in 1990 (paras 27 – 29). Yacoob J ultimately rejected the call by the *amici* to determine a minimum core in the context of the right to have access to adequate housing, largely because he felt that the Court did not have sufficient information to determine what would comprise such a minimum core obligation. He then also added that 'it is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right' – para 33.

the opinion that Yacoob J intends here to link the relevance of international law principles to the question of direct applicability:

> In terms of this understanding, the role of non-binding international law will be limited to provide guidance as to the correct gloss to place on a given provision… While directly applicable convention law still has a chance of receiving some consideration, non-binding norms of whatever kind are likely to be met with indifference.[77]

The authors believe that this more circumscribed approach will likely have a stifling effect on the creative use of international law as an interpretative tool. On the other hand, Botha and Olivier take a far more ebullient view, noting that Yacoob J's statement 'offers a ray of hope' for a turnaround in the neglect that international law has (according to the authors) suffered at the hands of the Constitutional Court since the judgment in *Makwanyane*.[78] They argue that the importance of his approach lies not only in its acknowledgment of the varying weight to be attached to different sources of non-binding law, but also in its recognition that the value of international law is not in all cases limited to an aid to interpretation.[79] Sources of international law that are binding on South Africa are an integral part of South African law, and should be applied as such. I believe that the latter interpretation is the preferred one, especially in the light of the second part of section 39(1), discussed below.

77 H Strydom & K Hopkins 'International law' in S Woolman *et al Constitutional Law of South Africa* 2 ed (Original Service 2005) 30-13. See also L du Plessis 'Interpretation' in S Woolman *et al Constitutional Law of South Africa* 2 ed (Original Service 2008) 32-176 - 32-180.

78 N Botha & ME Olivier 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' (2004) 29 *SA Yearbook International Law* 42 at 66.

79 *Ibid.*

*(b) Is the court **bound** to apply international law?*

The wording of section 39(1)(b) is significant here: the court is under obligation to *consider* international law. It is, however, a different question whether the court is also obliged to *follow* or *apply* these principles.

The Constitutional Court also provided an answer to this question in *S v Makwanyane*, where it stated that while the courts can derive assistance from public international law and foreign case law, they are in no way bound to follow it.[80] This was reiterated in *S v Williams*,[81] where Langa J[82] indicated that 'valuable insights' may be gained from international law.[83] Although courts are not bound to follow these international law principles, they may not ignore them either.[84] Similarly, the Court explained in *Coetzee v RSA*,[85] in relation to section 39(1), that what was required was not a rigid application of formulae but rather that due regard be paid to the principles that can be extracted from international experience – 'to look for rationales rather than rules'.[86]

In this regard, Mokgoro J adds an instructive dimension in her judgment in *S v Makwanyane*. She notes that the task of interpretation often involves making constitutional choices by balancing competing fundamental rights and freedoms.[87] This can often only be done 'by reference to a system of values extraneous to the constitutional text itself'. Guidance as to such as cohesive set of

80 Paras 34, 35 and 39.
81 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).
82 As he then was.
83 Para 23.
84 Para 50.
85 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC).
86 Para 57.
87 Para 302.

values, ideal to an open and democratic society, may be found in the international system of human rights protection.

In summary, it can therefore be said that although the extent and depth of this 'consideration' may vary, South African case law from 1994 onwards provides numerous examples where the courts have considered international law.[88] Based on the cursory overview presented here, the practice itself appears to have become an accepted interpretative tool (as one would expect, given the constitutional mandate).

However, some unanswered questions remain, with specific reference to the status of 'soft law' for purposes of section 39(1).[89] This issue, i.e. whether the notion of 'non-binding' international law, as employed by Chaskalson P in *Makwanyane*, includes so-called 'soft law' (such as declarations and the opinions of treaty-interpreting bodies) becomes particularly significant in the context of violence against women. Since the Women's Convention does not address violence against women in the document itself, the Committee on the Elimination of Discrimination against Women subsequently issued a General Recommendation dealing with the issue at some length.[90] (Such General Recommendations are non-binding, but persuasive.) Two important standard-setting documents, i.e. the Declaration on the Elimination of Violence against Women and the Beijing Declaration and Platform of Action, similarly have non-binding status only.

88 See in this regard Botha & Olivier *op cit* note 77 at 43-74 for a discussion of case law between 1995 and 2003; See also Olivier *op cit* note 64 at 338-340 (with specific reference to cases drawing on international human rights law).

89 See in this regard also E De Wet 'The "friendly but cautious" reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks' (2005) 28 *Fordham International Law Journal* 1529 at 1534-1535.

90 CEDAW *General Recommendation No 19* UN GAOR 11th Session UN Doc CEDAW/C/1992/L.1/Add.15 (1992). See also Chapter 3, Section 2.3.2.

In Chapter 6, I analyse judgments by the Constitutional Court and Supreme Court of Appeal relating to violence against women. In the light of the above discussion, this analysis will include consideration of which sources of international law the courts consulted in these judgments, and how much weight was attached to these sources.

4.2 Nature of obligations generated by human rights

4.2.1 Background

Steiner *et al* propose that in order to understand the significance of rights set out in the ICCPR, Women's Convention and other human rights instruments, it is instructive to look at the related duties or obligations resting on states.[91] Such an examination of duties clarifies the significance 'and even contents' of the rights concerned. It could also indicate strategies to realise a right, for example, by persuading the State to change its behaviour in some respect.

> The effort, then, is to deconstruct a right into its related state duties, perhaps duties that an advocate seeks to have imposed on the state.[92]

On the most elemental level, one can discern the so-called correlative duties: for example, one's right not to be tortured implies a correlative state duty not to

[91] HJ Steiner *et al International Human Rights in Context* 3 ed (2007) 185; see also JW Nickel 'How human rights generate duties to protect and provide' (1993) 15 *Human Rights Quarterly* 77 at 86.

[92] Steiner *et al loc cit*.

torture you.[93] Other duties may be necessary implications from the nature of a particular text: for example, a citizen's right to vote entails a duty on the state to create and implement electoral institutions. Different rights may imply different types of State duties; all depends on the nature of the rights and the problems it was meant to overcome or prevent. In short, according to the authors, identifying the multiple duties that may be relevant to any one right sharpens an understanding of what is distinctive to and necessary to realise that right.[94]

I find that this approach is particularly compelling for purposes of this study, where one is looking firstly at a relatively unexplored right, and secondly one that is closely bound up with the second type of duty outlined above, i.e. where more than a correlative 'hands off' duty is imposed on the State.

Shue proposes that every basic right assumes three types of duties:[95] a duty to *avoid* violating the right in question, a duty to *protect* from violation of the right, and a duty to *aid* those whose rights have been violated. All of these duties have to be performed if the basic right is to be fully honoured, though not necessarily by the same institutions or individuals.[96] The right to physical security therefore has the following three correlative duties:

(a) Duties not to eliminate a person's security (avoidance);
(b) Duties to protect people against deprivation of security by others (protection); and

93 *Ibid.*
94 *Idem* at 186.
95 H Shue *Basic Rights: Subsistence, Affluence and Foreign Policy* 2 ed (1996) 52.
96 *Ibid.*

(c) Duties to provide for the security of those unable to provide for their own (aid).[97]

Shue's tripartite analysis formed the basis for subsequent and more detailed ones, such as that presented by Steiner *et al*.[98] The latter authors propose a scheme consisting of five types of state duties, set out below. This scheme to a large extent corresponds with the exposition provided in respect of socio-economic rights.[99]

1. Respect Rights of Others

This duty requires the state to treat persons equally, to respect their individual dignity and worth, and hence not to interfere with or impair their declared rights, whether they be physical security rights or rights to due process, equal protection or political protection.[100] This duty of respect has often been described as 'negative' or 'hands-off': the idea is not to worsen an individual's situation by depriving them of the enjoyment of a declared right.

97 *Idem* at 52-53. For a more detailed discussion of Shue's tripartite typology, see MM Sepúlveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 157-160.

98 Steiner *et al op cit* note 89 at 187. See also Sepúlveda *op cit* note 97 at 163-169.

99 The Committee on Economic, Social & Cultural Rights ('CESCR') has adopted the analysis that human rights create three forms of state obligation: 'The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*' the right.' - CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health* UN Doc E/C.12/2000/4 (dated 11 August 2000) para 33. Budlender notes that some commentators add a further element, namely the obligation to 'promote' the right – G Budlender 'Justiciability of the right to housing – The South African experience' in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 207 at 212-213.

100 Steiner *et al op cit* note 91 at 187; see also Budlender *op cit* note 99 at 208.

2. Create Institutional Machinery Essential to Realisation of Rights

Certain rights may be impaired not only by government's direct interference with them, but also by its failure to put into place the institutional machinery essential for the realisation or practice of the right. The classic example, as noted above, is the right to vote. Public funds must be expended to create the infrastructure on which the practical realisation of the right depends.[101]

3. Protect Rights/ Prevent Violations

There are a number of human rights instruments that set out explicit state duties to protect against and to prevent violations of rights. For example, Article 2 of the International Covenant on Civil and Political Rights,[102] which imposes on the state the duty to 'ensure to all individuals' the recognised rights. As with the previous category, this entails institutional machinery as well; the state must by implication institute a police force to protect people against violations of their to physical security, either by state or non-state (private) actors.[103] Both normative systems (such as criminal law) and institutions (criminal and civil courts) and processes (criminal prosecutions) must be created in order to maintain a justice system that provides for remedies and sanctions. Importantly, Steiner *et al* observe that this duty to protect has been vital to the development of the Women's Convention and women's rights.[104]

4. Provide Goods and Services to Satisfy Rights

The State's duty here is primarily to provide material resources to the rights-bearer, such as housing, food or health care.[105] These are rights mainly associated

101 Steiner *et al op cit* note 91 at 188; Budlender *op cit* note 99 at 213-214.

102 International Covenant on Civil and Political Rights GA Res 2200A (XXI) UN Doc A/6316 (1966), entered into force 23 March 1976 [hereafter 'the ICCPR'].

103 Steiner *et al loc cit*.

104 *Ibid.*

105 *Idem* at 189.

with the ICESCR. Unlike the duty of respect (which implies not to worsen the situation of the rights-bearer), this duty to provide generally is meant to improve the situation of the rights-bearer.

5. Promote Rights

This duty refers to bringing about changes in public consciousness or perception about a particular problem, with the purpose of alleviating the problem.[106] As in the case of the duty to protect, the duty to promote generally requires the state to expend funds and create the institutional foundation needed to promote acceptance of the right – for example, public education campaigns intended to change attitudes about violence against women.[107]

4.2.2 The International Covenant on Civil and Political Rights

As noted above, Article 9, paragraph 1, of the ICCPR provides one of the early models for the right to security (in the sense of personal integrity). It is therefore instructive to look at the state duties that are associated with the recognition of rights in this Convention. In terms of Article 2, paragraph 1, of the ICCPR, States Parties undertake to 'respect and ensure' to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language and so forth. The Human Rights Committee, tasked with overseeing the implementation of the ICCPR, adopted General Comment No. 31, dealing with the nature of legal

[106] *Ibid*. Budlender explains that to 'promote' a right means to further or advance it – *op cit* note 99 at 212.

[107] Steiner *et al loc cit*.

obligations imposed on States Parties to the Covenant.[108] This Comment provides further understanding of the duties arising from the rights guaranteed in this document.

The Committee explained that the legal obligation under Article 2, paragraph.1, is both negative and positive in nature.[109] States Parties must *refrain from violation* of the rights recognised by the Covenant, and any restrictions placed on these rights must be permissible under the Covenant. Where such restrictions are imposed, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right. In terms of the five-part model set out above, this aspect would correlate with the duty to 'respect' rights.

Article 2 also requires States Parties to adopt legislative, judicial, administrative, educative and other appropriate measures in order to *fulfil* their legal obligations.[110] The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and state agents but also among the population at large. This requirement has elements of both the duties to create institute machinery and to promote rights proposed by Steiner *et al*.

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108 Human Rights Committee *General Comment No. 31 (80) Nature of the General Legal Obligation Imposed on States Parties to the Covenant* UN Doc CCPR/C/21/Rev.1/Add.13 (dated 26 May 2004) [hereafter '*General Comment No. 31*'].

109 *Idem* para 6.

110 *Idem* para 7.

The positive obligations on States Parties to ensure Covenant rights will however only be fully discharged if individuals are *protected* by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.[111] There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under Article 2 and the need to provide effective remedies in the event of breach under Article 2, paragraph 3.

The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities.[112] For example, the privacy-related guarantees[113] of Article 17 must be protected by law. It is also implicit in Article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.[114] In fields affecting basic aspects of ordinary life such as work or

111 *Idem* para 8.

112 *Ibid*.

113 Art 17 provides as follows:

'1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.'

114 Art 7 states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

housing, individuals are to be protected from discrimination[115] within the meaning of Article 26.

Significantly, the requirement in terms of Article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect.[116] A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attached importance to States Parties' *establishing appropriate judicial and administrative mechanisms* for addressing claims of rights violations under domestic law.[117]

Even when the legal systems of States Parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice.[118] Accordingly, States Parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.

115 Art 26 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

116 *General Comment No. 31 op cit* note 108 para 14.

117 *Idem* para 15.

118 *Idem* para 20.

Joseph *et al* further observe that linked to the Human Rights Committee's uncovering of positive aspects to duties arising from civil and political rights has been its willingness to 'permeate' ICCPR rights with significant economic, social and cultural elements.[119] For example, Article 6, the right to life, has been interpreted to incorporate a duty upon States to tackle infant mortality, epidemics, and to take measures to increase life expectancy.[120] States are thus required to provide a certain minimum standard of health care, which is traditionally perceived as a social right.[121]

This brief overview of the obligations imposed by the Human Rights Committee in respect of the ICCPR indicates a great extent of convergence with the five-part model of State obligations proposed by Steiner *et al*, and accordingly confirms that the latter typology is particularly suitable as a basis for analysis when it comes to a right such as the right to freedom from violence that is closely aligned to ICCPR rights.

4.3 The 'due diligence' standard

International law recognises the principle that States are under an obligation to act with 'due diligence' to prevent, investigate, punish and provide remedies for acts of violence regardless of whether these are committed by private or State actors. 'Due diligence' has a long history in international law, with references to this standard going back as far as the seventeenth century.[122] While the due

119 S Joseph *et al The International Covenant on Civil and Political Rights* 2 ed (2004) 34.

120 Human Rights Committee *General Comment No. 6: The Right to Life (Art 6)* (dated 30 April 1982) para 5.

121 Joseph *et al op cit* note 119 at 35.

122 For an in-depth discussion of this principle and its place in international law, see J Bourke-Martignoni 'The history and development of the due diligence standard in

diligence standard (or variants thereof) can be found across a range of different fields of international law, the application of this standard to human rights issues is relatively new.[123]

The Inter-American Court of Human Rights established the importance of the due diligence standard in the context of human rights in its key judgment in *Velásquez Rodríguez v Honduras.*[124] In this case, which arose from the unexplained disappearance of Manfredo Velásquez, the Court held that Honduras had failed to fulfil its duties under Article 1(1) of the American Convention on Human Rights and concluded that -

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[125]

The Court further pointed out that the State has a legal duty to take 'reasonable steps' to prevent human rights violations, to use the means at its disposal to thoroughly investigate any violations occurring within its jurisdiction, to identify the perpetrators, impose appropriate punishment and to ensure that the victim receives adequate compensation.[126] Regarding the duty to prevent human rights violations, the Court explained that this includes 'all those means of a legal, political, administrative and cultural nature that promote the protection of human

international law and its role in the protection of women against violence' in C Benninger-Budel (ed) *Due Diligence and Its Application to Protect Women from Violence* (2008) 48-49.

123 *Idem* at 49.

124 Inter-American Court of Human Rights *Velásquez Rodríguez v Honduras* (Judgment dated 29 July 1988) Series C: Decisions and Judgments, No. 04.

125 *Idem* para 172.

126 *Idem* para 174.

rights and ensure that any violations are considered and treated as illegal acts'.[127] It was emphasised that the preventive measures would vary according to the legal, social and political environment of the State concerned.

This judgment in *Velásquez Rodríguez v Honduras* has formed the basis for subsequent jurisprudential developments not only in the Inter-American context, but also in the broader international environment, as will be discussed below.

The European Court of Human Rights has developed its own line of jurisprudence relating to the positive obligations resting on States Parties to the European Convention on Human Rights to effectively prevent, investigate, prosecute, punish and provide remedies for acts of violence perpetrated by private persons.[128] These standards are similar to the 'due diligence' principle, although the Court only recently started employing this term in respect of violence against women in the case of *Opuz v Turkey*.[129] An important judgment in this regard is *Osman v United Kingdom*,[130] where the ECrtHR held that Article 2 of the European Convention, which guarantees the right to life, enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.[131]

The State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the

127 *Idem* para 175.

128 Bourke-Martignoni *op cit* note 122 at 51.

129 See discussion in Chapter 5, Part D, Section 4.5. It is interesting to note that the draft European Convention on Violence against Women and Domestic Violence contains a section entitled 'due diligence' – Chapter 5, Part D, Section 3.

130 (2000) 29 EHHR 245.

131 Paras 115-116.

commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices that must be made in terms of priorities and resources, such an obligation must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner that fully respects the due process and other guarantees that legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the European Convention.[132]

Thus, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established that the authorities knew (or ought to have known) at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the

[132] These Articles guarantee the rights to liberty and security of the person and to respect for private and family life respectively.

scope of their powers which, judged reasonably, might have been expected to avoid that risk. This is a question which can only be answered in the light of all the circumstances of any particular case.

Following the judgments in *Velásquez Rodríguez v Honduras*, the nature and scope of State duties to act with due diligence to prevent and respond to *acts of violence against women* have been set out in a number of instruments, which will be examined in more depth in Chapters 3, 4 and 5. In 2006, the United Nations ('UN') Special Rapporteur on Violence against Women further published a thematic report on the due diligence standard and its application in the context of violence against women.[133]

4.4 Analytical framework

Against this background, I therefore propose the following framework for analysing the normative documents in the international human rights systems in the following two chapters. Firstly, it will be important to consider the *legal nature* of the document, and what the legal implications of the document are for South Africa in terms of international law. For example, is the document potentially legally binding, has South Africa signed or ratified the document, and has the document been domesticated in any way.

The next step will then be to look at the substantive provisions of the document, using the 'template' below. This template will consider the following questions:

[133] Y Ertürk *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women* UN Doc E/CN/2006/61 (dated 20 January 2006).

(a) What does the document say about violence against women/ gender-based violence generally?

(b) What does the document say about women's right to freedom from violence?

(c) What does the document say about the State's obligations to –

(i) Respect women's right to freedom from violence

(ii) Create institutional machinery essential to realise women's right to freedom from violence

(iii) Protect women against violence

(iv) Provide goods and services to satisfy women's right to freedom from violence

(v) Promote women's right to freedom from violence

(d) What does the document say about the State's duty to act with due diligence in respect of violence against women?

(e) What does the document say about the State's duty to report to the implementing body about violence against women?

The purpose of 'tracking' these questions in respect of the international (global) and regional human rights systems is firstly, as Steiner *et al* put it, to attempt to clarify the significance and contents of women's right to freedom from violence through this deconstruction of, *inter alia*, the related state duties, and secondly, to investigate whether there are any variations and developments in this regard over the period under review. These, in turn, will inform the analysis of the development of normative standards in South African constitutional law.

5. DELINEATION OF STUDY: THEMATIC EXPLORATION OF INTERNATIONAL HUMAN RIGHTS LAW

5.1 Violence against women as torture

5.1.1 Background

In the early 1990s feminist commentators, concerned about the reluctance of international human rights and humanitarian law to recognise violence against women as a violation of human rights and provide its victims with adequate protection, developed the argument that certain instances of violence against women (particularly domestic violence) should be understood as torture.[134]

Drawing this comparison was inherently bound up with an understanding of the private/ public dichotomy in international law, which has formed the subject of severe criticism by feminist scholars.[135] The analogy drawn by Copelon between domestic violence and torture holds that the processes, purposes and consequences of 'official' torture and intimate violence are startlingly similar. The fact that domestic violence is privately, as opposed to officially inflicted, diminishes neither the atrocity of the violence nor the need for international sanction.[136] By providing protection against excesses of State power in the form

134 See eg R Copelon 'Recognizing the egregious in the everyday: Domestic violence as torture' (1994) 25 *Columbia Human Rights Law Review* 291 at 295; CA MacKinnon 'On torture: A feminist perspective on human rights' in KE Mahoney & P Mahoney (eds) *Human Rights in the Twenty-first Century* (1993) 21 at 25-31.

135 See especially C Romany 'Women as *aliens*: A feminist critique of the public/ private distinction in international human rights law' (1993) 6 *Harvard Human Rights Journal* 87 at 88, which constitutes a companion piece to the article by Copelon *op cit* note 134 above.

136 Copelon *op cit* note 134 at 298-299.

of 'torture', human rights law therefore protects the male experience in the public sphere, but fails to protect women from (essentially the same) violence that they experience at the hands – literally - of perpetrators in the private sphere.[137]

Fortin explains that the prohibition of torture is widely recognised as a principle of *ius cogens* and no derogation is permitted from this peremptory norm of international law.[138] This implies that where violence against women is viewed as torture, it can be brought under the ambit of one of the strongest protections that international law can offer.[139] The main obstacle to this reconceptualisation, however, could be seen to lie in the definition of 'torture' as set out in the Convention against Torture:[140]

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination on any kind, when such pain or suffering is inflicted by or at the instigation or of with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to unlawful sanctions.[141]

137 K Fortin 'Rape as torture: An evaluation of the Committee against Torture's attitude to sexual violence' (2008) 4 *Utrecht Law Review* 145 at 145.

138 *Idem* at 145-146.

139 *Ibid.*

140 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment GA Res 39/46 UN Doc A/39/51 (1984), entered into force 26 June 1987 [hereafter 'the Torture Convention'].

141 Art 1.

This definition requires three elements for an act to constitute torture.[142] First, there must be a physical or mental act that gives rise to a specified degree of pain or suffering. Second, the perpetrator must inflict the pain and suffering for a purpose or with an intent listed in the Article. Third, the perpetrator must be a public official or a person acting in an official capacity.

It was initially anticipated that the third requirement above might present difficulties in terms of reconceptualising acts of violence against women as torture.[143] Compared to other instruments such as the ICCPR, the definition of torture in the Convention against Torture is narrower because of its inclusion of the element of official involvement.[144] However, the concepts of 'consent or acquiescence' allow for an interpretation of torture that is broad enough to include the failure of government to redress domestic violence, even if the drafters did not have domestic violence in mind.[145]

The Special Rapporteur on Violence against Women in 1996 underwrote the argument (as put forward by Copelon) for domestic violence to be viewed as torture,[146] and discussed how the three elements constituting torture similarly apply to domestic violence.[147]

142 D Blatt 'Recognizing rape as a method of torture' (1992) 19 *Review of Law and Social Change* 821 at 828. A fourth element, i.e. intention, can be identified here – M Nowak (2008) *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc A/HRC/7/3 (dated 15 January 2008) para 27.

143 Fortin *op cit* note 137 at 146.

144 Copelon *op cit* note 134 at 355.

145 *Ibid.*

146 R Coomaraswamy *Report of the Special Rapporteur on violence against women, its causes and consequences* UN Doc E/CN.4/1996/53 (6 February 1996) paras 42-50.

147 *Idem* paras 46-49.

In respect of the third element of State involvement, she noted the following:

> Finally, where the State does not exercise due diligence and equal protection to prevent and punish domestic abuse, it, like official torture or independent paramilitary violence, occurs with at least the tacit involvement of the State. Where the State permits this violence or is passive or half-hearted, it abandons the battered woman to the dominion of the batterer and tacitly supports that dominion.[148]

She therefore stated that the argument that domestic violence should be understood and treated as a form of torture (and, when less severe, ill-treatment), is one that deserves consideration by the rapporteurs and treaty bodies that investigate these violations.[149]

This conceptualisation was however complicated by the fact that international law was traditionally notably slow to respond to rape and sexual violence of women committed by public officials. Blatt explains that prohibitions on the use of torture and prohibitions of rape by public officials historically developed independently of each other.[150] Feminist commentators have argued that treating torture and sexual violence committed against women by public officials as a means of torture (whether in detention or under circumstances of control by

148 *Idem* para 48.

149 *Idem* para 50.

150 Blatt *op cit* note 142 at 823. She notes that torture, originally an accepted method of punishment and interrogation, was first condemned in the eighteenth century. Its prohibition under international law initially appeared in various treaties governing war. After World War II, torture was repeatedly prohibited in a succession of human rights declarations and covenants, culminating in the adoption of the Torture Convention in 1984. In contrast, rape has been explicitly condemned under humanitarian law alone. See further Blatt *op cit* at 831, where she discusses the treatment of rape in the Fourth Geneva Convention of 1949, Relative to the Protection of Civil Persons in Time of War. Art 27 calls for the protection of women against any 'attacks on their honour', which includes rape, enforced prostitution or any form of indecent assault. See also Section 5.2 below.

soldiers, police officers or other state agents) as separate phenomena constituted a misunderstanding of both.[151]

An example of such failure to see rape as torture is found in the approach followed by the European Commission of Human Rights ('European Commission') in *Cyprus v Turkey*.[152] This case originated from the invasion of Cyprus by Turkey in 1974, and Cyprus claimed (*inter alia*) that hundreds of women and girls had been indiscriminately and repeatedly raped by Turkish troops.[153] The European Commission found that these acts were imputable to Turkey and constituted 'inhuman treatment' in contravention of Article 3 of the European Convention. The Committee did not however assess whether the rapes constituted torture.[154]

5.1.2 Recent developments

As briefly explained earlier, much has changed since the early 1990s. International human rights law has broadened its vision greatly in terms of the recognition of women's rights generally as well as the specific acknowledgment that violence against women constitutes a human rights violation. The notion of state accountability for failure to adequately address violence against women has also taken on new dimensions with the refinement of the concept of 'due

151 Blatt *op cit* note 142 at 843-850.

152 European Commission on Human Rights *Admissibility Decision: Cyprus v Turkey Application No 6780/74 & 690/75* (dated 26 May 1975).

153 Women and girls from various villages were rounded up by the troops, placed in houses, and raped. Many rapes were accompanied by brutal abuse or were followed by the killing of the woman.

154 At the time, the Torture Convention was admittedly not yet in force. However, the Declaration against Torture had already been adopted, and the Commission could have drawn on its provisions - Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment GA Res 3452 (XXX) UN Doc A/10034 (1975).

diligence'. I would argue that a reconceptualisation of violence against women as torture in order to enlist the protection of international law has thus now become largely redundant.

The armed conflict in the former Yugoslavia compelled international law to take a new look at its treatment of sexual violence against women.[155] For example, the International Criminal Tribunal for the formal Yugoslavia ('the ICTY') contributed to the understanding of rape as torture in the case of *Kunarac, Kovač and Vuković,*[156] in that the Court held that the element of 'severe physical or mental pain or suffering' is *per se* satisfied by an act of rape.[157] These shifts, together with the general developments in international human rights law, contributed to a greater awareness of the interplay between violence against women and torture.

Regarding sexual violence by public officials, two regional bodies unequivocally confirmed that such acts constitute torture when carried out by or at the instigation of or with the consent or acquiescence of public officials.[158] More recently, the Committee against Torture published two decisions bearing out the view that sexual violence constitutes torture under Article 1 of the Convention against Torture.[159] Both of these cases dealt with sexual violence committed by

155 See also Section 5.2 below.

156 *Prosecutor v Kunarac, Kovač and Vuković* Case No IT-96-23 & Case No IT-96-23/1-A (judgment dated 12 June 2002) para 150.

157 See also *Prosecutor v Delalic et al* Case No IT-96-21-T (judgment dated 16 November 1998) and *Prosecutor v Furundzija* Case No IT-95-17/1-T (judgment 10 December 1998).

158 Inter-American Commission on Human Rights *Report No. 5/9: Case 10.970 Raquel Martín de Mejía, Peru* (dated 1 March 1996); European Court of Human Rights *Aydin v. Turkey* No.57/1996/676/866 (judgment dated 25 September 1997).

159 Committee against Torture *CT and KM v Sweden Communication No 279/2005* (dated 17 November 2006) UN Doc CAT/C/37/D/279/2005 (2007); Committee against Torture *VL v Switzerland Communication No 262/2005* (dated 20 November 2006) UN

public officials (the former in the context of detention). The Committee expanded this understanding by stating in its General Comment on Article 2 of the Convention, adopted in 2007, that the contexts in which women are at risk include violence by private actors in communities and homes.[160]

The Special Rapporteur on torture published a thematic report in 2009 addressing the protection of women from torture. He notes that the aim of this initiative is to ensure that 'the torture protection framework' is applied in a gender-inclusive manner, and explains as follows:

> While a variety of international instruments explicitly or implicitly provide for an extensive set of obligations with respect to violence against women or rape, classifying an act as "torture" carries a considerable additional stigma for the State and reinforces legal implications, which include the strong obligation to criminalise acts of torture, to bring perpetrators to justice and to provide reparation to victims.[161]

However, typifying violence against women as torture serves more than just a symbolic or ideological purpose. In certain jurisdictions, it may also have practical implications, for example, in terms of asylum law.[162] Article 3 of the

Doc CAT/C/37/D/262/2005 (2007). The Committee had previously been criticised for its failure to engage with sexual violence – Fortin *op cit* note 137 at 147.

160 Committee against Torture *General Comment No. 2: Implementation of Article 2 by States Parties* UN Doc CAT/C/GC/2 (dated 24 January 2008) para 22.

161 Nowak *op cit* note 142 para 26.

162 Alexander recounts the case of Rodi Alvarado-Peña, a Guatemalan woman who fled to the US after more than ten years of severe domestic violence at the hands of her husband – BC Alexander 'Convention against Torture: A viable alternative legal remedy for domestic violence victims' (2000) 15 *American University International Law Review* 895 at 896-899. Her departure was prompted by the unwillingness of Guatemalan government officials to respond to her pleas for help; however, ultimately she fled to the US in 1995 because she believed that her only chances of escaping her husband were to flee or die. Although she was initially granted asylum in the US, in 1999 the Board of Immigration Appeals reversed this grant of asylum on the basis that Ms Alvarado had not shown that she had suffered persecution 'on account of either actual or imputed political opinion or membership in a particular social group' as

Convention against Torture prohibits the expulsion, *refoulement* or extradition of any 'person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'. This is illustrated by the following example: a woman who has left Country A as a result of persistent and severe domestic violence committed by her husband (and who is unable to find recourse from the justice system in Country A) now seeks asylum in Country B, based on her belief that she would be subjected to torture in the form of continued domestic violence if returned to country A. Article 3 of the Convention against Torture provides her with relief in that it prevents Country B from returning her.[163]

The linkages between violence against women and torture are clear and considerable, and it is apparent from the brief overview above that the crafting of international law standards on torture in order to include violence against women committed by public officials (and increasingly, by private actors) can add an extra dimension to an exploration of women's right to freedom from (private) violence. It should however be noted that the 'torture protection framework' (as referred to by the Special Rapporteur) is in itself still in a process of

required in terms of s 101(a)(42) of the Immigration and Nationality Act 8 USCA - cited in Alexander *op cit* at 898. Ms Alvarado's case became a *cause celebre* in the US for women's rights advocates, and in November 2009 she was finally granted asylum. At the time of writing, the USA (Obama) administration is reportedly crafting regulations to allow entry by other victims of domestic violence who feel they have no choice but to flee their home country to protect themselves. See Anon (18 December 2009) 'Domestic violence victim granted asylum in US' *Associated Press* [cgrs.uchastings.edu/pdfs/photos%20-%20Domestic%20Violence%20Victim%20Granted%20Asylum%20In%20US%20_%20NPR.pdf] (Accessed on 10 May 2010.); see also B Meyersfeld *Domestic Violence and International Law* (2010) 284-285.

163 This hypothetical example, based on the case of Alvarado in note 162 above, assumes that Country B has ratified the Convention against Torture and incorporated its provisions into domestic law. It should be noted the woman in the example will not automatically 'qualify' for asylum (which brings with it permanent resident status) in terms of Article 3 of the Convention - see Alexander *op cit* note 162 at 913.

development, in that the State accountability for acts of torture against women, committed by *private* actors, has not been settled in the adjudicatory jurisprudence of the Committee against Torture.

At the same time, the focus when viewing violence against women through the lens of torture is often on *severe* acts of physical and mental violence – given the elements of the definition of torture. This may imply that instances of less severe violence as well as violence other than physical violence (for example, economic abuse) may fall outside the ambit of what appears at first glance to be 'torture'. This is not in itself problematic: one concedes readily that not all instances of violence against women will constitute torture. The difficulty may arise in that the standards to distinguish where violence amounts to torture and where it does not are not always clear.[164]

Because of these potential definitional constraints, as well as the fact that the international protection of women's right to freedom from violence has learnt to 'walk on its own'[165] (rather than receiving protection by analogy under the rubric of the right to freedom from torture), this study focuses solely on the former right.

[164] See in this regard Blatt *op cit* note 142 at 833.

[165] Romany commented in 1993 that the challenge awaiting a feminist critique is to ensure that the discourse of rights learns to walk on its own in the human rights field as applied to women – *op cit* note 135 at 97.

5.2 The right to freedom from violence in international criminal law and law of armed conflict

A second area where a great deal of attention has in recently years been paid to violence against women is the intersection between international criminal law and humanitarian law. As a starting point, it is important to bear in mind that the issue of sexual violence against women in armed conflict was largely invisible until the mid-1990s.[166] For example, following World War II both the Nuremburg and Tokyo Tribunals failed to adequately prosecute acts of sexual violence.[167] Some normative development had admittedly taken place after 1945 in that rape was included in the Fourth Geneva Convention of 1949[168] as well as the 1977 Additional Protocols.[169] However, this did not lead to the prosecution of sexual violence against women in subsequent conflict such as the Vietnam war.[170] The stipulations that were in existence in international humanitarian law

166 Niarchos provides an overview of the history of sexual violence against women in armed conflict and its regulation – CN Niarchos 'Women, war and rape: Challenges facing the International Tribunal for the Former Yugoslavia' (1995) 17 *Human Rights Quarterly* 649 at 659-668; see also R Copelon 'Gender crimes as war crimes: Integrating crimes against women into international criminal law' (2000) 46 *McGill Law Journal* 217 at 220-221.

167 See Copelon *op cit* note 166 at 221-223, for a description of the situation of the 'comfort women' and the fact that these war-time crimes were never prosecuted in the Tokyo tribunal. For a general overview, see also E Meier 'Prosecuting sexual violence crimes during war and conflict: New possibilities for progress' (2004) 10 *International Legal Theory* 83 at 87-88.

168 *Convention Relative to the Protection of Civilian Persons in Time of War* 75 UNTS 287 (entered into force 21 October 1950) Art 3.

169 *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I) UNTS 1125/3 (entered into force 7 December 1978) Art 76; *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) UNTS 1125/609 (entered into force 7 December 1978) Art 4; See Section 5.1.1 above.

170 Niarchos *op cit* note 166 at 667-668; for an instructive overview see KD Askin 'Women and international humanitarian law' in KD Askin and DM Koenig (eds) *Women and International Human Rights Law* (1999) 41-87; also A Cole 'International

at the time have also been criticised for the fact that they mostly punished sexual violence as acts against the 'honour and dignity' of women, rather than as crimes of violence.[171]

The *ad hoc* tribunals for the former Yugoslavia and Rwanda dramatically changed this and brought sexual violence in armed conflict into the sharp glare of international attention. In the key judgment in *Akayesu,* the International Criminal Tribunal for Rwanda ('ICTR') recognised that acts of sexual violence (including rape) constituted genocide.[172] The judgment is also noteworthy in other respects: the Tribunal held that forced nudity is a form of inhumane treatment,[173] and recognised that rape could be a form of torture.[174] It further formulated an inclusive definition of rape as a physical invasion of a sexual nature (committed under coercive circumstances).[175]

The ICTY had also served as a site for normative development. As explained above, sexual assault was recognised as torture in the judgments of *Delalic* and

criminal law and sexual violence: an overview' in C McGlynn & VE Munro (eds) *Rethinking Rape Law* (2010) 47-60.

171 Niarchos explains that by linking the prohibition of rape to women's honour and dignity, the Geneva Convention not only overlooks the violent nature of rape, but attaches this prohibition to the 'wrong category of rights' – *op cit* note 166 at 672, 674.

172 *Prosecutor v Jean Paul Akayesu* ICTR Trial Chamber Case No ICTR-96-4-I paras 731-734.

173 *Idem* para 697.

174 However, as the Tribunal points out, in this instance the accused was not charged with torture in terms of Article 3(f) (torture) of the ICTR Statute or Article 4(a) (violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment) – see para 690 of the judgment.

175 'The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts' – para 687. See also para 688. As an aside, this latter recognition has played a crucial role in contemporary rape law reform on domestic (national) level. The *Akayesu* definition of sexual violence and its subsequent development in the *ad hoc* tribunals, will not be discussed at length here.

Furundžija.[176] In its 2001 judgment in *Kunarac, Kovač and Vuković*,[177] this Tribunal went beyond the *Akayesu* judgment by construing rape and sexual enslavement to be war crimes.[178] The practice before these tribunals furthermore illuminated the need for gender-sensitive protective measures for women victims and witnesses and reliable support to minimise the risks and potential retraumatisation of testifying.[179] Certain of these advances were already reflected in the early practices of the Special Court subsequently set up in Sierra Leone in 2002.[180]

More importantly, however, the jurisprudence emerging from the ad hoc tribunals provided a foundation for the codification of sexual violence as part of the substantive jurisdiction of the International Criminal Court.[181] The Statute of the International Criminal Court[182] codifies a number of crimes of sexual violence as part of the Court's jurisdiction and also makes provision for a range of structures and procedures to ensure that the victims of these crimes are 'properly treated in the process of justice'.[183]

176 See Section 5.1 (b) above.

177 *Prosecutor v Kunarac, Kovač and Vuković* Case No IT-96-23 & Case No IT-96-23/1-A (judgment dated 12 June 2002).

178 Para 186.

179 Copelon *op cit* note 166 at 231.

180 The Special Court for Sierra Leone was created in 2002 as a joint international-domestic effort to prosecute those bearing the greatest responsibility for crimes against humanity and war crimes committed during the conflict – see V Oosterveld 'Lessons from the Special Court for Sierra Leone on the prosecution of gender-based crimes' (2009) 17 *Journal of Gender, Social Policy and the Law* 407 at 408.

181 Copelon *loc cit*. The gender-related jurisprudence of the *ad hoc* tribunals has been subjected to criticism – see eg PV Sellers 'Gender strategy is not a luxury for international courts' (2009) 17 *Journal of Gender, Social Policy and the Law* 301 at 316-317 (relating to the ICTR subsequent to *Akayesu*); Oosterveld *op cit* note 180 at 414-420, 424-429 (relating to the Special Court for Sierra Leone).

182 UN Doc A/CONF.183/9 (dated 17 July 1998), entered into force on 1 July 2002 [hereafter 'the Rome Statute'].

183 Copelon *op cit* note 166 at 233.

Article 5 of the Rome Statute notes that the jurisdiction of the Court includes the 'most serious crimes of concern to the international community as a whole'. These crimes are genocide; crimes against humanity; war crimes; and the crime of aggression.[184] Articles 6 to 8 set out the definitions of the offences of genocide, crimes against humanity and war crimes respectively.

It is apparent from these definitions that the *context* in which these acts are committed are a determining factor in each instance. 'Genocide', for example, consists of certain acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[185] This implies that the prosecution has to prove not only that the accused committed the acts in question, but that the acts were committed with a specific intent and under particular circumstances.[186]

[184] Art 5(2) provides that the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision must be consistent with the relevant provisions of the UN Charter.
On 11 June 2010, the Review Conference of the Rome Statute concluded in Kampala, Uganda. This Conference adopted a resolution by which it amended the Rome Statute so as to include a definition of the crime of aggression. This definition is based on UN General Assembly Resolution 3314 (XXIX) of 14 December 1974, and in this context the Conference agreed to qualify as aggression, a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter. As regards the Court's exercise of jurisdiction, the Conference agreed that a situation in which an act of aggression appeared to have occurred could be referred to the Court by the Security Council, acting under Chapter VII of the United Nations Charter, irrespective as to whether it involved States Parties or non-States Parties. See [www.kampala.icc-cpi.info]. (Accessed on 16 June 2010.)

[185] Art 6 lists these acts as the following: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.

[186] The analysis of the Trial Chamber in respect of Counts 13 and 14 in the *Akayesu* case provides an example of how these aspects are interlinked.

'Crimes against humanity' consist of a number of listed acts when committed as part of a widespread or systematic attack direct against any civilian population, with knowledge of the attack.[187] The listed acts relating to sexual violence include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other forms of sexual violence of comparable gravity.[188] The Court furthermore has jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.[189]

It is therefore evident that much of the accent in the emergent jurisprudence has fallen on the scrutiny of this context in order to place the criminal acts (for example, of sexual violence) in the appropriate crime category, such as 'crimes against humanity' or 'genocide',[190] and then consider the liability of the accused accordingly. While this approach has been essential to overcome the previous invisibility of sexual violence in this area, it has also had the unintended

187 Art 7.

188 Art 7(1)(g).

189 The exposition of 'war crimes' in Art 8 is extensive. It lists four broad categories of war crimes, i.e. grave breaches of the Geneva Conventions of 1949; other serious violations of the laws and customs applicable in international armed conflict (within the established framework of international law); in the case of an armed conflict not of an international character serious violations of Article 3 common to the four Geneva Conventions of 1949; and other serious violations of the laws and customs applicable in armed conflicts not of an international character. The Statute provides specific instances under each of these categories. Sexual violence is either mentioned explicitly as part of these subcategories (see Art 8(2)(b)(xxii)) or could implicitly resort under others (eg Art 8(2)(a), which lists 'wilfully causing great suffering, or serious injury to body or health').

190 As pointed out above, 'sexual violence' can be charged under any of Articles 6 to 8 of the Rome Statute, depending on the context. The ICTY Tribunal confirmed a similar position, in relation to the ICTY Statute, in *Furundžija* (note 154): 'The prosecution of rape is explicitly provided for in Article 5 of the Statute… as a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly.' – para 172.

consequence of under-playing the rights to bodily and mental integrity and to sexual autonomy (amongst others) of the individual victims.[191]

Richey makes the argument that a crime against humanity, for example, is viewed by international humanitarian law as more than a serious crime against one person or one body:[192] crimes against humanity (or acts of ethnic cleansing) consist of bringing together attacks on the body and rights of one person with attacks on the body of a people (or body politic). She then poses the question whether this fusion of the bodily rights of women with the rights of the polity signals a strengthened commitment to the rights of women under international law,[193] and makes the following statement:

> Judgments and statutes regarding war rape must begin to speak literally about the right of women to be free from violations of bodily integrity and limitations on their sexual autonomy.[194]

Although I concur that this is clearly a conversation that should take place and a question that deserves further investigation, an exhaustive appraisal of the corpus of humanitarian law and international criminal law addressing sexual violence in armed conflict, with specific reference to the role of the right to women to

191 KC Richey 'Several steps sideways: International legal developments concerning war rape and the human rights of women' (2007) 17 *Texas Journal of Women and the Law* 109 at 110-111.

192 *Idem* at 112.

193 Richey is of the opinion that this is not necessarily the case. She makes her argument with reference to the issue of sexual violence committed against women by soldiers for purposes of 'recreation', i.e. when they are off duty and not under orders. Rape as recreation does not qualify as a crime against humanity and is not used as a weapon of 'ethnic cleansing', but it is committed during and after wars with frequency and impunity. It currently occupies a marginal space in international law. Interestingly, she proposes that conceiving of rape in war as a form of torture, rather than a crime against humanity, is the best way to ensure the protection of women's human rights – *idem* at 114-119.

194 *Idem* at 119-120.

freedom from violence, would have taken this study well beyond its limits in terms of length and breadth.

A second argument against the inclusion of this consideration here is the potentially destabilised architecture of the State in times of armed conflict. It has been noted that social regulatory mechanisms (which should be understood to go beyond State mechanisms) generally work to keep peacetime rates of sexual violence at a lower level than during war.[195] Thus incidences of sexual violence in armed conflict generally represent a weakening of these regulatory mechanisms.[196] At the risk of generalisation, the law of armed conflict generally suggests that the State institutions (or regulatory mechanisms) most closely associated with addressing violence against women (including the legislature, police, prosecution and judiciary) are not operating according to 'ordinary' or accepted standards.[197] Given that a major part of the research question here is to determine what these standards are, in terms of international human rights law, and how they should apply to South African jurisprudence, one notes the dissonance between this question and those arising more particularly in respect of armed conflict and political and other instability. This, then, is the second motivation for omitting this theme from this study.

195 *Ibid*. 'Armed conflict' may admittedly include a broad range of situations where State institutions are intact and functioning to a greater or lesser extent; the principles of international criminal law are further applicable to situations where there is no 'conflict' *strictu senso*, such as political unrest or instability.

196 See also T Winkler 'Violence against women in armed conflict' in C Benninger-Budel (ed) *Due Diligence and Its Application to Protect Women from Violence* (2008) 265 at 266-267.

197 In the case of political unrest or instability falling short of armed conflict but where the principles of international criminal law apply, one may find that State institutions are functioning, but not in such a way as to provide women with *adequate* recourse against acts of violence.

CHAPTER 3

THE DEVELOPMENT OF WOMEN'S RIGHT TO FREEDOM FROM VIOLENCE IN INTERNATIONAL LAW: THE WOMEN'S CONVENTION

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1. INTRODUCTION

This chapter constitutes the first of two examining the development of women's right to freedom from violence in international[1] human rights law.[2] In this first part, particular attention is paid to the major instrument in international law addressing women's rights, i.e. the Convention on the Elimination of All Forms of Discrimination against Women.[3] By means of introduction, the chapter briefly considers the historic background to the drafting of this Convention and looks into the legal nature of the document in international law.

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1 The term 'international' is used here to refer to the human rights system operating at global (predominantly UN) level. While it is acknowledged that international human rights law also finds expression in the so-called 'regional' human rights systems and that the latter is therefore not conceptually a separate 'category' or subset of legal norms, a distinction is drawn between 'international' and 'regional' (including subregional) human rights law for purposes of this thesis, mainly in Chapters 3 to 5, in order to set out the contents of instruments and explain the operation of the relevant implementation mechanisms.

2 This examination has been set over two chapters for ease of reading. Certain of the themes explored here and in Chapter 4 have also been addressed in an earlier article published as H Combrinck 'State duties to protect women from violence: Recent South African developments' (1998) 20 *Human Rights Quarterly* 666-690.

3 Adopted 18 Dec 1979, GA Res 34/180, UN GAOR 34th Session UN DOC A/34/ 46 (1980) (entered into force 3 September 1981) [hereafter 'the Women's Convention']. (Although 'CEDAW' is often used to denote the Convention itself, it is also employed to refer to the Committee on the Elimination of Discrimination against Women – as it is used for purposes of this thesis. See in this regard eg E Stamatopoulou 'Women's rights and the United Nations' in J Peters & A Wolper (eds) *Women's Rights: Human Rights* (1995) 36 at 38).

The contents of the Women's Convention are subsequently examined, with reference to both general provisions (including the definition of 'discrimination', the obligations imposed on States Parties and certain aspects relating to the implementation of the Convention such as the activities of the monitoring committee) and its provisions relating to violence against women. I then briefly look at the position of South Africa in relation to the Convention.

An important question, for purposes of this study, is how the monitoring body has interpreted the Convention. The chapter accordingly investigates four communications brought before the Committee on the Elimination of Discrimination against Women ('CEDAW') in terms of the Optional Protocol (adopted in 1999),[4] as well as the inquiry conducted by the Committee into gender-based violence committed against women in Ciudad Juárez, Mexico.[5] Finally, I evaluate how the interpretation by the CEDAW in these matters has contributed to the normative development of women's right to freedom from violence.

Chapter 4 similarly considers the emergence of standards relating to the protection of women's right to freedom from violence from the early 1990s to date by examining international documents *other* than the Women's Convention.

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4 Adopted on 6 October 1999, GA Res A/RES/54/4 UN Doc A/RES/54/4 (dated 15 October 1999), entered into force on 22 December 2000 [hereafter 'the Optional Protocol'].

5 CEDAW *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico* UN Doc CEDAW/C/2005/OP.8/MEXICO (dated 27 January 2005).

2. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

2.1 Background to drafting of the Convention

In the early 1970s the Commission on the Status of Women[6] ('CSW') embarked on the elaboration of what was to become the Women's Convention.[7] There had been statements in various international instruments promising equality and non-discrimination based on sex – some in binding instruments,[8] others in non-binding declarations.

For example, Article 1(3) of the UN Charter describes one of the purposes of the formation of the UN as 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[9] In Article 1 of the Universal Declaration of Human Rights,[10] signatories

6 The UN Commission on the Status of Women was instituted in 1946 as a permanent body under the auspices of the Economic and Social Council ('ECOSOC') to deal with women's rights – see E Evatt 'Finding a voice for women's rights: The early days of CEDAW' (2002) 34 *George Washington International Law Review* 515 at 515; S Wright 'Human rights and women's rights: An analysis of the United Nations Convention on the Elimination of All Forms of Discrimination against Women' in KE Mahoney & P Mahoney (eds) *Human Rights in the Twenty-first Century* (1993) 75 at 76.

7 A Byrnes 'The Convention on the Elimination of all Forms of Discrimination Against Women' in W Benedek et al (eds) *Human Rights of Women* (2002) 119 at 119; Wright *loc cit*.

8 For example, Convention on the Political Rights of Women GA Res 640 (VII) dated 20 December 1952; Convention on the Nationality of Married Women GA Res 1040 (XI) dated 29 January 1957; Convention on Consent to Marriage GA Res 1763 A (XVII) dated 7 November 1962.

9 Charter of the United Nations, adopted 26 June 26 1945, entered into force 24 October 1945 Art 1 § 3.

pledge to recognise that all 'human beings' are born free and equal in dignity and rights. According to Article 2, everyone is entitled to all the rights and freedoms set forth in the Declaration, 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status'. The UDHR confirms that every individual has the right to life, liberty and the security of the person;[11] the document further guarantees women and men equal rights to physical and mental health.[12] Both the International Covenant on Civil and Political Rights[13] and the International Covenant on Economic, Social and Cultural Rights[14] guarantee the right to be free from gender discrimination. The Declaration on the Elimination of Discrimination against Women (adopted in 1967) had been a broad, non-binding statement of women's rights to equality and non-discrimination.[15]

One notes, therefore, that there was no single detailed 'charter of equality' for women under international law. For this reason, supporters of a Women's Convention believed that the time had come for a 'comprehensive statement of women's entitlements to equality' in a form that would be legally binding on

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10 Universal Declaration of Human Rights GA Res 217A (III) UN GAOR 3rd Session UN Doc A/810 (1948) [hereafter 'UDHR']. The UDHR is not a legally binding document; however, some commentators have argued that the UDHR has a legally binding effect on all UN members since it is an authoritative interpretation of the general human rights commitments in the UN Charter- See A Vesa 'International and regional standards for protecting victims of domestic violence' (2004) 12 *American University Journal of Gender, Social Policy and the Law* 309 at 320.

11 Art 3.

12 Art 25 § 1.

13 Adopted 16 December 1966, GA Res 2200A (XXI) UN Doc A/6316 (1966), entered into force 23 March 1976 [hereafter 'the ICCPR']

14 Adopted 16 December 1966, GA Res 2200 (XXII) UN UN Doc A/6316 (1966), entered into force 3 January 1976) [hereafter 'the ICESCR'].

15 GA Res 2263 (XXII), adopted on 7 November 1967. See Byrnes *op cit* note 7 at 119.

governments.[16] The Women's Convention was subsequently adopted by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981. At the time of writing, the Convention had 98 signatories and 186 ratifications or accessions.[17]

2.2 Nature of the document

The Women's Convention is often referred to as the 'definitive international legal instrument requiring respect for and observance of the human rights of women'.[18] Byrnes explains that the Convention can be viewed from a number of perspectives.[19] It is a political manifesto, clearly declaring the right of women to equality and non-discrimination; it is also an international legal instrument (a treaty), as well as providing a framework or point of reference for policy-making, lobbying and social activism. It is primarily the second aspect that is of interest here: the fact that the Women's Convention constitutes a multi-lateral international treaty implies that its provisions are binding on ratifying States Parties in terms of international law, subject to reservations.[20] In addition to the direct implications of ratification of the Convention (i.e. the fact that ratifying states are bound by the obligations created by

16 *Ibid.*

17 See [treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en]. (Accessed on 17 March 2010.)

18 RJ Cook 'Reservations to the Convention on the elimination of All Forms of Discrimination against Women' (1990) 30 *Virginia Journal of International Law* 643 at 643.

19 Byrnes *op cit* note 7 at 120.

20 See discussion of reservations to the Convention below in Section 2.3.1 (g) below.

the Convention), the provisions of treaties may under certain circumstances constitute evidence of international custom.[21]

2.3 Contents of the Women's Convention

2.3.1 General provisions

(a) Overview

Part I (Articles 1-6) sets out the 'general' provisions of the Convention, consisting of definitions and obligations of a general nature to eliminate discrimination.[22] Part II sets out the following political rights: rights associated with political and public life, such as the rights to vote, to be eligible for election to all publicly elected bodies and to participate in the formulation of government policy and the implementation thereof (Article 7), the right of women to represent their governments at international level and to participate in the work of international organisations (Article 8) and nationality rights (Article 9). In Part III, certain social and economic rights are covered: education (Article 10), employment (Article 11), health care (Article 12) and other areas of economic and social life, including the right to bank loans, mortgages and other forms of financial credit (Article 13).

Article 14 pays specific attention to the problems faced by rural women, and recognises the significant roles that rural women play in the economic survival of

21 HJ Steiner *et al International Human Rights in Context* 3 ed (2007) 74-75.

22 Art 6, which addresses a specific substantive issue, is somewhat oddly placed here in Part I, which deals with general introductory matters applicable to the whole Convention.

their families, including their work 'in the non-monetised sectors of the economy'.[23] States Parties are required to take appropriate measures to eliminate discrimination against women in rural areas to ensure that they participate in and benefit from rural development and ensure to such women the right (*inter alia*) to participate in development planning at all levels;[24] to have access to adequate health care facilities, including information, counseling and services in family planning;[25] and to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.[26]

Part IV addresses civil law issues: Article 15 deals with women's equality with men before the law, and Article 16 covers matters relating to marriage and family relations.

Part V, consisting of Articles 17 to 22, provides for the establishment of a Committee on the Elimination of Discrimination against Women, the monitoring mechanism for the Convention, and describes its method of operation.[27] It also makes provision for a system of state reporting.[28]

The rest of the Convention, consisting of Articles 23 to 30, make up Part VI and contain 'formal' provisions relating to, for example, the Convention's entry into force and dispute resolution between States Parties.

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23 Art 14 § 1.
24 Art 14 § 2(a).
25 Art 14 § 2(b).
26 Art 14 § 2(h).
27 See Articles 19-22.
28 Art 18.

(b) Definition of discrimination against women

Article 1 of the Convention defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex that has the effect or purpose of impairing the enjoyment by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The framers of the Convention drew on the definition of 'racial discrimination' in the International Convention on the Elimination of All Forms of Racial Discrimination,[29] and the definition of 'discrimination against women' is accordingly similar to that set out in the former document in respect of race.[30] However, one important difference is that whereas the definition in the Race Convention is limited to 'public life', the Women's Convention extends to include discrimination in the private sphere.[31] This is evident from the definition of discrimination itself, as well as the provisions of (amongst others) Articles 2(e), 15 and 16 of the document.[32]

29 Adopted 21 December 1965, GA Res 21061 (XX), entered into force 4 January 1969 [hereafter 'the Race Convention'].

30 Art 1 defines 'racial discrimination' to mean 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.

31 Cook *op cit* note 18 at 666-668.

32 See also discussion by Cook *op cit* note 18 at 667, 669-670.

Byrnes points out that the problem addressed by the Convention is that of discrimination *against women*, rather than discrimination *on the basis of sex*.[33] Both direct and indirect discrimination are covered by the definition in Article 1. This means that not only discrimination that it is explicitly based on sex, but also apparently neutral practices or policies that have the effect of disproportionately excluding women from the enjoyment of opportunities (if not objectively justifiable), will amount to discrimination.[34] This aspect is linked to Article 4, which makes provision for positive measures to promote women's equality.

The CEDAW, which is tasked with monitoring the implementation of the Convention, has adopted a General Recommendation aimed at clarifying the nature and meaning of Article 4, paragraph 1.[35] This Recommendation also provides constructive guidelines on the scope and import of the notion of 'discrimination' more broadly. The Committee explains that the Convention goes beyond the concept of discrimination used in many national and international legal standards and norms.[36] While such standard and norms prohibit discrimination on the grounds of sex and protect both women and men from treatment based on arbitrary, unfair and/ or unjustifiable distinctions, the Convention focuses on discrimination against women, emphasising that women have suffered, and continue to suffer from various forms of discrimination because they are women.

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33 Byrnes *op cit* note 7 at 124; SE Merry *Human Rights and Gender Violence* (2006) 74. See also A Edwards 'Violence against women as sex discrimination: Judging the jurisprudence of the United Nations human rights treaty bodies' (2008) 18 *Texas Journal of Women and the Law* 1 at 22, who notes that this was the subject of one of the main discussions during the drafting process.

34 Byrnes *loc cit*.

35 CEDAW *General Recommendation No. 25: Temporary Special Measures* UN Doc A/59/38 (2004) [hereafter 'CEDAW *General Recommendation No 25*'].

36 *Idem* para 5.

The Committee further provides important interpretative guidance to States Parties when it points out that a joint reading of Articles 1 to 5 and 24, which form the general interpretative framework for all the Convention's substantive articles, indicates that three obligations are central to State's Parties efforts to eliminate discrimination against women.[37] These obligations should extend beyond a purely formal legal obligation of equal treatment of women with men.

Firstly, States Parties' obligation is to ensure that there is no direct or indirect[38] discrimination against women in their laws and that women are protected against discrimination (committed by public authorities, the judiciary, organisations, enterprises or private individuals) in the public as well as the private spheres by competent tribunals as well as through sanctions and other remedies.[39] Secondly, States Parties' obligation is to improve the *de facto* position of women through concrete and effective policies and programmes. Thirdly, States Parties' obligation is to address prevailing gender relations[40] and the persistence of gender-based

37 *Idem* para 6.

38 'Indirect discrimination' is defined by CEDAW as occurring when laws, policies and programmes are based on seemingly gender-neutral criteria that in their actual effect have a detrimental effect on women – CEDAW *op cit* note 35 endnote 1.

39 CEDAW *op cit* note 35 para 7.

40 The Committee defines 'gender' as the social meanings given to biological sex differences. It is an ideological and cultural construct, but it is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait – CEDAW *op cit* note 35 endnote 2.

stereotypes that affect women not only through acts by individuals, but also in law, and legal and societal structures and institutions.

Linking discrimination and gender stereotypes,[41] Cook and Howard explain that a State's decision to deny benefits to or impose burdens on women in reliance on gender stereotypes amounts to gender discrimination.[42] Women's equality requires both the acknowledgment and accommodation of women's actual differences, as well as the elimination of discriminatory treatment of gender stereotypes. Both efforts are required light of the overall object and purpose of the Convention.[43]

The Convention further covers discrimination on the basis of marital status. This would include both discrimination against married women as compared with married men,[44] as well as discrimination against women who are single in comparison with married women (*or vice versa*).[45]

41 Stereotypes generalise certain attitudes to an entire class of persons and preclude assessment of individual needs and circumstances. Accordingly, they suggest limits to individual autonomy in a manner that is arbitrary and unfair. The use of stereotypes is discriminatory when the generalisation implies that those persons subject to the stereotype are in some way inferior as persons – RJ Cook & S Howard 'Accommodating women's differences under the Women's Anti-Discrimination Convention' (2007) 56 *Emory LJ* at 1043-1044; see also M O'Sullivan 'Stereotyping and male identification: "Keeping women in their place"' in C Murray (ed) *Gender and the New South African Legal Order* (1994) 185 at 186-189.

42 Cook & Howard *op cit* note 41 at 1043.

43 *Idem* at 1044.

44 Byrnes observes (correctly) that this is really nothing more than discrimination based on sex – *op cit* note 7 at124.

45 *Ibid.*

An important aspect of the definition is that it covers inequality in the enjoyment of 'human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.[46] The Convention explicitly refers to many of the rights guaranteed by other international instruments such as the two Covenants; however, it does not include *all* of these rights. For example, there is no express mention in the Convention of the obligation of a State Party to eliminate discrimination in women's enjoyment of the right to privacy. These rights are nevertheless incorporated by reference as a result of the terms of Article 1.[47]

A related point is that some violations of women's rights are not covered by a specific article of the Convention, but are nevertheless covered by the Convention as a whole.[48] One example of this is violence against women, which the Committee has interpreted as constituting discrimination against women within the meaning of the Convention and therefore being covered by a number of articles.[49]

46 *Idem* at 125.

47 This means that although there may be no specific provision obliging a State Party not to discriminate in relation to these rights, the general obligations in the Convention (especially in Art 2) in effect impose such obligation.

48 Byrnes *loc cit*.

49 See discussion of *General Recommendation No. 19* in Section 2.3.2 below. Commentators have similarly pointed out that certain articles of the Convention do contain implicit guarantees against violence – see J Fitzpatrick 'The use of international human rights norms to combat violence against women' in RJ Cook (ed) *Human Rights of Women* (1994) 532 at 532; ML Liebeskind 'Preventing gender-based violence: From marginalisation to mainstream in international human rights' (1994) 63 *Revista Juridica Universidad de Puerto Rico* 645 at 664.

(c) Obligations

Article 2 sets out the general obligations undertaken by States Parties. They agree to condemn discrimination against women in all its forms and to pursue 'by all appropriate means and without delay' a policy of eliminating discrimination against women and, to this end, to undertake certain activities. These commitments include, firstly, to embody the principle of equality of women and men in national constitutions (if not yet incorporated therein) and to ensure, through law and other appropriate means, the practical realisation of this principle.[50] Secondly, they agree to adopt appropriate legislative and other measures, including sanctions, prohibiting all discrimination against women.[51] States Parties further commit to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals (and other public institutions) the effective protection of women against acts of discrimination.[52] They will also refrain from engaging in any act of discrimination against women and ensure that public authorities act in conformity with this obligation.[53]

States furthermore agree to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.[54] They will take all appropriate measures, including legislation, to modify or abolish existing laws,

50 Art 2(a).
51 Art 2(b).
52 Art 2(c).
53 Art 2(d).
54 Art 2(e).

regulations, customs and practices that constitute discrimination against women;[55] as well as repeal all national penal provisions constituting discrimination against women.[56]

Importantly, certain of these obligations are expressed in terms that incorporate limitations.[57] For example, when States Parties undertake to pursue 'by all appropriate measures and without delay' a policy of eliminating discrimination against women', it does not necessarily follow that every time an act of discrimination occurs, the state will have breached this obligation. It will be a matter of interpretation and judgment whether the State Party has taken 'all appropriate means'. In assessing whether the measures taken by the State Party are appropriate, sufficient and timely, the Committee may take into account, for example, the extent of the obstacles faced by the State Party and the extent of the 'good faith' efforts made by the State Party to overcome them.[58]

Article 3 contains a more general obligation to ensure the full development and advancement of women, for the purpose of 'guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men'.

In terms of Article 4, States Parties may adopt temporary special measures aimed at accelerating *de facto* equality between men and women; this will not be considered

55 Art 2(f). This provision has been referred to as the 'core' of the Convention – see Merry *op cit* note 33 at75.

56 Art 2(g).

57 AF Bayefsky *How to Complain to the UN Human Rights Treaty System* (2002) 31.

58 *Idem* at 32.

discrimination as defined in this Convention.[59] However, such measures should not entail the maintenance of unequal or separate standards: these temporary special measures must be discontinued when the objectives of equality of opportunity and treatment have been achieved. Furthermore, special measures aimed at protecting maternity will not be considered as discriminatory.[60]

Article 5 requires States Parties to take all appropriate measures to modify the social and cultural patterns of conduct of women and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[61] This provision can be regarded as one of the more important ones, since it requires States Parties to attack the very causes of discrimination.[62]

Cook and Cusack point out that the critical question is what constitutes 'appropriate measures' in a particular context.[63] They suggest that some guidance could be gained from the jurisprudence that has emerged from the concept of 'due diligence' in human rights law,[64] although in certain circumstances, the standard of appropriateness may be higher than the standard of conduct required by 'due diligence'. They further propose that the jurisprudence that has developed in relation

59 Art 4 § 1.

60 Art 4 § 2. See also discussion of CEDAW *General Recommendation No. 25* above.

61 Art 5(a). See also discussion on link between discrimination and gender stereotypes above.

62 F Kathree 'Convention on the Elimination of All Forms of Discrimination against Women' (1995) 11 *SAJHR* 421 at 423-424.

63 RJ Cook & S Cusack *Gender Stereotyping: Transnational Legal Perspectives* (2010) 91.

64 See introductory discussion of the 'due diligence' standard in Chapter 2, Section 4.3.

to the obligation to *protect* dimensions of rights may also provide additional guidance for interpretation of this phrase.[65]

Article 5(b) requires States Parties to ensure that family education includes a proper understanding of 'maternity as a social function' and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primary[66] consideration in all cases.

Part I concludes with Article 6, which imposes a duty on States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

(d) Monitoring Committee

The primary function of the twenty-three[67] member monitoring committee is to receive and consider reports from State Parties, setting out what they have done to give effect to give effect to the Convention, and indicating the difficulties they have encountered in fulfilling their obligations.[68] Evatt explains that the CEDAW was modelled on the monitoring bodies established by other UN human rights treaties

65 Cook & Cusack *loc cit*. See also discussion of the CEDAW's interpretation of the Convention in respect of violence against women in Section 2.6 below, given that Article 5 was raised in certain of the communications before the CEDAW.

66 The text of the Convention uses 'primordial'.

67 Art 17 § 1. At its 44rd session, held from 20 July to 7 August 2009, the Committee formally noted that South Africa had not yet nominated a member to replace Hazel Gumede Shelton, who had resigned from the Committee in 2007 – *CEDAW Draft Report: Forty-fourth Session* UN Doc CEDAW/C/2009/II/L.1 (dated 7 August 2009) para 11. (At the time of writing, this is the most recent Committee report available.)

68 Articles 17 § 1, 18 and 20 § 1; see also Evatt *op cit* note 6 at 518.

and has similar functions.[69] However, this Committee has been subject to its own particular limitations. Unlike the Race Convention and the ICCPR, the Women's Convention originally made no provision for an individual complaints procedure, thus limiting access by women and opportunities for CEDAW to develop jurisprudence.[70] Another limitation was that CEDAW would 'normally' meet for only two weeks annually,[71] which put enormous pressure on the Committee as the number of States Parties and reports to be considered increased. Furthermore, the CEDAW was initially based in Vienna, (forming part of the Division for the Advancement of Women).[72] It subsequently moved to the UN Headquarters in New York; [73] in 2008 it relocated to Geneva, Switzerland, finally ending its geographical and programmatic isolation from the other human rights treaty bodies.

The functions of CEDAW, in addition to considering the reports of States Parties, include reporting annually, through the ECOSOC, to the UN General Assembly on its activities; making suggestions and general recommendations based on the examination of reports and information received from the States Parties; and inviting

69 *Ibid.*

70 See discussion on introduction of the Optional Protocol in Section 2.4 below.

71 Art 20. Meron notes that this provision reflected an 'overzealous effort to reduce expenditure'; no other human rights treaty organs have been subjected to such constraints - T Meron 'Enhancing the effectiveness of the prohibition of discrimination against women' (1990) 84 *American Journal of International Law* 213 at 214. The meeting time of the Committee has however repeatedly been extended as a 'temporary measure'. Although an amendment to Art 20 was adopted in 1995, which would extend the meeting time of the Committee, this amendment has not yet attracted the required number of ratifications (i.e. two thirds of States Parties) to enter into force – GA Res 50/202 UN Doc A/RES/50/202 (dated 22 December 1995).

72 Meron *op cit* note 71 at 215.

73 JA Minor 'An analysis of the structural weaknesses in the Convention on the Elimination of All Forms of Discrimination against Women' (1994) 24 *Georgia Journal International & Comparative Law* 137 at 149.

the specialised agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

(e) State reporting

Article 18 requires States Parties to submit regular reports on the 'legislative, judicial, administrative or other measures' that they have adopted to give effect to the provisions of the Convention and on the progress they have made. The first report must be submitted within one year after the entry into force of the Convention for the State concerned, and thereafter every four years or whenever the Committee so requests.

Byrnes refers to the reporting procedure as the 'central feature' of the Convention's system of international supervision.[74] He also points out that it provides an important occasion for non-governmental organisations to focus debate at the national level on the extent to which the government has given effect to its obligations under the Convention. Nowak is of the view that the open and constructive attitude of members of the CEDAW and state delegations during the state reporting procedure was highly conducive to setting a number of relevant legal standards and practical steps to improve the status of women.[75]

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74 Byrnes *op cit* note 7 at 131. See further LA Hoq 'The Women's Convention and its Optional Protocol: Empowering women to claim their internationally protected rights' (2001) 32 *Columbia Human Rights Law Review* 677 at 686-688 for a discussion of problematic aspects of CEDAW's enforcement of the Convention through state reporting.

75 M Nowak *Introduction to the International Human Rights Regime* (2003) 87. See however Evatt's account of the early years of the Committee's operation for a description of the difficulties experienced in working together (she was one of the initial CEDAW members) – Evatt *op cit* note 6 at 529-534.

The same unfortunate situation prevails under the Convention as under the other UN human rights instruments: many States Parties have fallen behind in their reporting obligations and are overdue in their submission of reports – in many cases owing more than one report.[76] The purpose and objectives of the system of state reporting are frustrated if States do not submit their reports on time (or indeed, at all). For this reason, the CEDAW has taken measures to facilitate the submission of State reports; for example, States Parties are permitted to combine reports.[77]

While this is not an ideal solution, in that it may not encourage States Parties to submit their reports more timeously, the other side of the picture is that the Committee currently has a backlog in the form of reports that have been received, but have not yet been reviewed due to time constraints on the part of the Committee.[78] This means that even if a State Party does submit its report on time, it is highly likely that such a report will only be considered after some delay. This situation does not in itself contribute to encourage States to report on time.

In line with recent developments in the broader treaty monitoring system, the Committee has adopted Convention-specific reporting guidelines to assist States Parties in compiling their country reports.[79] These guidelines must be applied in

[76] Byrnes *op cit* note 7 at 133. See also discussion of South Africa's position in Section 2.5 below.

[77] Byrnes *loc cit*.

[78] Meron *op cit* note 71 at 214.

[79] CEDAW *Report of the Committee on the Elimination of Discrimination against Women: Fortieth Session (14 January – 1 February 2008)* UN Doc A/63/38 (2008) Decision 40/I. The guidelines are set out in Annex I to the report.

conjunction with the harmonised reporting guidelines on a common core document.[80]

An important aspect of the system of State reporting is the concluding observations or concluding comments compiled by the Committee in response to country reports.[81] These observations consist of an introduction, a section on positive aspects and then a section setting out the Committee's principal concerns and recommendations. These concluding observations are significant firstly because they set out the Committee's recommendations for action in respect of implementation; secondly, the State Party will subsequently be evaluated in respect of its response to the observations.[82]

(f) General Recommendations

In terms of Article 21 of the Convention, the CEDAW may make 'suggestions and general recommendations' to the States Parties. Since the early 1990s, the Committee has made use of this power to adopt General Recommendations to set out its understanding of particular articles of the Convention, or of how the Convention applies to thematic issues (such as violence against women).[83] This has been an important development in the work of the Committee.[84]

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80 The harmonised guidelines have been developed by the Human Rights Council – see UN Doc HRI/GEN/2/Rev.5. The common core document constitutes the first part of any report prepared for the CEDAW in accordance with the harmonised reporting guidelines.

81 Byrnes *op cit* at 136-137.

82 This may occur either in the context of a subsequent country report, or where the CEDAW has occasion to examine the State's response as a result of a communication or inquiry brought under the Optional Protocol – see discussion in Section 2.6. below.

83 Byrnes *op cit* note 7 at 138. See also discussion below.

84 *Ibid.*

The General Recommendations are not binding interpretations of the Convention, but are considered as influential interpretations of it.[85] As a formal matter of international law, General Recommendations are not binding on States Parties. Nevertheless they are considered as particularly persuasive interpretations of international law and they have been invoked before domestic courts and tribunals.[86]

(g) Reservations

Article 28 makes provision for States Parties to enter reservations to the Convention. This practice has proved to be a major weakness in the case of the Women's Convention. Byrnes observes that these reservations have ranged from specific reservations to individual provisions (that have subsequently been withdrawn once the inconsistent law or practice has been removed), to sweeping, sometimes vague reservations that appear to extensively limit the State Party's obligations.[87]

85 P Alston 'The historical origins of the concept of "General Comments" in Human Rights Law' in LB de Chazournes & VG Debbas (eds) *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001) 763 cited in Steiner *et al op cit* note 21 at 873-876; see also Byrnes *op cit* note 7 at 138-139.

86 See also discussion of South African jurisprudence in Chapter 5 below.

87 Byrnes *op cit* note 7 at 126-127. For example, the Government of the Kingdom of Morocco noted the following reservation to Art 16:
'The Government of the Kingdom of Morocco makes a reservation with regard to the provisions of this article, particularly those relating to the equality of men and women, in respect of rights and responsibilities on entry into and at dissolution of marriage. Equality of this kind is considered incompatible with the Islamic Shariah, which guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementary [*sic*] in order to preserve the sacred bond of matrimony.'
Available at [treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en] (Accessed on 27 May 2010.)

Although Article 28, paragraph 2 of the Convention states that reservations incompatible with the object and purpose of the Convention are impermissible,[88] the document does not make provision for a mechanism to determine incompatibility.[89] This means that although some of the reservations entered are 'almost certainly' incompatible with the spirit and purpose of the Convention, the issue has to be resolved by individual State Parties, the meeting of States Parties and the CEDAW.[90]

The CEDAW has raised the concern that noting reservations in respect of Article 2 constitutes a failure to adopt the spirit of the Convention.[91] On the other hand, a long-standing member of the Committee, Ms. Hanna Beate Schöpp-Schilling,[92] recounts that even States Parties that have registered significant reservations present their reports and engage in dialogue with the Committee members, which is a potentially constructive practice.[93] In the past, the Women's Convention had more reservations than any other;[94] however, a number of States Parties have in recent years withdrawn reservations, with the result that this Convention is no longer the 'most heavily reserved' international instrument of this nature.[95]

88 This is a re-statement of the general international law standard – Byrnes *op cit* note 7 at 127.

89 Cf the Race Convention, which provides that a reservation is considered to be incompatible if two-thirds of States Parties object to it – Art 20 § 2.

90 Byrnes *loc cit*.

91 Merry *op cit* note 33 at 81.

92 Ms. Schöpp-Schilling was a member of the CEDAW for twelve years – Merry *op cit* note 33 at 80.

93 Merry *op cit* note 33 at 81; see also Hoq *op cit* note 74 at 688-691.

94 Cook *op cit* note 18 at 644; Stamatopoulou *op cit* note 3 at 38.

95 Merry *op cit* note 33 at 81. See also Chapter 4, Section 7.

2.3.2 Provisions on violence against women

Although there was already at the time a growing concern about violence against women, the Convention, drafted in the 1970s,[96] does not contain any express provisions mentioning violence either as a form of discrimination, or as an obstacle to the equal enjoyment of rights by women.[97] Members of the CEDAW nevertheless regularly asked reporting States about the incidence of violence against women, and about the measures they had taken to prevent violence or to deal with its occurrence.[98] From the Committee's third session onwards, violence against women was frequently raised as an issue, regardless of whether it was covered by a State Party's report.

In 1985, General Recommendation No. 12 was adopted to encourage States Parties to report on violence against women.[99] In this Recommendation, the Committee already makes the important statement that Articles 2, 5, 11, 12 and 16 of the Convention require States Parties to 'act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life'.

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96 Merry also ascribes the omission of violence against women to the era in which the Convention was drafted – *idem* at 76.

97 Depending on the position taken regarding sex work/ prostitution, Art 6 could be seen as an exception – see eg Evatt *op cit* note 6 at 544. See also discussion in Chapter 1, Section 3.1 about sex work/ prostitution as 'violence against women'.

98 Evatt *loc cit*.

99 CEDAW *General Recommendation No. 12: Violence against Women* UN Doc CEDAW/C/SR.148.120n (dated 2 March 1989).

Because of pressure exerted by women's organisations,[100] the Committee in 1992 adopted a detailed General Recommendation setting out how the Convention should be interpreted to cover violence against women and explain the nature of state obligations.[101] General Recommendation No. 19 states that the general prohibition of gender discrimination includes 'gender-based violence – that is, violence that is directed at a woman because she is a woman or that affects women disproportionately'.[102] It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.[103] Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.[104]

General Recommendation No. 19 does not make express mention of the right to freedom from violence as such; it does state that gender-based violence, which impairs or nullifies women's enjoyment of their rights under general international law or human rights conventions, including the right to life, the right to liberty and security of the person and the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment, is discrimination within the meaning of Article 1 of the Convention.[105]

100 See Kathree *op cit* note 62 at 426.

101 CEDAW *General Recommendation No.19* UN GAOR 11th Session UN Doc CEDAW/C/1992/L.1/Add.15 (1992) [hereafter 'CEDAW *General Recommendation No. 19*']. Evatt describes the process leading up to the adoption of the General Recommendation in some detail – *op cit* note 6 at 545-548.

102 CEDAW *General Recommendation No 19* para 1.

103 *Idem* para 6.

104 *Ibid.*

105 *Idem* para 7.

The effect of these introductory provisions is to bring gender-based violence firmly within the ambit of the equality/ non-discrimination paradigm of the Women's Convention as a whole. Commentators have considered the wisdom of this approach;[106] however, as Edwards points out, characterising violence against women as sex discrimination has filled an important gap in international human rights law, i.e. the absence of an explicit binding provision on violence against women.[107] She notes that it nevertheless carries its own set of problems for women.[108]

This Recommendation also confirms that violence against women constitutes a violation of women's human rights irrespective of whether the perpetrators are state officials or private individuals, and reiterates the principle of 'due diligence':

> States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.[109]

It explains how gender-based violence fits under each relevant Article of the Convention, and then sets out a number of specific recommendations for state action.[110]

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106 See eg J Goldscheid 'Domestic and sexual violence as sex discrimination: Comparing American and international approaches' *Thomas Jefferson Law Review* (2006) 355 at 356 *et seq*.

107 Edwards *op cit* note 33 at 46.

108 See discussion of the CEDAW's decision in *Ms NSF v United Kingdom* in Section 2.6.4 below.

109 CEDAW *General Recommendation No 19* para 10.

110 CEDAW *General Recommendation No 19* paras 24(a) – (t).

Making use of the framework for analysis proposed for this study,[111] I have categorised these recommendations according to the five types of State obligations engendered by the protection or guarantee of a specific right. This categorisation is set out in *Table 1, Annexure A*. It should be noted that the classification process is not an exact one; certain duties could conceivably resort into more than one category.

One observation that immediately comes to the fore when looking at *Table 1* is that the obligations set out here are for the most part clustered around the duty to *protect*; no mention is made of the duty on the part of States Parties to respect the right (in other words to refrain from violating this right themselves). Furthermore, there is also emphasis on the duties to realise rights (i.e. to create institutional machinery) and satisfy (i.e. to provide services and goods). The duty to promote also receives attention, but not in very strong terms. Additional duties may be read into the reporting obligations of States Parties.

Given the nature of the document,[112] it is important to note that the language here is weaker ('States Parties should…') than in the Convention itself.

2.4 The Optional Protocol to the Women's Convention

In the initial years after its introduction, one of the identified weaknesses of the Women's Convention was its limited implementation structures and specifically, the

111 See Chapter 2 above.

112 That is, as an interpretative guideline.

fact that it lacked a complaints mechanism.[113] For this reason, calls were made, particularly from within the NGO community, to strengthen the Women's Convention through the addition of such a complaints mechanism in the form of an optional protocol, which would allow individual women to bring complaints before the CEDAW, alleging that their countries had failed to comply with their obligations under the Convention.[114] Proponents claimed that such a procedure would not only place the Convention and the CEDAW on an equal footing with other UN human rights treaties and treaty monitoring bodies, but also that a complaints procedure would ensure more effective implementation of the rights guaranteed in the Convention.[115]

After some years of debate and consideration, the Optional Protocol to the Convention was adopted on 6 October 1999.[116] At the time of writing, it had acquired 99 ratifications/ accessions and 79 signatories.[117]

The Optional Protocol makes provision for a communication procedure (set out in Article 2) and an inquiry procedure (Article 8). Communications may be submitted by or on behalf of individuals (or groups of individuals) claiming to be victims of a

113 A Byrnes & J Connors 'Enforcing the human rights of women: A complaints procedure for the Women's Convention?' (1996) 21 *Brooklyn Journal of International Law* 679 at 682-684; Meron *op cit* note 71 at 216; FG Isa 'The Optional Protocol for the Convention on the Elimination of all Forms of Discrimination against Women: Strengthening the protection mechanisms of women's human rights' (2003) 20 *Arizona Journal of International & Comparative Law* 291 at 303-304.

114 Hoq *op cit* note 74 at 693.

115 Byrnes and Connors *op cit note* 113 at 682-684.

116 Optional Protocol *op cit* note 4.

117 See [treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en]. (Accessed on 19 March 2010.)

violation of any of the rights set out in the Convention.[118] A number of requirements apply: for example, the communication must be in writing and must not be anonymous,[119] and the author must have exhausted all domestic remedies.[120] The Protocol also provides that the Committee may request a State Party, at any time after receipt of a communication and before making a determination on the merits, to urgently take interim measures to avoid possible irreparable damage to the victim of the alleged violation.[121]

The Committee may initiate an inquiry if it receives reliable information indicating 'grave or systematic violations' by a State Party of rights set forth in the Convention.[122] The Committee designates one or more its members to conduct the inquiry and report back urgently. Where warranted, the inquiry may include a visit to the territory of the State Party.[123] Such inquiries are conducted confidentially and the cooperation of the State Party must be sought at all stages of the proceedings.[124]

The fact that the Protocol is 'optional' implies that it applies only to States Parties that ratify or accede to its terms. Furthermore, Article 10 contains an 'opt-out' clause in respect of the inquiry procedure as set out in Article 8 and 9.[125]

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118 Where a communication is submitted on behalf of individuals or groups of individuals, this must be with their consent unless the author can justify acting on their behalf without such consent.

119 Optional Protocol *op cit* note 4 Art 3.

120 Unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief - Art 4 § 1.

121 Art 5.

122 Art 8 § 1.

123 Art 8 § 2.

124 Art 8 § 5.

125 See Isa *op cit* note 113 at 316-317 for a discussion of the background to this clause. (Isa was the Spanish representative to the Working Group for the elaboration of the Optional

2.5 Position of South Africa

South Africa ratified the Convention on 15 December 1995, and is therefore bound by the obligations created by the Convention. It submitted its first country report in 1997,[126] and a combined second, third and fourth report in 2009.[127] The Government unfortunately does not advance any reasons for the long delay between the submission of its first report and this combined 2009 report.

In its concluding comments on South Africa's initial report, the CEDAW expressed its concern at the high level of violence against women, including the high incidence of rape, particularly of young girls.[128] It noted in particular that, given the persistent overall high levels of crime and violence in the country, there was a danger that efforts to address violence against women, although identified as a priority area in the National Crime Prevention Strategy, may become submerged in the larger struggle against violence in society.

The Committee recommended that efforts to prevent and combat violence against women continue to receive the priority attention they require, with a view to

Protocol.) Bangladesh, Benin, Columbia and Cuba are among the States Parties that have declared that they do not accept the provisions of Articles 8 and 9.

126 CEDAW/C/ZAF/1 (dated 25 February 1998), available at [www.un.org/womenwatch/daw/cedaw/reports.htm#s]. (Accessed on 24 March 2010.)

127 CEDAW/C/ZAF/2-4 (dated 18 December 2009), available at [www2.ohchr.org/english/bodies/cedaw/cedaws48.htm]. (Accessed on 24 March 2010.)

128 UN General Assembly *Report of the Committee on the Elimination of Discrimination against Women (18th and 19th Sessions)* UN Doc A/53/38/Rev.1 (dated 14 May 1998) para 121.

ensuring a comprehensive approach.[129] Steps should be taken, including through education, awareness-raising and sensitisation of the public, to deal with stereotypical attitudes that are amongst the root causes of violence against women and to emphasise the unacceptability of such violence.

The Committee encouraged the Government to reinforce its existing strong collaboration with civil society and non-governmental organisations on violence against women with budgetary allocations commensurate with the priority attached to combating such violence.[130] The Committee recommended that the seriousness of rape, including marital rape, be emphasised and the law fully enforced. It also urged the Government to undertake research into the causes of the high incidence of rape so that effective preventive measures could be developed.

A group of NGO's prepared and submitted a shadow report to the CEDAW on South Africa's initial report, focusing specifically on the question of violence against women.[131] The report included a specific section emphasising the South African government's failure to properly grasp its obligations in respect of violence against women under international human rights law.[132] It was argued that this lack of awareness of the duty to protect and promote women's right to freedom from

129 *Idem* para 122.

130 *Idem* paras 123-124.

131 Masimanyane Women's Support Centre *NGO Shadow Report to CEDAW (South Africa): Violence against Women* (June 1998). The candidate was one of the contributors to the report.

132 See Masimanyane Women's Support Centre *op cit* note 129 Appendix A, entitled 'International Human Rights Law and Constitutional provisions Relating to Violence Against Women'.

violence was apparent *inter alia* from the description of piecemeal, unstructured government responses to violence against women.[133]

The 2009 report has been the subject of some NGO criticism as well. At the time of writing, a shadow report is in the final stages of completion; this shadow report focuses on the entire Government report.

The South African report has been scheduled for examination at the Committee's 48th Session, which will take place from 17 January to 4 February 2011 in Geneva.[134]

2.6 Interpretation of the Women's Convention by the Committee on the Elimination of Discrimination against Women

The CEDAW has to date considered three communications brought under the Optional Protocol to the Convention relating to violence against women.[135] It has also conducted an inquiry into allegations of systemic violence against women. The Committee's views (in the case of the communications) and its conclusions and recommendations in respect of the inquiry are examined here. A fourth communication, which the Committee held to be inadmissible, is also discussed; the

133 *Idem* at 17.

134 See official CEDAW website, available at [www2.ohchr.org/english/bodies/cedaw/sessions.htm]. (Accessed on 24 March 2010.)

135 Two of these communications (5/2005 and 6/2005), brought against Austria, are very similar and are accordingly discussed together – see discussion in Section 2.6.2 below.

motivation for its inclusion is that domestic violence played a central role in the events leading to the complaint against the State Party.[136]

I examine the Committee's views and conclusions in some detail, for a number of reasons. Firstly, the Optional Protocol, as explained above, is a relatively new mechanism, and the Committee has not had much opportunity to develop jurisprudence in relation to the Protocol. Linked to this is the consideration that because of the novelty of this area, it is important to scrutinise the Committee's interpretation of key concepts such as 'due diligence'. Finally, it is important to gain an understanding of the factual sequence of events in each case in order to grasp the findings of the Committee. The selection of the communications was done on the basis of information available on the Committee's Internet website(s).[137]

In each of the communications examined below, the set of facts is relatively lengthy. However, it was considered important to provide the reader with access to the factual circumstances of each case, in order to fully appreciate the Committee's Views, for example, relating to the State Party's compliance with the standard of 'due diligence'. For this reason, a short précis of the facts is given in the text, and a longer version is set out in ***Annexure B*** to the thesis.

136 *Ms NSF v United Kingdom* (CEDAW *Communication No 10*/2005). See discussion in Section 2.6.3 below.

137 [www2.ohchr.org/english/law/jurisprudence.htm]; [www.un.org/womenwatch/daw/cedaw/index.html]. (Accessed 19 March 2010.)

2.6.1 *A.T. v Hungary*[138]

(a) Background[139]

The author in *A.T. v Hungary* had been the victim of domestic violence committed over a four-year period by one L.F., her (former) common-law husband and father of her two children, one of whom was severely intellectually disabled.[140] Despite threats by L.F. to kill the author, she had not gone to a shelter, reportedly because no shelter in the country was equipped to accommodate a severely disabled child together with his mother and sister. The author also stated that there were at the time no protection orders or restraining orders available under Hungarian law. Her efforts to bar L.F. from the family apartment through civil proceedings had proved fruitless and the two criminal procedures arising from charges she had laid against L.F. were both still pending at the time of submitting her communication to CEDAW.[141]

She further pointed out that L.F. had not been detained at any time in connection with these criminal proceedings; the Hungarian authorities had not taken any actions to protect her from him.

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138 CEDAW *Communication No 2/2003 Ms. A. T. v. Hungary* (Views adopted on 26 January 2005, Thirty-second session).

139 The factual background to the communication is set out in more detail in *Annexure B*.

140 The facts are set out in paras 2.1 – 2.7 of CEDAW *Communication No 2/2003 op cit* note 138.

141 CEDAW *op cit* note 138 para 2.6. One of the criminal trials began in 1999, the other in July 2001.

(b) The author's complaint

Ms. A.T. alleged that she was a victim of violations by Hungary[142] of Articles 2(a), (b) and (e), 5(a) and 16 of the Women's Convention for its failure to provide effective protection from her former common law husband.[143] She claimed that the State Party passively neglected its 'positive' obligations under the Convention and supported the continuation of a situation of domestic violence against her. She alleged *inter alia* that the irrationally lengthy criminal procedures against L. F., the lack of protection orders or restraining orders under current Hungarian law and the fact that L. F. had not spent any time in custody constituted violations of her rights under the Convention as well as General Recommendation No. 19. She also urgently requested effective *interim* measures of protection in accordance with Article 5, paragraph 1, of the Optional Protocol, at the same time that she submitted her communication, because she feared for her life.[144] The author maintained that she had exhausted all available domestic remedies.[145]

142 The Convention and its Optional Protocol entered into force in the State Party on 3 September 1981 and 22 March 2001, respectively.

143 The author's complaint is detailed in paras 3.1 – 3.6 of CEDAW *op cit* note 138.

144 *Idem* para 1.2.

145 The author did concede that there was still a petition pending to the Supreme Court requesting a review of the decision of the Budapest Regional Court relating to the exclusion of L.F. from the apartment. (The Budapest Regional Court had previously issued a final decision authorising L.F. to return and use the apartment.) - CEDAW *op cit* note 138 para 3.5. This remedy is an exceptional one that is only available in case of a violation of the law by lower court; the author believed that it was highly unlikely that that the Supreme Court would find a violation of the law. This was because Hungarian courts do not regard the Women's Convention as law to be applied by them. This pending review therefore did not mean that she had failed to exhaust domestic remedies.

A potential hindrance to the admissibility of the communication was the fact that most of the incidents complained of had taken place prior to March 2001 when the Optional Protocol entered into force for Hungary. The author however contended that these incidents constituted 'elements of a clear continuum of regular domestic violence' and that her life continued to be in danger. She argued that Hungary had in effect assisted in the continuation of violence through protracted proceedings, the failure to take protective measures, including timely conviction of the perpetrator and the issuance of a restraining order, and the Regional Court decision authorising L.F. to return and use the apartment.

(c) Submissions on admissibility and merits

Significantly, the State Party maintained it did not wish to raise any preliminary objections as to the admissibility of the communication.[146] It also admitted that the available domestic remedies were not capable of providing immediate protection to the author from ill-treatment by her former partner.

The State Party outlined a range of measures that it had undertaken to address violence against women, having realised that the system of remedies against domestic violence was incomplete in Hungarian law and that the effectiveness of the existing procedures was not sufficient.[147] These included the institution of a comprehensive action programme against domestic violence in 2003,[148] and the adoption of a resolution on the national strategy for the prevention and effective

146 CEDAW *op cit* note 138 para 5.6.
147 *Idem* paras 5.6-5.10.
148 *Idem* para 5.7.

treatment of violence within the family by the Hungarian parliament on 16 April 2003. This resolution set out a number of legislative and other actions to be taken.[149]

The author stated that in spite of these government undertakings, her personal situation had not changed and she still lived in constant fear as regards her former partner.[150] From time to time L. F. had harassed her and threatened to move back into the apartment.

She reported that the criminal proceedings against L. F. were still ongoing as at 23 June 2004.[151] A hearing scheduled for April 2004 was postponed to May 2004 and, as the judge was reportedly 'too busy' to hear the case, the criminal proceedings were again postponed until 25 June 2004. The author believed that, whatever the outcome, the criminal proceedings had been so lengthy and her safety so severely neglected that she had not received the timely and effective protection and the remedy to which she was entitled under the Women's Convention and General Recommendation No. 19.[152]

149 These measures would include (amongst others), the following: introducing a restraining order into legislation; ensuring that proceedings before the Courts or other authorities in domestic violence cases are given priority; elaborating clear protocols for the police, childcare organs and social and medical institutions; extending and modernising the network of shelters and setting up victim protection crisis centres; providing free legal aid in certain circumstances; and training of professionals.

150 CEDAW *op cit* note 138 para 6.3.

151 *Idem* para 6.5.

152 In a subsequent submission dated October 2004, the author reported that L.F. had been convicted in the District Court of two counts of causing grievous bodily harm to her and had been fined the equivalent of approximately US$ 365 – CEDAW *op cit* note 138 para 6.11.

In August 2004, Hungary made a number of crucial concessions that effectively settled the matter. It conceded that domestic violence cases did not enjoy high priority in court proceedings, and that the legal and institutional system in Hungary was not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.

(d) Consideration of admissibility and merits

As noted, the State Party chose not to raise any preliminary objections to the admissibility of the communication and furthermore conceded that the remedies existing in Hungary at the time were not capable of providing the author with immediate protection against abuse by L.F.[153] Although the Committee agreed with this assessment, it nevertheless chose to make some observations.

It *inter alia* took note of the two sets of criminal proceedings against L.F. on charges of assault and battery.[154] The Committee expressed the view that the delay in finalising these proceedings of over three years from the dates of the incidents in question would amount to 'an unreasonably prolonged delay' within the meaning of Article 4, paragraph 1, of the Optional Protocol, particularly considering that the author had been at risk of irreparable harm and threats to her life during that period. Additionally, the Committee took account of the fact that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained.

153 *Idem* paras 8.3-8.4.

154 *Idem* para 8.4. These charges related to assault and battery allegedly committed in January 2000 and July 2001; the cases had been joined (see above).

As to the timing of the events that formed the subject of the communication, the Committee was persuaded by the author's argument regarding a 'clear continuum of regular domestic violence' and that her life was still in danger, as evidenced by the battering which took place in July 2001, that is after the Optional Protocol came into force in Hungary.[155] The Committee therefore found that it was competent *ratione temporis* to consider the communication in its entirety, because the facts that were the subject of the communication covered the alleged lack of protection/alleged culpable inaction on the part of the State Party for the series of severe incidents of battering and threats of further violence that had uninterruptedly characterised the period beginning in 1998 to the time of the communication. The communication was accordingly found admissible.

In considering the merits of the communication,[156] the Committee first recalled its General Recommendation No. 19, with specific reference to the statements that the definition of discrimination includes gender-based violence and that gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. Furthermore, the General Recommendation addresses the question of whether States Parties can be held accountable for the conduct of non-State actors by confirming that discrimination under the Convention is not restricted to action by or on behalf of governments and that States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

155 *Idem* para 8.5.

156 The Committee's views on the merits are set out in CEDAW *op cit* note 138 paras 9.1-9.6.

Against this backdrop, the immediate issue facing the Committee was whether the author of the communication was the victim of a violation of Articles 2(a), (b) and (e), 5(a) and 16 of the Convention because, as she alleged, for the previous four years the State Party had failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

With regard to Article 2(a), (b), and (e), the Committee observed that the State Party had admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner. Furthermore, legal and institutional arrangements in the State Party were not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for victims of domestic violence. While appreciating the State Party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believed that these had yet to benefit the author and address her persistent situation of insecurity.

The Committee further noted the State Party's general assessment that domestic violence cases as such did not enjoy high priority in court proceedings. The Committee was of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincided with this general assessment. It made the following important statement:

> Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.[157]

[157] *Idem* para 9.3.

The Committee also noted that the State Party did not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalled its concluding comments from August 2002 on the State Party's combined fourth and fifth periodic report, where the Committee expressed its concern about the prevalence of violence against women and girls, including domestic violence. It was particularly concerned that no specific legislation had been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters existed for the immediate protection of women victims of domestic violence.

Bearing this in mind, the Committee concluded that the obligations of the State Party set out in Article 2(a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case remained unfulfilled and constituted a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

The Committee had addressed Articles 5 and 16 of the Convention together in its General Recommendation No. 19 in dealing with family violence. In its General Recommendation No. 21,[158] the Committee stressed that the provisions of General Recommendation No. 19 concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men. It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The

[158] This General Recommendation deals with equality in marriage and family relations.

Committee recognised those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family.

In respect of the instant case, the facts of the communication revealed aspects of the relationships between the sexes and attitudes towards women that the Committee had recognised in respect of the country as a whole.[159] None of these facts were disputed by the State Party and, considered together, they indicated that the rights of the author under Articles 5(a) and 16 of the Convention had been violated. The Committee also noted that the lack of effective legal and other measures prevented the State Party from dealing in a satisfactory manner with the Committee's request for interim protective measures.[160]

The Committee accordingly found that the State Party had failed to fulfil its obligations and thereby violated the rights of the author under Article 2(a), (b) and (e) and Article 5 (a) in conjunction with Article 16 with the Convention.[161] It

[159] These aspects as enumerated by the Committee included the fact that for four years and continuing to the time of consideration of the communication, the author had felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She had been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option existed in Hungary. She was unable to flee to a shelter because none was equipped to accept her together with her children, one of whom is disabled – CEDAW *op cit* note 138 para 9.4.

[160] *Idem* para 9.5. The author had requested interim measures of protection in accordance with Art 5 § 1 of the Optional Protocol. This request did not meet with a speedy or effective response from the Hungarian authorities, even when the CEDAW intervened on behalf of the author – see CEDAW *op cit* note 138 paras 4.1-4.8.

[161] *Idem* para 9.6.

formulated a number of recommendations to the Hungarian Government, both concerning the author specifically and more generally.

In respect of the *author*, the Committee recommended that the State Party take immediate and effective measures to guarantee the physical and mental integrity of Ms. A.T. and her family; and ensure that she is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights.[162]

The Committee's *general* recommendations were for the State Party to respect, protect, promote and fulfil women's human rights, including 'their right to be free from all forms of domestic violence, including intimidation and threats of violence' and to assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women.[163]

The State Party was further enjoined to -

(i) Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;

(ii) Take all necessary measures to provide regular training on the Women's Convention and the Optional Protocol to judges, lawyers and law enforcement officials;

[162] *Idem* para 9.6.

[163] *Idem* paras 9.6.II (a) and (b).

(iii) Implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;

(iv) Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

(v) 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; and

(vi) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.

(e) Comments on the Committee's Views

As the first instance where the CEDAW had an opportunity to interpret the Women's Convention in respect of violence against women, this communication is of considerable significance. The first aspect that compels attention is the fact that the Committee agreed with the author's argument that the history of violence she experienced constituted a 'clear continuum of domestic violence'. This importantly brought all the incidents across the period of four years within the ambit of the Committee's scrutiny – whereas a strict 'piecemeal' application of the dates of commission of the violent incidents would have excluded most of these incidents,

given the date of ratification by the Optional Protocol of Hungary. The Committee's willingness to accept this argument indicates an understanding of the fact that multiple acts of domestic violence should be judged as an interlinked history rather than as individual, isolated incidents; an issue that has long plagued the prosecutors of domestic violence in criminal proceedings.[164]

It is also significant to note that the Committee was prepared to accept that even though the criminal proceedings against L.F. had not been concluded at the time that the author initiated the communication, the fact that these proceedings had already been underway for a period of approximately three years constituted 'unreasonably prolonged delay' for purposes of admissibility under the Optional Protocol. This was exacerbated by the fact that the author did not have access to any form of protection in respect of her right to security during this time.

When it comes to the merits, the capitulation of the Hungarian Government (in the face of overwhelming evidence) was inevitable. It is useful that the CEDAW nevertheless made certain statements to emphasise its findings that the rights of the author under the Convention had been violated. One of the most important of these statements of principle relate to the primacy of women's rights to life and physical integrity. This becomes a recurrent theme, as is apparent from the cases below.

From a formal perspective, it is interesting to note that the Committee draws very strongly on its concluding observations to a previous state report in finding that the State Party had failed to comply with its obligations. This indicates that States Parties will do well to take their reporting obligations more seriously, and also to

[164] Based on candidate's personal experience of working as public prosecutor.

note the substance of the Committee's concluding observations as more than a passing matter of form.

The Committee's recommendations to Hungary are also significant. Firstly, the recommendations specific to the author take the state obligation to respond to domestic violence further than envisaged in General Recommendation No. 19 by including the provision of a safe home in which to live with her children as well as appropriate child support with the other measures such as legal representation. (One of the distinctive facets of the Committee's views here is its sensitivity to the linkages between women's lack of access to adequate housing and their vulnerability to domestic violence.)

Even more important for purposes of this study, however, is the fact that the Committee's general recommendations include for the State Party to 'respect, protect, promote and fulfil women's human rights, including *their right to be free from all forms of domestic violence*, including intimidation and threats of violence'.[165] Given the fact that the right to be free from violence is not explicitly mentioned in either the Women's Convention or General Recommendation No. 19, this is a crucial statement.

One final observation regarding the Committee's recommendations to the Hungarian Government is that these range from a broad structural level (such as the drafting of legal measures such as protection orders, improvement of investigation in domestic violence cases) to more individualised level (for example, training for judges and lawyers) to the very specific individual case of the author.

[165] Emphasis added.

2.6.2 *Şahide Goekce (deceased) v Austria;*[166] *Fatma Yildirim (deceased) v Austria*[167]

The Committee subsequently dealt with two cases emanating from Austria where the facts resembled each other fairly closely. Both communications were brought on behalf of the deceased women by the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, two organisations in Vienna, Austria, that protect and support women victims of gender-based violence. They claimed that the deceased women, both Austrian nationals of Turkish origin and former clients of the Vienna Intervention Centre against Domestic Violence, were victims of a violation by the State Party of Articles 1, 2, 3 and 5 of the Women's Convention.[168] Due to the similarities, the two communications will be discussed jointly here.

(a) Background[169]

The first matter arose from a history of domestic violence perpetrated against Şahide Goekce by her husband, Mustafa Goekce.[170] The police were on repeated occasions summoned to the couple's home, where Şahide Goekce would report assault and

166 CEDAW *Communication No. 5/2005: Şahide Goekce (deceased) v Austria* (Views adopted on 6 August 2007, 39th Session) UN Doc CEDAW/ C/39/D/5/2005 (dated 6 August 2007).

167 CEDAW *Communication No 6/2005: Fatma Yildirim (deceased) v Austria* (Views adopted on 6 August 2007, 39th Session) UN Doc CEDAW/C/39/D/6/2005 (dated 1 October 2007).

168 The Convention and its Optional Protocol entered into force for Austria on 30 April 1982 and 22 December 2000, respectively.

169 The factual background is set out in more detail in *Annexure B*.

170 The facts are set out in CEDAW *op cit* note 166 paras 2.1 – 2.12.

threats to harm her by Mustafa Goekce. The police issued issued 'expulsion and prohibition to return' orders against Mr. Goekce but found it difficult to obtain the

cooperation required from Ms. Goekce to institute criminal prosecutions for serious charges. Requests directed at the Public Prosecutor for Mr. Goekce to be detained were denied. An interim injunction was subsequently issued against Mr. Goekce, prohibiting him from returning to the couple's apartment. However, there were indications that he was still living there. Despite the fact that his threats against Ms. Goekce, and the fact that he owned a handgun, were reported to the police, no action was taken. The matter culminated in Mr. Goekce shooting his wife with a handgun in their apartment in front of their two daughters.

Fatma Yildirim married Irfan Yildirim on 24 July 2001.[171] His threats to kill her reportedly started two years later. She wanted to divorce him, but he would not agree and threatened to kill her and her children should she go ahead. She moved out of their apartment, and when she was subsequently assaulted by Mr. Yildirim, she laid criminal charges and obtained an 'expulsion and prohibition to return' order against him. The police applied to the Public Prosecutor for Mr. Yildirim to be detained; this was denied. Ms. Yildirim also later applied for, and obtained, an interim injunction against him. When he continued threatening and harassing her, she enlisted the aid of the police, who again requested detention. This requested was once more denied. Ms. Yildirim filed for divorce, and as part of the proceedings, obtained an interim injunction against her husband. Eleven days later, Mr. Yildirim followed her home from work and fatally stabbed her on in the street near the family's apartment.

[171] The factual background is set out in CEDAW *op cit* note 167 paras 2.1-2.14.

(b) The authors' complaints

The authors' complaint in respect of Şahide Goekce was accordingly that she was a victim of a violation by the State Party of Articles 1, 2, 3 and 5 of the Women's Convention[172] because the State Party did not actively take all appropriate measures to protect her right to personal security and life.[173] This failure consisted of the following:

(i) The State Party failed to treat Mustafa Goekce as an extremely violent and dangerous offender in accordance with criminal law.

(ii) The authors claimed that the Federal Act for the Protection against Violence within the Family does not provide the means to protect women from highly violent persons, especially in cases of repeated, severe violence and death threats. Instead, the authors insist that detention is necessary.

(iii) The authors also alleged that had the communication between the police and Public Prosecutor been better and faster, the Public Prosecutor would have known about the ongoing violence and death threats and may have found that he had sufficient reason to prosecute Mustafa Goekce.

[172] The authors further contended that the State Party had also failed to fulfil its obligations stipulated in General Recommendations Nos. 12, 19 and 21 of the CEDAW, the UN Declaration on the Elimination of Violence against Women, the concluding comments of the CEDAW (dated June 2000) on the combined third and fourth periodic report and the fifth periodic report of Austria, the UN Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women, several provisions of the Outcome Document of the twenty-third special session of the General Assembly, Art 3 of the UDHR, Articles 6 and 9 of the ICCPR, several provisions of other international instruments, and the Austrian Constitution (CEDAW *op cit* note 166 para 3.2).

[173] CEDAW *op cit* note 166 para 3.1.

With regard to Article 1 of the Convention, the authors contended that women are far more affected than men by the failure of public prosecutors to take domestic violence seriously as a real threat to life and their failure to request detention of alleged offenders as a matter of principle in such cases.[174] Women are also disproportionately affected by the practice of not prosecuting and punishing offenders in domestic violence cases appropriately. Furthermore, women are disproportionately affected by the lack of coordination of law enforcement and judicial personnel, the failure to educate law enforcement and judicial personnel about domestic violence and the failure to collect data and maintain statistics on domestic violence.

The authors maintained with regard to Article 1 together with Articles 2(a), (c), (d) and (f) and Article 3 of the Convention that the lack of detention of alleged offenders in domestic violence cases, inadequate prosecution and lack of coordination among law enforcement and judicial officials and the failure to collect data and maintain statistics of incidences of domestic violence resulted in inequality in practice and the denial of Şahide Goekce's enjoyment of her human rights. She was exposed to violent assault, battery, coercion and death threats and when Mustafa Goekce was not detained, she was murdered.[175]

Regarding Article 1 together with Article 2(e) of the Convention, the authors stated that the Austrian criminal justice personnel failed to act with due diligence to

[174] CEDAW *op cit* note 166 para 3.3.
[175] *Idem* para 3.4.

investigate and prosecute acts of violence and protect Şahide Goekce's human rights to life and personal security.[176]

The authors claimed concerning Article 1 together with Article 5 of the Convention that the murder of *Şahide Goekce* was a tragic example of the prevailing lack of seriousness with which violence against women is taken by the public and by the Austrian authorities.[177] The criminal justice system, particularly public prosecutors and judges, consider the issue a social or domestic problem, a minor or petty offence that happens in certain social classes. They do not apply criminal law to such violence because they do not take the danger seriously and view women's fears and concerns with a lack of gravity.

The authors alleged that *Fatma Yildirim* was a victim of a violation by the State Party Articles 1, 2, 3 and 5 of the Women's Convention[178] because of the failure of the State Party to take all appropriate positive measures to protect her right to life and personal security.[179] In particular, the authors alleged that communication between the police and Public Prosecutor did not adequately allow the Public Prosecutor to assess the danger posed by Irfan Yildirim and that on two occasions the Public Prosecutor should have requested the investigating judge to order the detention of Irfan Yildirim under the Code of Criminal Procedure.

176 *Idem* para 3.5.

177 *Idem* para 3.6.

178 Similar to *Communication No 5/2005*, the authors also contended that the State Party had failed to fulfil its obligations stipulated in a number of other documents – CEDAW *op cit* note 167 para 3.2 (see above).

179 *Idem* para 3.1.

In both communications, much of the dispute between the authors and the State Party turned on the question of the admissibility of the communication, and particularly the issue of exhaustion of domestic remedies.[180] In this regard, the authors maintained that there were no other domestic remedies that could have been used to protect the women's personal safety and to prevent them being killed.

In respect of *Communication 5/2005*, the State Party outlined its version of the events leading up to Şahide Goekce's death, placing a heavy emphasis on her reluctance to cooperate with the authorities in each instance after she had initially enlisted their assistance. It also stated that she had not availed herself of all the legal options that existed.[181] Against this background, a decision to detain Mustafa Goekce at the time was not justified.

(c) CEDAW's decision on admissibility[182]

Dealing with the State Party's argument relating to Article 140, paragraph 1, of the Federal Constitution (i.e. that the failure of the deceased to make use of the procedure available under this provision barred the admissibility of the

180 See CEDAW *op cit* note 166 paras 3.10-3.11; CEDAW *op cit* note 167 paras 3.10-3.11.

181 The State Party relied very strongly on the proposition that Şahide Goekce had the option of addressing the Constitutional Court (*Verfassungsgerichtshof*) with a complaint in accordance with Article 140 § 1 of the Federal Constitution (*Bundesverfassungsgesetz*) that would challenge the provision that did not allow her to appeal against the decisions of the Public Prosecutor not to issue a warrant for the arrest of Mustafa Goekce. Assuming that they could show a current and direct interest in the preventive effect of the repeal of the pertinent provision for the benefit of victims of domestic violence, such as Şahide Goekce, it could still be possible for her surviving heirs to address the Constitutional Court on this question – see CEDAW *op cit* note 166 paras 4.15, 6.2-6.6. The State Party raised the same argument in respect of Fatma Yildirim - CEDAW *op cit* note 167 paras 4.3, 4.6, 6.3-6.10.

182 CEDAW *op cit* note 166 paras 7.1-7.6; CEDAW *op cit* note 167 paras 7.1-7.7.

communication), the Committee expressed the view that this procedure could not be regarded as a remedy that was likely to bring effective relief to a woman whose life was under threat. Neither did the Committee regard this domestic remedy as being likely to bring effective relief in the case of the deceased's descendants in light of the abstract nature of such a constitutional remedy. The communication was declared admissible. (The same applied to *Communication 6/2005*.)

The State Party subsequently brought a request for a review of admissibility,[183] which also contained detailed information about its measures to address domestic violence and its responses to the authors' claims.[184] However, the Committee was not persuaded that the State Party had introduced new arguments that would alter the Committee's view.[185]

(d) Consideration of the merits[186]

In addressing the merits of the communications, the CEDAW firstly recalled its General Recommendation No. 19 on violence against women, which deals with the question of whether States Parties can be held accountable for the conduct of non-State actors in stating that '… discrimination under the Convention is not restricted to action by or on behalf of Governments …' and that '[u]nder general international

183 The Austrian Government reiterated that the descendants of Şahide Goekce should avail themselves of the procedure under Art 140 § 1 of the Federal Constitution – CEDAW *op cit* note 166 para 8.1. It also argued that she would have been free to bring an action known as 'associated prosecution' after the Public Prosecutor dropped the charged against Mustafa. (An 'associated prosecution' is a form of private prosecution – *idem* para 8.2.).

184 CEDAW *op cit* note 166 paras 8.1 – 8.21; CEDAW *op cit* note 167 paras 8.1 – 8.17.

185 CEDAW *op cit* note 166 paras 11.1-11.5; CEDAW *op cit* note 167 paras 11.1-11.4.

186 The Committee's consideration of the merits is set out in CEDAW *op cit* note 166 paras 12.1.1-12.4; CEDAW *op cit* note 167 paras 12.1.1-12.4.

law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'.

The Committee noted with approval that the State Party had established a comprehensive model to address domestic violence that included legislation, criminal and civil law remedies, awareness-raising, education and training, shelters, counseling for victims of violence and work with perpetrators. However, in order for individual woman victims of domestic violence to enjoy the practical realisation of the principle of equality of men and women and of her human rights and fundamental freedoms, the Austrian Government must be supported by State actors who adhere to the State Party's due diligence obligations.

The Committee recounted the history of escalating violence committed against Şahide Goekce by her husband over a three-year period, with the frequency of calls to the police increasing; the police issuing orders against him on three separate occasions and twice requesting the Public Prosecutor to detain him; and a three-month interim injunction that was in place against Mustafa Goekce at the time of Ms. Goekce's death. She was shot to death with a handgun that he had purchased three weeks earlier, despite a weapons prohibition against him as well as an uncontested contention that the police had received information about the weapon from the brother of Mustafa Goekce. In addition, Şahide Goekce had called the emergency call service a few hours before she was killed, yet no patrol car was sent to the scene of the crime.

Given this combination of factors, the Committee considered that the police knew or should have known that Şahide Goekce was in serious danger and they should have treated the last call from her as an emergency (in particular because Mustafa had shown that he had the potential to be a very dangerous and violent criminal). In light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police were accountable for failing to exercise due diligence to protect Şahide Goekce.

The Committee makes the important statement that although the State Party correctly maintains that it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence (such as the right to freedom of movement and to a fair trial), the Committee is of the opinion, as expressed in its views on *A.T. v Hungary*,[187] that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity. In the present case, the Committee considered that the behaviour (threats, intimidation and battering) of Mustafa Goekce crossed a 'high threshold of violence' of which the Public Prosecutor was aware. As such, the Public Prosecutor should not have denied the requests of the police to arrest Mustafa Goekce and detain him in connection with the incidents of August 2000 and October 2002.

The Committee thus concluded that the State Party violated its obligations under Article 2(a) and (c) through (f), and Article 3 of the Convention read in conjunction with Article 1 of the Convention and General Recommendation No. 19 of the

[187] *A.T. v Hungary* (see discussion above).

Committee and the corresponding rights of the deceased Şahide Goekce to life and physical and mental integrity.[188]

In the case of Fatma Yildirim, the Committee took note of the (undisputed) sequence of events leading up to the fatal stabbing of Fatma Ildirim, in particular that Irfan Ildirim made continuous efforts to contact her and threatened by phone and in person to kill her. It also observed that Ms. Yildirim made positive and determined efforts to attempt to sever ties with her spouse and save her own life — by moving out of the apartment with her minor daughter, establishing ongoing contact with the police, seeking an injunction and giving her authorisation for the prosecution of Irfan Yildirim.

The Committee considered that the facts disclosed a situation that was 'extremely dangerous' to Fatma Yildirim, of which the Austrian authorities knew or should have known, and as such, the Public Prosecutor should not have denied the requests of the police to arrest Irfan Yildirim and place him in detention. The Committee pointed out in this regard that Irfan Yildirim had a lot to lose should his marriage end in divorce (for example, his residence permit in Austria was dependent on his staying married) and that this fact had the potential to influence how dangerous he would become. This failure to detain Irfan Yildirin was in breach of the State Party's due diligence obligation to protect Fatma Yildirim. The Committee reiterated its

[188] CEDAW *op cit* note 166 para 12.1.6. The Committee noted that the authors also made claims that Articles 1 and 5 of the Convention were violated by the State Party. The Committee stated in its General Recommendation No. 19 that the definition of discrimination in Art 1 of the Convention includes gender-based violence. It has also recognised that there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence. At the same time, the Committee was of the view that the submissions of the authors of the communication and the State Party did not warrant further findings.

view (as set out in *A.T. v Hungary)* that although the State Party maintains that at that time an arrest warrant seemed disproportionately invasive, the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.[189]

The Committee accordingly concluded that although Irfan Yildirim was prosecuted to the full extent of the law for killing Fatma, the State Party violated its obligations under Article 2 (a) and (c) through (f), and Article 3 of the Convention read in conjunction with Article 1 of the Convention and General Recommendation No. 19 adopted by the Committee and the corresponding rights of the deceased Fatma Yildirim to life and to physical and mental integrity.

The following recommendations were made to the State Party:[190]

(i) Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;

(ii) Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilised in cases where the perpetrator in a domestic violence

189 *Idem* para 12.1.5. See para 12.2 for the Committee's observation regarding the authors' claim of a violation of Articles 1 and 5 of the Convention.

190 Acting in terms of Art 7 § 3 of the Optional Protocol - CEDAW *op cit* note 166 para 12.3.

situation poses a dangerous threat to the victim; and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasising that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;

(iii) Ensure enhanced coordination among law enforcement and judicial officers and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organisations that work to protect and support women victims of gender-based violence; and

(iv) Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Women's Convention, General Recommendation No. 19, and the Optional Protocol.

(e) Comments on the Committee's Views

Given the similarities between the *Goekce* and *Yildirim* cases, they will be discussed together there. These two communications differ from the first one examined by the Committee in the important respect that whereas the Hungarian Government conceded that its efforts to respond to violence against women did not yet meet international standards, the Austrian Government on the other hand has a fairly sophisticated legal system in place to respond to domestic violence, including protection orders, interim injunctions and various other measures. The focus of the

CEDAW's inquiry was therefore directed at establishing whether these legal measures were supported by individual state actors acting with due diligence.

In these two matters, one therefore gets a clearer sense of the Committee's interpretation of the standard of 'due diligence' under these circumstances as well as its understanding of the proportionality principle that must be applied, for example, when considering whether or not to arrest and detain an alleged perpetrator of domestic violence as a preventive measure. This is where the statement regarding the supremacy of women's rights to life and physical and mental integrity in *A.T v Hungary* (above) again becomes important, bearing in mind that the liberty of the perpetrator and his property rights are often accorded a higher priority than the rights of the victim, as demonstrated in the two communications brought against Austria.

These two communications provide an interesting contrast in that the deceased victims present, to a certain extent, the two stereotypical extremes: on the one end, the 'good' victim Fatma Yildirim, who did everything 'right'; on the other hand, the non-compliant victim Şahide Goekce who (at least on the State's version) did not cooperate with the authorities, withdrew charges, allowed the perpetrator to move back into the home in spite of an interim injunction.[191] Ironically, both victims were ultimately unable to escape from the perpetrators.

The views expressed by the CEDAW to some extent represent a missed opportunity, in the sense that they did not address all the aspects raised in the authors' claims. For example, it would have been helpful to have a response to the allegation that the

[191] See eg LM Artz *An Examination of the Attrition of Domestic Violence Cases within the Criminal Justice System in Post-Apartheid South Africa* (2008) 294-195.

Austrian authorities were in violation of Article 1 of the Convention due to their prosecution policies, which had a disparate impact on women experiencing domestic violence. It would further have been instructive to have an express comment from the Committee regarding the way in which the Austrian Government attempted to place blame on Şahide Goekce for her perceived 'failure' to co-operate with the authorities, thus associating itself with stereotypical notions of how victims should ideally behave.[192]

Again, as in the case of *A.T. v Hungary*, the recommendations to the Austrian government are noteworthy. Given the relief requested by the authors,[193] the recommendations are mainly structural, i.e. for the State Party to 'vigilantly and in a speedy manner prosecute' perpetrators of domestic violence and to conduct training and education for judges and lawyers.

2.6.3 *Ms NSF v the United Kingdom*[194]

The CEDAW found this communication to be inadmissible. Nonetheless, it has been included here for discussion due to the fact that it raises the construction of 'violence against women' as a form of discrimination (rather than as a 'free-standing' violation) in a tangible way.[195]

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192 These assumptions are rarely based on victims' real experiences, and accordingly risk perpetuating discrimination.

193 The authors did not request individual relief, such as compensation for the heirs of the deceased – see CEDAW *op cit* note 167 paras 3.7 – 3.9.

194 CEDAW *Communication 10/2005* UN Doc CEDAW/C/38/D/10/2005 (dated 12 June 2007).

195 See also discussion in Chapter 4, Section 7.

(a) Background[196]

The author of this communication (dated 21 September 2005) was Ms. NSF, a Pakistani asylum seeker, at the time living in the United Kingdom with her two children.[197] She claimed to fear for her life at the hands of her former husband in Pakistan and for her two sons' future and education if the authorities of the United Kingdom deported her due to the domestic violence she had experienced at the hands of her former husband. (This violence had been the cause of her fleeing Pakistan with her children for the United Kingdom.) In her communication to the CEDAW, she did not invoke specific provisions of the Women's Convention nor demonstrated how the Convention may have been violated, but her claims appeared to raise issues under Articles 2 and 3 of the Convention. The author represented herself.[198]

Ms. NSF arrived in the United Kingdom on 14 January 2003 with her two children and applied for asylum on the same day. On 27 February 2003, the Immigration and Nationality Directorate of the Home Office rejected her asylum application. The author then went through an extended series of legal proceedings in her attempt to obtain asylum in the UK.[199] In February 2005, the Immigration and Nationality Directorate informed the author that she had no further right of appeal; it reminded her that she had no basis to stay in the United Kingdom and should make

196 The factual background to the communication is set out in more detail in *Annexure B*.
197 CEDAW *op cit* note 194 Introductory para.
198 *Ibid.*
199 These proceedings are detailed in *Annexure B*.

arrangements to leave the United Kingdom without delay. She was apprised of where to call for help and advice on returning home.

The author's efforts to avoid deportation included an application to the European Court of Human Rights alleging a violation by the United Kingdom of her rights under Article 3 (prohibition of torture) and Article 8 (right to respect for private and family life). In November 2005, this Court declared the communication inadmissible on the basis that it 'did not disclose any appearance of a violation of the rights and freedoms set out in the [European] Convention or its Protocols'.

In May 2006, the Home Office refused the author's request for discretionary leave on humanitarian grounds. The decision indicated that the author had no basis to stay in the United Kingdom and should make arrangement to leave the country without delay. If she failed to do so, the Home Department would take steps to ensure her removal to Pakistan. No deadline was given.

Ms. NSF claimed that she came to the United Kingdom to save her life and her children's future and education.[200] She alleged that as a single woman with two children, she would not be safe outside of the United Kingdom. She asserted that if she is deported back to Pakistan, she would no longer be protected and would be killed by her ex-husband and her children's future and education would be put at risk. She therefore asked that she and her two children be allowed to live in the United Kingdom and be granted temporary protection.

[200] CEDAW *op cit* note 194 paras 3.1.-3.2.

(b) Submission regarding admissibility

The United Kingdom challenged the admissibility of the communication, arguing that the author had failed to exhaust domestic remedies, that the same matter had been examined by the European Court of Human Rights, and that the communication was not sufficiently substantiated and/or was manifestly ill-founded.[201]

Regarding exhaustion of domestic remedies, the State Party alleged that there were effective remedies against the decision of 8 May 2006 by the Home Office refusing the author's request for discretionary leave on humanitarian grounds.[202] However, it was still open to the author to seek permission to apply for judicial review by the High Court.[203] Importantly, the State Party noted that the author had never formulated any allegation based on discrimination *as a woman* before the domestic authorities and/or courts and that, as a consequence, the domestic authorities and/or courts had not yet had an opportunity to deal with the author's assertion that the decisions involved sex discrimination. The State Party further noted that such an allegation would be relevant for bearing in mind by the Home Office when considering the author's case and, in due course, could therefore form part of the arguments in support of an application for permission to apply to the High Court for judicial review.

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201 *Idem* para 4.1. Only the first of these three challenges will be addressed here.

202 *Idem* para 4.2.

203 The State Party admittedly considered the granting of such permission very unlikely, in the light of the history of the case and the fact that such a request would be based upon the same factual and legal arguments developed previously before the national authorities (and the European Court of Human Rights).

(c) CEDAW's decision on admissibility[204]

The CEDAW observed that this communication raised the issue of the situation in which women who have fled their country because of fear of domestic violence often find themselves.[205] Recalling General Recommendation No. 19 on violence against women, it stated that the definition of discrimination against women in Article 1 of the Convention includes gender-based violence, i.e. violence that is directed against a woman because she is a woman or that affects women disproportionately. It considered the State Party's challenge to the admissibility of the author's claim under Article 4, paragraph 1, of the Optional Protocol because the author did not avail herself of the possibility of seeking permission to apply for a judicial review by the High Court of the refusal to grant her discretionary leave to remain in the country on humanitarian grounds.

In this regard, the Committee took account of the State Party's view that the granting of permission to the author to apply for a judicial review was uncertain.[206] It further noted the State Party's contention that the author had never formulated an allegation of sex discrimination and, as a consequence, the domestic authorities and/or courts had not yet had an opportunity to deal with such an assertion, which, in the opinion of the Committee, needed to be considered in the light of the State Party's obligations under the Convention. As a consequence, and in the light of the State Party's view that an allegation of sex discrimination would be relevant for consideration by the Home Office when again considering the author's case and, in

204 See CEDAW *op cit* note 194 paras 7.1-7.5.
205 *Idem* para 7.3.
206 *Idem* para 7.3.

due course, could form part of the arguments in support of an application for permission to apply to the High Court for a judicial review, the Committee found that the author should avail herself of this remedy. For this reason, the Committee found the communication inadmissible under Article 4, paragraph 1, of the Optional Protocol, i.e. on the basis that all available domestic remedies had not yet been exhausted.

(d) Comments on the Committee's decision

In this instance, the Committee's decision is unfortunately not very clear. It is apparent that the basis of the inadmissibility finding is the fact that the author had not exhausted all the available domestic remedies, and this in turn rested on the fact that she had not yet framed an argument of sex discrimination for consideration by the Home Office. The Committee places this finding against the background of General Recommendation No 19, and the fact that gender-based violence is included in the definition of discrimination against women in Article 1 of the Convention.

This juxtaposition suggests that the Committee's interpretation of 'sex discrimination' against the author in this instance consists of the fact that she had been the subject of such discrimination (in the form of gender-based violence) in her home country Pakistan, and that this could constitute the basis of her renewed asylum claim.[207] The fact that she chose to frame her communication in terms of gender-based discrimination and approach the CEDAW (instead of, for example, the

[207] An alternative interpretation is that the author could argue that she was discriminated against as a *woman* by the UK authorities in their refusal of her asylum request. This does not however fit in as readily with the Committee's referral to General Recommendation No. 19.

Human Rights Council or Committee against Torture, on the basis that her rights in terms of the ICCPR or CAT had been violated) meant in this instance that the gender-based violence she had experienced would, of necessity, be viewed through the lens of sex-based discrimination. As it happened, this translated into another 'opportunity' for the author at exploring domestic remedies due to inadmissibility of the communication.

2.6.4 *The murdered women of Ciudad Juárez*

At its 31st Session in July 2004, the CEDAW concluded its first inquiry in terms of Article 8 of the Optional Protocol. This inquiry related to the abduction, rape and murder of women in the city of Ciudad Juárez in the state of Chihuahua, Mexico. The report relating to this inquiry, which also included the observations received from the Government of Mexico, was published in January 2005.[208]

(a) Origin of the inquiry

From 1993 onwards, approximately four hundred[209] young women were brutally murdered in Ciudad Juárez, Mexico;[210] many more disappeared and remained

208 CEDAW *op cit* note 5.

209 The number of murdered women was the subject of much controversy, with estimates ranging from 230 to 470.

210 Simmons notes that overall, the murder rates for men in Ciudad Juárez still far exceeded those for women. However, from 1993 the murder rates for women increased much faster than the murder rates for men in Juárez, and were much higher than in comparable cities – WP Simmons 'Liability of secondary actors under the Alien Tort Statute: Aiding and abetting and acquiescence to torture in the context of the femicides of Ciudad Juárez' (2007) 10 *Yale Human Rights & Dev LJ* 88 at 92. See also DM Weissman 'The political economy of violence: Toward an understanding of the gender-based murders of Ciudad

missing.[211] About a quarter of the discovered bodies displayed signs of serial sexual torture prior to death. For a period of about 10 years from 1993-2003, the Mexican authorities failed to conduct adequate investigations or bring an end to the murders.[212] Gradually, local and international interest in the matter intensified, as did the pressure on the Mexican Government to frame an appropriate response.

In a letter dated 2 October 2002, the non-governmental organisations *Equality Now* and *Casa Amiga*[213] requested the CEDAW to conduct an inquiry under Article 8 of the Optional Protocol into the abduction, rape and murder of women in and around Ciudad Juárez, in order to reinforce the support it had already given to the case following its examination of Mexico's fifth periodic report, submitted in August 2002.[214]

In its concluding observations, the Committee had expressed particular concern at the apparent lack of results of the investigations into the causes of the numerous murders of women and the failure to identify and bring to justice the perpetrators of such crimes.[215] It had called on the State Party to accelerate compliance with

Juárez' (2005) 30 *North Carolina Journal of International Law & Commercial Regulation* 795 at 802.

211 Simmons *loc cit*; JH Robinson 'Another woman's body found outside Juárez – Applying *Velásquez Rodríguez* for women's human rights' (2005) 20 *Wisconsin Women's Law Journal* 167 at 167-168.

212 Based on available information, it appears that the murders are still continuing to date (see Section 2.6.4 (g) below). However, this account focuses on the period up to 2003, since this is when the CEDAW inquiry was held.

213 Located in New York, USA, and Ciudad Juárez, respectively.

214 Mexico ratified the Optional Protocol on 15 March 2002.

215 General Assembly *Report of the Committee on the Elimination of Discrimination against Women Exceptional Session (5-23 August 2002)* UN Doc A/57/38 para 439. The CEDAW's concluding observations are set out in paras 420-502.

Recommendation No. 44/98 of the Mexican National Human Rights Commission in relation to the investigation and punishment of the Ciudad Juárez murders.[216]

In July 2003, after having examined the information submitted in reply by the Mexican Government, the Committee decided to conduct a confidential inquiry under Article 8(2) of the Optional Protocol.[217] It nominated two of its members, Ms. María Yolanda Ferrer Gómez and Ms. Maria Regina Tavares da Silva, to conduct the inquiry and report back to the Committee. Lastly, the Committee requested the Government of Mexico to consent to a visit by the two members; the Government agreed and the two experts, accompanied by two UN officials, carried out the visit during October 2003.

(b) Background

Ciudad Juárez is situated in the northern part of the State of Chihuahua, on the border with the USA.[218] With a population of 1.5 million persons (including the transient population) at the time of the CEDAW inquiry, it is the largest centre in the State of Chihuahua, accounting for 40 per cent of the state's overall population. It includes an industrial sector that had seen explosive growth, especially over the previous decade (the 1980s), due to the expansion of the maquiladora[219] industry,

216 *Idem* para 440.

217 CEDAW *op cit* note 5 para 8.

218 *Idem* para 22.

219 Also referred to as '*maquilas*', these factories, typically owned by European, American and Japanese multinational corporations, manufacture items such as cell phones, televisions, computers, electrical appliances and toys – ER Arriola 'Accountability for murder in the maquiladoras: Linking corporate indifference to gender violence at US-Mexico border' (2007) 5 *Seattle Journal for Social Justice* 603 at 604, 605; see also Weissman *op cit* note

which had brought an increase in the flow of migrants from other parts of Mexico, compounded by the presence of foreign migrants. Regarded as an 'open door' to employment prospects and better opportunities, Cuidad Juárez was also an 'open door' to illegal immigration and drug trafficking.[220]

This accelerated population growth had not been accompanied by the creation of public services needed to respond to the basic needs of this population, such as health and education, housing, and sanitation and lighting infrastructure.[221] This had contributed to the creation of serious situations of destitution and poverty, accompanied by tensions within individual families and within society as a whole. During a visit to the city's western district, the CEDAW delegation witnessed the extreme poverty of the local families; most of those households were headed by women and lived in extreme destitution.

Arriola paints a vivid picture of Ciudad Juarez at this time. She describes thousands of maquiladora workers eking out 'sad lives in shantytowns without water, electricity or public lighting'.[222] New arrivals to the northern Mexican border area would find cities unable to meet their housing needs; dozens of families would accordingly stake out plots of land near public utilities where they pirate essential public services and lived in shacks made of sticks, cardboard, rags or discarded

210 at 801 fn 27. The companies were reportedly attracted to the area by low wage standards and lax labour and environmental regulations – Simmons *op cit* note 210 at 92.

220 See also Simmons *loc cit*; Weissman *op cit* note 210 at 824; Robinson *op cit* note 211 at 169.

221 CEDAW *op cit* note 5 para 23.

222 Arriola *op cit* note 219 at 604.

construction platforms.[223] Some people, she reports, even made their homes next to trash dumps.[224]

The CEDAW delegation was furthermore informed by various sources that in Ciudad Juárez there was a marked social class stratification, with the existence of a minority of wealthy, powerful families, who owned the land on which the marginal maquiladoras and urban districts were located, making structural change difficult.[225] The overall situation had led to a range of criminal behaviours, including organised crime, drug trafficking, trafficking in women, undocumented migration, money-laundering, procuring, and the exploitation of prostitution.[226]

All authorities consulted by the delegation recognised that the city's erratic growth, together with a combination of social, economic and criminal factors, had resulted in a complex situation characterised by the rupture of the social fabric.[227] One of its most significant aspects was the increase in violence in various forms, affecting the whole population - men, women and children. This rupture was also reflected in the acceptance of violence against women, which was regarded as a 'normal' phenomenon within the context of systematic and generalised gender-based discrimination. Weissman points out that during the period of sharp increase in the

223 See also Weissman *op cit* note 210 at 819-820, who observes that housing squalor has been accompanied by pervasive environmental degradation.

224 If one looks at the reasons for the social disintegration and concomitant increase in violent and organised crime experienced in Ciudad Juárez at this time, it is not coincidental that the settlement of informal housing described by Arriola and the specific patterns of gender-based violence recounted by the CEDAW delegation and others are so startlingly reminiscent of the current South African situation, especially in large urban centres such as Cape Town and Johannesburg.

225 CEDAW *op cit* note 5 para 23.

226 See also Weissman *op cit* note 210 at 824-825.

227 CEDAW *op cit* note 5 para 24.

number of femicides in Ciudad Juarez (i.e. leading up to the end of the 1990s), the city also experienced the highest levels of reported domestic violence in Mexico.[228]

In addition, the situation created by the establishment of the maquiladoras and the creation of jobs mainly for women, without the creation of enough alternatives for men, had changed the traditional dynamic of relations between the sexes, which was characterised by gender inequality.[229] This gave rise to a situation of conflict towards the women - especially the youngest - employed in the maquiladoras. This social change in women's roles was not accompanied by a change in traditionally patriarchal attitudes and mentalities, and thus the stereotyped view of men's and women's social roles was perpetuated.

Within this context, a culture of impunity had taken root that facilitated and encouraged 'terrible violations of human rights'.[230] Violence against women also took root, and developed specific characteristics marked by hatred and misogyny. There had been widespread kidnappings, disappearances, rapes, mutilations and murders, especially during 1993-2003.

(c) The murders

Although murders of women had occurred in Ciudad Juárez in previous years, it was in 1993 that the phenomenon intensified and started to become noticeable.[231] For the

[228] Weissman *op cit* note 210 at 797.
[229] CEDAW *op cit* note 5 para 25.
[230] *Idem* para 26.
[231] *Idem* para 27.

first ten years or so after the femicides began, the Mexican authorities did little to investigate or prevent them.[232]

The majority of the victims were young (between fifteen and twenty-five), similar in appearance and mostly migrants from southern Mexico who had come north in search of employment.[233] Many of the victims were maquiladora workers who were killed or who disappeared en route to or from work; others were students.

The evidence of sexual torture found on certain of the bodies ranged from beatings to bite-marks, mutilation and dismemberment, which made some of the bodies difficult to identify.[234] The nature of this violence added to the numerical evidence of the gendered aspect of the murders.[235]

As noted above, the response of the Mexican authorities was inadequate in various respects. Typical complaints of victims' families, NGO's and international organisations included:[236] little investigation, especially in 'missing persons' cases, evidence missing from case files, chronic delays in launching investigating into disappeared women, careless autopsies, delays in conducting DNA testing, and contamination and confusion of DNA evidence. Other complaints related to failures to follow up leads, to gather evidence from crime scenes, and to seal off crime scenes. Investigations were irrevocably and inexplicably botched by leaking information to the press, and in numerous cases of sexual assault there was no

232 Simmons provides a useful summary of the difficulties experienced by the families of the deceased women: *op cit* note 210 at 94-95.

233 Weissman *op cit* note 210 at 801-802; Robinson *op cit* note 211 at 168-169.

234 *Ibid*; Weissman *op cit* note 210 at 800 fn 12.

235 Robinson *op cit* note 211 at 174.

236 See Simmons *op cit* note 210 at 94-95.

forensic analysis. Family members of murdered women reported returning to crime scenes several months after the initial police investigation and finding clothing and other evidence that the police had not collected.[237]

The investigations were also plagued by claims of cover-ups by government authorities and claims that the police planted or falsified evidence to implicate specific individuals.[238] Several members of the investigative teams resigned, and they later discussed pressure to plant evidence and even alleged complicity between police and the murderers.[239] Reluctance to transfer cases to investigators at the federal level, even after members of the Mexican Congress urged it, slowed investigations, especially into allegations of complicity of local authorities in the murders.

The lack of attentiveness on the part of the Mexican authorities towards stopping the murders were blamed on the North American Free Trade Agreement (NAFTA), the income generated from the maquiladoras, and possible connections to elite rich families.[240] Interestingly, Weissman points out that the murder rate of women began to soar shortly after the signing of the NAFTA in December 1992.[241]

237 *Idem* at 95.

238 *Ibid*.

239 Weissman *op cit* note 210 at 804.

240 Robinson *op cit note* 211 at 168. On the NAFTA and Ciudad Juárez, see generally G Vega '*Maquiladora's* lost women: The killing fields of Mexico – Are NAFTA and NAALC providing the needed protection?' (2000) 4 *Journal of Gender, Race and Justice* 137-158.

241 Weissman *op cit* note 210 at 796-797, 809.

The Mexican authorities did make arrests in some of the cases, and several of the alleged perpetrators were prosecuted.[242] Most of the local activists working to end the femicides however believed that few, if any, of these men were connected to the murders, in part because of allegations that those arrested confessed only after being subjected to systematic torture.[243] A number of theories were developed to explain the murders. These included organ trafficking, production of 'snuff films' and ritual murders by satanic cults.[244] The murders were also explained as the killing of women for sport by sons of wealthy elites, including the owners of maquiladoras. Experts proposed the possibility of serial killers (possibly from the USA) who crossed the border and thus avoided detection. Others suggested that police officers were involved in the killing of women to avoid prosecution after raping them.

The Mexican authorities spent some effort creating 'alternative discourses' to attempt to explain away the murders. These included blaming the victims through claims that the murders could be 'justified' because the victims were prostitutes, because of their manner of dress, or because they frequented specific bars of areas of the cities.[245] They also attempted to claim that a large number of the murders had been solved.

242 Simmons *op cit* note 210 at 98-99.

243 Moreover, a number of those involved in the prosecutions met suspicious ends: two of the attorneys working on the cases were gunned down in nearly identical fashion three years apart. One of two bus drivers charged with certain of the murders, Gustavo Gonzalez Mesa, was found dead under suspicious circumstances in his prison cell while the conviction of the other, Victor Garcia Uribe, was eventually overturned - Simmons *op cit* note 210 at 99.

244 Weissman *op cit* note 210 at 805-806.

245 Simmons *op cit* note 210 at 96-97.

(d) Increasing national and international attention

In 1998, the Office of the Special Prosecutor for the investigation of the murders of women in Ciudad Juárez was established.[246] Moreover, the National Human Rights Commission investigated 36 of the murder cases and issued Recommendation 44/98, which found that the investigations conducted had included actions violating the human rights of the women victims and their relatives. It also stated that international regulations and instruments had been violated, 'to the detriment of the aggrieved persons'.

During 1999, the international community began to take notice of the events taking place in Ciudad Juárez.[247] In this year, the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions visited Mexico and alerted the authorities to the insecurity and impunity reigning in the city and to the sexist nature of the crimes committed. In addition, the UN Special Rapporteur on Violence against Women interviewed the Government concerning the murders of women that had occurred in Ciudad Juárez. In 2001 the UN Special Rapporteur on the Independence of Judges and Lawyers visited Mexico and addressed, among other matters, the question of the murders of women and the climate of impunity surrounding them.

246 CEDAW *op cit* note 5 para 28.

247 *Idem* para 30.

Public debate on the murders intensified after the 2002 release of a documentary film entitled 'Señorita Extraviada'.[248] During this year, in response to requests made by numerous individuals and NGO's to the Inter-American Commission on Human Rights (IACHR) and its Special Rapporteur on Women's Rights, the Federal Government of Mexico invited the latter to visit the country — a visit that took place in February 2002.[249] The following year, the IACHR adopted and published its report.[250]

As noted above, in 2002 the CEDAW also made a recommendation concerning the murders and disappearances in Ciudad Juárez, within the context of its consideration of the fifth periodic report of Mexico on the Women's Convention.[251]

(e) The CEDAW inquiry: Findings on Mexico's responsibility in terms of the Women's Convention

Reviewing the international commitments of the Mexican State in the field of women's rights, the CEDAW observed that the primary progress in the situation lay in the Government's recognition that the problem existed.[252] However, an effective response, appropriate to 'the magnitude of the tragedy' and to the obligations assumed by the Mexican Government with regard to the protection of women's rights, had to be found. The promotion and protection of human rights was one of

248 Arriola *op cit* note 219 at 605.

249 CEDAW *op cit* note 5 para 31. See also discussion in Chapter 5, Section 3.3.2.

250 Inter-American Commission on Human Rights *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination* OEA/Ser.L/V/II.117 doc44 (dated 7 March 2003).

251 CEDAW *op cit* note 5 para 32.

252 *Idem* para 48.

the obligations that had been actively assumed by the current administration.[253] Mexico had signed and ratified the principal international human rights instruments;[254] it was also bound by relevant regional instruments.

In the context of these obligations and, in particular, of the Women's Convention, the Committee found that there had been serious lapses on the part of the Mexican State, specifically concerning Articles 1, 2, 3, 5, 6 and 15 of the Convention.[255] It recounted the definition of 'discrimination against women' in Article 1 of the Convention and confirmed that gender-based violence, as defined the Committee's Recommendation No. 19, is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms. It further made reference to the definition of 'violence against women' in the 1993 UN Declaration on the Elimination of Violence against Women.[256]

Based on the Committee's findings, the situation in Ciudad Juárez - gender-based violence and the resulting impunity - amounted to a clear violation of the provisions of the Convention.[257] The Committee recalled the responsibilities undertaken by States Parties in terms of Article 2,[258] and observed that it was clear that there had been lapses and violations in the State's fulfilment of its obligations in those areas. While there was at the time of the inquiry a greater political will, especially on the part of Federal agencies, to deal with discrimination and violence against women,

253 *Idem* para 49.

254 These included the Universal Declaration of Human Rights; the ICCPR and its Optional Protocol; the ICESCR; the Convention on the Rights of the Child; and, specifically in the area of women's rights, the Women's Convention.

255 CEDAW *op cit* note 5 paras 50-52.

256 See Chapter 4, Section 3.

257 CEDAW *op cit* note 5 paras 53-54.

258 See Section 2.3.1 (c) above.

the policies adopted and the measures taken since 1993 in the areas of prevention, investigation and punishment of crimes of violence against women had been ineffective and had fostered a climate of impunity and lack of confidence in the justice system that were incompatible with the duties of the State.[259]

The Committee pointed out that under Article 5 of the Convention, States Parties are required to take appropriate measures 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'. This obligation of the State had not been duly fulfilled; even the campaigns aimed at preventing violence in Ciudad Juárez focused not on promoting social responsibility, change in social and cultural patterns of conduct of men and women and women's dignity, but on making potential victims responsible for their own protection by maintaining traditional cultural stereotypes.[260]

Similar observations could be made regarding Article 6, which establishes the obligation 'to suppress all forms of traffic in women and exploitation of prostitution of women' - a possible motive for the murders and disappearances that had been neither confirmed nor denied - and Article 15, which provides that 'States Parties shall accord to women equality with men before the law' in all aspects of life and, specifically, establishes the right to the free 'movement of persons'.[261] This was not the case in Ciudad Juárez and Chihuahua City, where a climate of fear and danger prevented many women, especially young women and women from the lower social

259 CEDAW *op cit* note 5 para 55.
260 *Idem* paras 56-57.
261 *Idem* para 58.

classes, from freely leading normal lives.[262] Furthermore, although the right to equality before the law is guaranteed in Article 4 of the Mexican Constitution, it had not been, and was at the time not being, guaranteed to women in the relevant proceedings carried out in Ciudad Juárez and Chihuahua City. All of these factors showed that there were serious lapses, which urgently needed to be remedied, in the Mexican Government's fulfilment of its responsibilities as a State Party to the Women's Convention.

(f) The Committee's conclusions and recommendations

The CEDAW found that the facts alleged in the communications of *Equality Now* and *Casa Amiga*, in association with the Mexican Committee for the Defence and Promotion of Human Rights, constituted 'grave and systematic violations' of the provisions of the Women's Convention, as well as of General Recommendation No. 19 and the UN Declaration on the Elimination of Violence against Women.[263] The Committee expressed great concern at the fact that these serious and systematic violations of women's rights had continued for over 10 years and noted 'with consternation' that it had not been possible to eradicate them, to punish the guilty and to provide the families of the victims with the necessary assistance.[264]

The Committee believed that there had been serious lapses in compliance with the commitments that Mexico had made through its ratification of the Women's Convention as evidenced by the persistence and tolerance of violations of women's

262 *Idem* para 58.
263 *Idem* para 259.
264 *Idem* para 260.

human rights.[265] This was indicated by the continuation of very widespread and systematic violence against women and by the crimes of murder and disappearance of women as one of its most brutal manifestations. The Committee accordingly formulated a number of recommendations along three broad themes, i.e. *general* recommendations, those concerning the *investigation of the crimes and punishment of the perpetrators* and recommendations aimed at *preventing violence, guaranteeing security and promoting and protecting the human rights of women*.

The Committee recommended that Mexico comply with all obligations assumed under the Women's Convention.[266] It reminded the State Party in particular that the obligation to eliminate discrimination against women refers not only to actions or omissions by the State at all levels, but also to the need to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.

The CEDAW's *general* recommendations included amongst others the improvement of the cooperation and participation among the three branches of Government (federal, state and municipal) with respect both to their mutual relations and to their relations with civil society.[267] It emphasised the responsibility of all authorities at all levels to prevent violence against women and to protect their human rights.

265 *Idem* para 263.
266 *Idem* para 264.
267 *Idem* paras 265-266.

The Committee further recommended that a gender perspective[268] should be incorporated into all investigations, policies to prevent and combat violence, and programmes to restore the social fabric, bearing in mind the specific characteristics of gender-based violence against women, its causes and consequences, and the specific social responses that the situation required.[269]

Regarding *recommendations concerning the investigation of the crimes and punishment of the perpetrators*, the Committee expressed its concern that, with respect to the murders and disappearances, there had been no serious and thorough investigation of each case and that complaints by relatives had even been ignored and evidence and proof destroyed.[270] The Committee therefore recommended the thorough investigation and punishment of the negligence and complicity of public authorities in the disappearances and murders of women and the fabrication of confessions under torture; as well as the investigation and punishment of public officials for their complicity in or tolerance of persecution or harassment or threats directed against victims' relatives or members of organisations representing them.[271]

It made the following important statement:

> The Committee is gravely concerned at the lack of due diligence shown by the state and municipal authorities in cases involving disappearances of women, the inconsistencies in their data, and the distinction made between women who are considered at "high risk" and those who are not when deciding whether to launch an immediate search or determination of their whereabouts. Such a practice

[268] That is, that consideration has not been given to the impact of such policies on women and men, bearing in mind their socially constructed roles and the power relations between them.

[269] CEDAW *op cit* note 5 paras 267-268.

[270] *Idem* para 273.

[271] *Idem* para 274.

> discriminates against women whose conduct may not conform to the accepted "moral code", but who have an equal right to life. The Committee is also concerned at the lack of sufficient resources and staff trained to act on complaints, and the fact that days sometimes pass before an investigation is opened.[272]

It recommended the establishment of early warning and emergency search mechanisms for cases involving missing women and girls in Ciudad Juárez and Chihuahua state, bearing in mind the close connection between disappearances and murders and hence the extreme danger that *every* disappearance represented.[273] The Committee also considered it essential to provide the competent authorities with the training and the human and material resources needed to act with due diligence.

Regarding the third theme of *preventing violence, guaranteeing security and promoting and protecting the human rights of women*, the Committee noted that a number of measures had been taken to prevent the violence against women that prevailed in Ciudad Juárez.[274] It emphasised that, because what was involved was a structural situation and a social and cultural phenomenon deeply rooted in the consciousness and customs of the population, it required a global and integrated response, a strategy aimed at transforming existing socio-cultural patterns, especially with regard to eradicating the notion that gender violence was inevitable.

From this standpoint it made certain immediate, medium-term and long-term recommendations. The Committee further proposed (*inter alia*) the promotion of

272 *Idem* para 275.

273 *Idem* para 276. The Committee explained that all cases of a similar pattern should be considered as high-risk disappearances and not simply cases of missing persons.

274 Idem paras 287-288.

training and capacity-building for public officials in general, and judges and judicial personnel in particular, in the area of gender violence and human rights and the need to take the gender dimension into account in their actions, procedures and judgements.

The Committee expressed concern at the situation of discrimination and insecurity that prevailed in the maquiladoras, where nearly all women in the work force were employed. It also noted that most of the female population lived in poverty and extreme poverty, with no assurances of meeting its basic needs - work, education, health care, housing, sanitation infrastructure and lighting.[275] Accordingly, it recommended for the Mexican Government to step up violence prevention programmes and policies, including early warning mechanisms, the reinforcement of security in dangerous or isolated areas, monitoring programmes and systematic information on security measures. The government was further advised to adopt and promote all measures to restore the social fabric and create conditions 'to guarantee that women in Ciudad Juárez were able to exercise the rights established in the Women's Convention'.[276]

(g) Subsequent developments

The published CEDAW report also contained observations from the Mexican Government, presented at the Committee's session in July 2004. This response comprised an extensive account of progress, obstacles and challenges facing the Government in respect of murders and disappearances of women in Ciudad

[275] *Idem* paras 289-290.
[276] *Idem* para 290.

Juárez.[277] As Sokhi-Bulley observes, the tone of the Government's reply is one of 'helplessness and inevitability'.[278] Mexico emphasised that the subordination of women was a social and cultural phenomenon, deeply rooted in customs and mindsets; this situation had been exacerbated by a lack of human and financial resources on the part of authorities. There was nothing to suggest that the State was pursuing a deliberate policy of discrimination.[279]

Writing in 2007, Simmons reported that the situation on the ground in Ciudad Juárez had not improved significantly.[280] A more recent report prepared by Amnesty International for purposes of Mexico's Universal Periodic Review process confirms that despite 'welcome measures' to prevent and punish violence against women in Ciudad Juárez and Chihuahua City, Chihuahua State, women and young girls continue to be murdered.[281] Legislation introduced in 2007 to prevent and punish violence against women has yet to be converted into practical tools for combating gender-based violence.

In 2009, the Inter-American Court of Human Rights considered the liability of the Mexican Government in respect of the disappearances and murders of three young women whose bodies were found in Ciudad Juárez in November 2001, and

277 *Idem* at 55 *et seq*.

278 B Sokhi-Bulley 'The Optional Protocol to CEDAW: First steps' (2006) 6 *Human Rights Law Review* 143 at 155.

279 *Ibid.*

280 Simmons *op cit* note 210 at 99-100.

281 Amnesty International *Mexico: Submission to the Universal Periodic Review* (February 2009) 6.

judgment was handed down in November 2009. I return to a discussion of the Court's findings in Chapter 5.[282]

3. EVALUATION

When examining women's right to freedom from violence in the context of the Women's Convention, the first observation that should be noted is the absence of this right from the original body of the document. The CEDAW subsequently brought violence against women within the ambit of the Convention through 'constructive' interpretation, and specifically, through stating that 'gender-based violence' constitutes a form of discrimination against women. This implies that the consideration of violence against women under this Convention, at least initially, mainly resorted under the right to equality or to non-discrimination (rather than under an explicit guarantee of women's right to freedom from violence). While this approach is understandable (and, to a large extent unavoidable), given the basis of the Women's Convention in 'elimination of discrimination', it raises the question whether a predominantly 'equality' approach to violence against women is necessarily the preferable one.[283]

The CEDAW's General Recommendation No. 19 is noteworthy in that it not only confirms that violence against women constitutes a violation of women's rights irrespective of whether the perpetrators are State officials or private actors, but also

[282] Chapter 5, Section 3.3.

[283] I do not attempt to answer this question immediately, but rather reserve it for further attention at the end of Chapter 4, the second part of the examination of international law. This is because of the fact that Chapter 4 also looks at certain equality-based provisions.

reiterated the application of the 'due diligence' standard for determination of State responsibility for private acts.[285]

The initial period of implementation of the Women's Convention was characterised by limited resources and concomitantly, circumscribed opportunities for normative development by the CEDAW. However, the adoption of the Optional Protocol to the Convention brought with it new prospects for such development. This is seen from the communications relating to violence against women that have already been brought before the CEDAW, as well as the inquiry into gender-based violence in Mexico undertaken by the Committee.

The Committee's Views in *A.T. v Hungary* are particularly significant in that women's right to be free from all forms of domestic violence is given express recognition in this instance. This is an important advance, given the background as outlined above.

Cook & Cusack argue that while the Committee is to be celebrated for identifying the link between gender stereotyping and gender-based violence in this case, it missed an opportunity to more fully address the gender stereotyping in Hungary as it operates in respect of violence against women.[286] They propose that the Committee could have strengthened its analysis by being more explicit about the sex stereotype of Hungarian women as men's subordinates, describing how it required Ms. A.T. to obey L.F. and to be disciplined by the use of violence if she did not obey him.[287] Similarly, the CEDAW could also have described more clearly the nature of

285 See discussion in Section 2.3.2 above.
286 Cook & Cusack *op cit* note 63 at 156-157.
287 *Idem* at 157.

Hungary's obligations to eliminate the gender stereotypes that facilitated domestic violence against Ms. A.T.[288]

The Committee's approach in the two communications[289] against Austria is quite different, given the different nature of the State's response to violence against women. Unlike Hungary, which had conceded before the Committee that its response to violence against women did not meet the expected international standards, the Austrian Government was clearly well-invested in being seen to be compliant with these standards. This is evident from the State Party's response to the Committee's finding of admissibility, and its request for a review in each case.

What is therefore at issue in the *Goekce* and *Yildirim* communications, more than in the case of *Ms. A.T. v Hungary*, is the standard of 'due diligence'. In both these instances, the State response, while perhaps adequate and responsive on legislative and policy level, fell down on individual level when State actors failed to adhere to the State's due diligence obligations. In the *Goekce* case, this failure took the form of the police not responding to the victim's last call as an emergency, given the long history of violence and threats against her by the perpetrator. In the case of *Yildirim*, the failure to exercise due diligence took the form of the refusal to detain the perpetrator, again with a background of repeated acts violence and threats against the victim.

Read with the findings of the Committee in the inquiry relating to the murders of the women in Ciudad Juárez, Mexico, one notes that certain interpretative themes, for

[288] *Idem* at 158.
[289] CEDAW *op cit* note 166; CEDAW *op cit* note 167.

example, on the standard of due diligence in relation to investigations (Ciudad Juárez) and on the obligation to provide training to judges and law enforcement officials (*A.T. v Hungary, Şahide Goekce (deceased) v Austria*; *Fatma Yildirim (deceased) v Austria*) are beginning to emerge.

The inquiry relating to Ciudad Juárez has correctly been referred to as a 'significant development in international human rights law'.[290] In spite of the ground covered by the CEDAW in its report, I concur with commentators who have observed that the Committee could have gone further in articulating the Mexican Government's obligations to address gender stereotyping under Articles 2(f), 5(a) and 15(1) of the Women's Convention.[291] It would also, for example, have been helpful for the Committee to include recommendations on how to address the structural nature of the problem of gender stereotyping.[292] Significantly, certain of these issues are also raised in the judgment handed down by the Inter-American Court of Human Rights, and I therefore return to this discussion in Chapter 5.

Having followed the progress of the Women's Convention, the inclusion of 'violence against women' through General Recommendation No. 19 and the incipient jurisprudence that has begun to emerge from communications before the Committee, the next chapter will look at other developments in the international arena (from around the time of the adoption of this General Recommendation).

290 Cook & Cusack *op cit* note 63 at 167.
291 *Idem* at 170.
292 *Idem* at 171-172.

CHAPTER 4

THE DEVELOPMENT OF WOMEN'S RIGHT TO FREEDOM FROM VIOLENCE IN INTERNATIONAL LAW: FROM VIENNA TO BEIJING AND BEYOND

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1. INTRODUCTION

This chapter constitutes the second of two in which the development of women's right to freedom from violence in international law is investigated. The first part of this examination, set out in Chapter 3, covered the Women's Convention; the second part looks at a number of international documents adopted subsequent to the introduction of CEDAW's General Recommendation No. 19 in 1992.[1]

The chapter starts with an assessment of the Vienna Declaration and Programme of Action. Although this is a 'general' human rights instrument, which does not have a specific focus on women's rights, the document represented an important breakthrough for women at the time, as will be explained below. I then proceed to an in-depth consideration of the Declaration on the Elimination of Violence against Women, which has proven to be a key standard-setting document. The Beijing Declaration and Platform for Action are subsequently investigated, together with the three follow-up reviews conducted at five-year intervals since 1995 to evaluate the implementation of the Beijing Platform. Finally, the chapter concludes with an outline of the thematic reports of the Special Rapporteur on Violence against Women, its Causes and Consequences, focusing specifically on

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[1] CEDAW *General Recommendation No. 19* UN GAOR 11th Session UN Doc CEDAW/C/1992/L.1/Add.15 (1992) [hereafter 'CEDAW *General Recommendation No. 19*'].

how the right to freedom from violence has been addressed in these reports, as well as an overall evaluation.

As indicated before, this evaluation at the end of this chapter will pay attention to the question of whether a predominantly 'equality' approach to violence against women is necessarily the preferable one.[2]

2. THE VIENNA DECLARATION AND PROGAMME OF ACTION

2.1 Background: Events prior to the Vienna Conference

Although international law had seen some gradual progress in the formal recognition of women's rights in the early decades after World War II (in the form of, *inter alia*, the various Conventions and Declarations initiated by the Commission on the Status of Women from its establishment in 1946),[3] these advances grew exponentially from the mid-1970s. This expansion was sparked by the UN declaring 1975 to 1985 to be the 'UN Decade for Women' as well as by the three UN World Conferences held during this period in Mexico City (1975), Copenhagen (1980) and Nairobi (1985) respectively.[4]

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2 See Chapter 3, Section 3.

3 See discussion in Chapter 3, Section 2.1.

4 S Wright 'Human rights and women's rights: An analysis of the United Nations Convention on the Elimination of All Forms of Discrimination against Women' in KE Mahoney & P Mahoney (eds) *Human Rights in the Twenty-first Century* (1993)75 at 76; BE Hernández-Truyol 'Human rights through a gendered lens: Emergence, evolution, revolution' in KD Askin & DM Koenig (eds) *Women and International Human Rights Law* (1999) 3 at 31.

The Decade for Women proved to be a defining period both in terms of providing women with opportunities to participate in official government delegations at the three UN Women's Conferences and allowing women's concerns to be placed on the international intergovernmental agenda.[5] Fitzpatrick recounts that after the Copenhagen Conference in 1980, for example, the issue of violence against women was considered in different UN bodies, such as the Commission on the Status of Women ('CSW') and its parent body (the ECOSOC) as well as the Commission on Crime Prevention and Control.[6] Importantly, the ECOSOC adopted Resolution 1982/22, labeling domestic violence and rape as offences against the dignity of the person and calling for steps to combat these violations. Following the Nairobi Conference (1985), the UN General Assembly adopted Resolution 40/36, which requested Member States to take urgent action to prevent domestic violence, to assist victims and to make criminal justice systems more sensitive.[7]

In 1986, an Expert Group Meeting on Violence in the Family with Special Emphasis on its Effects on Women was established.[8] In 1989, it will be recalled, the CEDAW for the first time addressed the question of violence against women

5 E Friedman 'Women's human rights: The emergence of a movement' in J Peters & A Wolper (eds) *Women's Rights, Human Rights* (1995) 18 at 23. Just as significantly, parallel NGO Forums were held alongside each of the three Conferences; at these meetings, women from different countries (and continents) met and were able to exchange strategies and consolidate ongoing working relationships (*ibid*). These alliances were to prove crucial in the advocacy campaigns leading to the Vienna Conference in 1993.

6 See J Fitzpatrick 'The use of international human rights norms to combat violence against women' in RJ Cook (ed) *Human Rights of Women* (1994) 532 at 536-537 for an overview of these events.

7 *Idem* at 536, citing ECOSOC Resolution 1982/22 and UN General Assembly Resolution 40/36.

8 UA O'Hare 'Realizing human rights for women' (1999) 21 *Human Rights Quarterly* 364 at 372.

by adopting General Recommendation No. 12.[9] In 1992, the same Committee adopted General Recommendation No. 19 on violence against women. Shortly thereafter, the third World Conference on Human Rights was held in Vienna in 1993.[10]

This conference represented an important milestone for women's rights in several respects, most notably in relation to violence against women.[11] The significance of the Conference should be understood against the background of the criticism leveled against international law by feminist commentators in the early 1990s for its failure to adequately take account of women's rights.[12] Copelon, for example, notes that in 1990, women's human rights were 'barely on the international human rights agenda'.[13] Bearing this in mind, the sense of achievement generated by the Vienna Conference moves into perspective. For instance, Mertus and Goldberg observe that prior to this Conference, the very notion that women could claim to have distinct and legally recognised human rights had been virtually unheard of in mainstream international dialogue.[14] With the benefit of hindsight, the Conference may not have proved the watershed

9 See Chapter 3, Section 2.3.2.

10 For a description of the general background to the Conference see K Davidse 'The Vienna World Conference on Human Rights: Bridge to nowhere or bridge over trouble waters?' (1995) 6 *Touro International Law Review* 239 at 242-246. The previous World Conference on Human Rights was held in Teheran, Iran in 1968.

11 Sullivan observes that the area of women's human rights was perhaps the only one in which the World Conference can be said to have met the challenge of defining a 'forward-looking agenda' – DJ Sullivan 'Women's human rights and the 1993 World Conference on Human Rights' (1994) 88 *American Journal of International Law* 152 at 152; see also Davidse *op cit* note 10 at 254.

12 See discussion in Chapter 1, Section 4.

13 R Copelon 'International human rights dimensions of intimate violence: Another strand in the dialectic of feminist lawmaking' (2003) 11 *American University Journal of Gender, Social Policy and the Law* 865 at 866.

14 J Mertus & P Goldberg 'A perspective on women and international human rights after the Vienna Declaration: The inside/ outside construct' (1994) 26 *NYU Journal of International Law & Politics* 201 at 202.

moment it was hoped to be; at the very least, as will be shown below, it did pave the way for a number of significant subsequent developments.

2.2 The Third World Conference on Human Rights (Vienna, 1993)

Prior to the World Conference, an international NGO coalition had organised itself into a 'Global Campaign for Women's Rights', with the aim of ensuring the inclusion of women's right on the agenda of the Vienna Conference.[15] One of the central strategies organised prior to the Conference by the Global Campaign was a worldwide petition drive. The petition stated that as the UDHR protects women, the World Conference should 'comprehensively address women's human rights at every level of its proceedings' and recognise gender-based violence 'as a violation of human rights requiring immediate action'.[16] The petition drive, coordinated by the Centre for Women's Global Leadership, was an unprecedented success.[17]

The World Conference was preceded by official preparatory meetings in Africa, Latin America and the Caribbean and Asia, as well as several NGO caucuses.[18]

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15 *Idem* at 204-206. For a detailed account of the work of the Global Campaign, see C Bunch *et al* 'Making the global local: International networking for women's human rights' in KD Askin & DM Koenig (eds) *Women and International Human Rights Law* (1999) 91 at 92-101.

16 Friedman *op cit* note 4 at 27-28.

17 The petition had gathered a total of 300,000 signatures from 123 countries in 20 languages when it was eventually delivered to the UN - Friedman *op cit* note 4 at 28; L Heise 'Violence against women: Translating international advocacy into concrete change' (1995) 44 *American University Law Review* 1207 at 1208-1209.

18 See Sullivan for an in-depth discussion of these preparatory meetings – *op cit* note 11 at 152 - 155; also Mertus & Goldberg *op cit* note 14 at 205n14; Friedman *op cit* note 4 at 28-30.

A great deal of work was done in advance by women's rights advocates at the level of the preliminary national and regional meetings, and the scene was set 'to secure a political commitment from the international community to end violations of women's human rights'.[19] This commitment was eventually embodied in the conference document, entitled the Vienna Declaration and Programme of Action.[20]

The Declaration, which sets out certain general principles, explains that the human rights of women and of the girl-child are an 'inalienable, integral and indivisible part of universal human rights'.[21] It confirms that the full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Significantly, the Declaration states that gender-based violence and all forms of sexual harassment and exploitation, including those 'resulting from cultural prejudice and international trafficking', are incompatible with the dignity and

19 Sullivan *op cit* note 11 at 155. The coordinated efforts of women's rights groups continued at the Conference itself, where the women's caucus was by far the most organised and vocal of the NGO participants – Friedman *op cit* note 4 at 30. The Global Campaign organised a pivotal event, entitled the 'Global Tribunal on Violations of Women's Human Rights', with the purpose of presenting cases that documented human rights abuses against women and demonstrating the failure of existing human rights mechanisms to protect and promote women's human rights – Friedman *op cit* note 4 at 30; Bunch *et al op cit* note 15 at 95.

20 Adopted by the World Conference on Human Rights on 25 June 1993 UN Doc A/Conf.157/23 (dated 12 July 1993). The contents of the Declaration and Programme of Action are numbered separately; to distinguish between the two sections for purposes of referencing, they will be referred to as 'Vienna Declaration' and 'Vienna Programme for Action' respectively.

21 Vienna Declaration *op cit* note 20 para 18. See Sullivan for an overview of the debate on universality of human rights at the Conference – *op cit* note 11 at 157-158.

worth of the human person, and must be eliminated.[22] This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

The Vienna Programme of Action, which contains specific measures aimed at achieving the broad goals set out in the Declaration, urges the full and equal enjoyment by women of all human rights and calls for this to be a priority for Governments and for the UN.[23] The equal status of women and the human rights of women should be integrated into the mainstream[24] of the UN.[25] The document also underlines the importance of women's full participation as both agents and beneficiaries in the development process,[26] and reiterates the objectives established on global action for women towards sustainable and equitable development set out in (amongst others) the Rio Declaration on Environment and Development.[27] This recognition of women's role in development is important from the perspective of African women (and others in so-called 'developing' countries).

22 Vienna Declaration *loc cit*.

23 Vienna Programme for Action *op cit* note 20 para 36.

24 O'Hare explains that the 'mainstream' is generally taken to refer to the treaty-based bodies and investigative bodies that operate under the auspices of the Geneva-based Office of the High Commissioner for Human Rights – *op cit* note 8 368 fn 15.

25 Vienna Programme for Action *op cit* note 20 para 37. However, as Sullivan correctly points out, women's rights are not integrated or 'mainstreamed' in the Vienna Declaration and Programme of Action as such, but treated as a separate category of rights - Sullivan *op cit* note 11 at 159.

26 Vienna Programme for Action *op cit* note 20 para 36.

27 This Declaration was adopted by the UN Conference on Environment and Development, held in Rio de Janeiro, Brazil, 3-14 June 1992. For a discussion of the Vienna Conference and the right to development, see Sullivan *op cit* note 11 at 162-163.

In particular, the Conference stressed the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.[28]

The inclusion of both 'public and private life' in this formulation is of importance, again in the context of feminist criticism of the failure of international law to recognise and address the dichotomy between the public/ private spheres.[29] It is also important in that violence against women, as previously explained, is usually committed by private (non-state) actors. A second significant aspect of this formulation, as Sullivan points out, is that by calling for the elimination of the *conflicts* that may arise between women's rights and the harmful effects of customary practices (rather than the 'harmful effects' themselves), the Conference evaded the difficult question of how to resolve conflicts between women's rights and cultural practices – even those considered to be harmful.[30]

An important measure proposed by the Conference on Human Rights was the adoption by the UN General Assembly of the draft Declaration on violence against women.[31] The Conference further urged the eradication of all forms of

28 Vienna Programme for Action *op cit* note 20 para 38.

29 Mertus and Goldberg *op cit* note 14 at 203.

30 Sullivan *op cit* note 11 at 158.

31 Vienna Programme for Action *op cit* note 20 para 38. This recommendation was carried out in December 1993, when the UN General Assembly adopted the Declaration on the Elimination of Violence against Women – see Section 3 below.

discrimination against women, 'both hidden and overt'.[32] To this end, it was recommended that the UN should encourage the goal of universal ratification by all States of the Women's Convention by the year 2000.[33] The Programme for Action recommended that 'ways and means' of addressing the large number of reservations to the Women's Convention should be encouraged, and States were urged to withdraw reservations that were contrary to the object and purpose of the Convention or otherwise incompatible with international treaty law.[34]

Treaty bodies were encouraged to disseminate necessary information to enable women to make more effective use of existing implementation procedures in their pursuits of full and equal enjoyment of human rights and non-discrimination. Notably, the Programme for Action recommends that the CSW and CEDAW should quickly examine the possibility of introducing the right of individual petition through the preparation of an optional protocol to the Women's Convention.[35] The decision of the Commission on Human Rights to consider the appointment of a special rapporteur on violence against women was also welcomed.[36] Finally, the document welcomed the World Conference on

32 Vienna Programme for Action *op cit* note 20 para 39.

33 *Ibid.*

34 The problem of reservations to the Women's Convention is discussed in Ch 3, Section 2.3.1 (g).

35 Vienna Programme for Action *op cit* note 20 para 40. This recommendation came to fruition in 1999, when the Optional Protocol to the Women's Convention was adopted – see Chapter 3, Section 2.4.

36 See discussion of the work of the Special Rapporteur in Section 5 below.

Women to be held in Beijing in 1995 and urged that human rights of women should play an important role in its deliberations.[37]

Sullivan points out that the recommendations for strengthening the operation of the Women's Convention did not include measures to assist the CEDAW in carrying out its mandate (as it did, for example, in the case of the Committee on the Rights of the Child).[38] Such measures could have included the extension of the CEDAW's meeting period (beyond the two-week period specified in the Convention)[39] or the improvement of secretariat support.[40]

Reflecting on the impact of the Vienna Conference, Mertus and Goldberg make the following observation:

> The principal accomplishment of Vienna was the establishment of a firm foothold which allows for issues of violence against women to be treated as human rights violations in the mainstream international arena.[41]

The authors noted that in particular, the breakdown of the public/ private dichotomy in examining violence against women represents a 'formidable accomplishment'.[42] There was, however a downside to the decision of the pre-conference organising women's coalition to focus on violence against women for

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37 Vienna Programme for Action *op cit* note 20 para 44. See discussion of the Beijing Conference and its Outcome Document in Section 4 below.

38 Sullivan *op cit* note 11 at 160.

39 Art 20 of the Women's Convention; see also discussion in Chapter 3, Section 2.3.1.

40 Sullivan *op cit* note 11 at 160.

41 Mertus & Goldberg *op cit* note 14 at 213. See also Hernandez-Truyol *op cit* note 3 at 33; Copelon *op cit* note 13 at 867.

42 Mertus & Goldberg *op cit* note 14 at 214.

raising women's rights issues:[43] this choice meant that the Vienna Conference cast a 'blinding spotlight' on issues of violence while ignoring other pressing issues, such as literacy, poverty (and linked to this, development) and discriminatory laws.[44]

Davidse observes that the World Conference on Human Rights did not produce a solemn result that immediately affected the state of human rights in the world.[45] However, considering the circumstances, a miracle was achieved: some 170 countries, many of which were not present as independent states when the UDHR or the two Covenants were adopted, finalised a document reaffirming universal human rights after an initial process that did not seem to bode well for this result. And from the perspective of women's rights advocates, the outcome of the Conference was an undeniable success.[46]

43 Mertus & Goldberg provide a useful overview of the historical background as well as events at the conference itself - *op cit* note 14 at 207- 214.

44 *Idem* at 214. See also Sullivan, who expresses concern about the lack of attention to more effective implementation of women's socio-economic rights - *op cit* note 11 at 160-161. Admittedly, the Programme of Action does address women's right to health – Vienna Programme for Action *op cit* note 20 para 41.

45 He explains that the text is too long, covers a broad range of issues, and is often not specific - Davidse *op cit* note 10 at 257.

46 See eg Mertus & Goldberg *op cit* note 14 at 202; Bunch *et al op cit* note 15 at 96.

3. THE DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN[47]

3.1 After Vienna

The 1985 Nairobi Forward-looking Strategies for the Advancement of Women included a set of measures aimed at combating violence against women.[48] However, the implementation of these measures proved problematic, and in 1991 the ECOSOC recommended the development of an international framework that would explicitly address this issue.[49]

At the time, different strategies were suggested, including the drafting of a new (legally binding) international instrument. Arguments against this proposal were that a wholly new instrument could create confusion over the relevance of existing human rights instruments, the risk of limited ratification and the expense of implementation.[50] Furthermore, a new instrument could open up controversial debate about how to define such violence. The strategy eventually consisted of the drafting of the Declaration on the Elimination of Violence against Women,

47 Adopted 20 December 1993, GA Res 48/104 (1994) [hereafter 'the Violence Declaration'].

48 United Nations *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, Nairobi, 15-26 July 1985 (1985) UN Doc A/Conf.116/28/Rev.1 (1986) Part A Paras 76, 258, 288.

49 ECOSOC Res 1991/18 *Violence against Women in All its Forms* (dated 30 May 1991) para 5.

50 A Edwards 'Violence against women as sex discrimination: Judging the jurisprudence of the United Nations human rights treaty bodies' (2008) 18 *Texas Journal of Women and the Law* 1 at 44.

which was adopted in 1993, as well as General Recommendation No. 19 introduced by the CEDAW.[51]

An initial draft of the Declaration was prepared at an expert group meeting in November 1991.[52] The CSW revised this experts' draft in August 1992, and accepted the revised draft in March 1993. The CSW's draft met no serious opposition at the July 1993 session of the ECOSOC Council, where it was adopted without changes to the text. The UN General Assembly adopted the Declaration in December 1993.

3.2 Nature of the document

A resolution or declaration of the UN General Assembly is not a treaty, which states may ratify and by which they are then bound. However, when these resolutions relate to general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of governments in 'the widest forum for the expression of such opinions'.[53] Even when they are framed as general principles, resolutions of this kind are said to provide a basis for the progressive development of the law and the speedy consolidation of customary rules.[54] Commentators have argued that the Declaration has the 'moral force of world consensus' because of its unanimous adoption by the General Assembly.[55]

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51 CEDAW *General Recommendation No. 19 op cit* note 1.

52 Sullivan *op cit* note 11 at 164.

53 I Brownlie *Principles of Public International Law* 7 ed (2008) 15.

54 *Ibid.*

55 R Coomaraswamy & LM Kois 'Violence against women' in KD Askin & DM Koenig (eds) *Women and International Human Rights Law* (1999) 177 at 182.

3.3 Provisions relating to violence against women

3.3.1 Overall framework

The Preamble to the Declaration contextualises the document in a number of important ways. It firstly situates the Declaration in the general framework of international human rights standards. It recognises that there is an urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings. These rights and principles are enshrined in international instruments, including the UDHR, ICCPR, ICESCR, the Women's Convention and the Convention against Torture.

It then proceeds to affirm that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms. Concern is expressed about the long-standing failure to protect and promote those rights and freedoms in the case of violence against women. Opportunities for women to achieve legal, social, political and economic equality in society are limited, *inter alia*, by continuing and endemic violence.

Secondly, the Declaration acknowledges that violence against women is a 'manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'. This recognition of the causes of violence against women, which is unprecedented in international law,

clearly accepts the systemic nature of violence against women (as opposed to isolated acts committed by individual actors).[56] An understanding of violence against women as a manifestation of 'unequal power relations', leading to domination over women, is also an important advance from a feminist perspective.[57]

In addition, the Preamble locates violence against women in terms of development, peace and equality, with specific reference to the Nairobi Forward-Looking Strategies. This also contextualises the issue in a development framework.[58]

The Preamble further emphasises that certain groups of women are especially vulnerable to violence, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict.

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56 O'Hare *op cit* note 8 at 374-375.

57 To the extent that such a theoretical identification is required (and possible, based on such a relatively limited text), the feminist approach in question here would be closest to so-called 'dominance' feminism, also known as radical feminism. See also RC Preston & RZ Ahrens 'United Nations Conventions documents in light of feminist theory' (2001) 8 *Michigan Journal of Gender & Law* 1 at 21.

58 See Coomaraswamy and Kois *op cit* note 55 at 182. It has been pointed out that violence prevents women from contributing to, and benefiting from, development by restricting their choices and limiting their ability to act. The resulting consequences for economic growth and poverty reduction should be of central concern to Governments. See UN Secretary General *In-Depth Study on Violence against Women* (2006) UN Doc A/61/122/Add.1 (dated 6 July 2006) para 54.

Regarding the relationship between the Women's Convention and the Declaration, the Preamble explains that it is recognised that effective implementation of the Women's Convention would contribute to the elimination of violence against women and that the Declaration will strengthen and complement that process.

3.3.2 Definition of violence against women

The Declaration defines the term 'violence against women' as follows:

> [A]ny 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. [59]

This definition is firstly significant for its use of 'violence against women' as an operational concept rather than 'gender-based violence', as is the case in the CEDAW's General Recommendation No 19. The reason for this difference is to be found in the equality-based approach necessitated by the Women's Convention: the focus in the Convention (and General Recommendation No. 19) is on the broader category of gender-based violence, i.e. violence committed 'against a woman because she is a woman or that affects women disproportionately'.[60] Because the drafters of the Declaration did not work exclusively within the paradigm of sex/ gender discrimination, it was possible to

[59] Violence Declaration *op cit* note 47 Art 1.

[60] CEDAW *General Recommendation No. 19 op cit* note 1 para 6. See also A Vesa 'International and regional standards for protecting victims of domestic violence' (2004) 12 *American University Journal of Gender, Social Policy & the Law* 309 at 330.

focus on the narrower category (within gender-based violence) of 'violence against *women*'.

The definition is further important in that it emphasises that violence against women is not limited to acts of physical violence, but includes acts resulting in psychological harm or suffering as well. In this sense, it confirms the definition set out in General Recommendation No 19.[61]

Article 2 further expands on the definition by setting out a non-exhaustive list of acts of violence against women occurring at three levels: in the family, in the community and the State. Examples of violence occurring in the family include sexual abuse of female children in the household, marital rape and female genital mutilation and other traditional practices harmful to women.[62] Violence occurring within the general community includes rape, sexual harassment and intimidation at work, and trafficking in women.[63] At the third level, the Declaration lists physical, sexual and psychological violence 'perpetrated or condoned by the State', wherever it occurs.[64] Coomaraswamy and Kois observe that this three-tiered categorisation allows for a comprehensive understanding of the pervasive nature of violence, which affects every sector of personal, social and public life.[65]

61 See Chapter 3, Section 2.3.2.

62 Violence Declaration *op cit* note 47 Art 2(a).

63 *Idem* Art 2(b).

64 *Idem* Art 2(c). It has been noted that the lack of clarification here of the level of State involvement that would amount to condonation makes it difficult to establish the parameters of state responsibility - O'Hare *op cit* note 8 at 378.

65 Coomaraswamy & Kois *op cit* note 55 at 183.

3.3.3 Statements of principle

The Declaration confirms that women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[66] These rights include, amongst others, the right to life; the right to equality; the right to liberty and security of person; the right to equal protection under the law; the right to the highest standard attainable of physical and mental health; and the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment. Each of the rights stipulated in Article 3 is footnoted with a reference to the relevant instrument.[67]

Article 3 should be read with the statements in the Preamble (discussed above) firstly locating the Declaration within the framework of international human rights instruments[68] and secondly confirming that violence against women constitutes a violation of the rights and fundamental freedoms of women, which impairs or nullifies their enjoyment of those rights and freedoms. Significantly, however, the Declaration stops short of pronouncing freedom from violence as a right as such.[69]

66 Violence Declaration *op cit* note 47 Art 3.

67 For example, the reference provided for the right to equality in Art 3(b) is Art 26 of the ICCPR, and the references for the right to liberty and security of the person (Art 3(c)) are Art 3 of the UDHR and Art 9 of the ICCPR.

68 Liebeskind points out that the allusion in Art 3 to the 'traditional' human rights instruments aims to include the Declaration in the existing human rights framework, thus avoiding marginalization - ML Liebeskind 'Preventing gender-based violence: From marginalisation to mainstream in international human rights' (1994) 63 *Revista Juridica Universidad de Puerto Rico* 645 at 650.

69 See also O'Hare *op cit* note 8 at 377.

One notes here that the Declaration places the issue of violence against women both in an equality/ non-discrimination framework as well as within a general 'rights violation' framework.

3.3.4 State obligations

The Declaration addresses the question of state responsibility in Article 4. The article starts with an overarching introduction reading as follows:

> States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by *all appropriate means and without delay* a policy of eliminating violence against women…[70]

Given the broad background of reservations to the Women's Convention carving out deviations for customary and religious systems within States Parties, this statement is an important one.[71] The language used here is interesting: on the one hand the phrase states 'without delay'; on the other hand, this appeared to be balanced by the use of an 'obligation of means'[72] in the form of 'all *appropriate* means'.[73]

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70 Emphasis added.

71 See O'Hare *loc cit*.

72 The term is not used in the technical legal sense, given the non-binding legal nature of the document.

73 Byrnes and Connors explain, in relation to the obligations to 'take all appropriate measures' set out in the Women's Convention, that it may be argued that States Parties have been left with considerable discretion to determine the means appropriate to eliminate discrimination in the specific fields covered by those articles - A Byrnes & J Connors 'Enforcing the human rights of women: A complaints procedure for the

Drawing on the framework of analysis developed for purposes of this study, the obligations imposed on States by the Declarations are set out in ***Table 2, Annexure A***. The linkages between the Declaration and the Women's Convention are apparent, with states being urged to ratify the Convention and to reconsider their reservations.[74]

A significant difference between the Declaration and General Recommendation No. 19 lies in the 'due diligence' provision. In the former document, the duty to exercise due diligence to prevent, investigate, and punish acts to violence against women is made subject to the phrase 'in accordance with national legislation'. According to commentators such as Sullivan, this qualifying reference to national legislation undermines the normative force of the provision;[75] O'Hare further explains that by permitting states to operate within the scope of their own legal system, with all its limitations, these provisions detract from the possibility

Women's Convention?' (1996) 21 *Brooklyn J International Law* 679 at 726. The obligation to take appropriate measures to achieve a particular goal has been characterised as an 'obligation of result' rather than an 'obligation of means' or conduct. However, this characterisation does not mean that steps taken by the State to achieve the specified goal are wholly within the discretion of that State . I argue that the comments by Byrnes and Connors also apply *mutatis mutandis* to the 'obligations' set out in the Violence Declaration. (See Cook for a discussion of the distinction traditionally drawn in international law between 'obligations of means' and 'obligations of ends'– RJ Cook 'State accountability under the Convention on the Elimination of All Forms of Discrimination against Women' in RJ Cook (ed) *Human Rights of Women* (1994) 228 at 231-232.)

74 O'Hare *loc cit*.

75 Sullivan *op cit* note 11 at 166.

of any serious international scrutiny of domestic provisions.[76] The duty to *compensate* for acts of violence is also omitted from the Declaration.

Looking at Article 4 generally, it is noteworthy that the language is generally more tentative than one would expect from a provision aiming to impose State duties. For example: States should -

(a) *Consider* ratifying the Women's Convention;[77]

(b) *Consider the possibility* of developing national plans of action to promote the protection of women against any form of violence;[78]

(c) Work to ensure, to the maximum extent feasible *in the light of their available resources* that women subjected to violence have specialized assistance;[79] and

(d) *Encourage* the development of appropriate guidelines.[80]

Sullivan provides an interesting explanation for this. She notes that the 'programmatic and policy emphasis' of the Declaration[81] is a reflection of a debate at the time over the relationship between the role of the CSW in promoting women's rights and the role of the UN Commission on Human Rights ('CHR') in promoting *and protecting* women's rights.[82] During discussions of

76 O'Hare *op cit* note 8 at 378. The same qualifier is included in Article 4(d), which enjoins States to develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence. Women who are subjected to violence should be provided with access to the mechanisms of justice and, *as provided for by national legislation*, to just and effective remedies for the harm that they have suffered.

77 Violence Declaration *op cit* note 47 Art 5(a).

78 *Idem* Art 5(e).

79 *Idem* Art 5(g).

80 *Idem* Art 5(n).

81 Although Sullivan refers to a draft version of the Declaration, the same considerations apply.

82 Sullivan *op cit* note 11 at 166.

the draft Declaration at the March 1993 session of the CSW, representatives implicitly contrasted a programmatic response to an approach 'within the context of human rights violations'. Sullivan expresses the opinion (with which I concur) that a suggestion that measures such as education campaigns or shelters for victims are 'policy' (rather than 'rights-based') initiatives reflects an inadequate understanding of the extent to which States have affirmative, as well as negative, duties under human rights instruments to eliminate gender-based violence.

4. BEIJING DECLARATION AND PLATFORM OF ACTION

4.1 Background

Following the success of women's advocacy at the Vienna Conference,[83] many of the groups and networks that became active during this period continued to organise in preparation for the Fourth World Women's Conference to be held in Beijing, China.[84]

The Beijing Conference was preceded by the International Conference on Population and Development (ICPD), held in Cairo in September 1994. According to Zulficar, the ensuing ICPD Programme of Action is more action-oriented than the Declarations and Programmes of Action adopted by other international conferences. The Programme of Action is also more detailed than the Vienna Declaration and Programme of Action, and attempts to identify quantitative and qualitative goals that are attainable and measurable.[85]

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83 See Section 2.2 above.

84 Friedman *op cit* note 4 at 31.

85 M Zulficar 'From human rights to program reality: Vienna, Cairo, and Beijing in perspective' (1995) 44 *American University Law Review* 1017 at 1022.

Noteworthy aspects of the ICPD Programme of Action include the recognition of gender equality, empowerment of women, the elimination of all kinds of violence against women, and women's reproductive rights through the document as cornerstones of population and development-related programmes.[86] The human rights of women and girls are reaffirmed as integral parts of human rights. The right to development is also recognised as a fundamental right. Violence against women, including domestic violence and rape, is specifically recognised as one cause of the rising number of women at risk of sustaining HIV and other sexually transmitted infections.[87]

The negotiations over certain chapters (most notably Chapters VII[88] and VIII[89]) were rendered sensitive and complicated because of the view taken by conservative religious institutions (such as the Vatican) that the draft Programme of Action was contrary to religious and ethical values.[90] These concerns mostly related to the right to choice in respect of abortion. Furthermore, both the Vatican and certain Islamic groups opposed proposals in the draft that would recognise various forms of the family, such as single-parent households. They also criticised language that would recognise the right of adolescents to family planning services and sex education. The negotiators spent most of their time and energy on these two chapters.[91]

86 *Idem* at 1023.

87 Programme of Action of the International Conference on Population and Development A/CONF.171/13 (dated 18 October 1994) para 7.35.

88 Entitled 'Reproductive Rights and Reproductive Health'.

89 Entitled 'Health, Morbidity and Mortality'.

90 Zulficar *op cit* note 85 at 1025.

91 Zulficar reports that it took five days to resolve the clause on abortion – *op cit* note 85 at 1028. The final version, set out in para 8.25 of the Programme of Action, in effect leaves any measures or changes related to abortion within the health system to be

Otto explains that by 1995, the 'women's rights are human rights' strategy developed in anticipation of the Vienna Conference confronted a complex and multi-faceted set of forces and ideologies.[92] For example, the cracks that had started showing at the Population Conference in Cairo around issues of abortion, sexual orientation and constructions of 'family' developed into fully-fledged fault lines at Beijing.

The Fourth World Conference on Women took place in Beijing from 4-15 September 1995.[93] The document ensuing from the Conference is the Beijing Declaration and Platform for Action, which was the culmination of a number of processes, including regional consultations, reports from export groups, and the 39th session of the CSW, which served as the preparatory meeting for the Conference.[94] At the end of this session, 40% of the draft document was in brackets, which indicated that agreement had not yet been reached on these sections. As Otto points out, this revealed the highly contested nature of women's issues globally. During the preparatory consultations, the fact that certain states were ready to reopen questions that had only recently been agreed at the earlier world conferences was significant. Issues related to women's

determined only 'at the national or local level according to the national legislative process'.

92 D Otto 'A post-Beijing reflection on the limitations and potential of human rights discourse for women' in KD Askin & DM Koenig (eds) *Women and International Human Rights Law* (1999) 115 at 126.

93 Over 50,000 people (mostly women) participated in the official intergovernmental Conference and the parallel NGO Forum, which was held from 30 August to 8 September 1995 in Huairou, situated about 50 km from Beijing. Participants came from 189 States, and in addition to the 400 NGO's with permanent consultative status with the ECOSOC, approximately 2,500 other NGO's were accredited to attend – D Otto 'Holding up half the sky, but for whose benefit? A critical analysis of the Fourth World Conference on Women' (1996) 8 *Australian Feminist Law Journal* 7 at 7, 10-11.

94 See Otto *op cit* note 93 at 10-11.

reproductive rights and religious and cultural relativity found their way back onto the official agenda at every opportunity.[95]

4.2 Nature of the Beijing Declaration and Platform of Action[96]

According to Brownlie, the statement of conclusions of a conference of States may be a form of multilateral treaty, but even if it is only an instrument recording decisions not adopted unanimously, the result may constitute cogent evidence of the state of customary law on the subject concerned.[97]

One may thus conclude that although the Declaration and Platform of Action are not legally binding per se, they may provide evidence of emerging norms of international custom.[98] At minimum, the Declaration and Platform of Action do embody solemn political commitments by states.

95 Otto recounts that the most ominous instance was perhaps the belated objection by certain States, at the CSW session, to the use of the word 'gender' in the draft Platform. This objection was aimed at ensuring that the term should not be understood as socially constructed, and particularly, to eliminate any suggestion that the Platform might be inclusive of homosexuals, bisexuals or transsexuals – *idem* at 11. The term was eventually retained in the document, with the understanding that no new meaning or connotation of the term was intended.

96 A/Conf.177/20 and A/Conf.177/20/Add.1 (15 September 1995). The Declaration and Platform for Action was subsequently endorsed by the UN General Assembly on 8 December 1995 (A/RES/50/42).

97 Brownlie *op cit* note 53 at 14-15.

98 See also Vesa *op cit* note 60 at 318.

4.3 Contents of the document[99]

4.3.1 General

One of the Beijing Platform's main themes is that there are areas of particular urgency that stand out as priorities for action. These special concerns emerged from a review of progress since the Nairobi World Conference in 1985.[100] For each of the twelve 'critical areas of concern' set out in the Platform,[101] the problem is diagnosed and strategic objectives are proposed with concrete actions to be taken by various actors in order to achieve these objectives. The Platform proposes that all actors should focus action and resources on these strategic objectives.

South Africa participated officially in the Beijing Conference through a delegation led by (then) Minister of Health Nkosazana Dlamini-Zuma, and the South African government adopted all parts of the Platform without reservations. In a speech to the conference, Dr Dlamini-Zuma stated that the South African government 'pledges itself to the full implementation of this programme as a major step to achieve the non-sexist South Africa, which is our ultimate goal'.[102]

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99 The Declaration and the Platform for Action are set out in separate Annexes and the paragraphs of each section are numbered independently. They are accordingly treated as separate texts for purposes of this discussion. Paragraph references are to the Platform for Action, unless specifically stated otherwise.

100 Beijing Platform *op cit* note 96 para 45.

101 These twelve critical areas of concern are the following: women and poverty; education and training of women; women and health; violence against women; women and armed conflict; women and the economy; women in power and decision-making; institutional mechanisms for the advancement of women; human rights of women; women and the media; women and the environment; and the girl child.

102 Department of Welfare *Report of the South African Government's Commitments Arising of the Fourth UN Women's Conference, Bejing* (1995) 3 (copy on file with candidate).

4.3.2 Provisions relating to violence against women[103]

Section D of the Beijing Platform, which deals with violence against women, notably elaborates on the Violence Declaration,[104] but also introduces a number of new themes. The introductory paragraph reiterates the Preamble to the Violence Declaration in that it confirms violence against women as an obstacle to the achievement of the objectives of equality, development and peace.[105] It also reaffirms that violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms.

The Platform explains that knowledge about the causes and consequences of violence against women, as well as its incidence and measures to combat it, have been greatly expanded since the Nairobi Conference.[106] In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women.

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103 This discussion focuses on two of the twelve critical areas of concern, i.e. violence against women and human rights of women. This limited focus runs the risk of presenting a one-dimensional view of the Platform of Action, which should be read as a whole to gain insight into broader issues such as the macro-economic framework of the document. For brief comments on this aspect, see J Hunt 'Reflections on Beijing' (1996) 6 *Australian Feminist Law Journal* 39 at 40; C Bulbeck 'Less than overwhelmed by Beijing: Problems concerning women's commonality and diversity' (1996) 6 *Australian Feminist Law Journal* 31 at 32-33.

104 See Section 3 above. Otto notes that as this section of the Platform builds on the language and approach of the Violence Declaration, the draft text was not heavily bracketed – which means that there was consensus on this section of the draft text going into the Conference – *op cit* note 93 at 17.

105 Beijing Platform *op cit* note 96 para 112.

106 *Ibid.*

(a) Definition of violence against women

In this respect, the Beijing Platform also draws on the Violence Declaration. It makes use of the basic formulation set out in Article 1 of the Violence Declaration,[107] with the listing of examples of violence occurring on each of the three 'tiers' (in the family, in the general community and violence perpetrated or condoned by the State). The Beijing Platform adds further instances of violence against women: violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy.[108] It notes that acts of violence against women also include forced sterilisation and forced abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection.[109]

(b) Women particularly vulnerable to violence

The groups of women who are particularly vulnerable to violence as recognised in the Violence Declaration,[110] are expanded in the Beijing Platform. Additions include the following: women migrant workers, displaced women, repatriated women, women living in poverty, in foreign occupation, wars of aggression, civil wars, and terrorism, including hostage-taking.[111]

107 *Idem* para 113.
108 *Idem* para 114.
109 *Idem* para 115.
110 See Violence Declaration *op cit* note 47 Preamble.
111 Beijing Platform *op cit* note 96 para 116.

The Platform further explains that women may be vulnerable to violence perpetrated by persons in positions of authority in both conflict and non-conflict situations.[112] For this reason, training of all officials in humanitarian and human rights law and the punishment of perpetrators of violent acts against women would help to ensure that such violence does not take place at the hands of public officials in whom women should be able to place trust, including police and prison officials and security forces.

(c) Consequences of violence against women

Importantly, the Beijing Platform acknowledges the far-reaching consequences of violence against women, which range from limiting women's access to resources and basic activities to serious health and economic costs to the individual and society more broadly.[113] In line with the general pattern emerging here, the Beijing Platform repeats the key principle set out in the Violence Declaration, viz that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men; however, the Platform expands on the particular theme by adding further information or broadening the theme.

(d) Causes of violence against women

The diagnostic section repeats the key statement in the Violence Declaration that violence against women is a manifestation of the historically unequal power relations between men and women, but also goes further to link violence against

[112] *Idem* para 121.
[113] *Idem* para 117.

women to the effect of cultural patterns. This was significant in a context where cultural relativity was gaining increasing influence.[114] The Beijing Platform explains that violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and 'all acts of extremism' linked to race, sex, language or religion that perpetuate the lower status accorded to women in the family, the workplace, the community and society.[115] It further states that violence against women is exacerbated by social pressures, notably the shame of denouncing certain acts that have been perpetrated against women; women's lack of access to legal information, aid or protection; the lack of laws that effectively prohibit violence against women; failure to reform existing laws; inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws; and the absence of educational and other means to address the causes and consequences of violence.

(e) General policy approach

Certain broad recommendations on how to approach violence against women are already to be found in the introductory section that precedes the 'Strategic Objectives' containing specific recommendations to States and other bodies. For example, this introductory section states that in addressing violence against women, Governments and other actors should promote an 'active and visible'

114 Otto explains that a serious debate over cultural relativity carried on throughout the Conference. It was only resolved, in the closing hours of the Conference, through a '"trade-off" in diversities' that saw all references to 'sexual preferences' in the Platform removed – *op cit* note 93 at 19. In exchange, language was included (adopted in Vienna) to the effect that while States much promote and protect all human rights, 'cultural and religious backgrounds must be borne in mind' - para 9 of the Platform.

115 Beijing Platform *op cit* note 96 para 118.

policy of mainstreaming a gender perspective in all policies and programmes so that before decisions are taken, an analysis may be made of their effects on women and men, respectively.[116] In addition, the Platform explains that the absence of adequate gender-disaggregated data and statistics on the incidence of violence makes the elaboration of programmes and monitoring of changes difficult.[117] Lack of or inadequate documentation and research on domestic violence, sexual harassment and violence against women and girls in private and in public, including the workplace, impede efforts to design specific intervention strategies.

(f) Violence against women as a violation of women's rights

A theme that appears to be under-stated in the diagnostic section is that of violence against women as a violation of women's rights. The introductory paragraph does confirm that violence against women 'both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms'.[118] However, this theme is not taken any further in this section.

Reference to violence against women as a rights violation is, on the other hand, found in another of the twelve critical areas of concern, i.e. 'Human Rights of Women'.[119] The diagnostic section here reaffirms a number of general propositions relating to, for example, the universal, indivisible, inter-dependent and inter-related nature of all rights, as set out in the Vienna Declaration.[120] The obligation of Governments to not only refrain from violating the human rights of

116 *Idem* para 123.
117 *Idem* para 120.
118 *Idem* para 112. See also discussion of the Violence Declaration in Section 3 above.
119 Beijing Platform *op cit* note 96 Section I para 210 *et seq*.
120 *Idem* para 213.

all women, but also work actively to promote and protect these rights is reiterated.[121]

In respect of violence against women, the Platform repeats the earlier statement that such violence both violates and impairs or nullifies the enjoyment by women of their human rights and freedoms. It then explains that -

> [G]ender-based violence, such as battering and other domestic violence, sexual abuse, sexual slavery and exploitation, and international trafficking in women and children, forced prostitution and sexual harassment, as well as violence against women, resulting from cultural prejudice, racism and racial discrimination, xenophobia, pornography, ethnic cleansing, armed conflict, foreign occupation, religious and anti-religious extremism and terrorism are incompatible with the dignity and the worth of the human person and must be combated and eliminated.[122]

The distinction here between 'gender-based violence' and 'violence against women' is difficult to understand, given that the document appears to use 'violence against women' as its operational concept.[123] The term 'gender-based violence' is used four times elsewhere in the Platform,[124] and, except for the definition of 'violence against women',[125] there is only one among these instances where the context could possibly justify the use of this term rather than 'violence against women'.[126]

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121 *Idem* para 215.

122 *Idem* Para 224.

123 See Beijing Platform *op cit* note 96 para 113.

124 *Idem* paras 99, 113, 125(b), 129(d).

125 *Idem* para 113.

126 Beijing Platform *op cit* note 96 para 129(d), which reads as follows: 'Encourage the media to examine the impact of gender role stereotypes, including those perpetuated by commercial advertisements which foster gender-based violence and inequalities, and how they are transmitted during the life cycle, and take measures to eliminate these negative images with a view to promoting a violence-free society.'

The statement is nevertheless significant for its introduction of the notion of 'dignity' into the motivation for the elimination of violence against women – again, a progression from the Violence Declaration, which does not refer to dignity in this particular sense.[127]

(g) Strategic Objectives and state obligations

The Platform identifies three strategic objectives in relation to violence against women:[128]

(i) To take integrated measures to prevent and eliminate violence against women;

(ii) To study the causes and consequences of violence against women and the effectiveness of preventive measures; and

(iii) To eliminate trafficking in women and assist victims of violence due to prostitution and trafficking.

Under each of these objectives, a list of 'actions to be taken' is set out. The actors range from Governments to the UN, including local government, trade unions, NGO's, international organisations, and so forth. Compared to Articles 4 and 5 of the Violence Declaration, there is again a progression to be seen in the Beijing Platform, both in terms of the number and level of specificity of 'state

127 The Preamble to the Violence Declaration contains the following introductory paragraph:
'Recognising the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and *dignity* of all human beings…' (Emphasis added.) See also discussion of the right to dignity in the African Women's Protocol in Chapter 5, Part D, Section 2.2.2.

128 Listed in as Strategic Objectives D1, D2 and D3 respectively in the Beijing Platform.

duties' as well as the more compelling nature of the language used in the Platform.

The actions under the first two Strategic Objectives listed above, to the extent that they comply with the model being developed, are set out in ***Table 3, Annexure A***.[129] Comparing this table with the previous two, compiled in respect of General Recommendation No. 19 (***Table 1***) and the Violence Declaration (***Table 2***), one notes that the 'actions to be taken' by Governments (and others, such as NGO's, the private sector and the media) are considerably more extensive than those stipulated in the other two documents.

The Beijing Platform envisages a three-tiered intergovernmental mechanism, consisting of the General Assembly, the ECOSOC and the CSW, to play the primary role in coordinating the implementation and monitoring of the Platform for Action.[130] The General Assembly adopted the Beijing Declaration and Platform of Action on 8 December 1995.

It has been pointed out that the language of the Platform itself provides little guidance on the development of time-bound targets for implementation, with specific targets identified in only three areas.[131]

[129] Trafficking and exploitation of prostitution are excluded from this study – see Chapter 1, Section 3.1. For this reason, Strategic Objective D.3 falls outside the ambit of the study.

[130] Beijing Platform *op cit* note 96 paras 312-320.

[131] Bulbeck *op cit* note 103 at 32. None of these identified targets relate to violence against women.

4.3.3 The Implementation Review Process

(a) The Beijing +5 Review (2000)

Five years after the conference in Beijing, a review of progress in the implementation of the Beijing Platform was undertaken by the UN General Assembly meeting in Special Session in June 2000. Around 180 government delegates and 1,200 NGO representatives convened in New York for this session, known as 'Beijing+5'.[132]

The CSW acted as preparatory body for the review, entitled 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century'. The process culminated in a Political Declaration[133] and an Outcome Document,[134] in which Member States reaffirmed their commitment to the Beijing Platform and adopted further actions for its implementation.[135] The Outcome Document,

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132 E Herzer 'Beijing+5: The uphill struggle continues' (2000) 86 *Women Lawyers Journal* 23 at 23.

133 General Assembly Resolution S-23/2. *Political Declaration,* adopted on 10 June 2000. UN Doc A/RES/S-23/2 (dated 16 November 2000).

134 General Assembly Resolution S-23/3. *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, adopted on 10 June 2000. UN Doc A/RES/S-23/3 (dated 16 November 2000) [hereafter 'the Outcome Document'].

135 Herzer recounts that although the CSW had recommended to the General Assembly that the Beijing Platform itself should not be opened up for discussion, in order to concentrate on the task of setting specific targets and benchmarks for ongoing obstacles faced by women, the opposite happened. Government delegates spent most of their time in ideological discussion. Much of the debate focused on reproductive freedom, with the Vatican and its allies attempting to reverse the achievements of the Beijing Platform. This attempt, which lasted into the early hours of the last night's discussion,

which was prepared on the basis of national reports, reports of the UN Secretary General and regional meetings held in preparation of the Special Session of the General Assembly,[136] reviewed each of the twelve critical areas of concern contained in the Beijing Platform and examined the achievements and obstacles to implementation in each instance.

In the case of violence against women, the *achievements* listed include the wide recognition that violence against women and girls, whether occurring in public or private life, is a human rights issue.[137] The Outcome Document further reported that it has been broadly accepted that violence against women, where perpetrated or condoned by the State or its agents, constitutes a human rights violation. It has also been accepted that States have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the State or by private persons, and to provide protection to victims.[138]

The Outcome Document noted that governments have increasingly become aware of and committed to preventing and combating violence against women and girls, including domestic violence through, *inter alia*, improved legislation, policies and programmes.[139] There is a growing recognition that all forms of

was unsuccessful – *op cit* note 132 at 25. See also Amnesty International *Beijing+15: Realizing Women's Rights* (2010) 2.

136 Outcome Document *op cit* note 134 para 6.

137 *Idem* para 13.

138 *Ibid.*

139 Governments have initiated policy reforms and mechanisms, such as interdepartmental committees, guidelines and protocols, national, multidisciplinary and coordinated programmes to address violence. Some Governments have also introduced or reformed laws to protect women and girls from all forms of violence and laws to prosecute the perpetrators.

violence against women seriously affect their health, and healthcare providers are seen to have a significant role to play this regard.

Some progress has been made in the provision of services for abused women and children, including legal services, shelters, special health services and counselling, hotlines and police units with special training. Education for law enforcement personnel, members of the judiciary, health-care providers and welfare workers was being promoted. Educational materials for women and public awareness campaigns have been developed as well as research on the root causes of violence.

Efforts towards the eradication of harmful traditional practices, including female genital mutilation, have received national, regional and international policy support. Many Governments have introduced educational and outreach programmes, as well as legislative measures criminalising these practices.

On the side of *obstacles*, the fact that women continue to be victims of various forms of violence was noted.[140] An inadequate understanding of the root causes of all forms of violence against women and girls hindered efforts to eliminate violence against women and girls. Socio-cultural attitudes that are discriminatory and economic inequalities reinforced women's subordinate place in society; this rendered women and girls vulnerable to various forms of violence.

[140] *Idem* para 14.

In many countries, a coordinated multi-disciplinary approach[141] to responding to violence was still limited. Domestic violence, including sexual violence in marriage, was still treated as a private matter in some countries. Insufficient awareness of the consequences of domestic violence, how to prevent it and the rights of victims still existed.

Looking at the *achievements* in the critical area of concern of human rights of women, the Outcome Documents noted (*inter alia*) that legal reforms have been undertaken to prohibit all forms of discrimination and discriminatory provisions have been eliminated in civil, penal and personal status law governing marriage and family relations and all forms of violence in many states.[142] The adoption of the Optional Protocol to the Women's Convention was also (rightly) listed as an achievement.[143] The role of women's NGO's in raising awareness that women's rights are human rights was acknowledged, as well as their generating support for the inclusion of a gender perspective in the elaboration of the Rome Statute of the International Criminal Court.[144]

Under *obstacles* here, the failure to achieve the goal of universal ratification of the Women's Convention by the year 2000 was included, as well as the fact that there continued to be a large number of reservations to the Convention.

The Outcome Document listed a number of actions to be taken by States at national level. These actions are not explicitly divided according to the critical areas of concern, although they do appear to be clustered together thematically.

141 Such an approach would include the health system, the workplace, the media, the education system as well as the justice system – *ibid.*

142 *Idem* at para 26.

143 See Chapter 3, Section 2.4.

144 See Chapter 2, Section 5.2.

A comparison between the original actions to be taken set out in the Beijing Platform and the actions as listed in the Outcome Document indicate certain meaningful additions to the latter (although there are also some nearly verbatim repetitions).[145]

For example, the Beijing Platform requires Governments to -

> … [a]dopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasising the prevention of violence and the prosecution of offenders; take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;[146]

The Outcome Document expands this into two composite 'duties'[147] addressing the review of legislation and prosecution and sentencing of perpetrators:[148]

(a) Governments should, as a matter of priority, review and revise legislation, where appropriate, with a view to introducing effective legislation, including on violence against women, and take other necessary measures to ensure that all women and girls are protected against all forms of physical, psychological and sexual violence, and are provided recourse to justice; and

(b) Prosecute the perpetrators of all forms of violence against women and girls and sentence them appropriately, and introduce actions aimed at

145 Cf para 69(i) of the Outcome Document – and para 106(q) of the Beijing Platform.
146 Beijing Platform *op cit* note 96 para 124(d).
147 The term is used here in the broad sense.
148 Outcome Document *op cit* note 134 para 69.

> helping and motivating perpetrators to break the cycle of violence and take measures to provide avenues for redress to victims;

One notes that the language here is more compelling and specific: whereas the Beijing Platform refers to 'adopt and/or implement and *periodically review and analyse legislation*', the Outcome Document requires Governments to '*as a matter of priority*, review and revise legislation'.[149] The Beijing Platform requires Governments to emphasise 'the prevention of violence and *the prosecution of offenders*' (in legislation); the Outcome Document expands on this by stating that they should 'prosecute the perpetrators of all forms of violence against women and girls and sentence them appropriately'. The latter is again more directed.

An additional shift can be discerned in 'take measures to ensure… *the rehabilitation of perpetrators*' (as stated in the Beijing Platform) and the instruction to 'introduce actions aimed at *helping and motivating perpetrators to break the cycle of violence*' (as seen in the Outcome Document).

The Outcome Document also introduces a number of additional themes in the area of violence against women. Firstly, it states that Governments should adopt and fully implement laws and other measures to eradicate harmful customary or traditional practices, including female genital mutilation, *early and forced marriage and so-called honour crimes*.[150] Herzer notes that this is the first time

149 Emphasis added. Governments are also, in a subsequent paragraph, enjoined to ensure that cases of domestic violence are brought to justice '*swiftly*' – Outcome Document *op cit* note 134 para 69(d).

150 *Idem* para 69(e).

that the UN in a consensus document calls for national legislation outlawing honour killings and forced marriage.[151]

Secondly, Government should take measures to address *racism and racially motivated* violence against women and girls.[152] In this way, the Outcome Document addresses the important aspect of intersecting discrimination(s) – although I argue that race is not the only ground that should have been enumerated here.[153]

The Outcome Document further called on Governments to treat all forms of violence against women and girls of all ages as a criminal offence punishable by law, including violence based on all forms of discrimination.[154] This is an important development if one bears in mind that domestic violence is often not treated as a criminal offence in and of itself: victims have to bring charges under generic offences such as assault, rape or attempted murder.[155]

151 Herzer op cit note 132 at 25. See also Y Ertürk 'The due diligence standard: What does it entail for women's rights?' in C Benninger-Budel (ed) (2008) *Due Diligence and Its Application to Protect Women from Violence* 27 at 30.

152 Outcome Document *op cit* note 134 para 69(g).

153 The sexual assault and murder of black lesbians in South Africa in recent years, by all indications based on their sexual orientation, is a stark example – see A Martin *et al Hate Crimes: The Rise of Corrective Rape in South Africa* (2009) 8-9.

154 Outcome Document *op cit* note 134 para 69(c).

155 South Africa is a case in point - at least in part. The only offence that specifically refers to domestic violence is contravention of s 17(1) of the Domestic Violence Act 116 of 1998 ('the DVA') – breach of a domestic violence protection order. Assault committed against a domestic partner where there is no protection order in place against the perpetrator would simply be a charge of assault, as if committed by a stranger. There are certain acts of domestic violence as defined in s 1 of the DVA that are not, at the time of writing, recognised as criminal offences; these include emotional and psychological abuse, economic abuse (depending on the facts), harassment and stalking.

The Outcome Document displays a growing awareness of the need for holistic coordination mechanisms. It therefore calls for Governments to consider setting up or strengthening a national coordinating mechanism, for example, a national rapporteur or an inter-agency body, with the participation of civil society, to encourage the exchange of information and to report on data, root causes, factors and trends in violence against women, in particular trafficking.[156] It also looks at over-arching mechanisms at international level, for example, the development, with the full participation of all countries, of an international consensus on indicators and ways to measure violence against women,[157] and establishment of a readily accessible database on statistics, legislation, training models, good practices, lessons learned and other resources with regard to all forms of violence against women.[158]

(b) The Beijing +10 Review (2005)

At its 49th session in 2005, the CSW carried out the 10-year review and appraisal of implementation of the Beijing Declaration and Platform for Action and the outcomes of the twenty-third special session of the General Assembly. The reviews conducted in 2005 and 2010, ten and fifteen years respectively after the Fourth World Conference in Beijing, were both based *inter alia* on surveys conducted among Member States to assess their progress in implementation. Questionnaires were distributed to Member States and Observer States, and the responses were used in preparing comprehensive reports.[159] Similar to the 5-year

156 Outcome Document *op cit* note 134 para 70(d).

157 See also discussion on the work of the Special Rapporteur on violence against women in Section 5 below.

158 Outcome Document *op cit* note 134 para 92(b).

159 By 31 October 2004, 134 Member States and one Observer State had responded to the 2005 questionnaire. In the case of the 2010 review, 139 Member States and one

review, the five regional commissions of the UN held preparatory intergovernmental meetings; NGO's in all regions held meetings in conjunction with those organised with those by the commissions.

The extensive Beijing+10 Review report sets out by providing an overview of the major trends in the implementation of the Beijing Platform, with reference to general achievements and obstacles and challenges.[160] It then discusses progress in each of the twelve critical areas of concern, again noting achievements, obstacles and challenges specific to each area, and also covers a number of additional issues that were identified as particularly important.[161] Part IV deals with institutional arrangements and mechanisms for the advancement of women, which include national mechanisms, gender mainstreaming, statistics and indicators, capacity building, resources, and importantly, monitoring and accountability.[162] The review report concludes by identifying priority areas for future action.[163]

Examining the critical area of concern of violence against women, the report states that violence against women has become a priority on the national and international agenda.[164] In their replies to the questionnaire, 129 countries

Observer State had responded to the questionnaire by 30 November 2009. South Africa participated in both surveys.

160 Report of the Secretary-General *Review of the implementation of the Beijing Platform for Action and the outcome documents of the special session of the General Assembly entitled 'Women 2000: gender equality, development and peace for the twenty-first century'* UN Doc E/CN.6/2005/2 (dated 6 December 2004) [hereafter 'Beijing+10 Report'] Part II para 41 *et seq*.

161 Part III para 82 *et seq*. These additional issues are trafficking in women and girls, women and HIV/AIDS, indigenous women, information and communication technologies, the Millennium Development Goals, and men and boys.

162 Beijing+10 Report *op cit* note 160 para 670 *et seq*.

163 *Idem* Part V para 738 *et seq*.

164 *Idem* para 197.

reported on measures taken to eliminate violence against women and girls. Governments recognised that violence against women in all its forms must be combated through 'effective and comprehensive' action.[165]

The review report addressed achievements at international and national level separately. At *international* level, the listed achievements included actions taken by the General Assembly and the functional commissions of the ECOSOC, such as the CSW, CHR and the Commission on Crime Prevention and Criminal Justice, which have regularly adopted resolutions on violence against women.[166] The need to combat violence against women has also been recognised in various other international fora.[167] Among the special procedures of the CHR, the Special Rapporteur on Violence against Women, its Causes and Consequences, is singled out as having made significant contributions through her analytical work and country visits.[168]

Regarding achievements at *national* level, the review report provides an overview of the status of legislation relating to violence against women, incorporating reference to 'good practices'. These 'good practices' relate both to

165 *Ibid.*

166 The General Assembly specifically has adopted resolutions on domestic violence against women, trafficking in women and girls, traditional or customary practices affecting the health of women and girls, crimes committed against women in the name of honour and the elimination of all forms of violence against women - Beijing+10 Report *op cit* note 160 para 199.

167 For example, in the Millennium Declaration, Heads of State and Government resolved to combat all forms of violence against women. In 2001, the twenty-sixth special session of the General Assembly on HIV/AIDS recognized the need to eliminate all forms of violence against women and girls as a way to reduce their vulnerability to HIV/AIDS. The World Summit on Sustainable Development, held in 2002, also acknowledged the importance of eliminating all forms of violence and discrimination against women - Beijing+10 Report *op cit* note 160 para 201.

168 *Idem* para 203.

substantive criminal law as well as the law of evidence and procedure.[169] The report further provides details of programmatic measures such as 'national action plans' to address violence against women and public information, education and awareness-raising campaigns.[170] Countries have also set up or expanded shelters, temporary accommodation, crisis centres, telephone hotlines or a combination of services for victims.[171]

In terms of obstacles to implementation, the report notes that among the most frequently mentioned challenges is the lack of reliable and comparable sex-disaggregated statistical data and information, compounded by insufficient research and studies.[172] Several countries reported lack of resources:[173] Government decisions have often failed to translate into budget appropriations. The report further indicates numerous 'structural' shortcomings in respect of especially the criminal justice system.[174]

169 *Idem* paras 208-212.

170 *Idem* paras 214, 218 and 225.

171 *Idem* para 226.

172 *Idem* para 227.

173 *Idem* para 234.

174 In many countries, law enforcement systems are not gender-sensitive, and police and criminal justice officials often fail to recognize the serious nature of violence against women - Beijing+10 Report *op cit* note 160 para 231. The complexity of court procedures and the lack of family courts or other competent tribunals can impede women's access to justice – para 232. Women, especially if they are poor, do not know their rights, and have difficulty starting legal proceedings because they have no legal assistance. Women can be reluctant to report incidents and seek help, as the result of social stigma, mistrust of the criminal justice system or a hostile environment, or because women believe that a man has a right to beat a woman, especially for disobedience to husbands, fathers or brothers. Professionals working on violence against women may be poorly trained, and several countries lack support measures such as shelters, hotlines, referral centres, and witness protection. Only a few States try to rehabilitate perpetrators.

A number of responses reported that male authority and women's subordination are deeply rooted in society, including legislative bodies and the judiciary.[175] Women's economic and financial dependence on the income of their husband was also considered to be a challenge to the effective eradication of domestic violence.

The Beijing+10 report concluded with 'priority areas for future actions'. These relate to each of the critical areas of concern, and consist of the areas outlined by respondents to the questionnaire as *their* priorities for future action. The report therefore noted what respondent countries intend or plan to do. For example, it noted that many countries indicated that effectively addressing the complex causes and consequences of violence against women and girls remained a priority. Numerous Governments planned to introduce new or strengthen existing legislation. Particular emphasis would be placed on enhancing provisions for victim protection, strengthening law enforcement and improving responsiveness of the criminal justice system. National strategies or plans of action would be major instruments for combating violence against women. Governments also intended to ensure a coordinated and comprehensive response to violence against women, including cooperation with NGO's.[176] The following is another example:

> Several countries intend to develop indicators, improve data collection or conduct research. Research in Ireland will assess why victims choose not to report violence to the police and why only a small percentage of reported cases result in a court hearing. Belgium will study early marriage and female genital mutilation/ cutting.[177]

[175] Beijing+10 Report *op cit* note 160 para 235.

[176] *Idem* para 753.

[177] *Idem* para 754.

This phrasing constitutes a clear shift from the hortatory (or even peremptory) language employed in earlier documents, which raises the questions of whether this section of the report (or indeed, the report as a whole) constitutes any more than a catalogue of 'good practices'.

(c) The Beijing +15 Review (2010)

During 1-13 March 2010, the 15-year review of the Beijing Platform took place during the 54th session of the CSW. As explained above, the review was based on the results of a survey conducted among UN Member States as well as the outcomes of regional consultative processes.[178] This review report included a particular focus on the linkages between the implementation of the Beijing Platform and the achievement of the Millennium Development Goals.[179]

The review report notes that since the 2005 review, violence against women has become a priority issue at the global, regional and national levels.[180] In October 2006, the Secretary-General issued an in-depth study on all forms and manifestations of violence against women. Following the completion of the study, the General Assembly adopted a series of comprehensive and 'action-

178 Report of the Secretary-General *Review of the implementation of the Beijing Declaration and Platform for Action, the outcomes of the twenty-third special session of the General Assembly and its contribution to shaping a gender perspective towards the full realization of the Millennium Development Goals*. UN Doc E/2010/4–E/CN.6/2010/2 (dated 8 February 2010) [hereafter 'Beijing+15 Report'] paras 11-12.

179 See Beijing +15 Report *op cit* note 178 para 4. These linkages are discussed in paras 423-471. Since these linkages or intersections focus to a large extent on implementation of the Beijing Platform on national level, with a strong emphasis on programmatic rather than normative development, they will not be addressed in detail here. See in this regard also generally UN Division on the Advancement of Women *Report of Expert Group Meeting: The Impact of the Implementation of the Beijing Platform for Action on the Achievement of the Millennium Development Goals* (2009).

180 Beijing+15 Report *op cit* note 178 para 117.

oriented' resolutions calling on all stakeholders to intensify their efforts to eliminate violence against women.[181]

In terms of trends in implementation at national level, the review report noted that the number and type of measures undertaken by Member States to prevent and address violence against women had significantly increased since 2005.[182] An assessment of these measures revealed the following trends: strengthened and more comprehensive legal, policy and institutional frameworks;[183] increased availability and quality of services for victims/survivors of violence;[184] engagement of multiple stakeholders to prevent violence against women;[185] and improvements in data collection and analysis.[186]

In addition to challenges and areas needing action, the Beijing+15 review report identifies a number of cross-cutting issues relating to all critical areas of concern.[187] Violence against women was consistently addressed as an obstacle to implementation in many areas and the need for significant further action across sectors, including health, education, employment and law enforcement, was highlighted.[188]

The report concludes with strategies and proposed actions for each of the critical areas of concern. In the case of violence against women, these strategies (set out

181 *Ibid*, citing General Assembly Resolutions 61/143, 62/133 and 63/155.
182 *Idem* para 121.
183 See Beijing +15 Report *op cit* note 178 paras 122-131.
184 *Idem* paras 132-135.
185 *Idem* paras 136-140.
186 *Idem* paras 141-145.
187 *Idem* para 482.
188 *Idem* para 485.

in five relatively brief paragraphs) are generally a broad restatement of the State actions already set out in the preceding documents.[189]

5. REPORTS OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN

5.1 Background

On 4 March 1994, the Commission on Human Rights, adopting a resolution for 'integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women', appointed a Special Rapporteur on violence against women, including its causes and consequences.[190] Two experts have since held the office of the Special Rapporteur on Violence against Women: Radhika Coomaraswamy, a Sri Lankan lawyer, who served three terms of office (three years each), from June 1994-July 2003; and Yakin Ertürk, a Turkish sociologist, who served two terms (August 2003-August 2009). The new mandate holder, Rashida Manjoo, a South African lawyer, has recently taken office.[191]

189 *Idem* paras 523-527. For example: 'In addition to establishing provisions for penalizing and punishing perpetrators, legislative frameworks on violence against women should mandate support and protection for victims/survivors, prevention measures, training for relevant officials, funding and the creation of mechanisms to monitor implementation.' – para 523.

190 Commission on Human Rights *Resolution 1994/45* UN Doc E/CN.4/RES/1994/45.

191 The mandate was established by the Commission on Human Rights in 1994 (Resolution 1994/45) and was extended in 1997, 2000 and 2003 (Resolutions 1997/44, 2000/45 and 2003/45). The most recent extension was in 2008: Human Right Council *Resolution 7/24 Elimination of violence against women* (dated 28 March 2008) para 5.

The two previous incumbents both produced review reports at the end of their mandate periods, i.e. in 2003 and 2009 respectively. Compiled after periods of ten and again fifteen years, these reports provide a valuable overview not only of the work of the Special Rapporteurs, but also of progress made since the institution of the mandate. The fifteen-year review report especially represents a useful measurement of various developments since 1994 to date.[192]

The introduction (and scope)[193] of the mandate of the Special Rapporteur, following soon after the call for this mechanism in the Vienna Declaration,[194] was regarded as a victory for the women's rights movement. However, as Ertürk observes, this victory also brought with it –

> … the onerous responsibility upon the [Special Rapporteur] for covering a vastly neglected and obstacle-ridden legal terrain - that of developing legal doctrines for distinct forms of gender-based violence faced by women, including those that are cognizant of the multilayered violations of women, to examine communications and make recommendations for eliminating violence as well as its root causes.[195]

The methods of work set out in the mandate are (a) to seek and receive information on violence against women, its causes and consequences, from governments, intergovernmental bodies, women's groups, and UN agencies,

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192 During their period in office, the first two Special Rapporteurs produced an impressive corpus of work consisting of 16 thematic reports and numerous country mission reports and communication reports (comprising communications to and from governments).

193 This refers to the fact that the mandate included not only violence against women, but also its causes and consequences.

194 See discussion in Section 2 above.

195 Y Ertürk *15 Years of the UN Special Rapporteur on Violence against Women, its Causes and Consequences (1994-2009) - A Critical Review* UN Doc A/HRC/11/6/Add.5 (dated 27 May 2009) para 2.

mechanisms and treaty bodies, and to respond effectively to such information; (b) to recommend measures, ways and means at national, regional and international levels towards the elimination of violence against women and its causes, and to remedy its consequences; and (c) to work closely with other special mechanisms created by the CHR (and since 2006 by the Human Rights Council), and bodies within the UN.[196]

The mandate holder interacts with a wide range of stakeholders engaged with eliminating violence against women, including governments, UN bodies, agencies and special mechanisms, civil society organizations and academia; receives communications and complaints; conducts and reports on country missions; and produces annual reports. These activities allow the Special Rapporteur to identify and, where necessary, express concerns over trends in women's human rights violations and develop legal standards and doctrines.[197]

The themes of the annual reports are: preliminary report (1995); violence against women in the family (1996); violence against women in the community (1997); violence perpetrated or condoned by the State (1998); a follow-up report on violence against women in the family (1999); trafficking in women, women's migration and violence against women (2000); violence against women perpetrated or condoned by the State during times of armed conflict (2001); cultural practices in the family that are violent towards women (2002); international, regional and national developments in the area of violence against women, 1994-2002 (2003); towards an effective implementation of international norms to end violence against women (2004); intersections of violence against

196 *Idem* para 17.
197 *Idem* para 18.

women and HIV/AIDS (2005); the due diligence standards a tool for elimination of violence against women (2006); intersections between culture and violence against women (2007); indicators on violence against women (2008); political economy and violence against women (2009); and reparations (2010).

The country mission reports aim to provide an analysis of violence against women in relation to a specific country, illustrating the particular aspects of the problems and the nature of risks arising in the context. The reports identify gaps in protection and provide detailed recommendations.[198] Importantly, the Special Rapporteur also receives individual complaints, responding to all reliable and credible information regarding alleged cases of violence against women.[199] Such communication is premised on the obligation of the State to prevent, protect, compensate and punish violence against women in the family, in the community and by the State.[200] In this way, the mandate serves as a mechanism of 'last resort' for accountability or protection for many women worldwide, particularly because access to this special mechanism is not contingent on ratification by the State of any treaty law or reservations in respect thereto, nor is its role activated upon a periodic reporting cycle.[201]

For purposes of this study, the thematic report on due diligence standards has been particularly instructive, although the contents of other reports such as the preliminary report of 1995, the two reports on violence against women in the

198 *Idem* para 22.

199 *Idem* para 24. A standard reporting format is available on the website of the office of the UN High Commissioner for Human Rights ('OHCHR') to facilitate submission of individual complaints: [www2.ohchr.org/english/issues/women/rapporteur/form.htm]. (Accessed on 10 March 2010.)

200 Ertürk *op cit* note 195 para 22.

201 *Idem* para 24.

family (1996 and 1999) and the recent report on political economy and violence are also essential for an understanding of the development of international and regional norms relating to the right to freedom from violence. The Special Rapporteur conducted a country visit to South Africa in 1996, and while her resulting country report has since become somewhat dated in the light of subsequent developments on legal and policy level, it is nevertheless informative to refer back to this report, especially for purposes of a comparison between the situation as it stood then and the current *status quo*.[202]

5.2 Nature of the Special Rapporteurs' reports

Although the findings and recommendations set out in the annual thematic reports of Special Rapporteurs are not legally binding in international law, these reports are nevertheless influential in that the mandate holders generally make use of these annual reports to develop interpretations of the norms in question.[203] In this way, the reports may generate 'soft law' principles.[204]

The Special Rapporteur has observed (correctly) that the thematic annual reports are particularly good resources in providing a normative framework for addressing distinct forms of gender-based violence, an analysis of the causes and consequences of violence, and an elaboration of the role of the State as well as regional and international stakeholders in combating violence in the public and private domains. They are also important for informing policy and shaping the

202 R Coomaraswamy *Report on the mission of the Special Rapporteur to South Africa on the issue of rape in the community (11-18 October 1996)* UN Doc E/CN.4/1997/47/Add.3 (dated 24 February 1997).

203 See HJ Steiner et al *International Human Rights in Context* 3 ed (2007) 767.

204 *Ibid.*

advancement of women's human rights standards in international law.[205] In the case of South Africa, the reports of the Special Rapporteur were, for example, relied on in the drafting of the Bill that was enacted as the present Domestic Violence Act.[206]

5.3 Contents of the Special Rapporteurs' reports

5.3.1 Overview

Two phases can be distinguished in the work of the Special Rapporteur, broadly commensurate with the periods in office of the first two mandate holders. Coomaraswamy dedicated her annual thematic reports to discussing in detail the three broad categories of violence against women in the family, in the community, and perpetrated or condoned by the State, in addition to violence in specific contexts.[207] In addition to securing recognition for distinct forms of violence against women and their causes, the focus in this period was on outlining legal doctrines and State obligations in relation to them.[208] These have been critical *inter alia* to granting visibility to the broad spectrum of acts that constitute 'violence against women' occurring in both the public and private spheres and linking violence against women with power structures, including macroeconomic policies. Coomaraswamy indicated in her last report that the first

205 Ertürk *op cit* note 195 para 20. See also discussion of right to freedom from violence below.

206 See South African Law (Reform) Commission *Research Paper on Domestic Violence* (1999) para 4.5.2, noting that the model framework for domestic violence legislation proposed by the Special Rapporteur was extensively consulted in preparing the Domestic Violence Bill.

207 Ertürk *op cit* note 195 para 21.

208 *Idem* para 62.

decade of the mandate emphasised standard-setting and awareness, and that the next decade should accordingly focus on strategies for a more effective implementation.[209]

> In many ways, the first decade of this mandate was an exploratory one. As the issue of [violence against women] was new on the human rights agenda, it was necessary to develop definitions and standards. This has been done by many relevant mechanisms, including CEDAW. While the first decade emphasised the need for conceptual clarity and standard-setting, the second decade must focus on compliance and monitoring. The first decade involved persuading States to accept international standards, to pass appropriate legislation and to set mechanisms in place to combat [violence against women]. The second decade must test the practice and implementation of these standards by focusing on a set of indicators.[210]

The first report submitted by Ertürk in 2004 emphasised implementation and accountability as priority areas of the mandate, particularly in relation to non-State actors. This focus has accordingly included tools and frameworks to facilitate implementation, such as the expansion of the 'due diligence' standard in relation to violence against women and the elaboration of indicators for measuring State progress in addressing violence against women.[211]

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209 *Idem* para 21; R Coomaraswamy *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women* UN Doc E/CN.4/2003/75 (dated 6 January 2003) para 78.

210 *Idem* para 79.

211 Ertürk *op cit* note 195 para 62. See also Sections 5.3.2 (b) and (c) below.

5.3.2 Key themes emerging from the work of the Special Rapporteur

(a) Definition of 'violence against women'

The Violence Declaration introduced a three-tiered understanding of violence against women, consisting of violence in the family, violence in the community and violence perpetrated or condoned by the State, with examples at each level.[212] In their thematic reports, the Special Rapporteurs have elaborated upon these forms of violence as follows:[213]

(a) Violence in the family - such as domestic violence; incest; forced prostitution by the family; violence against domestic workers and the girl-child; sex-selective abortion and infanticide; and religious/customary laws;

(b) Violence in the community - such as violence within institutions; violence against women migrant workers; and pornography; and

(c) Violence perpetrated or condoned by the State - such as gender-based violence during armed conflict; custodial violence; violence against refugees and internally displaced persons; and violence against women from indigenous and minority groups.

[212] See discussion in Section 3 above.

[213] Ertürk *op cit* note 195 para 12

Ertürk also suggested adding a fourth level, i.e. the 'transnational arena', which, due to globalisation and increased transnational processes, has emerged as another site where women 'are encountering new vulnerabilities'.[214]

Although expansion can be observed at all three levels, it is especially at the level of violence perpetrated or condoned by the State that the work done by the Special Rapporteur has served to further illuminate the definition as set out in the Violence Declaration.[215]

(b) The due diligence standard

The due diligence standard, which imposes on the State the duty to prevent, investigate, punish and provide compensation for all acts of violence against women wherever they occur, has been crucial in developing State responsibility for violence perpetrated by private actors.[216] Under this standard, States are required to '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 private persons'.[217]

214 *Idem* para 13. In her 2004 report, Ertürk explains that the term 'transnationalism' is used to refer to a 'continuum of life experience' across conventional state boundaries, and may therefore include women who enter the transnational arena as refugees, migrant workers or trafficked prostitutes – Y Ertürk *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences: Towards an Effective Implementation of International Norms to End Violence against Women* UN Doc E/CN.4/2004/66 (dated 26 December 2003) paras 42-44, 47.

215 See also O'Hare's comment in note 64 above.

216 Ertürk *op cit* note 195 para 66. See discussion in Chapter 2, Section 4.3.

217 J Bourke-Martignoni 'The history and development of the due diligence standard in international law and its role in the protection of women against violence' in C Benninger-Budel (ed) *Due Diligence and its Application to Protect Women from Violence* (2008) 47 at 47, with reference to art 4(c) of the Violence Declaration (see Section 3.3 above).

The Special Rapporteur has been instrumental in analysing what 'due diligence' entails in respect of prevention, investigation, punishment and compensation, thus providing States with crucial practical guidance in terms of compliance with their obligations. As early as her first thematic report in 1995, Coomaraswamy made the following compelling statement regarding due diligence:

> In the context of norms recently established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women.[218]

As noted above, Ertürk undertook an investigation into the due diligence standard as a tool for the elimination of violence against women as part of her focus on the implementation of existing human rights standards.[219] In her 2006 report, the Special Rapporteur traced the development of this standard in international law from its early origins to its application by the Inter-American Court of Human Rights in *Velásquez Rodríguez v Honduras*.[220] Having looked at certain international and regional instruments and the application of the due diligence standard by human rights bodies,[221] she concluded on the basis of practice and *opinio juris* that a rule of customary international law has developed

[218] R Coomaraswamy *Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences* UN Doc E/CN.4/1995/42 (dated 22 November 1994) para 72.

[219] Y Ertürk *The Due Diligence Standard as a Tool for the Elimination of Violence against Women* UN Doc E/CN.4/2006/61 (dated 20 January 2006).

[220] Inter-American Court of Human Rights *Velásquez Rodriguez v. Honduras* (Judgment dated 29 July 1988) Series C: Decisions and Judgments, No. 04.

[221] Ertürk *op cit* note 219 paras 19-29.

that 'obliges States to prevent and respond to acts of violence against women with due diligence'.[222]

She then noted that what is less clear is the *content* of generalised obligations of due diligence - those that go beyond specific (identifiable) individuals or groups of women at known risk of violence, and the manner in which compliance with these obligations may be assessed and monitored.[223] In more recent reports, her work has accordingly focused on developing the tangible 'contents' of these due diligence obligations.

It has been observed that although each case has to be assessed on its merits, there are certain 'basic' obligations that should be implemented with due diligence in all contexts. Bourke-Martignoni explains that these different elements can be broken down into a 'checklist' of obligations or State duties.[224] For example, in her 1999 review report, Coomaraswamy developed such a list of considerations against which State compliance with due diligence obligations may be assessed. These included: ratification of international human rights instruments; constitutional guarantees of equality for women; the existence of national legislation and/ or administrative sanctions providing adequate redress for women victims of violence; executive policies or plans of action to deal with the issue of violence against women; the gender-sensitivity of the criminal justice system and police; accessibility and availability of support services; and collection of data and statistics concerning violence against women.[225]

222 *Idem* paras 28-29.

223 *Idem* para 30.

224 Bourke-Martignoni *op cit* note 217 at 56.

225 R Coomaraswamy *Report of the Special Rapporteur on violence against women, its causes and consequences: Violence against women in the family* UN Doc E/CN.4/1999/68 (dated 10 March 1999) para 25.

The Special Rapporteur has made an important contribution to two previously neglected aspects of the due diligence standard: the State duty to *prevent* violence against women and to *compensate* its victims. The latter is of particular relevance given that the duty to 'compensate' or provide reparation to victims has not been included in the formulation of the Violence Declaration or the Beijing Platform, as well as in the context of recent South African developments.[226]

Ertürk observes that the responsibility to 'prevent' has the potential of involving the State in actively intervening in and transforming social and material structures that are at the root of violence against women. In this context, the Special Rapporteur has emphasised the value of altering the intrinsic nature of the State to make it less patriarchal. [227] This may be accomplished, for example, through strong statements condemning violence against women made on behalf of society through the judiciary or the prosecutorial services.[228]

In addition, the Special Rapporteur has emphasised the duty of the State to compensate for the consequence of violence. Ertürk notes that this not only includes, but goes beyond access to legal remedies and rehabilitative and support services, possibly involving 'financial damages for any physical and psychological injuries suffered, for loss of employment and educational

226 See Chapter 6, Section 4.5.

227 Ertürk *op cit* note 195 para. 70.

228 The Special Rapporteur explains that State action, symbolised through judicial or prosecutorial action, embodies both 'consequential effects' in that condemnation of patriarchy can lead to changes in socio-cultural norms, as well as 'intrinsic effects' in that prosecutors or judges can be considered to be the 'mouthpieces' of society – *op cit* note 195 para 70.

opportunities, for loss of social benefits, for harm to reputation and dignity as well as any legal, medical or social costs incurred as a consequence of the violence'.[229] She points out that the State must provide reparations to compensate financial and other forms of loss so as to fulfill the demands of restorative justice.

In the most recent thematic report, the Special Rapporteur elaborates further on the theme of reparations.[230] She notes that although a 'coherent theory and practice' for remedies for victims of human rights violations does not yet exist under international law, the right of individuals to reparation for the violation of their human rights has been increasingly recognised.[231] The content of the obligation to provide reparation to the individual whose rights have been violated remains unclear. All human rights treaties use rather vague language when referring to the remedies ensuing after violation of a right.[232]

The Women's Convention, for example, is not particularly explicit regarding women's right to remedies, reparation or compensation.[233] The Violence Declaration spells out the obligation to provide reparations to women subjected to violence much more clearly: it places a duty on the State to develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence. Regional instruments such as the Convention of Belém do Pará and the African Women's Protocol are also more specific about States' obligations to provide women with

229 *Ibid.*

230 R Manjoo *Report of the Special Rapporteur on violence against women, its causes and consequences* UN Doc A/HRC/14/22 (dated 23 April 2010).

231 *Idem* para 13.

232 *Idem* para 14.

233 *Idem* para 22, citing Art 2(c) of the Women's Convention.

access to legal measures or to reparations.[234] However, in spite of these advances this aspect of due diligence remains grossly underdeveloped.

Manjoo accordingly makes a number of recommendations for exploring the notion of 'reparations' in different contexts, including the development of a gender-sensitive understanding of 'harm' and alternative means of victim compensation. Specific attention is paid to the reparations order made by the inter-American Court of Human Rights in the case of *González et al v Mexico*[235] as an example of 'gender-sensitive reparations with a transformative aspiration'.[236] The Special Rapporteur comments as follows:

> The Court's sensitivity in capturing the systemic nature of the problem of violence against women is also reflected in its reparations approach. It recognized for the first time that in a situation of structural discrimination reparations should aim at transforming such situation, thus aspiring not only to restitution but also to correction.[237]

It is particularly this transformative potential of reparations that compels interest. The Special Rapporteur suggests that reparations for women cannot be just about returning them to the situation in which they were found before the violence occurred – but should strive to have this transformative potential. In other words, reparations should aspire, to the extent possible, to subvert instead of reinforce

234 *Idem* para 23.

235 Inter-American Court of Human Rights, Unreported judgment dated 16 November 2009.

236 See Chapter 5, Part B, Section 3.3.2 for discussion of this case.

237 Manjoo *op cit* note 230 para 78. Cf also the Special Rapporteur's criticism of the European Court of Human rights's judgment in *Opuz v Turkey* (2009) – para 81. See Chapter 5, Part C, Section 4.5 for discussion of the *Opuz* case.

pre-existing structural subordination and inequalities that may be the root cause of the violence that women experience.[238]

(c) Indicators, data collection and research studies

An area where the Special Rapporteur has done particularly interesting (and important) work is that of developing indicators for measuring State progress in addressing violence against women.[239]

This report on indicators on violence against women and State response views indicators as part of the State's human rights obligations, as they ensure that interventions aimed at combating violence against women are based on accurate empirical data, and as a consequence are effective and responsive to prevailing patterns of violence.[240] The Special Rapporteur further notes that indicators help make data accessible for non-specialist decision makers and enable interventions and their impact to be open to public scrutiny.[241] Ertürk observes that uninformed legislative activity or 'tokenistic responses' cannot amount to compliance with

238 Manjoo *op cit* note 230 para 85.

239 It is instructive to briefly recount how this focus came about. In order to assess State compliance in relation to violence in the family, Coomaraswamy sought information from Governments inter alia on national plans and statistics on domestic violence - Ertürk *op cit* note 195 para 78. She accordingly noted that States were erroneously making linkages between domestic violence, alcoholism and drugs, instead of connecting such violence with patriarchal ideology, resulting in misdirected responses and resources. In 2004 the CHR called on the Special Rapporteur to formulate proposals for indicators on violence against women and on measures taken by States to eliminate it – *idem* para 80. Extensive research was undertaken on trans-national indicators and the 2008 annual thematic report reflected the findings of that research.

240 Y Ertürk *The Next Step: Developing Transnational Indicators on Violence against Women* UN Doc A/HRC/7/6/Add.5 (dated 25 February 2008) paras 52-55.

241 Ertürk *op cit* note 195 para 82.

the due diligence obligation of the State to prevent, investigate and punish violence against women.[242]

The report calls for formulating common indicators on violence against women, and proposes a set of indicators to measure violence against women (outcome indicators) and State responses to it.[243] The report further recommends that the proposal be carried forward within the UN by an expert working group through technical manuals, pilots, and revisions, with concurrent steps and assistance on management of data systems at the national level.

The relevance of indicators, sex-disaggregated data and gender impact studies is part of the obligation to comply with human rights standards, and is the basis for formulating State responses and monitoring the extent of State compliance.[244]

(d) Conceptual gains

The fifteen-year review report describes a number of conceptual shifts that have taken place since the inception of the mandate in 1994. These shifts have not only broadened the understanding of violence against women, but have 'compelled revisiting international and domestic laws and State responsibility'.[245] Prominent among these have been contributions to a paradigm

242 *Idem* para 79.

243 *Idem* para 84. These consist of *institutional* or *structural* indicators, which pertain to States' international commitments, including ratification of CEDAW and plans of action on violence against women; and *process* indicators, which pertain to access to justice and reporting, including victims' protection, prevention and training.

244 Ertürk *op cit* note 195 para 78.

245 *Idem* para 85.

shift in the way cultural[246] discourses are considered within a human rights framework,[247] and an increased awareness of multiple layers of discrimination that combine to heighten the vulnerability of marginalised women and their experience of violence.[248]

The fifteen-year review report recounts further shifts in the work of the Special Rapporteurs. The first is that of taking an approach of 'empowerment' rather than 'victimisation' to women experiencing violence, an issue that Ertürk discusses in some detail in this report.[249] The mandate holders have also shown how the control of female sexuality is central to the normative systems at the social, cultural and State levels, thereby reinforcing and reproducing unequal power relations that justify violence against women.[250]

(e) Political economy and violence against women

The Special Rapporteur's 2009 thematic report addresses the important question of political economy and violence against women.[251] This report, which follows from the previous reports on the due diligence standard and intersections

246 *Idem* para 101. In her 2007 report, Ertürk defined 'culture' as the set of shared spiritual, material, intellectual and emotional features of human experience that is created and constructed within social habits or custom. As such, culture is intimately connected with the diverse ways in which social groups produce their daily existence economically, socially and politically - Y Ertürk *Intersections between Culture and Violence against Women* UN Doc A/HRC/4/34 (dated 17 January 2007) para 17.

247 Ertürk *op cit* note 195 paras 101-106.

248 *Idem* paras 107-111. See in this regard also the key article by K Crenshaw 'Mapping the margins: Intersectionality, identity politics, and violence against women of color' (1990) 43 *Stanford Law Review* 1241-1299.

249 Ertürk *op cit* note 195 paras 89-94.

250 *Idem* paras 95-100.

251 Y Ertürk *Report of the Special Rapporteur on violence against women, its causes and consequences: Political economy and violence against women* UN Doc A/HRC/11/6/Add.6 (dated 23 June 2009).

between culture and violence against women, notes that a viable strategy in addressing the issue of culture and violence against women must include a political economy perspective.[252] This allows one to understand the material foundation and the underlying vested interests of cultural norms and practices. A political economy approach to violence against women is especially relevant in the context of the global recession, which is predicted to have a disproportionate effect on women and girls' education, employment and livelihood. The report shows that these factors are all linked to violence against women, due in part to men's responses to economic displacement and disempowerment.[253]

In this crucial report, Ertürk argues that economic destabilisation brought about by competitive globalisation processes and neoliberal policies maintained by states and international economic institutions are heightening the conditions for, and increasing the extent of, violence against women.[254] She observes that persistent and egregious violence against women is intertwined with the feminisation of poverty, transnational labor exploitation, limitations on women's sexual and reproductive rights and ongoing control of women's mobility.

The report accordingly examines the connections between violence against women and women's enjoyment (or lack thereof) of specific socio-economic rights, including adequate housing, ownership or control over land and property, access to food and water, enjoyment of education and health, and access to paid employment and social security.[255] This analysis reveals that violence against women acts as a barrier to women's realisation of their socio-economic rights,

252 *Idem* para 1.
253 *Idem* para 1.
254 *Idem* para 5.
255 See Ertürk *op cit* note 251 paras 78-79.

but also that, in turn, the lack of access to these rights renders women inherently vulnerable to violence. This emphasises the interconnectedness of socio-economic rights and the need for an integrated approach to their realisation, especially for the 'poorest and most marginalised women' who are subjected to ongoing violence.

The report finds that violence against women is a violation of the right to life and to personal security but also of a whole range of basic economic and social rights. Yet the differential treatment and implementation of the twin Covenants of rights remains a major barrier greatly limiting the efforts of government and non-state actors to achieve the full and equal realisation of women's human rights in order to prevent violence against women from occurring in the first place.[256] The conclusion is that an integrated approach to human rights, combining the obligations set out in the twin Covenants on civil and political rights and economic, social and cultural rights is crucial for the realisation of women's human rights and the elimination of violence against women.

5.3.3 The right to freedom from violence?

Although the Special Rapporteur does not include this aspect in the fifteen-year review of the mandate, it should be noted that the work of the Rapporteur has also made a contribution to the recognition of women's right to freedom from violence.

[256] Ertürk *op cit* note 251 para 112.

During the first ten years of the mandate, Coomaraswamy on occasion makes reference to women's right to freedom from violence, without in-depth analysis or discussion of this right or its implications, but with a clear acknowledgment of its existence in international law.[257] In the ten-year review of her mandate, she provides the following important summary of progress:

> A decade ago, [violence against women] was a completely invisible issue. Today the right of women to be free from violence is recognised as an international human right and standards and mechanisms are in place. It is therefore our future duty to ensure access, compliance and monitoring so that the right to be free from violence is the fundamental right of all women no matter where they live. Finally, the success of women's rights will only be realised if human rights in general are preserved and protected. The struggle for women's right to be free from violence must always take place within the framework of human rights practice and protection.'[258]

A similar pattern emerges from the reports of the second incumbent, who also makes passing reference to women's right to freedom from violence in certain of her annual thematic reports.[259] In her 2007 thematic report on culture and violence against women, Ertürk sets out to trace the development of the international normative framework on violence against women in relation to culture that culminated in the recognition of the primacy of women's right to live a life free of gender-based violence over any cultural considerations.[260] These norms establish the primacy of women's right to live a life free of gender-based

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257 See Coomaraswamy *op cit* note 218 paras 82, 115; Coomaraswamy *op cit* note 225 para 221; R Coomaraswamy *International, Regional and National Developments in the Area of Violence against Women 1994-2003* UN Doc E/CN.4/2003/75/Add.1 (dated 27 February 2003) paras 3, 1253, 1264.

258 Coomaraswamy *op cit* note 225 paras 82-83.

259 See Ertürk *op cit* note 214 para 34; Ertürk *op cit* note 219 Executive Summary; para 51;

260 Ertürk *op cit* note 246 para 21.

violence and provide that States cannot invoke any cultural discourses, including notions of custom, tradition or religion, to justify or condone any act of violence.[261] This also means that they may not deny, trivialise or otherwise play down the harm caused by such violence by referring to these notions. Instead, States are expressly required to condemn such violence, which entails denouncing any cultural discourse put forward to justify it.[262] In the course of this discussion, the Special Rapporteur thus makes it clear that she not only regards the right to freedom from violence as an independent right, but one that implies clear obligations for States.

She finally proposes a number of broad guidelines for a viable strategy in addressing the issue of culture and violence against women, which should include (but not be limited to) approaching all forms of violence against women as a continuum and intersectional with other forms of inequality.[263] One of the components of this aspect is ensuring that diverse women's voices within specific communities are heard and that their claim for a right to a life free of violence is not 'sacrificed' in the name of culture.[264]

In her fifteen-year review report, the Special Rapporteur further confirms progress, when she observes that applying a human rights perspective to violence against women has created a momentum for breaking the silence around violence.[265] She observes that today, a 'life free of violence' is increasingly accepted as an entitlement rather than merely a humanitarian concern.

261 *Idem* paras 21, 30.
262 *Idem* para 30.
263 *Idem* para 72(c).
264 *Idem* subpara (iv).
265 Ertürk *op cit* note 195 para 90.

6. RECENT DEVELOPMENTS

Two instruments recently introduced in the international human rights system present further evidence of the acceptance of a right to freedom from violence (or the notion of a life free from violence). The first of these is the UN Convention on the Rights of Persons with Disabilities ('CRPD'), adopted by the General Assembly in 2006.[266]

Article 16, which bears the heading 'freedom from exploitation, violence and abuse', provides as follows:

> States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, *from all forms of exploitation, violence and abuse, including their gender-based aspects*.[267]

Furthermore, the UN Declaration on the Rights of Indigenous Persons[268] states that indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence.[269]

Although it could be argued that the *right* to freedom from violence is not necessarily stated in explicit terms, the phrasing and environment of the surrounding text should be taken into consideration. I argue that these provisions

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266 Adopted 6 December 2006, GA Res 61/106 Annex I UN Doc A/61/49 (2006), entered into force 3 May 2008.

267 Para 1. Emphasis added.

268 Adopted by General Assembly Resolution 61/295 on 13 September 2007.

269 Art 7 § 2. Art 7 § 1 provides that indigenous individuals have the rights to life, physical and mental integrity, liberty and security of the person.

both provide evidence of the recognition of this norm; in the case of the CRPD, it is notable that gender differentiations are indicated.

Beyond these two instruments, it is noteworthy that the issue of violence against women has gained a great deal of importance in the UN. In 2006, the UN Secretary General issued the findings of a comprehensive, in-depth study on all forms of violence against women.[270]

Since 2006, the General Assembly has adopted a series of resolutions aimed at addressing violence against women.[271] In the most recent of these the General Assembly reiterates the principle that States have the obligation to promote and protect all human rights and fundamental freedoms for all, including women and girls, and must exercise due diligence to prevent and investigate acts of violence against women and girls and punish the perpetrators, to eliminate impunity and to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.[272]

The UN Secretary-General is now requested, on an annual basis, to report to the General Assembly on measures taken by entities of the United Nations system to intensify their efforts to eliminate violence against women.[273] In the most recent

270 *Op cit* note 58.

271 See eg General Assembly Resolutions 61/143 (dated 19 December 2006), 62/133 (dated 18 December 2007) and 63/155 (dated 18 December 2008).

272 General Assembly *Resolution 64/137*: *Intensification of efforts to eliminate all forms of violence against women* Un Doc A/RES/64/137 (dated 11 February 2010).

273 Including through increased coordination and collaboration among UN entities and enhanced support for national efforts to address violence against women.

of these reports,[274] the Secretary General relates progress *inter alia* in respect of initiatives such as the 'UNiTE to End Violence Against Women' (2008-2015) campaign[275] and the Inter-Agency Network on Women and Gender Equality Task Force on Violence against Women.[276] While the report for the most part deals with programmatic measures, it is important to note for purposes of this thesis that violence against women, described in the Secretary General's report as a 'pervasive violation of the human rights of women', has become a 'highly visible issue for attention by the entities of the United Nations system'.[277]

This is further reflected in the approach of the Human Rights Council, which adopted a resolution on violence against women in 2009.[278] The Human Rights Council *inter alia* notes with appreciation the work of the Special Rapporteur on Violence against Women;[279] it also stresses that challenges and obstacles remain in the implementation of international standards and norms to address the inequality between men and women, and violence against women in particular, and pledges to intensify action to ensure their full and accelerated implementation.[280]

274 Report of the Secretary General *Intensification of efforts to eliminate all forms of violence against women* UN Doc A/64/151 (dated 17 July 2009).

275 *Idem* paras 5-9.

276 *Idem* paras 10-11.

277 *Idem* para 55.

278 Human Rights Council *Resolution 11/2: Accelerating efforts to eliminate all forms of violence against women* (dated 17 June 2009).

279 *Idem* para 9.

280 *Idem* para 14. The Resolution recounts a number of these standards, including the obligation to promote and protect all human rights and to exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women and girls – para 3.

7. EVALUATION

7.1 General overview

The period reviewed in this chapter spans approximately seventeen years, from 1993 to the time of writing (2010). When one considers the extent of the development in international women's rights during this period as outlined in this chapter and the previous one, with specific reference to women's right to freedom from violence, it is evident that a great deal of normative expansion has taken place.

The starting point of this expansion, from a formal perspective,[281] was the third World Conference on Human Rights held in Vienna in 1993. The gains made by women's rights advocates at this event provided a 'firm foothold' for violence against women to be placed on the human rights agenda.[282]

The adoption of the Violence Declaration Women in 1993 was a further advance, both from a symbolic perspective (this was the first international instrument addressing violence against women, unanimously accepted by the UN General Assembly) and from the perspective of its contents.

[281] I refer here to 'formal perspective' in the sense of the explicit enumeration of women's rights in a 'mainstream' human rights instrument. Progress in the form of the Women's Decade and the initial World Conferences should also be acknowledged, but on a different level.

[282] Copelon *op cit* note 13 at 867.

In spite of the shortcomings identified in respect of this document,[283] the Declaration constituted an important rung in the ladder of normative development of women's right to freedom from violence. Although the document stops short of explicit enunciation of the right itself, the fact that it combines the equality/ non-discrimination framework of the Women's Convention with a broader rights approach paves the way for subsequent progress in the recognition of the right to freedom from violence as such. The importance of key principles such as States' obligations to include in government budgets adequate resources for their activities related to the elimination of violence against women is self-evident.

The difficulty, unfortunately, is firstly that the Declaration is not a binding document. Secondly, neither the document itself, nor any other instrument explicitly makes provision for a mechanism for enforcing or monitoring compliance.[284] The Declaration's force therefore mainly lies in its potential contribution to the consolidation of international standards. Nevertheless, it has been said (correctly, I would argue), that the Declaration 'offers a vocabulary for women to assert their needs in the language of the powerful'.[285]

Commentators reflecting on the Beijing Conference pointed out that it represented considerable achievements, in spite of the divisions appearing among delegations. For example, Hunt observed that at the 1985 Third World Conference, domestic violence was not something that Governments were eager

283 See Section 3 above.

284 O'Hare expresses the opinion that because of the approach followed in the Declaration to understand violence against women as a form of discrimination, responsibility for monitoring state compliance with the Declaration vests with the CEDAW – *op cit* note 8 at 379.

285 *Idem* at 380.

to discuss and acknowledge; at Beijing 'it was taken as a fact of life which had to be addressed'.[286]

Looking at the Beijing Platform, Neuwirth argues that the Platform gave new impetus to the reform of laws that discriminated on the basis of sex and to the implementation of the Women's Convention.[287] She notes that despite the legally binding nature of the Convention and its potential enforceability through domestic law, the Beijing Conference in 1995 and its follow-up processes may have had more of an impact at the national level than the Convention on the elimination of *de jure* discrimination that fundamentally violates State obligations under the Convention.

According to Neuwirth, the positive impact of the Beijing process on the implementation of the Women's Convention can be seen in part from a review of the pattern of objections made by States Parties to the reservations made to the Convention by other States, which notably increased in number around and following the time of the Beijing Conference.[288] Another important manifestation of the impact of the Beijing process, following domestic law reforms in the 1990's, was that a number of States Parties withdrew reservations that they had made to the Convention upon ratification.[289] At the domestic level, the national

286 Hunt *op cit* note 103 at 42.

287 J Neuwirth 'Inequality before the law: Holding states accountable for sex discriminatory laws under the Convention on the Elimination of All Forms of Discrimination against Women and through the Beijing Platform for Action' (2005) 18 *Harvard Human Rights Journal* 19 at 40.

288 *Idem* at 43.

289 *Idem* at 44.

machinery established following the Beijing Conference, and the impact of the Beijing Platform, have often overshadowed the Women's Convention.[290]

The Beijing Platform expands the definition and understanding of violence against women and also broadens especially the 'promotional' obligation resting on States Parties. The Outcome Document that emanated from the first Beijing review process further contains key reinforcements of the State duties set out in the original conference document. However, although the second (Beijing+10) and third (Beijing+15) review reports contain helpful accounts of current 'good' practices being implemented by States in the area of violence against women, these reports appear to have taken a step away from the more hortatory tone adopted in the earlier documents to a more neutral *descriptive* one.

A progression is further apparent when one compares the scope of State 'obligations' or undertakings set out in the documents discussed in this chapter and the preceding one. Taking as an example 'the duty to provide services' (one of the key State obligations set out under the five-part typology identified as part of the framework of analysis for this study),[291] one notices that General Recommendation No. 19 requires States *inter alia* to establish or support services for victims of gender-based violence, including 'refuges'.[292]

The Violence Declaration is less specific in this respect, providing broadly that States should work to ensure, to the maximum extent feasible in the light of their available resources, that women subjected to violence have specialised assistance, as well as support structures, and should take all other appropriate

290 *Idem* at 45.

291 Chapter 2, Section 4.2.1.

292 CEDAW General Recommendation No. 19 *op cit* note 1 para 24(k).

measures to promote their safety and physical and psychological rehabilitation.[293] The document does not make explicit mention of a State obligation to establish, or fund, refuges or shelters for victims of violence against women (and is in this respect more modest than General Recommendation No. 19).

The Beijing Platform, however, expands on the standard by including among the actions to be taken by governments - 'provide *well-funded* shelters and relief support for girls and women subjected to violence…'[294]

Finally, there is the work of the Special Rapporteur on violence against women. The appointment of a Special Rapporteur on violence against women under the special procedures of the CHR has been described as a recognition by the international community of the need to address violence against women within a human rights framework.[295]

The reports of the first two incumbents provide a rich source of information, and it is surprising that more academic analysis of these reports has not yet been undertaken. For purposes of this thesis, it is particularly the Special Rapporteur's treatment of the right to freedom from violence that compels attention. Notably, the first Special Rapporteur takes the existence of this right as a given virtually

293 Violence Declaration *op cit* note 45 Art 4(g).

294 Beijing Platform para 125(a) (emphasis added). This is only one instance; the development of various State obligations (for example, to undertake law reform, to provide counseling services to victims of violence, and so forth), can be tracked across the three instruments in question by means of the tables in *Annexure A.*

295 C Benninger-Budel 'Introduction' in C Benninger-Budel (ed) *Due Diligence and Its Application to Protect Women from Violence* (2008) 1 at 8.

from the beginning of her mandate.[296] The second mandate holder also freely makes reference to the right, and specifically elaborates on the link between the right to freedom from violence and culture in her 2007 thematic report on the intersections between culture and violence against women.[297]

Another issue that receives a great deal of attention in the work of the Special Rapporteur that is also of relevance to this study, is that of the 'due diligence' standard and its application to violence against women. The conclusion reached by the Special Rapporteur, as part of her detailed 2006 thematic report, that a rule of customary international law has developed that obliges States to prevent and respond to acts of violence against women with due diligence, is particularly noteworthy, given the relatively short period of time since this issue first managed to get a 'foot in the door' of the international human rights arena.[298]

Guidance on where the margins lie of this duty to prevent and respond with due diligence has already been provided by the CEDAW, specifically in the two communications brought against Austria, as set out in Chapter 3.[299] The work done by the Special Rapporteur, both in the 2006 thematic report as well as in subsequent reports, contributes to these guidelines, and as will become clear from Chapter 5, further direction can be found in the interpretation by regional human rights bodies.

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296 It must be borne in mind that the Special Rapporteur assumed office in 1994; at the same time, women's right to freedom from violence was formally recognised in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (see Chapter 5, Section 2.3).

297 *Op cit* note 246.

298 I argue that the re-statement of this rule in the resolutions of the General Assembly and Human Rights Council, as noted above, further confirms the conclusion reached by the Special Rapporteur.

299 See Chapter 3, Section 2.6.

7.2 Violence against women and equality/ non-discrimination

For much of the period under consideration violence against women was characterised predominantly as a form of sex-based discrimination. While this understanding was necessitated by the framework in place in international law (initiated by the discrimination-based definition of violence against women in the Women's Convention) feminist commentators have questioned the utility of an equality/ discrimination approach to violence against women. For example, Goldscheid observes that the connection between sex discrimination and domestic and sexual violence is not easily, nor precisely, described.[300] Edwards furthermore notes that by equating violence against women to sex-based discrimination, the former notion is subject to understandings of discrimination based on sex, which have proven to be 'complex and unsettled'.[301] This approach, by requiring women to characterise the violence they experience as sex-based discrimination rather than violence *per se*, implies that they are treated unequally under law – thus reinforcing an international legal system that disadvantages women by subjecting them to additional, different or unequal criteria.[302] She further argues that the rhetoric of equality is also weaker than the 'language of violence'.

Edwards conducts an instructive review of international instruments and jurisprudence on equality, and finds that the dominant paradigm of equality remains centered around 'sameness' and 'difference'.[303] This is driven by an

300 J Goldscheid 'Domestic and sexual violence as sex discrimination: Comparing American and international approaches' (2006) 28 *Thomas Jefferson Law Review* 355 at 360.

301 Edwards *op cit* note 50 at 5.

302 *Ibid.*

303 *Idem* at 40.

emphasis on non-discrimination, rather than equality, with the male sex still set as the standard for equality.

These concerns echo those expressed by Fitzpatrick shortly after the adoption of General Recommendation No. 19 in 1992, who posited that the application of an equality paradigm has a 'certain logic and force', given that many of the problems experienced by women in relation to domestic violence originate from a denial of the fundamental principles of equality before the law.[304] At the same time, a simplistic 'equal treatment' approach to domestic violence, which does not allow for dedicated measures (such as shelters for battered women or specialist police units to investigate domestic violence) will not ameliorate domestic violence.[305]

One of the advantages of adopting an equality/ non-discrimination approach to violence against women is that this interpretation draws on the normative framework that has developed in international law with reference to sex equality. As noted earlier, the major international human rights instruments include a prohibition of discrimination based *inter alia* on sex,[306] and it is important to note how the treaty-interpreting bodies have expanded the understanding of this prohibition to include notions of State duties in respect of violence against women. For example, the Committee on Economic, Social and Cultural Rights ('CESCR') has adopted General Comment No. 16,[307] which deals with the equal

304 Fitzpatrick *op cit* note 6 at 538.

305 *Idem* at 539-540.

306 See Chapter 3, Section 2.1.

307 CESCR *General Comment No. 16: Article 3: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights* UN Doc E/C.12/2005/3 (2005) [hereafter '*General Comment No. 16*'].

right of men and women to the enjoyment of all economic, social and cultural rights, as set out in Article 3 of the ICESCR.

The CESCR points out that Article 3 is a cross-cutting provision, which applies to all the rights contained in articles 6 to 15 of the Covenant,[308] and provides specific examples of States Parties' obligations. The Committee observes that implementing Article 3, in relation to *Article 10*,[309] requires States Parties *inter alia* to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage.[310]

The CESCR also addresses State obligations to deal with gender-based violence under the intersection between Articles 3 and 10.[311] It points out that gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States Parties must therefore take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors. One therefore notes that there is an alignment between the standards that have evolved as part of an explicit 'equality' framework (for example, as expressed by the CESCR), and those that have developed as part of a framework consisting of 'equality/ non-discrimination' together with a rights approach

308 *Idem* para 22.
309 Art 10 § 1 of the ICESCR requires States parties to recognise that the widest possible protection and assistance should be accorded to the family, and that marriage must be entered into with the free consent of the intending spouses.
310 *General Comment No. 16 op cit* note 305 para 27.
311 *Idem* para 27.

(such as that found in the Violence Declaration and the Beijing Platform). I argue that the solution lies in an approach that combines a view of violence against women 'as discrimination' with violence against women 'as a human rights violation *per se'* – rather than having to choose between the two as opposing approaches.[312] This links up with the following aspect for discussion, i.e. whether women's right to freedom from violence has acquired 'independent' status in international law.

7.3 A right to freedom from violence *eo nomine*

It will be recalled that one of the central research questions formulated for purposes of this thesis is whether it can be said that women's right to freedom from violence has achieved full recognition under international law.[313] Meyersfeld,[314] for instance, observes that the combination of instruments, cases and commentaries in international law makes a compelling argument that the right to be free from systematic[315] intimate violence is an international human right for which states can be held liable.[316] She notes that although it is 'probably

312 This argument is discussed further when I examine the definition of 'violence against women' in the Convention of Belém do Pará – Chapter 5, Part 1, Section 2.3 (b).

313 See Chapter 2, Section 3.

314 B Meyersfeld *Domestic Violence and International Law* (2010) 106.

315 Meyersfeld is of the opinion that not all forms of domestic violence are appropriate for regulation by international law – *idem* at 110. While conceding that categorising violence is uncomfortable (but necessary), she accordingly excludes 'abuse that is intermittent and involves only minor and/or one-off incidents'. I do not agree with this approach: it constitutes a failure to understand 'the fluid and cyclical pattern of domestic violence' that Meyersfeld herself describes – *idem* at 122.

316 This appears to be an expansion of her earlier, slightly more conservative view – see B Meyersfeld 'Domestic violence, health, and international law' (2008) 22 *Emory International Law Review* 61 at 76.

impossible' to argue that there is no international norm prohibiting domestic violence, the question is 'whether this is part of international law'.[317]

She argues that the 'array of instruments addressing domestic violence' are not conclusive evidence of customary international law if one adopts a 'black letter' traditional approach to customary international law. However, the increasing precision in many international instruments and the adoption of domestic violence within the rubric of mainstream treaty monitoring bodies indications 'a trend towards the internationalization of domestic violence'.[318]

I disagree with Meyersfeld in the sense that it is clear, from a careful reading of the Women's Convention in conjunction with the 'soft law' set out above, that certain State obligations to respond to violence against women have crystallised in international law. As demonstrated, these obligations can be categorised based on the typology of the duties to respect rights, create institutional machinery, protect rights, provide services and promote rights, and the standard of State compliance can be tested against the principle of 'due diligence'. Whether the cumulative effect of the articulation of these State obligations is to contribute to a recognition that women have a right to freedom from violence in terms of customary international law, is perhaps a matter of argument; however, it is my contention that at worst, international law has already traversed a great deal of distance towards this recognition.

317 Meyersfeld *op cit* note 314 at 106. The juxtaposition of 'an international norm prohibiting domestic violence' with 'part of international law' is that of Meyersfeld.

318 *Ibid.*

However, the question here goes broader than what Halley identifies as 'the politics of recognition'.[319] It lies not so much in the acknowledgment of a right to freedom from violence for women as such (although this aspect is important), but rather in the whole of the normative framework supporting this right. This framework consists of, *inter alia*, the various sets of State duties to respond to violence against women as set out in the international instruments (which includes the duty to act with due diligence in response to such violence). I argue that this framework also includes the increasing sense of urgency with which the international community has in recent years regarded violence against women, and the resulting prioritisation of this issue.[320] On a more practical level, this framework is also in the process of developing concrete guidelines in respect of the standards that are expected of State actors, for example, in respect of conducting investigations into allegations of violence against women.[321] In this way, it is crucial to look at 'the whole picture' to understand both the right to freedom from violence and accompanying entitlements (framed in the form of State obligations).[322]

319 In other words, 'making explicit and visible' – J Halley 'Rape at Rome: Feminist interventions in the criminalization of sex-related violence in positive international criminal law' (2008) 30 *Michigan Journal of Gender and Law* 1 at 55.

320 Section 6 above.

321 See *Gonzales v Mexico (Cotton Field*) (Chapter 5, Part B, Chapter 3.3.2).

322 This is where I part company with Meyersfeld again: the central focus of her work is not so much on women's right to freedom from violence *per se*, but the somewhat amorphous question of whether 'there is an international legal principle prohibiting domestic violence' – see Meyersfeld *op cit* note 314 at 1.

CHAPTER 5

THE DEVELOPMENT OF WOMEN'S RIGHT TO FREEDOM FROM VIOLENCE IN REGIONAL HUMAN RIGHTS LAW

PART A: INTRODUCTION

This chapter examines the development of women's right to freedom from violence in the three regional[1] human rights systems, i.e. the European, the Inter-American, and the African systems. The consideration of each system commences with an examination of the applicable human rights instruments, with specific emphasis on documents addressing the right to freedom from violence, with a brief overview of the implementation mechanisms for these instruments. The main focus of each section is how the relevant provisions have been interpreted by the regional human rights bodies. (The exception here is the African system, which has not yet seen such interpretation of the documents in question.) Each Part concludes with an evaluation of the current position, and the chapter as a whole is rounded off by means of an overall assessment of the regional human rights systems.

PART B: THE INTER-AMERICAN SYSTEM

1. Introduction

The Inter-American regional body, the Organisation of American States ('OAS'), is the oldest of its kind internationally, dating back to 1889-1890.[2] The thirty-five

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1 For an explanation of the terms 'international' and 'regional' human rights law as used in this thesis, see Chapter 3, Section 3.1.

2 M Nowak *Introduction to the International Human Rights Regime* (2003) 189. See VR Rescia & MD Seitles 'The development of the Inter-American human rights

Member States[3] of the OAS constitute a diverse grouping, ranging from the richest industrialised countries (such as the United States of America and Canada) to the poorest (for example, Haiti).[4]

Although the institutional structure and the normative provisions of the Inter-American system are superficially similar to their counterparts in the European context, the conditions under which the two systems evolved differed dramatically.[5] Due to the turbulent political history of the Americas, the human rights bodies of the region have been confronted with problems such as widespread poverty, military dictatorships, weak or corrupt domestic judiciaries and the systematic torture and enforced disappearances of political dissidents.[6] In response, the Inter-American Commission on Human Rights ('IACHR') and the Inter-American Court of Human Rights ('IACrtHR') have developed a body of case law[7] from which much guidance can be drawn. It will for instance be recalled that the judgment regarded as the guiding light when it comes to the

system: A historical perspective and a modern-day critique' (2000) 16 *New York Law School Journal of Human Rights* 593 at 596 *et seq* for an interesting synopsis of the history of the American human rights system.

3 The membership status of Cuba, which had been excluded from participation in the OAS system in 1962, was recently restored: on 3 June 2009 the Ministers of Foreign Affairs of the Americas adopted resolution AG/RES 2438 (XXXIX-O/09), rescinding the 1962 resolution that excluded the Government of Cuba from its participation in the Inter-American system. On 5 July 2009, the OAS unanimously resolved to suspend Honduras. This decision was adopted as a result of the coup d'état on 28 June 2009 that expelled President José Manuel Zelaya from office - see official OAS website at [www.oas.org/en/about/member_states.asp]. (Accessed 29 May 2010.)

4 Nowak *op cit* note 2 at 190.

5 HJ Steiner *et al International Human Rights in Context* 3 ed (2007) 1021.

6 *Idem* at 1020-1021; Nowak *loc cit*.

7 The term 'case law' is used here in the broad sense to include both judgments by the Court and reports published by the Commission. However, it is not intended to carry the implication that reports published by the Commission are legally binding.

standard of 'due diligence', i.e. *Vélasquez Rodríquez v Honduras*,[8] was delivered by the IACrtHR.[9]

It should be noted that the inter-American system is a complex one, mainly because it consists of two overlapping mechanisms with different foundational documents, i.e. the American Declaration on the Rights and Duties of Man[10] on the one hand, and the American Convention on Human Rights[11] on the other.[12] The operation of these intersections is discussed in more detail below.

In 1994, the OAS Member States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women – the Convention of Belém do Pará.[13] This Convention is of great significance for purposes of this study, since it is the first instrument of this nature to explicitly recognise women's right to freedom from violence. It is also the first document with legally binding effect to deal with violence against women, although it is admittedly only binding in the Inter-American region (and in respect of ratifying States).

8 Inter-American Court of Human Rights *Velásquez Rodríguez v Honduras* (Judgment dated 29 July 1988) Series C: Decisions and Judgments No. 04.

9 See Chapter 2, Section 4.3.

10 OAS Res XXX, adopted by the Ninth International Conference of American States (1948) [hereafter 'the American Declaration'].

11 American Convention on Human Rights OAS Treaty Series No. 36, entered in force on 18 July 1978 – as amended [hereafter 'the American Convention'].

12 I Brownlie *Principles of Public International Law* 7 ed (2008) 570; D Harris 'Regional protection of human rights: The Inter-American achievement' in D Harris & S Livingstone (eds) *The Inter-American System of Human Rights* (1998) 1 cited in Steiner *et al op cit* note 4 at 1027.

13 OAS/Ser.L.V/II.92/doc31 rev.3 (1994) (signed on 9 June 1994, entered into force 3 March 1995) [hereafter 'Convention of Belém do Pará'].

The IACHR in 2007 published a report on violence against women in the Americas.[14] The report is noteworthy for purposes of this thesis because it sheds light on the crucial aspect of access to adequate and effective judicial remedies for women who have experienced gender-based violence. The report examines the major obstacles that women in the region encounter when they seek effective judicial protection to redress acts of violence, and disturbingly observes that most cases of violence against women are never formally investigated, prosecuted and punished by the administration of justice systems in the hemisphere. In some countries, the Commission has observed a pattern of systematic impunity.[15]

The Inter-American region further provides a useful basis for comparison in respect of women's rights and gender equality in the sense that religious norms are strongly influential across the region.[16] This is analogous to the African region, where cultural and traditional norms interact with women's rights as guaranteed in international human rights instruments, in practice often resulting in limitations of these rights.[17]

14 IACHR *Access to Justice for Women Victims of Violence in the Americas* OEA/Ser.L/V/II. Doc.68 (dated 20 January 2007).

15 See also NJ Velasco 'The Guatamalan femicide: An epidemic of impunity' (2008) 14 *Law and Business Review of the Americas* 397 at 397 *et seq*; AW Reimann 'Hope for the future? The asylum claims of women fleeing sexual violence in Guatamala' (2009) 157 *University of Pennsylvania Law Review* 1199 at 1200, 1211-1213.

16 See eg SR Hamilton 'The status of women in Chile: Violations of human rights and recourse under international law' (2004) 25 *Women's Rights Law Reporter* 111 at 112-113 for a discussion of the influence of the Catholic church on women's rights in Chile.

17 See also discussion in Part D, Section 1 below.

2. KEY INSTRUMENTS

2.1 American Declaration on the Rights and Duties of Man (1948)

The first building block in the Inter-American human rights system is the American Declaration,[18] which was adopted in Bogotá, Columbia, in 1948.[19] Although the American Declaration may appear like a (mere) declaration of principles, it has been recognised as the text that defines the human rights referred to in the OAS Charter and as constituting a source of international obligations related to the Charter for OAS Member States.[20]

The American Declaration guarantees, in Article I, the right of 'every human being' to life, liberty and the security of 'his' person. It further states that all persons are equal before the law and have the rights and duties established in the Declaration, without distinction as to race, sex, language, creed or any other factor.[21] Interestingly, it provides for a right to protection for mothers and children: Article VII states that all women, during pregnancy and 'the nursing period', and all children have the right to special protection, care and aid.[22] The

18 The adoption of this regional document preceded that of the UDHR by 7 months – Steiner *et al op cit* note 5 at 1021.

19 The American Declaration was adopted at the Ninth International Conference of American States, which also created the OAS Charter - Rescia & Seitles *op cit* note 2 at 598.

20 This was noted by the Inter-American Court of Human Rights in an advisory opinion relating to the Declaration - IACrtHR *Advisory Opinion No 10 Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights* (1989) Ser A No 10 paras 40 - 47. See also IACHR *Report No 52/07 Petition 1490-05 Admissibility: Jessica Gonzales and Others, United States* OEA/Ser/L/V/II.28 Doc.19 (dated 24 July 2007) para 56.

21 Art 2.

22 See PP Zuloaga 'The path to gender justice in the Inter-American Court of Human Rights' (2008) 17 *Texas Journal of Women and the Law* 227 at 278-283 for a compelling discussion of the veneration of motherhood in Latin American culture, and how this has found expression in judgments of the IACrtHR such as *Case of the Miguel Castro-Castro Prison v Peru* (Judgment dated 25 November 2006) Ser C No 160.

Declaration also makes provision for certain economic, social and cultural rights.[23]

The American Declaration also contains ten articles detailing the duties of the citizen. These include the duty to 'aid, support, educate and protect his minor children', to 'acquire at least an elementary education', to 'obey the law and other legitimate commands of the authorities' and to work.

2.2 American Convention on Human Rights (1969)

2.2.1 Provisions

The American Convention (also known as the Pact of San José) is modelled on the European Convention for the Protection of Human Rights and Fundamental Freedoms[24] and the ICCPR.[25] The Convention sets out a number of rights, to be protected by States Parties, and provides for implementation by the IACHR and the IACrtHR. At the time of writing, the Convention had 25 ratifications.[26]

23 For example, Art XI (right to the preservation of health and to well-being), Art XII (right to education), Art XIII (right to work and to fair remuneration), and Art XVI (right to social security). Steiner *et al* observe that when it comes to rights, the American Declaration is similar in content to the UDHR- Steiner *et al op cit* note 5 at 1022.

24 European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222, entered into force 3 September 1953.

25 AP Ewing 'Establishing state responsibility for private acts of violence against women under the American Convention on Human Rights' (1995) 26 *Columbia Human Rights Law Review* 751 at 755; Steiner *et al op cit* note 5 at 1022.

26 See official OAS website [www.oas.org/juridico/english/sigs/b-32.html]. (Accessed on 21 March 2010.)

The Convention protects, *inter alia*, the right to life,[27] the right of every person[28] to have their physical, mental and moral integrity respected (under the heading 'the right to humane treatment'),[29] the right to personal liberty and security,[30] the right to a fair trial,[31] the right of every person to have their honour protected and their dignity recognised,[32] the right to equal protection of the law,[33] and the right to judicial protection, which includes 'simple and prompt recourse, to a competent court or tribunal' for violations of the rights guaranteed by the Convention.[34]

In terms of Article 1, States Parties undertake to *respect* the rights and freedoms recognised in the Convention and to *ensure* to all persons subject to their jurisdiction the free and full exercise of these rights, without any discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or 'any other social condition'. In contrast to the American Declaration, the Convention does not explicitly guarantee socio-economic rights; instead, in terms of Article 26, States Parties agree to adopt measures to achieve progressively the full realisation of the rights 'implicit in the economic, social, educational, scientific and cultural standards' set forth in the Charter of the OAS.[35]

27 Art 4 § 1 reads that this right shall be protected by law and 'in general, from the moment of conception'.

28 Art 1 § 2 stipulates that for the purposes of this Convention, 'person' means every human being.

29 Art 5.

30 Art 7.

31 Art 8.

32 Art 11 § 1.

33 Art 24.

34 Art 25.

35 An Additional Protocol to the American Convention on Economic, Social and Cultural Rights ('the Protocol of San Salvador') was adopted in 1988 within the framework of the OAS – OAS Treaty Series No. 69 (1988), entered into force 16 November 1999.

The acceptance of the American Convention was subsequently followed by the introduction of additional instruments, such as the Protocol to Abolish the Death Penalty. Furthermore, self-standing instruments aimed at the protection of human rights were also later adopted, such as the Convention of Belém do Pará.

2.2.2 Implementation mechanisms

(a) The Inter-American Commission on Human Rights

When the American Convention came into operation in 1978, a dual human rights protection structure slotted into place.[36] One system encompasses the OAS Member States that have not yet ratified the American Convention but recognise the American Declaration.[37] A second system involves Member States that are party to the American Convention and are thus governed by two protective mechanisms: the IACHR, which already existed at the time,[38] but whose functions were redefined in the American Convention, as well as the IACrtHR. The functions of the IACHR are set out in Article 41 of the American Convention, and include investigatory, advisory, promotional and protective tasks.[39]

This Protocol recognises certain rights (similar to those in the ICESR) and enjoins parties to adopt measures 'to the extent allowed by their available resources, and taking into account their degree of development' for the progressive achievement of the listed rights. The Protocol had 25 States Parties at the time of writing - see OAS website *op cit* note 25. (Accessed on 22 May 2010.)

36 Rescia & Seitles *op cit* note 2 at 599.

37 The United States of America ('USA') feature prominently among these States - see Steiner *et al op cit* note 4 at 1029. In respect of these States, the IACHR acts under the authority of the OAS Charter and the IACHR Statute.

38 See Rescia & Seitles regarding the origin of the Commission in 1959 – *op cit* note 2 at 598.

39 The role and operation of the IACHR are set out in Chapter VII (Articles 34 to 51) of the American Convention; see also C Medina 'The Inter-American Commission on

The IACHR may examine petitions alleging human rights violations in contravention of the American Convention from an individual, groups of individuals or an NGO legal recognised in an OAS Member State.[40] (The Commission may also begin an examination *mero motu*.[41]) The Commission will first determine the admissibility of a petition, with reference to Articles 46 and 47 of the Convention; it then considers the merits of the complaint.[42]

Where no friendly settlement is reached, the Commission is required to compile a report setting out the facts and its conclusions.[43] This initial report, which is not published but transmitted to the State, is the first in a two-phase process; if the matter is not resolved or submitted to the Court by the Commission or the State within a period of three months from the date of the transmittal of the report of the Commission to the State concerned, the IACHR may write a second report.[44] This second report will contain the Commission's opinion and conclusions, the measures recommended by the Commission, and a time limit for the State to comply with these measures. When the time limit expires, the IACHR decides whether the State has responded adequately and whether to publish the report.

Human Rights and the Inter-American Court of Human Rights: Reflections on a joint venture' (1990) 12 *Human Rights Quarterly* 439 at 443.

40 Art 44 of the Convention.

41 Medina *op cit* note 39 at 445, citing Art 26(2) of the IACHR Regulations.

42 The procedure and powers of the Commission are set out in Articles 48 and 49 of the Convention. Provision is made for a friendly settlement between the parties.

43 Art 50.

44 Art 51.

The opinion of the Commission, as expressed in this published report, is not legally binding, but may be useful to draw attention to an issue and to put pressure on governments to take action.[45]

An important development under the methods of work of the Commission has been the introduction of a Special Rapporteurship on the Rights of Women. The IACHR established this mechanism in 1994 with an initial mandate to analyse the extent to which the legislation and practices of Member States affecting the rights of women comply with the broad obligations of equality and non-discrimination guaranteed in the American Declaration and the American Convention.[46] The mandate serves to raise awareness of the need for further action to ensure that women are able to fully exercise their basic rights; issues specific recommendations aimed at enhancing ompliance by Member States with their priority obligations of equality and non-discrimination; promotes the mechanisms that the Inter-American human rights system provides to protect the rights of women; conducts specialised studies and prepares reports in this area; and assists the Commission in responding to petitions and other reports of violations of these rights in the region.[47]

45 JH Robinson 'Another woman's body found outside Juárez – Applying *Velásquez Rodríguez* for women's human rights' (2005) 20 *Wisconsin Women's Law Journal* 167 at 181.

46 See official IACHR website at [www.cidh.org/women/mandate.htm]. (Accessed on 15 June 2010.)

47 For example, the visit of the Special Rapporteur to Ciudad Juárez, Mexico, in 2002 and the resulting report of the IACHR - see Chapter 3, Section 2.6.4 (d) and Section 3.3.1 below.

(b) The Inter-American Court of Human Rights

The IACrtHR, based in Costa Rica, is composed of seven members.[48] In order for a matter to be considered by the Court, the State Party in question must have ratified both the American Convention and have accepted the contentious ('adjudicatory') jurisdiction of the Court.[49] In addition to its contentious jurisdiction, the IACrtHR also has advisory jurisdiction over questions of interpretation of the American Convention and other treaties relating to the protection of human rights in the American States.[50] In terms of Article 61, only States Parties and the IACHR may submit cases to the Court.[51] Since 2001, the victim is entitled to present independent legal counsel in addition to the Commission.[52]

Where a State does not comply with a judgment, the Court may inform and make recommendations to the OAS General Assembly.[53] The Convention does not make reference to any action that the General Assembly may take; being a political body, the Assembly may take any political action it deems necessary to persuade the State to comply with its obligations.[54]

The fact that only a limited number of States Parties to the American Convention have recognised the contentious jurisdiction of the IACrtHR clearly weakens the

48 Chapter VIII (Articles 52-69) of the American Convention deals with the composition, jurisdiction and functioning of the Court.

49 Art 62.

50 Art 64 § 1. The Court may also, at the request of a Member State of the OAS, provide that State with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments – Art 64 § 2.

51 Art 61 § 1.

52 The Commission presents the case against the State Party in an adversarial fashion.

53 Art 65.

54 Medina *op cit* note 39 at 447.

impact of this body. This is exacerbated by the lack of a separate political mechanism to effectively enforce its judgments.[55]

2.3 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women – Convention of Belém do Pará (1994)

(a) Origin of the Convention

In 1990, the Inter-American Commission of Women (CIM)[56] convened a Consultation on Women and Violence to study this issue.[57] The Consultation found that a high level and intensity of violence against women, including violence committed by domestic partners, existed in the region.[58] The Consultation recommended that international human rights norms be utilised 'to establish effective measures as a means of international denunciation of states for their shortcomings' in failing to investigating, prevent, and punish violence

55 Furthermore, a number of OAS member states (such as the United States of America) continue to avoid international supervision under the American Convention through their failure to ratify this instrument – Nowak *op cit* note 2 at 198. In contrast, the Council of Europe conferred to its Committee of Ministers the supervision of the domestic implementation of the Court's judgments – *idem* at 199.

56 The Inter-American Commission of Women (CIM), a specialised organisation of the OAS, is the principal forum for generating hemispheric policy to advance women's rights and gender equality. Established in 1928 at the Sixth International Conference of American States in Havana, Cuba, the CIM was the first official intergovernmental agency in the world created expressly to ensure recognition of the civil and political rights of women. The CIM is made up of 34 Principal Delegates, one for each Member State, who are designated by their respective governments. See official CIM website at [www.oas.org/CIM/English/History8.htm] (Accessed on 25 April 2010.)

57 KM Culliton 'Finding a mechanism to enforce women's right to state protection from domestic violence in the Americas' (1993) 34 *Harvard International Law Journal* 507 at 508; P Goldberg & N Kelly 'International human rights and violence against women' (1993) 6 *Harvard Human Rights Journal* 195 at 201.

58 Cullliton *op cit* note 57 at 508.

against women.[59] It was further noted that the universal prevalence of the various forms and manifestations of violence against women justified a series of remedial actions, including the development of an Inter-American convention on women and violence.[60]

A follow-up meeting of experts was held in Caracas, Venezuela, in August 1991 to consider the viability of such an Inter-American Convention.[61] The work of this group of exports concluded in April 1994, when a Special Assembly of CIM delegates approved a draft text of the Convention for submission to the OAS General Assembly. Adopted by the Twenty-fourth Regular General Assembly of the OAS, which was held in Belém do Pará, Brazil, in June 1994, the Convention was immediately signed by several OAS member governments. To date, the Convention has been ratified or acceded to by 32 Member States.[62]

(b) Understanding of violence against women

The Preamble to the Convention is relatively brief, compared to similar instruments, but it contains a number of statements that are of significance in terms of contextualising its provisions. It firstly refers to the American Declaration as well as the UDHR, recognising that full respect for human rights

59 *Idem* at 509.

60 Goldberg & Kelly *op cit* note 57 at 201.

61 *Idem* at 201. Abi-Mershed notes that the vast majority of delegates and experts who participated in the decisive drafting meetings were women – EAH Abi-Mershed, 'Due diligence and the fight against gender-based violence in the inter-American system' in Benninger-Budel, C (ed) *Due Diligence and Its Application to Protect Women from Violence* (2008) 127 at 130 fn 13. For a more detailed drafting history, see [www.oas.org/CIM/English/History8.htm]. (Accessed on 25 April 2010.)

62 See official IACHR website at [www.cidh.oas.org/Basicos/English/Basic14.Conv%20of%20Belem%20Do%20Para%20Ratif.htm]. (Accessed on 26 April 2010.)

has been enshrined in those documents. It confirms that violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms. In addition, the Preamble states that violence against women is an offence against human dignity, and reiterates the important statement, set out in earlier documents,[63] that such violence is a manifestation of the historically unequal power relations between women and men.

The Preamble furthers expressly draws on the Violence Declaration, noting that this Declaration had been adopted by the 25th Assembly of the CIM. Again, similar to earlier instruments, the Preamble incorporates a reference to a developmental aspect: it notes that 'the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life'.[64]

Article 1 of the Convention provides that violence against women must be understood as 'any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere'.[65]

Setting out the same three-tier typology as other documents,[66] Article 2 confirms that violence against women consists of physical, sexual and psychological violence -

63 For example, the Declaration on the Elimination of Violence ['the Violence Declaration'] and the Beijing Platform of Action – see Chapter 4, Sections 3 and 4.

64 See also Chapter 4, Section 3.

65 See in this regard Ewing *op cit* note 25 at 759-763.

66 See discussion in Chapter 4, Sections 3 and 4.

(i) that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;

(ii) that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and

(iii) that is perpetrated or condoned by the state or its agents regardless of where it occurs.

(c) Rights protected by the Convention

Article 3 of the Convention states, clearly and simply, that 'every woman has the right to be free from violence in both the public and free spheres'. Article 4 extends this statement by noting that every woman has the right to the recognition, enjoyment, exercise, and protection of all human rights and freedoms embodied in regional and international human rights instruments. The rights listed here include, amongst others, the right to have her life respected; the right to have her physical, mental and moral integrity respected; the right to personal liberty and security; the right not to be subject to torture; the right to have the inherent dignity of her person respected and her family protected; the right to be equal before the law and of the law; and the right to simple and prompt recourse to a competent court for protection again acts that violate her rights.[67]

[67] Art 4(a) – (g).

These provisions have been the subject of some interpretation by the IACHR and IACrtHR, will be discussed below. Significantly, the IACHR found that the provisions of this Convention could be applicable in a petition relating to the death of a woman resulting from forced sterilisation, which illustrates the potentially broad application of the document. In *Chávez v Peru*,[68] the petitioners relied on the provisions of the Convention of Belém do Pará as part of their claim that the Government of Peru had violated the rights of Ms. Chávez by forcing her to undergo a surgical sterilisation, which ultimately resulted in her death.[69] The Commission found the petition admissible with respect to the alleged violations of the American Convention and Article 7 of the Convention of Belém do Pará.[70]

The Convention also specifies that every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights.[71] States Parties recognise that violence against women prevents and nullified the exercise of these rights.

68 IACHR *Report No 66/00 Case 12.191 Admissibility: Maria Mamérita Mestanza Chávez, Peru* (dated 3 October 2000).

69 *Idem* para 1.

70 *Idem* para 13. On 10 October 2003 the Commission approved a friendly settlement agreement in the case. This means that the Commission did not address the merits of the petition, including whether the Convention of Belém do Pará was in fact in this instance applicable - IACHR *Report No. 71/03 Petition 12.191 Friendly Settlement: María Mamérita Mestanza Chávez, Peru* (dated 22 October 2003).

71 Art 5. While this provision may on the face of it appear tautologous, it is important to bear in mind that the American Convention does not *per se* include social and economic and rights, but rather addresses these rights in an additional Protocol: see Art 26 of the American Convention and the Additional Protocol to the American Convention on Economic, Social and Cultural Rights ('the Protocol of San Salvador') - note 35 above.

Article 6 explains that the right of every woman to be free from violence includes, amongst others, the right of women to be free from all forms of discrimination, and the right of women to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on inferiority and subordination.

This elucidation of the right to freedom from violence is of great importance against the background of the debate, discussed above,[72] as to whether the appropriate approach to violence against women in international law should be primarily based on violence as sex-based discrimination (as followed in General Recommendation No. 19, adopted by CEDAW) or instead on violence as such. In my view, the inclusion of women's rights to be free from discrimination (and to be valued free of stereotyped patterns and practices based on subordination) *into* a broad over-arching right to freedom from violence is not only jurisprudentially sound, but also immediately resolves the dilemmas posed by the construction of a binary choice between a right to freedom from violence and a right to freedom from discrimination as has been suggested by certain authors.[73]

(d) State obligations under the Convention

Articles 7 and 8 stipulate the duties of States Parties in respect of addressing violence against women. In terms of Article 7, States Parties must condemn all

72 See Chapter 4, Section 7.2.

73 See eg A Edwards 'Violence against women as sex discrimination: Judging the jurisprudence of the United Nations human rights treaty bodies' (2008) 18 *Texas Journal of Women and the Law* 1 at 47-58.

forms of violence against women and agree to pursue, 'by all appropriate means and without delay', policies to prevent, punish and eradicate such violence. They accordingly agree to undertake a range of measures specified in the article, including to apply due diligence to prevent, investigate and impose penalties for violence against women.[74] These measures are set out in ***Table 4*** in ***Annexure A***.

Under Article 8, States Parties agree to undertake specific measures, including programmes to promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected,[75] and to provide appropriate specialised services for women who have been subjected to violence, such as shelters, counseling services for all family members where appropriate, and care and custody of the affected children.[76] Significantly, these programmatic duties are subject to the qualification of 'progressive' implementation. Article 9 requires States Parties to take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons.

(e) Implementation measures

The Convention provides for different aspects of implementation. Article 10 requires States Parties to include in their national reports to the CIM information

74 Art 7(b). Abi-Mershed points out that the Convention drew on the evolution of the principles relating to due diligence set out in *Velásquez Rodriquez*. However, it is interesting to note that initial versions of Article 7 did not expressly include the due diligence standard – Abi-Mershed *op cit* note 61 at 130-131.

75 Art 8(a).

76 Art 8(d).

on measures adopted to prevent and prohibit violence against women. They are also expected to report on the factors that contribute to violence against women.

Article 12 states that any person or group of persons, or any non-governmental entity legally recognised in one or more member states of the OAS, may lodge petitions with the IACHR containing complaints of violations of Article 7 of this Convention by a State Party, and the Commission will consider such claims in accordance with the established norms and procedures relating to petitions.

Article 11, which notes that States Parties and the CIM may request advisory opinions of the IACrtHR on the interpretation of the Convention, has given rise to some uncertainty. This is due to the fact that the Article speaks to the Court's advisory jurisdiction, but is silent on the question of its *contentious* jurisdiction in respect of the Convention. The difficulty is compounded by the fact that Article 12 only makes reference to petitions relation to violations of *Article 7* (omitting Articles 8 and 9).

The Court recently dealt with this issue in its judgment in *González et al ('Cotton Field') v Mexico*.[77] Finding that it had contentious jurisdiction in respect of Article 7 of the Convention,[78] the Court however concluded it did not have jurisdiction to examine violations of Articles 8 and 9.[79]

[77] Unreported judgment dated 16 November 2009. See discussion in Section 3.3.2 below.
[78] Paras 31-77.
[79] Paras 78-79.

3. JURISPRUDENCE

3.1 Introduction

In this section, I examine two cases in which the IACHR and the IACrtHR respectively dealt with alleged violations of women's right to freedom from violence.

In selecting these two matters, guidance was found in the factual basis of cases, for example, whether the violence had been committed by State agents or private actors.[80] This criterion led to the exclusion of the IACrtHR's judgment in *Case of the Miguel Castro-Castro Prison v Peru*,[81] where a group of prison detainees (women and men) were attacked by government forces under the guise of dealing with a suspected prison uprising.[82] Two admissibility reports published by the Commission in 2006, arising from the alleged rape of indigenous women by soldiers of the Mexican Army, were also excluded firstly on the basis that the perpetrators of the sexual violence were State agents and secondly because the

80 See Chapter 1 in this regard.

81 *Case of the Miguel Castro-Castro Prison v Peru op cit* note 22.

82 The Court acknowledged that the men and women detainees (allegedly members of the communist party or 'Shining Path') were targeted in different ways by the government forces. The group of women inmates, which included a number of pregnant women, was attacked first. The attack was initiated on women's visiting day and the women visitors who had gathered outside the prison were insulted, gassed and shot at. Furthermore, the timing of the attack (starting on 6 May and carrying on for four days) meant that the mothers of the victims were searching through the morgues on Peruvian Mother's Day for their missing children. During the days following the attack, the surviving inmates were kept under appalling conditions, which included forced nudity and sexual violence committed against women detainees. However, commentators have questioned whether the denial of justice for human rights violations in this case was indeed based on the fact that the victims were *women* – see Zuloaga *op cit* note 22 at 242.

admissibility proceedings do not raise any substantive issues pertinent to the objectives of this study.[83]

At the time of writing, certain cases are pending before the Commission that have the potential for expansion of current principles, especially in relation to the standard of 'due diligence'. These include the matters of *M.Z. v Bolivia*,[84] *Franco v Guatemala*,[85] and *Gonzales v The United States*.[86] The first two have not been included for discussion here, given that the admissibility reports do not raise any new substantive issues. While this is also strictly speaking true of the third case, I have added this case to the analysis because of its potential impact in developing the notion of 'due diligence'.

83 IACHR *Report No. 93/06 Petition 972-03 Admissibility: Valentina Rosendo Cantú et al, Mexico* (21 October 2006); *Report No. 94/06 Petition 540-04 Admissibility: Ines Fernandez Ortega et al, Mexico* (dated 21 October 2006). The issue in dispute in both instances was whether or not the petitioners had exhausted domestic remedies as required in terms of Article 46 § 1(a) of the American Convention.

84 IACHR *Report No 73/01 Case 12.350 Admissibility: M.Z., Bolivia* (dated 10 October 2001). The petition dealt with a case of rape, where a woman who had allegedly been raped appealed against the unsatisfactory sentence imposed on the perpetrator; on appeal, the accused was acquitted. The Commission ruled the petition admissible; the matter is currently still pending.

85 IACHR *Report No 92/06 Petition 95-04 Admissibility: María Isabel Véliz Franco, Guatemala* (dated 21 October 2006). This complaint related to gaps and irregularities in the investigation of the death of María Isabel Véliz Franco, 15 years of age, who disappeared on 17 December 2001 in Guatemala City and was found dead the next day. Brought by the mother of the deceased young woman, the complaint was found admissible by the IACHR on the above date and is still pending. The same considerations apply to the following petitions pending befote the IACHR, relating to the murders of women in Ciudad Juárez, Mexico: *Report No 32/06 Petition 1173-03 Admissibility: Paloma Angélica Escobar Ledezma, Mexico* (dated 14 March 2006); *Report No 31/06 Petition 1176-03 Admissibility: Silvia Arce, Mexico* (dated 14 March 2006).

86 *Op cit* note 20. See discussion in Section 3.4 below.

In considering the cases dealing with violence against women, it is important to also take notice of the Court's previous rulings relating to women's equality, most notably the judgment in *Morales de Sierra*.

3.2 *Maria de Penha v Brazil*[87]

3.2.1 Petition before the Inter-American Commission

The first case in which the IACHR dealt with the Convention of Belém do Pará was that brought by Maria da Penha Maia Fernandes against Brazil, which arose from a long-standing history of domestic violence committed against the victim and an equally enduring period of impunity for the perpetrator.

In this matter, the petitioners[88] alleged that on 29 May 1983, Maria da Penha Maia Fernandes[89] was the victim of attempted murder by her then husband, Marco Antônio Heredia Viveiros, at their home in Fortaleza in the State of Ceará.[90] He shot her in the back while she was asleep, bringing to a climax a series of acts of violence committed over the course of their married life. As a result of this attack, Ms. Fernandes sustained serious injuries, had to undergo numerous operations and incurred permanent paraplegia and other physical and psychological trauma. Two weeks after the initial shooting incident, Ms.

87 IACHR *Report No 54/01 Case 12.051 Maria da Penha Maia Fernandes v Brazil* (6 April 2001) [hereafter 'IACHR *Fernandes* Report'].

88 The petition was jointly filed by Maria da Penha Fernandes, the Centre for Justice and International Law (CEJIL), and the Latin and Caribbean Committee for the Defence of Women's Rights (CLADEM).

89 The IACHR *Fernandes* Report refers to Maria da Penha Maia Fernandes interchangeably as 'Mrs Maria da Penha Maia Fernandes', 'Mrs Fernandes' and 'Maria da Penha'. In the interest of brevity, I use 'Ms. Fernandes'.

90 The factual background as alleged by the petitioners is set out in IACHR *Fernandes* Report *op cit* note 87 paras 8-19.

Fernandes returned from the hospital and was recovering from the attempt on her life. Mr. Viveiros again attempted to kill her by allegedly trying to electrocute her while she was taking a bath.

The Office of the Public Prosecutor filed charges against Mr Viveiros on 28 September 1984, leading to public criminal proceedings. Despite the preponderance of the evidence, the case languished for several years before the jury found Mr. Viveiros guilty on 4 May 1991. He was sentenced to 15 years' imprisonment for assault and attempted murder, which was reduced to 10 years because he had no previous convictions. The defence then embarked on a protracted series of appeals; at the time of submission of the petition to the Commission (in 1998), the most recent of these appeals had been pending since 1997 without an outcome.

The petitioners claimed that as of the date of the petition, the Brazilian justice system had dragged its feet for more than fifteen years without handing down a final ruling against the ex-husband of Ms. Fernandes, who had been free during that entire period, despite the serious nature of the charges. They maintained that the primary aim of the Brazilian State ought to have been to ensure compensation for the suffering of Ms. Fernandes, by guaranteeing her a fair trial within a reasonable time period. Importantly, the petitioners maintained that this complaint did not represent an isolated situation; rather, it was an example of a 'pattern of impunity' in cases of domestic violence against women in Brazil, since the majority of complaints filed did not lead to criminal prosecution and in the few cases where they did, the perpetrators were convicted in only a small number of cases.[91]

[91] *Idem* para 20.

The petition accordingly alleged the violation of Article 1(1) (the obligation to respect and ensure rights), Article 8 (the right to a fair trial), Article 24 (the right to equal protection), and Article 25 (the right to judicial protection) of the American Convention.[92] For its part, the Brazilian State did not provide the Commission with a response regarding the admissibility or the merits of the petition, despite repeated requests of the Commission to the State.[93]

In deciding whether the *right to justice, right to fair trial and judicial protection*[94] had been violated, the IACHR observed that by then, more than 17 years had elapsed since the launch of the investigation into the attack on the victim. At the time of the Commission's consideration in 2001, the case against the accused remained open, a final ruling had not been handed down, and remedies had not been provided for the consequences of the attempted murder of Ms. Fernandes.[95]

Making reference to existing jurisprudence of the IACrtHR, the Commission found that considerations such as the characteristics of the case, the personal situation of persons involved in the proceedings and the level of complexity could not explain the unwarranted delay in the administration of justice in this case. The Commission held the view that the domestic judicial decisions in this

92 Articles 1(1), 8, 24 and 25 of the American Convention, in relation to Articles II and XVIII of the American Declaration, as well as Articles 3, 4(a), (b), (c), (d), (e), (f) and (g), 5 and 7 of the Convention of Belém do Pará.

93 IACHR *Fernandes* Report *op cit* note 87 para 25.

94 Articles 8 and 25 of the American Convention stipulate that all persons are entitled to access to judicial remedies and to be heard by a competent authority or court when they think that their rights have been violated, which is reaffirmed in Article XVIII (right to justice) of the Declaration, all in relation to the obligation set forth in Article 1(1) of the Convention – IACHR *Fernandes* Report *op cit* note 87 para 37.

95 *Idem* para 38.

case revealed inefficiency, negligence, and failure to act on the part of the Brazilian judicial authorities and unjustified delay in the prosecution of the accused.[96] These shortcomings stood in the way of punishment of the accused and raised the spectre of impunity (and failure to compensate the victim) as a result of the operation of the statute of limitations.[97] They demonstrated that the State was not capable of organising its entities in a manner that guaranteed those rights. As a whole, this situation constituted a violation of Articles 8 and 25 of the American Convention read with Article 1(1) thereof and the corresponding Articles of the Declaration.

Regarding the alleged violation of the right to *equality before the law*,[98] the Commission noted that it had followed with special interest developments related to respect for the rights of women, particularly those related to domestic violence.[99] The Commission considered information from a broad range of sources relating, inter alia, to the high number of domestic attacks of women in Brazil,[100] the fact that women are the victims of domestic violence in disproportionate numbers compared to men, discrimination against women who were attacked and the role of the inefficiency of the Brazilian judicial system in this discrimination.[101] It also referred to the small number of reported cases that

96 *Idem* para 44.

97 The prescribed limitation period here was twenty years.

98 The petitioners alleged a violation of Art 24 of the American Convention in relation to the right to equality before the law and the right to justice enshrined in the American Declaration (Articles II and XVIII) – IACHR *Fernandes* Report *op cit* note 87 para 45.

99 *Idem* para 46.

100 *Idem* 46-49.

101 The Commission refers to its 1997 report on the situation of human rights of women in Brazil – *idem* para 47. This includes, for example, persistent reliance by the courts on the so-called 'honour defence' despite its formal abolition by the Supreme Court of Brazil in 1991, as well as an undue focus on the conduct of the victim in sexual crimes – *ibid*.

are investigated, and those that eventually result in the conviction of the perpetrator.

In this analysis examining the pattern shown by the State in responding to this kind of violation, the Commission did note that positive measures have also been taken in the legislative, judicial, and administrative spheres.[102] However, these positive initiatives had been implemented on a limited basis in relation to the scope and urgency of the problem, as indicated earlier. In this case, 'which stands as a symbol', these initiatives had not had any effect whatsoever.[103]

Finally, the petitioners sought a finding of *violation by the State of Articles 3, 4, 5 and 7 of the Convention of Belém do Pará*. They alleged that this case had to be analysed in a context of gender-based discrimination by Brazilian State organs, which served to reinforce the systematic pattern of violence against women and impunity in Brazil.[104] The Commission, by means of introduction, observed that the Convention of Belém do Pará is an essential instrument that reflects the great efforts made to identify specific measures to protect the right of women to a life free of aggression and violence, both outside and within the family circle.[105] Recounting the definition of violence against women as set out in Article 2, and the duties of the State in Article 7, the Commission found that the impunity that the ex-husband of Ms. Fernandes had enjoyed (and, at the time, continued to

102 Three initiatives were directly relevant here: the establishment of special police stations to handle reports on violence against women; the establishment of shelters for battered women; and the 1991 decision of the Supreme Court to strike down the archaic concept of 'honour defense' as a justification for crimes against wives.

103 IACHR *Fernandes* Report *op cit* note 87 para 50.

104 *Idem* para 51.

105 *Idem* para 53.

enjoy), was at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará.[106]

The failure to prosecute and convict the perpetrator under these circumstances was an indication that the State condoned the violence suffered by Ms. Fernandes, and this failure by the Brazilian courts to take action was exacerbating the direct consequences of the aggression by her ex-husband.[107] Furthermore, this tolerance by the State organs was not limited to this case; rather, it was a pattern.[108] The condoning of this situation by 'the entire system' only served to perpetuate the psychological, social and historical roots and factors that sustain and encourage violence against women. The Commission made the following important statement:

> Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, *but also the obligation to prevent these degrading practices*. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.[109]

106 *Idem* para 55.

107 For example, the petition notes that because of the paraplegia incurred as a result of the shooting incident, Ms. Fernandes had to undergo extensive physical therapy, and because of her loss of independence, required constant assistance in order to move around – *idem* para 11. The ongoing need for medication and physical therapy was expensive and she received no financial assistance from her ex-husband to cover her expenses.

108 *Idem* para 55.

109 *Idem* para 56. Emphasis added.

The Commission explained that it must, in relation to Articles 7(c)[110] and (h),[111] consider the measures taken by the State to eliminate the condoning of domestic violence.[112] Noting the positive measures taken by the current administration, the Commission nonetheless found that in this case, which represented 'the tip of the iceberg', ineffective judicial action, impunity and the inability of victims to obtain compensation exemplified the State's lack of commitment to take appropriate action to address domestic violence. The Commission accordingly held the view that the State was liable for failing to perform its duties set out in Articles 7(b), (d), (e), (f), (g) of the Convention of Belém do Pará in relation to rights protected therein, among them, the right to a life free of violence (Article 3).[113]

In conclusion, the Commission made a number of potentially far-reaching recommendations to the Brazilian State, including the rapid and effective completion of criminal proceedings against the person responsible for the assault and attempted murder of Ms. Fernandes, and in addition, conducting a serious and exhaustive investigation to determine responsibility for the irregularities or delays that prevented rapid and effective prosecution of the perpetrator. It also proposed a range of measures aimed at the continuation and expansion of the reform process that will put an end to the condonation by the State of domestic violence against women in Brazil and discrimination in the handling thereof. These included training and awareness-raising for the judiciary and specialised

110 Art 7(c) provides that States Parties undertake to include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary.

111 Art 7(h) provides that States Parties undertake to adopt such legislative or other measures as may be necessary to give effect to this Convention.

112 IACHR *Fernandes* Report *op cit* note 87 para 57.

113 *Idem* para 58.

police; simplification of criminal justice proceedings to reduce the time taken for proceedings; the inclusion in teaching curriculums of units aimed at providing an understanding of the importance of respecting women and their rights recognized in the Belém do Pará. The State was also required to report to the Commission within sixty days on steps taken to implement these recommendations.

3.2.2 Follow-up to the IACHR report

Santos explains that despite the importance of the case, the Brazilian government only began to pay attention to the situation of Ms. Fernandes in October 2002.[114] Pressure was reportedly exerted on the Superior Tribunal of Justice to finalise the appeal proceedings of the perpetrator, and the case was concluded soon after. (The original sentencing decision of the local jury was confirmed.) This decision was delivered just a few months before the deadline for the prescription of the crime.

The other IACHR recommendations were also initially disregarded by the Brazilian government. However, due to increasing pressure from the women's movement, the government began to partially comply with the IACHR's recommendations. This resulted in a proposal by the government to National Congress for legislation on domestic violence against women - a proposal that had been demanded by the women's movement since the 1980's.[115] The new

[114] CM Santos 'Transnational legal activism and the State: Reflections on cases against Brazil in the Inter-American Commission on Human Rights' (2007) 7 *SUR International Journal on Human Rights* 29 at 47.

[115] See Pitanguy for an overview of legal reform measures relating to violence against women introduced in Brazil since the mid-1990s – J Pitanguy (ed) *Violence against Women in the International Context: Challenges and Responses* (2007) 37-39.

legislation was signed on 7 August 2006 in a public ceremony widely publicised by the Brazilian media.[116] As an act of symbolic reparation, the new legislation was named the 'Maria da Penha Law'.[117]

The main features of this legislation, which is based on the Convention of Belém do Pará, can be summarised as follows: the definition of domestic violence as physical, psychological, sexual, patrimonial and moral violence; the definition of responsibility of governments to promote policies of women's social inclusion; the creation of specialised family and domestic violence courts, with civil and criminal jurisdiction; the creation of mechanisms aimed at the empowerment of women victims of violence; the creation of emergency protective measures to prevent new acts of violence; and the inclusion of victims with low incomes in the government's social programmes.[118]

Although recent reports indicate that the implementation of the 'Maria da Penha Law' has not been smooth,[119] it is encouraging to note that the IACHR's recommendations have had practical impact in the form of law reform at national level.

116 Santos *op cit* note 114 at 47.

117 Law No. 11.340/2006 (dated 7 August 2006).

118 Pitanguy *op cit* note 115 at 39. See also Abi-Mershed *op cit* note 61 at 133; JG Roure 'Domestic violence in Brazil: Examining obstacles and approaches to promote obstacles and approaches to promote legislative reform' (2009) 41 *Columbia Human Rights Law Review* 67 at 92.

119 IACHR *Annual Report* (2009) para 127, available at official IACHR website at [www.cidh.org/annualrep/2009eng/Chap.III.h.eng.htm#12.051] (Accessed on 26 April 2010.) Significantly, the State did not submit information on compliance with the recommendations of the IACHR; however, the petitioners provided the Commission with this information.

3.3 Returning to Ciudad Juárez

3.3.1 Background

It will be recalled from the discussion in Chapter 3 above that the CEDAW conducted an inquiry in 2003 in terms of the Optional Protocol to the Women's Convention into the abduction, rape and murder of women in Ciudad Juárez, Mexico.[120] In February 2002, prior to the CEDAW inquiry, the IACHR Special Rapporteur on the Rights of Women carried out a visit to the country.[121] The IACHR subsequently adopted a report on the findings of the Special Rapporteur, which also offered recommendations to the State.[122]

A number of petitions were consequently submitted to the IACHR arising from the circumstances of individual murder victims and alleged weaknesses in the response of Mexican authorities. Three of these petitions related to women whose bodies had been found on a cotton field outside Ciudad Juárez on 6 November 2001. In 2005 the Commission dealt with the admissibility of the petitions, finding them all admissible.[123] Considering that the cases may be

120 See Chapter 3, Section 2.6.4. The CEDAW subsequently published its findings in 2005 - CEDAW *Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico* UN Doc CEDAW/C/2005/OP.8/MEXICO (dated 27 January 2005).

121 See Chapter 3, Section 2.6.4.

122 Events following the Special Rapporteur's visit and adoption of the Commission's report, including the CEDAW inquiry, are detailed in Chapter 3, Section 2.6.4(d). The CEDAW report refers to the IACHR report at some length.

123 IACHR *Report No 16/05 Petition 281-02 Admissibility: Claudia Ivette González, Mexico* (dated 24 February 2005); *Report No 17/05 Petition 282-02 Admissibility: Esmeralda Herrera Monreal, Mexico* (dated 24 February 2005); *Report No 18/05 Petition 283-02 Admissibility: Laura Berenice Ramos Monarrez, Mexico* (dated 24 February 2005).

linked, the Commission decided to join the three, and this combined case was eventually submitted to the Court.[124]

Commentators had suggested that the liability of the Mexican Government in respect of the abduction and murders of women in Ciudad Juárez should be tested in the IACrtHR, with specific application of the principles laid down in *Velásquez Rodríguez v Honduras*.[125] The case of *González et al ('Cotton Field') v. Mexico* provided the Court with an opportunity to respond to this invitation.

3.3.2 *Case of González et al ('Cotton Field') v. Mexico*[126]

The three victims in the instant case had been identified as Claudia Ivette González,[127] Esmeralda Herrera Monreal[128] and Laura Berenice Ramos

124 The bodies of another five women were found nearby in the same cotton field on the following day (7 November 2001). Although the representatives of the next of kin requested the Court to expand the number of victims to include these bodies, these five women were not considered alleged victims in this case, largely for technical reasons – paras 4, 209 of the judgment.

125 See eg Robinson *op cit* note 45 at 185-187; WP Simmons 'Remedies for the women of Ciudad Juárez through the Inter-American Court of Human Rights' (2006) 4 *Northwestern Journal of International Human Rights* 492 at 503-505.

126 IACrtHR *Case of González et al ('Cotton Field') v. Mexico* (Unreported judgment dated 16 November 2009.) [hereafter '*González et al* judgment']

127 Claudia Ivette González was 20 years old and worked for a maquila plant. According to a close friend, 'when she went out, it was almost always for short periods, because she helped her sister take care of her daughter, and therefore sometimes arrived late' at work. On 10 October 2001, she arrived at work two minutes late and, consequently, was not allowed in. She disappeared that day – *González et al* judgment *op cit* note 126 para 166.

128 Esmeralda Herrera Monreal was 15 years old and had completed 'third year of secondary school'. She disappeared on Monday, 29 October 2001, after leaving the house where she worked as a domestic employee – *idem* para 167.

Monárrez[129] ('Mss. González, Herrera and Ramos'). The Commission asked the Court to hold the Mexican State liable for its failure to comply with its obligations to ensure certain of the rights of the victims.[130] This overview of the judgment will focus on two specific aspects, i.e. the State's obligations to guarantee the right to life of the victims, and the obligation to conduct an effective investigation.

Despite acknowledging the serious nature of the murders, the Mexican State denied that it had committed any violation of the rights to life, humane treatment and personal liberty.[131] The State distinguished two stages in the investigation: the first stage from 2001 to 2003, and the second from 2004 to 2009. It acknowledged responsibility for some irregularities during the first stage, but alleged that during the second stage, these deficiencies had been corrected.[132] The Mexican Government denied the assertion of impunity; it explained that the investigations into the cases were still open and measures were still being taken to identify those responsible for the earlier wrongdoings.[133]

129 Laura Berenice Ramos Monárrez was 17 years old and a fifth semester high school student. The last information about her was that she telephoned a girl friend on Saturday, 22 September 2001, to tell her that she was ready to go to a party. The report that was filed indicated that she disappeared on Tuesday, 25 September 2001, without giving any further details – *idem* para 165.

130 These included the obligations to ensure the right to life of the victims 'by adopting measures to prevent their murders', the obligation to act diligently to prevent, investigate and punish the acts of violence suffered by the victims in violation of Article 7 of the Convention of Belém do Pará, as well as the obligation to conduct an effective and adequate investigation into the disappearances and subsequent deaths of Mss. González, Herrera and Ramos, in violation of Articles 8, 25 and 1(1) of the American Convention. Further alleged violations related to the right to humane treatment in Art 5 (in respect of the victims' next of kin) and the State's obligations towards minors (arising from Art 19).

131 *González et al* judgment *op cit* note 126 para 111.

132 *Idem* paras 20, 296.

133 *Idem* para 111.

As an introductory issue, the Mexican State contested the Court's jurisdiction to determine violations of the Convention of Belém do Pará.[134] The Court dealt with this point at some length,[135] referring *inter alia* to its judgment in the *Miguel Castro-Castro* matter, where it had drawn on this Convention for interpretive guidance.[136] It accordingly held that it had jurisdiction to examine violations of Article 7 of the Convention, but that this jurisdiction did not extend to alleged violation of Articles 8 and 9.[137]

In a lucid and systematic judgment, the Court first examined the broad context within which the murders occurred. It set out to establish whether the violence suffered by the three victims constituted 'violence against women' as defined in the American Convention and the Convention of Belém do Pará.[138] Considering factors such as the Mexican State's acknowledgment of the general situation of violence against women in Ciudad Juárez as well as its statement that the murders of women in Ciudad Juárez 'are influenced by a culture of

134 *Idem* para 31.

135 See *González et al* judgment *op cit* note 126 paras 31-80. Although this exposition is instructive in terms of treaty interpretation broadly, it is not relevant to the specific focus of this study and will therefore not be discussed further.

136 *Idem* paras 74-76. In the *Miguel Castro-Castro* case, the main judgment noted that with regard to the aspects specific to violence against women, the Court would take the relevant provisions of the Convention of Belém do Pará and the Women's Convention into consideration as a 'reference of interpretation' in its application of Art 5 of the American Convention, since these instruments complement the international *corpus iuris* in matters or protection of women's right to humane treatment, of which the American Convention forms part – para 276. However, it is important to also take note of the individual judgment of Judge García Ramírez, which posits the direct applicability of the Convention of Belém do Pará.

137 Section 2.3 (e) above.

138 *González et al* judgment *op cit* note 126 para 224. See definition of 'violence against women' in Convention of Belém do Pará' in Section 2.3(b) above. The Court noted that it had previously established that not all human right violations committed against a woman necessarily imply a violation of the provisions in the Convention of Belém do Pará – *idem* para 227 .

discrimination against women',[139] international reports[140] indicating that many of the killings of women in Ciudad Juárez were manifestations of gender-based violence, and the specific circumstances of this case,[141] the Court concluded that Mss. González, Herrera and Ramos had been victims of 'violence against women' for purposes of the American Convention and the Convention of Belém do Pará. On the same basis, the Court considered that the murders of the victims were gender-based and were perpetrated in an acknowledged context of violence against women in Ciudad Juárez.[142]

The next question was whether the violence perpetrated against the victims could be attributed to the State. This question had to be determined with reference to Article 1(1) of the American Convention, which imposes the obligation on States to *respect* and *ensure* the rights (such as the rights to life, personal integrity and personal liberty) established therein.[143]

Regarding the obligation to 'respect', the Court observed that both the IACHR and the representatives of the next-of-kin had alluded to the possible participation of public officials; however, they could not provide any corroborating evidence.[144] The fact that the impunity in the present case made it impossible to know whether the perpetrators were public officials, or private individuals acting with the support and tolerance of such officials, did not imply

139 *González et al* judgment *op cit* note 126 paras 228-230.

140 Such as those compiled by CEDAW, Amnesty International, and so forth.

141 Thirdly, the three victims in this case were young, underprivileged women, workers or students, as were many of the victims of the murders in Ciudad Juárez. They were abducted and their bodies appeared in a deserted field. It had been accepted as proved that they suffered physical ill-treatment and very probably sexual abuse of some type before they died.

142 *González et al* judgment *op cit* note 126 para 231.

143 *Idem* para 234.

144 The Court deals with this obligation at paras 238-242 of the judgment.

that the Court could assume that there were in fact public officials involved - and therefore automatically condemn the State for failing to comply with its obligation to respect.

When it came to the obligation to 'guarantee', however, the Court reiterated that States should not merely abstain from violating rights, but must adopt positive measures, which are to be determined based on the specific needs of protection of the subject of law, either because of his or her personal situation or because of the specific circumstances in which he or she finds himself.[145]

The Court accordingly had to analyse whether the State took adequate steps to prevent the disappearance, abuses and death suffered by the three victims, and whether it had investigated these facts with due diligence.[146] A second question to be considered was whether the State allowed access to justice to the next of kin of the three victims.[147] The first question highlighted by the Court will be examined in some detail here due to its importance for this thesis. In particular, the obligation of *prevention* in this context as set out by the Court is noteworthy.

(a) Obligation of prevention in relation to the right to personal liberty, to personal integrity and to life of the victims

Noting that the obligation to prevent is one of *means or conduct*, and that a failure to comply with it is not proved merely because the right has been

145 These aspects are set out in paras 243-248 of the judgment.

146 In other words, whether it complied with the obligation to guarantee Articles 4, 5 and 7 of the American Convention (in relation to Art 1(1) thereof) and Art 7 of the Convention of Belém do Pará, which complements the international *corpus juris* as regards the prevention and punishment of violence against women.

147 As stipulated in Articles 8(1) and 25(1) of the American Convention (in relation to Articles 1(1) and 2 thereof).

violated,[148] the Court firstly revisited the general principles relating to due 'diligence' as these had developed in international law with reference to violence against women.[149] This overview revealed that States should adopt comprehensive measures to comply with due diligence in cases of violence against women:

> In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. The prevention strategy should also be comprehensive; in other words, it should prevent the risk factors and, at the same time, strengthen the institutions that can provide an effective response in cases of violence against women. Furthermore, the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence.[150]

The Court analysed a range of measures taken by the Mexican State to address violence against women, both in Ciudad Juárez and in the broader national context.[151] Its conclusion was that even though the State was fully aware of the danger faced by women such as the three murdered women of being subjected to violence, it had not shown that, prior to November 2001, it had adopted useful preventive measures that would have reduced the risk factors for the women. While the measures taken by the Mexican State were necessary and revealed a

148 *González et al* judgment *op cit* note 126 para 252.

149 The Court makes reference, *inter alia*, to CEDAW's General Recommendation No. 19, the IACHR's report in the case of *Maria de Penha v Brazil* and the guidelines on 'due diligence' developed by the UN Special Rapporteur on Violence against Women - paras 253-257. It is useful to read this exposition with the second concurring judgment in this case, delivered by Judge García-Sayán, which deals with the State's obligation to prevent acts of (private) violence. This separate judgment specifically aims to draw a distinction between this obligation to prevent in the context of international responsibility and a more general responsibility to put in place public policy to address criminal acts.

150 *González et al* judgment *op cit* note 126 para 258.

151 *Idem* paras 262-279.

commitment on the part of the State,[152] it had not been demonstrated that these measures were 'sufficient and effective' to prevent the serious manifestations of violence against women that were occurring in Ciudad Juárez at the relevant time.[153]

Nevertheless, according to the jurisprudence developed by the Court, a State cannot be held responsible for *all* human rights violation committed by private actors within its jurisdiction.[154] The State's obligation to guarantee rights in terms of the American Convention does not imply an unlimited responsibility for any act or deed of private individuals. The State's obligation to adopt measures of prevention and protection for private individuals in their relations with each other is firstly conditional on its awareness of a situation of real and imminent danger for a specific individual or group of individuals and secondly on the reasonable possibility of preventing or avoiding that danger.

The Court accordingly identified two crucial moments in this case in which the obligation of prevention must be examined. The first is prior to the disappearance of the victims and the second is before the discovery of their bodies.[155]

Regarding the first moment, i.e. before the disappearance of the victims, the Court found that the failure to prevent the disappearance does not *per se* result in

152 Such as the creation of an Office of the Special Prosecutor for the Investigation of the Murders of Women in Ciudad Juárez within the Office of the Attorney General of Chihuahua (see para 262) and certain additions to the legislative framework.

153 *González et al* judgment *op cit* note 126 para 279.

154 *Idem* para 280. The Court referred *inter alia* to its judgment in *Case of the Massacre of Pueblo Bello v Columbia* (Judgment dated 31 January 2006) Series C No. 140 para. 123. Reference was also made to the jurisprudence of the European Court of Human Rights, including *Case of Osman v The United Kingdom* (Judgment of 28 October 1998) paras 115 and 116.

155 *González et al* judgment *op cit* note 126 para 281.

the State's international responsibility because, even though the State was aware of the situation of risk for women in Ciudad Juárez, it had not been established that it knew of a real and imminent danger for the particular victims in this case.[156]

With regard to the second moment – before the discovery of the bodies – given the context of the case, the State was aware that there was a real and imminent risk that the three particular victims could be sexually abused, subjected to ill-treatment and killed. The Court therefore found that, in this context, an obligation of 'strict due diligence' arose in regard to reports of missing women, with respect to search operations during the first hours and days. Since this obligation of means is more rigorous, it required that exhaustive search activities be conducted. The Court observed that it was above all essential for authorities to take prompt immediate action by ordering, without delay, the necessary measures to find the victims or the place where they may have been retained.[157]

In this instance, Mexico did not prove that it had adopted reasonable measures, according to the prevailing circumstances, to find the victims alive. The actions of officials during the first hours and days following the reported disappearances revealed that the State did not act with the required due diligence to adequately prevent the death and abuse suffered by the victims and did not act, as could reasonably be expected, to end their deprivation of liberty.[158] This failure to comply with the obligation to guarantee rights is particularly serious owing to the context of which the State was aware – which placed women in a particularly

156 The Court's evaluation in respect of these two key moments is set out in paras 282-286.
157 *Idem* para 283.
158 *Ibid*.

vulnerable situation – and of the even greater obligations imposed in cases of violence against women by Article 7(b) of the Convention of Belém do Pará.

Furthermore, the Court found that that the State did not prove that it had implemented the necessary measures, pursuant to Article 2 of the American Convention and Article 7(c) of the Convention of Belém do Pará, that would have allowed the authorities to provide an immediate and effective response to the reports of disappearance and to adequately prevent the violence against women. In addition, it did not prove that it had taken measures to ensure that the officials in charge of receiving the missing reports had the capacity and the sensitivity to understand the seriousness of the phenomenon of violence against women and the willingness to act immediately.[159]

Based on these considerations, the Court found that the State had violated the rights to life, personal integrity and personal liberty of Mss. González, Herrera and Ramos.[160]

(b) Obligation to investigate the facts effectively, in accordance with Articles 8(1) and 25(1) of the Convention

The Court explained that the obligation to investigate cases of the alleged violation of the rights to life, personal integrity and personal liberty arises from the general obligation to guarantee these rights: in other words, Article 1(1) of the Convention in conjunction with the substantive right that must be ensured,

159 *Idem* para 285.

160 As recognised in Articles 4(1), 5(1), 5(2) and 7(1) of the American Convention, as well as the obligations established in Article 7(b) and 7(c) of the Convention of Belém do Pará, read with the general obligation to guarantee rights contained in Art 1(1) and the obligation to adopt domestic legal provisions contained in Art 2 of the Convention.

protected and guaranteed.[161] In addition, Mexico must comply with the provisions of Article 7(b) and 7(c) of the Convention of Belém do Pará, which establish the obligation to act with due diligence, and to adopt the necessary laws to investigate and to punish violence against women.

Recalling its judgment in the case of *Velásquez Rodríguez v Honduras,*[162] the Court repeated that, pursuant to the obligation to guarantee rights, the State is obliged to investigate every situation involving a violation of the rights protected by the Convention.[163] The duty to investigate is an obligation of means and not of results, which must be assumed by the State as an inherent legal obligation and not as a mere formality pre-ordained to be ineffective. The State's obligation to investigate must be complied with diligently in order to avoid impunity and the repetition of this type of act. In this regard, the Court recalled that impunity encourages the repetition of human rights violations.

The Court noted that within the framework of the obligation to protect the right to life, the European Court of Human Rights has developed the concept of the 'procedural obligation' to carry out an effective official investigation in cases of the violation of that right. The Inter-American Court has also applied this concept in several cases.[164]

Importantly, the Court found that in terms of the standards it had established, the obligation to investigate effectively has a wider scope when dealing with the case

161 The general principles are outlined in paras 287-295 of the judgment.
162 See note 7 above.
163 See *González et al* judgment *op cit* note 126 paras 288-290.
164 *González et al* judgment *op cit* note 126 para 292 fn 305 and authorities cited there.

of a woman who is killed or ill-treated or whose personal liberty is affected within the framework of a general context of violence against women.[165]

Applying these principles in the instant case, the Court accordingly analysed alleged irregularities relating to various aspects of the investigation, including (amongst others) the custody of the crime scenes, collection and handling of evidence, actions taken against those presumed to be responsible and alleged 'fabrication' of suspects; and unjustified delay and absence of substantial progress in the investigations.[166] Each of these aspects was meticulously scrutinised with reference to, *inter alia*, the previous jurisprudence of the IACrtHR[167] and accepted international standards.[168]

Based on this examination, and also on the acknowledgement of partial responsibility made by the State, the Court found that various irregularities had occurred. These irregularities violated the right of access to justice and to effective judicial protection, and the right of the next of kin and of society to know the truth about what happened. In addition, it revealed that the State had failed to comply with ensuring the rights to life, personal integrity and personal

165 Similarly, the European Court has said that where an 'attack is racially motivated, it is particularly important that the investigation is pursued with vigor and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.' - *Case of Angelova and Iliev v Bulgaria* (Judgment dated 26 July 2007) para 98, as cited in *González et al* judgment *op cit* note 125 para 293.

166 *Idem* paras 296-387.

167 See eg para 300, where the Court referred to earlier judgments establishing that the obligation to investigate a death means that the effort to determine the truth with all diligence must be evident as of the very first procedures – with reference to *inter alia Case of the Miguel Castro-Castro Prison v Peru op cit* note 22 para 383.

168 Such as those set out in the UN Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, Doc E/ST/CSDHA/.12 (1991) – cited in *González et al* judgment *op cit* note 126 para 301 fn 310.

liberty of the three victims by conducting a 'conscientious and competent' investigation.

These factors led the Court to conclude that impunity existed in the instant case and that the measures of domestic law adopted had been insufficient to deal with the serious human rights violations that occurred. The State did not prove that it had adopted the necessary norms or implemented the required measures, in accordance with Article 2 of the American Convention and Article 7(c) of the Convention of Belém do Pará, that would have permitted the authorities to conduct an investigation with due diligence.

Based on the foregoing, the Court found that the State failed to comply with its obligation to investigate – and, consequently, with its obligation to guarantee – the rights of Mss. González, Herrera and Ramos.[169]

(c) The obligation not to discriminate: violence against women as discrimination

The next duty considered by the Court was the obligation not to discriminate, in other words, violence against women as discrimination.[170] In this regard, the Court made reference to established norms such as the principles set out by the European Court,[171] the definitions of 'discrimination' and 'violence against

169 As embodied in Articles 4(1), 5(1), 5(2) and 7(1) of the American Convention, in relation to Articles 1(1) and 2 thereof and to Article 7(b) and 7(c) of the Convention of Belém do Pará, For the same reasons, it found that the State violated the rights of access to justice and to judicial protection, embodied in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof and to Articles 7(b) and 7(c) of the Belém do Pará Convention, to the detriment of the three victims' next of kin.

170 This obligation is examined in paras 390-402 of the judgment.

171 ECrtHR *Case of Opuz v Turkey* (Judgment of 9 June 2009) paras 180, 191 and 200.

women' contained in the Women's Convention and the Convention of Belém do Pará. It noted that the Mexican State itself had informed the CEDAW that a 'culture of discrimination' against women influenced the fact that 'the murders [of women in Ciudad Juárez] were not perceived at the outset as a significant problem requiring immediate and forceful action on the part of the relevant authorities'. In addition, the State also indicated that this culture of discrimination against women was 'based on the erroneous idea that women are inferior'.

In addition, it had been established that, when investigating this violence, some authorities mentioned that the victims were 'flighty' or that 'they had run away with their boyfriends'. The Court noted that the subordination of women can be associated with persistent socially-dominant gender stereotypes (a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women). This situation is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case.[172]

The Court therefore found that, in the instant case, the violence against women constituted a form of discrimination, and declared that the State violated the duty not to discriminate contained in Article 1(1) of the Convention.

[172] *González et al* judgment *op cit* note 126 para 401.

(d) Other violations

The Court further considered the obligations of the Mexican State regarding the two victims who were minors at the time of their murders, i.e. Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez, in other words the protective measures towards children required in terms of Article 19 of the American Convention.[173] The State was also found to have been in violation of this obligation. Violations of the rights of the victims' next of kin (specifically Article 5 of the American Convention) were furthermore found by the Court.

(e) Reparations

The Court ordered the Mexican State to make a range of reparations,[174] including to finalise the investigation into the abductions and murders of Mss. González, Herrera and Ramos in an effective manner. The Court set out certain directives for this investigation, such as that it must be conducted by officials who are highly trained in dealing with victims of discrimination and gender-based violence.

The reparation order further required the Mexican State to organise a public act or ceremony to acknowledge its international responsibility in order to honour the memory of Mss. González, Herrera, and Ramos, and to erect a monument in memory of the women victims of gender-based murders in Ciudad Juárez within one year of notification of the judgment. The monument should be unveiled at the above public ceremony.

173 See *González et al* judgment *op cit* note 126 paras 403-411.

174 *Idem* para 446 *et seq*.

Other reparation measures related to the reform of criminal justice procedures, the payment of pecuniary and non-pecuniary damages to the victims' next of kin and the introduction of education and public awareness programmes. As with its other judgments, the Court also imposed reporting requirements on the State aimed at monitoring the implementation of the order.[175]

3.4 *Jessica Gonzales v United States of America*[176]

At the time of writing, this matter is pending before the IACHR, which found it admissible on 24 July 2007. Although the Commission has not yet made a finding on the merits,[177] the matter has been included here due to the substantive issues it raises.

Jessica Gonzales, of Hispanic and Native American origin,[178] lived in Castle Rock, Colorado. In June 1999, she had obtained a domestic violence restraining order against her estranged husband, Simon Gonzales, ordering him to stay away from her and their children.[179] Several weeks later, Mr Gonzales abducted their three daughters (Leslie, 7, Katheryn, 8 and Rebecca, 10) from their front yard at

175 Within one year of notification of the judgment, the State is required to provide the Court with a report on the measures adopted to comply with it – *González et al* judgment *op cit* note 126 para 26 of Part X (Operative Paragraphs).

176 *Op cit* note 20 [hereafter 'IACHR *Gonzales* Report'].

177 The merits hearing took place in October 2008 - C Bettinger-López (2008) 40 'Human rights at home: Domestic violence as a human rights violation' *Columbia Human Rights Law Review* 19 at 49. Caroline Bettinger-López is lead counsel in the matter of *Gonzales v United States.*

178 The facts are set out in the IACHR *Gonzales* Report *op cit* note 20 paras 10-17, as well as the judgment of the US Supreme Court (reported as *Town of Castle Rock v Gonzales* 545 US 748). See also Bettinger-López *op cit* note 177 at 20.

179 However, the order permitted him to visit the children on alternate weekends and for one dinner a week at a time prearranged between the parties.

around 18.00. Attempts by Ms Gonzales over the course of the next ten hours to enlist the assistance of the Castle Rock Police Department ('CRPD') in locating her children and arresting Mr Gonzales were met with disinterest and a lack of response, in spite of the 'mandatory arrest' law in operation in Colorado State.[180]

Nearly ten hours after Ms Gonzales's first call to the police, Mr Gonzales arrived at the police station with a gun he had purchased earlier that evening, got out of his truck and opened fire. Police officers returned fire and killed him, and then discovered the bodies of the three children inside the truck. The Colorado authorities conducted an investigation into the use of deadly force by the police officers, and summarily concluded, without supporting evidence, that the children had been murdered by their father with the gun that he had bought earlier. Despite repeated requests from Ms Gonzales, no subsequent investigation into the girls' death took place.[181]

Ms Gonzales filed a '§ 1983 claim'[182] against the CRPD in federal court, alleging violations of the procedural and substantive components of the Fourteenth Amendment's Due Process Clause.[183] This claim eventually made its way to the

180 Colorado Rev Stat § 18-6-803.5(3) (1999).

181 Several questions relating to the deaths of the children remained unresolved. It appeared that the Colorado authorities never examined the truck or investigated whether police bullets had penetrated the truck's interior and whether the fatal bullets found inside the girls' bodies came from Simon Gonzales's gun, the police officers' guns, or both - Bettinger-López *op cit* note 177 at 24-25.

182 Section 1983 creates a federal remedy against a state official for the violation of federal rights – 42 USC § 1983 (2000).

183 Bettinger-López explains that the procedural due process claim rested on the assertion that the restraining order, coupled with Colorado's mandatory arrest law, entitled her to a response from the police – in essence, a 'property right' that could not be denied her without fair procedure – *op cit* note 177 at 25. Ms. Gonzales argued that the police violated her children's substantive due process rights when they failed to take reasonable steps to protect them from the real and immediate risk posed by their father.

US Supreme Court, where a majority[184] held in June 2005 that Ms. Gonzales had no personal entitlement to police enforcement of her restraining order. This ruling revolved around the question of whether the Colorado legislation indeed made the enforcement of restraining orders mandatory.

She accordingly filing a petition before the IACHR, alleging violation of rights protected by the American Declaration:[185] the rights to life and freedom from inhumane treatment;[186] equal protection/ non-discrimination;[187] special protection for women and children;[188] privacy, family unity, and safety in the home;[189] and an adequate and effective remedy.[190]

In addition to seeking an individual remedy in the form of financial compensation and equitable relief, Ms Gonzales's petition urges legal and programmatic reform in respect of domestic violence in the US, in order to address the larger systemic problems that her case represents.[191]

Ms. Gonzales highlighted that domestic violence is a widespread and tolerated phenomenon in the USA, with a disproportionate impact on women and negative repercussions for children.[192] She further emphasised that even though the prevalence and gravity of such violence is recognised at the state and federal

184 The Court was divided 7-2. Scalia J wrote the judgment for the majority, with Stevens J and Ginsberg J dissenting.

185 As noted earlier, the USA has neither ratified the American Convention, nor recognised the jurisdiction of the Court. It has not signed or ratified the Convention of Belém do Pará either.

186 Art I.

187 Art II.

188 Art VII.

189 Articles V, VI and IX.

190 Articles XVIII and XXIV.

191 Bettinger- López *op cit* note 177 at 20.

192 IACHR *Gonzales* Report *op cit* note 20 para 20.

levels and legislative measures have been adopted to confront the problem, the response of police officers is to treat it as a 'family' and private matter of low priority as compared to other crimes. This perception influences negatively the response of the police in the implementation of protection orders.

Regarding the right to equality before the law, Ms. Gonzales alleged that the lack of State response to her reports was based on negative stereotypes embraced by some police officers and a facially neutral police department police of assigning lower priority to reports of domestic violence incidents, a policy that affects women disproportionately since they constitute the majority of victims of domestic violence.[193] According to the petitioners, these deficiencies in the state response allegedly have a particularly alarming effect on women that pertain to racial and ethnic minorities, and lower-income groups.

She further emphasised that the interpretation of the US Supreme Court prevents victims of domestic violence from obtaining legal remedies, and from holding the police legally accountable for failure to protect victims from acts of domestic violence.[194] She challenged the Supreme Court's decision in *DeShaney*,[195] which held that the USA Government has no constitutional duty to protect individuals from private acts of violence, and also questioned the Supreme Court's decision in *United States v Morrison*,[196] which struck down as unconstitutional a private

193 *Idem* para 21.

194 *Idem* para 23.

195 *DeShaney v Winnebago City Department of Social Services* 489 US 189 (1989), which is regarded as the *local classicus* regarding the State's protective duties under the Fourteenth Amendment. For discussion of the judgment, see eg GK Miccio 'Notes from the underground: Battered women, the state, and conceptions of accountability' (2000) 23 *Harvard Women's Law Journal* 133 at 154-155.

196 529 US 598, 602 (2000).

right of action for victims of gender-motivated crimes such as domestic and sexual violence against their abusers.[197]

As noted before, the admissibility hearing did not raise any new issues: the USA government response firstly indicated a factual dispute as to the conduct of the CRPD, and secondly argued that the American Declaration does not impose an affirmative duty on States to actually prevent the commission of the crimes perpetrated by Mr Gonzales.[198] (It alleged that no provision of the Declaration contained language that addressed implementation of the rights enumerated therein, in contrast to the American Convention.) Finally, it was also alleged that Ms Gonzales had not exhausted all domestic remedies.[199]

The IACHR dispensed with these arguments fairly easily, and found the petition admissible. As noted above, the outcome of the merits hearing is currently awaited. This outcome will be of considerable interest, given firstly the strong statements by the IACrtHR in the Mexico case regarding the obligation to prevent violations of rights, as well as the obligation to conduct a diligent and effective investigation. Although the matter is before the Commission, rather than the Court, it has the potential to advance the current position regarding the connection between the right to freedom from violence and the right to freedom from discrimination (given the specific claims made by the petitioner) and to further shape the contours of the due diligence standard, with specific reference to the legal duty of police officials to respond to emergency calls in cases of

197 Bettinger- López *op cit* note 177 at 34.

198 IACHR *Gonzales* Report *op cit* note 20 para 32. This position taken by the USA is not a new one – see also Steiner *et al op cit note* 4 at 1029.

199 This related to the possibility of litigation at state level.

domestic violence. Especially the latter aspect is of enormous practical relevance in many jurisdictions, including South Africa.

4. EVALUATION: INTER-AMERICAN SYSTEM

Although the Inter-American system may not to date have yielded a great number of cases interpreting women's right to freedom from violence and concomitant State obligations, I am of the view that the value of the analysis provided by both the IACHR and the IACrtHR is considerable. I briefly set out the reasons for this view here.

With the introduction of the Convention of Belém do Pará in 1994, the Inter-American system was the first to explicitly recognise women's right to freedom from violence. Article 3 of the Convention, which guarantees this right, answers the question that has been left lingering in the context of international human rights instruments, i.e. whether this right has received full acknowledgment as an independent right.[200] Equally important is the inclusion, within the ambit of the right to freedom from violence, of women's right to be free from discrimination and to be valued and educated free of stereotyped patterns based on inferiority and subordination.

Article 7, which specifically includes the State obligation to respond to violence against women with due diligence, is furthermore noteworthy. It is unfortunate that Article 8, which refers to the programmatic measures to be undertaken by States Parties, is subject to 'progressive realisation'; it is also less than ideal that

[200] See Chapter 4, Section 7.

violations of Articles 8 and 9 have been held to fall outside the ambit of the adjudicatory jurisdiction of the IACrtHR.

The IACHR first applied the Convention of Belém do Pará in the petition of Maria da Penha Maia Fernandes against Brazil. This matter firstly demonstrates how the existing jurisprudence of the IACrtHR was applied, together with the norms introduced by the Convention of Belém do Pará, to arrive at a gender-specific interpretation of the American Convention.

The willingness of the IACHR to consider the broader context of violence against women in Brazil is particularly encouraging. Such a broader examination would be necessary in order to grasp both the domestic violence (and the deplorable State response) as structural phenomena – rather than isolated incidents affecting only an individual woman. This understanding on the part of the IACHR in turn led to recommendations aimed at addressing not only the position of Ms. Fernandes, but also at overcoming the larger shortcomings in the Brazilian legal and social systems. This contextual approach is similar to the one adopted by the CEDAW in dealing with the communications relating to domestic violence.[201]

Of further importance is the link drawn by the Commission between the failure on the part of the State to comply with its obligation to *prosecute and convict* perpetrators of violence against women and its obligation to *prevent* such violence: it states that 'general and discriminatory judicial ineffectiveness' creates a climate that is conducive to domestic violence, in that society sees no

[201] See Chapter 3.

evidence of the State, as representative of society, taking effective action to sanction such acts.[202]

One of the practical outcomes of this matter was the enactment of the 'Maria da Penha Law' in 2006. It is fairly encouraging to note that the Brazilian State, which was not apparently heavily invested in being seen to comply with the recommendations of the IACHR, introduced this legislation as early as 2006. (Bearing in mind that the Commission's report was published in 2001, this was relatively soon, given one's experience with the length of time that law reform initiatives may take.) In this way, the standards encapsulated in the Convention of Belém do Pará found their way into the domestic legal system of Brazil in a tangible way.

With its judgment in the 'Cotton Field' case, the IACrtHR to a large extent completed the process started in 2002 when the Special Rapporteur of the IACHR conducted the inquiry into the abduction and murders of women in Ciudad Juárez. It can be predicted that this judgment, and the standards laid down here in respect of State obligations to prevent violence against women, will have considerable influence in future.

As noted in respect of the Commission above, one of the noteworthy aspects of the judgment is the Court's careful inquiry into the context in which the abduction and murders of the three women occurred. In this instance, this contextual investigation becomes necessary in order to establish whether the

[202] This theme is developed further by the IACrtHR in its judgment in *González et al v Mexico*: see para 388, where the Court comments that 'judicial ineffectiveness when dealing with individual cases of violence against women' encourages an environment of impunity, which sends a message that violence against women is tolerated and accepted as part of daily life.

violence constitutes 'violence against women' (and, accordingly, whether the Convention of Belém do Pará finds application *in casu*).

In assessing the State's positive obligations (i.e. the duty to 'guarantee' in terms of Article 2 of the American Convention), the Court's evaluation of the obligation to prevent violence against women is particularly compelling. Similar to the approach adopted by the IACHR in the *Fernandes* case, the Court sets out the general principles, but then adapts them to the specific circumstances of violence against women. An example here is the Court's finding of an obligation of 'strict due diligence', which arose after the women had been reported missing, but before discovery of the bodies.

Regarding the obligation to investigate, the Court similarly recounted the general principles, including the 'procedural obligation' to carry out an effective investigation, and then observed that this obligation has a wider scope when dealing with a case of woman who is killed or ill-treated or whose personal liberty is affected within the framework of a general context of violence against women.

It will be recalled that one of the points of criticism raised against the CEDAW inquiry report into the murders and abductions in Ciudad Juárez was that the Committee did not go far enough in articulating the Mexican Government's obligations to address gender stereotyping. The IACrtHR, on the other hand, does take this issue further than the Committee by providing concrete guidelines to the Mexican Government in its judgment on how the problems of

discrimination and gender stereotyping should be addressed *inter alia* through training courses for judges and law enforcement officials.[203]

Another striking aspect of the Court's approach is that it interweaves its judgment with reference to, for example, the jurisprudence of the European Court of Human Rights and the considerations of the CEDAW inquiry. From a normative perspective, this means that the judgment is not limited to the standards prevalent in the Inter-American system, but also reflects the principles that have gained acceptance internationally.

It is noteworthy that the UN Special Rapporteur on Violence against Women made specific reference to the Court's reparations order in this judgment in her recent report on reparations,[204] drawing attention to the transformative potential of the order and the gender-sensitive approach adopted by the Court.

As suggested at the beginning of this Part, and illustrated by the approach adopted by the IACrtHR in its judgment in *González et al ('Cotton Field') v. Mexico*, the existing jurisprudence of the Court offers much on which to draw. In this regard, Ewing suggests that violence against women can be viewed as a comprehensive violation of the American Convention as a whole – in the same way that the IACrtHR construed the systematic practice of enforced disappearances as the 'multiple and continuous violation' of many rights under the American Convention.[205] While this construction is not *required* in order to

[203] See paras 531-542 of the judgment.

[204] R Manjoo *Report of the Special Rapporteur on violence against women, its causes and consequences* UN Doc A/HRC/14/22 (dated 23 April 2010) para 81. See Chapter 4, Section 5.3.2 (b).

[205] *Velásquez Rodríguez v Honduras op cit* note 8 para 155; see Ewing *op cit* note 25 at 765-766.

bring violence against women within the ambit of human rights protection, given the specialised provisions of the Convention of Belém do Pará, it may serve to give an additional sense of urgency to State obligations to respond to such violence.[206]

PART C: THE EUROPEAN HUMAN RIGHTS SYSTEM

1. INTRODUCTION

The European system, with its foundational instrument, the European Convention for the Protection on Human Rights and Freedoms,[207] is regarded as particularly influential in the context of international human rights.[208] The reasons for this include the fact the Convention was the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first international court for the determination of human rights matters. Furthermore, it remains the most judicially developed of all the human rights systems and has generated a more extensive jurisprudence than any other part of the international system.[209] The European Convention has been described as an 'essential component of the political order of Europe'.[210]

206 I argue that the IACrtHR's observation in *Velásquez Rodríguez v Honduras* that the phenomenon of disappearances is a 'complex form of human rights violation that must be understood and confronted in an integral fashion' (para 150) equally applies to violence against women.

207 *Op cit* note 24 [hereafter 'the European Convention'].

208 Steiner *et al op cit* note 5 at 933.

209 *Ibid*.

210 J Dugard *International Law: A South African Perspective* 3 ed (2005) 330.

There are three inter-governmental organisations in Europe that deal intensively with the protection of human rights:[211] the European Union ('EU')[212], the Council of Europe and the Organisation for Security and Cooperation in Europe ('OSCE')[213]. This examination focuses on the Council of Europe, the third (and oldest) organisation, which was established as a regional intergovernmental human rights body in the aftermath of World War II.[214] The mandate of the Council is to promote social and economic progress and to safeguard the fundamental values of democracy, liberty and the rule of law.[215]

2. KEY INSTRUMENTS

2.1 The European Convention on Human Rights (1953)

2.1.1 Provisions

The European Convention was adopted by the Council of Europe in 1950 and came into operation in 1953. Its provisions, which incorporate civil and political rights, are

211 Nowak op *cit note* 2 at 157.

212 The 27-member EU was originally organised as a tool for economic integration only. However, it has gradually developed into a political union where human rights are becoming increasingly important for domestic and foreign relations - Nowak *loc cit*; DN Hickey 'The as yet unfulfilled promise and potential of European Union human rights law' (2008) 30 *Women's Rights Law Reporter* 647 at 648. (See official EU website at [europa.eu/abc/european_countries/index_en.htm] for a list of the current Member States.) (Accessed on 21 June 2010.)

213 At the time of writing, the OSCE has 56 Member States, including all sovereign European States and certain non-European countries, i.e. the USA, Canada, and certain central-Asian successor states of the former Soviet Union – see official OSCE website at [www.osce.org/about/13131.html]. (Accessed on 20 June 2010.) The OSCE is primarily a regional security organisation, but human rights have always played an important role in the body's comprehensive security concept, both during and after the Cold War.

214 The founding instrument is the Statute of the Council of Europe ETS No.1, also known as the Treaty of London, adopted on 5 May 1949, entered into force on 3 August 1949 [hereafter 'the Treaty of London'].

215 *Idem* Preamble, Art 1.

binding not only on what was traditionally known as 'western' Europe, but also the former eastern European States of Romania, Hungary and Bulgaria.[216] The Russian Federation and Turkey are also included.[217]

As mentioned, the Convention is limited to civil and political rights. Economic, social and cultural rights are dealt with in the European Social Charter (1961).[218] Article 1 of the European Convention requires Member States to 'secure to everyone within their jurisdiction' the rights set out in the Convention; this provision is supplemented by Article 13, which enjoins Member States to ensure an effective remedy before a national authority.

The Convention further contains a prohibition of torture and 'inhuman or degrading treatment',[219] and guarantees the rights to liberty and security,[220] to a fair trial,[221] to respect for private and family life[222] and to an effective remedy.[223] Article 14 provides that the rights and freedoms set out in the Convention are to be enjoyed without discrimination on a number of listed grounds, including sex.[224]

216 See Steiner *et al* for a brief overview of the establishment of the Council of Europe – *op cit* note 5 at 936-937.

217 See official Council of Europe website for a list of Member States at [www.coe.int/aboutcoe/index.asp?page=47pays1europe&l=en]. (Accessed on 22 June 2010.)

218 ETS No. 35, adopted on 18 October 1961, entered into force on 26 February 1965.

219 European Convention *op cit* note 24 Art 3.

220 Art 5.

221 Art 6.

222 Art 8.

223 Art 13.

224 This implies that Art 14 secures Convention rights to all persons, but one of the other substantive Articles needs to be engaged. Protocol 12 of 2000 to the Convention introduces a 'freestanding' right to equality (note 228 below). See P Londono 'Defining rape under the European Convention on Human Rights' in C McGlynn & VE Munro (eds) *Rethinking Rape Law* (2010) 109 at 117, 119-120.

When the Convention was adopted in 1950, a number of proposals were outstanding on which agreement could not be reached.[225] It was accordingly decided to adopt protocols containing additional provisions, and since 1952, fourteen Protocols have been introduced. These Protocols address, in addition to procedural matters, the important substantive issues of (amongst others) the right to property,[226] equality of rights and responsibility of spouses[227] and a general prohibition of discrimination.[228] Significantly, adoption of these Protocols by Member States is *optional*.

The Convention does not contain any provisions that make explicit reference to violence against women.[229] Although Article 5 of the Convention entrenches the right to 'liberty and security of the person', the European Commission found this provision to refer strictly to physical liberty and security in the context of arrest and detention (a narrow 'due process reading').[230] Violence against women has accordingly been dealt with under Article 3 (the prohibition of torture and inhuman treatment) and Article 8 (the right to respect for private and family life). This is discussed in more detail below in the examination of jurisprudence.

225 See Steiner *et al op cit* note 5 at 938.

226 First Protocol to the European Convention of 1954, ETS No. 9, entered into force 18 May 1954.

227 Protocol 7 to the European Convention of 1984, ETS No. 117, entered into force 1 November 1988.

228 Protocol 12 to the European Convention of 2000, ETS No. 177, entered into force 1 April 2005.

229 See Hickey *op cit* note 212 at 658.

230 See European Commission on Human Rights *Adler and Others v Federal Republic of Germany Applications No. 5573/72 and 5670/72 (joined) Decision: Admissibility* (dated 16 July 1976) para 28; *Dyer v The United Kingdom App No. 10475/83 39 Decision: Admissibility* (dated 9 October 1984) 246 at 256. See also discussion in Chapter 6, Section 2.3.1.

Commentators have pointed out that the Convention was drafted when there was little understanding of women's rights. It was not designed with women's needs in mind, reflecting their political marginalisation at the time.[231] Despite this, Londono notes that the ECrtHR has in recent years made progress in developing human rights jurisprudence in a manner that assists victims of rape.[232] (I argue that this also applies to domestic violence.)[233] In addition, the Council of Europe has taken steps to increase protection for women by drafting a Convention on the combating and prevention of violence against women.[234]

2.1.2 Implementation mechanisms

In terms of the European Convention's original implementation system, a part-time European Commission on Human Rights ('ECHR') acted as a 'filtering body' to decide on admissibility and as a mechanism to secure friendly settlements.[235] Where a settlement was not possible, the Commission reported on the facts and expressed its opinion on the merits of the matter.[236] The Commission's reports were submitted to the Committee of Ministers[237] of the Council, and where no settlement could be achieved, the application was referred to a part-time European Court of Human Rights

231 Londono *op cit* note 224 at 109.

232 *Ibid*.

233 See in this regard also T Abdel-Monem 'Opuz v Turkey: Europe's landmark judgment on violence against women' (2009) 17 *Human Rights Brief* 29 at 30.

234 See discussion in Section 3 below.

235 Dugard *op cit* note 210 at 331. The petition procedure was initially optional, and Member States were tentative in accepting it – Steiner *et al op cit* note 5 at 939.

236 *Ibid.*

237 The Council of Europe consists of two branches: the Committee of Ministers, which is the Council's decision-making body, and the Parliamentary Assembly, which is the deliberative branch of the Council – Treaty of London *op cit* note 214 Art 10; Hickey *op cit* note 212 at 657 n 65.

('ECrtHR') for a final, binding adjudication including, where appropriate, compensation.[238]

A new system was however implemented in 1999,[239] in response to the increased work load on part-time commissioners and judges.[240] This system entailed the abolition of the Commission, and the introduction of a full-time Court, fulfilling in effect the function of both Commission and Court.[241]

Although the system makes provision for an inter-state complaint mechanism,[242] this has not been used extensively.[243] Instead, the majority of cases before the Commission (before 1999) and subsequently before the Court have been brought by individuals.[244] This has been ascribed to the fact that the European Convention is so well known that both individuals and their legal representatives view the right of individual petition as a basic legal remedy.[245]

238 Steiner *et al op cit* note 5 at 939; Dugard *op cit* note 210 at 332. Referral to the Court depended on whether the State had opted to accept the compulsory jurisdiction of the Court. In cases that were not referred to the Court but to the Committee of Ministers, the Committee could award 'just satisfaction' to the victim where it found that there had been a violation of the Convention – Steiner *et al op cit* note 5 at 940.

239 This system was introduced by Protocol 11 to the European Convention of 1994, ETS No. 155, entered into force 1 November 1998.

240 Dugard *op cit* note 210 at 332; Steiner *et al op* cit note 5 at 940.

241 See Section II of the Convention (Articles 19 to 50) for the functions, jurisdiction and composition of the Court.

242 Art 33.

243 Dugard *op cit* note 210 at 332; Steiner *et al op cit* note 5 at 938.

244 The individual petition procedure is set out in Art 34; see also Dugard *loc cit.*

245 *Ibid*.

As noted above, execution of the Court's judgments of the Court is supervised by the Committee of Ministers.[246] Similar to the IACrtHR, the European Court also has advisory jurisdiction.[247]

3. DRAFT CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE[248]

3.1 Background

In spite of the absence of explicit provisions in the European Convention addressing violence against women, the Council of Europe has in recent years taken steps to address this issue.[249] An important measure was the adoption by the Council of Ministers in 2002 of a Recommendation to Member States on violence against women.[250] The Recommendation reaffirms that violence against women is leading to serious discrimination 'against the female sex', both within society and within the family, and notes that such violence constitutes a violation of women's physical, psychological and/or sexual integrity.[251]

The document recommends that the governments of Member States *inter alia* review their legislation and policies with a view to guaranteeing women the enjoyment of

246 Art 46 § 2.
247 Articles 47-49.
248 CAHVIO (2009) 32 prov (dated 15 October 2009).
249 For a discussion of these measures, see Hickey *op cit* note 212 at 659.
250 Committee of Ministers *Recommendation to Member States on the Protection of Women against Violence* Rec(2002)5 (dated 30 April 2002).
251 Rec(2002)5 Preamble.

their human rights and fundamental freedoms.[252] Member States should further recognise that they have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the state or private persons, and provide protection to victims.[253] They are also required to inform the Council of Europe on the follow-up given at national level to the provisions of this recommendation.[254] A number of general measures concerning violence against women are then detailed in the Recommendation.[255]

From 2006-2008 the Council of Europe ran a campaign to combat violence against women, including domestic violence.[256] The Council of Europe's *Task Force to Combat Violence against Women, including Domestic Violence* carried out an assessment of national measures to address violence against women taken before and during the Campaign and concluded that serious gaps remained in the areas of prevention, protection and prosecution.

This assessment furthermore showed the need for harmonised legal standards to ensure that victims across Europe benefit from the same level of protection and support. The *Task Force* therefore recommended that the Council of Europe develop a human rights convention to prevent and combat violence against women.[257] At around the same time, the Ministers of Justice of Council of Europe member states began discussing the need to improve protection from domestic violence. A study on this

252 Art I § 1.
253 Art II.
254 Art IX.
255 Appendix to Rec(2002)5.
256 Council of Europe *Working towards a Convention on Preventing and Combating Violence against Women and Domestic violence* (undated pamphlet) - see official Council of Europe website at [www.coe.int/t/dghl/standardsetting/violence/default_EN.asp?]. (Accessed on 16 June 2010.)
257 *Ibid.*

subject stressed the importance of setting legally binding standards to ensure adequate protection for all victims and recognise it as a crime.

In response, the Committee of Ministers of the Council of Europe created, in December 2008, the *Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence* (CAHVIO). In October 2009, the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence ('CAHVIO') completed a draft Convention on Preventing and Combating Violence against Women and Domestic Violence.

At the time of writing, the Committee is scheduled to hold a few more meetings to conclude its work.[258] Once it has adopted the final draft text of the Convention and the accompanying explanatory memorandum, the Convention will be submitted to the Parliamentary Assembly for opinion. The step thereafter will be the adoption of the Convention by the Committee of Ministers of the Council of Europe. Subsequently, the Convention will open for signature and ratification by member states of the Council of Europe.[259]

3.2 The Draft Convention on Preventing and Combating Violence against Women and Domestic Violence

The Preamble to the Draft Convention places this document in the existing human rights framework by making reference to (amongst others) the European Convention, the Beijing Platform, the Women's Convention and its Optional Protocol and the

[258] The next meeting of CAHVIO is scheduled for 29 June – 2 July 2010 (Council of Europe website note 255 above).

[259] Council of Europe *op cit* note 256.

Rome Statute. Similar to other documents, it makes important statements of principle by recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. It further acknowledges that women and girls are exposed to a higher risk of gender-based violence than men are, and that domestic violence affects women disproportionately, while noting that men may also experience domestic violence.

The Draft Convention sets out certain key definitions in Article 2.[260] Violence against women is defined as a form of discrimination against women and a violation of human rights. It includes all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological, or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Turning to the substantive contents of the Draft Convention, Article 3 addresses 'fundamental rights, equality and non-discrimination'. Paragraph 1 of this Article provides that States Parties shall take the necessary legislative and other measures to implement the right for everyone, particularly women, to be free from violence in both the public and the private sphere.

The rest of this Article (paragraphs 2-5) indicates that this right is closely interlinked with aspects of equality. States Parties are required to condemn discrimination between women and men and to take, without delay, the necessary legislative and

[260] The following terms are defined in the draft Convention: 'violence against women'; 'domestic violence'; 'gender'; 'a gendered understanding'.

other measures to prevent it.[261] The enjoyment of the right to be free from violence is interconnected with the Parties' obligation to secure equality between women and men to exercise and enjoy all civil, political, economic, social and cultural rights as set out in the human rights instruments of the Council of Europe and other international instruments, particularly the Women's Convention, to which they are Parties.[262] The provisions of the Convention, in particular the measures to protect the rights of victims, must be implemented without discrimination on any of a number of listed grounds.[263] Special measures which are necessary to prevent and protect women from gender-based violence will not be considered discrimination in terms of this Convention.[264]

Article 4 of the draft Convention embodies the so-called 'due diligence' principle: it provides that States Parties shall take the legislative and other measures necessary to exercise due diligence to prevent, investigate and, 'in accordance with internal law', punish acts of violence against women and domestic violence, whether those acts are perpetrated by the state or non-state actors.

The draft Convention then sets out a detailed set of measures to be taken by States Parties. (Due to the current 'draft' status of the document, I have opted not to include it in *Annexure A* in the table format used in this thesis for similar instruments.) These measures include integrated policies; prevention; protection and support services; substantive law; investigation, prosecution, procedural law and sentencing; migration; international co-operation; and data collection. The document also makes provision

261 Art 3 § 2. The measures required include embodying the principle of equality between women and men in their national constitutions or other appropriate legislation; and prohibiting discrimination between women and men.

262 Art 3 § 3.

263 Art 3 § 4.

264 Art 3 § 5.

for a group of experts on violence against women and domestic violence to monitor the implementation of the Convention.[265]

4. JURISPRUDENCE

4.1 Introduction

As noted before, the ECrtHR has generated a rich body of jurisprudence, and the method of analysis that was decided on was therefore to address a representative selection of the influential judgments. One criterion for elimination of judgments was again the question of whether the violence has been committed by state officials or private actors; this led to the exclusion of cases such as *Aydin v Turkey*[266] and *Maslova v Russia,*[267] given that both of these matters dealt with sexual violence committed against women (by State officials) whilst in custody.[268]

It will be recalled that the European Convention does not specifically guarantee the right to freedom from violence as such. For this reason, this examination of the Court's jurisprudence aims to trace how the rights in the Convention have been interpreted in response to violence against women (and where applicable, inter-personal violence more broadly). I opted to evaluate earlier developments on a thematic basis, rather than to discuss individual judgments at length; the Court's most recent judgment in *Opuz v Turkey* is however discussed in more depth.

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265 Art 55.

266 (1998) 25 EHRR 251.

267 (2009) 48 EHRR 37.

268 The issue of torture also featured prominently in both matters, which further places them beyond the ambit of this study – see Chapter 2, Section 5.1

4.2 Enlisting Article 8 against domestic violence

Article 8 of the European Convention, which guarantees the right to respect for private and family life,[269] has traditionally been employed to limit State scrutiny of family life and relationships between private individuals.[270] However, the European Court has also interpreted this right as imposing certain duties on the State to intervene in this private sphere in cases of domestic violence or other instances of interpersonal violence.

The first of these cases was *Airey v Ireland*,[271] where Johanna Airey complained that she had been trying, for several years, to obtain a decree of judicial separation from her estranged husband, who had previously been convicted of assaulting her.[272] At the relevant time, divorce in the sense of dissolution of a marriage did not exist in Irish law. However, spouses could be 'relieved from the duty of cohabiting' either by a legally binding deed of separation concluded between them or by a court decree of judicial separation.[273] Decrees of judicial separation were obtainable only in the High

269 Art 8 provides as follows:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

270 See Abdel-Monem *op cit* note 233 at 30; also C Pitea 'Rape as a human rights violation and a criminal offence: The European Court's judgment in *MC v Bulgaria*' (2005) 3 *Journal of International Criminal Justice* 447 at 453; S Choudhry & J Herring 'Righting domestic violence' (2006) 20 *International Journal of Law, Policy and the Family* 95 at 98-99.

271 ECrtHR *Airey v Ireland Application No. 6289/73* (Judgment dated 9 October 1979.) [hereafter '*Airey* judgment'].

272 The facts are set out in Paras 8-9 of the judgment.

273 Also known as a divorce *a mensa et thoro*. Such a decree had no effect on the existence of the marriage in law and could be granted only if the petitioner furnished evidence proving one of three specified matrimonial offences, namely, adultery, cruelty or unnatural practices. The parties were expected to call and examine witnesses on this issue.

Court.[274] The parties could conduct their case in person. Ms. Airey was in the invidious position that she was unable, in the absence of legal aid and not being in a financial position herself to meet the costs involved, to find a solicitor willing to act for her. [275]

She argued that by not ensuring that there is an accessible legal procedure in family law matters, Ireland had failed to respect her family life, thereby violating Article 8 of the Convention. The Court noted that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.[276]

In Ireland, many aspects of private or family life are regulated by law. As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together. Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant: not having been put in a position in which she could apply to the High Court, she was unable to seek

274 *Airey* judgment *op cit* note 271 para 11.

275 When Ms. Airey brought her application before the Commission, legal aid was not available in Ireland for the purpose of seeking a judicial separation, nor indeed for any civil matters. However, at the hearings on 22 February 1979, counsel for the Irish Government informed the Court that the Government had decided in principle to introduce legal aid in family law matters.

276 *Airey* judgment *op cit* note 271 para 32.

recognition in law of her *de facto* separation from her husband. She had therefore been the victim of a violation of Article 8.[277]

This case represents an early recognition by the ECrtHR that the right to respect for private or family life, as guaranteed in Article 8, paragraph 1, of the European Convention, does not insulate the private or domestic sphere from State scrutiny. Instead, in order to ensure that women are protected in this sphere, State intervention may occasionally be required. Given the feminist critique of the pervasive public/ private dichotomy, this was an important acknowledgment.[278]

The protection of the right to private or family life was at issue again in the case of *X and Y v The Netherlands*.[279] The matter also raised the application of the right not to be subjected to inhuman and degrading treatment in the context of sexual violence, i.e. violation of Article 3.

The case originated in an application brought by Mr. X, on behalf of himself and of his daughter, Y.[280] The daughter, who was mentally disabled[281], had been living since 1970 in a privately-run home for mentally disabled children. Just after her sixteenth birthday in December 1977, she was sexually assaulted by one Mr. B, the son-in-law of the director of the facility.[282] This incident had traumatic consequences for Ms. Y, causing her major 'mental disturbance'. Due to a technical lacuna existing in Dutch

277 *Idem* para 33. The Court also found a violation of Art 6 § 1.

278 See Chapter 1, Section 4.

279 ECrtHR (Judgment dated 26 March 1985) Series A No. 91 [hereafter '*X and Y* judgment'].

280 The applicants had asked for their identity not to be disclosed.

281 The judgment of the ECrtHR uses the term 'mentally handicapped'; I have substituted 'mentally disabled' here.

282 Mr. B lived with his wife on the premises of the facility although he was not employed there.

criminal law at the time, it was not possible for Mr. X to pursue criminal proceedings against the perpetrator (on behalf of this daughter).

Mr. X thus brought an application to the ECHR in January 1980, claiming his daughter had been subjected to inhuman and degrading treatment, within the meaning of Article 3 of the Convention, and that the right of both his daughter and himself to respect for their private life, guaranteed by Article 8, had been infringed.[283]

The Court recalled, with reference to its judgment in *Airey* (above) that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it not only compels the State to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.[284] These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

The position taken by the applicants was that, for a young girl like Ms. Y, the requisite degree of protection against the wrongdoing in question would have been provided only by means of the *criminal law*.[285] On the other hand, the Government's view was that the Convention left it to each State to decide upon the protective means to be utilised and did not prevent it from opting for civil law provisions.

283 *X and Y* judgment *op cit* note 279 para 18. In addition, Mr. X claimed that he and his daughter had not had an effective remedy before a national authority as required by Article 13, and that the situation complained of was discriminatory and contrary to Article 14.

284 *X and Y* judgment *op cit* note 279 para 23.

285 *Idem* para 24.

The Government explained the difficulty encountered by the legislature in laying down criminal law provisions calculated to afford the best possible protection of the physical integrity of persons with mental disabilities: to go too far in this direction might lead to unacceptable paternalism and occasion an inadmissible interference by the State with the individual's right to respect for his or her sexual life.[286] It listed the different options in civil law that were available to the applicants, such as an action for damages against Mr. B.

The applicants, in turn, pointed out that these civil law remedies were unsuitable.[287] Amongst other reasons, the absence of any criminal investigation made it harder to furnish evidence on the elements that had to be established to found an action for damages. The Court found in this respect that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y was insufficient.[288] It made the following important comment:

> This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.[289]

Moreover, this was in fact an area in which The Netherlands had generally opted for a system of protection based on the criminal law. The only gap was as regards persons in the situation of Ms. Y; in such cases, this system met a procedural obstacle that the Netherlands legislature had apparently not foreseen. Thus, the Criminal Code did not

286 *Idem* para 25.
287 *Ibid*.
288 *Idem* para 27.
289 *Ibid.*

provide Ms. Y with 'practical and effective protection'.[290] The Court therefore concluded, taking account of the nature of the wrongdoing in question, that she was the victim of a violation of Article 8 of the Convention.[291]

This judgment not only confirms the point made in *Airey* that the protection of the right to respect for private and family life in Article 8 implies positive State duties, but also demonstrates how these State duties are interlinked with the right of the victim to pursue an effective remedy when the right has been violated. In this instance, because of the 'fundamental values and essential aspects of private life' that were at stake, civil law could not offer the victim such remedies, and it was therefore incumbent on the State to ensure that the criminal law provide the victim with practical and effective protection.

The role of Article 8 was again confirmed in the more recent case of *Bevacqua and S. v Bulgaria*.[292] The complaint arose from divorce proceedings between the first applicant, Valentina Nikolaeva Bevacqua, and her husband, Mr. N., and specifically related to an application for an *interim* custody order for S., the couple's young son (the second applicant).[293] While the divorce matter was pending, the two parents of S. were unable to reach agreement about custody of their son.

The first applicant had applied for the *interim* custody order on the same day as filing for divorce, and attempted to obtain an *interim* custody order while awaiting the outcome of the divorce proceedings. However, the proceedings relating to the custody

290 *Idem* para 30.

291 Having made this finding, the Court did not deem it necessary to give separate decisions on the other aspects of the complaint, i.e. the alleged violations of Articles 3 and 13.

292 EcrtHR *Bevacqua and S. v Bulgaria Application No 71127/01* (Judgment dated 12 June 2008) [hereafter '*Bevacqua* judgment'].

293 The facts are set out in paras 5-38 of the judgment.

order were firstly separated from the divorce matter, and secondly subjected to numerous delays, to such an extent that the first applicant eventually abandoned her application for *interim* relief and requested the finalisation of the divorce matter. The first applicant was also unable to obtain recourse for violence she had been subjected to by her former husband. Relying on Articles 3, 8, 13 and 14, the applicants complained that the authorities failed to take the necessary measures to secure respect for their family life and failed to protect the first applicant against the violent behaviour of her former husband.[294]

The Court firstly found that in the particular circumstances of the case these complaints had to be examined under *Article 8* of the Convention. It reiterated the principle that the concept of private life includes a person's physical and psychological integrity, and confirmed again, as stated in *X and Y* above, that this Article may hold positive obligations for the State inherent in effective 'respect' for private and family life.[295]

The authorities' positive obligations – in some cases under Articles 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.[296] The Court made the important statement that the particular vulnerability of the victims of domestic violence and the need for active State

294 *Bevacqua* judgment *op cit* note 292 para 54.
295 *Idem* para 65.
296 *Idem* para 66, with reference *inter alia* to *Osman v The United Kingdom* (2000) 29 EHHR 95 (see note 306 below).

involvement in their protection has been emphasised in a number of international instruments.[297]

In this instance, the Court concluded that the District Court's handling of the *interim* measures issue for a period of approximately eight months was open to criticism as regards its insufficient attention to the need for speedy finalisation during that period. It noted that this attitude, during a period of tense relations between the first applicant and her husband that affected adversely the second applicant, a three-year old child at the time, was 'difficult to reconcile with the authorities' duty to secure respect for the applicants' private and family life'.

Regarding the second aspect, the Court observes that the police and the prosecutors, to whom the first applicant turned for help, did not remain totally passive.[298] Furthermore, the Bulgarian legal system provided legal means whereby the first applicant could seek establishment of the facts, as well as Mr N.'s punishment, and compensation.[299] Without overlooking the vulnerability of the victims in many cases of domestic violence, the Court did not accept the applicants' argument that her Convention rights could only be secured if Mr N. was prosecuted by the State and that the Convention required State-assisted prosecution, as opposed to prosecution by the victim, in all cases of domestic violence.

297 *Idem* para 65. Reference is made, *inter alia*, to Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe, Art 4(c) of the Violence Declaration and the conclusion of the Special Rapporteur in her 2006 thematic report that there is a rule of customary international law that 'obliges States to prevent and respond to acts of violence against women with due diligence' - paras 49-53 of the *Bevacqua* judgment.

298 Mr N. was issued with a police warning and an attempt was made to broker an informal agreement between the parents, albeit with little effect in practice.

299 It was open to her to bring private prosecution proceedings and a civil claim for damages against Mr N.

On the basis of the facts here, the Court found that certain administrative and policing measures would have been called for, for example, a domestic violence protection order prohibiting the perpetrator from assaulting her. However, at the relevant time Bulgarian law did not provide for specific administrative and policing measures and the measures taken by the police and prosecuting authorities on the basis of their general powers did not prove effective. The possibility for the first applicant to bring private prosecution proceedings and seek damages was not sufficient as such proceedings obviously required time and could not serve to prevent recurrence of the incidents complained of.

In the Court's view, the authorities' failure to impose sanctions or otherwise enforce Mr N.'s obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicants needed. The authorities' view that no such assistance was due as the dispute concerned a 'private matter' was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights.

The failure of the District Court to adopt *interim* custody measures without delay in a situation that affected adversely the applicants (and, above all, the well-being of the second applicant) accordingly amounted to a failure to assist the applicants contrary to the positive obligations of the State under Article 8 of the Convention to secure respect for their private and family life. So, too, did the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour.

4.3 Expanding Article 3 to address 'private' violence

Article 3 of the European Convention provides protection against torture and inhuman or degrading treatment. Early cases indicated a willingness to apply this article to cases of rape of women by public or State agents; however, the Court initially appeared reluctant to apply Article 3 in situations of sexual violence committed by private actors.[300] However, a different approach can be discerned from the case of *E and Others v The United Kingdom*[301] onwards.

This claim related to an alleged violation of rights in terms of Articles 3, 8 and 13 of the Convention, brought by four siblings, E., L. T. and H.[302] Their complaint arose from long-standing physical and sexual abuse committed against the four applicants by W.H., who began cohabiting with the siblings' mother after the death of their father in 1965. In January 1977, W.H. was convicted of indecent acts committed against E. and L., and the terms of his sentence prohibited him from further cohabitation with the applicants' mother. The applicants submitted that the evidence established that they were abused by W.H., that the abuse continued after January 1977, that there were material faults in the handling of the situation by the social services and that they sustained loss and damage as a result.[303]

The applicants alleged (*inter alia*) that the local authority (acting through its social services) was aware of proven sexual abuse in January 1977 in relation to E. and L.; the authorities therefore knew of the risk of future ill-treatment to the children and

300 See Londono *op cit* note 224 at 112.

301 ECrtHR *E and Others v The United Kingdom Application no. 33218/96* (Judgment dated 26 November 2002); 36 EHRR 31 [hereafter '*E and Others* judgment'].

302 The facts are set out in paras 8-60 of the judgment.

303 *E and Others* judgment *op cit* note 301 para 79.

ought to have been aware of the continuation of actual abuse. The local authority however failed to take the necessary protective measures (for example, referral of the children) and also failed to properly supervise W.H.'s probation.[304] The Government conceded that the social services' actions were inadequate in certain respects, particularly with regard to the support offered to the applicants after W.H.'s conviction in 1977.[305]

In its assessment of the general principles, the Court noted that Article 3 of the Convention enshrines 'one of the most fundamental values of a democratic society'.[306] The obligation on States Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[307]

The determining question here was therefore whether the local authority (acting through its Social Work Department) was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse.[308] Upon considering the

[304] It was noted that he had been found in the mother's home and yet no further investigation into the situation occurred.

[305] *E and Others* judgment *op cit* note 301 para 86.

[306] *Idem* para 88.

[307] These principles were set out in *Osman v The United Kingdom* (2000) 29 EHHR 245; see *E and Others* judgment *op cit* note 301 para 88; see also discussion in Chapter 2, Section 4.3.

[308] *E and Others* judgment *op cit* note 301 para 92.

facts, the Court was satisfied that that the social services should have been aware that the situation in the family disclosed a history of past sexual and physical abuse from W.H. and that, notwithstanding the probation order, he was continuing to have close contact with the family, including the children. Even if the social services were not aware he was inflicting abuse at this time, they should have been aware that the children remained at potential risk.[309] Yet the social services failed to take steps that would have enabled them to discover the exact extent of the problem and, potentially, to prevent further abuse taking place.[310] There was, accordingly, a breach of Article 3 in respect of the applicants in this case.[311]

This judgment illustrates the application of the principles of State responsibility for the acts of private actors, as developed by the Court in the *Osman* case, to instances of violation of Article 3.[312] Importantly, it confirms that Article 3, which addresses acts of torture or inhuman treatment, finds application in cases of physical and sexual abuse, and again shows the linkages between a violation of this right and the right to an effective remedy under Article 13. Although States are allowed some 'margin of appreciation' in their arrangements for such remedies on national level, these provisions should allow the victim an effective opportunity to claim compensation for non-pecuniary damages.

309 *Idem* para 96.

310 *Idem* para 97.

311 *Idem* paras 100-101.

312 It will be recalled that the *Osman* matter specifically dealt with Article 2 of the Convention, i.e. the right to life.

4.4 The combined effect of Articles 3 and 8

The violation of Articles 3 and 8 of the Convention came under scrutiny again in *M.C. v Bulgaria*.[313] The applicant alleged that she had been raped by two men (both acquaintances) when she was fourteen years and 10 months old.[314] After a prolonged investigation, the public prosecutor decided not to institute criminal proceedings against the two men,[315] having concluded that there was insufficient proof of the applicant having been compelled to have sex.

In her complaint before the European Court, the applicant took issue with Bulgarian law and its application in rape cases, as well as the investigation into the rape of which she had been a victim. She averred that the Bulgarian authorities failed to provide *effective* legal protection against rape and sexual abuse,[316] due to an unwarranted emphasis on active resistance on the part of the victim. She also claimed the authorities had not investigated the events in her case effectively. In this way, they had failed to comply with their positive obligations under the European Convention.

In its overall assessment, the Court first dealt with the existence of a positive obligation to punish rape and to investigate rape cases. It noted that having regard to the nature and the substance of the applicant's complaints, they fell to be examined primarily under Articles 3 and 8 of the Convention.[317]

313 ECrtHR *M.C. v Bulgaria Application no. 39272/98* (Judgment dated 4 December 2003); 40 EHRR 20 [hereafter '*MC* judgment'].

314 See Paras 9-43 of the judgment for an exposition of the facts.

315 *MC* judgment paras 44-65.

316 *Idem* para 3.

317 *Idem* para 148.

The Court reiterated that the obligation of the States Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.[318] Positive obligations on the State are also inherent in the right to effective respect for private life under Article 8, as noted in previous decisions.

While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.

In a number of cases, it has been confirmed that Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation.[319] Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents. Further, the Court had not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation. On this basis, the Court found that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions

318 *Idem* paras 149-150.

319 *Idem* paras 151.

effectively punishing rape and to apply them in practice through effective investigation and prosecution.[320]

The second aspect to be examined was the modern conception of the elements of rape and its influence on the substance of Member States' obligation to provide adequate protection. The Court therefore considered the relevant comparative and international law and practice relating to rape, with specific reference to the definition of this offence, the question of whether the requirement is 'lack of consent' or 'force or coercion' and the minimum age of consent for sexual activity.[321]

In respect of the means to ensure adequate protection against rape, States undoubtedly enjoy a wide margin of appreciation.[322] In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account. The limits of the national authorities' margin of appreciation are nonetheless circumscribed by the provisions of the Convention. In interpreting them, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within contracting States and respond, for example, to any evolving convergence as to the standards to be achieved.

The Court observed that the previous decade had seen a clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definitions and narrow interpretations of the law in this area. Firstly, it appears that a requirement

320 *Idem* paras 152-153.

321 *Idem* paras 88-108. This examination spanned several European jurisdictions, the ICTY, and the CEDAW, as well as a submission by Interights on the law of European countries, the USA, Australia, Canada and South Africa. The candidate, with Lillian Artz, provided a legal opinion to Interights on South African law relating to rape and sexual assault for purposes of this submission.

322 *MC* judgment *op cit* note 313 para 154.

that a victim must resist physically is no longer present in the statutes of European countries.[323] The Court also noted that the member States of the Council of Europe, through the Committee of Ministers, had agreed that penalising non-consensual sexual acts, '[including] in cases where the victim does not show signs of resistance', is necessary for the effective protection of women against violence and had urged the implementation of further reforms in this area.[324]

The Court was accordingly persuaded that a rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risked leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy.[325] In accordance with contemporary standards and trends in that area, the Members States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

The task of the Court in the instant case was therefore to examine whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention.

323 *Idem* para 157.
324 *Idem* para 162.
325 *Idem* para 166.

The Court examined the provision of the Bulgarian Criminal Code that sets out the definition of rape,[326] and also looked at how this article had been interpreted by the courts.[327] The outcome of this assessment was that the provisions of Bulgarian criminal law were not deemed by the Court to be objectionable in themselves; however, it was important to consider how these provisions had been applied by the authorities in the instant case.

The Court noted that the authorities (investigator and the prosecutors) had adopted a restrictive approach, practically elevating 'resistance' to the status of a defining element of the offence. This led to several shortcomings in the investigation and the eventual evaluation of the available evidence. The Court thus found that the approach taken by the authorities fell short of the requirements inherent in the State's positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse.[328] In the present case there had been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention.[329]

[326] Art 152 § 1 of the Bulgarian Criminal Code defines rape as 'sexual intercourse with a woman -
(1) incapable of defending herself where she did not consent
(2) who was compelled by the use of force or threats
(3) who was brought to a state of helplessness by the perpetrator.' – para 74.
In terms of Art 151 para 1 of the Criminal Code, sexual intercourse with a person under 14 years of age is a punishable offence ('statutory rape'); consent is not a valid defence – para 72.

[327] *MC* judgment *op cit* note 313 paras 75-84.

[328] *Idem* para 185.

[329] It also held that no separate issue arose under Art 13 of the Convention. Given this finding, the Court considered that it was not necessary to examine the complaint under Art 14 of the Convention.

This judgment is significant for two reasons. Firstly, it demonstrates the European Court's willingness to undertake an investigation into the contextual basis of a challenged statutory provision or practice; in this instance, the examination included an extensive comparative inquiry into jurisdictions in Europe (and more broadly). The examination went to the heart of what the criminal provisions aim to achieve, i.e. the protection of the individual's sexual autonomy. Secondly, as Rudolf and Eriksson point out, the Court in this matter for the first time applied Articles 3 and 8 jointly to a case of rape.[330]

4.5 State obligations to prevent violence

The Court expanded its application of the key articles of the Convention in the recent case of *Opuz v Turkey*,[331] where the facts were reminiscent of those in the two communications brought before the CEDAW against Austria.[332] The applicant, Ms. Nahide Opuz, alleged that the Turkish authorities had failed to protect her and her mother from domestic violence, which had resulted in the death of her mother and her own ill-treatment.[333]

330 B Rudolf & A Eriksson 'Women's rights under international human rights treaties: Issues of rape, domestic slavery, abortion and domestic violence' (2007) 5 *International Journal of Constitutional Law* 507 at 511; Londono *op cit* note 224 at 113; Pitea *op cit* note 270 at 458.

331 ECrtHR *Opuz v Turkey Application No 33401/02* (Judgment dated 9 September 2009) [hereafter '*Opuz* judgment']. The State obligation to act in prevention of (fatal) domestic violence was also in focus in *Kontrová v Slovakia* - ECrtHR *Kontrová v Slovakia Application No 7510/04* (Judgment dated 31 May 2007). Given the similarities between this matter and the *Opuz* case, I have elected to focus on the latter.

332 Communication No. 5/2005: *Şahide Goekce (deceased) v Austria* (Views adopted on 6 August 2007, 39th Session.) UN Doc CEDAW/ C/39/D/5/2005 dated 6 August 2007. See discussion in Chapter 3, Section 2.6.2.

333 *Opuz* judgment *op cit* note 331 para 3.

The applicant's mother had married A.O. in a religious ceremony. In 1990 the applicant and H.O., A.O.'s son, started a relationship and began living together in Diyarbakir, a town in south-eastern Turkey. They officially married on 12 November 1995. They had three children, in 1993, 1994 and 1996 respectively. The applicant and H.O. had heated arguments from the outset of their relationship.

The train of events set out by the applicant commenced in 1995 with a complaint of assault filed by the applicant and her mother with the Diyarbakir Public Prosecutor's Office against H.O. and A.O., and consisted of a number of incidents of violence over a period of years.[334] These incidents followed a pattern in that the complaints that were laid by the applicant (or her mother) were, at least initially, withdrawn at their request. However, there was also a clearly discernible escalation in the degree of violence committed by H.O.

H.O.'s actions culminated in the killing of the applicant's mother in 2002. He was convicted of murder and illegal possession of a firearm and sentenced to life imprisonment. However, taking into account the fact that the accused had committed the offence as a result of alleged provocation[335] by the deceased and his good conduct during the trial, the court mitigated the original sentence, changing it to fifteen years and ten months' imprisonment and a fine of 180 new Turkish liras. In view of time spent in pre-trial detention and the fact that he was appealing against the judgment, the court ordered the release of H.O.[336]

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334 These events are detailed in paras 9-52 of the judgment.

335 In his statements to the police, the public prosecutor and the court, H.O. claimed that he had killed the applicant's mother because she had induced his wife to lead an immoral life, like her own, and had been taking his wife and children away from him – *Opuz* judgment *op cit* note 331 para 56.

336 At the time of consideration by the ECrtHR, the appeal was still pending.

Following his release, the applicant filed a criminal complaint with the Public Prosecutor's Office, and asked the authorities to take measures to protect her life. She reported that H.O. had been issuing threats against her again since his release from prison.

Before the Court, the applicant sought to argue that Turkey had violated her mother's right to life under Article 2 in combination with Article 14, and that her rights under Article 3 (prohibition of torture and inhuman or degrading treatment), in combination with Article 14, had been violated. Furthermore, she complained that there had been violations of Articles 6 (right to fair trial) and 13 (right to an effective remedy) in light of the lack of effective criminal remedies to protect both her mother and herself.

The Court accordingly considered this aspect of the complaint under two broad headings, i.e. the State's alleged failure to protect Ms. Opuz's mother's life, and the effectiveness of the criminal investigation into the killing of her mother.

(a) Alleged violation of Article 2: Failure to protect the applicant's mother's life

The Court noted the well-established principles, laid down in the *Osman* case, that where there is an allegation that the authorities have violated their positive obligation to protect the right to life it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. It is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is

a question that can only be answered in the light of all the circumstances of any particular case.

The Court therefore had to ascertain whether the national authorities had fulfilled their positive obligation to take 'preventive operational measures' to protect the right to life of the applicant's mother. In this regard, it had to be established whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the applicant's mother from criminal acts by H.O. A crucial question in the instant case was whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. despite the withdrawal of complaints by the victims.

(i) Whether the local authorities could have foreseen a lethal attack from H.O.

The Court evaluated the sequence of events from the first reported incident of violence perpetrated by H.O. against the applicant and her mother in 1995 leading up to the final request by the applicant's mother in February 2002, directed at the public prosecutor, to take action against H.O. – given that his threats had intensified and their lives were in immediate danger.[337] It found that in view of the above events, the violence committed against Ms. Opuz and her mother by H.O. was clearly escalating. The crimes committed by H.O. were sufficiently serious to warrant preventive measures and there was a continuing threat to the health and safety of the victims. When examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further

[337] Approximately two weeks after this request, H.O. killed the applicant's mother.

violence. However, the authorities' reaction to the applicant's mother's request was limited to taking statements from H.O. about the mother's allegations.

Having regard to these circumstances, the Court found that the local authorities could have foreseen a lethal attack by H.O. While it could not conclude with certainty that matters would have turned out differently and that the killing would not have occurred if the authorities had acted otherwise, it recalled that a failure to take reasonable measures that could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.[338]

(ii) Whether the authorities displayed due diligence to prevent the killing of the applicant's mother

The Court next examined to what extent the authorities took measures to prevent the killing of the applicant's mother. The Government claimed that each time the prosecuting authorities commenced criminal proceedings against H.O., they had to terminate those proceedings, in accordance with the domestic law, because the applicant and her mother withdrew their complaints.[339] The applicant explained that she and her mother had been forced to withdraw their complaints because of death threats and pressure exerted by H.O.

In this regard, the Court had to examine the legislative framework that was in place, with specific reference to the question of whether the consent or cooperation of the victim is required to pursue the criminal prosecution against the perpetrator of domestic violence. The Court conducted an extensive inquiry into legislation in other

338 With reference to *E. and Others op cit* note 301.

339 *Opuz* judgment *op cit* note 331 para 137.

European jurisdictions,[340] and noted that there seemed to be no general consensus among States Parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints.[341] Nevertheless, there appeared to be an acknowledgement of the duty on the part of the authorities to strike a balance between a victim's Article 2, Article 3 or Article 8 rights in deciding on a course of action.

In this connection, having examined the practices in the Member States, the Court observed that there are certain factors that can be taken into account in deciding to pursue the prosecution. These include (*inter alia*) the seriousness of the offence and whether the attack was pre-planned. The Court noted that it can be inferred from this practice that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.[342]

In the Court's opinion, it did not appear that the local authorities sufficiently considered these factors when repeatedly deciding to discontinue the criminal proceedings against H.O. Instead, they seemed to have given exclusive weight to the need to refrain from interfering in what they perceived to be a 'family matter'.

340 Based on the comparative overview, the Court noted that in 11 Member States of the Council of Europe, the authorities are required to continue criminal proceedings despite the victim's withdrawal of complaints in cases of domestic violence. In 27 Member States, the authorities have a margin of discretion in deciding whether to pursue criminal proceedings against perpetrators of domestic violence. It appears from the legislation and practice of these 27 countries that the decision on whether to proceed where the victim withdraws his/her complaint lies within the discretion of the prosecuting authorities, which primarily take into account the public interest in continuing criminal proceedings

341 *Opuz* judgment *op cit* note 331 para 138.

342 *Idem* para 139.

As regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' privacy rights under Article 8 of the Convention, the Court recalled its ruling in *Bevacqua and S. v. Bulgaria*, where it held that the authorities' view that no assistance was required as the dispute concerned a 'private matter' was incompatible with their positive obligations to secure the enjoyment of the applicants' rights.

However, the criminal investigations in the instant case were strictly dependent on the pursuance of complaints by the applicant and her mother on account of the domestic law provisions in force at the relevant time,[343] which prevented the prosecuting authorities from pursuing the criminal investigations. In other words, the legislative framework then in force fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims. The Court thus found that, bearing in mind the seriousness of the crimes committed by H.O. in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints.[344]

The legislative framework preventing effective protection for victims of domestic violence aside, the Court also had to consider whether the local authorities displayed due diligence to protect the right to life of the applicant's mother in other respects.[345] In this connection, the Court noted that despite the deceased's complaint that H.O. had been harassing her, invading her privacy by wandering around her property and carrying knives and guns, the police and prosecuting authorities failed either to place

[343] Articles 456 § 4, 457 and 460 of the now defunct Criminal Code.

[344] *Opuz* judgment *op cit* note 331 para 145, with reference to Recommendation Rec(2002)5 of the Committee of Ministers.

[345] *Idem* para 147.

H.O. in detention or to take other appropriate action in respect of the allegation that he had a shotgun and had made violent threats with it. While the Government argued that there was no tangible evidence that the applicant's mother's life was in imminent danger, the Court observed that it was not in fact apparent that the authorities had assessed the threat posed by H.O. and concluded that his detention was a disproportionate step in the circumstances; rather the authorities had failed to address the issue at all.[346]

Furthermore, in the light of the State's positive obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting the applicant's mother. On the contrary, in response to Ms. Opuz's mother's repeated requests for protection, the police and the Magistrate's Court merely took statements from H.O. and released him. While the authorities remained passive for almost two weeks apart from taking statements, H.O. shot dead the applicant's mother.

In these circumstances, the Court concluded that the national authorities could not be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 of the Convention.

[346] The Court emphasised that in domestic violence cases, the rights of perpetrators cannot supersede victims' human rights to life and to physical and mental integrity (with reference to the *Fatma Yıldırım v. Austria* and *A.T. v. Hungary* decisions of the CEDAW Committee) – *ibid*. See also Chapter 3, Section 2.6.

(ii) The effectiveness of the criminal investigation into the killing of the applicant's mother

The Court reiterated that the positive obligations laid down in the first sentence of Article 2 of the Convention also require by implication that an efficient and independent judicial system should be set in place by which the cause of a murder can be established and the guilty parties punished.[347] The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.

A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention. It must be accepted that there may be obstacles or difficulties that prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of tolerance of unlawful acts.

In this instance, a comprehensive investigation had indeed been carried out by the authorities into the circumstances surrounding the killing of Ms. Opuz's mother. However, although H.O. was tried and convicted of murder and illegal possession of a firearm by the Diyarbakır Assize Court, the proceedings were still pending before the Court of Cassation at the time of consideration by the ECrHR. Accordingly, the criminal proceedings in question, which had already lasted more than six years, could not be described as a 'prompt' response by the authorities in investigating an

[347] *Opuz* judgment *op cit* note 331 para 150.

intentional killing where the perpetrator had already confessed to the crime. The Court therefore found a violation of Article 2 of the Convention.[348]

(b) Alleged violation of Article 3 of the Convention

The applicant complained that she had been subjected to violence, injury and death threats several times but that the authorities were negligent towards her situation, which caused her pain and fear in violation of Article 3 of the Convention. The Court reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.[349]

Regarding the question whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors, the Court recalled the principle that the obligation on the States Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

348 *Idem* para 153.

349 *Idem* para 158.

In this instance, the Court noted that the applicant could be considered to fall within the group of 'vulnerable individuals' entitled to State protection. In this connection, it noted the violence suffered by the applicant in the past, the threats issued by H.O. following his release from prison and her fear of further violence as well as her social background, namely the vulnerable situation of women in south-east Turkey. The Court observed also that the violence suffered by the applicant, in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention.

Therefore, the Court next had to determine whether the national authorities had taken all reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity. In carrying out this scrutiny, and bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court explained that it would consider whether the national authorities had sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concerned other States.

Furthermore, in interpreting the provisions of the Convention and the scope of the State's obligations in specific cases, the Court noted that it would also look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the CEDAW, as well as giving heed to the evolution of norms and principles in international law through other developments such as the Convention of Belém do Pará.

In the light of the foregoing, the Court considered that the response to the conduct of the applicant's former husband was manifestly inadequate to the gravity of the

offences in question. Therefore, it observed that the judicial decisions in this case revealed a lack of efficacy and a certain degree of tolerance.

Finally, the Court noted 'with grave concern', with reference to the threats issued by H.O. immediately after his release from prison, that the violence suffered by the applicant had not come to an end and that the authorities had continued to display inaction.

The Court concluded that there had been a violation of Article 3 of the Convention as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her former husband.

(c) Alleged violation of Article 14 of the Convention

The applicant complained under Article 14, in conjunction with Articles 2 and 3 of the Convention, that she and her mother had been discriminated against on the basis of their gender. Ms Opuz alleged that the domestic law of the respondent State was discriminatory and insufficient to protect women, since a woman's life was treated as inferior in the name of family unity. The former Civil Code, which was in force at the relevant time, contained numerous provisions distinguishing between men and women, such as the husband being the head of the family, his wishes taking precedence as the representative of the family union, and so forth.[350]

[350] The applicant alleged that the then Criminal Code treated women as second-class citizens. A woman was viewed primarily as the property of society and of the male within the family. The most important indicator of this was that sexual offences were included in the section entitled 'Crimes Relating to General Morality and Family Order', whereas in fact sexual offences against women are direct attacks on a woman's personal rights and freedoms. It was because of this perception that the Criminal Code imposed lighter sentences on persons who

The Court found that the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional. The applicant had been able to show, supported by unchallenged statistical information, the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.

Bearing in mind this finding that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court found that the violence suffered by the applicant and her mother could be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court thus concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3 of the Convention, in the instant case.

5. EVALUATION: EUROPEAN SYSTEM

As demonstrated by the judgments discussed above, there has been discernible progress in the jurisprudence of the European Court of Human Rights in respect of the standards applicable to violence against women, especially in the area of State obligations. This development has been incremental, in the sense that it initially only engaged either Article 3 or Article 8; one notes that the Court subsequently began

had murdered their wives for reasons of family honour. The fact that H.O. received a sentence of 15 years was a consequence of that classification in the Criminal Code – *idem* para 178.

applying Articles 3 and 8 in conjunction with each other, and in the most recent judgment in *Opuz v Turkey*, an important additional application is Article 14, which guarantees equal protection of the rights under the Convention.[351]

An aspect that comes to the fore very clearly in the interpretation of the European Court is the interaction between the rights to physical and psychological integrity (and, I would argue, freedom from violence) and the right to access to an effective judicial remedy when there has been a violation of those rights. This is apparent from the early case of *Airey* onwards.

Another aspect that is clearly visible is the emphasis placed by the Court on the values underlying the emerging jurisprudence regarding violence against women. This was specifically pointed out in *X and Y v The Netherlands,* where the Court made reference to 'fundamental values and essential aspects of private life' being at stake,[352] as well as in *E and Others v The United Kingdom*, where the rights in Articles 2 and 3 were referred to as the 'most fundamental provisions' of the Convention.[353]

As Londono points out, the case of *Opuz* has significant implications for the way in which authorities address domestic violence.[354] They are required to take a proactive approach in cases where the violence is serious and must endeavour to bring criminal proceedings against perpetrators of such violence regardless of whether the

351 See in this regard Abdel-Monem op cit note 233 at 31-32; P Londono 'Developing human rights principles in cases of gender-based violence: Opuz v Turkey in the European Court of Human Rights' (2009) 9 *Hum Rts L Rev* 657 at 667.

352 Section 4.2 above.

353 It will be recalled that Art 2 guarantees the right to life; Art 3 prohibits torture and inhuman treatment. The Court had found a violation of Art 3 in the instant case – see Section 4.3 above.

354 *Ibid*.

complainant is willing to give evidence. Given that the victims of domestic violence are regarded by the Court as 'vulnerable' for the purposes of Article 3, this puts a far greater onus on States to take measures to protect them. In particular, it may call for State authorities to take action against perpetrators in the absence of the victim's consent to do so, as well as the obligation to provide assistance and support for victims.

Although the jurisprudence of the ECrtHR can already be described as relatively progressive, the introduction of a specialised Convention on Violence against Women and Domestic Violence will significantly augment the normative environment. This Convention (in its current draft form) contains an explicit guarantee of the right to freedom from violence, and imposes positive duties on the State to ensure the implementation of this right. Similar to the Convention of Belém do Pará, this draft instrument makes it clear that the right to freedom from violence goes hand in hand with the prohibition of sex-based discrimination. In this way, it consolidates the existing jurisprudence of the ECrtHR and aligns it with fellow regional human rights bodies.[355]

[355] It will be recalled that the IACrtHR cited the *Opuz* case in its judgment in *González et al v Mexico*, specifically on the issue of violence against women as discrimination – see Part B, Section 3.3.2 (c) above.

PART D: AFRICAN HUMAN RIGHTS SYSTEM[356]

1. INTRODUCTION

The African human rights system is often seen as the 'least developed' among the regional systems.[357] This view rests on an under-estimation of the contribution that Africa has made to international human rights law.[358] Nevertheless, it cannot be gainsaid that African regional human rights jurisprudence is lacking in the area of women's rights and more specifically, violence against women.

The African system is complicated by the interaction between constitutional, statutory and customary law, the construction of notions of 'custom', 'culture' and 'tradition'[359] and the limitations of their rights that women experience in practice.[360] These tensions, played out against the larger backdrop of the long-standing debate between cultural relativism and the universality of women's

356 This part is an updated version of the chapter published as H Combrinck 'Rape law reform in Africa: "New opportunities" or more of the same?' in C McGlynn & VE Munro (eds) *Rethinking Rape Law* (2010) 122-135.

357 Steiner *et al op cit* note 5 at 1062-1063.

358 See eg generally F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Journal on Human Rights* 18-39.

359 'Religious norms' (both Christian and Islamic) are increasingly playing a role in the African context, and should therefore be added to this list.

360 See in this regard eg S Ndashe 'Using customary human rights instruments to re-envision gender in customary law' in C van der Westhuizen (ed) *Gender Instruments in Africa* (2005) 77 at 77-78; see also Chapter 2, Section 2.1.

human rights,[361] become especially pertinent when it comes to, for example, the definition of concepts such as 'harmful traditional practices'.[362]

It has been pointed out that the initial African regional organisation, the Organisation of African Unity ('OAU'), was primarily concerned with the struggle against colonialism and apartheid, the preservation of territorial integrity and non-interference in the internal affairs of States – rather than the prioritisation of human rights.[363] With the transition from the OAU to the African Union ('AU') in 2002 this position changed significantly: human rights and democratic values are clearly expressed as founding principles of the AU.[364]

The Constitutive Act of the AU determines the promotion of gender equality as one of the body's guiding principles.[365] The AU has accordingly undertaken a number of initiatives aimed at the achievement of this objective. Prominent among these have been the adoption in 2004 of the Solemn Declaration on Gender Equality in Africa.[366] The Preamble to the Declaration notes with

361 There is a significant body of literature addressing this issue; a comprehensive exploration is beyond the specific focus of this thesis. See eg R Coomaraswamy 'To bellow like a cow: Women, ethnicity, and the discourse of rights' in RJ Cook (ed) *Human Rights of Women* (1994) 39-57; AA An-Na'im 'State responsibility under international human rights law to change religious and customary laws' in RJ Cook (ed) *Human Rights of Women* (1994) 167-188; E Brems 'Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse' (1997) *Human Rights Quarterly* 136 at 147-150, 154-164; R Murray 'A feminist perspective on reform of the African human rights system' (2001) 2 *African Human Rights Law Journal* 206 at 220-221; S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 47 at 47-48.

362 See Section 2.2.2 below.

363 G Naldi 'The African Union and the regional human rights system' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights* 2 ed (2008) 20 at 45.

364 See Preamble of the Constitutive Act of the African Union, adopted by the 36th Ordinary Session of the OAU, meeting in Lomé, Togo in July, 2000; entered into force on 26 May 2001.

365 *Idem* Art 4(1).

366 Assembly/AU/Decl 12 (III) Rev 1 (2004).

concern the negative impact on women of issues such as the high incidence of HIV/AIDS among girls and women, poverty, harmful traditional practices, violence against women and women's exclusion from politics. The document then sets out a range of commitments aimed at advancing gender equality, including accelerating measures aimed at combating the HIV/AIDS pandemic,[367] and initiating and engaging in sustained public campaigns against gender-based violence.[368]

The adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[369] ('the African Women's Protocol') and the prioritisation of women in activities of the New Partnership for Africa's Development ('NEPAD') are further examples of initiatives undertaken by the AU.[370] Stefiszyn argues (convincingly) that although significant obstacles still exist, opportunities have been created at every level of AU structures for the advancement of African women's rights.[371]

Similar to the approach adopted in respect of the inter-American and European systems, this Part of the chapter examines the key African instruments as well as their implementation mechanisms. Specific attention is devoted to the African Women's Protocol.[372]

367 *Idem* para 1.

368 *Idem* para 4.

369 CAB/LEG/66 6/Rev 1 (2003), entered into force on 25 November 2005.

370 Similar to the approach adopted in respect of the two other regional human rights systems, this Part will not examine the broader regional organisation, i.e. the AU, but will focus on the implementation mechanisms of the key human rights instruments.

371 K Stefiszyn 'The African Union: Challenges and opportunities for women' (2005) 5 *African Human Rights Law Journal* 358 at 360, 384-385.

372 See Section 2.2 below.

2. KEY INSTRUMENTS

2.1 The African Charter on Human and Peoples' Rights (1981)

2.1.1 Provisions

The foundational instrument in the African human rights system is the African Charter on Human and Peoples' Rights ('the African Charter').[373] Article 18(3) of the Charter calls on States to ensure the elimination of discrimination against women and also to ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

The African Charter further guarantees the right to liberty and security of the person,[374] as well as the right to respect of 'the dignity inherent in a human being'.[375] These rights are bolstered by Article 4, which states that 'human beings are inviolable'. It also provides that every human being is entitled to respect for 'his' life and the integrity of his person.

Article 2 states that every individual is entitled to the enjoyment of the rights and freedoms set out in the Charter, without distinction based on a number of listed grounds (including sex). The broad undertaking on the part of States Parties to recognise the rights, duties and freedoms enshrined in the Charter and to adopt legislative or other measures to give effect to these rights, is found in Article 1.

373 OAU Doc CAB/LEG/67/3 rev. 5, entered into force on 21 October 1986.

374 Art 6.

375 Art 5. This article also prohibits all forms of exploitation, particularly slavery, slave trade and cruel, inhuman or degrading punishment and treatment.

2.1.2 Implementation mechanisms

The African Commission on Human and Peoples' Rights ('ACHPR') is the main implementation body for purposes of the African Charter. Established in terms of Article 30 of the Charter, the Commission has both a promotional and protective mandate.[376]

The *promotional* aspects of the Commission's mandate are carried out mainly by means of the examination of State reports, which are to be submitted every two years.[377] The compliance (or lack thereof) of African States with their reporting obligations under the African Charter has placed serious constraints on the ability of the ACHPR to properly carry out this aspect of its work.[378] Other promotional aspects include special mechanisms, such as the appointment of Special Rapporteurs. A mandate of Special Rapporteur on the Rights of Women in Africa was established in 1998; the impact of this mandate has been variable, with much emphasis in recent years being placed by mandate holders on the drafting and adoption of the Women's Protocol.[379]

376 Viljoen provides an in-depth discussion of the ACHR, its functions and its constraints – see F Viljoen *International Human Rights Law in Africa* (2007) 310-417. See also Steiner *et al op cit* note 5 1065-1066; Naldi *op cit* note 363 at 34-40.

377 Art 62 of the Charter.

378 Evans & Murray describe the situation that pertains in practice regarding State reporting: see M Evans & R Murray 'The state reporting mechanisms of the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* 2 ed (2008) 49-75; see also TS Bulto 'Beyond the promises: Resuscitating the state reporting procedure under the African Charter under Human and Peoples' Rights' (2006) 12 *Buffalo Human Rights Law Review* 57 at 69-76; Viljoen *op cit* note 376 at 369-392.

379 R Murray 'The Special Rapporteurs in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* 2 ed (2008) 344 at 360-364; Viljoen *op cit* note 376 at 397-398.

The *protective* mandate of the ACHPR revolves around individual communications,[380] inter-state communications and 'on-site' or 'fact-finding' missions,[381] with individual communications being the most important aspect. As noted above, the Commission has not yet been presented with communications relating to violence against women.[382]

When the African Charter was first adopted, the ACHPR was established as the supervisory body. The drafters of the Charter believed that a supranational judicial institutional, similar to the courts in the European and inter-American regional human rights systems, was not appropriate at that time, and accordingly introduced the Commission, a quasi-judicial body, instead.[383] However, the possibility of introducing an African human rights court remained alive, and in 1998, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights was adopted.[384] Unfortunately, Member

380 Viljoen points out that the African Charter does not refer to 'individual' communications as such; instead, Art 55 of the Charter makes reference to 'other' communications – F Viljoen 'Communications under the African Charter: Procedure and admissibility' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* 2 ed (2008) 76 at 76. The admissibility requirements for such communications are set out in Art 56.

381 See Viljoen *op cit* note 376 at 318-367.

382 The ACHPR's decisions in respect of 'general' Articles of the Charter may, depending on the facts, also be applicable to cases of violence against women: see eg *Communication 245/02: Zimbabwe Human Rights NGO Forum, Zimbabwe* (adopted at 39th Ordinary Session held from 11– 5 May 2006 in Banjul, The Gambia) in which the Commission dealt *inter alia* with the State's duty to recognise the rights enshrined in the Charter, arising from Art 1, and made reference to the IACrtHR's judgment in *Velásquez Rodríguez v Honduras* – paras 114-146.

383 The findings of the Commission are not legally binding: the Commission issues 'recommendations' to States Parties. See F Viljoen & L Louw 'State compliance with the recommendation with the African commission on Human and People's Rights, 1993-2004' (2009) 7 *International Journal of Civil Society Law* 22 at 23.

384 OAU/LEG/MIN/AFCHPR/PROT (III), entered into force 25 January 2004 [hereafter 'the African Court Protocol']. See Viljoen *op cit* note 376 at 420-421 for the historical background to the adoption of this Protocol.

States were not very eager to ratify the Protocol, with the result that it only came into force on 25 January 2005.[385]

The first eleven judges were elected in 2006, and although the establishment of the Court was troubled by a number of delays,[386] it is now operational.[387] Based in Arusha, Tanzania, the Court may receive cases from States Parties, the ACHPR, and individuals and NGO's with observer status before the ACHPR, provided that the State Party in question has recognised the Court's jurisdiction in respect of direct access by individuals and NGO's.[388]

2.2 African Women's Protocol (2003)

2.2.1 Background

The wording of Article 18(3) of the African Charter, referred to above, was one of the factors that led African activists to consider whether an alternative

385 In the *interim*, the Protocol on the Court of Justice of the African Union had been adopted (on 11 July 2003), and steps had been put in place for the merger of the two courts – Viljoen *op cit* note 376 at 457-459; see also I Kane & AC Motala 'The creation of a new African Court of Justice and Human Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* 2 ed (2008) 406 at 408-417. In 2008, the Protocol on the Statute of the African Court of Justice and Human Rights was adopted, which will formally merge the African Court on Human and Peoples' Rights with the African Court of Justice. This Protocol will enter into force once it has been ratified by 15 Member States; at the time of writing, it had received two ratifications – see official AU website at [www.africa-union.org/root/au/Documents/Treaties/treaties.htm]. (Accessed on 20 June 2010.)

386 These delays resulted *inter alia* from the need to draft the Internal Rules of Procedure of the Court; it was also necessary to harmonise the rules of procedure that govern the relations between the Court and the ACHPR to ensure complementarity between the two bodies.

387 The first judgment was handed down in December 2009 in *Michelot Yogogombaye v The Republic of Senegal Application No. 001/2008* (Judgment dated 15 December 2009) – see official Court website at [www.african-court.org/en/cases/latest-judgments/]. (Accessed on 20 June 2010.)

388 See Articles 5(3) and 34(6) of the African Court Protocol *op cit* note 383. At the time of writing, States Parties have displayed very little interest in making the declaration required in terms of Art 34(6).

instrument for the promotion of women's rights was required.[389] Concern arose from the close alignment of this provision with the preceding sub-articles, which require State protection for the family as 'the custodian of morals and traditional values recognised by the community'.[390] The emphasis on traditional values in the African Charter[391] was particularly identified as troubling from a women's rights perspective.[392]

Article 18 therefore appeared to contain an inherent contradiction between the duty of the State to protect the family as the custodian of traditional values, at the same time as ensuring the protection of the rights of women. A practical difficulty was that there were no decisions from the ACHPR to resolve this apparent contradiction.[393]

A further reason for the drafting of the African Women's Protocol was the fact that the African Charter does not explicitly address issues affecting the rights of women such as female genital cutting, forced marriages and violence against women.[394] It was also argued that women in Africa continued to be victims of harmful practices and discrimination, in spite of the widespread ratification of

389 See Section 2.1.1 above.

390 Articles 18(1) and (2).

391 See African Charter *op cit* note 372 Preamble, Articles 29(1) and 61.

392 ME Adjami 'African courts, international law, and comparative case law: Chimera or emerging human rights jurisprudence?' (2002) 21 *Michigan Journal of International Law* 103 at 123; MS Nsibirwa ' A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 1 at 41; H Onoria 'Introduction to the African system of protection of human rights and the draft Protocol' in W Benedek *et al* (eds) *Human Rights of Women* (2002) 231 at 234; Viljoen *op cit* note 376 at 269; see however DM Chirwa 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on Women's Rights' (2006) 53 *Netherlands International Law Review* 63 at 69-70 *contra*.

393 Onoria *loc cit*.

394 See R Karugonjo-Segawa *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2005) 6-7.

the African Charter and international such as the Women's Charter by African States.[395]

The Protocol emerged from two parallel processes. In March 1995, the ACHPR (working in association with Women in Law and Development in Africa) held a seminar on women's rights, where it was decided that an additional protocol to the African Charter should be drawn up to address women's rights.[396] The OAU Assembly Heads of State and Government affirmed the need for such a protocol in July 1995, and a draft document (known as 'the Draft Kigali Protocol') was approved by the ACHPR in 1999. At the same time, the Women's Unit in the OAU was working on a draft OAU Convention on the elimination of all forms of harmful practices affecting the fundamental rights of women and girls.[397] A draft Protocol, consisting of an integrated version of the two documents, was completed in September 2000. The final version was adopted in July 2003 in Maputo, Mozambique, and the Protocol acquired legal force on 25 November 2005. At the time of writing, 27 countries had ratified the Protocol.[398]

2.2.2 Overview of contents

This section briefly outlines the key articles of the Protocol in the field of violence against women, with reference to international instruments, particularly the Women's Convention.

395 D Olowu 'A critique of the rhetoric, ambivalence, and promise in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2006) *Human Rights Review* 78 at 81.

396 Nsibirwa *loc cit*.

397 *Idem* at 42.

398 See AU website *op cit* note 385. (Accessed on 20 June 2010.)

Article 1 comprises the definition section of the African Women's Protocol, where the meaning of the terms 'discrimination against women' as well as 'violence against women' are set out (among others). The definition of 'discrimination against women' is almost *verbatim* to that employed in CEDAW, and it is clear that both 'direct' and 'indirect' forms of discrimination are included. 'Violence against women' is defined as follows:

> [A]ll acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

This definition is broader than the one contained in the Violence Declaration in that it includes 'economic harm'.[399] This is important in the African context where, for example, widows may be denied their inheritance through the practice of 'property-grabbing'.[400] The definition also includes the phrase 'in peacetime and during situations of armed conflicts or of war' – again a valuable emphasis in the African situation.[401] Furthermore, Article 1 uniquely provides a definition for 'harmful practices', i.e. all behaviour, attitudes and practices that negatively affect the fundamental rights of women and girls, such as their rights to life, health, dignity and physical integrity.[402]

399 In this respect the definition is similar to that proposed in the draft Convention on Preventing and Combating Violence against Women and Domestic Violence currently under preparation by the Council of Europe – see Part C, Section 3.2 above.

400 F Banda 'Building on a global movement: Violence against women in the African context' (2008) 8 *African Human Rights Law Journal* 1 at 18; LH Limann 'Practices and rites related to widowhood and the rights of women in Africa: The Ugandan experience' (2002) *Human Rights Development Year Book* 187 at 215-217.

401 Karugonjo-Segawa *op cit* note 394 at 16.

402 *Idem* at 15.

Similar to the Women's Convention, Article 2 of the African Women's Protocol imposes a series of obligations on States to combat discrimination against women through appropriate legislation, institutional and other measures, such as the inclusion of the principle of equality between men and women in their national constitutions.[403] States also have a duty to 'modify the social and cultural patterns and conduct of women and men' with a view to eliminating harmful cultural and traditional practices, as well as all other practices based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.[404] In contrast to Article 2(e) of the Women's Convention, the Protocol does not impose an explicit duty on States to 'take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise'.[405]

The Women's Protocol provides that every woman has the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.[406] States must take measures to prohibit the exploitation or degradation of women, and to ensure the protection of every women's right to respect for her dignity. Importantly, this includes the protection of women from all forms of violence, particularly sexual and verbal violence.[407] The link drawn here between the protection from all forms of violence and dignity is a significant one, given the statement in both the ICCPR and ICESCR that other rights derive from the inherent dignity of the human person.[408]

403 Art 2 § 1(a).
404 Art 2 § 2.
405 Chirwa *op cit* note 392 at 73.
406 Art 3 § 1.
407 Art 3 §§ 3 and 4.
408 See ICCPR and ICESCR Preamble; also S Cowen 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 34 at 49.

Article 4, which states that every woman is entitled to respect for her life and the integrity and security of her person, is the central clause dealing with violence against women (although this issue is also interwoven with several other articles of the document).[409] States are required to take a range of measures to address violence against women, including enacting and enforcing laws to prohibit all forms of violence against women, 'including unwanted or forced sex whether the violence takes place in private or public'.[410] This provision is a key one in respect of jurisdictions where the criminalisation of marital rape remains problematic.[411]

States are further expected to adopt such 'other legislative, administrative, social and economic measures as may be necessary' to ensure the prevention, punishment and eradication of all forms of violence against women.[412] The omission from the Protocol of any reference to the 'due diligence' standard is notable. In addition, a review of key international instruments shows that duties are imposed on States to respond 'by all appropriate means and without delay'.[413] The language used in Article 4 of the Protocol seems curiously weak by comparison. States are required to 'take appropriate and effective measures' – there is no reference to urgency or responding 'without delay'. Also surprisingly absence from this article of the Protocol is any statement to the effect that violence against women constitutes discrimination.

409 See F Banda 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights* 2 ed (2008) 441 at 456.

410 Art 4 § 1(a).

411 Banda *op cit* note 400 at 13.

412 Art 4 § 1(b).

413 See discussion of CEDAW's General Recommendation No. 1 in Chapter 3, the Violence Declaration and the Beijing Platform in Chapter 4 and the Convention of Belém do Pará in Part B of this Chapter. See also Tables 1 to 4 of *Annexure A*.

Having said this, the provisions of Article 4 remain important. States are required, *inter alia*, to identify the causes and consequences of violence against women and to take measures to prevent and eliminate such violence.[414] In addition, they should take steps to eradicate elements in traditional and cultural beliefs, practices and stereotypes that legitimise the persistence and tolerance of violence against women.[415] They are furthermore expected to establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.[416] Importantly, States must provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women.[417] The Article also addresses specific instances of vulnerability, such as trafficking, medical experiments without women's consent and the situation of women refugees.

In dealing with the special protection of elderly women,[418] States Parties undertake to ensure the rights of elderly women to freedom from violence, including sexual abuse and discrimination based on age.[419] Article 23 mirrors this provision in respect of women with disabilities. [420]

Against the background of the AIDS pandemic in sub-Saharan Africa,[421] Article 14, which deals with health and reproductive rights, is also worth mentioning. In terms of this provision, States Parties must ensure that the right to health of women, including sexual and reproductive health, is respected and promoted.

414 Art 4 § 1(c).
415 Art 4 § 1(d).
416 Art 4 § 1(f).
417 Art 4 § 1(i).
418 Art 22.
419 Art 22(b).
420 Art 23(b).
421 See Chapter 2, Section 2.1.

This includes the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS, as well as the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.[422]

Article 16 provides that women have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties must grant to women, whatever their marital status, access to adequate housing. This recognition is significant, given the links between women's lack of access to adequate housing and domestic violence.[423] The UN Special Rapporteur on Adequate Housing has described Article 16 as a model example for 'regional recognition of women's equal rights to access housing'.[424] In this regard, the African Women's Protocol expands on the Women's Convention, which only refers to women's right to have access to adequate housing in a very limited sense.[425]

The African Women's Protocol further protects women's equal right to acquire and manage her own property during the course of marriage, and to equal benefit in the distribution of joint property on dissolution of marriage.[426] It also guarantees widows certain rights,[427] and provides that women have the right to inherit, in equal shares with men, the property of their parents.[428] Property ownership has been shown as a valuable strategy to reduce women's

422 Art 14(1)(d) and (e). See in this regard Viljoen *op cit* note 376 at 272-273.
423 H Combrinck *Living in Security, Peace and Dignity* (2009) 1-2.
424 M Kothari *Report by the Special Rapporteur on Adequate Housing: Women and Adequate Housing* UN Doc E/CN.4/2006/118 (dated 27 February 2006) para 24.
425 See Art 14(2)(h) of the Women's Convention.
426 Articles 6(j) and 7(d).
427 Art 20.
428 Art 21(1).

vulnerability to gender-based violence and HIV/AIDS,[429] and therefore these provisions are important when considering issues of violence against women in the African context. Finally, the Protocol requires States Parties to ensure effective access by women to judicial and legal services, including legal aid,[430] and to provide for appropriate remedies to any woman whose rights or freedoms have been violated.[431]

South Africa has ratified the Protocol; at the time of ratification, it also noted certain reservations and interpretative declarations.[432]

2.2.3 Implementation mechanisms

The African Women's Protocol does not introduce any 'new' mechanisms to oversee its implementation.[433] Instead, the implementation and interpretation of the document is slotted into the existing arrangements for the African Charter. In this way, the Protocol is unfortunately subject to the same shortcomings that have limited the implementation of the Charter.[434]

429 ICRW *et al Women's Property Rights, HIV and AIDS and Domestic Violence: Research Findings from Two Districts in South Africa and Uganda* (2008) viii.

430 Art 8(a).

431 Art 25(a).

432 See JD Mujuzi 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations' (2008) 12 *Law, Democracy and Development* 41 at 52-60. None of these reservations or declarations relate directly to violence against women.

433 See Articles 26, 27 and 32.

434 R Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International Law: Modern Feminist Approaches* (2005) 253 at 269-270; Banda *op cit* note 409 at 470-471.

The ACHPR is responsible for monitoring the implementation of the Protocol – through the system of state reporting.[435] Article 27 provides that the African Court of Human and Peoples' Rights has jurisdiction over matters of interpretation of the Protocol.[436]

The thorny question is whether the ACHR has the resources and the commitment to women's rights issues to carry out this task in a vigorous and progressive way.[437] Murray has pointed out that while the Commission has a broad rage of mechanisms at its disposal to protect and promote the rights in the Charter, few have historically been used to enhance the rights of women.[438] On the positive side, considerable gains have been made, as seen, for example, in the establishment of the mandate of a Special Rapporteur on women's rights and the adoption of resolutions specific to women by the Commission since 2004.[439] However, as noted, little jurisprudence applicable to women's rights has emerged from the Commission.

Previously, this was partly due to the fact that women's organisations did not fully explore the potential role of the ACHPR in protecting women's rights.[440] This situation arose from a number of factors, including an initial focus on development rather than on human rights among African women's organisations,

435 Art 26.

436 See discussion of the African Court on Human and Peoples' Rights in Section 2.1.2 above.

437 Banda *op cit* note 409 at 471.

438 Murray *op cit* note 434 at 259.

439 See eg Resolution on the Situation of Women in Africa (ACHPR/Res.66(XXXXV)04 dated 2004); Resolution on the Status of Women and the Entry into Force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (ACHPR/Res.85(XXXXVIII)05 dated 2005); Resolution on the situation of Women in the Democratic Republic of Congo (ACHPR/Res.103(XXXX)06 dated 2006).

440 Murray *op cit* note 434 at 259-260.

a lack of awareness about the system on the part of such organisations, and a lack of financial resources.[441] Certain of these factors, such as resource constraints, may still currently have an impeding effect. It is nonetheless interesting to note that even with a greatly increased degree of attentiveness among women's organisations to human rights and participation in the activities of the ACHPR, these organisations have not made use of the complaints mechanism, even now that the Protocol has entered into force. The reasons for this remain to be explored.[442]

3. GENDER-RELATED INSTRUMENTS: DEVELOPMENTS AT SUB-REGIONAL LEVEL

In addition to the adoption of the African Protocol, the African system has lately seen certain developments indicating that sub-regional bodies may in the future play a more prominent role in the protection and promotion of women's rights. For example, the Economic Community of West African States ('ECOWAS') Court of Justice recently handed down the first ruling on women's rights by a sub-regional body in *Hadijatou Mani Koraou v Niger*.[443] Furthermore, two

441 CE Welch 'Human rights and African women: A comparison of protection under two major treaties' (1993) 15 *Human Rights Quarterly* 549 at 557-558; F Butegwa 'Using the African Charter on Human and Peoples' Rights to secure women's access to land in Africa' in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 495 at 509-510.

442 This exploration, while important, falls outside the focus of this study.

443 Judgment No. ECW/CCJ/JUD/06/08 (dated 27 October 2008). Unofficial English translation of judgment provided by Interights available at [www.interights.org/view-document/index.htm?id=533]. (Accessed on 15 March 2010.) The matter dealt with the customary practice of 'wahiya', which entails a man acquiring a young woman to work as a servant (as well as a concubine) under slave-like conditions. While the Court found in favour of the applicant, there are several aspects of the judgment that are

gender-related instruments have been adopted in the southern and central African subregions respectively that may also contribute to the normative framework relating to violence against women. These are the Great Lakes Protocol on the Prevention and Suppression of Sexual Violence against Women and Children[444] and the SADC Protocol on Gender and Development, discussed next.

3.1 SADC Protocol on Gender and Development

The most recently adopted sub-regional instrument is the Southern African Economic Development Community ('SADC') Protocol on Gender and Development.[445] At the time of writing, the Protocol had attracted two ratifications (those of Namibia and Zimbabwe).

The SADC Protocol had its genesis in the 1997 SADC *Declaration on Gender and Development*[446] and an Addendum on violence against women, accepted in

disconcerting, for example, the Court's unwillingness to examine the legislation of Niger to establish whether there had been a violation of Art 1 of the African Charter (which requires the State to take legislative and other measures to give effect to the rights in the Charter) – para 60. This stands in contrast to the approach taken by other human rights bodies.

444 The Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, agreed on by eleven countries in the Great Lakes region in 2006, came into force in June 2008. This Protocol, innovative in its combination of international humanitarian law and international criminal law, was developed in the specific context of sexual violence against women and children during and after the protracted armed conflict in the Great Lakes region. Because of this particular focus, the document falls outside the ambit of this study, and will accordingly not be discussed here. For a brief discussion, see Banda *op cit* note 409 at 458.

445 Adopted at the SADC Summit and Heads of Government in Johannesburg, South Africa, on 17 August 2008.

446 Adopted on 8th September 1997. Text available at official SADC website at [www.sadc.int/index/browse/page/174]. (Accessed on 16 June 2010.) Building on the SADC Treaty, the Women's Convention and the Beijing Platform, Action, the

1998,[447] which called for States to consider the adoption of a legally binding instrument on the prevention of violence against women and children.

In 2005, the process of transforming the Declaration and its Addendum into a binding document formally commenced, steered by the SADC Secretariat in collaboration with civil society organisations. Adopted in August 2008, the Protocol will enter into force after ratification by two-thirds[448] of the Member States.

Part Six of the SADC Protocol (Articles 20 to 25) deals in depth with gender-based violence and State obligations to address such violence. Importantly, it attaches time-frames to the duties undertakes by States. The key articles deal with legislative requirements, setting out how States should (by 2015) address gender-based violence in legislation. States must also review and reform their criminal laws and procedures to (*inter alia*) eliminate gender bias. Further articles address in detail the provision of services to victims of gender-based violence, including police, prosecutorial, health, social welfare and legal services and mandate training for service providers.

The implementation of the Protocol, set out in Articles 34 and 35, rests on States Parties in the form of the obligation to firstly ensure that national action plans,

Declaration *inter alia* requires signatories to take urgent measures to prevent and deal with the increasing levels of violence against women – para H.

447 Addendum on the Prevention and Eradication of Violence against Women and Children (1998). Reprinted in (1999) 26 *Review of African Political Economy* 415-417. This Addendum set out further detailed commitments regarding measures to address violence against women and children. It also contained a provision stating that urgent consideration should be given to the adoption of legally binding SADC instruments on preventing violence against women and children – para 26.

448 At the time of writing, SADC has fifteen Member States. This means that 10 ratifications are required.

with measurable time frames, are in place.[449] They are also required to ensure that national and regional monitoring and evaluation mechanisms are developed. In order to facilitate such monitoring, States Parties must collect and analyse baseline data against which progress in achieving targets can be measured.[450] Significantly, States Parties are expected to mobilise and allocate the necessary human, technical and financial resources for the successful implementation of the Protocol.[451] As a further aspect of implementation, States Parties are required to submit progress reports to the SADC Council and Summit for consideration once every two years.[452]

This document is potentially far-reaching in that it sets out tangible time-frames and in-depth provisions relating to the monitoring of its implementation. However, full compliance with the Protocol will undeniably have resource implications for States in areas where service provision is already imperilled, such as the public health sector. For example, Article 20, paragraph 2, requires the provision of universal access to post exposure prophylaxis to victims of sexual offences to reduce the risk of contracting HIV.[453]

On a more fundamental level, though, commentators have rightly questioned the wisdom of adopting a treaty on gender and development in the SADC (i.e. subregional) context, when there is already a legally binding instrument on women's rights at the continental level.[454] I concur with the conclusion reached by Forere and Stone that the SADC Protocol to a large extent constitutes a

449 Art 35 § 2.
450 Art 35 § 3.
451 Art 33 § 2.
452 Art 35§§ 4 and 5.
453 Art 20 § 2(b).
454 See M Forere & L Stone 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights?' (2009) 9 *African Human Rights Law Journal* 434 at 438.

duplication of the African Women's Protocol, with serious question marks hanging over the capacity of the sub-regional human rights institutions to effectively oversee the implementation of the SADC Protocol.[455] This duplication, and the energy and resources that may be expended towards the 'maintenance' of this sub-regional document in the future, appears even more unfortunate when one considers the dearth of communications on women's rights brought before the African Commission.[456]

4. EVALUATION: AFRICAN SYSTEM

The African Women's Protocol has been met with mixed reviews. On one hand, gender activists have referred to the adoption of the Protocol as 'an important event in the history of African women's struggle for the recognition of their rights'.[457] MacKinnon has also praised the Protocol for putting Africa 'in the lead on women's equality in world law'.[458]

Similarly, Viljoen is of the opinion that the Protocol takes an 'undeniable normative step forward'.[459] However, he expresses concern that the main reasons for the deficiencies in the supervisory procedures under the African Chapter (as well as the Women's Convention) – i.e. lack of compliance with reporting obligations, the failure on the part of States to domesticate treaty obligations and implement concluding observations, and the limited use of complaints

455 *Idem* at 453-456.

456 See discussion in Section 2.2.2 above.

457 K Adjamagbo-Johnson 'The entry into force of the Protocol on the Rights of Women in Africa: A challenge for Africa and women' *Pambazuka News* (24 June 2004) cited in Chirwa *op cit* note 392 at 64.

458 CA MacKinnon *Are Women Human? And Other International Dialogues* (2006) 9.

459 Viljoen *op cit* note 375 at 272; see also Banda *op cit* note 400 at 84; Olowu *op cit* note 395 at 85.

mechanisms – are also likely to plague the implementation of the African Women's Protocol.[460]

Murray, on the other hand, has questioned why the decision was taken in the first place to propose an additional Protocol, when existing mechanisms such as the State reporting system and the ability to submit cases before the ACHPR had not been fully explored.[461] Her assessment of the substantive provisions is that the Protocol is hardly a 'comprehensive restatement of existing obligations', nor is it structured to be an interpretation of the Charter for women.[462] She concludes that one of the underlying aims in drafting the Protocol was to develop a document that would be a promotional tool and over which there would be a sense of ownership on the part of African organisations. What is missing, according to her, is an overall vision of how the Protocol would consolidate existing standards, interpret the African Charter for women or ensure mechanisms for enforcement.[463]

Chirwa observes that while the Protocol has great potential to transform women's lives on the continent, it also provides the raw materials for its own failure.[464] He argues that the Protocol's greatest weakness is that it departs significantly from the core components of African perspectives on human rights as established by the African Charter and the African Charter on the Rights and Welfare of the Child.

460 Viljoen *op cit* note 376 at 275.
461 Murray *op cit* note 434 at 261.
462 *Idem* at 269.
463 *Idem* at 271.
464 Chirwa *op cit* note 392 at 64.

Looking at the provisions on violence against women, I concur with commentators who have noted that the Protocol advances the existing normative structure. Firstly, the Protocol emphasises the importance of 'institutional machinery' (such as the allocation of budgetary resources) and the provision of services to victims that underpin the State's legislative response to violence against women. While it is true that certain of these duties have been set out in other documents, the African Women's Protocol now constitutes a *legally binding* document[465] in the African human rights system, which elevates its significance as a standard-setting document.

The articles specific to violence against women (or harmful practices, as the case may be) should, secondly, be read with other inter-locking provisions, such as Article 25, which requires the States to ensure access to justice for women and to provide appropriate remedies where women's rights have been violated.[466] Another example is the right to equal access to housing.[467]

By thus considering the provisions on violence against women in conjunction with other articles of the Protocol, the progressive potential of the document becomes even more apparent. This reading is in line with the general principle of the indivisibility of and inter-relationship between rights. One hopes that the Commission and in due course, the African Court, will be presented with an opportunity to consider the provisions of the African Women's Protocol in respect of violence against women, especially since there is now forward-looking jurisprudence from other regional human rights bodies to provide guidance (depending of course, on the facts and legal question in the particular case).

[465] In respect of ratifying States.
[466] See discussion in Section 2.2.1 above.
[467] Art 16 – see Section 2.2.1.

I have argued elsewhere that interpretative guidance may be one way in which the newly emergent African human rights instruments may have an impact on law reform initiatives. In jurisdictions where the law reform process has faltered or remains incomplete, a court challenge to existing (or recently amended) legislation may be the only way to effect changes. For example, in spite of recent amendments to legislation on sexual violence, both Kenyan and Ethiopian law still fail to criminalise marital rape.[468] This is a serious shortcoming, and there can be no doubt that these two countries are falling short of the standards set in the African Women's Protocol, which requires States to ensure the prevention, punishment and eradication of *all* forms of violence against women. This failure should be open to court challenge at national level, even though both countries at the time of writing are only signatories to the Protocol (i.e. they have yet to ratify the document).[469]

Another prospective level of impact is that of advocacy and mobilisation. Ebeku identifies a number of instances where the African Women's Protocol, even when it was still in draft form, already made its influence felt in law reform initiatives at the national level.[470] The potential of these instruments as promotional tools for the purposes of advocacy and other strategies should not be underestimated, especially when it comes to the 'infrastructure' provisions such as budget allocation, training of police officials and other aspects that are crucial to the successful implementation of legislation.

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468 S 3(1) read with s 43(5) of the Kenyan Sexual Offences Act 3 of 2006; Art 620 of the Ethiopian Criminal Code as amended in 2005.

469 See AU website *op cit* note 385. (Accessed on 20 June 2010.)

470 KSA Ebeku 'Considering the Protocol on the Rights of Women in Africa' (2006) 36 *Africa Insight* 24 at 26.

In this respect, the effect of the 'interlocking' provisions of the Protocol and other documents should once again be taken into consideration. For example, given the intersections between sexual violence and women's disproportionate vulnerability to contracting HIV, the provisions of the Protocol that relate to health and reproductive rights[471] should be taken into account when advocating for changes to existing legislation on sexual violence. Similarly, the provisions on the elimination of harmful practices, read with the guarantee of the rights of widows,[472] may be important tools for advocacy in jurisdictions where systematic violations such as 'widow-cleansing' or property-grabbing are still tolerated.

In this regard, the sense of ownership that Murray mentions, and the credentials of these instruments as 'African' documents, may go a long way to consolidate their power.[473] This can imply power in a direct, short-term sense of overcoming instances of lack of political will on the part of governments (for example, to allocate the required budgetary resources). But it can also indicate the longer-term transformative power of these instruments – in other words, to change the societal beliefs and norms that underlie unequal gender relations and contribute to violence against women.

Individual African countries are at present in the process of either reviewing or introducing new legislation addressing gender-based violence. Even a country such as Sierra Leone, still reeling in the after-shock of eleven years of armed conflict, recently introduced three laws aimed at combating gender inequality,

471 Art 14.

472 Art 22.

473 Murray *op cit* note 434 at 271; see also C Ocran (2007) 15 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' *African Journal of International and Comparative Law* 147 at 152.

including domestic violence.[474] It has been argued that the speed with which the Africa Women's Protocol attracted the number of ratifications required to come into force is an indication of a renewed commitment among African states to address women's rights concerns.[475] All of these developments, together with the adoption of the instruments described above, indicate a gathering of momentum on the continent to address violations of women's rights.

PART E: EVALUATION – REGIONAL HUMAN RIGHTS SYSTEMS

Despite the difference between the three regional systems described above, instructive similarities can be observed. The first similarity is that all three systems have seen developments by means of a specific instrument outlining women's right to freedom from violence. In the Inter-American system, this instrument was adopted in 1994 in the form of the Convention of Belém do Pará, which focuses particularly on violence against women; in the case of the European system, a draft Convention that is also specifically directed at violence against women is currently in the process of development. And the African Women's Protocol, adopted in 2003, includes detailed provisions addressing violence against women in the form of Articles 3 and 4. The regional human rights systems have therefore all embarked on formal standard-setting processes, albeit at different stages during the past sixteen years.

These instruments have the following in common: a clear definition of 'violence against women'; a link between violence against women and discrimination (in the case of the Convention of Belém do Pará and the draft European

474 E Hanciles 'From frameworks and norms on sexual and gender-based violence to action' *Pambazuka News* (14 July 2008).

475 Ocran *op cit* note 473 at 152.

Convention); and an exposition of State obligations to address violence against women. The first two documents also contain an explicit statement of the right to freedom from violence. All three documents are legally binding on ratifying States.

The emerging jurisprudence has been constructed around the foundational instruments (the American Declaration and the American Convention, and the European Convention respectively), as well as existing case law relating to positive State obligations to protect rights and prevent violations by private actors. The human rights bodies have therefore drawn on existing principles, and expanded these principles to apply to situations of violence against women.

However, it is notable that both the IACrtHR and the ECrtHR have pointed out that additional considerations may apply in the case of violence against women. For example, in the case of *González et al v Mexico*, the IACrtHR held that an obligation of 'strict due diligence' arose when the three young women were reported as missing, given the context of the case and the fact that the State was aware that there as a real and imminent risk that the victims would be sexually abused, subjected to ill-treatment and killed. This obligation of 'strict due diligence' required prompt and immediate action to try and find the victims alive. The Court found that the obligations imposed on the State were amplified by Article 7(b) of the Convention of Belém do Pará. Similarly, the Court held that the obligation to conduct an effective investigation has a wider scope when dealing with a case of a woman who is killed or ill-treated or whose personal liberty is affected within the framework of a general context of violence against women.

The European Court followed an analogous approach in *Bevacqua v Bulgaria*, where the Court emphasised the vulnerability of victims of domestic violence and the concomitant need for active State involvement in their protection.[476]

One notes that in this way the regional human rights jurisprudence confirms and, in fact, *strengthens* the norms and standards that have simultaneously developed in international law (in the global sense).

[476] Bevacqua judgment *op cit* note 292 para 65.

CHAPTER 6

WOMEN'S RIGHT TO FREEDOM FROM VIOLENCE IN SOUTH AFRICAN LAW

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1. INTRODUCTION

Having charted the recognition of women's right to freedom from violence in international human rights law in previous chapters, this thesis now turns to South African law. It first examines the right to freedom from violence as included in the South African Constitution, with reference to the broader environment of the constitutional text. It then investigates the interpretation of this right by the two highest courts, i.e. the Constitutional Court and the Supreme Court of Appeal ('SCA').[1]

This inquiry is done with reference to the central research question of this study, which has been formulated as establishing how the development of women's right to freedom from violence in international and regional human rights law should guide the understanding of this right in South African jurisprudence.[2] Two sub-questions were identified: positive duties on the South African State to address private acts of violence against women; and State liability arising from failure to comply with such duties. These aspects will accordingly receive particular attention.

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1 One exception is the High Court judgment in *S v Engelbrecht* 2005 (2) SACR 41 (WLD); this decision was included because of the importance of the issue dealt with (i.e. the defence of 'private defence' in cases of battered women killing their abusive partners) as well as the instructive approach taken by the court in this instance. See Section 3.4.3 below.

2 See Chapter 2, Section 3.

2. THE RIGHT TO FREEDOM FROM VIOLENCE IN THE SOUTH AFRICAN CONSTITUTION

2.1 Constitutional provision

Section 12 of the South African Constitution[3] reads as follows:

> (1) Everyone has the right to freedom and security of the person, which includes the right –
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) *to be free from all forms of violence from either public or private sources;* [4]
> (d) not to be tortured in any way; and
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right –
> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and
> (c) not to be subjected to medical or scientific experiments without their informed consent.

2.2 Background

Commentators have observed that the individual's right to physical and psychological integrity (as an adjunct to both the right to life and the right to liberty) is not a new invention - the rights to life, liberty and property have long

[3] Constitution of the Republic of South Africa Act 108 of 1996 [hereafter 'the Constitution'].

[4] Emphasis added.

been recognised as the three 'classic' fundamental rights.[5] Bishop and Woolman make the persuasive point that the constitutional protection of the right to freedom and security of the person (as in the case of section 12) is a recognition that the history of emancipation associated with the modern nation-state is often, if not inevitably, accompanied by domination.[6] They observe that this section accordingly represents a 'preoccupation with the worst forms of abuse that the State – and modern society – can visit upon the individual'.[7] (I would argue that the 'domination' referred to by the authors in this instance also includes the power imbalances and inequality inherent in gender-based violence.) Article 12 therefore aims to curb State excesses such as unlawful arrest and detention or torture, but also, importantly, violence committed by 'private' actors.

The right to freedom from violence, as set out in section 12(1)(c), constitutes an innovation in the 1996 Constitution,[8] since it was not expressly[9] included in the interim Constitution. Albertyn explains that the constitutional protection of women's right to freedom from violence had not been a particular focus of advocacy during the negotiations for the interim Constitution in 1992, when the main concerns were gender equality and the relationship between customary law and the Constitution and the Bill of Rights.[10] However, both gender-based

5 G Carpenter 'The right to physical safety as a constitutionally protected human right' in G Carpenter (ed) *Suprema Lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 139 at 140.

6 M Bishop & S Woolman 'Freedom and security of the person' in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2 ed (Original Service, 2006) 40-23.

7 *Idem* at 40-24 – 40-25. See also G Devenish *A Commentary on the South African Bill of Rights* (1999) 129.

8 I Currie & J De Waal *The Bill of Rights Handbook* 5 ed (2005) 303.

9 Bishop and Woolman point out that this right had already been recognised by the courts under the Constitution of the Republic of South Africa Act 200 of 1993 [hereafter 'the 1993 Constitution'] – Bishop and Woolman *op cit* note 6 at 40-48 and authorities cited there. See also discussion in Section 3.3.1 below.

10 C Albertyn 'Introduction: Women's freedom and security of the person' in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 295 at 297 fn 14.

violence and reproductive rights formed the subject of feminist advocacy during the subsequent Constitutional Assembly process, leading to the inclusion of section 12(1)(c) in the final document.

Although the exact history of the incorporation of the right to freedom from violence in the Bill of Rights is not well-documented, it appears that this inclusion occurred through the *Women's Charter for Effective Equality*, a document that was adopted by the National Women's Coalition ('NWC') in 1994.[11] The NWC was a broad coalition of South African women's organisations that operated during 1992-1994 with the aims of mobilising women around equality and involving women in the constitutional process.[12] During the second half of 1993, the NWC engaged in a series of nation-wide thematic campaigns on issues of concern to women.[13] One of these campaign initiatives focused on violence to women.

The demands made by women during this campaign in respect of gender-based violence were eventually reflected in Article 10 of the *Women's Charter for Effective Equality*.[14] These claims included legal protection against sexual and racial harassment, abuse and assault; a call for facilities staffed by trained personnel where women could report cases of violence; the provision of accessible and affordable shelters and counselling services for survivors; and appropriate education and training for all service providers, including the police, prosecutors, magistrates, judges and district surgeons.

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11 See P Singh 'Protection from violence is a right' in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 135 at 142.

12 C Albertyn 'Women and the transition to democracy in South Africa' in C Murray (ed) *Gender and the New South African Legal Order* (1994) 39 at 50-57.

13 C Albertyn *et al Engendering the Political Agenda* (1999) 121.

14 *Women's Charter for Effective Equality* (Second draft of Charter drawn up through the National Women's Coalition structures, and approved at the National Conference on 27 February 1994 - copy on file with candidate).

Importantly, Article 10 of the *Women's Charter* also spells out the right to freedom from violence:

> Women shall be entitled to security and integrity of the person which shall include the right to be free from all forms of violence in the home, in communities, in the workplace and in public spaces.

According to Currie and De Waal,[15] the right provided for in section 12(1)(c) is modeled on Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.[16] The first part of this article reads as follows:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
> (c) …

The authors note that this Convention will provide useful comparative material for the interpretation of the right to freedom from violence, particularly in relation to the obligation that the rights impose on the State to prevent violence from private sources.[17]

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15 Currie & De Waal *op cit* note 8 at 303 fn 51; Bishop & Woolman *op cit* note 6 at 40-48 fn 5.

16 GA Res 2106A (XX) dated 21 December 1965, entered into force 4 January 1969 [hereafter 'the Race Convention'].

17 Currie & De Waal *op cit* note 8 at 303 fn 51.

However, the Committee on the Elimination of Racial Discrimination[18] has pointed out in its General Recommendation No. 20 that Article 5 of the Race Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not in itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights.[19] It notes that most of these rights have been elaborated in the International Covenants on Human Rights.[20] For this reason, I look at one of these, the International Covenant on Civil and Political Rights, in more detail below.

2.3 'The right to freedom and security of the person'

Bishop and Woolman recount that section 11 of the interim Constitution originated from two distinct rights found in the early drafts of this document: a right to personal liberty and a right to freedom from torture and inhuman punishment.[21] The Technical Committee on Fundamental Rights then drafted a new right to 'Security of the Person' (which included the right to be free from torture or inhuman punishment) and combined this with the right to personal liberty. This combined provision was termed 'Freedom and Security of the Person' in the interim Constitution.[22]

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18 The Committee on the Elimination of Racial Discrimination [hereafter 'CERD'] is tasked with overseeing the implementation of the Race Convention.

19 CERD *General Recommendation No. 20: Non-Discriminatory Implementation of Rights and Freedoms (Art. 5)* (dated 15 March 1996) para 1.

20 *Ibid.*

21 Bishop & Woolman *op cit* note 6 at 40-1.

22 Section 11 of the 1993 Constitution provided as follows:
(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

The enacted version of Section 12 in the 1996 Constitution differs substantially from both Section 11 in the interim Constitution and early draft formulations of Section 12.[23] The right to freedom of the person and the right to security of the person (which had been separated in the drafts) are placed in the same subsection, i.e. 12(1). This subsection now embraces three different kinds of freedoms that had previously been placed in different subsections: freedom of the person and its largely procedural subsections, freedom from all kinds of violence and freedom from torture and crucial and degrading treatment and punishment. Subsection 12(2) underwent a change in name and substance. It is no longer the right to security; instead, it is the right to bodily and psychological integrity.

Bishop and Woolman point out that when viewed through the lens of women's rights, the re-organisation in the enacted version of section 12(2) is not ideal.[24] In earlier drafts, the freedom from all forms of violence had been joined to the rights to reproductive choice and to bodily integrity. All three these subsections thus dealt with matters of great importance for South African women. Under the reorganised section 12(2), reproductive rights are combined with the right to be free from medical experimentation without informed consent. Although bodily control is central to both these rights, *women*'s concerns are no longer the focus of the section.[25]

(2) No person shall be subject to torture of any kind, whether physical, mental, or emotional, not shall any personal be subject to cruel, inhuman or degrading treatment or punishment.

23 Bishop & Woolman *op cit* note 6 at 40-4.

24 *Idem* at 40-5.

25 The authors do concede that the jurisprudence emanating from section 12 suggests that these structural alterations have not in fact diminished women's rights: 'Real revolutions in the law have already been wrought from… [section] 12's protection of individuals against various sources of physical violence and psychological harm.' (*Ibid*.)

Carpenter similarly notes that it is unfortunate that a number of diverse issues are dealt with in a single provision: subsections 12(1)(a) and (b) deal with physical freedom (or liberty); section 12(1)(c) with the right (expressed in positive terms) to be free from all forms of violence from either public or private sources and 12(1)(d) and (e) with the right (couched in negative terms) not to be tortured or to be treated or punished in a cruel, inhuman or degrading way.[26] Subsection (2) moves to the right to bodily and psychological integrity, with specific reference to decisions concerning reproduction, control over one's body and the right not to be subjected to scientific experiments. While Carpenter proposes that all these aspects are obviously closely related, she cautions that the positive right to be free from violence could easily be overlooked, especially if one takes into account the detail in which the rights of arrested, accused and detained persons are spelled out in section 35.[27]

In spite of what may appear to be logical inconsistencies in the organisation of the subsections, the particular formulation of 'the right to freedom and security' in the 1996 Constitution, with the elaboration of discrete aspects such as the right to freedom from all forms of violence, clarified a number of the jurisprudential debates that have historically occurred around these rights in other jurisdictions (and initially, in South Africa, under the interim Constitution). I briefly consider certain of these debates.

26 Carpenter *op cit* note 5 at 141.

27 *Idem* at 141-142.

2.3.1 One right - or two?

One of the initial questions, arising from the combination of the right to liberty or freedom and the right to security in the majority of human rights instruments,[28] was whether these are in fact separate rights or whether they are 'two sides of the same coin'.[29] The generally accepted view appears to be that these are in fact different and distinct rights,[30] in spite of bodies such as the European Commission on Human Rights holding that the term 'liberty and security' must be read as a whole, and, in view of its context, must be taken as referring only to *physical* liberty and security (in the context of freedom from unlawful arrest or detention).[31]

In this regard it is useful to look at the interpretation of Article 9 of the ICCPR. Although Article 9 has usually been invoked as protection against unlawful arrest or detention (in other words, in the context of 'due process'), the article also guards the right to security of the person.[32] This was confirmed by the Human Rights Committee in *Delgado Páez v Columbia*.[33] The author, a Columbian teacher of religion and ethics, had received death threats as a result of complaints

28 See eg Art 9 of the ICCPR, Art 5 of the European Convention; Art 6 of the African Charter.

29 See H Combrinck 'Positive state duties to protect women from violence: Recent South African developments' (1998) 20 *Human Rights Quarterly* 666 at 682.

30 *Idem* at 683; see also D Davis 'Freedom and security of the person' in MH Cheadle *et al* (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (2005) 7-1 at 7-1.

31 European Commission on Human Rights *Adler and Others v Federal Republic of Germany Applications No. 5573/72 and 5670/72 (joined) Decision: Admissibility* (dated 16 July 1976) para 28; *Dyer v The United Kingdom App No. 10475/83 39 Decision: Admissibility* (dated 9 October 1984) 246 at 256. See also M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* 2 ed (2005) 213.

32 S Joseph *et al The International Covenant on Civil and Political Rights* 2 ed (2004) 304.

33 Human Rights Committee *Views: Delgado Páez v Columbia Communication No. 195/1985* UN Doc CCPR/C/39/D/195/1985 (1990).

he had submitted against the Apostolic Prefect and the education authorities regarding discrimination against him. After a work colleague was shot to death by unknown assailants and he himself was attacked, he left the country and obtained political asylum in France. The author filed a complaint alleging that the Columbian government had violated its obligation to protect his rights to equality, justice and life and therefore he had found it absolutely essential to leave the country.

In spite of the author not initially relying on this right, the Committee found a violation of Article 9(1) on the ground that the State Party had not taken, or had been unable to take, appropriate measures to ensure the author's right to security of the person. It stated that although the only reference in the Covenant to the right to security of person is to be found in Article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty.[34]

2.3.2 Meaning of the term 'freedom' or 'liberty'

Nowak explains that the term 'liberty of the person'[35] is fairly narrow and should not be confused with that of liberty (or freedom) in general.[36] It could be said that all human rights ultimately serve the realisation of 'human freedom' (in the broad sense), even when in accordance with their object and purpose they relate to differing dimensions of liberty. Liberty of the person, on the other hand, relates only to a very specific aspect of human liberty, i.e. the freedom of bodily

34 *Idem* para 5.5.

35 The right to freedom is set out in most of the international human rights instruments, although the term 'liberty' is generally used rather than 'freedom'.

36 Nowak *op cit* note 31 at 212. Although Nowak's discussion relates to the rights as set out in the ICCPR, I submit that his comments are also more broadly applicable.

movement in the narrowest sense. An interference with liberty of the person in this sense results from the forceful detention of a person at a 'certain, narrowly bounded location', such as a prison or other detention or correctional facility, a psychiatric facility, a rehabilitation facility for persons with substance addictions as well as an order for house arrest.[37] In these cases, the procedural guarantees under Article 9 of the ICCPR (comparable to section 12(1)(a) and (b) of the South African Constitution) are applicable.[38] Where the arrest or detention takes place in criminal proceedings, the procedural guarantees in Article 9, paragraphs 2 and 3, will also apply.[39]

All 'less grievous' restrictions on bodily movement, such as limitations on domicile or residency or expulsion from State territory, fall to be dealt with under freedom from movement under Articles 12 or 13 of the ICCPR (and

37 *Ibid.*

38 Art 9 of the ICCPR provides the following, under the heading 'Liberty and security of the person':

1. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

39 The equivalent rights in the South African Constitution are s 35(1) and (2).

section 21 of the Constitution).[40] Restrictions on other rights of liberty, such as freedom of religion, association or assembly, 'come still less under the coverage of personal liberty'.[41]

In *Ferreira v Levin NO & Others*,[42] the South African Constitution Court grappled with this question, i.e. whether the concept of 'freedom' as set out in subsection 11(1) of the interim Constitution included all forms of liberty or only physical liberty.[43] Bishop and Woolman observe (correctly) that because of the 'far stricter and more specific formulation' of section 12(1), this debate about the meaning of freedom that arose in respect of section 11(1) of the interim Constitution has largely been settled.[44] All five aspects or dimensions of the right, as listed in subsections (a) to (e), relate to physical liberty and aim to protect the bodily integrity of the individual against unwarranted intrusion by the State.[45] (The scope of subsection (c) however extends much further.[46]) The

40 Nowak *op cit* note 31 at 212.

41 *Ibid.* The equivalent rights under the South African Constitution are s 15 (freedom of religion, belief and opinion) and s 18 (freedom of association).

42 1996 1 BCLR 1 (CC). See also *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) para 44 for a summary of the questions animating this debate.

43 Ackermann J, in his minority judgment, proposed a 'broad and generous' reading of s 11(1): he argued that the right to freedom should be defined negatively as the right of individuals not to have obstacles to possible choices and activities placed in their way by the State - para 54. He further maintained that this section protected an unspecified number of 'residual' freedom rights. That is, it guaranteed protection of rights not specifically protected elsewhere in the Bill of Rights of the interim Constitution, such as immunity against self-incrimination under circumstances where the fair trial rights set out in section 25(3) of the interim Constitution did not apply. However, the majority (per Chaskalson P) disagreed with this interpretation, and held that the primary purpose of the right to freedom is to ensure that the *physical integrity* of every person is protected, for this is how a guarantee of freedom and of security of the person would ordinarily be understood. This is also the primary sense in which the phrase 'freedom and security' is used in public international law – *Ferreira v Levin NO & Others* para 170.

44 Bishop & Woolman *op cit* note 6 at 40-22; see also Currie & De Waal *op cit* note 8 at 293.

45 Ibid.

protection of physical liberty is therefore clearly the primary purpose of s 12(1). Section 12(2) carries this purpose further by protecting aspects of bodily self-determination.[47]

2.4 'The right to bodily and psychological integrity'

As explained above, section 12(2) entrenches the right to 'bodily and psychological integrity'. This right, as formulated here, has three components, i.e. the right to make decisions concerning reproduction, the right to security in and control over the body, and the right to be free from coercive medical and scientific experiments.

Commentators note that the structure of this provision makes it somewhat difficult to give 'distinct meaning' to 'bodily and psychological integrity' on the one hand, and 'security in and control over the body' on the other.[48] This also applies to the provisions in section 12(1): as Davis points out, the concept of bodily integrity lies at the heart of the right to freedom from torture and from cruel, inhuman or degrading treatment or punishment.[49] The right to bodily and psychological integrity furthermore links up with the right to freedom from violence, and I would argue that the dividing line between these two is a relatively permeable one.

46 See discussion in Section 2.5 below.
47 Currie & De Waal *op cit* note 8 at 293.
48 Bishop & Woolman *op cit* note 6 at 40-76.
49 Davis *op cit* note 30 at 7-16 – 7-17.

Bishop and Woolman suggest that section 12(2) recognises, at a minimum, that each 'physical' body is of equal worth and is entitled to equal respect.[50] They note that while the three subsections of section 12(2) give 'bodily integrity' concrete content, the same cannot be said for 'psychological integrity'.[51] Although psychological integrity already receives comprehensive protection in South African common law in the form of delictual damages for 'emotional shock' (and courts award such damages for a broad array of psychological trauma), it has been proposed that section 12(2) may be specifically meaningful in instances where the harm suffered by the complainant may not specifically fall under the right to dignity or the right to privacy.[52] For example, a father who suffered psychological harm because of his inability to protect his daughter from being raped.[53]

The right to 'security in and control over one's body', as guaranteed in section 12(2)(b), has to date received little explicit attention in South African law.[54] According to Bishop and Woolman, this provision creates a sphere of 'individual inviolability' with two components.[55] 'Security in' one's body means the protection of bodily integrity against physical invasions by the State and others.[56] The meaning of the right to 'control over one's body', in terms of section 12(2)(b), has not expressly been tested by the Constitutional Court; however, it

50 Bishop & Woolman *op cit* note 6 at 40-77.

51 *Idem* at 40-78 – 40-79.

52 *Ibid.*

53 L Magnus 'Dad gets rape-trauma payout' *Beeld* (16 February 2006).

54 Davis *op cit* note 30 at 7-4.

55 Bishop & Woolman *op cit* note 6 at 40-85.

56 The interpretation of s 12(2)(b) arose in two matters where the court had to decide whether the surgical removal of a bullet from a suspect in a criminal case constituted a limitation of the suspect's right to bodily integrity. Two divisions of the High Court reached different conclusions as to whether the surgical invasion constituted a justifiable limitation under s 36 of the Constitution – see *S v Xaba* 2003 (2) SA 703 (D) 708H; *S v Gaca* 2002 (1) SACR 654 (C) 658H *contra*.

has been argued that the judgment in *S v Jordan*[57] suggests that the Court may not be particularly sympathetic to 'uses' of the body that it finds morally problematic.[58]

The analysis of South African jurisprudence below, especially the judgments relating to sentencing, indicates that the Constitutional Court and the SCA have made progress in the recognition of women's right to sexual autonomy as a protected interest in the context of rape and sexual violence. I suggest that this right is an aspect of the right to control over one's body as guaranteed in section 12(2)(b), even where this is not explicitly articulated as such.

2.5 Formulation of Section 12(1)(c)

2.5.1 'Violence'

The use of the phrase 'all forms of violence' in section 12(1)(c) indicates an intention to include not only physical, but also emotional, verbal and psychological abuse in the ambit of this subsection.[59] South African legislation, most notably the Domestic Violence Act, is in line with this broad understanding in that it recognises 'economic abuse' as a form of domestic violence.[60]

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57 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC). The case related to the alleged unconstitutionality of provisions of the Sexual Offences Act 23 of 1957 prohibiting different aspects of commercial sex work, including 'sex for reward' (s 20(1)(Aa)) and 'brothel-keeping' (s 2).

58 Bishop & Woolman *op cit* note 6 at 40-89.

59 Cf the definition of 'domestic violence' in s 1 of the Domestic Violence Act 116 of 1998 [hereafter 'the DVA'].

60 According to s 1(ix) of the DVA, 'economic abuse' includes -

(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of

There appears to be a difference of opinion between certain commentators as to whether 'violence' for purposes of this subsection should be interpreted as a 'grave invasions of personal security' or whether the concept should be taken more broadly to also include 'ordinary' invasions.[61] As a general statement of principle I concur with Bishop and Woolman that the notion of 'violence' contemplated by this provision should not be construed in a narrow sense.

2.5.2 'From either public or private sources'

From a feminist perspective, the phrase 'from either public or private sources' is one of the most significant ones in this section. I have asserted elsewhere that the inclusion of this phrase clearly shows that the Constitution does not sustain any distinction between 'public' and 'private' violence.[62] This distinction has traditionally operated to justify an unwillingness on the part of the State to intervene in, for example, domestic violence.[63]

necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; or

(b) the unreasonable disposal of household effects or other property in which the complainant has an interest.

61 See Bishop & Woolman *op cit* note 6 at 40-49, commenting on Currie & De Waal *op cit* note 8 at 304. I suggest, however, that this apparent dispute rests on a misreading of Currie & De Waal and that the latter do not in fact intend to suggest that the Constitution provides the individual with protection only in the case of 'grave invasions'.

62 H Combrinck 'The right to freedom from violence and the reform of sexual assault law in South Africa' in J Sarkin & W Binchy (eds) *The Citizen and the State – South African and Irish Perspectives* (2001) 185.

63 *Ibid*. See also Chapter 1, Section 4.

Looking more closely at the obligations imposed on the State, Currie and De Waal observe that the State is required to protect individuals, both *negatively* by refraining from invasions of personal security itself and *positively* by discouraging private individuals from such invasions.[64] According to commentators, one likely area of controversy in relation to the negative obligations imposed on the State will be in assessing the limits of the State's power to use force, for example, in effecting arrests.[65]

Section 12(1)(c) imposes positive obligations on the State to protect individuals against violations of their physical integrity by others. It is this set of duties that is of particular interest in the context of violence against women,[66] where the perpetrators almost always stand in a private relationship to the victim.[67] It is also these positive obligations, amplified by section 7(2) of the Constitution, which enjoins the State to 'respect, protect, promote and fulfill' the rights in the Bill of Rights, that have provided the impetus for developments in the South African law of delict, initiated predominantly by the Constitutional Court judgment in *Carmichele v Minister of Safety and Security*.[68]

64 Currie & De Waal *op cit* note 8 at 304. Bishop & Woolman *op cit* note 6 at 40-49 – 40-55.

65 Currie & De Waal *op cit* note 8 at 304. See *Ex parte Minister of Safety and Security & Others: In re Ex parte Walters & Another* 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC), which dealt with the issue of 'minimum force' required to effect arrest.

66 Currie & De Waal *op cit* note 8 at 304.

67 The so-called 'vicarious liability' cases are an exception to this principle – see discussion below.

68 See Section 3.3.1.

3. WOMEN'S RIGHT TO FREEDOM FROM VIOLENCE EXAMINED BY SOUTH AFRICAN COURTS[69]

3.1 Introduction

Shortly after the adoption of the 1996 Constitution, I argued that although the inclusion of the right to freedom from violence might have far-reaching implications generally, its effect was likely to be felt most keenly in the area of violence against women.[70] I submit that this has been borne out by the body of case law that has since emerged. This body of case law pays particular attention to these positive State obligations to protect individuals against acts of private violence.

The jurisprudence relating to the right to freedom from violence is evolving around certain broad themes. For purposes of the discussion below, I have grouped the cases according to these broad themes. The first among these is the state duty to enact legislative measures to address domestic violence, which has been addressed in two judgments. Secondly, a substantial corpus of decisions deals with a failure on the part of the State to prevent acts of violence. Thirdly, a number of issues have arisen in the context of criminal law that elude easy classification under a single State obligation. These include recognition of the interests of the victim in sentencing in sexual violence cases and developing the principles of criminal liability in respect of abused women who kill the perpetrators.

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69 This section is to a large extent based on H Combrinck 'The dark side of the rainbow: Violence against women in South Africa after ten years of democracy' (2005) *Acta Juridica* 171-199.

70 Combrinck (1998) *op cit* note 29 at 667.

As explained in Chapter 2,[71] the discussion of judgments in this chapter will consider which sources of international law the courts consulted in these judgments, where applicable, and how much weight was attached to these sources. In certain instances, I describe the facts of each case in some detail in order to also provide an overview of the circumstances in which the right to freedom from violence has been invoked.

3.2 The State duty to enact legislative measures to address domestic violence

The first significant judgment in this line was *S v Baloyi*,[72] where the constitutionality of a key provision of the Prevention of Family Violence Act[73] was challenged. The appellant averred that section 3(5)[74] of the Prevention of Family Violence Act placed a reverse onus of proving absence of guilt on a person charged with breaching a family violence interdict. In doing so, the provision allegedly conflicted with the presumption of innocence, a limitation that could not be constitutionally justified.[75]

As an introduction to his assessment of the constitutionality of this provision, Sachs J establishes that the State is under a direct constitutional obligation to deal

71 Chapter 2, Section 4.1.

72 2000 (1) SACR 81 (CC) [hereafter '*Baloyi*'].

73 Act 133 of 1993. Except for two provisions, this Act was repealed by the DVA.

74 This section prescribed the procedure to be followed at an inquiry into an alleged breach of an interdict: it provided that the procedure set out in s 170 of the Criminal Procedure Act 51 of 1977 would be applicable to such an inquiry.

75 The Transvaal Provincial Division of the High Court (as it then was) had initially ruled in the appellant's favour and declared the section invalid. The matter was accordingly referred to the Constitutional Court for confirmation of the declaration of invalidity.

effectively with domestic violence, which includes the duty to enact appropriate legislation to reduce and prevent family violence.[76] This imperative is derived from section 12(1)(c), as read with section 7(2) of the Constitution. The Court points out that domestic violence further compels 'constitutional concern' in that it both reflects and reinforces patriarchal domination, which implies that the non-sexist society promised in the foundational clauses of the Constitution and the right to equality and non-discrimination are undermined when perpetrators enjoy impunity.[77]

The Court further notes that in enacting the Prevention of Family Violence Act, the legislature was acting in compliance with South Africa's international obligations. Sachs J finds these international duties firstly in the UDHR (referring to the right to freedom from fear).[78] In addition, he cites the provisions of a number of instruments that enjoin states to pursue policies to eliminate violence or discrimination against women (including by passing legislative measures), such as Article 4(d) of the Violence Declaration, Article 2 of the 'Convention on the Elimination of Discrimination Against Women' (*sic*), and Article 18 of the African Charter.[79] In terms of the weight to be attached to these instruments, the Court observes, with reference to section 233 of the Constitution, that 'these injunctions are directly relevant' here.[80]

On the other side of the equation, Sachs J emphasises that the need to protect family members from violence must be balanced against the protection that the

76 *Baloyi op cit* note 72 para 11.
77 *Idem* para 12.
78 *Idem* para 13.
79 *Ibid.*
80 *Ibid.*

Constitution must afford (in the form of the presumption of innocence) to persons against whom the domestic violence interdict has been granted.[81]

The eventual conclusion reached in this instance was that an alleged violator of an interdict is an 'accused person' as contemplated by section 35(3)(h) of the Constitution and accordingly entitled to the benefit of the presumption of innocence.[82] However, Sachs J held that section 3(5) does not impose a reverse onus on the accused and is therefore not inconsistent with the Constitution.[83] This conclusion was the result of the interpretation of section 170 of the Criminal Procedure Act preferred by the Court: a reading that imported only the summary procedure contained in section 170 and not the reverse onus.[84]

This judgment, and its treatment of domestic violence, was generally welcomed by commentators.[85] The significance of the judgment lies firstly in its unequivocal identification of the constitutional obligation resting on the State to deal effectively with domestic violence through the enactment of appropriate legislation.[86] Secondly, the recognition that domestic violence is a concern from the perspective of gender equality (in addition to violating the right to freedom and security of the person) is important.[87] Thirdly, and most importantly for current purposes, Sachs J clearly demonstrates how the 'constitutional

81 *Baloyi op cit* note 72 at para 14.

82 *Idem* para 23.

83 *Idem* paras 25–33.

84 See *Baloyi* paras 25, 33. Sachs J noted that the aim was to find the interpretation of the text which best fit the Constitution and balanced the duty of the state to deal effectively with domestic violence with its duty to guarantee accused persons the protection involved in a fair trial – para 26.

85 See eg P Andrews 'The Constitutional Court provides succour for victims of domestic violence' (2000) 16 *SAJHR* 337 at 339-341; S Jagwanth 'Equality in criminal law' (2000) 117 *SALJ* 681 at 687-688.

86 *Idem* at 688-689.

87 See in this regard Jagwanth *op cit* note 85 at 687-688.

imperatives' to enact appropriate legislation to reduce and prevent family violence are amplified by the standards set in international human rights law.

The *Baloyi* case has been influential in shaping subsequent judgments, not only in terms of providing an understanding of the peculiar nature of domestic violence (for example, its gendered dimensions),[88] but also in terms of emphasising that the State has clear constitutional (and international law) obligations to respond to violence against women.

The subsequent judgment in *Omar v Government of South Africa*[89] indeed to a large extent followed in the footsteps of *Baloyi*. The challenge here related to the successor of the Prevention of Family Violence Act, namely the DVA. The applicant disputed the constitutionality of section 8 of the DVA (which provides for a suspended warrant of arrest to be issued simultaneously with the granting of a protection order in terms of sections 5 or 6 of the Act).[90] He argued that section 8 violated his rights to freedom and security of the person, to a fair trial and to access to the courts.

Taking a similar approach to that adopted by Sachs J in the *Baloyi* judgment, Van der Westhuizen J first examines the context of the DVA. This includes looking at the context and purpose of the legislation as set out in the Preamble to the Act.[91] Significantly, the Preamble makes specific reference to the rights to equality and to freedom and security of the person as well as the 'international commitments and obligations of the State towards ending violence against women and children'.

88 See eg *S v Engelbrecht op cit* note 1 para 334.

89 *Omar v Government of the RSA* 2006 (2) SA 289 (CC) [hereafter '*Omar*'].

90 See *Omar* paras 20-31 for a useful description of the operation of these sections.

91 *Idem* para 11.

Van der Westhuizen J remarks that domestic violence 'brutally offends' the values and rights enshrined in the Constitution.[92] These rights include the right to be free from all forms of violence, which must be understood in conjunction with the rights to dignity, life, equality and privacy. Importantly, Van der Westhuizen J points out that the Constitutional Court has previously recognised the constitutional requirement to deal effectively with domestic violence (with reference to *Baloyi*).[93] He furthermore notes the Court's observation in the *Carmichele* judgment[94] that South Africa 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.[95] (Interestingly, this point had already been made by Sachs J in the *Baloyi* judgment.)

Returning again to *Baloyi*, Van der Westhuizen observes that the complex private as well as public character of domestic violence and the need to combine civil and criminal remedies to address it were previously recognised by the Constitutional Court. Because victims are ambivalent about their fate and reluctant to go through with criminal prosecution, it is understandable for the legislature to enact measures that differ from those generally applicable to

92 *Idem* para 17.

93 *Ibid.*

94 See discussion in Section 3.3.1 below.

95 Para 17 fn 17. The reference here is to *Carmichele (CC)* para 62 fn 67 (Section 3.3.1 below). Van der Westhuizen J adds that the principles of CEDAW are also evident in two further documents, namely in the Preamble of the Universal Declaration of Human Rights and Article 4(d) of the Declaration on the Elimination of Violence Against Women of 1994, which were also cited in *Baloyi.*

criminal arrests and prosecutions. It is thus clear that the Act serves a very important social and legal purpose.[96]

This does not mean, however, that in addressing domestic violence the legislature may disregard the fundamental rights and fair trial procedures guaranteed in the Constitution.[97] The applicant's submission was that this was the case; however, the exact basis of his complaint was somewhat murky.[98] The Court concluded that no case was made that section 8 of the DVA falls foul of any of the provisions of the Constitution on which the applicant relied.[99]

The progression from *Baloyi* to the *Omar* judgment to some extent foretells the pattern that will also be distinguishable in the so-called 'police liability' cases below. One notes that the initial 'foundational' judgment contains a relatively superficial analysis of the State's obligations arising under international law. The subsequent judgments then reproduce this analysis with its conclusion, and as the conclusion becomes more entrenched in later judgments, the conclusion or rationale only is relied on. There is in principle nothing wrong with this type of progression – some would call it a fairly simplistic summary of the law of precedent at work. However, what is of interest is that the later judgments do not contain an 'independent' analysis of international law sources, despite the fact that further normative developments may have taken place in the international or regional human rights systems subsequent to the 'foundational' judgment.

96 *Omar* at para 18. Van der Westhuizen J noted earlier that there is clearly a need for an adequate legal response to domestic violence, and that the legislature, in recognition of the need for effective domestic violence legislation, had enacted the Prevention of Family Violence Act of 1993 – paras 13-14.

97 *Idem* para 19.

98 Van der Westhuizen J accurately described the applicant's case as 'neither precisely stated nor fixed' - see *Omar* at para 32.

99 *Idem* at para 63.

A second observation is that the notion of proportionality was strongly expressed in both judgments. In *Baloyi*, it was emphasised that the need to protect family members from violence must be balanced against the protection that the Constitution must afford to persons against whom the domestic violence interdict has been granted. Similarly, the court in *Omar* pointed out that in enacting 'specialised'[100] legislation to address domestic violence, the legislature may not disregard the fundamental rights and fair trial procedures (of the alleged perpetrator) guaranteed in the Constitution.

3. 3 Development of the State obligation to prevent acts of violent crime

It is interesting to note that one area that has seen a great deal of development in South African law, i.e. the liability of State agencies for their failure to prevent acts of violence against women, also corresponds with significant advances in terms of standard-setting in international and regional jurisprudence.[101]

A claim that yielded significant milestones in the development of State responsibility to prevent acts of violence against women is that brought by Alix Carmichele against the Minister of Safety and Security and the Minister of Justice. It is fair to state that the judgment of the Constitutional Court in this case has had a profound effect on the evolution of the law of delict generally and the principles relating to State responsibility to prevent acts of violent crime more specifically. As could be expected, it has also generated considerable academic analysis.[102] The following section discusses the series of judgments ensuing from

[100] My term.

[101] See discussions in Chapters 3, 4 and 5 respectively.

[102] See J Neethling 'Die regsplig van die polisie om die reg op die fisies-psigiese integriteit te beskerm' (2000) 63 *THRHR* 150-154; J Neethling 'Die regsplig van die staat om die

the *Carmichele* matter, as well as related cases, in some detail. The discussion focuses on the aspects relevant to this study, as outlined earlier.

3.3.1 The *Carmichele* case: judgment in the Constitutional Court

Alix Carmichele had been attacked and seriously injured by a perpetrator (one Francois Coetzee) who was at the time awaiting trial on a charge of rape.[103] At his first court appearance in the rape matter, Coetzee was released unconditionally on his own recognizance in spite of a previous conviction for indecent assault. Neither the police nor the prosecution had offered any opposition to his release, in spite of the investigating officer being aware of his previous conviction. Coetzee subsequently attacked Carmichele, leaving her with serious head injuries and a broken arm.[104]

Ms. Carmichele accordingly sought to hold the police and prosecution liable in delict for their negligent failure to take proactive steps to protect potential

reg op die fisies-psigiese integriteit teen derdes te beskerm' (2001) 64 *THRHR* 489-495; J Neethling & JM Potgieter 'Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen aantasting deur derdes te beskerm: Twee teenstrydige beslissings'(2002) 65 *THRHR* 273-278; B Leinius & JR Midgley 'The impact of the Constitution on the law of delict: *Carmichele v Minister of Safety and Security*' (2002) 119 *SALJ* 17-27; M Pieterse 'The right to be free from public or private violence after *Carmichele*' (2002) 119 *SALJ* 27-39; G Carpenter 'The *Carmichele* legacy – enhanced curial protection of the right to physical safety'(2003) 18 *SAPR/PL* 252-266; J Van der Walt 'Horizontal application of fundamental rights and the threshold of the law in view of the *Carmichele* saga' (2003) 19 *SAJHR* 517-540; J Neethling 'Die *Carmichele*-saga kom tot 'n gelukkige einde' (2005) *TSAR* 402-409; A Fagan 'Reconsidering *Carmichele*' (2008) 125 *SALJ* 659-673.

103 The facts are set out comprehensively in the judgment of the Constitutional Court reported as *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) [hereafter '*Carmichele (CC)*'] para 5 *et seq*.

104 Coetzee was convicted of housebreaking and attempted murder in respect of this incident, and sentenced to an effective twelve and a half years' imprisonment – *Carmichele (CC) op cit* note 103 at para 24.

victims against further violent acts committee by Coetzee. In order to succeed, she would have to establish at trial firstly, that the police or the prosecutors had a legal duty to protect her, and secondly, that they negligently acted in breach of such duty. Thirdly, she would have to show that there was a causal connection between such negligent breach of the duty and the damage she suffered.[105]

The Cape Provincial Division of the High Court[106] (*per* Chetty J) initially granted an order for absolution from the instance on the basis that the plaintiff had not shown that the defendants owed her a legal duty to prevent the harm she had suffered.[107] The Court reached this finding by applying the common-law test for determining the wrongfulness of omissions.[108] This test has been summarised as one of 'reasonableness, determined with reference to the legal perceptions of the community as assessed by the court'.[109] This 'test' entails a value judgment based on balancing the interests of the parties and conflicting interests of the community. The plaintiff's subsequent appeal to the SCA was also dismissed, with Vivier JA confirming the finding of the court *a quo* regarding the (pre-constitutional) common-law inquiry into wrongfulness.[110]

On further appeal to the Constitutional Court, Ms. Carmichele advanced the argument that both the CPD and the SCA had erred in failing to apply the provisions of the Constitution in their examination of the question whether the police had a legal duty towards her. She specifically relied on the constitutional

105 *Idem* para 25.

106 As it then was [hereafter 'CPD'].

107 This finding is set out in *Carmichele v Minister of Safety and Security and Another* 2002 (10) BCLR 1100 (C) [hereafter '*Carmichele CPD*'] para 1.

108 *Idem* para 2.

109 *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) [hereafter '*Carmichele (SCA) 1*'] para 7.

110 *Carmichele SCA (1) loc cit.* The court *inter alia* referred to the common-law *locus classicus* on this point, viz *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

obligation imposed on all courts to develop the common law with regard to 'the spirit, purport and objects of the Bill of Rights',[111] and averred that if the CPD and SCA had considered the impact of the Bill of Rights, their finding regarding a legal duty would have been different.[112]

The Constitutional Court agreed that the assessment of whether a legal duty existed must now (i.e. after the introduction of a new constitutional dispensation) be carried out in line with the Bill of Rights.[113] The relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values. The Court emphasises that the Constitution is not merely a formal document regulating public power: it also embodies an objective, normative value system, and it is within the matrix of this value system that the common law should be developed as envisaged in section 39(2) of the Constitution.[114] The Court thus highlights that the normative context had undergone a significant and irreversible shift.

Exploring the content of these norms, Ackermann and Goldstone JJ point out that the constitutional entrenchment of the rights to life, dignity and freedom and security of the person implies a duty on the State and all its organs to refrain from infringing on these rights.[115] In some circumstances, it also implies a

111 S 39(2) of the Constitution; s 35(3) of the 1993 Constitution.

112 *Carmichele (CC) op cit* note 103 para 28.

113 *Idem* para 43.

114 *Idem* para 54. Van der Walt poses the interesting question whether there really is a fundamental gap between the common law of delict and the fundamental rights in the Constitution – Van der Walt *op cit* note 102 at 519 *et seq*.

115 Pieterse *op cit* note 102 at 33 points out that the right to be free from violence was not explicitly relied upon by the parties, firstly because the claim originated under the *interim* Constitution and s 12(1)(c) does not have an explicit counterpart in the 1993 Constitution. Secondly, the matter turned on the duty of the courts to develop the

positive duty to provide appropriate protection to everyone 'through laws and structures designed to afford such protection'.[116]

While finding that the High Court had misdirected itself in relation to the requirements of section 39(2), the Court was however reluctant to embark on the formulation of a new order without the benefit of considered judgments from the preceding courts on these issues.[117] It accordingly limited its decision to whether absolution from the instance should have been granted in the CPD.

Ackermann and Goldstone JJ considered the provisions of the interim Constitution[118] and the Police Act,[119] and found positive obligations on members of the police force in both. The judges note that in addressing these obligations in relation to dignity and the freedom and security of the person 'few things can be more important to women than freedom from the threat of sexual violence'.[120] The Court further refers to the State's 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'. As authority it cites here the Women's Convention, including the 'due diligence' provision[121]

common law in accordance with the spirit, purport and objects of the Bill of Rights, and the specific application of any particular constitutional right was thus not required.

116 *Carmichele (CC) op cit* note 103 para 44.

117 The applicant had not relied on s 39(2) in its arguments before the CPD or the SCA, and neither of these fora addressed this aspect in its judgment.

118 S 215 of the 1993 Constitution.

119 S 5 of Act 7 of 1958.

120 *Carmichele (CC) op cit* note 103 para 62.

121 CEDAW General Recommendation No. 19 para 9 (see discussion in Chapter 3, Section 2.3.2.) The Court also makes reference to *Osman v United Kingdom* (2000) 29 EHHR 245 as authority for the point that the Constitution imposes positive obligations on the State to prevent harm – para 45. (See discussion of *Osman v United Kingdom* in Chapter 2, Section 4.3.)

from the CEDAW Committee's General Recommendation No. 19 and the preceding judgment in *Baloyi*.[122]

The Court observes that the police service is one of the primary agencies of the State responsible for the protection of the public in general, and women and children in particular, against the invasion of their fundamental rights by perpetrators of violent crime.[123] Regarding the prosecution, the Court noted that the Constitution did not contain any provisions dealing with the duties of prosecutors. However, prosecutors have always owed a duty to carry out their public functions independently and in the interest of the public.[124] In relation specifically to bail, prosecutors are obliged to place before the court any information relevant to the question of whether or not an accused person should be released on bail.[125]

Based on this exploratory examination, the Court was satisfied that the evidence already led was sufficient to place the respondents on their defence. It held that absolution from the instance had been incorrectly ordered,[126] and the case was accordingly remitted to the CPD.

The CPD heard further evidence and Chetty J reached a finding in Carmichele's favour, not only in relation to the existence of a legal duty but also on the other elements of delictual liability. The Ministers of Safety and Security and of Justice subsequently lodged an appeal against this finding.[127]

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122 See *Carmichele (CC) op cit* note 103 para 62 fn 67.
123 *Idem* paras 61-62.
124 *Idem* para 72.
125 *Ibid*.
126 *Idem* para 77.
127 The discussion of the second SCA judgment follows in Section 3.3.3 below.

3.3.2 Meanwhile: *Van Duivenboden* and *Van Eeden*

Following the Constitutional Court's judgment in *Carmichele*, the SCA was presented with two cases revolving around the legal duty of the police to prevent acts of violence.[128] The plaintiff in *Minister of Safety and Security v Van Duivenboden*[129] sought to hold the Minister of Safety and Security liable for injuries he had sustained at the hands of one Neil Brooks, his neighbour. On the day in question, Brooks, who had a history of excessive alcohol abuse and committing domestic violence with his (licenced) firearms while under the influence of alcohol, embarked on a shooting spree in the course of which he killed his own wife and daughter and wounded Van Duivenboden when the latter attempted to intervene.

Van Duivenboden claimed that the police had been negligent in failing to take the steps available in law to deprive Brooks of his firearms before the tragic shooting occurred (while there were clear grounds for doing so), and that this negligence was a cause of his being shot.[130] Before the fatal incident took place, various police officers had information that adversely reflected on Brooks's fitness to be in possession of a firearm.[131] However, they failed to take steps to act on this information by initiating an inquiry aimed at declaring him unfit to possess firearms.[132]

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128 The discussion here will only deal with this requirement, although the other elements of delictual liability were also in dispute in certain of the cases examined below.

129 2002 (6) SA 431 (SCA) [hereafter '*Van Duivenboden*'].

130 *Idem* para 2.

131 *Idem* para 4.

132 *Idem* paras 3, 11. This inquiry would have been held in terms of s 11 of the Arms and Ammunitions Act 75 of 1969 (now repealed by the Firearms Control Act 60 of 2000).

The first aspect that the SCA accordingly had to address was the wrongfulness of the omission on the part of the police, or simply put, the existence of a legal duty towards Van Duivenboden. The majority (per Nugent JA)[133] adopted the approach taken by the Constitutional Court in *Carmichele*, i.e. that the notion of the 'legal convictions of the community' that is central to the common-law test for wrongfulness must now be informed by the norms and values embodied in the Constitution.[134]

The Court found that where there is a potential threat of the kind in issue here, the constitutionally protected rights to human dignity, to life, and to security of the person, are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them. (This conclusion is drawn without recourse to international law.)

In some instances, the exigencies of effective government or some other considerations of public policy may outweigh the need to hold the State accountable, but these considerations do not arise here.[135] The Court accordingly recognized that the police officers who, in the exercise of duties on behalf of the State, were in possession of information that reflected on Brooks's fitness to possess firearms were under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm occurring.[136]

Shortly after handing down judgment in *Van Duivenboden*, the SCA was called on to consider a further claim arising from alleged police dereliction of duty. The

133 Howie JA, Heher AJA and Lewis AJA concurring.
134 *Van Duivenboden op cit* note 129 para 17.
135 Idem paras 20-22.
136 *Idem* para 22.

plaintiff in *Van Eeden v Minister of Safety and Security*[137] was raped and robbed by one André Gregory Mohamed, a known dangerous criminal and serial rapist who had escaped from police custody some time before the attack on her.[138] Mohamed was facing 22 serious charges (including rape, indecent assault and armed robbery) when he escaped from police cells in Durban through the simple expedient of leaving via an unlocked security gate. The plaintiff claimed that members of the police owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and causing her harm, and that they negligently failed to comply with this duty.[139]

The court *a quo* considered itself bound by the (initial) judgment of the SCA in *Carmichele*, and accordingly held that the police did not have a duty towards the appellant to prevent harm.[140] However, while Van Eeden's appeal to the SCA was pending, the Constitutional Court gave its *Carmichele* judgment, which had the effect of materially reshaping the SCA's consideration of the *Van Eeden* case.

The SCA, in *Van Eeden*, reiterated the importance of the Constitution in shaping 'the legal convictions of the community'.[141] Vivier ADP notes that the entrenchment of fundamental rights and values in the Bill of Rights affords them a higher status in that all law, State actions, court decisions and even the conduct of natural and juristic persons may be tested against them. All private law rules,

137 2002 (4) AllSA 346 (SCA) [hereafter '*Van Eeden*'].
138 *Idem* para 1.
139 *Idem* para 3.
140 This decision was reported as *Van Eeden v Minister of Safety and Security* 2001 (4) SA 646 (T).
141 *Van Eeden op cit* note 137 para 12.

principles or norms, including those regulating the law of delict, are subjected to and thus given content in the light of the basic values in the Bill of Rights.[142]

The Court recognised that section 12(1)(c) of the Constitution in itself imposed a positive duty on the State to protect everyone from violent crime.[143] Freedom from violence is recognized as essential to the equal enjoyment of human rights and fundamental freedoms.[144] It is noted that section 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right.[145]

Similar to the approach taken in *Baloyi* and *Carmichele (CC)*, Vivier ADP considers the State obligations arising in terms of international law to protect women against violent crime and against the gender discrimination inherent in violence against women.[146] He refers to the preamble of the UDHR, Article 4(d) of the Violence Declaration and Article 2 of the Women's Convention.[147]

The Court also considers section 205(3) of the Constitution (where the objects of the police service are set out),[148] and the provisions of the South African Police Service Act.[149] It reiterates the *dictum* from *Carmichele (CC)* that the police service is one of the primary agencies of the State responsible for the discharge of the constitutional duty to protect the public in general and women in particular

142 *Ibid*.
143 *Idem* para 13.
144 *Ibid*, citing *S v Baloyi.*
145 *Ibid.*
146 *Idem* para 15.
147 *Ibid*.
148 This section reads as follows:
'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'
149 Act 68 of 1995.

against the invasion of their fundamental rights by perpetrators of violent crime.[150] Against the backdrop of this exposition, the Court's conclusion that the police indeed had a legal duty to act positively to prevent Mohamed's escape becomes unavoidable.

The principles emerging from the *Carmichele, Van Duivenboden* and *Van Eeden* cases were similarly applied by the SCA in its subsequent judgment in *Minister of Safety and Security v Hamilton*.[151] *In casu* the respondent was shot by one Erna McArdell with a licenced firearm in the course of an argument about a parking bay and was rendered a tetraplegic. Hamilton alleged that when the police issued McArdell, who had a history of psychiatric illness, with a firearm licence, they failed to take reasonable steps to investigate whether she was competent and fit to possess a firearm. The question that arose on appeal was to what extent the police authorities charged with considering applications for firearm licences were under a legal duty to further investigate the information furnished to them by the applicant.

The Court refers to the formulation of the test for wrongfulness in *Van Eeden*,[152] and notes that the affected interest here is the respondent's right to bodily integrity and security of the person, a right long regarded in our law as 'one of an individual's absolute rights of personality'.[153] As is abundantly clear from its inclusion in both the 1993 and 1996 Constitutions, this right is one deemed worthy of legal protection. Even prior to the advent of the 1993 and 1996 Constitutions, our law recognised that 'the police are under a positive duty in law

150 *Van Eeden* para 16.

151 (2) SA 216 (SCA) para 35. See also *Minister of Safety and Security v De Lima* [2006] 4 All SA 433 (SCA).

152 *Idem* para 16.

153 *Idem* para 19.

to protect citizens from assault when in a position to do so and that, if they negligently fail to do so, the State will be liable in damages'.[154]

After consideration of the relevant legislation and regulations, the Court finds that police members are under a legal duty to take proper measures to screen an application for a firearm licence by making such enquiries as are reasonable in the circumstances to corroborate the veracity of the information furnished to them by the applicant in relation to his or her physical, temperamental and psychological fitness to possess a firearm.[155] This duty is particularly important in a country where high levels of violence are notorious and are fostered to a significant degree by access to firearms.[156]

Van Heerden AJA points out that should firearm licences be issued to unfit persons, then the bodily integrity, safety and security, and even the lives, of members of the general public are potentially at risk. Thus, the imposition of such a legal duty on the relevant police members is clearly reasonable and 'congruent with the court's appreciation of the sense of justice of the community'.[157]

The Court reaches the conclusion that there was indeed a legal duty on the police members as contended by the respondent.[158] The source of this legal duty is both the common law and the statutory provisions analysed by the court. Interestingly, the court reaches this conclusion without relying *directly* on the provisions of the Bill of Rights in either the 1993 or the 1996 Constitutions (both of which came into operation *after* the dates relevant to this matter and neither of which has

154 *Idem* para 20.
155 *Idem* para 32.
156 *Idem* para 33.
157 *Ibid.*
158 *Idem* para 36.

retrospective operation). The Court was, however, satisfied that the existence of a legal duty on the police in these circumstances is entirely consistent with the norms and values of South African society as embodied in both Constitutions.[159]

In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail and Others*[160] the first applicant was a voluntary association established as a result of grave public concern about the levels of violent crime on trains operated by the first respondent in the Western Cape. The Rail Commuters Action Group, alleging that Metrorail and the other respondents[161] owed rail commuters in the Western Cape a duty of care to protect their lives and property against criminal activities on commuter trains and train stations, approached the High Court for an order aimed at ensuring the provision of a safe rail commuter service in which violent attacks on passengers would be prevented. [162]

While the Rail Commuters Action Group was initially successful in the High Court,[163] the matter was taken on appeal to the SCA, and the judgment of the High Court was set aside.[164] In the subsequent appeal to the Constitutional Court, O'Regan J evaluated whether any of the respondents were under an obligation to provide for the safety and security of commuters on Metrorail trains in the

159 *Ibid.*

160 2003 (3) BCLR 288 (C).

161 The four respondents were the following: first respondent was Transnet trading as Metrorail; second respondent was the South African Rail Commuter Corporation; third respondent was the Minister of Transport; fourth respondent was the Minister of Safety and Security.

162 See 291F-H.

163 The High Court declared that the respondents had a legal duty to protect the lives and property of members of the public who commute by rail, whilst they are making use of the rail transport services provided and ensured by, respectively, the first and second respondents- 352D. The Court also mandated certain steps to be put in place by the first, second and third respondents in order to protect the constitutional rights of rail commuters- 352E-H.

164 *Transnet Ltd t/a Metrorail and Others v Rail Commuters Action Group and Others* 2003 (6) SA 349 (SCA); 2003 (12) BCLR 1363 (SCA).

Western Cape. Specifically, the question was whether such an obligation arose from the relevant legislation[165] or the provisions of the Constitution.[166]

The Court observed that it is clear that rights other than the social and economic rights in the Constitution also at times impose positive obligations, and makes specific reference to *Baloyi* and *Carmichele* to illustrate this point (in respect of the rights to life, dignity and security).[167] O'Regan J points out that since the Constitutional Court's judgment in *Carmichele,* the SCA has developed the legal principles governing the State's delictual liability in respect of its constitutional obligations, and particularly, those relating to the rights to dignity, life and freedom and security of the person in a series of cases.

Considering the context within which these obligations are to be performed and the need to hold the first and second respondents (Metrorail and the Commuter Corporation) accountable for the exercise of their powers, O'Regan J concluded that Metrorail and the Commuter Corporation bear a positive obligation arising from the relevant statutory provisions, read with the Constitution, to ensure that reasonable measures are in place to provide for the security of rail commuters when they provide rail commuter services.[168]

165 In this instance, the Legal Succession to the South African Transport Services Act 9 of 1989.

166 *Rail Commuters Action Group v Transnet* 2005 (2) SA 359 (CC) para 61 [hereafter '*Rail Commuters CC*']

167 *Idem* para 71.

168 The Court finally issued a declaratory order to the effect that the first and second respondents (Metrorail and the Commuter Corporation) have an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided and ensured by, respectively, the first and second respondents – *idem* para 111.

Important for purposes of this thesis, the Court notes that what constitutes 'reasonable measures' will depend on the circumstances of each case.[169] Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave the threat to fundamental rights, the greater the responsibility on the duty-bearer.[170] A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation.

This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities.

169 *Idem* para 88.

170 Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb.

3.3.3 *Carmichele*: Supreme Court of Appeal (again)

It cannot be disputed that when the SCA contemplated the *Carmichele* matter for the second time, the geography of the legal landscape had undergone seismic shifts. The Constitutional Court's ruling had infused not only the findings of the trial court (CPD) upon remittal[171] but also the subsequent SCA judgments in *Van Duivenboden* and *Van Eeden*, so that the impact of the Constitution on the inquiry into the existence of a legal duty was by now quite clear.

It will be recalled that the case had been remitted to the High Court, and that the trial court had ruled in favour of Ms. Carmichele. The Ministers of Safety and Security and of Justice appealed against this finding, which meant that the SCA would now re-examine the case.

In its second consideration of *Carmichele*,[172] Harms JA sets out what he terms 'the general norm of accountability' by explaining that the State is liable for its failure to perform the duties imposed upon it by the Constitution unless it can be shown that there is compelling reason to deviate from that norm.[173] As in *Van Eeden*, the SCA found no reason here to depart from this 'general norm of accountability'.[174]

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171 For an interesting reflection on the matter by the trial judge, see D Chetty 'The perspective of a High Court judge' (2004) 121 *SALJ* 493 at 495-497.

172 *Carmichele v Minister of Safety and Security* 2004 (3) SA 305 (SCA) ['hereafter *Carmichele SCA (2)*'].

173 *Idem* para 43. See also para 34, where the Court confirms that this 'general norm' relates to the test for wrongfulness 'in the light of constitutional demands'.

174 The Court's conclusions regarding the elements of negligence and causation similarly favoured the plaintiff, resulting in the dismissal of the appeal.

Given its acceptance of 'the general norm of accountability', the Court (presumably) did not find it necessary to specifically consider international human rights law in order to determine whether the State had a duty towards Carmichele. Vivier ADP does reiterate the Constitutional Court's reference to the judgment of the European Court of Human Rights in *Osman v United Kingdom*, and cites a further paragraph not quoted in the *Carmichele* judgment.[175] This relates to the point that in certain circumstances there may a positive duty on State authorities to take preventive measures to protect a person whose life is at risk from the criminal acts of another individual (in terms of the European Convention on Human Rights), but that this duty is not an unlimited one.[176] It does not however appear that this reference in any way influences or changes the application of the *Carmichele dictum* by the SCA in this instance.

While one agrees with the eventual conclusion reached by the SCA in *Carmichele SCA (2)*, the following statement is somewhat startling:

> Both [the Constitutional Court and the CPD] emphasised, quite rightly, the special constitutional duty of the State to protect women against violent crime in general and sexual abuse in particular. *But this should not be seen as implying that the State's liability in a case such as this is necessarily determined by or dependent on the sex of the victim or the nature of or motive behind the assault*. [177]

I contend that the 'sex of the victim and the nature of or motive behind the assault' are indeed aspects of *great* significance when considering whether or not certain duties rest on the state, given firstly the standards that have emerged

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175 *Carmichele SCA (2)*' *op cit* note 172 paras 32-33. Viviers ADP also takes issue with the understanding of the Constitutional Court of the judgment of the ECrtHR in *Z v United Kingdom* [2001] 10 BHRC 384 – para 41 fn 36.

176 See discussion of the jurisprudence of the European Court of Human Rights in Chapter 5, Part C, Section 4.

177 *Carmichele SCA (2*) *op cit* note 172 at para 42. Emphasis added.

internationally and secondly, the incidence of gender-based violence in South Africa. The fact that this is a form of interpersonal violence with singular characteristics and *sequelae* raises specific expectations of State intervention; this is clear from the way in such violence and concomitant State duties have been considered by international human rights bodies.[178] The above *dictum* further stands in contrast to the judgment of the Constitutional Court in *S v Baloyi*, where Sachs J (correctly) considered the peculiar gender-based nature of domestic violence in assessing the constitutionality of the impugned provision.

And so the lengthy Carmichele saga drew to a close (at least as far as the determination of the merits was concerned).[179] It should be clear from this initial discussion already that the judgment of the Constitutional Court has been greatly influential in the development of this line of cases, and it has also had an impact on other facets of the right to freedom from violence, as will be apparent from the rest of this chapter. Much of the commentary on the judgment has related to its implications for the law of delict, specifically the element of wrongfulness.[180]

178 For example, CEDAW and the IACrtHR.

179 The CPD awarded Ms. Carmichele approximately R1 million in 2008. This was about a quarter of her original R4,6 million claim – see K Breytenbach 'Crime victim awarded R1m in damages' *The Mercury* (9 September 2008).

180 Considerable academic discussion has arisen from the question whether the Constitutional Court and SCA correctly applied the tests for wrongfulness and negligence in *Carmichele* and subsequent matters – see A Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90-141; J Neethling & JM Potgieter 'Die regsoortuigings van die gemeenskap as selfstandige onregmatigheidskriterium' (2006) *TSAR* 609-616; J Neethling 'The conflation of wrongfulness and negligence: Is it always such as bad thing for the law of delict?' (2006) 123 *SALJ* 204-214; RW Nugent 'Yes, it is always a bad thing for the law: A reply to Professor Neethling' (2006) 123 *SALJ* 557-563; J Neethling & JM Potgieter 'Wrongfulness and negligence in the law of delict: A Babylonian confusion?' (2007) 70 *THRHR* 120-130; A Fagan 'Blind faith: A response to Professors Neethling and Potgieter' (2007) 124 *SALJ* 285-295; FDJ Brand 'Reflections on wrongfulness in the law of delict' (2007) 124 *SALJ* 76-83; J Neethling & JM Potgieter 'In (self-) defence of the distinction between wrongfulness and negligence' (2007) 124 *SALJ* 280-284; A Paizes 'Making sense of

What is noteworthy about this series of cases is that section 39(2) has been the 'driving force' behind its development. This may be one of the reasons why the right to freedom from violence itself as set out in section 12(1)(c) has not been the subject of extensive analysis by the courts. (Other reasons include the fact that a case such as *Hamilton* was not decided with express reference to constitutional provisions, but rather common law and statute.) The consideration of the constitutional right by the SCA in *Van Eeden* is arguably the most detailed among the cases examined here.

Carpenter, in her discussion of *Carmichele, Van Duivenboden* and *Van Eeden*, predicts that this line of this line of jurisprudence regarding State liability has clearly not yet reached its final development.[181] She observes that cases that are factually more difficult and complex could arise, and it is therefore gratifying that 'such a sound foundation' has been laid for the future development of our law.[182] Her point regarding further development is borne out by the approach adopted by the Constitutional Court in *K v Minister of Safety and Security*,[183] where the question at issue was one of vicarious liability (and more specifically, the so-called 'deviation situation', where the employer acts outside the scope of the employer's mandate).

wrongfulness' (2008) 125 *SALJ* 371-412. A discussion of this issue is beyond the focus of this thesis.

181 Carpenter *op cit* note 102 at 265-266.

182 *Idem* at 266.

183 2005 (6) SA419 (CC) [hereafter '*K v Minister*'], discussed in Section 3.3.4 below.

3.3.4 Developing the doctrine of vicarious liability

The 'liability' cases discussed above, brought against representatives of the State (for the most part the Minister of Safety and Security) were generally all founded in the doctrine of vicarious liability. This doctrine entails that the acts, or omissions, of individual employees, such as police officials who negligently allow a notorious rapist to escape from police cells, are ascribed to their employer, the Minister of Minister of Safety and Security, who is then held liable for any harm that ensues as a result of the escape, such as subsequent rapes committed by the fugitive.[184] The question of vicarious liability was not in dispute in any of the matters discussed above. However, in *K v Minister of Safety and Security* the scope of vicarious liability was raised as the central issue.

Ms. K., the applicant, had been raped by three uniformed and on-duty policemen after she accepted a lift home from them when she found herself stranded in the early hours of the morning. Both the High Court and SCA dismissed Ms. K.'s claim on the ground that the Minister of Safety and Security was not vicariously liable for the conduct of the policemen. The SCA applied the existing principles of vicarious liability, with specific reference to the so-called 'deviation' cases (where the employee deviates from the course and scope of his employment in committing the delict), and was not persuaded by the argument advanced on behalf of Ms. K. that it had a duty[185] to develop these common law principles.[186]

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184 See facts of *Van Eeden v Minister of Safety and Security* note 137 above.

185 As set out in s 39(2) of the Constitution - *K v Minister op cit* note 183 para 9.

186 See overview of the common law position as provided by O'Regan at paras 21-33 of the judgment, including the leading cases with regard to 'deviation', i.e. *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *Minister of Police v Rabie* 1986 (1) SA 117 (A).

The Constitutional Court (per O'Regan J) had to consider as a preliminary point whether this matter raised a constitutional issue. Starting with the constitutional requirement that a court, when developing the common law, should promote the spirit, purport and objects of the Constitution, O'Regan J reiterated the acknowledgement of the 'pervasive normative effect of our Constitution' in *Carmichele (CC)*. She considered the circumstances when the need for development of the common law in terms of section 39(2) would arise, and concluded that the overall purpose of this provision is to ensure that our common law is infused with the values of the Constitution.[187] It is therefore not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required: the normative influence of the Constitution must be felt throughout the common law.[188] Where courts are making decisions that involve the incremental development of the rules of the common law, and the values of the Constitution are relevant, they are also bound by the terms of section 39(2):

> The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.[189]

In casu, the applicant's argument that the principles of vicarious liability are inconsistent with the spirit, purport and objects of the Bill of Rights (and therefore need to be developed to hold the respondent liable) did raise a constitutional issue.[190] The question of the protection of Ms. K.'s rights to security of the person, dignity, privacy and substantive equality were of profound constitutional importance. In addition, it was clear that it was part of the three

187 *K v Minister op cit* note 183 paras 16-17.
188 *Idem* para 17.
189 *Ibid.*
190 *Idem* para 18.

policemen's work to ensure the safety and security of all South Africans and to prevent crime. These obligations arise from the Constitution[191] and are affirmed by the Police Act.[192]

O'Regan J further referred to the *dictum* in *Carmichele (CC)* that in terms of addressing these (State) obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence.[193] She confirmed that these comments were of equal importance in the present case.[194] The obligations imposed upon courts by sections 8(1) and 39(2) of the Constitution are not applicable only to the criterion of wrongfulness in the law of delict; in considering the common-law principles of vicarious liability, and the question of whether that law needs to be developed in that area, the normative influence of the Constitution must be considered.[195]

The Court proceeds to consider the current (common-law) principles of vicarious liability, with specific reference to the so-called 'deviation' cases.[196] The approach developed in South African law to the latter category entails two questions. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely *factual* question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable

191 S 205(3) of the Constitution, where the objects of the police service are set out (see note 148 above).

192 Preamble to the South African Police Service Act 68 of 1995.

193 *K v Minister op cit* note 183 para 18. The original *dictum* further noted that the State also has duties under international law to respond appropriately to violence against women – see *Carmichele (CC) op cit* note 103 para 62.

194 *K v Minister op cit* note 183 para 19.

195 *Idem.*

196 *Idem* paras 24 *et seq*.

vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts have been done solely for the purpose of the employee, there is nevertheless a sufficiently *close link* between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.[197]

This objective element, which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, 'but other norms as well'.[198] It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not.

In this instance, as to the first leg of the *Rabie* test, it is clear that the three policemen were, subjectively viewed, acting in pursuit entirely of their own objectives and not those of their employer.[199] But this conclusion is not the end of the matter. The next question is whether their conduct was sufficiently close to their employer's business to render the respondent liable.[200] The Court found three important points indicating a close connection. First, the policemen bore a statutory and constitutional duty to prevent crime and protect the members of the public. Secondly, the police here had offered to assist the applicant and she had

197 *Idem* para 32.
198 *Idem* para 44.
199 *Idem* para 50.
200 *Idem* para 51.

accepted their offer. The fact that they were in uniform (which is aimed at making it easier for members of the community to identify police officials when they require their assistance) contributed to her placing her trust in them. Thirdly, the conduct of the policemen which caused harm constituted a simultaneous commission and omission.[201] The commission lay in their brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case.

According to O'Regan J, these three inter-related factors made it plain that viewed against the background of the Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.

Commentators have offered divergent perspectives on this judgment. Neethling and Potgieter, for example, welcome the judgment;[202] in their comment on the SCA judgment, they called for an expansion of the common-law principles of vicarious liability on the same policy grounds as those eventually employed by the Constitutional Court, and were therefore vindicated by the eventual pronouncement in the latter forum.[203] Calitz appears to have certain misgivings about the justification provided by the Constitutional Court for hearing the case,[204] but nevertheless agrees with the Court's finding that the test is a policy

201 *Idem* para 53.

202 J Neethling & JM Potgieter 'Middellike aanspreeklikheid van die staat vir verkragting deur polisiebeamptes' (2005) *TSAR* 595 at 602.

203 *Idem* at 601-602.

204 K Calitz 'The close connection test for vicarious liability' (2007) 18 *Stell LR* 451 at 460.

decision based on values.[205] She does caution that it may be difficult to establish the limits of this liability in cases where 'non-constitutional issues' are not as prominent.

The most intriguing comment, for purposes of this thesis, is that of Hopkins, who points out that customary international law could have offered the appellant an interesting argument.[206] This putative argument rests, firstly, on section 232 of the Constitution, which provides that customary international law is automatically part of our domestic legal system.[207] The second leg of the argument consists of the principles of international law relating to liability of States for private conduct of individuals in their employ.[208] Hopkins demonstrates that international law has recognized a rule to the effect that the conduct of an organ of State or a person or entity empowered to exercise of governmental authority shall be considered an act of the state under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[209] He concludes that in terms of customary international law, the State would, on the facts of *K v Minister of Safety and Security*, be responsible for the conduct of the three police officials who raped the appellant.[210]

This 'alternative' approach proposed by Hopkins is important in the light of my earlier observation that following the initial examination of international law in *Baloyi* and *Carmichele*, the courts have not engaged with the normative

205 *Idem* at 468.

206 K Hopkins 'Can customary international law play a meaningful role in our domestic legal order: A short case study to consider' (2005) 30 *SAYIL* 276 at 277.

207 *Idem* at 280.

208 *Idem* at 283 *et seq*.

209 See Hopkins *op cit* note 206 at 286-287, citing Art 7 of the Articles on State Responsibility adopted by the International Law Commission on 9 August 2001.

210 *Idem* at 287-288.

developments that have been taking place on international level. O'Regan J does not specify here which 'other norms' may be considered in addition to constitutional norms to amplify the second objective leg of the test for vicarious liability, but section 232 of the Constitution already provides a possible answer in the case of rules of customary international law. (In fact, based on this section it could be argued that 'customary international law' forms part of the notion of 'constitutional norms'.) In any event, I suggest that rules of international law, for example, so-called 'soft law', that do not yet constitute customary law should also be included in the category of 'other norms' referred to by O'Regan J.

3.4 Interpretation of women's right to freedom from violence in criminal matters

3.4.1 Introduction

It is noticeable that women's right to freedom from violence has increasingly been discussed in criminal proceedings arising from acts of violence against women. These pronouncements were predominantly made in sentencing proceedings, although the courts have also expressly given consideration to the rights of the rape victim in other situations arising in the course of criminal proceedings.[211] I discuss developments in three groupings of cases here: sentencing principles, criminal liability (with specific reference to the common-law defence of 'private defence') and the common-law offence of rape.

[211] For example, in *S v M* 1999 (1) SACR 664 (CPD) the Court noted (*obiter*) that the sordid and unduly protracted cross-examination of the complainant by the accused constituted a 'gratuitous violation' of her dignity. It would therefore have constituted a reasonable and justifiable limitation of the accused's right to a fair trial if the court a quo had investigated and ruled this cross-examination inadmissible in order to protect the complainant's dignity – at 673g-j.

3.4.2 Sentencing principles

It is a long-established principle that in determining an appropriate sentence, a court should take into account three main factors: the seriousness of the offence, the personal circumstances of the offender and the interests of society.[212] The impact of the crime on the victim is usually considered in assessing the seriousness of the offence. It is interesting to note that the courts are increasingly placing this examination of the impact of the crime on the victim within a human rights framework, as demonstrated in the 1997 judgment in *S v Chapman*.[213]

In casu the SCA strongly affirmed that rape constitutes a 'humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim'.[214] The Court acknowledged that the ubiquitous threat of sexual violence limits women's freedom to exercise their rights, and explains that women have a legitimate claim to walk peacefully in the streets, to enjoy shopping and entertainment, to travel to and from work, and to enjoy the peace and tranquility of their homes without the fear of sexual assault and the insecurity that constantly diminishes the quality and enjoyment of their lives.[215]

212 *S v Zinn* 1969 (2) SA 537 (A).

213 1997 (3) SA 341 (SCA).

214 *Idem* at 344J.

215 *Idem* at 345A-B. This statement is in line with the observations of feminist commentators regarding sexual violence as a form of social control. See in this regard generally L Artz & H Combrinck 'Sexual assault' in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 298 at 305-307.

It was emphasised that courts are under a duty to send the following unambiguous message to the accused, to other potential rapists and to the community:

> We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.[216]

Despite the apparent clarity (and the strongly protective language) of this *dictum*, sentencing in rape matters subsequently emerged as the subject of some controversy. This controversy arose against the background of the introduction in 1997 of so-called mandatory minimum sentences for serious offences. The Criminal Law Amendment Act[217] provides that a court is bound to impose a specified minimum sentence where an accused is convicted of certain listed offences.[218] A departure from the prescribed minimum sentence is permitted where the court is satisfied that 'substantial and compelling circumstances' exist.[219] The legislature initially did not include any guidelines as to the meaning of the phrase 'substantial and compelling circumstances', thus leaving its interpretation entirely to the courts.[220]

The judicial interpretation of 'substantial and compelling circumstances' in rape matters subsequently led to concern when certain judicial officers found such circumstances in outdated and stereotypical assumptions about rape and its effect

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216 *S v Chapman op cit* note 213 at 345C-D.

217 Act 105 of 1997.

218 Ss 51 and 52.

219 S 51(3)(a).

220 The SCA and the Constitution Court subsequently examined the meaning of this phrase and provided guidance on its interpretation: *S v Malgas* 2001 (1) SACR 469 (SCA) at paras 8-10; *S v Dodo* 2001 (3) SA 382 (CC) at paras 11, 40.

on victims.[221] In addition to revealing some startling perceptions about sexual assault,[222] the interpretation of these provisions also led the courts to engage in a 'grading exercise' of rape matters falling within the prescribed categories for imposition of a minimum sentence. Where a particular case did not comply with the worst imaginable case in the category concerned, this appeared to present a justification for departing from the set minimum sentence.[223]

A case in point was *S v Abrahams*,[224] where the accused was convicted of raping his 14-year old daughter, and the court *a quo* found substantial and compelling circumstances justifying a lesser sentence than the prescribed sentence of life imprisonment.[225] The judgment in the court *a quo* had (controversially) created the impression that rape is less reprehensible when committed within a family than rape outside the family context.[226]

221 For a detailed analysis of the interpretation of this concept, see NJ Kubista '"Substantial and compelling circumstances": Sentencing of rapists under the mandatory minimum sentencing scheme' (2005) 18 *SACJ* 77 at 77.

222 The ruling of the court a quo in *S v Mahomotsa* 2002 (2) SACR 435 (SCA) provides a particularly unfortunate example. Kotze J found 'substantial and compelling circumstances' justifying a departure from the prescribed minimum sentence inter alia in the fact that the sexual assault of the two complainants had resulted from the accused's 'virility' as well as in the fact that the complainants had been sexually active prior to the incidents of rape – see paras 10-13 of the SCA judgment, where Kotze J's reasoning is recounted.

223 Kubista *op cit* note 221 at 82-86 presents well-founded criticism of this development.

224 2002 1 SACR 116 (SCA).

225 Instead, the accused was sentenced to seven years' imprisonment.

226 *S v Abrahams op cit* note 224 at 124d-g. In considering the State's appeal, the SCA carefully scrutinised the judgment of the High Court (per Foxcroft J), and came to the conclusion that although the judge's comments had been 'incautiously expressed', they did not intend to convey the proposition that rape within the family context was of a less serious nature (124g). The Court also pointed out that in this particular instance the fact that the rape occurred within the family complicated the damaging effects of the violation – 125d-g.

On appeal, the SCA found that the High Court had materially misdirected itself in certain respects.[227] However, in considering what an appropriate sentence would be, Cameron JA agreed with the court a quo that this was not 'one of the worst cases of rape'.[228] This does not mean that rape could ever be condoned; however, some rapes are worse than others and not all instances of rape deserve equal punishment.

The *amicus curiae* argued that the Constitution, as well as international treaty obligations, require the government and the courts to take special steps to protect the public in general and women in particular against violent crime. These obligations must be accorded appropriate weight in the sentencing process. Cameron JA concurred with this submission, making reference to *Baloyi* and *Carmichele (CC)*; however, he pointed out that to disregard the proportionality between the offence and the period of imprisonment would be in turn to deny the offender's humanity.[229] The original sentence of seven years' imprisonment imposed by the High Court was accordingly substituted by one of 12 years' imprisonment.

Although this 'mandatory minimum' sentencing legislation was initially introduced in 1998 as a temporary measure,[230] it was eventually in 2007 made permanent. Due to submissions by women's groups, the Act now includes a provision to the effect that when imposing a sentence in respect of the offence of rape, certain factors are excluded from constituting substantial and compelling

227 *S v Abrahams op cit* note 224 at 122g – 124d.

228 *Idem* at 127d.

229 *S v Abrahams op cit* note 224 at 127g-h. The notion of proportionality, also expressed as the principle that 'the punishment should fit the crime', is associated with retribution as a purpose of punishment. See SS Terblanche *The Guide to Sentencing in South Africa* 2 ed (2007) 166-167; *S v Makwanyane* 1995 (2) SACR 1 (CC) para 129.

230 The Act came into effect on 1 May 1998 for a period of two years but could be extended by proclamation for two years at a time.

circumstances, i.e. the complainant's previous sexual history; an apparent lack of physical injury to the complainant; an accused person's cultural or religious beliefs about rape; or any relationship between the accused person and the complainant prior to the offence being committed.[231] (These factors have traditionally played a role in stereotyped assumptions on the part of judicial officers regarding rape and its impact on the victim.)

The need to achieve a sense of proportionality between competing interests in the sentencing process was also expressed in a different context in *S v Ferreira*, where an abused woman was on trial for killing the perpetrator of the abuse.[232] The first appellant had hired two men (the second and third appellants respectively) to kill her abusive partner. The fact that the killing was premeditated brought the three appellants within the ambit of the prescribed minimum sentence of life imprisonment,[233] and the court a quo duly imposed this sentence after finding that there were no substantial and compelling circumstances justifying a lesser sentence.[234]

On appeal, the SCA held that substantial and compelling circumstances did in fact exist in respect of the first appellant,[235] and found these circumstances in the history of repeated and ever-escalating abuse that she had experienced at the hands of the deceased.[236] Howie JA notes that the appellant's actions must be judicially evaluated 'not from a male perspective' but by the court placing itself

231 S 51(3)(aA) of Act 105 of 1997 (as amended).
232 2004 (2) SACR 454 (SCA).
233 S 51(1)(a) read with Part I of Schedule 2 of Act 105 of 1997.
234 *S v Ferreira op cit* note 232 at paras 1-4.
235 The SCA found no such circumstances in respect of the second and third appellants. Their position is not germane to the present discussion.
236 *S v Ferreira op cit* note 232 at para 43.

as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship and the assistance of expert evidence.

> Only by judging the case on that basis can the offender's equality right under s 9(1) of the Constitution be given proper effect. It means treating an abused woman accused with due regard for gender difference in order to achieve equality of judicial treatment… It also, therefore, means having regard to an abused woman accused's constitutional rights to dignity, freedom from violence and bodily integrity that the abuser has infringed.[237]

The Court does immediately add that in the weighing process due emphasis should be accorded to the fact that the offender had taken the extreme step of depriving the abuser of his constitutional right to life.[238]

3.4.3 Criminal liability: the defence of 'private defence'

The matter of *S v Engelbrecht*[239] is akin to that of *S v Ferreira* (above) in that it also deals with a woman who killed her husband after years of long-standing and pervasive abuse under circumstances suggesting premeditation. The accused in *Engelbrecht* denied criminal liability, and argued for a development of the normative theory of culpability, which would excuse her from the act of killing the deceased.[240] Alternatively, it was contended that if the lawfulness of her conduct had to be tested against an established ground of justification, the

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237 *Idem* para 40. Footnotes omitted.

238 *Idem* para 41. The ultimate conclusion reached by the SCA was that the sentence of life imprisonment was set aside and substituted by a sentence of six years' imprisonment, with the portion that the appellant had not yet served to be suspended. At the time of finalisation of the appeal, the appellant had already served more than three years of the original sentence – para 46.

239 *Op cit* note 1 [hereafter '*Engelbrecht*'].

240 *Idem* paras 15-16.

elements of such defence should be developed in order to promote the spirit, purport and object of the Bill of Rights.[241]

In a well-reasoned judgment, Satchwell J considers the requirements for the common-law defence of private or self defence.[242] She points out that it has generally been stated that the question whether an accused who relies on self-defence has acted lawfully must be judged by objective standards.[243] The test here is one of 'reasonableness'. It is also accepted that the 'reasonableness' test is the vehicle to ascertain the legal convictions of the community or the community's sense of equity and justice (the *boni mores*).[244] In conducting this enquiry, the court must be driven by the values and norms underpinning the Constitution.[245] The Constitution is a system of objective normative values for legal purposes;[246] an approach to the 'legal convictions' test would be informed by the foundational values of the Constitution, namely human dignity, equality and freedom.

The Court observes that such approach will necessarily have at its core the circumstances and perceptions of the accused. In the context of an abused woman who killed her abuser, it requires the court to have regard to her experience of abuse as well as the impact of the abuse on her.[247] Importantly, Satchwell J not only acknowledges the gendered dimension of domestic violence

241 *Idem* para 17.

242 See also discussion by M Reddi 'Domestic violence and abused women who kill: Private defence or private vengeance?' (2007) 124 *SALJ* 22 at 22.

243 *Engelbrecht op cit* note 1 para 327.

244 *Idem* para 330.

245 *Idem* para 332.

246 Satchwell J cites *inter alia* the *Van Duivenboden* and *Van Eeden* judgments as authority here.

247 *Engelbrecht op cit* note 1 para 333.

(with reference to *Carmichele (CC)* and *Baloyi*),[248] but also recognises that the development of the law relating to defences excluding unlawfulness has been gendered in that this development has 'largely ignored women's lives and their experience of violence'.[249]

Satchwell J agrees that there may be a need to develop the common law to promote and protect the right to equality and to equal treatment before the law. She proceeds to examine the common-law requirements for private or self defence, including the requirement that the unlawful attack against the defender must be 'imminent'.[250] *In casu* the State argued that there was no immediately threatening attack on the accused or her daughter at the time of the killing.[251] The court finds that where abuse is frequent and regular such that it can be termed a 'pattern' or 'cycle of abuse, the requirement of imminence should extend to encompass abuse that is 'inevitable'.[252] It follows that premeditation of the defensive act is not necessarily inconsistent with reliance placed on this ground of justification.[253] Although the accused here was ultimately convicted of murder,[254] the significance of the interpretation given to the notion of 'imminence' is obvious.

248 *Idem* para 334.

249 *Idem* paras 334-337.

250 *Idem* para 227 *et seq*.

251 *Idem* para 232. In fact, the deceased was either sleeping or unconscious at the point when the accused placed a plastic bag over his head, resulting in death by suffocation.

252 *Idem* para 346-350.

253 *Idem* para 350.

254 The conviction turned on the application of the requirements that the defensive action must be 'necessary' to avert the unlawful attack and must be proportional to the attack. Satchwell J concluded that the accused had exhausted all other options available to her, and killing the deceased was therefore both reasonably necessary and proportionate. The two assessors however preferred a different conclusion on the facts, which then constituted the majority finding of the court – *idem* paras 399-449. The accused was sentenced to be detained until the rising of the court.

3.4.4 Developing the common-law offence of rape

In *Masiya v Director of Public Prosecutions (Pretoria)*[255] the Constitutional Court had to consider the constitutional validity of the common-law definition of rape, which was traditionally formulated as 'the unlawful, intentional sexual intercourse with a woman without her consent'. This definition excluded anal penetration and was gender-specific both in relation to the perpetrator and the victim.

Mr. Masiya, the applicant, had been tried in the regional court at Graskop on a charge of raping a nine-year old girl.[256] The evidence established that the complainant was penetrated anally instead of vaginally. The State argued for his conviction of indecent assault, a competent verdict on a charge of rape.[257] The regional court considered *mero motu* whether the common law definition of rape needed to be developed to include anal penetration, and concluded that such development was required in order to 'promote constitutional objectives'.

The regional court thus extended the definition of rape to include 'acts of non-consensual sexual penetration of the male sexual organ into the vagina or anus of another person'. Mr. Masiya was accordingly convicted of rape (in terms of this extended definition) and was committed to the High Court for sentencing. The High Court made an order to the effect that the common law definition of rape was unconstitutional, and extended this definition to include acts of non-

255 2007 (5) SA 30 (CC) [hereafter '*Masiya*'].

256 The facts are set out in paras 6-15 of Nkabinde J's judgment.

257 See s 261(1)(b) of the Criminal Procedure Act 51 of 1977.

consensual sexual penetration of the male penis into the vagina or anus of another person.[258]

Although the Constitutional Court was divided over the outcome, the majority and the minority judgments were in agreement about most of the issues before the court. They agreed that the common-law definition of rape is not in itself objectionable; however, the problem was that it was 'under-inclusive' and therefore had to be expanded to include anal penetration by a male penis. The majority and minority views parted company on one most essential aspect of the case, i.e. whether this expansion should be a gender-neutral one. This entails whether the definition should include both male and female victims, or whether it should be gender-specific, in the sense of being limited to female victims only. The latter view was the one held by the majority.[259]

In order to explain this limited expansion, Nkabinde J firstly pointed out that the facts *in casu* did not require the Court to consider non-consensual penetration of a male anus by a penis. She also referred to the separate roles of the courts and the legislature – in a constitutional democracy the legislature, and not the courts, has the major responsibility for law reform.[260] The development of the common law is a power that has always vested in our courts, and is exercised 'in an incremental fashion' as the facts of each case require.[261] The Court noted that -

> … [H]istorically, rape has been and continues to be a crime of which females are its systematic target. It is the most

[258] Certain accompanying legislation referring to the offence of rape was also declared unconstitutional to the extent that these references were gender-specific. (This declaration required referral to the Constitutional Court.)

[259] Nkabinde J, with Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, Van Heerden AJ and Yacoob J concurring.

[260] *Masiya op cit* note 255 para 30.

[261] *Idem* para 31.

> reprehensible form of sexual assault constituting as it does a humiliating, degrading and brutal invasion of the dignity and the person of the survivor. It is not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifesting male supremacy over females.[262]

For further support of her point, Nkabinde J referred to the Violence Declaration, which 'enjoins member States to pursue policies to eliminate violence against women'.[263] She noted that non-consensual anal penetration of women and young girls such as the complainant in this case constitutes a form of violence against them equal in intensity and impact to that of non-consensual vaginal penetration. The object of the criminalisation of this act is therefore to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group.

The extended definition would protect the dignity of survivors, especially young girls who may not be able to differentiate between the different types of penetration.[264] Nkabinde J also listed further ways in which an extended definition would afford women and girls increased protection.[265]

The Court nevertheless held, with reference to the principle of legality,[266] that this extended definition should not apply to Mr. Masiya. His conviction was accordingly amended to one of indecent assault and he was referred back to the regional court for sentencing.

262 *Idem* para 36.
263 *Idem* para 37.
264 *Idem* para 38.
265 *Idem* paras 38-39.
266 This principle prevents an accused from being convicted in respect of an act that was not an offence at the time of commission.

In his minority judgment, [267] Langa CJ made the incisive comment that today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy.[268] He noted, with reference to the International Criminal Tribunal for Rwanda (ICTR), that the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.[269]

Langa CJ was of the opinion that the anal penetration of a male should be treated in the same manner as that of a female.[270] He provided three reasons for this view. Firstly, to do otherwise fails to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom as rape negates not only dignity, but bodily autonomy. All these concerns apply equally to men and women and necessitate a definition that is gender-neutral concerning victims.[271]

> The fact that women are the primary target of rape cannot be ignored by this court; nor can it be denied that male domination of women is an underlying cause of rape.[272]

However, this does not mean that men must be excluded from the definition, since the criminalisation of rape is about protecting the 'dignity, sexual autonomy and privacy' of all people, irrespective of their sex or gender. Here,

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267 With Sachs J concurring.

268 *Masiya op cit* note 255 para 78.

269 *Idem* para 78, citing *Prosecutor v Musema* Case No ICTR-96-13-A (Judgment dated 27 January 2000) para 226.

270 *Idem* para 80.

271 *Idem* para 80.

272 *Idem* para 84.

Langa CJ again drew on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) for authority.[273]

Secondly, there is no reason to believe that including men in the definition will in any way decrease the protection afforded to women.[274] Thirdly, the groups of men who are most often the survivors of rape, young boys, prisoners and homosexuals, are, like women, also vulnerable groups in our society.[275] Moreover, they, and most other male victims, are raped precisely because of the gendered nature of the crime. Finally, Langa CJ pointed out that the extension to male survivors was in line with both recent foreign experience and international criminal and humanitarian law.[276]

There are several reasons why Langa CJ's analysis in the minority judgment is preferable to that of Nkabinde J.[277] For purposes of the current discussion, it is important to note that both judgments draw on international law to bolster the arguments regarding the expansion of the common law definition of rape. However, the way in which this is done differs considerably. Langa CJ, on the one hand, cites specific paragraphs from recent tribunal judgments and statutes that go directly to the points he is seeking to support. Nkabinde J, on the other hand, refers only to one source, i.e. the 1993 Violence Declaration, (without citing a particular provision of the Declaration). She notes that this document 'enjoins member States to pursue policies to eliminate violence against women', and then proceeds to argue for the 'criminalisation' of anal penetration. This is

273 *Idem* para 84 fn 8, citing *Prosecutor v Furundzija* Case No IT-95-17/1-T (Judgment dated 10 December 1998) para 183.

274 *Idem* para 85.

275 *Idem* para 86.

276 Langa CJ notes that the ICTR and the ICTY have both defined rape as including male anal penetration, and the Elements of Crimes of the International Criminal Court also include male anal penetration under the definition of rape – *idem* para 87.

277 See also discussion in Section 4.3 below.

however not what is in issue – coerced anal penetration was already criminalised, albeit as another offence (indecent assault). As Langa CJ points out, there is no question here of criminalisation or decriminalisation – it is rather a matter of re-categorisation.[278]

Nkabinde J's recourse to international law, in additional to displaying evidence of inadequate research, therefore does not address the issue that lies at the heart of the difference between the two points of view. In contrast, Langa CJ captures the gist of the matter perfectly.

The outcome of the *Masiya* judgment has since been overtaken by the promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[279] which contains an expansive gender-neutral definition of rape.[280] However, the majority judgment remains disconcerting, as I discuss in the general evaluation below.[281]

3.5 Delays in institution of action

The applicant in *Bothma v Els*[282] had instituted a private prosecution against the first respondent, alleging that thirty-nine years before, when she had been a thirteen year old schoolgirl, he had subjected her to a pattern of sexual abuse for a period of more than two years.[283] Mr Els, who denied this charge, successfully applied to the High Court for an order permanently staying the private

278 *Masiya op cit* note 255 para 83.
279 Act 32 of 2007 [hereafter 'the 2007 Sexual Offences Act'].
280 See s 3.
281 See Section 4 below.
282 2010 (1) BCLR 1 (CC).
283 *Idem* para 1.

prosecution. The High Court held that the unreasonable delay, for which it regarded Ms. Bothma as being fully culpable, would result in irreparable trial prejudice to Mr Els, thus denying him his constitutional right to a fair trial.

The Constitutional Court (per Sachs J) held that the High Court had erred in granting the stay of prosecution. It found that in deciding whether a particular lapse of time (before institution of prosecution) was reasonable, it was important to also consider the nature of the offence and public policy dimensions.[284] In his evaluation of the nature of the offence, Sachs J observed the following:

> Rape often entails a sexualised act of humiliation and punishment that is meted out by a perpetrator who possesses a mistaken sense of sexual entitlement. The criminal justice system should send out a clear message through effective prosecution that no entitlement exists to perpetrate rape.[285]

He stated that a notable feature of recent decades has been the manner in which adult women have through newly discovered insight found themselves suddenly empowered to come to grips with and denounce sexual abuse they had suffered as children.[286]

Sachs J undertook a brief survey of regional standards and comparative law, stating that the need for courts to give an effective response to rape, and

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284 *Idem* para 38. The High Court had considered the following three factors: the length of the delay; the reason for the delay; and the trial prejudice caused to Mr Els by the delay – *idem* para 39.

285 *Idem* para 46.

286 In *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA), the appellant, at the age of forty-eight, sued her uncle for sexual abuse over a period of eight years of her childhood. The issue to be determined was the date from which civil prescription would run. The appellant argued that the prescription period ran not from the dates of the commission of the crime, but rather from the date on which she subjectively realised that a wrong had been done to her by her uncle. This contention was upheld in the SCA. See also *S v Cornick and Another* 2007 (2) SACR 115 (SCA), where the appellants were convicted of rapes committed nineteen years before the complainant laid charges against them.

especially the rape of young girls, has been emphasised throughout the world. He made reference to Article 4 of the African Women's Protocol,[287] as well as the African Charter on the Rights and Welfare of the Child, and furthermore included jurisprudence from courts in the Southern African region.[288] On this basis, Sachs J concludes that the High Court had failed to give appropriate weight to the nature of the offence.[289]

This judgment is of significance due to its emphasis on the importance of an effective response (in this instance, by the courts) to sexual violence, in particular where the victims are vulnerable persons, such as young girls. One further hopes that criminal courts will take guidance from the carefully worded statements of Sachs J regarding new knowledge and insights into the reasons for extended delays between incidents of sexual violence and the institution of action.[290]

4. EVALUATION

In this section, I provide comments on aspects of South African jurisprudence relating to the right to freedom from violence as outlined in this chapter, and also attempt to identify areas where the standards and norms in international and regional human rights law may have an impact on South African law.

287 This provision states that every woman is entitled to respect for her life and the integrity and security of her person.

288 *Bothma v Els op cit* note 282 para 57.

289 *Idem* para 83.

290 The 2007 Sexual Offences Act includes a provision to the effect that in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof – s 59. (See also s 58 of the Act.) These provisions were introduced to counter long-standing stereotyped views on the part of judicial officers regarding how women who have been raped are 'expected' to behave.

4.1 Formulation of the right to freedom from violence in the Constitution

Although there may be logical inconsistencies in the organisation of the subsections of section 12, section 12(1)(c) is clearly defined. The fact that it refers to *all* forms of violence from *either public or private sources* leaves no doubt about the ambit of the right or the fact that the State duties associated with this right include both negative and positive obligations. Section 7(2), which requires the State to 'respect, protect, promote and fulfill' the rights in the Bill of Rights further reinforces these obligations

4.2 The State duty to prevent acts of violent crime

The approach in this series of judgments, set in motion by the decision of the Constitutional Court in *Carmichele*, has been to concentrate on the constitutional obligation to develop the common law with regard to the spirit, purport and objects of the Bill of Rights in accordance with the injunction in section 39(2) of the Constitution.

The Constitutional Court's assessment in *Carmichele* of the question as to whether a legal duty existed towards the assault victim cannot be faulted, at least from a constitutional perspective. Importantly, the Court emphasised that this determination must take place within the matrix of the 'objective normative value system' embodied by the Constitution. This normative value system included the principles of international (and regional) human rights law considered by the Court. The radical shifts brought about by the application of this approach are tangibly demonstrated when comparing the SCA's two

judgments in the *Carmichele* case: one before the Constitutional Court judgment, and the other afterwards.[291]

The *Carmichele* judgment accordingly laid the basis for what could have been a vibrant expansion of this matrix of constitutional values in subsequent judgments on police dereliction of duty (and, arguably, other aspects of interpersonal violence)[292] through closer regard of the normative value system relating to violence against women that was simultaneously emerging international human rights law.[293] Unfortunately, as discussed above, this promise has not yet been realised, whether because of superficial analysis of section 39(2) or due to an assumption that the law is settled and that further recourse to international law is therefore redundant. I submit that this is an oversight that should be avoided in future where section 39(2) is applicable, and even more so where the direct interpretation of the right to freedom from violence is in issue.

In this regard, the guidelines that have been laid down by international and regional human rights bodies in respect of the state obligation to *prevent* violence against women (and the application of the standard of due diligence) should be borne in mind.

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291 The same can be said in respect of the *Van Eeden* judgment, although the initial judgment holding that the police did not have a legal duty towards the victim was handed down by the High Court. The SCA subsequently dealt with the appeal against this ruling after *Carmichele (CC)*.

292 Cf eg the *Rail Commuters (CC)* judgment *op cit* note 166.

293 As illustrated with reference to the article by Hopkins, *K v Minister of Safety and Security* is a case in point. The minority judgment in *Masiya*, and its examination on international human rights and humanitarian law, is however an example of how these emerging standards have influenced (and enriched) the Court's analysis.

4.3 Reliance on section 39(2) of the Constitution

Woolman, in his analysis of *Masiya* and two other recent judgments,[294] disapproves of what he describes as the Constitutional Court's persistent refusal to engage in the direct application of the Bill of Rights.[295] He notes that 'flaccid analysis' in respect of three vaguely defined values (dignity, equality and freedom) almost invariably substitutes for more rigorous interrogation of constitutional challenges in terms of the specific substantive rights in Chapter 2 of the Constitution.[296]

Secondly, he argues, by continually relying on section 39(2) to decide challenges both to rules of common law and to provisions of statutes, the court obviates the need to give the specific substantive rights in Chapter 2 the content necessary to determine the actual validity of the rule being challenged in the instant matter and of similar matters challenged in subsequent matters.[297] This is his main point of criticism against the *Masiya* judgment: the fact that it never truly considers the direct application of the substantive provisions of the Bill of Rights to the challenged common-law rule regarding the definition of rape.[298] This view is shared by other commentators.[299]

294 *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC); *NM v Smith* 2007 (5) SA 250 (CC). These judgments do not relate to violence against women, and are accordingly not included in the discussion here.

295 S Woolman 'The amazing, vanishing Bill of Rights' (2007) *SALJ* 762 at 762-763.

296 *Idem* at 763.

297 *Ibid*.

298 At 768.

299 See eg K Phelps 'A dangerous precedent indeed – A response to CR Snyman's note on *Masiya*' (2008) 125 *SALJ* 648 at 653.

Looking at the way in which the right to freedom from violence has been applied by the courts as set out above, I have to concur with Woolman. The continued reliance on the initial foundational judgments, i.e. *Baloyi* and *Carmichele* (and to a lesser degree, *Van Duivenboden* and *Van Eeden*), and *Chapman* in the context of sentencing, has resulted in a lack of analysis of the right itself. It has also led to this line of jurisprudence beginning to lag behind recent developments in international law.[300] This does not mean that one disagrees with the approach taken in *Baloyi* and *Carmichele*. However, the (majority) *Masiya* judgment is a clear demonstration of a superficial application of section 39(2).

4.4 Sentencing principles

Although it has been encouraging to note that the courts are increasingly articulating women's right to freedom from violence as a protected interest in respect of sentencing, the controversy in South African law regarding the operation of the so-called mandatory minimum sentencing legislation (and particularly, the interpretation of the phrase 'substantial and compelling circumstances') has to a large extent obscured the question of how much weight the court should attach to the violation of the victim's rights. It may be useful, for future purposes, to consider that State duties, as formulated, for example, by CEDAW, include the obligation to act with due diligence to punish violence against women,[301] and how this connects with existing sentencing principles.

300 Cf also E De Wet 'The "friendly but cautious" reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks' (2005) 28 *Fordham International Law Journal* 1529 at 1556-1558, albeit with reference to judgments other than the ones analysed here.

301 See eg CEDAW *General Recommendation No. 19* (Chapter 3, Section 2.3.2).

4.5 Areas for future development: hard cases, good law?

It is axiomatic that the courts can only adjudicate those legal problems placed before them. The following issues are therefore raised on the assumption that the Constitutional Court may have an opportunity to respond to these matters at some point in the future.

In *Brooks v Minister of Safety and Security*,[302] the appellant was the son of Neil Brooks, the perpetrator in the *Van Duivenboden* matter.[303] Brooks Jnr. brought a claim for damages against the Minister of Safety and Security based on loss of support (as a result of his father's incarceration). His argument, similar to that of Van Duivenboden, was that the police had been negligent in failing to remove his father's firearm. Had this been done, the tragedy would have been averted and his father would not have been incarcerated. The SCA made short shrift of this argument, with reference to the material differences between the action for bodily injury (the basis of Van Duivenboden's claim) and the action for loss of the breadwinner (which formed the basis of the instant claim) as well as other policy considerations.[304] While this approach may be technically correct under South African law, the end result nevertheless appears anomalous.[305]

302 [2008] ZASCA 141.

303 See Section 3.3.2 above.

304 See paras 10-13 of the judgment.

305 The case of *Minister of Safety and Security v Madyibi* [2009] ZASCA 95 similarly included a claim for the loss of the breadwinner. Ms. Madyibi had instituted a claim for damages against the Minister after her husband, a sergeant in the South African Police Service, shot her in the throat in their home in Ngqeleni in 2003. He then committed suicide with the same firearm. Her argument in the Eastern Cape High Court was that the suicide was the consequence of a failure by the police to confiscate an official firearm from her husband, despite repeated previous requests by her and others to do so. It was also contended that Sergeant Madyibi had repeatedly threatened to shoot his

Returning to the practical examples set out in Chapter 2 above,[306] the exposition of standards in international human rights law allows us to venture some answers in response to the questions posed there. It should be noted that these examples were selected not only because of their practical relevance, but also to include certain of the legislative and other measures required of States as part their response to violence against women.

The first example is that of the victim of domestic violence who wishes the prosecution to appeal against the acquittal of the perpetrator on charges of breaching the protection order that she had obtained against him. As explained earlier, in South African law the complainant is not a party to the criminal trial, and she accordingly does not have standing to challenge any findings, such as a decision to release the accused on bail, or the outcome of the case.[307]

The fact that the accused may appeal against his conviction on both a factual finding and a point of law, but the prosecution may only appeal against an acquittal on a point of law is understandable, given the traditional power imbalance between the State and the (often unrepresented) accused person; however, where the charges are of a deeply personal nature, as is usually the case with violence against women, it does appear that the pendulum of the power imbalance can swing too far in the other direction. This is particularly true when the complainant's personal safety is staked on the outcome of the criminal case,

wife. Her claim included loss of income to her and four children. Both the High Court and SCA found in her favour; however, this was largely because of concessions made on the part of the Minister.

306 Chapter 2, Section 2.2.

307 See also discussion in H Combrinck 'Claims, entitlements or smoke and mirrors? Victims' rights in the Sexual Offences Act' in L Artz & D Smythe (eds) (2008) *Should We Consent? Rape Law Reform in South Africa* 262 at 266.

as may happen in the hypothetical example where the perpetrator has been acquitted of breaching a domestic violence protection order.

I would therefore argue that the State's obligation to effectively prosecute acts of violence against women necessitates an amendment to section 310 of the Criminal Procedure Act to allow an appeal against an acquittal based on *factual findings* as well as points of law.

The second example entails the police forensic laboratory misplacing the medico-legal samples taken in a rape case, resulting in the matter being permanently withdrawn without any prospect of a prosecution. The question is whether the rape victim can hold the State accountable for this mishap.

In this instance, it is important to firstly bear in mind that the State has a duty to conduct an investigation into alleged acts of violence against women with due diligence. The IACrtHR provided detailed guidelines on the standards for forensic investigations in its judgment in *González et al ('Cotton Field') v Mexico*.[308] In the absence of a satisfactory explanation of how the samples were lost, the State is in breach of its obligations. (It is useful to also recall the comments of the ECrtHR in the case of *X & Y v The Netherlands*, to the effect that the absence of a criminal investigation made it harder to furnish evidence on the elements that had to be established to found an action for damages.) This is similar to our example in the sense that without the DNA analysis, there will be no way for the victim to identify the perpetrator, and thus no way for her to take action in civil law against the identified perpetrator. The loss of the sample thus precludes *any* effective remedy in law for the victim.

[308] IACrtHR (Unreported judgment dated 16 November 2009). See discussion in Chapter 5, Part B, Section 3.3.2.

The third example of lesbian women subjected to corrective rape, accompanied by a reluctance on the part of criminal justice officials to pay adequate attention to these cases both individually and *as a group*, is unfortunately not a hypothetical one in South Africa, as indicated by recent research reports.[309] The second part of the question, i.e. whether these women can compel the police and prosecutors to conduct diligent and timely investigations and prosecutions, based on their right to freedom from violence, brings this scenario squarely within the ambit of the 'due diligence' standards of international law, as discussed in Chapters 3, 4 and 5. Similarly, reading the provisions of the Women's Convention (as interpreted by the CEDAW in its inquiry into the situation of women in Ciudad Juárez) with the South African Constitution, one can make a strong argument that there is a duty on the South African Government to address the destructive gender stereotypes and homophobia underpinning the current wave of sexual violence against lesbian women in South Africa.

Another area that may serve before the courts is that of victim compensation. In terms of section 300 of the Criminal Procedure Act,[310] a court may upon conviction make an order for the accused to pay to the victim compensation for damage to or loss of property, including money. However, this section does not allow for compensation for physical, psychological or other injury, or for loss of income or support. Its provisions are therefore fairly limited.[311]

309 See in this regard A Martin *et al Hate Crimes: The Rise of Corrective Rape in South Africa* (2009) 13 for a discussion of inadequate criminal justice responses to recent violence against lesbian women in South Africa; also People Opposing Women Abuse (POWA) *et al Criminal Injustice: Violence against Women in South Africa* (2010) 15.

310 Act 51 of 1977.

311 Interestingly, in terms of clause 27 of the Prevention and Combating of Trafficking in Persons Bill B7-2010 (which has been introduced in the National Assembly and at the time of writing, awaits debate by the portfolio committee), a court may order a person

While it is true that the victim may bring a civil claim against the perpetrator, the cost of civil proceedings (and the fact that legal aid assistance in civil matters is generally very limited) places this option beyond reach of most victims of violence against women. There is at present no State-funded compensation scheme for victims of violent crime in operation in South Africa, although the possibility has been raised on a number of occasions by the South African Law Reform Commission.

In 2004, the National Department of Justice and Constitutional Development introduced a Victims' Charter aimed at 'consolidation of the present legal framework in South Africa relating to the rights of and services provided to victims of crime'.[312] The Charter addresses victims' rights under seven broad headings, which includes the right to compensation. The document briefly explains the process under section 300, and also informs victims that they can institute a civil claim against the accused where the criminal court did not grant a compensation order.[313]

convicted of an offence to pay appropriate compensation to any victim of the offence for -

(a) damage to or the loss or destruction of property, including money;
(b) physical, psychological or other injury;
(c) being infected with a life-threatening disease; or
(d) loss of income or support,

suffered by the victim as a result of the commission of that offence.

This provision, if included in the final version in the legislation, would place victims of human trafficking in a better position in terms of being able to claim compensation as part of the criminal proceedings against an alleged 'trafficker', compared to victims of all other violent crime (including violence against women).

312 Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004) Preamble. According to the Preamble, the objectives of this Charter are to eliminate secondary victimisation in the criminal justice process and to ensure that victims remain central in this process – *ibid.*

313 *Idem* at 13-14.

Given the standards that have been set in international law in respect of the State's duty to investigate, prosecute, punish and *compensate for*, acts of violence against women, I question whether the current position in South Africa, which allows for such a narrow 'right to compensation', are in line with these standards. While the question of victim compensation is admittedly applicable not only to crimes of violence against women, but to victims of crime more broadly, I argue that one has to consider this question first and foremost in the light of international and regional human rights standards relating to violence against women.

Finally, an issue that has not yet reached our courts, but is bound to do so before long,[314] is the question of the State's obligation to realise the right to have access to adequate housing of women experiencing gender-based violence. Here, one would have a confluence of the right to freedom from violence with the right to have access to adequate housing; I have argued elsewhere that considering the standards established in international law in respect of these rights, South Africa is not currently complying with its obligations to protect and fulfill these rights.[315] This is where an understanding of equality, and particularly, *substantive* equality,[316] as an aspect of the right to freedom from violence becomes important.

[314] Given firstly, the high levels of violence against women and secondly, the lack of a specific government housing policy (at the time of writing) to accommodate women experiencing domestic violence – see H Combrinck *Living in Security, Peace and Dignity: The Right to have Access to Housing of Women who are Victims of Gender-Based Violence* (2009) 30-31.

[315] *Idem* at 54-55.

[316] I argue that the Committee on the Elimination of Discrimination against Women applied this understanding of the right to freedom from violence in its views on *A.T. v Hungary*, where it made clear the linkages between women's lack of access to adequate housing and their vulnerability to domestic violence (see Chapter 3, Section 2.6.1). See also Liebenberg and Goldblatt, who make a cogent case for an interpretative approach to socio-economic rights that integrates the value of equality - S Liebenberg & B Goldblatt 'The interrelationship between equality and socio-economic rights under

As Bumiller points out, the international human rights framework is useful firstly for affirming norms and standards and secondly, for holding the State to those standards.[317] However, I submit that this process can only be effective as long as the courts fully comply with the injunction set out in section 39(1)(b) of the Constitution. Given the findings set out above, my conclusion is that when held up to the normative mirror of current international law and regional law, the position in South African jurisprudence relating to women's right to freedom from violence is in danger of becoming a pale imitation of what it rightfully should be.

South Africa's transformative Constitution' (2007) 23 *SAJHR* (2007) 335 at 351. They explain that such an equality perspective alerts us to the fact that socio-economic programmes may be implemented in such a way that they exclude or are practically inaccessible for disadvantaged groups. Significantly, the examples listed by the authors include a housing programme that failed to make provision for the housing needs of women seeking refuge from abusive partners (*ibid*).

317 K Bumiller 'Freedom from violence as a human right: Toward a feminist politics of nonviolence' (2005) 28 *Thomas Jefferson Law Review* 327 at 344. See also Meyersfeld, who applies the theory of 'non-coercive compliance' to conceptualise international law as a 'standard-setting spectrum': an enunciation of norms to which states can aspire and on which individuals can rely in holding their governments to account - *Domestic Violence and International Law* (2010) 253. (Non-coercive compliance theory holds that international law influences the behaviour of states through a cooperative rather than a coercive process – Meyersfeld *loc cit*; see also HH Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599-2659.)

CHAPTER 7

CONCLUSIONS

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1. INTRODUCTION

The personal is political.[1]

This thesis set out to address, as one of its central research questions, how the understanding given to women's right to freedom from violence in international human rights law should guide the interpretation of this right under the South African Constitution. This research question, as phrased here, has two unspoken assumptions bound up within it. The first assumption is that where developments take place in international human rights law with regard to a particular right that is guaranteed under the South African Constitution, these advances should in turn also guide the interpretation of this right in South African jurisprudence. The basis for this assumption is to be found in section 39(1)(b) of the Constitution, which requires courts to consider international law when interpreting the rights in the Bill of Rights. I return to this assumption momentarily.

The second assumption is that there have indeed been some significant developments relating to women's right to freedom from violence in international human rights law worthy of incorporation in South African law. This implies that when relating the rules, principles and standards of international human rights law, more than an exposition of the *status quo* is

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[1] Feminist slogan – see eg J Oloka-Onyango & Sylvia Tamale '"The personal is political," or why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691 at 692.

required: it is important to also reproduce the sense of movement from a previous situation to the present one. In tracing the progress of women's rights generally, and the recognition of women's right to freedom from violence specifically, from the early 1990s to date, I accordingly found it difficult to provide a fleeting 'bird's eye view' or a neatly wrapped summary – instead, each step forward as documented (albeit at some length) in Chapters 3, 4 and 5 is presented to demonstrate the extent of the distance traveled in the elaboration of this right.[2]

2. WOMEN'S RIGHT TO FREEDOM FROM VIOLENCE IN INTERNATIONAL (GLOBAL) LAW

As explained in Chapter 3, the key international instrument dealing with women's equality, i.e. the Convention on the Elimination of All Forms of Discrimination against Women, was enacted to address the silence regarding women's concerns in the 'mainstream' documents such as the UDHR, ICCPR, ICESCR, and so forth.[3] Unfortunately, the drafters of the Women's Convention themselves left a deafening silence: the absence of provisions explicitly addressing violence against women. This required the monitoring committee to include 'gender-based violence' in the ambit of the Convention through constructive interpretation in its General Recommendation No. 19, adopted in 1992. This General Recommendation represented the 'base line' against which future developments were to be measured; importantly, because of its foundation

[2] This is where the personal element – the inescapable fact of my also having traveled this distance as a feminist lawyer working in the area of violence against women while these changes were taking place – has resulted in a particular end product.

[3] Chapter 3, Section 2.1.

in the Women's Convention, 'gender-based violence' is first and foremost addressed from the perspective of the prohibition of sex-based discrimination.[4]

In 1993, the Vienna World Conference on Human Rights provided women's rights activists, organised into a powerful coalition, with an opportunity to successfully advocate for the inclusion of women's rights, and particularly the issue of violence against women, in the final conference document.[5] This point also signified the inclusion of violence against women (and by extension, women's rights) in the 'mainstream' international human rights agenda. Given that women's rights were merely 'shimmering on the horizon' of the broader international human rights law environment at the beginning of the 1990s, this incorporation was a remarkable achievement in itself, and provided the starting point for subsequent developments detailed below.

The following year saw the adoption of the Declaration on the Elimination of Violence against Women ('the Violence Declaration'), which also introduced a period of consolidation of the norms initially set out in CEDAW's General Recommendation No.19.[6] These norms include not only the recognition that violence against women is a form of discrimination against women, but also the principle that States are held responsible for acts of private violence if they fail to act with due diligence to prevent, investigate, prosecute and compensate such acts. Further consolidation occurred by means of the Beijing Platform of Action.[7]

4 Chapter 3, Section 2.3.2. See also Chapter 4, Section 7.2.
5 Chapter 4, Section 3.
6 Chapter 4, Section 4.
7 Chapter 4, Section 5.

The Beijing Platform recognised violence against women as one of its twelve critical areas of concern, and outlined actions to be taken by Governments and other entities. As indicated in the evaluation of the international instruments,[8] the Beijing Platform has been influential not only on its own terms, but also in the sense of amplifying the effect of, for example, the Women's Convention.[9]

Recalling the typology of State duties that was set out as part of the framework of analysis for this thesis,[10] and which formed the outline for the table that was constructed for each of the international instruments[11] and the State obligations[12] listed there,[13] one notes that there are also increments across these obligations. One example is the State obligation to provide shelters for victims of violence against women.[14]

At around the same time as the adoption of the Violence Declaration in 1994, the mandate of the Special Rapporteur on Violence against Women, its Causes and Consequences was established. The mandate holders have been well-placed not only to document developments in the normative framework of international law; I submit that they have also contributed to this framework through, for example, thematic reports such as the 2006 report on due diligence.[15]

8 Chapter 4, Section 4.1.
9 See Chapter 4, Section 7.1.
10 Chapter 2, Section 4.2.
11 CEDAW *General Recommendation No. 19*, the Violence Declaration and the Beijing Platform.
12 The term 'obligation' is used here in the broad sense, with the acknowledgment that these instruments are not all legally binding in international law.
13 Tables 1-3 of *Annexure A*.
14 This example is discussed in Chapter 4, Section 7.1.
15 See Chapter 4, Section 7.1.

The coming into force of the Optional Protocol to the Women's Convention in 2000 provided renewed opportunities for expansion of the normative framework through more in-depth interpretation, brought about by the individual complaints mechanism introduced by this Protocol. The CEDAW's interpretation of the Convention and General Recommendation No. 19 in the three communications before it dealing with violence against women, as well as its inquiry into the gender-based murders of women in Ciudad Juárez, Mexico, gave insight into the practical operation of the emerging international standards.[16] For example, in the two communications brought against Austria, the Committee observed that even where the State has a well-developed legislative structure and impressive policy arrangements in place to address violence against women, these commitments have to be implemented by individual State officials acting with due diligence.[17]

In the case of Mexico, the Committee pointed out clearly how the stereotyped approach of the Mexican authorities had contributed to violence against women.[18] (This view was subsequently borne out by the judgment of the IACrtHR in the 'Cotton Field' case.)

As part of the investigation into international law (in the global sense), I examine the question whether it can be said that women's right to freedom from violence has achieved full recognition at this level. The answer, I submit, can be found, in the thematic reports of the Special Rapporteur on Violence against Women (which make repeated reference to this right) as well as two recent enactments, i.e. the Convention on the Rights of Persons with Disabilities and the Declaration on Indigenous Peoples, which both contain reference to the right to live free from

16 Chapter 3, Section 2.6.
17 Chapter 3, Section 2.6.2.
18 Chapter 3, Section 2.6.4.

violence. In addition, one should consider the cumulative impact of the various instruments addressing violence against women. This means that even though there is at the time of writing no dedicated (binding) international instrument that explicitly guarantees women's right to freedom from violence, this right has nevertheless gained acknowledgment in international law as a right *eo nomine*.

At the same time, international law has developed a framework consisting of the Women's Convention, the Violence Declaration and the Beijing Platform, which contains a clear understanding of what violence against women entails (both as a form of sex-based discrimination and a human rights violation *per se*), and an broad exposition of State obligations to respond to violence against women. These obligations have been affirmed not only by CEDAW, but also by other human rights bodies such as ICESCR and the Human Rights Council, and have recently been identified by the UN General Assembly itself as matters of priority. This indicates an 'evolving convergence'[19] of standards, extending well beyond the recognition of the right to freedom from violence, on international level.

3. THE CONTRIBUTION FROM REGIONAL HUMAN RIGHTS LAW

It is useful here to first look at the Inter-American system. The reason for this is that the leading regional instrument, i.e. the Convention of Belém do Pará, was adopted in this system in 1994. While it is virtually impossible to draw a clearly perceptible direct line between this Convention and subsequent events in the international arena (such as the Special Rapporteur on Violence against Women

[19] The term is used by the ECrtHR in *MC v Bulgaria* – see Chapter 5, Part B, Section 4.3

referring to the right to freedom from violence as a matter of course in her thematic reports), I argue that the influence of this Convention has carried beyond its immediate sphere of application.

However, it is not only the express articulation of the right to freedom from violence in the Inter-American Convention of Belém do Pará that is of importance to this study. The incorporation, within the understanding of this right, of the right to be free from discrimination and the right to be educated and valued free from stereotypes has already proved to be crucial in that it carries an 'equality interpretation' into the heart of the right to be free from violence – not as an incidental adjunct or parallel investigation, but as a central part of this interpretation.[20] A similar approach has been followed by the drafters of the proposed European Convention on Violence against Women and Domestic Violence.[21] This interpretation of violence against women resolves the concern identified earlier in respect of international law, i.e. whether violence against women should be typified predominantly as a form of discrimination or as a violation *per se*.[22]

As can be expected, given its previous jurisprudence in this area, the IACrtHR has laid down important guidelines in respect of the State's obligations to respond to violence against women, most notably in the recent case of *Gonzáles et al ('Cotton Field') v Mexico*, which specifically addresses the obligation to *prevent* acts of gender-based violence, as well as the obligation to conduct a diligent and effective investigation.

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20 See in this regard the analysis of the IACrtHR in the 'Cotton Field' case – Chapter 5, Part B, Section 3.3.2.

21 See Chapter 5, Part C, Section 3.

22 See Chapter 3, Section 3; Chapter 4, Section 7.2.

Because of the particular provisions of the European Convention (and the 'due process' interpretation attached to the right to liberty and security in this context), the interpretation of the applicable rights has followed a slightly different route from the Inter-American one. Rather than focusing on the right to freedom from violence, the European Court has found protection for women against domestic violence and sexual violence in Articles 3 and 8 of the European Convention (dealing with the right to freedom from torture and inhuman treatment and the right to respect for privacy and family life respectively). The fact that the Court recently found a violation of the equal protection provision in Article 14 of the Convention in the *Opuz v Turkey* case further broadens the protection provided under this instrument.[23]

The draft Convention on Preventing and Combating Violence against Women and Domestic Violence, currently being prepared by the Council of Europe, with its explicit recognition of the right to freedom from violence, due diligence standards and detailed State measures to respond to violence against women, holds much promise for the future.[24]

The African regional system currently awaits full implementation of the African Women's Protocol, an instrument that was drafted to supplement the African Charter on Human and Peoples' Rights.[25] (At the risk of generalisation, it can be said that while the document is formally in operation, its impact has yet to fully filter through to practice on domestic level.) Whether 'implementation' therefore

[23] Chapter 5, Part D, Section 4.5.

[24] However, at the time of writing, this document is still in the drafting stages and the final product may therefore differ substantially from the version analysed here.

[25] Chapter 5, Part D, Section 2.2.

in this sense means domestication of the Protocol, law reform initiatives, interpretative guidance or 'direct' implementation through the regional human rights bodies such as the African Commission on Human and Peoples' Rights, it is clear that the African Women's Protocol has the potential to provide significant normative guidance at national level – especially if taken together with the standards emerging from the other regional systems.

In conclusion, the assessment of the regional human rights systems shows firstly that in spite of differences, these systems have all moved towards the formal consolidation of norms regarding violence against women, or women's rights more broadly, in dedicated instruments (albeit at different points in the past sixteen years): the Convention of Belém do Pará, the draft European Convention on Violence against Women and Domestic Violence and the African Women's Protocol.[26] All three instruments guarantee women's right to freedom from violence;[27] the first two also explicitly link the right to freedom from violence with a prohibition of sex-based discrimination. Similarly, the first two instruments both contain provisions on the State duty to respond with due diligence to violence against women.[28]

[26] Chapter 5, Part E.

[27] The African Women's Protocol refers to the State duty 'to ensure the protection of women from all forms of violence' – Art 3; Art 4 states that every woman is entitled to respect for the integrity and security of her person.

[28] Art 4 of the African Women's Protocol does set out a number of measures to be taken by States to address violence against women; however, the 'due diligence' terminology is not employed.

4. THE RIGHT TO FREEDOM FROM VIOLENCE IN SOUTH AFRICAN LAW

> Unless we make the linkages and begin to see how we ourselves can exercise power differently, with different interests, objectives, choices, values, and priorities, we will not make the link in a sustained way between the instruments, the commitments on paper, and the changes in peoples' lives.[29]

The investigation of South African law has firstly shown that the right to freedom from violence has not yet received much attention from theorists.[30] In particular, the implications of the intersections between this right and the right to equality deserve further attention. (This intersection was, significantly, noted by the Constitutional Court in its judgment in *S v Baloyi*.[31])

Turning to the investigation of the jurisprudence of the Constitutional Court and the Supreme Court of Appeal, certain trends were distinguished.[32] When examining the two judgments on the obligation to enact legislation to address domestic violence, I observed that the initial 'foundational' judgment (*Baloyi*) contained a relatively superficial analysis of the State's obligations arising under international law. The subsequent judgment (*Omar*) then reproduced this analysis with its conclusion, and as the conclusion became more entrenched in later judgments, the conclusion or rationale only was relied on. This meant that the later judgments do not contain an 'independent' assessment of international law, in spite of the constitutional provision requiring courts to consider

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29 P Govender 'Leadership and the exercise of power after Beijing+10' in C van der Westhuizen (ed) *Gender Instruments in Africa* (2005) 22 at 24.

30 Chapter 6, Section 2.

31 Chapter 6, Section 3.2.

32 Chapter 6, Section 4.

international law. In practice, this implied that an opportunity was lost to commence a developmental trajectory reflecting progress in international law.

This pattern is particularly discernible in the line of cases relating to police liability for failure to prevent acts of violence following the judgment of the Constitutional Court in *Carmichele*.[33] While the analysis of international law in *Carmichele* was apt *at the time*, it is questionable whether this relatively uncomplicated analysis, which has now become solidified in South African law through its repeated application as described above, is really of any assistance to courts that may be confronted with more complex legal problems.

This is illustrated by the 'alternative' approach offered by Hopkins in response to the case of *K v Minister of Safety of Security*,[34] where the Constitutional Court relied on section 39(2) to expand the common-law rules of vicarious liability.[35] He argues that the application of customary international law would similarly have resulted in a finding of State responsibility for the conduct of the three police officials who raped the appellant.[36]

In this instance, the result would have been the same. And so, why does it matter, the skeptic may well ask. Why undertake a wide-ranging (potentially time-consuming) *excursus* into international human rights law when the 'simple' application of South African constitutional principles will bring the same result?

33 Chapter 6, Section 4.2.

34 2005 (6) SA419 (CC).

35 K Hopkins 'Can customary international law play a meaningful role in our domestic legal order: A short case study to consider' (2005) 30 *SAYIL* 276 at 277. See Chapter 6, Section 3.3.4.

36 Hopkins does not go as far as to suggest this application as an alternative to the Court's approach, which was to develop the common-law principles of vicarious liability in terms of section 39(2) to reach a finding of State liability. He merely proposes this as an 'interesting possibility'. The phrase 'alternative approach' is mine.

After all, the right to freedom from violence is clearly and unequivocally enshrined in the South African Constitution; why trouble oneself with an interpretative framework where, at least on international level, the guarantee of this right is not even clearly spelled out?

The first part of my response to this (understandably) skeptical interlocutor is to be found in the conclusion to the examination of international law in Chapter 4, i.e. that the value of the principles that have developed in international law since the adoption by CEDAW of Recommendation No. 19 to date lies not so much in the emergence of a right to freedom from violence for women as such, but rather in the whole of the normative framework supporting this right.[37] This framework consists of, *inter alia*, the various sets of State duties to respond to violence against women as set out in the international instruments (which includes the duty to act with due diligence in response to such violence). I argue that this framework also includes the increasing sense of urgency with which the international community has in recent years regarded violence against women, and the resulting prioritisation of this issue.[38] On a more practical level, the normative framework provides guidance in respect of the standards that are expected of State actors, for example, when considering whether or not to detain a perpetrator of violence,[39] when deciding whether or not to respond to emergency calls from victims of violence,[40] in conducting an investigation into allegations of violence against women,[41] and so forth.

37 Chapter 4, Section 7.3.
38 See Chapter 4, Section 6.
39 See *Fatma Yildirim (deceased) v Austria* (Chapter 3, Section 2.6.2).
40 See *Şahide Goekce (deceased) v Austria* (Chapter 2, Section 2.6.2).
41 See *Gonzales v Mexico (Cotton Field*) (Chapter 5, Part B, Chapter 3.3.2).

The second part of my response can be found in the judgment of the Constitutional Court in *S v Masiya*.[42] I submit that the differences between Nkabinde J's majority and Langa CJ's minority judgments illustrate the necessity of a more measured reliance on international law by the courts. Langa CJ's detailed consideration of international human rights law and international criminal law allowed him to recognise that criminalisation of rape is about protecting the 'dignity, sexual autonomy and privacy' of all people, irrespective of their sex or gender; Nkabinde J's brief reference to the Violence Declaration stands in contrast.[43]

In order to further strengthen my argument, I will briefly refer to certain areas of South African law where a more in-depth consideration of international and regional human rights law may result in changes or development of the current position.[44] For example, in the evaluation of sentencing judgments, I argued that the controversy around 'compelling and substantial circumstances' (applicable to the so-called mandatory minimum sentences) has to a large extent clouded the development of the line of cases recognising the violation of the victim's rights as a significant aspect in the imposition of sentence.[45] The enlightening recent report of the Special Rapporteur on Violence against Women on reparations could especially be instructive here, for example, through the emphasis on a gender-sensitive understanding of 'harm'.[46] Closely linked is the difficult area of

42 Chapter 6, Section 3.4.4.

43 See also the evaluation in Chapter 6, Section 4.

44 In setting out this argument, I am conscious of the principle that it is not the primary function of the courts to reform or enact law.

45 Chapter 6, Section 4.4.

46 See Chapter 4, 5.3.2 (b).

State compensation for acts of violence against women, where I argue that South Africa is not at present meeting the international standards.[47]

There are aspects of South African law, with a bearing on violence against women, where the influence of the standards of international human rights law could lead to a change in the current position. As indicated in Chapter 6, these include, for example, the action for loss of support where the breadwinner (who may be the perpetrator) is still alive (but incarcerated as a result of the violence), and the question of State liability for failure to prevent or diligently investigate acts of violence against lesbian women based on homophobic stereotypes.[48]

Given the fact that the South African legal system is moving (albeit slowly) towards growing sophistication in the way that its legislative and policy framework is set up to address violence against women, it is in my opinion likely that the courts may in future have to increasingly adjudicate instances of individual failures by State agents to act with due diligence,[49] analogous to the communications brought against Austria before the CEDAW.[50] I submit that the notion of 'due diligence', as it has developed in international and regional human rights law, can usefully be applied by the courts to amplify the common-law standard of the legal convictions of the community.

In order for such shifts to happen in South African jurisprudence, however, one would have to see firstly an interrogation of international law similar to that undertaken by Langa CJ in *Masiya* – reflecting more than a 'rote recitation' of

47 Chapter 6, Section 4.5.
48 Chapter 6, Section 4.5. This is not an exhaustive list.
49 Rather than challenges based on shortcomings in the legal and policy framework itself.
50 Chapter 3, Section 2.6.

the approximately relevant international instruments, without a real consideration of the contents (such as that found in the majority judgment of Nkabinde J in the same matter). A second requirement, to avoid the 'flaccid analysis' against which Woolman cautions, is for the courts to engage more rigorously with the substantive right to freedom from violence, rather than a one-dimensional reliance on section 39(2) of the Constitution.[51] In this way, I would argue, one can move closer to the first assumption expressed at the beginning of this chapter: that the developments in international human rights law will breathe new life into South African jurisprudence on women's right to freedom from violence.

In terms of such guidance, one would also like to discern, for example, an understanding of the right to freedom from violence similar to that set out in the Convention of Belém do Pará, in other words, incorporating the right to be free from discrimination. Such a conceptualisation of the right to freedom from violence will entail a broader range of State obligations, and may even attribute certain socio-economic aspects to the right.[52]

This brings us back to the central hypothesis set out in respect of the study, i.e. that a more in-depth and nuanced understanding of the nature and scope of women's rights to freedom from violence, as it has recently emerged in international human rights law, is essential for a correct and comprehensive interpretation of this right. I argue that this hypothesis has been borne out by the research findings, as demonstrated by the examples provided above.

51 Chapter 6, Section 4.3.

52 See discussion of CESCR General Comment No. 16 in Chapter 4, Section 7.2.

5. FINAL COMMENTS

> What the feminist debate around violence shows is that human rights are not static.[53]

It will be recalled that I earlier referred to the statement by Mokgoro J in *S v Makwanyane* that the task of interpretation often involves making constitutional choices by balancing competing fundamental rights and freedoms.[54] She noted that this can often only be done by reference to a system of values extraneous to the constitutional text itself, and that guidance as to such a cohesive set of values, ideal to an open and democratic society, may be found in the international system of human rights protection.

I have argued that international and regional human rights law indeed offer such a 'cohesive set of values' to guide the interpretation of women's right to freedom from violence in South African law. I have also demonstrated that much of the promise seen in the early judgments of the Constitutional Court in *S v Baloyi* and *Carmichele v Minister of Safety and Security and Others*, with their well-placed reliance on international law, has since lost momentum and become little more than a worn refrain in recent decisions.

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53 UA O'Hare 'Realizing human rights for women' (1999) 21 *Human Rights Quarterly* 364 at 402.

54 Para 302. See Chapter 2, Section 4.1.

What one would therefore like to see reflected in the future jurisprudence of our courts is not those 'flat narratives of gender-based violence,'[55] but the energising, transformative potential bound up in contemporary international human rights law, as demonstrated by the findings of this thesis.

[55] The term is borrowed from the previous Special Rapporteur on Violence against Women – see Y Ertürk *15 Years of the UN Special Rapporteur on Violence against Women, its Causes and Consequences (1994-2009) - A Critical Review* UN Doc A/HRC/11/6/Add.5 (dated 27 May 2009) para 107. (It is however used in a different context in the Special Rapporteur's report.)

ANNEXURE A:

TABLES SETTING OUT STATE OBLIGATIONS

Table 1: CEDAW General Recommendation No. 19 (1992)

Table 2: Declaration on Elimination of Violence against Women (1994)

Table 3: Beijing Declaration and Platform of Action (1995)

Table 4: Convention of Belém do Pará (1994)

ANNEXURE A

Table 1: CEDAW General Recommendation No. 19 (1992)

Statement of principle	• Gender-based violence is discrimination. • Seriously inhibits women's ability to enjoy rights on basis of equality with men. • Women's Convention in Art 1 defines discrimination; this includes gender-based violence.				
Statement right to freedom from violence?	• Not explicitly • Gender-based violence, which impairs enjoyment of women of rights under international law generally or human rights conventions, is discrimination. • These rights include rights to life, liberty and security etc.				
Due diligence	Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.				
	Respect	**Create Institutional Machinery – Realise**	**Protect**	**Provide Goods & Services - Satisfy**	**Promote**
		Effective complaints procedures and remedies, including compensation, should be provided;	States Parties should - • take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act; • ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. • take measures to overcome such practices [gender-based	States Parties should – • establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling; • ensure that services for victims of violence are accessible to rural women and that where	States Parties should – • encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence; • introduce education and public information programmes to help eliminate prejudices that hinder women's equality (Recommendation No.

			violence] and should take account of the Committee's recommendation on female circumcision (Recommendation No. 14) in reporting on health issues; • ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control; • take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, *inter alia*, effective legal measures, such as penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including *inter alia* violence and abuse in the family, sexual assault and sexual harassment in the workplace; • take all legal and other measures that are necessary to provide effective protection of women against gender-based violence;	necessary, special services are provided to isolated communities; Appropriate protective and support services should be provided for victims; Measures to protect rural women from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers; Measures that are necessary to overcome family violence should include: (a) Services to ensure the safety and security of victims of family violence; (b) Rehabilitation programmes for perpetrators of domestic violence; (c) Support services for families where incest or sexual abuse has occurred;	3, 1987); • take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, *inter alia*, preventive measures, such as public information and education programmes to change attitudes concerning the roles and status of men and women; Effective measures should be taken to – • ensure that the media respect and promote respect for women; • overcome attitudes, customs and practices that perpetuate violence against women;

			Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention; Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation; Measures that are necessary to overcome family violence should include: (a) Criminal penalties where necessary and civil remedies in cases of domestic violence; (b) Legislation to remove the defence of honour in regard to the assault or murder of a female family member;		

Reporting measures:
States parties in their reports should -

- identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result;
- report on the measures that they have undertaken to overcome violence and the effect of those measures;
- describe the extent of all these problems and the measures, including penal provisions, preventive and rehabilitation measures that have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described;
- include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace;
- take account of the Committee's recommendation on female circumcision (Recommendation No. 14) in reporting on health issues;
- state the extent of problems relating to fertility and reproduction and should indicate the measures that have been taken and their effect;
- report on the risks to rural women, the extent and nature of violence and abuse to which they are subject, their need for and access to support and other services and the effectiveness of measures to overcome violence;
- report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken;
- report on all forms of gender-based violence, and such reports should include all available data on the incidence of each form of violence and on the effects of

such violence on the women who are victims;

- include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.

Table 2: Declaration on Elimination of Violence against Women (1994)

Statement of principle	• Recognition of urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings (as enshrined in international instruments). • Violence against women – - constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms; - is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men; - is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.				
Statement right to freedom from violence?	• Not explicitly • Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, *inter alia*, right to life, security, etc.				
Due diligence	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.				
	Respect	**Create Institutional Machinery – Realise**	**Protect**	**Provide Goods & Services - Satisfy**	**Promote**
	States should refrain from engaging in violence against women;	States should – • consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by NGO's	States should – • condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination; • pursue by all appropriate means and without delay a policy of eliminating violence	States should work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialised assistance, such as rehabilitation, assistance in child care and maintenance, treatment,	States should - • adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for

		• include in government budgets adequate resources for their activities related to the elimination of violence against women; • take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women; • encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration; • women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm	against women; • develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; • develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimisation of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions; • adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence;	counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;	men and women; • recognise the important role of the women's movement and NGO's world wide in raising awareness and alleviating the problem of violence against women; • facilitate and enhance the work of the women's movement and NGO's and cooperate with them at local, national and regional levels; • encourage intergovernmental regional organisations of which they are members to include the elimination of violence against women in their programmes, as appropriate; • inform women [who are subjected to violence] of their rights in seeking redress through the mechanisms [of justice]; • promote research, collect data and compile statistics,

		that they have suffered;			especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; • those statistics and findings of the research will be made public;
Reporting measures: • Include, in submitting reports as required under relevant human rights instruments of the UN, information pertaining to violence against women and measures taken to implement the present Declaration;					

Table 3: Beijing Declaration and Platform for Action (1995)

Statement of principle	• Violence against women - - both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms.; - is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men; - is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. • Any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated. • Governments should take urgent action to combat and eliminate all forms of violence against women in private and public life, whether perpetrated or tolerated by the State or private persons.				
Statement right to freedom from violence?	• Not explicitly. • Gender-based violence (such as battering and other domestic violence, sexual abuse and sexual harassment), as well as violence against women, resulting from cultural prejudice, racism and racial discrimination, xenophobia, pornography, ethnic cleansing, armed conflict, foreign occupation, religious and anti-religious extremism and terrorism are incompatible with the dignity and the worth of the human person and must be combated and eliminated.				
Due diligence	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				
	Respect	**Create Institutional Machinery – Realise**	**Protect**	**Provide Goods & Services - Satisfy**	**Promote**
<u>Strategic Objective D1: Take integrated measures to prevent and eliminate violence against women</u> **Actions to be taken by**	Refrain from engaging in violence against women;	• Provide women who are subjected to violence with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm they have suffered;	• Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Violence Declaration;	• Ensure that women with disabilities have access to information and services in the field of violence against women;	• Promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes related to violence against women; • Actively encourage, support and implement

Governments		• Create or strengthen institutional mechanisms so that women and girls can report acts of violence against them in a safe and confidential environment, free from the fear of penalties or retaliation, and file charges; • Create, improve or develop and fund the training programmes for judicial, legal, medical, social, educational and police and immigrant personnel, in order to avoid the abuse of power leading to violence against women and sensitise such personnel to the nature of gender-based acts and threats of violence so that fair treatment of female victims can be assured; • Allocate adequate resources within the government budget and mobilise community resources for activities related to the elimination of violence against women,	• Enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society; • Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasising the prevention of violence and the prosecution of offenders; • Take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators; • Enact and enforce legislation against the perpetrators of		measures and programmes aimed at increasing the knowledge and understanding of the causes, consequences and mechanisms of violence against women among those responsible for implementing these policies, such as law enforcement officers, police personnel and judicial, medical and social workers, as well as those who deal with minority, migration and refugee issues, and develop strategies to ensure that the revictimisation of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices; • Formulate and implement, at all appropriate levels, plans of action to eliminate violence against women; • Adopt all appropriate measures, especially in the field of education,

		including resources for the implementation of plans of action at all appropriate levels;	practices and acts of violence against women, such as female genital mutilation, female infanticide, prenatal sex selection and dowry-related violence, and give vigorous support to the efforts of non-governmental and community organisations to eliminate such practices; • Adopt laws, where necessary, and reinforce existing laws that punish police, security forces or any other agents of the State who engage in acts of violence against women in the course of the performance of their duties; • Review existing legislation and take effective measures against the perpetrators of such violence;		to modify the social and cultural patterns of conduct of men and women, and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women; • Inform women who are subjected to violence of their rights in seeking redress through the mechanisms of justice.
	Respect	**Create Institutional Machinery – Realise**	**Protect**	**Provide Goods & Services - Satisfy**	**Promote**
Actions to be taken by			• Recognise the	• Provide well-funded	• Support initiatives of

Governments, including local governments, community organisations, NGO's, educational institutions, public and private sectors, and mass media, as appropriate			vulnerability to violence of women migrants, including women migrant workers, whose legal status in the host country depends on employers who may exploit their situation;	shelters and relief support for girls and women subjected to violence, as well as medical, psychological and other counselling services and free or low-cost legal aid, where it is needed, as well as appropriate assistance to enable them to find a means of subsistence; • Establish linguistically and culturally accessible services for migrant women and girls, including women migrant workers, who are victims of gender-based violence; • Provide, fund and encourage counselling and rehabilitation programmes for the perpetrators of violence;	women's organisations and NGO's all over the world to raise awareness on violence against women and to contribute to its elimination; • Organise, support and fund community-based education and training campaigns to raise awareness about violence against women as a violation of women's enjoyment of their human rights and mobilise local communities to use appropriate gender-sensitive traditional and innovative methods of conflict resolution; • Recognise, support and promote the fundamental role of intermediate institutions, such as primary health-care centres, family-planning centres, existing school health services, etc in the field of information and education related to abuse; • Organise and fund information campaigns

					and educational and training programmes in order to sensitise girls and boys and women and men to the personal and social detrimental effects of violence in the family, community and society; teach them how to communicate without violence and promote training for victims and potential victims so that they can protect themselves and others against such violence; • Disseminate information on the assistance available to women and families who are victims of violence; • Raise awareness of the responsibility of the media in promoting non-stereotyped images of women and men and in eliminating patterns of media presentation that generate violence, and encourage those responsible for media content to establish professional guidelines and codes of conduct; also raise awareness of the important role of the media in informing and

					educating people about the causes and effects of violence against women and in stimulating public debate on the topic; • Promote research to further efforts concerning counselling and rehabilitation programmes for perpetrators of violence so as to prevent the recurrence of such violence.
	Respect	**Create Institutional Machinery – Realise**	**Protect**	**Provide Goods & Services - Satisfy**	**Promote**
Actions to be taken by Governments, employers, trade unions, community and youth organisations and NGO's, as appropriate			• Develop programmes and procedures to eliminate sexual harassment and other forms of violence against women in all educational institutions, workplaces and elsewhere; • Take special measures to eliminate violence against women, particularly those in vulnerable situations, such as young women, refugee, displaced and internally displaced	• Develop counselling, healing and support programmes for girls, adolescents and young women who have been or are involved in abusive relationships, particularly those who live in homes or institutions where abuse occurs;	• Develop programmes and procedures to educate and raise awareness of acts of violence against women that constitute a crime and a violation of the human rights of women;

			women, women with disabilities and women migrant workers, including enforcing any existing legislation and developing, as appropriate, new legislation for women migrant workers in both sending and receiving countries.		
Actions to be taken by the Secretary General of the UN	Provide the Special Rapporteur of the CHR on violence against women with all necessary assistance, in particular the staff and resources required to perform all mandated functions, especially in carrying out and following up on missions undertaken either separately or jointly with other special rapporteurs and working groups, and adequate assistance for periodic consultations with the CEDAW and all treaty bodies.				
Actions to be taken by Governments, international organisations and NGO's:	Encourage the dissemination and implementation of the UNHCR Guidelines on the Protection of Refugee Women and the UNHCR Guidelines on the Prevention of and Response to Sexual Violence against Refugees.				
	Respect	**Create Institutional Machinery – Realise**	**Protect**	**Provide Goods & Services - Satisfy**	**Promote**
<u>Strategic Objective D2: Study the causes and consequences of violence against women and the effectiveness of preventive measures</u>					• Promote research, collect data and compile statistics, especially concerning domestic violence relating to the prevalence of different forms of violence against women, and encourage research into the causes, nature, seriousness and

Actions to be taken by Governments, regional organisations, the UN, other international organisations, research institutions, women's and youth organisations and NGO's, as appropriate:					consequences of violence against women and the effectiveness of measures implemented to prevent and redress violence against women; • Disseminate findings of research and studies widely; • Support and initiate research on the impact of violence, such as rape, on women and girl children, and make the resulting information and statistics available to the public; • Examine the impact of gender role stereotypes, including those perpetuated by commercial advertisements which foster gender-based violence and inequalities, and how they are transmitted during the life cycle, and take measures to eliminate these negative images with a view to promoting a violence-free society.

Reporting measures:
Include in reports submitted in accordance with the provisions of relevant UN human rights instruments, information pertaining to violence against women and measures taken to implement the Violence Declaration;

International:

- Work actively to ratify and/or implement international human rights norms and instruments as they relate to violence against women, including those contained in the UDHR, ICCPR, the ICESCR and the CAT;

- Implement the Women's Convention, taking into account General Recommendation 19, adopted by the CEDAW;

- Cooperate with and assist the Special Rapporteur of the CHR on violence against women in the performance of her mandate and furnish all information requested; cooperate also with other competent mechanisms, such as the Special Rapporteur of the CHR on torture and the Special Rapporteur of the CHR on summary, extrajudiciary and arbitrary executions, in relation to violence against women;

- Recommend that the CHR renew the mandate of the Special Rapporteur on violence against women when her term ends in 1997 and, if warranted, to update and strengthen it.

Table 4: Convention of Belém do Pará (1994)

Statement of principle	• Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others, The right to have her physical, mental and moral integrity respected and The rights to have the inherent dignity of her person respected and her family protected; The right to simple and prompt recourse to a competent court for protection against acts that violate her rights; • Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights.				

Statement right to freedom from violence?	• **Yes – Article 3**
	• The right of every woman to be free from violence includes, among others:
	  • The right of women to be free from all forms of discrimination; and
	  • The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.				

Due diligence	[States Parties undertake to] apply due diligence to prevent, investigate and impose penalties for violence against women;				
	Respect	**Create Institutional Machinery – Realise**	**Protect**	**Provide Goods & Services - Satisfy**	**Promote**
	States Parties undertake to refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;	States Parties undertake to establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies;	States Parties undertake to - • include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt	States Parties undertake to - • provide appropriate specialised services for women who have been subjected to violence, through public and private sector agencies, including shelters, counseling services for all family members	States Parties undertake to - • promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected; • modify social and cultural patterns of conduct of men and women, including the

			appropriate administrative measures where necessary; • adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property; • take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; • establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely	where appropriate, and care and custody of the affected children; • provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life;	development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimise or exacerbate violence against women; • promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women; • promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women; • encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all

			hearing and effective access to such procedures; • adopt such legislative or other measures as may be necessary to give effect to this Convention.		its forms, and to enhance respect for the dignity of women; • ensure research and gathering of statistics and other info relating to causes, consequences and frequency of violence against women, in order to assess effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement necessary changes; • foster international cooperation for the exchange of ideas and experiences and the execution of programs aimed at protecting women who are subjected to violence.

- **Reporting measures:**

States Parties shall include in their national reports to the Inter-American Commission of Women information on measures adopted to prevent and prohibit violence against women, and to assist women affected by violence, as well as on any difficulties they observe in applying those measures, and the factors that contribute to violence against women.

ANNEXURE B

FACTUAL BACKGROUND: COMMUNICATIONS CONSIDERED BY THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN[1]

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1. *A.T. v Hungary*[2]

The author in *A.T. v Hungary* had been the victim of domestic violence committed over a four-year period by one L.F., her (former) common-law husband and father of her two children, one of whom was severely intellectually disabled.[3] Despite threats by L.F. to kill the author, she had not gone to a shelter, reportedly because no shelter in the country was equipped to accommodate a severely disabled child together with his mother and sister. The author also stated that there were at the time no protection orders or restraining orders available under Hungarian law. Her efforts to bar L.F. from the family apartment through civil proceedings had proved fruitless and the two criminal procedures arising from charges she had laid against L.F. were both still pending at the time of submitting her communication to CEDAW.[4]

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1 See Chapter 3, Section 2.6. In each of the communications examined in the thesis, the set of facts is relatively lengthy. However, because it was considered important to provide the reader with access to the factual circumstances of each case, (in order to fully appreciate the Committee's Views, for example, relating to the State Party's compliance with the standard of 'due diligence'), a short précis of the facts is given in the text, and a longer version is set out here in *Annexure B.*

2 CEDAW *Communication No 2/2003 Ms. A. T. v. Hungary* (Views adopted on 26 January 2005, Thirty-second session).

3 The facts are set out in paras 2.1 – 2.7 of CEDAW *Communication No 2/2003 op cit* note 2.

4 CEDAW *op cit* note 2 para 2.6. One of the criminal trials began in 1999, the other in July 2001.

In March 1999, L.F. moved out of the family apartment. His subsequent visits were allegedly typically marked by loud shouting and battering, aggravated by his being in a drunken state. In March 2000, L.F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claimed that he did not pay child support for three years, thus forcing her to claim this support through the courts and police. She alleged that he used this tactic of financial abuse in addition to continuing to threaten her physically.

In March 2000, hoping to protect herself and the children, A.T. changed the lock on the front door of the apartment. On 14 and 26 March 2000, L. F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused him entrance. On 27 July 2001, he broke into the apartment using violence.

L. F. reportedly battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates had been issued in connection with separate incidents of severe physical violence, even after L. F. had left the family residence, which, the author submitted, constituted a continuum of violence. The last incident took place when he broke into the apartment in July 2001 and subjected A.T. to a severe beating, which required her hospitalisation.

The author initiated civil proceedings against L.F. to bar his access to the family's residence, a 2½ room apartment (of 54 by 56 square metres) jointly owned by L. F. and A.T.[5] Decisions by the court of the first instance, the Pest

[5] Para 2.4. These events vividly illustrate the linkages between domestic violence and access to housing. The perpetrator had not only succeeded in preventing the victim

Central District Court, were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court issued a final decision authorising L.F. to return and use the apartment. The judges reportedly based their decision on the following grounds: lack of substantiation of the claim that L. F. regularly battered the author; and L.F.'s right to the property, including possession, which could not be restricted. A.T. claimed that since that date, and on the basis of the earlier attacks and verbal threats by her former partner, her physical integrity, physical and mental health and life were at serious risk, and that she lived in constant fear.[6]

The author reported that there were two ongoing criminal procedures against L.F. arising from incidents of his assaulting her. In both cases, the trials were yet to take place at the time of submitting her communication.[7] She further pointed out that L.F. had not been detained at any time in connection with these procedures and that no actions were taken by the Hungarian authorities to protect her from him.

The author also recounted that she had requested assistance in writing, in person and by telephone, from the local child protection authorities, but that her requests had been to no avail since the authorities allegedly felt unable to do anything in such situations.

from finding safety within the apartment; by contesting her attempts to gain control of the apartment, he turned the apartment itself into an instrumentality of coercion. A.T. first attempted to exclude him from the apartment 'mechanically' by changing the locks. When he then brought trespass proceedings against her, she attempted to obtain legal tenure of the apartment by bringing an action against L.F. for separation of their common property – see Para 5.2.

6 The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

7 Para 2.6.

2. *Şahide Goekce (deceased) v Austria*[8]

The matter arose from a history of domestic violence perpetrated against Şahide Goekce by her husband, Mustafa Goekce.[9] The first known attack against her was in December 1999, resulting in a report to the police. The police issued an 'expulsion and prohibition to return' order against Mustafa Goekce. However, in order to prosecute him on the serious charge of 'making a dangerous criminal threat', authorisation from the threatened spouse (or a relative) was required; Şahide did not provide this and Mustafa was acquitted on a charge of causing bodily harm.

In August 2000, the police were again summoned to the apartment; Şahide reported that Mustafa had threatened to kill her. A second 'expulsion and prohibition to return' order was issued and the police requested the Public Prosecutor to detain Mustafa. This request was however denied. On five subsequent occasions, the police were called to the Goekce apartment because of reports of disturbances and disputes and/or battering.

A third 'expulsion and prohibition to return' order was issued against Mustafa Goekce as a result of an incident on 8 October 2002 that Şahide Goekce had called in. She pressed charges against her husband for causing bodily harm and making a dangerous criminal threat. The police interrogated him and again requested that he be detained. Again, the Public Prosecutor denied the request.

8 CEDAW *Communication No. 5/2005: Şahide Goekce (deceased) v Austria* (Views adopted on 6 August 2007, 39th Session) UN Doc CEDAW/ C/39/D/5/2005 (dated 6 August 2007).

9 The facts are set out in Paras 2.1 – 2.12.

On 23 October 2002, a District Court issued an interim injunction for a period of three months against Mustafa, which forbade him from returning to the family apartment and its immediate environs and from contacting Şahide or the children. (The three children were all minors born between 1989 and 1996.)

In November 2002, the Youth Welfare Office (which had been in constant contact with the Goekce family because of the violent assaults that took place in front of the children) informed the police that Mustafa Goekce had not obeyed the interim injunction and was living in the family apartment. The police however did not find him there when they checked.

According to the authors, the police knew from other sources that Mustafa Goekce was dangerous and owned a handgun. Both Şahide's father and Mustafa's brother had informed the police of Mustafa's frequent threats to kill her or another family member. Neither report was recorded or taken seriously.

On 5 December 2002, the Public Prosecutor stopped the prosecution of Mustafa for causing bodily harm and making a criminal dangerous threat on grounds that there was insufficient reason to prosecute him. On 7 December 2002, Mustafa Goekce shot Şahide Goekce with a handgun in their apartment in front of their two daughters. The police report reads that no officer went to the apartment to settle the dispute between Mustafa Goekce and Şahide Goekce prior to the shooting. Two-and-a-half hours after the commission of the crime, Mustafa Goekce surrendered to the police. He is reportedly currently serving a sentence of life imprisonment in an institution for 'mentally ill' offenders.[10]

[10] According to an expert witness testifying at his trial, he had committed the murder under the influence of a paranoid jealousy psychosis that absolved him of criminal responsibility – Para 4.10.

3. *Fatma Yildirim (deceased) v Austria*[11]

Fatma Yildirim married Irfan Yildirim on 24 July 2001.[12] She had three children from her first marriage, two of whom were adults. Her youngest daughter, Melissa, was born on 30 July 1998. Irfan reportedly threatened to kill Fatma for the first time in July 2003. Fatma Yildirim wanted to divorce Irfan Yildirim, but he would not agree and threatened to kill her and her children should she divorce him.

In August 2003, fearing for her life, Fatma and her five-year-old daughter, Melissa, moved in with her eldest daughter, Gülen. Two days later, she returned to their apartment to pick up some of her personal belongings, believing that Irfan was at work. Irfan entered the apartment while she was still there. He grabbed her wrists and held her — but she managed to escape. Subsequently, he called her on her cell phone and threatened to kill her again. Fatma went to the Vienna Federal Police to report Irfan for assault and for making a criminal dangerous threat.

On the same day, the police issued an 'expulsion and prohibition to return' order against Irfan covering the apartment. They also informed the Vienna Intervention Centre against Domestic Violence and the Youth Welfare Office of the issuance of the order and the grounds therefore. The police further reported to the Vienna Public Prosecutor on duty that Irfan Yildirim had made a criminal dangerous threat against Fatma and requested that he be detained. The Public Prosecutor rejected that request.

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11 Communication No. 6/2005: *Fatma Yildirim (deceased) v Austria* (Views adopted on 6 August 2007, 39th Session) UN Doc CEDAW/C/39/D/6/2005 dated 1 October 2007.

12 The factual background is set out in Paras 2.1-2.14.

On 8 August 2003, with the assistance of the Vienna Intervention Centre against Domestic Violence, Fatma Yildirim applied on her own behalf and on behalf of her youngest daughter, to the Vienna District Court for an interim injunction against Irfan. The District Court informed the Vienna Federal Police about the application.

During the course of the next few days, Irfan repeatedly harassed and threatened Fatma. She reported these incidents to the police, who intervened and also reported the matter to the Public Prosecutor, requesting that Irfan Yildirim be detained. Again, this request was refused.

On 26 August 2003, Fatma filed a petition for divorce at the Vienna District Court and shortly thereafter, the same court issued an interim injunction against Irfan valid until the end of the divorce proceedings and an interim injunction for Melissa valid for three months. The order forbade Irfan Yildirim from returning to the family's apartment and its immediate surroundings, from going to Fatma Yildirim's workplace and from meeting or contacting Fatma or Melissa.

Eleven days later, Irfan followed Fatma home from work and fatally stabbed her on in the street near the family's apartment. He was convicted of killing Fatma and is serving a sentence of life imprisonment.

4. *Ms NSF v The United Kingdom*[13]

The author of this communication (dated 21 September 2005) was Ms NSF, a Pakistani asylum seeker, at the time living in the United Kingdom with her two children.[14] She claimed to fear for her life at the hands of her former husband in Pakistan and for her two sons' future and education if the authorities of the United Kingdom deported her. In her communication to the CEDAW, she did not invoke specific provisions of the Women's Convention nor demonstrated how the Convention may have been violated, but her claims appeared to raise issues under Articles 2 and 3 of the Convention. The author represented herself.[15]

The author requested interim measures of protection in accordance with Article 5, paragraph 1 of the Optional Protocol to the Convention. The Committee accordingly requested the State Party (the United Kingdom) not to deport the author and her two children while the case was pending before the Committee.

Ms NSF got married in Pakistan in 1996 and two sons were born from this union.[16] Her husband's personality and behaviour changed towards her immediately after the marriage took place; he started to subject her to numerous instances of ill-treatment – particularly when he was affected by alcohol and drugs or after he had incurred gambling losses. He compelled her with threats to obtain money from her parents and he used the money to provide for his habits. She also endured marital rape.

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13 CEDAW *Communication 10/2005* UN Doc CEDAW/C/38/D/10/2005 (dated 12 June 2007).

14 Introductory Para.

15 *Ibid.*

16 The facts as represented by the author are set out in Paras 2.1 – 2.14.

She eventually divorced her husband in 2002 and fled to a nearby village with her two sons. Her ex-husband continued to harass her after the divorce and she had to move two more times. Although she reported him to the police, she did not receive any protection. In January 2003, the author's ex-husband came to her home with other men armed with knives and threatened to kill her. After this incident, she decided to flee the country.

Ms. NSF arrived in the United Kingdom on 14 January 2003 with her two children and applied for asylum on the same day. On 27 February 2003, the Immigration and Nationality Directorate of the Home Office rejected her asylum application. The author then went through an extended series of legal proceedings in her attempt to obtain asylum in the UK.[17]

In February 2005, the Immigration and Nationality Directorate informed the author that she had no further right of appeal; it reminded her that she had no basis to stay in the United Kingdom and should make arrangements to leave the United Kingdom without delay. She was apprised of where to call for help and advice on returning home.

[17] She firstly appealed against the 'Refusal of Leave to Enter after Refusal of Asylum' by the Immigration and Nationality Directorate of the Home Office, basing her claim on the 1951 Convention on the Status of Refugees and the European Convention on Human Rights and Fundamental Freedoms. In April 2004 the Adjudicator sitting as the first instance court dismissed the author's appeal on both asylum and human rights grounds. While sympathising with her situation and accepting her factual case, the Adjudicator did not accept the author's submission that she could not relocate further away from her ex-husband within Pakistan. As a result, he concluded that he could not see why there would be a serious possibility or reasonable chance of her being at risk of further persecution on return to Pakistan if she relocated within the country. He also found that the difficulties that she might experience on return would not constitute 'persecution' as such and that she would be sufficiently protected in Pakistan, including because the parties were no longer married. In July 2004, the Immigration Appeal Tribunal refused Ms. NSF's application for permission to appeal. She challenged this decision by applying for Statutory Review before the High Court of Justice, Queens Bench Division, Administrative Court. In October 2004, the High Court affirmed the decision. She was advised that this decision was final.

The author's efforts to avoid deportation included an application to the European Court of Human Rights alleging a violation by the United Kingdom of her rights under Article 3 (prohibition of torture) and Article 8 (right to respect for private and family life). In November 2005, this Court declared the communication inadmissible on the basis that it 'did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols'.

In May 2006, the Home Office refused the author's request for discretionary leave on humanitarian grounds. The decision indicated that the author had no basis to stay in the United Kingdom and should make arrangement to leave the country without delay. If she failed to do so, the Home Department would take steps to ensure her removal to Pakistan. No deadline was given.

Ms NSF claimed that she came to the United Kingdom to save her life and her children's future and education.[18] She alleged that as a single woman with two children, she would not be safe outside of the United Kingdom. She asserted that if she were deported back to Pakistan, she would no longer be protected and would be killed by her ex-husband; her children's future and education would be put at risk. She therefore asked that she and her two children be allowed to live in the United Kingdom and be granted temporary protection.

[18] Paras 3.1.-3.2.

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4. INTERNATIONAL AND REGIONAL TREATIES AND DECLARATIONS

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