
.....Chapter 11
**WOMEN'S RIGHTS IN
THE ADMINISTRATION
OF JUSTICE**

Learning Objectives

- *To sensitize the participants to the specific human rights problems faced by women in different spheres of life*
- *To familiarize the participants with existing international legal rules designed to protect the rights of women*
- *To increase the participants' awareness of their own potential as judges, prosecutors and lawyers to contribute to improved protection of the rights of women*

Questions

- *How are the rights of women protected by legislation in the country in which you work?*
- *In your view, is this legislation efficiently enforced?*
- *What are the specific problems facing women in the country in which you work?*
- *Are these problems due to shortcomings in the de jure protection of women or to a failure to enforce existing legal rules?*
- *Are there any other factors that might account for the problems facing women in the country in which you work?*
- *If so, what are they?*
- *Does the girl child face any specific problems in the country in which you work?*
- *If so, what are these problems and what may be their root cause?*
- *How, and to what extent, does the law deal with the specific problems of the girl child?*
- *What can you do as judges, prosecutors and lawyers to improve the protection of the rights of women in the country in which you work?*

Relevant Legal Instruments

Universal Instruments

- Charter of the United Nations, 1945
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949
- Convention on the Political Rights of Women, 1953
- Convention on the Nationality of Married Women, 1957
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962
- Convention on the Rights of the Child, 1989
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999
- UNESCO Convention against Discrimination in Education, 1960
- Rome Statute of the International Criminal Court, 1998
- United Nations Convention against Transnational Organized Crime, 2000
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

- Statute of the International Tribunal for the Former Yugoslavia, 1993
- Statute of the International Tribunal for Rwanda, 1994

- Universal Declaration of Human Rights, 1948
- Declaration on the Elimination of Violence against Women, 1993
- Vienna Declaration and Programme of Action, 1993
- Beijing Declaration and Platform for Action, 1995

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994
- European Convention on Human Rights, 1950

1. Introduction

International human rights law as a whole is, of course, fully applicable to women. The rights described in other chapters of this Manual are therefore equally relevant to women and the female juvenile. However, as evidenced by the above list of treaties and declarations, it has been considered necessary, in order to deal more efficiently with the serious and multiple violations of the rights of women that still exist in the majority of countries, including widespread discriminatory practices, to draw up separate gender-specific legal documents focusing on the particular needs of women. While women in some countries have made great strides towards securing increased respect for their human rights, including the right to equality with men, in areas such as family law and the law of succession and in access to education, adequate health care and the labour market, the majority of women still suffer violations of their most basic human rights. For instance, they are not always allowed to enter freely into marriage or to divorce on the same conditions as men, and in some countries they do not enjoy equal rights with men in terms of succession. Women's right to life, personal liberty and security, including the right to health, are also frequently violated through domestic, institutional and community violence such as dowry killings, "honour" killings, battering, sexual violence, traditional practices, trafficking and forced prostitution. Further, women may be denied the right to education or even to the most basic health care services. They may also be subject to strict dress codes, the violation of which can result in severe corporal punishment. Discrimination against the female gender sometimes occurs even before birth in the form of selective pre-natal testing that may lead to abortion of the female foetus.

The seriousness of these violations is compounded by the fact that many of the victims are living in poverty or extreme poverty and lack the financial means to alter their situation. They cannot afford to hire a lawyer, for instance, to help them vindicate their rights, and even if they could, the legal system may often be such that women's rights are not given the same weight as the rights of men or the rights of the affluent strata of society. The legal system may be unfairly biased in favour of men so that a woman has an unduly heavy burden of proof to bear in cases of violence, including rape. Further, lawyers representing women are sometimes threatened in various ways, even with murder.

The legal and factual situation of women is also in many cases particularly precarious owing to their status as migrants, refugees or displaced persons, or simply because they are part of an ethnic or racial minority. Governments and members of the legal professions therefore have a duty to be alert to such problems and to identify possible solutions.

Reluctance and failure to promote and protect women's rights effectively can often be explained – though not justified – by the fear that such rights constitute a threat to accepted societal values and interests.¹ But this marginalization of women has a devastating human, social and financial cost that goes far beyond the life of the

¹On this issue, see the United Nations Development Programme's *Human Development Report 2000* (New York/Oxford, Oxford University Press, 2000), p. 30.

individual women concerned; it affects society as a whole, since women are excluded from the decision-making process that would have enabled them to play a constructive role in building a community free from fear, want and intolerance.

Women living in industrialized countries are by no means immune to violations of their rights. They may have to contend with a variety of systemic and attitudinal problems and may suffer discrimination, which is often, however, more indirect than direct.

Women are thus frequently caught up in a vicious social, cultural, religious, political and legal circle and may be unable to break out of it alone. To do so, they need, inter alia, the support of independent and impartial legal professions that are familiar with international human rights law and its application to women, and are capable of exercising their responsibilities diligently and fearlessly. Enhancement of awareness among judges, prosecutors and lawyers of acts and practices that violate the most fundamental rights of women and girls constitutes an important step towards providing half of humanity with an acutely needed remedy and a means of redress.

The problems involved in promoting and protecting women's rights are too varied and numerous to be dealt with in depth in this chapter, which will confine itself to highlighting some of the most serious quandaries facing women and the response provided by international law. It will begin with a general description of women's right to legal personality and move on to consider women's right to equality before the law and equal protection of the law. The subsequent sections will deal with women's right to respect for their life and their physical and mental integrity; women's right to freedom from slavery, the slave trade, forced and compulsory labour, and trafficking; and women's right to equality in respect of marriage, in civil matters and in terms of participation in public affairs. After touching on various other fields of law where gender discrimination is commonplace, the chapter will briefly describe women's right to an effective remedy, including their right of access to the courts. Lastly, the role of the legal professional in promoting and protecting the rights of women will be emphasized, and the chapter will close with some concluding remarks. Whenever relevant, reference will be made to gender issues dealt with in other chapters of the Manual.

Albeit equally important, women's rights in the areas of employment and health and other rights pertaining to the social, economic or cultural fields will not, for reasons of space, be considered in this context, although some pertinent references will be made. Instead, **Handout No. 1** will provide a short list of relevant legal documents. For further resource material on the rights of women, see **Handout No. 2**, which contains a list of useful books, reports and web sites.

2. Women's Right to Legal Personality

The right to recognition as a person before the law lays the basis for the right of women to enjoy full human rights and freedoms. Although the right to legal/judicial personality is inherent in international human rights law, it has been included *expressis verbis* in both article 16 of the International Covenant on Civil and Political Rights and article 3 of the American Convention on Human Rights. Moreover, pursuant to article 4(2) of the International Covenant and article 27(2) of the American Convention, this is a right that cannot in any circumstances be derogated from in times of public emergency. The right of women to legal personality on an equal basis with men must, in other words, be respected in times of peace and in times of war or warlike situations.

As emphasized by the Human Rights Committee, “the right of everyone under article 16 to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status.”² As pointed out by the Committee,

“this right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that women may not be treated as objects to be given, together with the property of the deceased husband, to his family.”³

Legal personality also means that women must have full and unimpeded access to the legal institutions of their country for the purpose of vindicating their rights and obtaining compensation or restoration where they are violated.⁴

Women have a right to legal personality on an equal basis with men. This right is absolute and must be guaranteed in all circumstances and at all times.

²General Comment No. 28 (Article 3 – Equality of rights between men and women), in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (hereinafter referred to as *United Nations Compilation of General Comments*), p. 171, para. 19.

³*Ibid.*, loc. cit.

⁴See further *infra*, section 10.

3. Women's Right to Equality Before the Law and Equal Protection of the Law

3.1 The Charter of the United Nations and the International Bill of Human Rights

According to article 1(3) of the Charter of the United Nations, one of the purposes of the Organization is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, **sex**, language, or religion” (emphasis added). The same principle of equality between men and women is stated in articles 13(1)(b), 55(c) and 76(c). The drafters were thus convinced of the need for gender equality in the enjoyment of rights in the post-war world. At the universal level, the prohibition of discrimination on the basis of sex was subsequently included in article 2 of the Universal Declaration of Human Rights, articles 2(1), 4(1) and 26 of the International Covenant on Civil and Political Rights and article 2(2) of the International Covenant on Economic, Social and Cultural Rights. By virtue of article 3 of both Covenants, the States parties further expressly undertake to ensure the equal right of men and women to the enjoyment of all the rights guaranteed by the respective Covenant.

3.2 The Convention on the Elimination of All Forms of Discrimination against Women, 1979

Discrimination based on sex became the exclusive focus of the *1979 Convention on the Elimination of All Forms of Discrimination against Women*, which entered into force on 3 September 1981. As of 10 May 2001, there were 168 States parties. The Convention was preceded by the *Declaration on the Elimination of Discrimination against Women*, proclaimed by the General Assembly in 1967. The Convention has become an important legal means of promoting the protection of the equal rights of women within the framework of the United Nations. The implementation of its provisions is reviewed by the Committee on the Elimination of Discrimination against Women.

For the purposes of the Convention, article 1 states that:

“the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil *or any other field*.” (emphasis added).

As explained by the Committee on the Elimination of Discrimination against Women, this definition also includes

“gender-based violence, that is, violence that is directed against a women because she is a women or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”⁵

It is important to note that this wide interpretation of the definition of discrimination means that “gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”⁶

The prohibition of discrimination against women thus extends beyond traditional categories of human rights to other fields where discrimination might occur. However, “temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination” as defined in the Convention; on the other hand, such measures “shall be discontinued when the objectives of equality of opportunity and treatment have been achieved” (art. 4(1)).

It is also important to point out that, contrary to the International Convention on the Elimination of All Forms of Racial Discrimination, which only refers to discrimination in the “field of public life” (art. 1(1)), the Convention on the Elimination of All Forms of Discrimination against Women has a wider field of application and also covers acts falling within the private sphere. As emphasized by the Committee on the Elimination of Discrimination against Women,

“discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”⁷

Under article 2 of the Convention, States parties more particularly “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” and to this end they undertake:

- ❖ “To embody the principle of equality of men and women in their national constitutions or other appropriate legislation ... and to ensure ... the practical realization of this principle” (art. 2(a));
- ❖ “To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women” (art. 2(b));
- ❖ “To establish effective legal protection of the equal rights of women ... and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination” (art. 2(c));

⁵General Recommendation No. 19 (Violence against women), *United Nations Compilation of General Comments*, p. 216, para. 6.

⁶*Ibid.*, loc. cit.

⁷*Ibid.*, p. 217, para. 9. On the possible responsibility of States under international human rights law for acts of private persons, see also Chapter 1, subsection 2.9 and Chapter 15.

- ❖ “To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation” (art. 2(d));
- ❖ “To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise” (art. 2(e));
- ❖ “To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” (art. 2(f));
- ❖ “To repeal all national penal provisions which constitute discrimination against women” (art. 2(g)).

The subsequent articles provide further details of States parties' obligations to eliminate discrimination against women, which include the following:

- ❖ “To modify the social and cultural patterns of conduct of men and women ... 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” (art. 5(a));
- ❖ “To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases” (art. 5(b));
- ❖ To take “all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women” (art. 6), to eliminate discrimination against women in the political and public life of the country (arts. 7 and 8), and in education (art. 10), employment (art. 11), health care (art. 12) and other areas of economic and social life (art. 13), and to ensure the application of the Convention to women in rural areas (art. 14).

While many articles of the Convention are framed as general legal obligations of States parties to take “all appropriate measures” to eliminate discrimination against women, some set forth specific rights that must be guaranteed on a basis of equality to men and women such as:

- ❖ the right to education: women have the right, *inter alia*, to the same conditions for career and vocational guidance and for access to studies and to the same opportunities for access to scholarships and other grants (art. 10);
- ❖ the right to work, to the same employment opportunities, to free choice of profession and employment, to equal remuneration, to social security and to protection of health and safety in working conditions (art. 11);
- ❖ the right to family benefits, to bank loans, mortgages and other forms of financial credit and to participate in recreational facilities, sports and all aspects of cultural life (art. 13);
- ❖ the right of rural women to participate in the elaboration and implementation of development plans, to have access to adequate health care facilities, to benefit directly from social security programmes, to obtain all types of training and education, to organize self-help groups, to participate in all community activities, to have access to agricultural credit and loans, and to enjoy adequate living conditions (art. 14).

Lastly, the Convention imposes a specific duty on States parties to accord to women “equality with men before the law” and a legal capacity in civil matters identical to that of men (art. 15(1) and (2)), and requires them to ensure, “on a basis of equality of men and women” a number of rights relating to marriage and the family (art. 16). The meaning of a number of these obligations will be dealt with further below.

Other relevant universal treaties aiming at ensuring the equality of women in terms of the enjoyment of specific rights will be considered in the appropriate section below.

3.3 Regional human rights treaties

At the regional level, article 2 of the African Charter of Human and Peoples' Rights, article 1 of the American Convention on Human Rights, article 14 of the European Convention on Human Rights and Part V, article E, of the European Social Charter (Revised), 1996, all stipulate that the rights and freedoms set forth in these treaties shall be enjoyed without discrimination based on **sex**. Like article 26 of the International Covenant on Civil and Political Rights, Protocol No. 12 to the European Convention on Human Rights contains a general and independent prohibition of discrimination on certain grounds, which is not linked to the enjoyment of the rights guaranteed by the treaty. However, as of 8 June 2002, only Cyprus and Georgia had ratified this Protocol, which needs ten ratifications to enter into force. It should be pointed out that the non-discrimination provision contained in article 14 of the European Convention is linked to enjoyment of the rights and freedoms guaranteed by the Convention and its Additional Protocols and hence does not have an existence independent of those rights and freedoms.

Article 3 of the African Charter and article 24 of the American Convention further guarantee the right to equality before the law and the right to equal protection of the law.

3.4 The meaning of the principle of gender equality and non-discrimination between women and men

The general meaning of equality and non-discrimination is dealt with in some depth in Chapter 13, and references are made there to relevant examples of international case law and legal comments. The present chapter will therefore merely summarize the general meaning of the notion of equality of treatment and non-discrimination in international human rights law and then examine how the international monitoring bodies have dealt with the specific issue of gender equality.

3.4.1 The general meaning of equality and non-discrimination

The Human Rights Committee has emphasized that non-discrimination, “together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights”.⁸ However, not all distinctions made between persons and groups of persons can be regarded as discrimination in the true sense of the term. This follows from the consistent case law of the international monitoring bodies, according to which distinctions between people are justified provided that, in general terms, they are reasonable and imposed for an objective and legitimate purpose. The common features of the case law (also with respect to the equal rights of women) of the Human Rights Committee and the Inter-American and European Courts of Human Rights is summarized as follows in Chapter 13 in the light of some of their most detailed and authoritative rulings on the notion of equality of treatment and non-discrimination:

The principle of equality and non-discrimination does not mean that all distinctions made between people are illegal under international law.

Differentiations are legitimate and hence lawful provided that they:

- *pursue a legitimate aim such as affirmative action in order to deal with factual inequalities, and*
- *are reasonable given their legitimate aim.*

Alleged purposes for differential treatment that cannot be objectively justified and measures that are disproportionate to the attainment of a legitimate aim are unlawful and contrary to international human rights law.

In order to ensure the right to equality, States may have to treat differently persons whose situations are significantly different.

This basic interpretation is the point of departure for any member of the legal professions who has to consider allegations of discrimination in the exercise of rights and freedoms, including complaints regarding discrimination based on gender.

3.4.2 The meaning of equality between women and men

Although the principle of equality and non-discrimination in general human rights treaties is gender neutral in that it is equally applicable to alleged discrimination whether it originates from women or from men, it was considered necessary, as already noted, to include in the two International Covenants specific provisions emphasizing the obligation of States to ensure the equal right of men and women to the enjoyment of all the rights guaranteed by the respective treaty.

⁸See General Comment No. 18 (Non-discrimination), *United Nations Compilation of General Comments*, p. 134, para. 1.

In the case of the International Covenant on Civil and Political Rights, the Human Rights Committee believes that, contrary to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, which “deal only with cases of discrimination on specific grounds”,

“the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁹

The Human Rights Committee thus has a much wider field of competence in dealing with issues of discrimination than the Committees overseeing the implementation of the other two treaties.

With regard to the equality of rights between women and men as provided by article 3 of the Covenant, it implies, according to the Committee,

“that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.”¹⁰

The obligation to ensure the rights contained in the Covenant without discrimination

“requires that States parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials to human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant. The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.”¹¹

Moreover, in the Committee’s view, articles 2 and 3 of the Covenant mandate the States parties “to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, *both in the public and the private sector*, which impair the equal enjoyment of rights”.¹²

⁹Ibid., p. 135, para. 7.

¹⁰Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 168, para. 2.

¹¹Ibid., p. 168, para. 3.

¹²Ibid., p. 168, para. 4; emphasis added.

The Committee adds in this connection that:

“Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”¹³

The legal duty of States parties to ensure full and equal enjoyment of rights for all and, in particular, for men and women, thus covers all sectors of society. It should be noted that this obligation is immediate and thus neither progressive nor dependent on the available resources of the States parties concerned.

The Committee that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women has not yet made any general recommendation on article 1 of the Convention as such. The best sources of information about the Committee’s understanding of the concept of “discrimination against women” are therefore its comments on reports submitted by States parties and its general recommendations on specific issues.

Suffice it to recall in this regard that, as pointed out by the Committee, “discrimination under the Convention is not restricted to action by or on behalf of Governments”¹⁴ but also extends to private entities. In support of its view, the Committee refers to articles 2(e), 2(f) and 5 of the Convention which impose on States parties the legal duty to take all appropriate measures both “to eliminate discrimination against women by any person, organization or enterprise” and to modify existing laws, regulations, customs and practices as well as social and cultural patterns that constitute discrimination against women.¹⁵

These legal provisions clearly show that the States parties to this Convention also have a legal duty to take specific positive steps in all fields of society where gender discrimination exists, including positive steps to change entrenched discriminatory practices in the private domain, where women often suffer serious hardship, inter alia as a consequence of violence.

¹³Ibid., pp. 168-169, para. 5.

¹⁴Ibid., General Recommendation No. 19 (Violence against women), p. 217, para. 9.

¹⁵Ibid. For further details of these legal provisions see above (sub-section 3.2).

Although not legally binding per se, the *Vienna Declaration and Programme of Action* is an important statement of principles and policy that was unanimously adopted by the States participating in the World Conference on Human Rights in 1993; according to the Declaration, the “human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights” and 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.”¹⁶ The *Beijing Declaration and Platform for Action* was likewise adopted unanimously by the participating States; paragraph 1 of the Mission Statement opening the Platform states that it aims inter alia at “removing all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making”.¹⁷

Given that the world’s Governments have an all-inclusive legal duty to eliminate gender-based discrimination in their countries, judges, prosecutors and lawyers also have a professional responsibility to examine alleged violations of the right to equality and non-discrimination on the basis of gender, regardless of the origin of the alleged discrimination.

Women have the right to equality with men before the law. This right to legal equality is independent of a woman’s civil status.

The prohibition of discrimination based on sex includes gender-based violence.

Women’s right to legal equality with men means that States have to eliminate all legal and factual discrimination against women in both the public and private sectors. It also implies that States are duty bound, as a minimum, to take all appropriate measures to modify local customs and traditions that may impede the full realization of women’s right to equality.

¹⁶See UN doc. A/CONF.157/23, Part I, para. 18; emphasis added. The United Nations General Assembly subsequently endorsed the Declaration and its recommendations without a vote by resolution 48/121 of 20 December 1993.

¹⁷For the text of the Beijing Declaration and Platform for Action, see www.un.org/womenwatch/daw/beijing/platform; the Declaration and Platform for Action was subsequently endorsed by the United National General Assembly without a vote by resolution 50/42 of 8 December 1995. For information about the Special Session of the General Assembly that assessed progress made since the 1995 Beijing Conference, see www.un.org/womenwatch/confer/beijing5/.

4. Women's Right to Respect for their Life and their Physical and Mental Integrity

4.1 Relevant legal provisions

Women have the right to respect for their life, their right to freedom from torture and cruel, inhuman or degrading treatment and punishment, and their right to liberty and security of person as guaranteed by all general human rights treaties (e.g. articles 6, 7 and 9 of the International Covenant on Civil and Political Rights, articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights, articles 4, 5 and 7 of the American Convention on Human Rights and articles 2, 3 and 5 of the European Convention on Human Rights).¹⁸

The only universal legal document dealing *expressis verbis* with violence against women, is the ***Declaration on the Elimination of Violence against Women***, which was adopted by the United Nations General Assembly in 1993¹⁹ and which states that:

“the term ‘violence against women’ means 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 private life.”

Violence against women is given a wide meaning in article 2 of the Declaration. It is understood to encompass, but is not limited to, the following:

- “(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

Article 3 of the Declaration confirms, in a limited way, what is already evident from the general application of international human rights law, namely 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.” It may be

¹⁸On these issues, see Chapters 5 and 8 of this Manual.

¹⁹General Assembly resolution 48/104 adopted on 20 December 1993.

noted that the ensuing list, which is admittedly non-exhaustive, makes no reference to such important rights as freedom of opinion, belief, religion, expression and movement, without which women are unlikely to be able to vindicate their rights efficiently.

The Declaration also identifies measures to be taken both by individual States and by the organs and specialized agencies of the United Nations to eliminate violence against women in both the public and private spheres (arts. 4-5).

Although it is not legally binding per se, the Declaration provides strong evidence that the violent acts it describes constitute infringements of international human rights law by the States Members of the United Nations. The Declaration can thus also be useful in interpreting relevant provisions of both international and national law aimed at protecting the physical and mental integrity of women.

While there is no treaty dealing *expressis verbis* with gender violence at the universal level, the Committee on the Elimination of Discrimination against Women has made it clear, as noted in sub-section 3.2 above, that the definition of discrimination contained in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women also covers gender-based violence, notwithstanding the fact that the provisions of the Convention do not expressly mention violence. The Committee has also interpreted articles 2, 5, 11, 12 and 16 of the Convention as requiring the States parties “to act to protect women against violence of any kind occurring within the family, at the workplace or in any area of social life”.²⁰ The Committee further holds that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men,”²¹ and such violence, “which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention”.²²

So far, only one treaty deals exclusively with the widespread problem of violence against women, namely the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, which is also called the “Convention of Belém do Pará” and which was adopted by the General Assembly of the Organization of American States in 1994. According to article 2 of this Convention:

²⁰General Recommendation No. 12 (Violence against women), *United Nations Compilation of General Comments*, p. 209.

²¹*Ibid.*, General Recommendation No. 19 (Violence against women), p. 216, para. 1.

²²*Ibid.*, p. 217, para. 7. The General Recommendation also gives examples of how violence can negatively affect the enjoyment of a number of rights such as those in articles 6, 11, 12, 14 and 16(5), and provides a list of specific recommendations to States parties aimed at overcoming gender-based violence.

“Violence against women shall be understood to include physical, sexual and psychological violence:

- a. 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 women, including, among others, rape, battery and sexual abuse;
- b. that occurs in the community and is perpetrated by the 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
- c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.”

The Convention goes on to state that “every woman has the right to be free from violence in both the public and private spheres” (art. 3) and the States Parties recognize that “violence against women prevents and nullifies the exercise” of the civil, political, economic, social and cultural rights embodied in regional and international human rights instruments, the “free and full exercise” of which women are entitled to enjoy (art. 5).

According to article 6 of the Convention, a woman’s right to be free from violence, includes, inter alia, “the right ... to be free from all forms of discrimination” and “the right to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination”.

Articles 7 and 8 lay down measures that States parties have to take either “without delay” (art. 7) or “progressively” (art. 8) in order to prevent, punish and eradicate violence against women. In adopting such measures:

“the States Parties shall 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. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.”

This provision is an important admission of the precariousness (to which reference was already made in the Introduction) of special groups of women, whose situation is particularly dramatic and who may therefore need special protection from the legal professions against acts of violence.

Every woman has the right to respect for her life and for her physical and mental integrity on an equal basis with men.

Gender-based violence and threats of such violence are prohibited by international human rights law, whether such acts occur in the public or private sphere.

Violence against women impairs or nullifies their right to enjoy their rights and freedoms on a basis of equality with men.

Women in vulnerable situations must be given special attention and protection against acts of violence.

4.2 The right to life

While the terms of the various human rights treaties vary to some extent, their common basic rule is that women, like men, have the right not to be arbitrarily deprived of life (article 6 of the International Covenant on Civil and Political Rights, article 4 of the African Charter on Human and Peoples' Rights, article 4 of the American Convention on Human Rights and article 2 of the European Convention on Human Rights). Article 4(a) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women states that every woman has “the right to have her life respected”.

With regard to the *death penalty*, article 6(5) of the International Covenant and article 4(5) of the American Convention contain a specific provision outlawing its application to pregnant women, a case in which “the enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance”.²³

The Human Rights Committee states that the “inherent right to life” as guaranteed by article 6 of the International Covenant “cannot properly be understood in a restrictive manner” and that its protection “requires that States adopt positive measures”.²⁴ Basing itself on this wide interpretation, the Committee also considers, for instance, “that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”.²⁵

4.2.1 Abduction and murder

Violence against women involving abduction and murder as well as extrajudicial killings by security forces are, of course, strictly forbidden under international human rights law. Whether committed by government officials or family members, such illegal acts must be investigated and punished. Moreover, Governments have a legal duty under international law to prevent them from taking place.²⁶

The Human Rights Committee expressed concern in the case of Mexico “at the level of violence against women, including the many reported cases of abduction and murder which have not led to the arrest or trial of the perpetrators”; the State Party should

²³Human Rights Committee, General Comment No. 18 (Non-discrimination), *United Nations Compilation of General Comments*, p. 135, para. 8.

²⁴*Ibid.*, General Comment No. 6 (art. 6), p. 115, para. 5.

²⁵*Ibid.*, loc. cit.

²⁶On the duty of Governments to prevent, investigate and remedy human rights abuses, see Chapter 15 of this Manual.

“take effective measures to protect the security of women to ensure that no pressure is brought to bear on them to deter them from reporting such violations, and to ensure that all allegations of abuse are investigated and the perpetrators brought to justice”.²⁷

The Committee also expressed concern about the level of violence against women in Venezuela, “including the many reported cases of kidnapping and murder that have not resulted in arrests or prosecution of those responsible”. It recommended that the State Party “should take effective measures to guarantee women’s safety”, stating that the issue raised “serious concerns” under article 6 of the Covenant.²⁸

In the case of *Velásquez Rodríguez*, the Inter-American Court of Human Rights held that the practice of disappearances violated many provisions and constituted “a radical breach” of the American Convention on Human Rights in that it showed “a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention”.²⁹ For a State party to incur responsibility under the Convention for an alleged disappearance, it is not conclusive that there is evidence that the State itself is directly responsible for the act. As stated by the Court, “what is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible;” in other words, the State has “a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.³⁰ States’ legal responsibilities are thus far-reaching, although they may not themselves be directly involved, for instance, in the abductions. For more information on States’ duty to prevent, investigate, punish and compensate human rights violations, see Chapter 15 of this Manual.

4.2.2 Dowry violence and “honour” killings

In some countries, the bride’s family has to pay a dowry to the bridegroom’s family, the sum of which is agreed upon by the families. If for some reason the dowry is not paid or is considered to be too small, violence against the bride can ensue, and in some communities she may even be burned alive or disfigured by sulphuric acid either by her husband or by his family.³¹ “Honour” killings take place in a number of countries. A male member of the family kills a girl or woman who has “erred” in her

²⁷UN doc. GAOR, A/54/40 (vol. I), p. 64, para. 328.

²⁸UN doc. GAOR, A/56/49 (vol. I), p. 52, para. 17.

²⁹I-A Court HR, *Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C, No. 4*, p. 149, para. 158.

³⁰*Ibid.*, pp. 154-155, paras. 173-174.

³¹See, for example, Carin Benninger-Budel and Anne-Laurence Lacroix, *Violence against Women – A Report* (Geneva, World Organization against Torture (OMCT), 1999), pp. 119-120.

conduct, a “mistake” that is considered to justify the taking of her life; alternatively, a man from outside the family circle may be hired to commit the crime.

The Committee on the Elimination of Discrimination against Women has stated with regard to articles 2(f), 5 and 10(c) of the Convention on the Elimination of All Forms of Discrimination against Women that “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.”³²

The Committee expressed concern about violence against women in Jordan and Iraq in the form of “honour” killings; under article 340 of the Jordanian Penal Code, for instance, “a man who kills or injures his wife or his female kin caught in the act of adultery” is excused.³³ The Committee urged Jordan “to provide all possible support for the speedy repeal of article 340 and to undertake awareness-raising activities that make ‘honour killings’ socially and morally unacceptable”.³⁴ As women in Jordan threatened by “honour” killings are jailed for their own protection, the Committee also urged the Government “to take steps that ensure the replacement of protective custody with other types of protection for women”.³⁵ The Committee urged Iraq “in particular to condemn and eradicate honour killings and ensure that these crimes are prosecuted and punished in the same way as other homicides”.³⁶

The Committee on Economic, Social and Cultural Rights also expressed concern, in the case of Jordan, “at the fact that crimes against women perpetrated in the name of honour go unpunished”.³⁷

4.2.3 Female genital mutilation

Female genital mutilation is a practice that is widespread in certain parts of the world and may have serious implications for girls’ health, even causing death through the use of unsterilized surgical tools or owing to poor general hygiene during the intervention. The harmfulness of female genital mutilation has been documented by the World Health Organization.³⁸

³²See General Recommendation No. 19 (Violence against women), *United Nations Compilation of General Comments*, pp. 217-218, para. 11.

³³UN doc. GAOR, A/55/38, p. 20, para. 178 (Jordan), and p. 69, para. 193 (Iraq).

³⁴*Ibid.*, p. 20, para. 179.

³⁵*Ibid.*, loc. cit.

³⁶*Ibid.*, p. 69, para. 194.

³⁷UN doc. E/2001/22 (E/C.12/2000/21), p. 51, para. 236.

³⁸See in general WHO web site: www.ilo.int/ and also references in **Handout No. 1**.

The Committee on the Elimination of Discrimination against Women has recommended that States parties to the Convention on the Elimination of All Forms of Discrimination against Women should ensure “the enactment and effective enforcement of laws that prohibit female genital mutilation”.³⁹ It has also recommended that States parties “take appropriate and effective measures with a view to eradicating the practice of female circumcision”. Such measures could include:

- ❖ the collection and dissemination of basic data about such traditional practices;
- ❖ the support of women’s organizations working for the elimination of female circumcision and other practices harmful to women;
- ❖ the encouragement of politicians, professionals, religious and community leaders at all levels including the media and the arts to cooperate in influencing attitudes towards the eradication of female circumcision;
- ❖ the introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision;
- ❖ the inclusion in national health policies of appropriate strategies aimed at eradicating female circumcision in public health care.⁴⁰

With regard to Egypt, the same Committee welcomed the Minister of Health’s Decree of 1996 imposing a ban on female genital mutilation, but it still expressed concern at the lack of information about implementation of the Decree.⁴¹

4.2.4 Abortion

The question of abortion is not expressly dealt with in the general international human rights treaties, but article 4(1) of the American Convention on Human Rights stipulates that the right to life “shall be protected by law, and, in general, from the moment of conception”, a provision that seems to exclude any unconditional resort to abortion even during the first weeks of pregnancy. On the other hand, it has been argued that unduly restrictive abortion laws may endanger the life and health of pregnant women who resort to clandestine interruptions of pregnancy.

Examining this issue under article 6 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated, with regard to the situation in Guatemala, that “the criminalization of all abortion, with the severe penalties imposed by the legislation in force except where the mother’s life is in danger, gives rise to serious problems, especially in the light of unchallenged reports of serious impact on maternal mortality of clandestine abortions and the lack of information on family planning;” in the Committee’s view, the State party therefore had the duty

³⁹See General Recommendation No. 24 (Article 12 – Women and health), *United Nations Compilation of General Comments*, p. 248, para. 15(d).

⁴⁰*Ibid.*, General Recommendation No. 14 (Female circumcision), pp. 211-212, subparagraphs (a) and (b).

⁴¹UN doc. *G.AOR*, A/56/38, p. 36, para. 348.

“to adopt the necessary measures to guarantee the right to life (art. 6) of pregnant women who decide to interrupt their pregnancy by providing the necessary information and resources to guarantee their rights and amending the legislation to provide for exceptions to the general prohibition of all abortions, except when the mother’s life is in danger”.⁴²

The Committee also suggested that Costa Rican legislation on abortion be amended to allow for exceptions to the general prohibition of the interruption of pregnancy in that country.⁴³ Peruvian legislation has also been “a matter of concern” to the Committee, since it penalizes abortions even where pregnancy is the result of rape. Noting that clandestine abortion continues to be the main cause of maternal mortality in Peru,⁴⁴ the Committee reiterated that such legal provisions “are incompatible with articles 3, 6 and 7 of the Covenant” and recommended “that the legislation should be amended to establish exceptions to the prohibition and punishment of abortion”.⁴⁵

The Committee on the Elimination of Discrimination against Women expressed concern, in the case of Jordan, “that the prohibition of abortion also applies to cases where pregnancy is due to rape or incest” and called on the Government “to initiate legislative action to permit safe abortion for victims of rape and incest”.⁴⁶

4.2.5 *Infant mortality and life expectancy*

Given its wide understanding of the right to life and the ensuing responsibilities of States parties to act positively to protect it, including the aforementioned duty to take measures to reduce infant mortality and increase life expectancy, the Human Rights Committee stated, in the case of the Democratic People’s Republic of Korea, that it remained “seriously concerned about the lack of measures taken by the State party to deal with the food and nutrition situation in the DPRK and the lack of measures taken to address, in cooperation with the international community, the causes and consequences of the drought and other natural disasters which seriously affected the country’s population in the 1990s”.⁴⁷ This duty of States parties under article 6 of the Covenant to take positive measures to reduce infant mortality and increase life expectancy by dealing with the root causes of the problems affecting the population’s life cycle is particularly important in the case of women and the girl child, who often have to carry an undue burden in times of scarcity of food and inadequate health care. Women and children must therefore at all times have access to food and health care on an equal footing with men.

⁴²UN doc. GAOR, A/56/40 (vol. I), p. 96, para. 19.

⁴³UN doc. GAOR, A/54/40 (vol. I), p. 55, para. 280.

⁴⁴UN doc. GAOR, A/56/40 (vol. I), p. 48, para. 20.

⁴⁵Ibid., loc. cit.

⁴⁶UN doc. GAOR, A/55/38, p. 20, paras. 180-181.

⁴⁷UN doc. GAOR, A/56/40 (vol. I), p. 100, para. 12.

Women's right to life must be respected at all times.

States have a corresponding legal duty positively to protect women's life.

Violence, including abduction, murder and extrajudicial killings, are strictly prohibited at all times.

Violence linked to dowry or "honour" killings are strictly prohibited by international law and must be prevented, prosecuted and punished by the State concerned.

Female genital mutilation is harmful to the health and life of women and contrary to international law. States have a duty to take appropriate and effective measures to eradicate this practice.

To prevent maternal mortality, national legislation must, as a minimum, provide for the possibility of abortion in cases where, for example, the health of the mother is in danger, and in cases of rape or incest.

The death penalty may not be imposed on pregnant women.

States have a legal responsibility under international law to take positive measures to reduce infant mortality and increase life expectancy by dealing with the root causes and providing women with equal access to food and health care.

4.3 The right to freedom from torture and other cruel, inhuman or degrading treatment or punishment

Women have the basic right at all times effectively to enjoy freedom from torture and from cruel, inhuman or degrading treatment or punishment (see article 7 of the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the African Charter on Human and Peoples' Rights, article 5(2) of the American Convention on Human Rights, article 4 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, article 3 of the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment). The right to freedom from torture and other ill-treatment must be ensured at all times and cannot be derogated from in public emergencies (article 4(2) of the International Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention).

Without being in any way exhaustive, this sub-section will consider institutional, institutionalized, domestic and community violence against women.

4.3.1 Violence against women deprived of their liberty

The general international human rights treaties do not *expressis verbis* recognize the fact that women deprived of their liberty are in a particularly vulnerable situation and therefore need special protection against violence such as sexual abuse on the part of prison officials. Only in article 7(a) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women do the 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 the obligation to prevent, punish and eradicate violence against women.

With regard to the treatment of detainees, article 10(1) of the International Covenant on Civil and Political Rights stipulates, more specifically, that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” In a similar vein, article 5(2) of the American Convention on Human Rights stipulates that “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” Lastly, according to Rule 8(a) of the United Nations Standard Minimum Rules for the Treatment of Prisoners:

“Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate.”

If strictly applied, this rule of separation of categories of prisoners helps to protect female prisoners. However, they are still vulnerable to abuse by prison officials and guards, especially if they are men.

The international monitoring bodies have so far paid relatively scant attention to the problem of abuse of women in police custody or otherwise deprived of their liberty. However, in General Comment No. 28, the Human Rights Committee emphasizes that “States parties must provide all information relevant to ensuring that the rights of persons deprived of their liberty are protected on equal terms for men and women. In particular, States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards. States parties should also report about compliance with the rule that *accused juvenile females* shall be separated from adults and on any difference in treatment between male and female persons deprived of liberty, such as access to rehabilitation and education programmes and to conjugal and family visits. *Pregnant women who are deprived of their liberty* should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children.”⁴⁸

⁴⁸General Recommendation No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 170, para. 15. Emphasis added.

The Human Rights Committee has stated, for instance, that the many allegations of rape and torture of women detained in Mexico and Venezuela by the security forces in those countries raise “serious concerns” under article 7 of the International Covenant on Civil and Political Rights; the States Parties should therefore “take effective measures to guarantee women’s safety, ensure that no pressure is put on them to dissuade them from reporting such violations, that all allegations of abuses are investigated and that those committing such acts are brought to justice”.⁴⁹

The Committee against Torture has recently begun to ask States parties to the Convention against Torture to provide data disaggregated by gender “on civil and military places of detention as well as on juvenile detention centres and other institutions where individuals may be vulnerable to torture or ill-treatment”.⁵⁰ When examining the initial report of Kazakhstan, the Committee expressed concern about “the absence of information in the report regarding torture and ill-treatment affecting women and girls, particularly in view of the rise in imprisonment rates of females and allegations of abusive treatment of women in police custody”.⁵¹ In the case of Canada, it expressed concern about allegations that female detainees had been “treated harshly and improperly by the authorities of the State party, and that many recommendations of the Arbour report [had] yet to be implemented”.⁵²

The Committee against Torture also expressed concern, in the case of the United States, about alleged “cases of sexual assault upon female detainees and prisoners by law enforcement officers and prison personnel”; in the Committee’s view, female “detainees and prisoners are also very often held in humiliating and degrading circumstances”.⁵³ The Committee recommended in general that the State party take “such steps as are necessary to ensure that those who violate the Convention are investigated, prosecuted and punished, especially those who are motivated by discriminatory purposes or sexual gratification”.⁵⁴ In the case of the Netherlands, the Committee expressed concern about the “inadequate deployment of female officers” (i.e. law enforcement officers).⁵⁵

When examining the third periodic report of Egypt, the Committee further expressed concern at the allegation by the World Organization against Torture concerning the “treatment of female detainees, by both the police and the State Security Intelligence, which sometimes involves sexual abuse or threat of such abuse in order to obtain information relating to husbands or other family members”; the Committee therefore recommended that “effective steps be taken to protect women from threats

⁴⁹UN docs. *GAOR*, A/54/40 (vol. I), p. 64, para. 328 (Mexico), and *GAOR*, A/56/40 (vol. I), p. 52, para. 17 (Venezuela); the quotation is from the latter report but the content is the same as in the report concerning Mexico.

⁵⁰See, for example, with regard to Kazakhstan, UN doc. *GAOR*, A/56/44, p. 55, para. 129(m).

⁵¹*Ibid.*, p. 54, para. 128(f).

⁵²*Ibid.*, p. 26, para. 58(b); the report referred to was: *Commission of Inquiry into Certain Events at the Prisons for Women at Kingston*, Commissioner: The Honorable Louise Arbour, Canada, 1996.

⁵³UN doc. *GAOR*, A/55/44, p. 32, para. 179(d).

⁵⁴*Ibid.*, p. 32, para. 180(b).

⁵⁵*Ibid.*, p. 34, para. 187(a).

of sexual abuse by police and officers of the State Security Intelligence as a means of obtaining information from them”.⁵⁶

For information on case law concerning rape as torture, see Chapter 8, sub-section 2.3.1, of this Manual.

It is vitally important that judges, prosecutors and lawyers pay particular attention to the special needs and vulnerability of women in custody, that they examine allegations of ill-treatment, including sexual abuse, with diligence and efficiency and that they are alert to any sign of torture or other kinds of ill-treatment of women, who might not dare to denounce the perpetrators of such violence.

4.3.2 Unlawful punishments

According to the Human Rights Committee, “the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim;” in the Committee’s view, moreover, “the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”⁵⁷ This view was confirmed in the *Osbourne* case, where the author had been given a 15-year prison sentence with hard labour and ordered to receive ten strokes of the tamarind switch for illegal possession of a firearm, robbery with aggravation and wounding with intent. It was “the firm opinion of the Committee” in this case that, irrespective of “the nature of the crime that is to be punished, however brutal it may be, ... corporal punishment constitutes *cruel, inhuman and degrading treatment or punishment*” contrary to article 7 of the Covenant, which was thus violated.⁵⁸ The Committee informed the Government that it was “under an obligation to refrain from carrying out the sentence of whipping upon Mr. Osbourne” and, further, that it “should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment”.⁵⁹

With regard to Namibia, the Committee against Torture recommended “the prompt abolition of corporal punishment” insofar as it was still legally possible under Namibian law to impose such punishment.⁶⁰

⁵⁶UN doc. GAOR, A/54/44, p. 23, paras. 209 and 212.

⁵⁷General Comment No. 20 (Article 7), *United Nations Compilation of General Comments*, p. 139, para. 5.

⁵⁸Communication No. 759/1997, *G. Osbourne v. Jamaica* (Views adopted on 15 March 2000), in UN doc. GAOR, A/55/40 (vol. II), p. 138, para. 9.1; emphasis added

⁵⁹Ibid., p. 138, para. 11.

⁶⁰UN doc. GAOR, A/52/44, p. 37, para. 250.

The prohibition of corporal punishment is, of course, equally applicable to women, who may, for instance, run the risk of flogging or stoning if they have not complied with a certain *dress code* or if, as illustrated by the two cases described below, they have committed *adultery*. The Human Rights Committee has therefore asked States parties to provide information in their reports “on any specific regulation of clothing to be worn by women in public”, stressing that such regulations “may involve a violation of a number of rights” contained in the International Covenant on Civil and Political Rights, such as article 7, “if corporal punishment is imposed in order to enforce such a regulation”.⁶¹ The following two cases involving the possible imposition of corporal punishment for having committed adultery were brought, respectively, under the Convention against Torture and the European Convention on Human Rights. The outcome of these cases showed, quite importantly, that there is consistency among the international monitoring bodies in their understanding of the concept of “torture” and other kinds of ill-treatment outlawed by international human rights law.

Female refugees and asylum-seekers may have an interest in not being returned to their country of origin because they risk being subjected, for instance, to torture or cruel punishment. In the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, this possibility has to be considered under article 3(1), which reads as follows:

- “1. No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

The Committee against Torture has described the determination of risk under article 3 in the following terms:

“The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of

⁶¹General Comment No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 170, para. 13. Other articles of the Covenant that may be violated by regulations imposing a dress code are: article 26 on non-discrimination; article 9 “when failure to comply with the regulation is punished by arrest”; article 12, “if liberty of movement is subject to such a constraint”; article 17, “which guarantees all persons the right to privacy without arbitrary or unlawful interference”; articles 18 and 19, “when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression”; and, lastly, article 27, “when the clothing requirements conflict with the culture to which the women can lay a claim”.

human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.”⁶²

In this particular case, the author, an Iranian citizen, had applied for asylum in Sweden for herself and her son. The author stated that she was “the widow of a martyr and as such supported and supervised by the *Bonyad-e Shabid* Committee of Martyrs”; she claimed furthermore that she had been forced into a *sighe* or *mutab* marriage and that she had “committed and been sentenced to stoning for adultery”.⁶³ Although the Swedish Government questioned her credibility, the Committee against Torture ruled in her favour and decided that the State Party had “an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to the Islamic Republic of Iran or to any other country where she [ran] a risk of being expelled or returned to the Islamic Republic of Iran”.⁶⁴ The Committee thus accepted that the author would run the risk of being sentenced to stoning for adultery if returned to her country of origin. In arriving at its decision the Committee referred to a report of the United Nations Special Representative on the situation of human rights in the Islamic Republic of Iran as well as to “numerous reports of non-governmental organizations”, which confirmed that married women had recently been sentenced to death by stoning for adultery.⁶⁵

The situation in the case of *Jabari* – which was brought under article 3 of the European Convention on Human Rights – was similar in that the applicant, an Iranian citizen, alleged that “she would be subjected to a real risk of ill-treatment and death by stoning if expelled from Turkey” to the Islamic Republic of Iran.⁶⁶ While attending a secretarial college in the Islamic Republic of Iran, the applicant had met a man with whom she fell in love; after some time they decided to get married but her friend’s family opposed the marriage and he married another women; however, the applicant and her former friend continued to see each other and to have sexual relations until they were stopped one day by policemen and detained.⁶⁷ The applicant underwent a virginity test in custody but was eventually released with the help of her family; she entered Turkey illegally and then tried to go to Canada via France where she was caught using a forged Canadian passport.⁶⁸ She was thereupon returned to Istanbul. Back in Turkey, the Office of the United Nations High Commissioner for Refugees (UNHCR) granted her refugee status “on the basis that she had a well-founded fear of persecution if removed to Iran as she risked being subjected to inhuman punishment, such as death by stoning, or being whipped or flogged”.⁶⁹

⁶²See Communication No. 149/1999, *A.S. v. Sweden* (Views adopted on 24 November 2000), in UN doc. *GAOR*, A/56/44, pp. 184-185, para. 8.3.

⁶³*Ibid.*, p. 185, para. 8.4.

⁶⁴*Ibid.*, pp. 185-185, paras. 8.5 and 9.

⁶⁵*Ibid.*, p. 185, para. 8.7.

⁶⁶*Eur. Court HR, Case of Jabari v. Turkey, Judgment of 11 July 2000*, para. 3. The text used is that found at the Court’s web site: www.echr.coe.int/

⁶⁷*Ibid.*, paras. 9-11.

⁶⁸*Ibid.*, paras. 12-14.

⁶⁹*Ibid.*, para. 18.

The European Court recalled its well established case law, according to which

“expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.”⁷⁰

Importantly, the Court added that

“having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3.”⁷¹

In the case before it, the Court was “not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability” and it consequently gave “due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which would face the applicant if her deportation were to be implemented”; the UNHCR had “interviewed the applicant and had the opportunity to test the credibility of her fears and the veracity of her account of the criminal proceedings initiated against her in Iran by reason of her adultery”.⁷² Lastly, the Court stated that it was “not persuaded that the situation in the applicant's country [had] evolved to the extent that adulterous behaviour [was] no longer considered a reprehensible affront to Islamic law”, since adultery by stoning remained on the statute books and might be resorted to by the authorities.⁷³ Consequently, the Court found it “substantiated” that there was “a real risk of the applicant being subjected to treatment contrary to Article 3 if ... returned to Iran” and that her deportation to that country would constitute a violation of that article.⁷⁴

4.3.3 Violence against women and the girl child in families and the community in general

Violence, including sexual abuse of women and the girl child, is all too common in families, schools and the community in general, and its existence is, as seen above, a clear breach of various provisions of international human rights law, such as the right to freedom from ill-treatment and the right to personal security. *Although much of this violence takes place in the domestic sphere, Governments have a responsibility to act with due diligence to eradicate it.*

⁷⁰Ibid., para. 38.

⁷¹Ibid., para. 39.

⁷²Ibid., paras. 40-41.

⁷³Ibid., para. 41.

⁷⁴Ibid., para. 42.

In this connection, the Committee on the Elimination of Discrimination against Women has recommended that the States parties to the Convention on the Elimination of All Forms of Discrimination against Women “should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act” and that they should also, *inter alia*:

“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. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.”⁷⁵

In accordance with its recommendations, the Committee requested Iraq, for instance, to provide “a comprehensive picture with regard to violence against women in the State party, including information on legislation, statistical data on the types and incidence of violence against women and the responses to such violence by law enforcement officials, the judiciary, social workers and health-care providers”. It urged the Government “to encourage and support the establishment of facilities for women victims of domestic violence, such as telephone hotlines and shelters for battered women, and to launch a zero-tolerance campaign on violence against women so as to raise awareness about the problem and the need to combat it effectively”.⁷⁶

The Committee also urged the Government of the Republic of Moldova “to place high priority on measures to address violence against women in the family and in society, and to recognize that such violence, including domestic violence, constitutes a violation of the human rights of women under the Convention”; the Committee called on the Government “to ensure that such violence constitutes a crime punishable under criminal law, that it is prosecuted and punished with the required severity and speed, and that women victims of violence have immediate means of redress and protection”.⁷⁷ It further recommended “that measures be taken to ensure that public officials, especially law enforcement officials and the judiciary, are fully sensitized to all forms of violence against women”; lastly, it invited the Government “to undertake awareness-raising measures, including a campaign of zero tolerance, to make such violations socially and morally unacceptable”.⁷⁸

The Committee on the Elimination of Discrimination against Women also expressed concern about violence against women in Lithuania, in particular domestic violence, and urged the Government to amend article 118 of the Criminal Code “in order explicitly to define rape as sexual intercourse without consent”; it further urged the Government “to continue to pay serious attention to domestic violence against women, including through ongoing training of police officials, future lawyers and judges and through easy access to courts by the victims of domestic violence”.⁷⁹ Lastly, it recommended “the introduction of a specific law prohibiting domestic violence

⁷⁵General Recommendation No. 19 (Violence against women), *United Nations Compilation of General Comments*, p. 219, para. 24(a) and (b).

⁷⁶UN doc. GAOR, A/55/38, p. 68, para. 190.

⁷⁷*Ibid.*, p. 59, para. 102.

⁷⁸*Ibid.*, loc. cit.

⁷⁹*Ibid.*, p. 64, para. 151.

against women, which would provide for protection and exclusion orders and access to legal aid and shelters”.⁸⁰

The increase in violence against women in Romania was also an issue of concern to the Committee as well as “the absence of legislation criminalizing domestic violence, including marital rape, and the recognition of the defence of a so-called ‘reparatory marriage’ in the Criminal Code, which eliminates criminal liability of a rapist if the rape victim consents to marry him”; the Committee was also concerned that there was “no legislation concerning sexual harassment”.⁸¹

Lastly, the Committee expressed concern in the case of India about the exposure of women “to the risk of high levels of violence, rape, sexual harassment, humiliation and torture in areas where there are armed insurrections”; it therefore recommended “a review of prevention of terrorism legislation and the Armed Forces Special Provisions Act ... so that special powers given to the security forces do not prevent the investigation and prosecution of acts of violence against women in conflict areas and during detention and arrest”.⁸²

The Human Rights Committee has also focused on violence against women in *the private sphere*. With regard to Cambodia, for instance, the Committee expressed concern that marital rape was not an offence and that the authorities did not provide support for women complaining about domestic violence; the State party should therefore, in its view, “introduce measures to enable women to seek effective protection of the law in case of domestic violence”.⁸³ The Committee also expressed concern “that violence against women and domestic violence in particular is on the increase in Costa Rica” and it recommended “that all necessary measures, including the enactment of appropriate legislation, be taken to protect women in these areas”.⁸⁴

The Committee expressed concern about the continued existence in Venezuela “of a legal provision exempting a rapist from any penalty if he marries the victim”, adding that the State party “should immediately repeal this legislation, which is incompatible with articles 3, 7, 23, 26, 2(3) and 24 of the Covenant, particularly taking into account the early age at which girls can enter into marriage”.⁸⁵ The same concern was expressed with regard to the legislation of Guatemala which, moreover, requires a woman to be “honest” for the offence of rape to be held to have been committed; the Committee informed the State party that it should “immediately repeal this legislation, which is incompatible with articles 3, 23, 26 and 2(3) of the Covenant”.⁸⁶

⁸⁰Ibid., loc. cit.

⁸¹Ibid., p. 80, para. 306.

⁸²Ibid., p. 11, paras. 71-72. On the issue of “Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997/2000)”, see, for example, UN doc. E/CN.4/2001/73, *Violence against Women – Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy*, 45 pp.

⁸³UN doc. GAOR, A/54/40 (vol. I), p. 60, para. 309.

⁸⁴Ibid., p. 55, para. 281.

⁸⁵UN doc. GAOR, A/56/40 (vol. I), p. 52, para. 20.

⁸⁶Ibid., p. 97, para. 24.

The Committee on Economic, Social and Cultural Rights noted “with concern” that the problem of domestic violence against women in Egypt “is not being sufficiently addressed and that marital rape is not criminalized”.⁸⁷ With regard to Mongolia, the Committee stated that it was “deeply concerned about the adverse effects of the prevailing traditional values and practices and of poverty on women” and it deplored “the lack of facilities and the inefficiency of remedies for victims of domestic violence”, which was estimated to affect a third of the country’s women; the Committee urged the Government “to organize public campaigns to raise awareness about domestic violence, to criminalize spousal rape and to provide victims with shelters and adequate remedies”.⁸⁸ The “phenomenon of violence against women, including marital violence” was also a matter of concern in the case of Portugal.⁸⁹

The European Court of Human Rights made an important ruling in the case of *X and Y v. the Netherlands* regarding ***the duties of the Contracting States to the European Convention on Human Rights to provide victims of abuse caused by private individuals with “practical and effective protection”***. The case concerned the impossibility of having criminal proceedings instituted against the alleged perpetrator of a sexual assault carried out on a mentally handicapped girl, Miss Y. The alleged perpetrator was the son-in-law of the directress of the privately run home for mentally handicapped children where the girl was staying. The police took the view that Miss Y was incapable of filing a complaint herself and, as she was over 16 years of age, her father’s complaint could not be considered as a substitute; hence nobody was legally empowered to bring a criminal complaint on Miss Y’s behalf.⁹⁰

The Court stated 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 ... 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.”⁹¹

It then found that:

“the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. 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.”⁹²

⁸⁷UN doc. E/2001/22 /E/C.12/2000/21), p. 41, para. 162.

⁸⁸Ibid., p. 55, para. 270, and p. 56, para. 281.

⁸⁹Ibid., p. 72, para. 414.

⁹⁰*Eur. Court HR, Case of X and Y v. the Netherlands, Judgment of 26 March 1985, Series A, No. 91*, pp. 8-9, paras. 9-13.

⁹¹Ibid., p. 11, para. 23.

⁹²Ibid., p. 13, para. 27.

Considering that, for persons in the situation of Miss Y, there was a procedural obstacle to bringing criminal proceedings against the alleged perpetrator of an assault, the Court concluded that the Netherlands Criminal Code did not provide Miss Y “with practical and effective protection”; “taking account of the nature of the wrongdoing in question”, the Court concluded that she was a victim of a violation of article 8 of the European Convention on Human Rights.⁹³

Another notable case in this regard is that of *A v. the United Kingdom*, which, although it concerns the beating of a boy child by his stepfather, has equally important implications for the duty of States to protect the girl child. The applicant, who was nine years old at the relevant time, was “found by the consultant paediatrician ... to have been beaten with a garden cane which had been applied with considerable force on more than one occasion”; in the view of the Court, this treatment reached the level of severity prohibited by article 3 of the European Convention on Human Rights.⁹⁴ The question that had to be determined therefore was “whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather”.⁹⁵ The Court considered:

“ that the obligation on the High Contracting 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. ”⁹⁶

Under English law, it was “a defence to a charge of assault on a child that the treatment in question amounted to ‘reasonable chastisement’”, and it was “on the prosecution to establish beyond reasonable doubt that the assault went beyond the limits of lawful punishment”; although the applicant had been subjected to treatment considered to be of sufficient severity to fall within the scope of article 3 of the Convention, his stepfather had been acquitted by the jury.⁹⁷ In the Court’s opinion, therefore, the law did not provide adequate protection to the applicant and this failure constituted a violation of article 3 of the Convention.⁹⁸

For more information on the duty of States to protect human rights, see Chapter 15 below.

⁹³Ibid., p. 13, para. 27, and p. 14, para. 30.

⁹⁴*Eur. Court HR, Case of A v. the United Kingdom, Judgment of 23 September 1998, Reports 1998-VI, p. 2699, para. 21.*

⁹⁵Ibid., p. 2699, para. 22.

⁹⁶Ibid., loc. cit.; emphasis added.

⁹⁷Ibid., pp. 2699-2700, para. 23.

⁹⁸Ibid., p. 2700, para. 24.

4.4 Violence against women as crimes against humanity and war crimes

In conclusion, it is important to point out in this context that, according to both article 5(f) and (g) of the Statute of the International Tribunal for the Former Yugoslavia and article 3(f) and (g) of the Statute of the International Tribunal for Rwanda, *torture* and *rape* are considered to constitute *a crime against humanity* when committed against any civilian population in the course of an armed conflict. Moreover, pursuant to article 4 of its Statute, the International Tribunal for Rwanda has the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 1949, including the 1977 Protocol Additional thereto. Article 4(e) and (h) specifies that these violations shall include “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”, including threats to commit such acts.

According to article 7 of the 1998 Statute of the International Criminal Court, the concept of a *crime against humanity* covers not only such acts as murder, extermination, enslavement, torture and deportation or forcible transfer of population but also rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization “or any other form of sexual violence of comparable gravity” (art. 7(g)). However, to constitute a “crime against humanity”, these acts must be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Such acts may also constitute serious *war crimes* in both international and non-international armed conflicts (art. 8(2)(b)(xxii) and (e)(vi) respectively).

For more information on the protection of human rights in times of crisis, see Chapter 16 concerning “The Administration of Justice during States of Emergency”.

Women have the right to freedom from torture and from cruel, inhuman or degrading treatment or punishment at all times, including in times of emergency.

Women deprived of their liberty must be treated with humanity and given special protection against violence and sexual abuse.

Corporal punishment is prohibited by international law, also when imposed on women for reasons of adultery or for having violated specific dress codes.

A women must not be returned to a country where she runs a serious risk of being subjected to torture or other treatment contrary to international law.

Domestic and community violence against women is contrary to international law. States have a legal duty to take immediate and effective measures to eradicate all forms of gender-based violence in society. This duty implies, inter alia, that States must also provide adequate and effective protection under criminal law to victims of violence by private individuals.

5. Women's Right to Freedom from Slavery, the Slave Trade, Forced and Compulsory Labour, and Trafficking

Although it is beyond the scope of this Manual to examine the notions of slavery, the slave trade, servitude, and forced and compulsory labour, it is important for the legal professions to know that there are international legal provisions outlawing these practices, which, contrary to what many people may think, still occur in many countries. Such practices are also often linked in many ways to trafficking in women and children and forced prostitution. The notions of slavery, the slave trade, forced and compulsory labour, and trafficking, including for purposes of servitude and prostitution, are thus intricately interwoven in practice and difficulties may arise when it comes to applying the relevant legal principles. After reviewing the major legal provisions, this section will give particular attention to the serious and increasingly widespread phenomenon of trafficking, which has become particularly acute in Europe since the collapse of the Soviet Union and the opening up of borders.

5.1 Relevant legal provisions

5.1.1 *Slavery, the slave trade and servitude*

Slavery is prohibited under all general human rights treaties (article 8(1) of the International Covenant on Civil and Political Rights, article 5 of the African Charter on Human and Peoples' Rights, article 6(1) of the American Convention on Human Rights, article 4(1) of the European Convention on Human Rights). *The slave trade* is expressly prohibited under article 8(1) of the Covenant, article 5 of the African Charter and article 6(1) of the American Convention. *Servitude* is outlawed by article 8(2) of the Covenant, article 6(1) of the American Convention and article 4(1) of the European Convention.

These practices are further prohibited under the Slavery Convention, 1926, as amended by the 1953 Protocol, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956. While the 1926 Convention deals with the prevention and suppression of slavery and the slave trade, the 1956 Convention is interesting in that it also, inter alia, expressly deals with institutions and practices such as *debt bondage*, *serfdom* and *forced marriages for money*. Article 1 requires States parties to take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices:

“(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt of the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of eighteen years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

The right to freedom from slavery, the slave trade and servitude must be ensured *at all times* and cannot be derogated from in public emergencies (article 4(2) of the International Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention).

5.1.2 Forced and compulsory labour

Forced and compulsory labour is expressly prohibited by three of the four general human rights treaties, namely by article 8(3) of the International Covenant on Civil and Political Rights, article 6(2) of the American Convention and article 4(2) of the European Convention. Such practices are further outlawed by the ILO Forced Labour Convention, 1930 (No. 29) and the ILO Abolition of Forced Labour Convention, 1957 (No. 105). The three general human rights treaties and the 1930 ILO Convention exclude from the definition of “forced and compulsory labour” such services as are required, for instance, in the course of military service, which form part of normal civil obligations or which can be exacted in cases of emergency or calamity. All these prohibitions must be applied without discrimination to women.

5.1.3 Trafficking

Under article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the States parties agree to punish any person who, to gratify the passions of another:

“(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person”.

The States parties also agree to punish any person who:

“(1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel;

(2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others”.

These offences are regarded as extraditable offences (arts. 8-9).

Furthermore, States parties are required, under article 6 of the Convention on the Elimination of Discrimination against Women, to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Another international treaty of potential relevance in this field is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, which was adopted by the General Assembly on 15 November 2000 and opened for signature on 13 December 2000. This Protocol, like the Convention itself, requires 40 ratifications to enter into force and cannot enter into force before the Convention (art. 17 of the Protocol). As of 15 November 2001, only four States had ratified the Convention (Monaco, Nigeria, Poland and Yugoslavia).

Lastly, article 35 of the Convention on the Rights of the Child stipulates that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” A final significant development with regard to trafficking in children, including, in particular, the girl child, is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which entered into force on 18 January 2002. Although the text of the Optional Protocol does not refer specifically to trafficking, the link between trafficking and the sale of children, child prostitution and child pornography is a direct one; bearing this reality in mind, the drafters of the Protocol hoped that it would prove to be an additional tool in the fight against trafficking and related exploitation of children.⁹⁹ As of 8 February 2002, the Optional Protocol had been ratified by 17 States.

⁹⁹UN doc. E/CN.4/2001/72, *Traffic in women and girls, Report of the Secretary-General*, p. 3, para 8.

5.2 The practice of slavery, forced and compulsory labour, and trafficking in women

Overt or disguised forms of slavery, forced and compulsory labour, and trafficking in women and children are unlawful practices that are a continuing source of concern to the international monitoring bodies.

In analysing legal obligations under article 8 of the International Covenant, the Human Rights Committee emphasized that States parties should inform it of measures taken “to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised, *inter alia*, as domestic or other kinds of personal service. States parties where women and children are recruited, and from which they are taken, and States parties where they are received should provide information on measures, national or international, which have been taken in order to prevent the violation of women’s and children’s rights.”¹⁰⁰

The Human Rights Committee expressed deep concern about information on trafficking in women to Venezuela, especially from neighbouring countries, and the lack of information from the delegation of the State party on the extent of the problem and action to combat it.¹⁰¹ The Committee also noted that Croatia had “a variety of measures at its disposal in its criminal law to combat the practice of trafficking of women into and through its territory, particularly for purposes of sexual exploitation”; it regretted, however, that, despite widespread reports of the extent and seriousness of the practice, it had not been provided with information on actual steps taken to prosecute the persons involved. The State party should therefore

“take appropriate steps to combat this practice, which constitutes a violation of several Covenant rights, including the right under article 8 to be free from slavery and servitude”.¹⁰²

The Human Rights Committee welcomed the appointment in the Netherlands “of an independent National Rapporteur on Trafficking in Persons endowed with appropriate investigative and research powers”, but it nonetheless remained concerned “at on-going reports of sexual exploitation of significant numbers of foreign women in the State party”, since such exploitation raised issues under articles 3, 8 and 26 of the Covenant; the State party should therefore ensure that the National Rapporteur was “equipped with all means necessary to achieve real and concrete improvement in this area”.¹⁰³ The Committee was even more explicit with regard the situation of trafficking in the Czech Republic, which gave rise to deep concern since the State party was both a country of origin and transit and a recipient country. It recommended that:

¹⁰⁰General Recommendation No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 170, para. 12.

¹⁰¹UN doc. GAOR, A/56/40 (vol. I), p. 51, para. 16.

¹⁰²*Ibid.*, p. 67, para. 12.

¹⁰³*Ibid.*, p. 79, para. 10.

“The State party should take resolute measures to combat this practice, which constitutes a violation of several Covenant rights, including article 3 and the right under article 8 to be free from slavery and servitude. The State party should also strengthen programmes aimed at providing assistance to women in difficult circumstances, particularly those coming from other countries who are brought into its territory for the purpose of prostitution. Strong measures should be taken to prevent this form of trafficking and to impose sanctions on those who exploit women in this way. Protection should be extended to women who are the victims of this kind of trafficking so that they may have a place of refuge and an opportunity to give evidence against the person responsible in criminal or civil proceedings. The Committee wishes to be informed of the measures taken and their result.”¹⁰⁴

The Committee on the Elimination of Discrimination against Women has pointed out that poverty and unemployment increase opportunities for trafficking in women.¹⁰⁵ New forms of sexual exploitation have emerged in addition to the established forms of trafficking “such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.”¹⁰⁶

The Committee further notes that “poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.”¹⁰⁷

The Committee points out in this regard that “wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.”¹⁰⁸ As women are “particularly vulnerable in times of internal or international armed conflicts”, the Human Rights Committee has also recommended that States parties to the International Covenant on Civil and Political Rights inform it “of all measures taken during these situations to protect women from rape, abduction and other forms of gender-based violence”.¹⁰⁹

¹⁰⁴Ibid., p. 86, para. 13. Trafficking is also a matter of serious concern in the Democratic People's Republic of Korea, p. 104, para. 26.

¹⁰⁵General Recommendation No. 19 (Violence against women), *United Nations Compilation of General Comments*, p. 218, para. 14.

¹⁰⁶Ibid., loc. cit.

¹⁰⁷Ibid., p. 218, para. 15.

¹⁰⁸Ibid., p. 218, para. 16.

¹⁰⁹Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 169, para. 8.

The Committee on the Elimination of Discrimination against Women urged Uzbekistan to provide more information and data on the situation of trafficking of women and girls and on progress made in that area; it considered “that comprehensive measures should be developed and introduced in order to address the problem effectively, including prevention and reintegration and the prosecution of those responsible for trafficking”.¹¹⁰ The Committee also expressed concern about non-European women in the Netherlands who have been trafficked, “who fear expulsion to their countries of origin and who might lack the effective protection of their Government on their return”. It urged the Government of the Netherlands “to ensure that trafficked women are provided with full protection in their countries of origin or to grant them asylum or refugee status”.¹¹¹

The Committee on Economic, Social and Cultural rights welcomed the adoption of the 1998 immigration bill in Italy, which grants one-year residence/work permits to women who have been the victims of trafficking and who denounce their exploiters, and the criminalization of trafficking of migrants under the Penal Code. However, the Committee remained concerned at the extent of trafficking of women and children in Italy.¹¹²

Women have the right to freedom from slavery, the slave trade, servitude, and forced and compulsory labour.

Women may not therefore be subjected to any kind of slavery or to similar practices such as prostitution and domestic or other kinds of service that may be disguised slavery or servitude.

Trafficking in women and the girl child is strictly prohibited by international law.

Slavery, the slave trade, servitude, forced and compulsory labour, and trafficking in women and children, including the girl child, are practices that must be penalized in national law, and those responsible for such illegal acts must be rigorously prosecuted and punished by the national authorities.

States have a legal duty to take immediate, appropriate and effective measures to combat these unlawful practices at all levels, including through international cooperation, and to provide adequate help and protection to victims, including foreign nationals.

¹¹⁰UN doc. GAOR, A/56/38, p. 21, para. 179.

¹¹¹Ibid., p. 66, paras. 211-212.

¹¹²UN doc. E/2001/22 (E/C.12/2000/21), p. 34, para. 109, and p. 36, para. 121.

6. The Right to Equality in respect of Marriage

6.1 The right of intending spouses to marry freely and to found a family

The right of men and women of marriageable age to marry and found a family is recognized by article 23(2) of the International Covenant on Civil and Political Rights, article 17(2) of the American Convention on Human Rights (which uses the term “to raise a family” instead of “to found”) and article 12 of the European Convention on European Rights. Article 23(3) of the International Covenant and article 17(3) of the American Convention on Human Rights further stipulate that “no marriage shall be entered into without the free and full consent of the intending spouses”. Although the European text does not expressly refer to the fact that marriage must be freely entered into, this is implied in the term “*right* to marry” (emphasis added), which must also be interpreted in the light of the non-discrimination provision contained in article 14 of the Convention so as to secure equality before the law between women and men in the enjoyment of this right.

Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women sets out the States parties' duties with regard to the elimination of “discrimination against women in all matters relating to marriage and family relations”. They are required to ensure, on a basis of equality of men and women, inter alia, the same right to enter into marriage and the same right freely to choose a spouse and to enter into marriage only with their free and full consent (art. 16(1)(a) and (b)).

Another international treaty of interest in this regard is the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* which was adopted by the United Nations General Assembly in 1962 and entered into force on 9 December 1964. The Convention contains, inter alia, the following legal undertakings:

- ❖ “No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law” (art. 1(1));
- ❖ “States parties ... shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses” (art. 2).

The factors that may affect a woman's capacity to make an informed and uncoerced decision to marry include, as will be seen below, an unduly low minimum age for women. As indicated by the Human Rights Committee with regard to the

interpretation of article 23 of the International Covenant, other factors that may undermine a woman's "free and full consent to marriage" are "the existence of social attitudes which tend to marginalize women victims of rape and put pressure on them to agree to marriage" as well as "laws which allow the rapist to have his criminal responsibility extinguished or mitigated if he marries the victim".¹¹³ The Committee also notes that "the right to choose one's spouse may be restricted by laws and practices that prevent the marriage of a woman of a particular religion to a man who professes no religion or a different religion."¹¹⁴

On the issue of free consent, the Committee on the Elimination of Discrimination against Women stresses that "a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being."¹¹⁵ However, while most countries reported that national constitutions and laws comply with the Convention on the Elimination of All Forms of Discrimination against Women, "custom, tradition and failure to enforce these laws in reality contravene the Convention". An examination of States parties' reports disclosed that there were countries

- ❖ that permitted forced marriages or remarriages on the basis of custom, religious beliefs or the ethnic origins of particular groups of people;
- ❖ that allowed a woman's marriage to be arranged for payment or preferment; and
- ❖ where poverty forced women to marry foreign nationals for financial security.¹¹⁶

The Committee adds in this context that "a women's right to choose when, if, and whom she will marry must be protected by law" and subject only to "reasonable restrictions based for example on a woman's youth or consanguinity with her partner".¹¹⁷

The Committee on the Elimination of Racial Discrimination expressed particular concern "at section 10(2)(c) of the Immigration Act of the Laws of Tonga, according to which the right to marriage between a Tongan and a non-Tongan is conditioned by the written consent of the Principal Immigration Officer", a requirement that might constitute a breach of article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination, which, inter alia, guarantees enjoyment of the right to marriage and choice of spouse, without distinction as to race, colour, or national or ethnic origin.¹¹⁸

¹¹³General Comment No. 28 (Article 23 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 172, para. 24.

¹¹⁴*Ibid.*, loc. cit.

¹¹⁵*Ibid.*, General Recommendation No. 21 (Equality in marriage and family relations), p. 226, para. 16.

¹¹⁶*Ibid.*, p. 226, paras. 15-16.

¹¹⁷*Ibid.*, p. 226, para. 16.

The Committee on Economic, Social and Cultural Rights was “disturbed about the reassertion of traditional attitudes towards women in Kyrgyz society” and noted in this connection with deep concern “the re-emergence of the old tradition of bride kidnapping”. It recommended that the State party continue more actively to implement the law with regard to this phenomenon.¹¹⁹

6.1.1 Polygamous marriages

According to the Human Rights Committee, “equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”¹²⁰ With regard to the situation in Gabon, the Committee reiterated that “polygamy is incompatible with equality of treatment with regard to the right to marry.” The Government must “ensure that there is no discrimination based on customary law in matters such as marriage”; polygamy “must be abolished” and the relevant article of the Civil Code repealed.¹²¹

The Committee on the Elimination of Discrimination against Women has stated that polygamous marriage “contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited”; countries which permit polygamous marriage in spite of constitutionally guaranteed equal rights thus violate not only the constitutional rights of women but also article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women, which requires States parties to modify the social and cultural patterns of conduct of men and women in order to eliminate gender-based discrimination.¹²² The Committee therefore expressed concern regarding the continued legal authorization of polygamy in Egypt and urged the Government to take measures to prevent the practice in accordance with its General Recommendation No. 21.¹²³ It also recommended that Burkina Faso “work towards the elimination of the practice of polygamy” and that the State party “embark on a comprehensive public effort ... to change existing attitudes regarding polygamy, and in particular to educate women on their rights and how to avail themselves of these rights”.¹²⁴

¹¹⁸UN doc. GAOR, A/55/18, p. 38, para. 182.

¹¹⁹UN doc. E/2001/22 /E/C.12/2000/21, p. 64, para. 344, and p. 65, para. 358.

¹²⁰General Comment No. 28 (Article 3 – Equality of rights between men and women), *UN Compilation of General Comments*, pp. 172-173, para. 24.

¹²¹UN doc. GAOR, A/56/40 (vol. I), pp. 42-43, para. 9.

¹²²General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 226, para. 14.

¹²³UN doc. GAOR, A/56/38, p. 37, paras. 354-355.

¹²⁴UN doc. GAOR, A/55/38, p. 28, para. 282.

6.1.2 The marriageable age

Although the minimum age for marriage is one factor that may prevent women from being able to take the decision to marry freely, the international treaties do not specify a minimum age. However, article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women states that:

“2. The betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

Interpreting article 23 of the International Covenant on Civil and Political Rights, the Human Rights Committee states that the article:

“does not establish a specific marriageable age either for men or for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law.”¹²⁵

Such provisions must furthermore “be compatible with the full exercise of the other rights guaranteed by the Covenant” such as the right to freedom of thought, conscience and religion.¹²⁶

The Committee noted with regard to Venezuela that the minimum marriageable age is 14 for girls and 16 for boys and that “such age may be lowered without any limits for girls in case of pregnancy or childbirth,” a matter that raised problems with respect to the fulfilment by the State party of its obligation under article 24, paragraph 1, to protect minors. Moreover, in the Committee’s view, marriage at such an early age does not appear to be compatible with article 23 of the Covenant, “which requires the free and full consent of the intending spouses”.¹²⁷ The Committee also questioned the compatibility with the Covenant of the legislation on the minimum marriageable age in the Syrian Arab Republic, where the permissible age is 17 years for girls and 18 for boys, an age that “can be further reduced by a judge to 15 years for boys and 13 for girls with the father’s consent”.¹²⁸ As this legislation was felt to pose problems of compliance with the Covenant, the State party was asked to amend its legislation to bring it into line with the provisions of articles 3, 23 and 24.¹²⁹ Monaco, where the legal age for marriage is 15 years for girls and 18 years for boys, was also asked “to amend its legislation to ensure that girls and boys are treated equally by making the legal age of marriage 18 years, regardless of sex”.¹³⁰

¹²⁵General Comment No. 19 (Article 23), *United Nations Compilation of General Comments*, p. 138, para. 4.

¹²⁶*Ibid.*, loc. cit.

¹²⁷UN doc. *GAOR*, A/56/40 (vol. I), p. 52, para. 18.

¹²⁸*Ibid.*, p. 74, para. 20.

¹²⁹*Ibid.*, loc. cit.

¹³⁰*Ibid.*, p. 91, para. 12.

As pointed out by the Committee on the Elimination of Discrimination against Women, article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women, as well as the relevant provisions of the Convention on the Rights of the Child, “preclude States parties from permitting or giving validity to a marriage between persons who have not attained their majority”; in the Committee’s view, “the minimum age for marriage should be 18 years for both men and women.”¹³¹ As men and women “assume important responsibilities” when they marry, “marriage should not be permitted before they have attained full maturity and capacity to act.”¹³² Laws which provide for different ages for marriage for men and women should be abolished.¹³³

The Committee on the Elimination of Discrimination against Women expressed concern about the high number of early marriages of girls in Egypt, especially in rural areas, and recommended “that the Government amend the law on the legal age of marriage to prevent early marriage, in line with its obligations as a State party to the Convention”.¹³⁴ With regard to the Republic of Moldova, it expressed concern “at the differential ages of marriage established in the Family Code for boys and girls and the legal recognition of marriages of girl children”, which was not in conformity with article 16(2) of the Convention. It therefore recommended “that the Government take action to bring legislation on the marriage age for women and men into full conformity with the Convention, taking into consideration ... general recommendation 21”.¹³⁵ Lastly, the Committee urged the Maldives “to introduce minimum age of marriage laws and other programmes to prevent early marriage, in line with the obligations of the Convention”.¹³⁶

6.1.3 Other de jure and de facto impediments to the right to marry freely

The Human Rights Committee expressed concern that marriages in Cambodia were decided by the parents and urged the State party to take steps to ensure respect for laws prohibiting marriage without the full and free consent of the spouses.¹³⁷

It also held that the absence of divorce under Chilean law might amount to a violation of article 23(2) of the Covenant, according to which men and women of marriageable age have the right to marry and found a family. It left married women “permanently subject to discriminatory property laws ... even when a marriage has broken down irretrievably”.¹³⁸

¹³¹General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, pp. 229-230, para. 36.

¹³²*Ibid.*, p. 229, para. 36.

¹³³*Ibid.*, p. 230, para. 38.

¹³⁴UN doc. *GAOR*, A/56/38, p. 36, paras. 352-353.

¹³⁵UN doc. *GAOR*, A/55/38, pp. 60-61, paras. 113-114.

¹³⁶UN doc. *GAOR*, A/56/38, p. 17, para. 136.

¹³⁷UN doc. *GAOR*, A/54/40/ (vol. I), p. 60, para. 309.

¹³⁸*Ibid.*, p. 46, para. 213.

The Committee on the Elimination of Racial Discrimination noted “with approval” when examining the fifteenth and sixteenth periodic reports of Cyprus “that a draft marriage law, allowing marriage between a Greek Orthodox Christian and a Muslim of Turkish origin [had] been approved by the Council of Ministers and laid before the House of Representatives for enactment”.¹³⁹ The prohibition of marriages between persons of different religious faiths would not only constitute a violation of the right to marry freely but also of the right to freedom of religion.

The Committee on the Elimination of Discrimination against Women urged the Democratic Republic of the Congo to enact legislation to prohibit “traditional customs and practices, which are in violation of women’s fundamental rights, such as dowry, the levirate, polygamy [and] forced marriage”.¹⁴⁰

6.1.4 Restrictions on remarriage

The Human Rights Committee urged Venezuela, in order to comply with its obligations under articles 2, 3 and 26 of the International Covenant on Civil and Political Rights, “to amend all laws that still discriminate against women, including those relating to adultery and the ban on marriage for 10 months following the dissolution of a previous marriage”.¹⁴¹ With regard to Japan, the Committee stated that the six-month ban on remarriage by women following the dissolution or annulment of marriage was incompatible with articles 2, 3 and 26 of the Covenant.¹⁴² The Committee on the Elimination of Discrimination against Women stated that the Luxembourg law according to which a widow or divorced women must wait for 300 days before she can remarry appeared “anachronistic”.¹⁴³

In the case of *F. v. Switzerland*, the applicant complained that the three-year prohibition on remarriage imposed on him by the Lausanne District Civil Court was a violation of article 12 of the European Convention on Human Rights. In its judgment, the European Court of Human Rights pointed out that the exercise of the right of a man and a women to marry and found a family guaranteed by article 12 “gives right to personal, social and legal consequences”; it is a right that

“is ‘subject to the national laws of the Contracting States’, but ‘the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’.”¹⁴⁴

¹³⁹UN doc. GAOR, A/56/18, p. 49, para. 264.

¹⁴⁰UN doc. GAOR, A/55/38, p. 23, paras. 215-216.

¹⁴¹UN doc. GAOR, A/56/49 (vol. I), p. 53, para. 22.

¹⁴²UN doc. GAOR, A/54/40 (vol. I), p. 38, para. 158.

¹⁴³UN doc. GAOR, A/55/38, p. 41, para. 406.

¹⁴⁴*Eur. Court HR, Case of F. v. Switzerland, judgment of 18 December 1987, Series A, No. 128, p. 16, para. 32.*

The Court then pointed out that:

“In all the Council of Europe’s Member States, these ‘limitations’ appear as conditions and are embodied in procedural or substantive rules. The former relate mainly to publicity and the solemnisation of marriage, while the latter relate primarily to capacity, consent and certain impediments.”¹⁴⁵

After lengthy reasoning, in the course of which the Court noted that a waiting period no longer exists in the other Contracting States and recalled that “the Convention must be interpreted in the light of present-day conditions”, it concluded that “the disputed measure, which affected the very essence of the right to marry, was disproportionate to the legitimate aim pursued” and therefore violated article 12 of the Convention.¹⁴⁶

6.1.5 Registration of marriages

Under article 3 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the States parties undertake to have all marriages registered “in an appropriate official register by the competent authority”. According to article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women, States parties have a legal duty to take “all necessary action ...to make the registration of marriages in an official registry compulsory”. There are no comparable provisions in the other human rights treaties.

The Committee on the Elimination of Discrimination against Women has stated with regard to article 16(2) that States parties “should also require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.”¹⁴⁷ The Committee expressed concern “that India has not yet established a comprehensive and compulsory system of registration of births and marriages”; “inability to prove those important events by documentation prevents effective implementation of laws that protect girls from sexual exploitation and trafficking, child labour and forced or early marriage.”¹⁴⁸

On this issue the Human Rights Committee has merely accepted, under article 23 of the International Covenant on Civil and Political Rights, that “for a State to require that a marriage, which is celebrated in accordance with religious rights, be conducted, affirmed or registered also under civil law is not incompatible with the Covenant.”¹⁴⁹

¹⁴⁵Ibid., loc. cit.

¹⁴⁶Ibid., p. 16, para. 33, and p. 19, para. 40. In the course of its reasoning the Court recognized “that stability of marriage is a legitimate aim which is in the public interest”, but it doubted “whether the particular means used were appropriate for achieving that aim”, p. 17, para. 36.

¹⁴⁷General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 230, para. 39.

¹⁴⁸UN doc. GAOR, A/55/38, p. 10, para. 62.

¹⁴⁹General Comment No. 19 (Article 23), *United Nations Compilation of General Comments*, p. 138, para. 4.

6.1.6 Meaning of the right to found a family

As seen above, the right to found a family is guaranteed by article 23(2) of the International Covenant on Civil and Political Rights and article 17(2) of the American Convention on Human Rights. Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination against Women requires States parties to ensure, “on a basis of equality of men and women”, “the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.

According to the Human Rights Committee, article 23(2) of the International Covenant “implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.”¹⁵⁰ In the Committee’s view, the possibility to live together “implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons”.¹⁵¹

The Committee on the Elimination of Discrimination against Women states that the reasons why “women are entitled to decide on the number and spacing of their children” under article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination against Women are that “the responsibilities that [they] have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women’s lives and also affect their physical and mental health, as well as that of their children.”¹⁵² The Committee further expresses the view that “decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government,” for example through forced pregnancies, abortions or sterilization.¹⁵³

With regard to *compulsory family planning*, the Human Rights Committee expressed concern about reports of forced sterilization in Peru, “particularly of indigenous women in rural areas and women from the most vulnerable social sectors”. It followed that the State party “must take the necessary measures to ensure that

¹⁵⁰Ibid., p. 138, para. 5.

¹⁵¹Ibid., loc. cit.

¹⁵²General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 227, para. 21.

¹⁵³Ibid., p. 227, para. 22.

persons who undergo surgical contraception are fully informed and give their consent freely”.¹⁵⁴ On similar allegations concerning the mountain ethnic minority women in Viet Nam and their rejection by the State party, the Committee on the Elimination of Racial Discrimination simply stated that it would welcome information “on the impact of its population-planning policies on the enjoyment of reproductive rights by persons belonging to such minorities”.¹⁵⁵ The latter Committee has made it clear that “racial discrimination does not always affect women and men equally or in the same way”. It mentions in this connection “the coerced sterilization of indigenous women” as a form of racial discrimination that “may be directed towards women specifically because of their gender”. The Committee will therefore endeavour in its work “to take into account gender factors or issues which may be interlinked with racial discrimination”.¹⁵⁶

Women have the right to enter into marriage with their full and free consent on a basis of equality with men. Forced marriages are prohibited by international law and must be outlawed at the national level. The same applies to dowry and other similar traditions.

Traditions, customs and religious beliefs cannot therefore be allowed to justify forced marriages under international law.

Similarly, polygamy is prohibited under international law since it violates the principle of equality between women and men.

If set too low, the legal marriageable age may violate the principle of free consent; the legal age for marriage should preferably be 18 years for both men and women.

The non-existence of divorce under national law violates the right to marry and found a family. Temporary bans on remarriage are contrary to international law.

A record of all marriages, whether civil or religious, should be kept in an official registry. Such registration is, inter alia, indispensable in order to prevent forced marriages, bigamy and polygamy.

The right to found a family means, inter alia, that women are entitled to decide on the number and spacing of their children, preferably in consultation with their partner. Compulsory family planning such as forced sterilization is prohibited under international law.

¹⁵⁴UN doc. GAOR, A/56/40 (vol. I), p. 48, para. 21.

¹⁵⁵UN doc. GAOR, A/56/18, p. 69, para. 417.

¹⁵⁶General Recommendation No. XXV (Gender-related dimensions of racial discrimination), *United Nations Compilation of General Comments*, p. 194, paras. 1-3.

6.2 Equality of rights in terms of nationality laws

The *Convention on the Nationality of Married Women* was adopted by the United Nations General Assembly in 1957 and entered into force on 11 August 1958. States parties agree under this Convention:

- ❖ “that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife”(art. 1);
- ❖ “that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national” (art. 2);
- ❖ “that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy” (art. 3(1)).

On the question of equal rights with respect to nationality, article 9 of the Convention on the Elimination of All Forms of Discrimination against Women stipulates that:

- “1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”

Although article 23 of the International Covenant on Civil and Political Rights does not explicitly refer to the right of equality in terms of nationality laws, the Committee has stated that “no sex-based discrimination should occur in respect of the acquisition or loss of nationality by reason of marriage.”¹⁵⁷

Article 23(1) of the Covenant entitles the family to “protection by society and the State” and it follows from articles 2(1), 3 and 26 of the Covenant that “such protection must be equal, that is to say not discriminatory, for example on the basis of sex”.¹⁵⁸ Where legal restrictions on access to Mauritius were imposed on foreign husbands of Mauritian women but not on foreign spouses of Mauritian men, the Human Rights Committee concluded that the legislation was discriminatory with respect to Mauritian women and could not be justified by security requirements; there was consequently a violation of articles 2(1), 3 and 26 of the Covenant in conjunction with article 23 thereof in so far as the three married co-authors were concerned.¹⁵⁹ The impugned legislation implied that only the wives of Mauritian men would have the right

¹⁵⁷Ibid., General Comment No. 19 (art. 23), p. 138, para. 7.

¹⁵⁸Communication No. 35/1978, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* (Views adopted on 9 April 1981), in UN doc. CCPR/C/OP/1, *Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, p. 71, para. 9.2 (b) 2 (ii) 2.

¹⁵⁹Ibid., p. 71, paras. 9.2 (b) 2 (ii) 3 and 4.

of free access to Mauritius and enjoy immunity from deportation, while foreign husbands had to apply to the Minister of the Interior for a residence permit and, in case of refusal, would have no possibility to seek redress before a court of law.¹⁶⁰ This case therefore also violated articles 2(1) and 3 of the Covenant in conjunction with article 17(1), which *inter alia* guarantees the right to a family. The Human Rights Committee noted that the law “made an adverse distinction based on sex” which affected the alleged victims in their enjoyment of one of their rights; as no “sufficient justification” for this difference had been given, the aforementioned provision had been violated.¹⁶¹

As pointed out by the Committee on the Elimination of Discrimination against Women, nationality is “critical to full participation in society”, since “without status as nationals or citizens, women are deprived of the right to vote and to stand for public office and may be denied access to public benefits and a choice of residence.”¹⁶² In its view, “nationality should be capable of change by an adult women and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality.”¹⁶³

The Committee recommended to Guinea “that female and male spouses who marry foreigners be treated equally in regulations governing nationality” and urged the Government to ensure that the concept of *jus sanguinis* is applied “to ensure that children of mixed parentage born outside the country can acquire nationality through their Guinean mother”.¹⁶⁴ It was also concerned that “Jordanian nationality law prevents a Jordanian woman from passing on her nationality to her children if her husband is not Jordanian”, a situation that it characterized as “anachronistic”.¹⁶⁵

The same Committee was also concerned that “Iraq’s nationality law, which is based on the principle that the members of a family should all have the same nationality and that none should have dual nationality or lose their nationality, does not grant women an independent right to acquire, change or retain their nationality or to pass it on to their children.” It therefore recommended that the Government withdraw its reservations to articles 2(f) and (g) as well as articles 9 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women so as to ensure full implementation thereof.¹⁶⁶

¹⁶⁰Ibid., p. 69, para. 7.2.

¹⁶¹Ibid., p. 70, para. 9.2 (b) 2 (i) 8.

¹⁶²General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 223, para. 6.

¹⁶³Ibid., loc. cit.

¹⁶⁴UN doc. GAOR, A/56/38, p. 58, para. 125; see also regarding Singapore, p. 54, para. 75.

¹⁶⁵UN doc. GAOR, A/55/38, p. 19, para. 172. The Committee on Economic, Social and Cultural Rights expressed concern with regard to the same law; see UN doc. E/2001/22 (E/C.12/2000/21), p. 50, para. 234.

¹⁶⁶UN doc. GAOR, A/55/38, p. 68, paras. 187-188.

The Human Rights Committee, concerned at the discriminatory legal status of women as regards the transmission of Monegasque nationality, recommended that Monaco “adopt legislation giving men and women the same right to transmit nationality to children”. The problem raised concerns under articles 3 and 26 of the Covenant.¹⁶⁷

The Committee on the Elimination of Racial Discrimination expressed concern “at the nationality law, which prevents an Egyptian mother married to a foreigner from passing on her nationality to her children”.¹⁶⁸ The same Committee expressed satisfaction at the amendment of the 1967 Citizenship Law in Cyprus, “which eradicates discrimination in marriage to foreigners”. As a result of the amendment, the right of an alien spouse to acquire the citizenship of the Cypriot spouse is recognized for both spouses, as is “the equal right of both spouses to transmit citizenship to their children”.¹⁶⁹ It also welcomed the 1998 amendment to Icelandic legislation, which addressed “the unequal rights of men and women with regard to the naturalization of their children, and the elimination of the requirement to adopt an Icelandic patronym as a condition for naturalization”.¹⁷⁰

For more examples of gender discrimination, see Chapter 13 of this Manual.

6.3 The equal right to a name

Under article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women, State parties are legally required to ensure, “on a basis of equality of men and women”, “the same personal rights as husband and wife, including the right to choose a family name”. According to the Committee on the Elimination of Discrimination against Women, this provision means that “each partner should have the right to choose his or her name, thereby preserving individuality and identity in the community and distinguishing that person from other members of society. When by law or custom a woman is obliged to change her name on marriage or its dissolution, she is denied these rights.”¹⁷¹

The Human Rights Committee has stated, with respect to article 23 of the International Covenant on Civil and Political Rights, that “the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name should be safeguarded”¹⁷² and that “States parties should

¹⁶⁷UN doc. *GAOR*, A/56/40 (vol. I), p. 90, para. 10.

¹⁶⁸UN doc. *GAOR*, A/56/18, p. 52, para. 288. The Committee on Economic, Social and Cultural Rights expressed concern with regard to the same law (UN doc. E/2001/22 (E/C.12/2000/21), p. 40, para. 159), as did the Committee on the Elimination of Discrimination against Women (UN doc. *GAOR*, A/56/38, p. 35, para. 330).

¹⁶⁹UN doc. *GAOR*, A/56/18, p. 49, para. 263.

¹⁷⁰*Ibid.*, p. 33, para. 150.

¹⁷¹General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 228, para. 24.

¹⁷²*Ibid.*, General Comment No. 19 (Article 23), p. 138, para. 7.

ensure that no sex-based discrimination occurs in respect of ... the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name.”¹⁷³ States Parties must also ensure “the capacity to transmit to children the parents’ nationality” on a non-discriminatory basis.¹⁷⁴

The Committee on the Elimination of Discrimination against Women expressed concern “that Jamaica’s passport law provides that a married women may keep her maiden name on her passport only if she insists or for professional reasons and that, in those cases, a note would be entered in her passport with the name of her husband and the fact of her marriage”. The Committee called on the Government to bring its passport law into line with article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women.¹⁷⁵ The Committee believes that the Netherlands new Law on Names violates the same provision, particularly inasmuch as it grants the father the ultimate decision in giving a child a name when the parents cannot agree. The Committee therefore asked the Government to make the law consistent with the Convention.¹⁷⁶

Under international law, women and men have equal rights in terms of nationality laws. This means that female and male spouses who marry foreigners must be treated equally and have equal rights to transmit their nationality to their children.

Under international law, women and men have the same right to choose a family name.

6.4 Equal rights and responsibilities of spouses as to marriage, during marriage and at its dissolution

6.4.1 Relevant legal provisions

States parties are required, under article 23(4) of the International Covenant on Civil and Political Rights, to take appropriate steps “to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution”. Article 17(4) of the American Convention on Human Rights stipulates in this regard that the “States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution.” Article 5 of Protocol No. 7 to the European Convention on Human Rights states that “spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations

¹⁷³Ibid., General Comment No. 26 (Article 3 – Equality of rights between men and women), p. 173, para. 25.

¹⁷⁴Ibid., loc. cit.

¹⁷⁵UN doc. GAOR, A/56/38, p. 24, paras. 213-214.

¹⁷⁶Ibid., p. 67, paras. 223-224.

with their children, as to marriage, during marriage and in the event of its dissolution.” All three treaties accept that special provision should be made for children in the event of dissolution of the marriage. Under the more detailed provisions of article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, States parties are required to ensure, “on a basis of equality of men and women”,

- ❖ “The same rights and responsibilities during marriage and at its dissolution”(art. 16(1)(c));
- ❖ “The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount” (art. 16(1)(d));
- ❖ “The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount (art. 16(1)(f)); and
- ❖ “The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration” (art. 16(1)(h)).

6.4.2 General understanding of the principle of equal rights and responsibilities

The Human Rights Committee states, with regard to article 23(4) of the International Covenant, that “during marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.”¹⁷⁷ According to the Committee, “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection.”¹⁷⁸

These views were expanded by the Committee in its General Comment No. 28, where it emphasized that, in order to fulfil their obligations under article 23(4), “States parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children, the children’s religious and moral education ... and the ownership or administration of property, whether common property or property in the sole ownership of either spouse.” States parties should further ensure that no gender-based discrimination occurs in respect of residence rights. In short, “equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family.”¹⁷⁹

¹⁷⁷ General Comment No. 19 (art. 23), *United Nations Compilation of General Comments*, p. 138, para. 8.

¹⁷⁸ *Ibid.*, p. 138, para. 9.

¹⁷⁹ *Ibid.*, General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 173, para. 25.

In explaining its understanding of article 16(1)(c) of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee notes that, in providing for the rights and responsibilities of married partners, many countries rely on the application of common law principles, religious or customary law, rather than complying with the principles contained in the Convention. In the Committee's view, these variations in law and practice have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage by making the husband the head of the household and primary decision-maker in contravention of the Convention.¹⁸⁰

To the extent possible, the various components of the equal rights and responsibilities of spouses will be given particular attention in the following sub-sections.

6.4.3 Equal right to decision-making

The Human Rights Committee expressed concern about articles 182 and 196 of the Civil Code of Monaco, which respectively state that the “husband is the head of the family” and give him the right to choose the couple's place of residence. The State party was asked by the Committee to repeal those provisions and to ensure de facto equality between men and women.¹⁸¹

While recognizing the importance of the family as the basic social unit, the Committee on the Elimination of Discrimination against Women expressed concern, with regard to Singapore, “that the concept of Asian values regarding the family, including that of the husband having the legal status of head of household, might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women”.¹⁸²

6.4.4 Equal parental rights and responsibilities

With regard to the shared parental rights and responsibilities defined in article 16(1)(d) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee states that they should be “enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption. States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children.”¹⁸³ It furthermore states that, although most States recognize the shared responsibility of parents for care, protection and maintenance of children, in practice some of them do not observe this principle, particularly when the parents are not married. As a result, “the children of such unions

¹⁸⁰Ibid., General Recommendation No. 21 (Equality in marriage and family relations), p. 226, para. 17.

¹⁸¹UN doc. GAOR, A/56/40 (vol. I), p. 90, para. 9.

¹⁸²UN doc. GAOR, A/56/38, p. 54, para. 79.

¹⁸³General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 227, para. 20.

do not always enjoy the same status as those born in wedlock and, where the mothers are divorced or living apart, many fathers fail to share the responsibility of care, protection and maintenance of their children.”¹⁸⁴

The Human Rights Committee expressed concern about the discriminatory nature of article 301 of the Civil Code of Monaco, “which vests the father with the parental authority over the children”, and recommended that the State party repeal this provision.¹⁸⁵

6.4.5 Equal rights to marital property

Given that article 23(4) of the International Covenant requires States parties, according to the Human Rights Committee, to ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the ownership or administration of property, whether common property or property in the sole ownership of either spouse, “States parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary.”¹⁸⁶ Women naturally also have the equal right to represent matrimonial property before the courts. On this issue, see the case of *Ato del Avellanal* considered in section 10 below and in Chapter 13.

The Committee on the Elimination of Discrimination against Women points out that the equal rights of spouses with regard to property under article 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination against Women overlap with and complement those in article 15(2) of the Convention “in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property” (see further section 7 below).¹⁸⁷ As to marital property, the Committee notes that “there are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.”¹⁸⁸

The Committee also notes that “even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or

¹⁸⁴Ibid., p. 227, para. 19.

¹⁸⁵UN doc. GAOR, A/56/40 (vol. I), p. 90, para. 9.

¹⁸⁶General Comment No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 173, para. 25.

¹⁸⁷Ibid., General Recommendation No. 21 (Equality in marriage and family relations), p. 228, para. 25.

¹⁸⁸Ibid., p. 228, para. 30.

otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it".¹⁸⁹

The Committee on the Elimination of Discrimination against Women points out also that "in some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight."¹⁹⁰

The Committee further notes that "in many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the women receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged."¹⁹¹

Lastly, the Committee noted with concern that Egyptian women "who seek divorce by unilateral termination of their marriage contract under Law No. 1 of 2000 (khul) must in all cases forego their rights to financial provision, including the dower". It recommended that the Government consider a revision of the law in order to eliminate this financial discrimination against women.¹⁹²

6.4.6 The equal right to a profession and an occupation

States parties are required, under article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women, to ensure, "on a basis of equality of men and women", "the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation". As stated by the Committee on the Elimination of Discrimination against Women, "a stable family is one which is based on principles of equity, justice and individual fulfilment for each member. Each partner must therefore have the right to choose a profession or employment that is best suited to his or her abilities, qualifications and aspirations, as provided in article 11(a) and (c) of the Convention."¹⁹³

6.4.7 Women living in de facto unions

With regard to women living in de facto unions, the Human Rights Committee states that "in giving effect to recognition of the family in the context of article 23 [of the International Covenant], it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children, and to ensure the equal treatment of women in these

¹⁸⁹Ibid., pp. 228-229, para. 31.

¹⁹⁰Ibid., p. 229, para. 32.

¹⁹¹Ibid., p. 229, para. 33.

¹⁹²UN doc. GAOR, A/56/38, p. 35, paras. 328-329.

¹⁹³General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 228, para. 24.

contexts.”¹⁹⁴ On the same subject, the Committee on the Elimination of Discrimination against Women holds that “the form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people,” as required by article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.¹⁹⁵ Women in de facto unions “should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.”¹⁹⁶

6.4.8 Equality with respect to divorce

In explaining the meaning of article 23(4) of the International Covenant on Civil and Political Rights, the Human Rights Committee notes that States parties have a duty to ensure “equality in regard to the dissolution of marriage, *which excludes the possibility of repudiation*. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children. Determination of the need to maintain contact between children and the non-custodial parent should be based on equal considerations.”¹⁹⁷

6.4.9 The equal right of succession between spouses

According to the Human Rights Committee, “women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses” (on the right of succession in general, see below sub-section 7.2).¹⁹⁸

The Committee on the Elimination of Discrimination against Women points out that “there are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband’s or father’s property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased’s property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.”¹⁹⁹

¹⁹⁴Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 173, para. 27.

¹⁹⁵Ibid., General Recommendation No. 21 (Equality in marriage and family relations), p. 226, para. 13.

¹⁹⁶Ibid., p. 227, para. 18.

¹⁹⁷Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 173, para. 26; emphasis added.

¹⁹⁸Ibid.

¹⁹⁹Ibid., General Recommendation No. 21 (Equality in marriage and family relations), p. 229, para. 35.

The Committee on Economic, Social and Cultural Rights expressed concern that there are still “persisting patterns of discrimination against women” in Moroccan legislation, “particularly in family and personal status law, as well as inheritance law”.²⁰⁰

Women and men have equal rights as to marriage, during marriage and at its dissolution. In other words, they have the same rights and responsibilities with regard to all matters arising from their relationship, such as residence, economy, assets and children.

Married women have the same right as their spouse to choose and exercise a profession and occupation suited to their abilities.

International law accepts various forms of family life including unmarried couples. Women living in de facto unions should have the same rights as men with regard to both family life and sharing of property and income. These rights should be protected by law.

Under international law women and men have equal rights with regard to divorce. Repudiation is prohibited by international law.

Women have an equal right of succession when the marriage is dissolved by the death of the spouse.

7. The Equal Right to Legal Capacity in Civil Matters

7.1 Equal rights to administer property and conclude contracts

As noted at the beginning of this chapter, women have a right to legal personality on equal terms with men. Of course, this legal personality not only covers family affairs but extends to civil matters in general. Under the International Covenant on Civil and Political Rights, this is implicit in article 16, which guarantees the right to legal personality. Article 15(2) and (3) of the Convention on the Elimination of All forms of Discrimination against Women stipulates as follows:

“2 States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

²⁰⁰UN doc. E/2001/22 (E/C.12/2000/21), p. 84, para. 527.

3. States parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.”

On the interpretation of these provisions, the Committee on the Elimination of Discrimination against Women states that “when a women cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband’s or a male relative’s concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman’s ability to provide for herself and her dependants.”²⁰¹

The Committee urged Jordan to revoke a law that prohibits women from concluding contracts in their own name, since such a prohibition is inconsistent with the legal status of women under the Jordanian Constitution and the Convention on the Elimination of All Forms of Discrimination against Women.²⁰² In the case of the Democratic Republic of Congo, the Committee expressed concern “about de jure and de facto discrimination against women with regard to the right to work, particularly the requirement of the husband’s authorization of a wife’s paid employment and reduction of pay during maternity leave”. Such discriminatory laws should be amended to be consistent with article 11 of the Convention on the Elimination of All Forms of Discrimination against Women.²⁰³ With regard to the situation in Burkina Faso, the same Committee was concerned that “despite the law on agrarian and land reform, which establishes equality between men and woman with regard to land, prejudices and customary rights are once again hindering the implementation of this law.” It therefore recommended that the State party “encourage the services concerned to take into account the rights of women to property and to provide them with the necessary credit”.²⁰⁴

On the question of legal autonomy, the Human Rights Committee states that the right of everyone under article 16 of the International Covenant on Civil and Political Rights “to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status”; in its view, “this right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground.”²⁰⁵ The Committee was therefore gravely concerned that both common and customary law in Lesotho permitted discrimination against women by treating them as minors. It noted with concern “that under customary law, inheritance and property rights of women are severely restricted and

²⁰¹General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 224, para. 7.

²⁰²UN doc. GAOR, A/55/38, p. 19, paras. 172-173.

²⁰³Ibid., p. 24, paras. 225-226.

²⁰⁴Ibid., p. 28, paras. 277-278.

²⁰⁵General Comment No. 28 (art. 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 171, para. 19.

that under customary law, as well as under common law, women may not enter into contracts, open bank accounts, obtain loans or apply for passports without the permission of their husbands". The Committee therefore urged the State party "to take measures to repeal or amend these discriminatory laws and eradicate these discriminatory practices", which violate articles 3 and 26 of the Covenant.²⁰⁶

The Committee on Economic, Social and Cultural Rights was "deeply concerned that the Government of Cameroon [had] not yet embarked on the necessary law reform to repeal laws which maintain the unequal legal status of women, particularly in aspects of the Civil Code and the Commercial Code relating to, *inter alia*, the right to own property and the laws regarding credit and bankruptcy, which restrict women's access to means of production". These Codes are, in the Committee's view, "in flagrant violation of the non-discrimination and equal treatment provisions of the Covenant [on Economic, Social and Cultural Rights] and are inconsistent with the recently amended Constitution of Cameroon which upholds the equal rights of all citizens." The Committee therefore recommended that the State party repeal all provisions of the Civil and Commercial Codes which discriminate against women.²⁰⁷

7.2 The equal right to succession in general

It follows from the right to equality before the law that women must have *equal rights of inheritance* with men. As noted above in connection with article 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination against Women, as interpreted in the light of article 15(1), "any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself and to live in dignity as an independent person."²⁰⁸ "All of these rights", including the right to inherit equal shares, "should be guaranteed regardless of a women's marital status."²⁰⁹

The Committee on the Elimination of Discrimination against Women expressed concern that in India "the practice of debt bondage and the denial of inheritance rights in land result in gross exploitation of women's labour and their impoverishment." It called on the Government "to review laws on inheritance urgently and to ensure that rural women obtain access to land and credit".²¹⁰ The Committee was also concerned "that failure to register marriages may ... prejudice the inheritance of women".²¹¹

²⁰⁶UN doc. GAOR, A/54/40 (vol. I), p. 52, para. 253.

²⁰⁷UN doc. E/2000/22 (E/C.12/1999/11), p. 58, para. 327, and p. 60, para. 346.

²⁰⁸General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 228, para. 28.

²⁰⁹*Ibid.*, p. 228, para. 29.

²¹⁰UN doc. GAOR, A/55/38, p. 12, paras. 82-84.

²¹¹*Ibid.*, p. 10, para. 62.

The Human Rights Committee stated that Gabon “must review its legislation and practice in order to ensure that women have the same rights as men, including rights of ownership and inheritance,” and that “there is no discrimination based on customary law in matters such as marriage, divorce and inheritance”.²¹² It also expressed concern about the persistent inequality between women and men “in a number of areas, such as inheritance” in the Libyan Arab Jamahiriya and recommended that the State party “intensify its efforts to guarantee full equal enjoyment by men and women of all their human rights”.²¹³

The Committee on Economic, Social and Cultural Rights expressed concern that, under the laws on inheritance in Tunisia, “females are entitled to receive only half of the inheritance of males.” It strongly recommended “that all men, women and children of both sexes should be enabled to enjoy the right to inherit on a basis of equality”.²¹⁴

Women have the right to equal legal capacity with men in civil matters.

This means, for instance, that women must be ensured equal rights to own and administer property, and to conclude contracts and obtain credit, and that they must be allowed to work without their husband's or other relative's permission.

The right to equal legal autonomy also implies that women have a right to inherit on a basis of full equality with men.

Customs and traditions are not allowed to prejudice the effective exercise of these rights.

8. The Right to Equal Participation in Public Affairs, including Elections

8.1 Relevant legal provisions

Article 25 of the International Convention on Civil and Political Rights stipulates that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

²¹²UN doc. GAOR, A/56/40 (vol. I), pp. 42-43, para. 9.

²¹³UN doc. GAOR, A/54/40 (vol. I), pp. 35, para. 137.

²¹⁴UN doc. E/2000/22 (E/C.12/1999/11), pp. 37-38, para. 165, and p. 39, para. 173.

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.”

Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women reads as follows:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.”

Article 8 of the same treaty reads:

“States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.”

Another universal treaty of interest in this connection is the *Convention on the Political Rights of Women*, which was adopted by the United Nations General Assembly in 1953 and entered into force on 7 July 1954. It is a short treaty setting forth the following rights, which must be ensured “on equal terms with men, without any discrimination”:

- ❖ the right to vote in all elections (art. I);
- ❖ the right to be eligible for election to all publicly elected bodies, established by national law (art. II); and
- ❖ the right to hold public office and to exercise all public functions (art. III).

At the regional level, article 23 of the American Convention on Human Rights guarantees the right to equal participation in public affairs and the right to vote and to be elected in “genuine periodic elections”. The right to vote and to be elected is not expressly guaranteed by article 13 of the African Charter on Human and Peoples’ Rights, but it does recognize the right to participate freely in the government of one’s

country “either directly or through freely chosen representatives in accordance with the provisions of the law”. Article 13 of the Charter also provides for the right of equal access to the public service of one’s country. Under article 3 of Protocol No. 1 to the European Convention on Human Rights, “the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” Article 14 of the Convention requires the exercise of this right to be ensured without discrimination between men and women.

Clearly, therefore, women’s right to equal participation in public affairs, including the right to vote and to be elected, is firmly rooted in international human rights law. This important right cannot, however, be discussed in detail in this context, which will be limited to a brief description of its main features.²¹⁵

8.2 The interpretation of article 25 of the International Covenant on Civil and Political Rights

As pointed out by the Human Rights Committee, “article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant” and it must be guaranteed without discrimination based on sex.²¹⁶ Women must therefore enjoy, inter alia, the following rights on equal terms with men:

- ❖ the right to exercise political power, in particular legislative, executive and administrative powers. This right covers all levels of administration – local, regional, national and international – and can be exercised, for instance, through membership of a legislative body or by holding executive office;²¹⁷
- ❖ the right to exert influence through public debate and dialogue with their representatives or through their capacity to organize themselves. “This participation is supported by ensuring freedom of expression, assembly and association;”²¹⁸
- ❖ the right to vote or to run for election. “Genuine periodic elections ... are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them;”²¹⁹
- ❖ the right to freedom of expression, assembly and association, which are “essential conditions for the effective exercise of the right to vote and must be fully protected”;²²⁰

²¹⁵For more details on the interpretation of article 25 of the International Covenant, see General Comment No. 25 (Article 25), *United Nations Compilation of General Comments*, pp. 157-162. On articles 7-8 of the Convention on the Elimination of All Forms of Discrimination Against Women, see General Recommendation No. 23 (Political and public life), pp. 233-244.

²¹⁶*Ibid.*, General Comment No. 25 (Article 25), p. 157, paras. 1 and 3.

²¹⁷*Ibid.*, pp. 157-158, paras. 5-6.

²¹⁸*Ibid.*, p. 158, para. 8.

²¹⁹*Ibid.*, p. 158, para. 9.

²²⁰*Ibid.*, p. 159, para. 12.

- ❖ “the right ... to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable.”²²¹

On the basis of its long experience, however, the Human Rights Committee has found that “the right to participate in the conduct of public affairs is not fully implemented everywhere on an equal basis. States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women’s participation in the conduct of public affairs and in public office, including appropriate affirmative action. Effective measures taken by States parties to ensure that all persons entitled to vote are able to exercise that right should not be discriminatory on the grounds of sex.”²²²

While recognizing that there had been some progress in achieving equality for women in political and public life in Croatia, the Human Rights Committee remained concerned “that the representation of women in Parliament and in senior official positions, including the judiciary, still [remained] low”. The State party was therefore urged to make every effort to improve the representation of women in the public sector, if necessary through appropriate positive measures, in order to give effect to its obligations under articles 3 and 26 of the International Covenant.²²³ A similar recommendation was made to the Czech Republic in view of the low participation of women in political life, as well as their inadequate representation in higher levels of administration in the country.²²⁴

8.3 The interpretation of articles 7 and 8 of the Convention on the Elimination of All Forms of Discrimination against Women

The Committee on the Elimination of Discrimination against Women has expressed its views on how to interpret articles 7 and 8 of the Convention on the Elimination of All Forms of Discrimination against Women in its General Recommendation No. 23 on “political and public life”. With regard to the obligation of States parties under article 7 to take all appropriate measures to eliminate discrimination against women in political and public life, the Committee states that this obligation:

“extends to all areas of public and political life and is not limited to those areas specified in subparagraphs (a), (b) and (c). The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels. The concept also includes many aspects

²²¹Ibid., p. 161, para. 23.

²²²Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), pp. 173-174, para. 29.

²²³UN doc. *GAOR*, A/56/40 (vol. I), p. 69, para. 21.

²²⁴Ibid., p. 86, para. 12. See similar concern regarding Romania, in UN doc., *GAOR*, A/54/40 (vol. I), p. 69, para. 366.

of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life."²²⁵

The Committee further states that:

“to be effective, this equality must be achieved within the framework of a political system in which each citizen enjoys the right to vote and be elected at genuine periodic elections held on the basis of universal suffrage by secret ballot, in such a way as to guarantee the free expression of the will of the electorate, as provided for under international human rights instruments, such as ... article 25 of the International Covenant on Civil and Political Rights.”²²⁶

The right to vote and to be elected “on the basis of equality with men” must be enjoyed both *de jure* and *de facto*. In the Committee's experience, however, women in many nations “continue to experience difficulties in exercising this right” owing to factors such as women's double burden of work, financial constraints, “traditions and social and cultural stereotypes”, male influence on or control of women's votes (practices that “should be prevented”) and restrictions on women's freedom of movement.²²⁷

With regard to the right to participate in the formulation of government policy, as guaranteed by article 7(b), States parties have a duty:

- ❖ “to ensure that women have the right to participate fully in and be represented in public policy formulation in all sectors and at all levels”;
- ❖ “where it is within their control, both to appoint women to senior decision-making roles and, as a matter of course, to consult and incorporate the advice of groups which are broadly representative of women's views and interests”;
- ❖ “to ensure that barriers to women's full participation in the formulation of government policy are identified and overcome”.²²⁸

With regard to the right to hold public office and to perform all public functions, which is also guaranteed by article 7(b) of the Convention, “the examination of the reports of States parties demonstrates”, according to the Committee, “that women are excluded from top-ranking positions in cabinets, the civil service and in public administration, in the judiciary and in justice systems”.²²⁹ In some cases, the law also “excludes women from exercising royal powers, from serving as judges in religious or traditional tribunals vested with jurisdictions on behalf of the State or from full participation in the military. These provisions discriminate against women ... and contravene the principles of the Convention.”²³⁰

²²⁵General Recommendation No. 23 (Political and public life), *United Nations Compilation of General Comments*, p. 234, para. 5.

²²⁶*Ibid.*, p. 234, para. 6.

²²⁷*Ibid.*, p. 237, paras. 18-20.

²²⁸*Ibid.*, p. 238, paras. 25-27.

²²⁹*Ibid.*, p. 239, para. 30.

²³⁰*Ibid.*, p. 239, para. 31.

With respect to article 8 of the Convention, “Governments are obliged to ensure the presence of women at all levels and in all areas of international affairs [such as] in economic and military matters, in both multilateral and bilateral diplomacy, and in official delegations to international and regional conferences”. In the Committee’s experience, “it is evident that women are grossly under-represented in the diplomatic and foreign services of most Governments, and particularly at the highest ranks” and that many permanent missions to international organizations have no women among their diplomats and few at senior levels.²³¹ Yet “States parties are under an obligation to take all appropriate measures, including the enactment of appropriate legislation,” to comply with articles 7 and 8 of the Convention.²³²

With regard to the situation in India, the Committee expressed concern about “the low participation of qualified women in the administration and the judiciary, including family courts and *lok adalats* or conciliation tribunals”.²³³ With respect to the Maldives, it was concerned “that the reservation to article 7(a) on political participation supports the retention of legislative provisions that exclude women from the office of President and Vice-President of the Country”.²³⁴

Women have a right to equal participation with men in the conduct of public affairs of their country and they have the right to do so either directly themselves or through freely chosen representatives.

Women have a right to vote and to be elected themselves on an equal footing with men in all elections and referenda.

Women have an equal right with men to hold public office and to perform governmental functions at all levels.

Women have a right to equal participation in the formulation and implementation of government policy.

Women have an equal right to participate in public debate, either alone or through a variety of organizations, a right that presupposes the effective enjoyment also of the freedoms of expression, assembly and association.

States must ensure that women have an equal opportunity with men to represent their government at the international level.

The right to equal participation in a country’s public and political life is a cornerstone of a democratic society based on respect for the freely expressed will of the people concerned.

²³¹Ibid., p. 240, paras. 35-37.

²³²Ibid., p. 241, paras. 41-42.

²³³UN doc. GAOR, A/55/38, p. 12, para. 80.

²³⁴UN doc. GAOR, A/56/38, p. 17, para. 130.

9. Women's Right to Equal Enjoyment of Other Human Rights

Women's right to equal enjoyment of human rights is not, of course, limited to the rights dealt with in some detail above *but covers the entire spectrum of internationally guaranteed human rights and fundamental freedoms*. This means that all rights, whether civil and political, or economic, social and cultural, must be ensured to women on an equal footing with men. As explained in Chapter 14 below, these rights are all intrinsically linked and interdependent, and therefore depend on each other for their full implementation. *It follows logically that women's rights cannot be fully guaranteed, and women's potential as a positive element in the construction of a secure, peaceful and prosperous world cannot be adequately ensured without a holistic approach both to the rights and freedoms that they are entitled to enjoy, and to the role they have a legitimate interest in fulfilling, at the local, regional, national and international levels.*

In addition to the rights already dealt with, some further rights are listed below, the equal enjoyment of which is of particular importance to women. The list is not, however, exhaustive. It does not, for instance, include women's right to equal enjoyment of economic, social and cultural rights protected by international human rights law such as the right to equality in the field of employment with equal pay for equal work and the right of equal access to health, which is of fundamental importance to the development of the girl child. For more information about women's enjoyment of economic, social and cultural rights, see the relevant recommendations of the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women, and the work carried out by the International Labour Organization.

This section will therefore confine itself to equal enjoyment of freedom of movement and residence, the right to privacy, freedom of thought, conscience, belief, religion, opinion, expression, association and assembly, and the right to education.

9.1 The right to freedom of movement and residence

The equal right to freedom of movement and residence is guaranteed by article 12 of the International Covenant on Civil and Political Rights, article 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women, article 12 of the African Charter on Human and Peoples' Rights, article 22 of the American Convention on Human Rights and article 2 of Protocol No. 4 to the European Convention on Human Rights. The exercise of this right can in principle be restricted on certain grounds such as those described in article 12(3) of the International Covenant, article 22(3) of the American Convention and article 2(3) of Protocol No. 4 to the European Convention.

According to the Human Rights Committee, State parties must ensure “that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.”²³⁵ This applies to both married women and adult daughters, who need no consent from their spouse or parents, or from anybody else, in order to travel freely or to have a passport or any other travel document issued in their name. Any such legal or de facto requirement would be incompatible with article 12(3) of the Covenant.²³⁶ In examining States parties’ reports, “the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of article 12.”²³⁷ More specifically, it expressed concern, for instance, at the inequality between men and women in terms of freedom of movement in the Libyan Arab Jamahiriya and asked the Government to intensify its efforts to ensure full equality in this and other areas.²³⁸

The Committee on the Elimination of Discrimination against Women noted with concern “that Jordanian law prohibits women ... from travelling alone and from choosing their place of residence,” limitations which, in its view, are inconsistent with the legal status of women under both the Jordanian Constitution and the Convention on the Elimination of All Forms of Discrimination against Women.²³⁹

Women have the right to freedom of movement and residence on an equal basis with men.

No one has the right to prohibit an adult woman from travelling or choosing her residence.

No custom or tradition can justify a limitation of this right.

9.2 The right to privacy

The right to respect for one’s private life is protected by article 17 of the International Covenant on the Civil and Political Rights, article 11(2) of the American Convention on Human Rights, and article 8 of the European Convention on Human Rights.

²³⁵General Comment No. 27 (Article 12 – Freedom of movement), *United Nations Compilation of General Comments*, p. 164, para. 6.

²³⁶*Ibid.*, General Comment No. 28 (Article 3 – Equality of rights between men and women), pp. 170-171, para. 16.

²³⁷*Ibid.*, General Comment No. 27 (Article 12 – Freedom of movement), p. 166, para. 18.

²³⁸UN doc. GAOR, A/54/40 (vol. I), p. 35, para. 137.

²³⁹UN doc. GAOR, A/55/38, p. 19, para. 172.

An example of gender-based interference with a women's right to respect for her private life is "where the sexual life of a women is taken into consideration in deciding the extent of her legal rights and protection, including protection against rape. Another area where States may fail to respect women's privacy relates to their reproductive functions, for example, where there is a requirement for the husband's authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion."²⁴⁰

As shown in sub-section 4.3.3 above, a woman's right to respect for her private life requires States, *inter alia*, to take practical and effective measures such as providing for the possibility of bringing criminal proceedings against perpetrators of sexual assault.

Women have the right to enjoy respect for their private life on the same basis as men. This right must be effectively guaranteed.

A woman's reproductive life forms part of her private sphere, over which she has the ultimate right to decide.

9.3 Freedom of thought, conscience, belief, religion, opinion, expression, association and assembly

The freedoms of thought, conscience, belief, religion, opinion, expression, association and assembly are the cornerstone of a democratic society. These freedoms are guaranteed by articles 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, articles 8-11 of the African Charter on Human and Peoples' Rights, articles 12, 13, 15 and 16 of the American Convention on Human Rights, and articles 9-11 of the European Convention on Human Rights.

According to the Human Rights Committee States parties to the International Covenant must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice, including the freedom to change religion or belief and to express one's religion or belief, are "guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination". These freedoms, which are protected by article 18 of the Covenant, "must not be subject to restrictions other than those authorized by the Covenant and must not be constrained by, *inter alia*, rules requiring permission from third parties, or by interference from fathers, husbands, brothers or others. Article 18 may not be relied upon to justify discrimination against women by reference to the freedom of thought, conscience and religion".²⁴¹

²⁴⁰General Comment No. 28 (Article 3 – Equality of right between men and women), *United Nations Compilation of General Comments*, p. 171, para. 20.

²⁴¹*Ibid.*, p. 172, para. 21.

As shown in section 8 above, freedom of expression, assembly and association is of fundamental importance for enabling women to take an active part in public life on equal terms with men. These freedoms must therefore be effectively ensured for women and men alike. Restrictions on their exercise must not discriminate against women.

For information on the substantive interpretation of freedom of thought, conscience, religion, opinion, expression, association and assembly, see Chapter 12 of this Manual.

Women have the right to exercise freedom of thought, conscience, belief, religion, opinion, expression, association and assembly on the same basis of equality as men. No one has the right to interfere with a woman's free exercise of these freedoms.

Restrictions on the exercise of these freedoms must respect the conditions laid down in international human rights law. Such restrictions must not be discriminatory.

9.4 The right to education

The right to education is guaranteed by article 13 of the International Covenant on Economic, Social and Cultural Rights, article 10 of the Convention on the Elimination of All Forms of Discrimination against Women, article 17 of the African Charter on Human and Peoples' Rights, and article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Under these treaties, the right to education must be guaranteed without discrimination based on sex. Furthermore, the 1960 UNESCO Convention against Discrimination in Education, which entered into force on 22 May 1962, aims at the elimination of discrimination in general, including gender-based discrimination in the field of education.

The Committee on Economic, Social and Cultural Rights noted with concern “that despite the achievements of Egypt in the field of education, inequality of access to education between boys and girls, high drop-out rates for boys and high illiteracy rates among adults, particularly women, persist”. It urged the Government to undertake measures to address the economic, social and cultural factors that are the root cause of these problems.²⁴² The Committee also expressed concern regarding the situation in Kyrgyzstan, where children were dropping out of school to provide for their families; the situation of girls was particularly alarming as “their access to education [was] being curtailed by a revival of the tradition of early marriage, and a decrease in the prestige of having a formal education.”²⁴³

²⁴²UN doc. E/2001/22 (E/C.12/2000/21), p. 41, para. 166, and p. 43, para. 182.

²⁴³Ibid., p. 64, para. 351.

The Committee on the Elimination of Racial Discrimination expressed concern at the fact that “children born to Egyptian mothers and foreign fathers are faced with discrimination in the field of education.”²⁴⁴

The Human Rights Committee expressed concern at the situation in Zambia, where, “despite some advances, [women] continue to be *de jure* and *de facto* the object of discrimination, particularly as regards education.” It therefore recommended that the State party review its law so as to ensure “full legal and *de facto* equality for women in all aspects of social and economic relationships”.²⁴⁵

The Committee on the Elimination of Discrimination against Women expressed concern about “the restricted admission of women to certain courses in higher education” in Myanmar, which contravenes article 10(b) and (c) of the Convention on the Elimination of All Forms of Discrimination against Women. It urged the Government “to modify the policies on restricted admissions, noting that the women themselves should be entitled to decide which subjects they wish to study and professions they wish to pursue”.²⁴⁶ Despite the efforts of the Cameroon Government in the area of education, the Committee remained concerned “at the low rate of female literacy, the high female dropout rate, and the low rate of female enrolment in basic education”. It encouraged the Government “to intensify its efforts to promote female access to basic and secondary education and to develop programmes specifically designed to reduce female illiteracy”.²⁴⁷ The Committee also expressed concern at the high prevalence of illiteracy among women in Burundi and the low level of schooling of girls, especially in rural areas. It noted that “education is a key to the empowerment of women, and low levels of education of women remain one of the most serious impediments to national development.”²⁴⁸ The Committee therefore urged the Government “to continue its efforts to improve the access of girls to all levels of education and to prevent their dropping out of school”.²⁴⁹

Girls and women have the right to equal access with boys and men to education, be it at the primary, secondary or higher levels of education.

Under international human rights law, women have the right to choose their subjects of study and the professions they want to pursue. There must be no gender-based restrictions on access to higher education.

Education is essential to ensure women's effective enjoyment of other human rights and to help them play a constructive role in the development of their country.

²⁴⁴UN doc. GAOR, A/56/18, p. 52, para. 288.

²⁴⁵UN doc. GAOR, A/51/40, p. 40, para. 195, and p. 41, para. 207.

²⁴⁶UN doc. GAOR, A/55/38, p. 15, paras. 125-126.

²⁴⁷Ibid., p. 56, paras. 57-58.

²⁴⁸UN doc. GAOR, A/56/38, p. 10, para. 57.

²⁴⁹Ibid., p. 10, para. 58.

10. Women's Right to an Effective Remedy, including the Right of Access to the Courts and Due Process of Law

The legal duty to provide effective remedies for persons whose rights and freedoms are violated is contained in article 2(3) of the International Covenant on Civil and Political Rights, article 7(a) of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights and article 13 of the European Convention on Human Rights. Article 2(b) and (c) of the Convention on the Elimination of All Forms of Discrimination against Women contains rules about the legal duties of States parties "to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women" and "to establish legal protection of the rights of women on an equal basis with men".

Article 14 of the International Covenant, article 8 of the American Convention and article 6 of the European Convention also contain due process guarantees which must be ensured to everyone without discrimination on any ground such as sex (cf. articles 2(1), 3 and 14(1) of the Covenant, article 1 of the American Convention and article 14 of the European Convention). As will be seen below, these provisions also guarantee access to the courts or, in other words, access to justice.²⁵⁰

Although the question of availability of domestic remedies will be dealt with in some depth in Chapter 15 of this Manual concerning "Protection and Redress for Victims of Human Rights Violations", it should be mentioned in this context that women may in many instances be in a particularly disadvantageous position to vindicate their rights, since they may not, for instance, have access to the courts or be able to benefit from due process guarantees. The Human Rights Committee has therefore asked the States parties to the International Covenant to provide information in their reports on the following points:

- ❖ "whether there are legal provisions preventing women from direct and autonomous access to the courts";
- ❖ "whether women may give evidence as witnesses on the same terms as men";
- ❖ "whether measures are taken to ensure equal access to legal aid, in particular in family matters", and
- ❖ "whether certain categories of women are denied the enjoyment of the presumption of innocence under article 14, paragraph 2, and on the measures which have been taken to put an end to this situation".²⁵¹

The case of *Ato del Avellanal v. Peru* illustrates the dilemma that can face women who do not have equal access to justice. The case concerned a Peruvian women who owned two apartment buildings in Lima and who, by final decision of the Supreme

²⁵⁰On article 14 of the Covenant, see Human Rights Committee General Comment No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 171, para. 18.

²⁵¹*Ibid.*, loc. cit.

Court, was not allowed to sue the tenants in order to collect overdue rents, since, under article 168 of the Peruvian Civil Code, when a woman is married, only her husband is entitled to represent the matrimonial property before the courts.²⁵² According to the Human Rights Committee, this violated the following provisions of the International Covenant on Civil and Political Rights:

- ❖ Article 14(1), which guarantees that all persons shall be equal before the courts and tribunals, since “the wife was not equal to her husband for purposes of suing in Court”;
- ❖ Article 3, which requires States parties to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant, and article 26, which states that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”; the Committee found that the application of article 168 of the Peruvian Civil Code to the author “resulted in denying her equality before the courts and constituted discrimination on the ground of sex”.²⁵³

Another important case illustrating women's right of access to the courts is that of *Airey v. Ireland*, which was considered by the European Court of Human Rights. In this case, Ms. Airey claimed a violation of, inter alia, article 6(1) of the European Convention of Human Rights, “since the prohibitive cost of litigation prevented her from bringing proceedings before the High Court for the purpose of petitioning for judicial separation” from her husband who was an alcoholic, frequently threatened her and sometimes also subjected her to physical violence. Her husband had even once been convicted of assaulting her.²⁵⁴ Legal aid was not available at the time in Ireland either for the purpose of seeking a judicial separation or for any other civil matters.²⁵⁵

The Court held that, since judicial separation was a remedy provided for by Irish law, it should be available to anyone who satisfied the conditions prescribed thereby.²⁵⁶ The Court responded as follows to the Government's contention that the applicant did in fact enjoy access to the High Court since she was “free to go before that court without the assistance of a lawyer”:

“The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ... It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily”.²⁵⁷

²⁵²Communication No. 202/1986, *G. Ato del Avellanal v. Peru* (Views adopted on 28 October 1988), in UN doc. GAOR, A/44/40, p. 196, paras. 1 and 2.1.

²⁵³*Ibid.*, pp. 198-199, paras. 10.1-10.2.

²⁵⁴*Eur. Court HR, Case of Airey v. Ireland, judgment of 9 October 1979, Series A, No. 32*, p. 12, para. 20, and p. 6, para. 8.

²⁵⁵*Ibid.*, p. 7, para. 11.

²⁵⁶*Ibid.*, p. 12, para. 23.

²⁵⁷*Ibid.*, pp. 12-13, para. 24.

The Court considered it “most improbable that a person in Mrs. Airey’s position [could] effectively present his or her own case”. It therefore concluded that the possibility to appear in person before the High Court did not provide the applicant with an effective right of access to the courts, and that, hence, it did not constitute a domestic remedy for the purpose of article 26 of the European Convention.²⁵⁸ However, this conclusion did not mean that the State would have to provide free legal aid for every dispute relating to a “civil right” but that article 6(1) “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigations, or by reason of the complexity of the procedure or of the case”.²⁵⁹ In the *Airey* case the Court found that article 6(1) of the Convention had been violated since the applicant “did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation”.²⁶⁰

With regard to the availability of remedies, the Committee on the Elimination of Discrimination against Women called upon the Government of Belarus “to create adequate remedies for women to obtain easy redress from direct and indirect discrimination, especially in the area of employment,” and “to improve women’s access to such remedies, including access to courts, by facilitating legal aid to women and embarking on legal literacy campaigns”.²⁶¹ The Committee recommended that the Government of Cameroon “provide access to legal remedies” to women who are victims of violence.²⁶² It requested the Government of Uzbekistan “to pass a law against violence, especially against domestic violence, including marital rape, as soon as possible and to ensure that violence against women and girls constitutes a crime punishable under criminal law and that women and girls victims of violence have immediate means of redress and protection”.²⁶³ It also expressed concern with regard to Jamaica, where “there are no constitutional remedies available to women”, although the right to equality of all citizens is guaranteed by the Jamaican Constitution.²⁶⁴

Under international human rights law women have the right of access to justice, and the right to due process of law, on equal terms with men.

This means, in particular, that women must have access to effective domestic remedies, including effective access to the courts, for the purpose of vindicating their rights. This applies to all alleged violations of their human rights but is particularly important in cases of alleged violence to their person.

²⁵⁸Ibid., pp. 12-13, para. 24.

²⁵⁹Ibid., pp. 15-16, para. 26.

²⁶⁰Ibid., p. 16, para. 28.

²⁶¹UN doc. GAOR, A/55/38, p. 37, para. 360.

²⁶²Ibid., p. 55, para. 50.

²⁶³UN doc. GAOR, A/56/38, p. 21, para. 177.

²⁶⁴Ibid., p. 24, para. 211.

To ensure the effective exercise of the right of access to the courts/ access to justice, States may have a legal obligation to provide legal aid.

The due process guarantees laid down in international human rights law are equally valid for women and men. This implies, inter alia, that women's evidence must be given and assessed on the same terms as that of men, and that all women must be allowed to benefit from the presumption of innocence.

11. The Role of Judges, Prosecutors and Lawyers in Ensuring Protection of the Rights of Women

The role of judges, prosecutors and lawyers in the protection of human rights in general is at all times of fundamental importance, but the role that the legal professions play, or should play, in protecting the rights of women and the girl child is of special significance in a social and cultural environment in which women may have nowhere else to go to seek protection and relief from violations of their basic human rights, including gender-based discrimination.

Judges, prosecutors and lawyers have a special duty at all times to be alert to any sign of violence against women, whether State-sponsored, institutional, State-tolerated, community violence or violence in the private sphere. The legal protection of women must be scrupulously applied in the face of religious, cultural or other local customs that may resist the view that a woman's life is of equal value to that of a man.

The crucial role of judges, prosecutors and lawyers extends, of course, beyond the context of violence against women. It covers the whole spectrum of human rights as outlined in this chapter, including, for instance, the many aspects of equality pertaining to marriage, divorce, the care of children, participation in public life and education. Moreover, it covers a long list of economic, social and cultural rights, which, for reasons of space, have not been dealt with in this context.

It is, however, particularly important that the legal professions, in considering allegations of violations of the human rights of women, including gender-based discrimination, adopt a holistic approach to individual rights, because, as shown in this chapter, the interdependence of the rights guaranteed by international human rights law emerges with particular clarity from any analysis of the rights of women.

12. Concluding Remarks

This chapter has shown that human rights are also women's rights, that women have the right to full legal recognition under international human rights law and that they must be treated on an equal footing with men. However, the precarious situation in which many of the world's women live and which makes the enjoyment of many of their human rights illusory, gives rise to a very special responsibility for both national legal professions and international monitoring bodies. If human rights are to become a reality in the future for more than a minority of the world's women, a concerted effort will have to be made at all levels to ensure that they are genuinely able to exercise their rights without fear of being beaten, killed or, at best, socially rejected.