

Chapter 2

Violence Against Women and Girls as a Human Rights Issue

Objectives

This chapter introduces readers to international human rights law, violence against women as a human rights issue and obligations of States parties under human rights law. The aim is to enable judges and other stakeholders to rely on international human rights law when dealing with cases involving VAWG and to make human rights-compliant decisions.

This chapter consists of six sections. Section 2.1 briefly introduces international human rights law (IHRL). Section 2.2 identifies and delineates a clear definition of VAWG in human rights law. Section 2.3 establishes that VAWG is a human rights issue as it violates several human rights such as the right to human dignity, right to life and the right not to be tortured. Section 2.4 outlines States parties' obligations under IHRL and section 2.5 outlines human rights obligations of the target countries. Section 2.6 contains a brief conclusion.

2.1 International human rights law (IHRL)

International law or the law of nations is the binding body of rules and principles that govern the relationship between one state and another and the relationship between the state and other international organisations. International human rights law is a branch of international law.

Initially, international law was concerned solely with the relations between nation-states. Only states were the subjects and had rights under international law. Individuals were not deemed to have rights and, therefore, were objects of international law. Individuals were governed by national law.¹

The status of the individual underwent changes after the development of IHRL. Now it is accepted that the fundamental rights of individuals are part of the subject matter of international law. Individuals may seek remedies, after exhausting domestic remedies, through international human rights bodies if their human rights are not respected by their own states. In most serious cases of human rights violations such as genocide, torture or persistent racial discrimination, international bodies such as the UN Security

Council or the International Criminal Court may take necessary action. Individuals are the direct subjects of international human rights law.

2.1.1 What are human rights?

Human rights are legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.

Human rights are commonly understood as those rights to which a person is entitled merely for being human. Human rights may not be renounced or forfeited.²

Human rights are rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.³

Human rights are inalienable. They cannot be restricted or abrogated except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.⁴ But restrictions must be specified and proportionate.

Non-discrimination is a cross-cutting principle in international human rights law. The principle is contained in all core human rights treaties and is seen as a candidate for customary status. The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of various grounds including sex. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: 'All human beings are born free and equal in dignity and rights.'

Individuals are entitled to all human rights but correspondingly they must also respect the human rights of others.⁵

2.1.2 Sources of international law

International law is primarily developed and endorsed by states with increasing support from civil society and international organisations on technical issues such as drafting. The sources of international law are listed in Article 38 of the Statute of the International Court of Justice 1945. The primary sources of international law are: international conventions, international custom reflecting practice accepted as law and the general principles of law recognised by the community of nations. The subsidiary sources of international law are judicial decisions and 'the teachings of the most highly qualified publicists'.

As international human rights law is a branch of international law, its primary and subsidiary sources are the same as international law. There are nine core international human rights instruments. Each of these instruments has established a committee of experts to monitor implementation of the treaty provisions by its States parties. Some of the treaties are supplemented by optional protocols dealing with specific concerns whereas the Optional Protocol to the Convention against Torture establishes a committee of experts. These treaties are:

- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social and Cultural Rights 1966
- International Convention on the Elimination of All Forms of Racial Discrimination 1965
- Convention on the Elimination of All Forms of Discrimination against Women 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984
- Convention on the Rights of the Child 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990
- International Convention on the Rights of Persons with Disabilities 2006
- International Convention for the Protection of All Persons from Enforced Disappearance 2006.

2.1.3 Implementation of IHRL

International human rights law is implemented at two levels: national and international. National implementation is given primacy as the international forums are activated only after exhausting domestic remedies.

International implementation

Human rights treaty bodies are responsible for the monitoring and implementation of IHRL at international level. Treaty bodies are created in accordance with the provisions of the parent treaties that they monitor, e.g. the CEDAW Committee is responsible for the monitoring and implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women 1979. These committees are called treaty bodies. Currently, there are nine treaty bodies established under the core

human rights treaties. They consist of independent experts. Treaty bodies perform four main functions: concluding observations on reports of States parties, individual communication (i.e. complaint against a State party), inquiry and general comments/recommendations.

Concluding observation: States parties are required to submit periodic reports to the committees as to how the rights in a specific treaty are implemented. The relevant committee will examine a report from a State party and will issue its views on the report in the form of ‘concluding observations.’⁶ It usually consists of areas where improvement have been made and areas of concern; that is, where improvement is needed. The committees always offer recommendations as to how to deal with identified areas of concern. The committees will be keen to see whether those recommendations are followed in the next periodic report.

Individual communication: Most committees have the competence to examine individual complaints with regard to alleged violations of human rights by a particular State party.⁷ The committees consider these communications and adopt a view of whether there has been a violation of the particular Convention. The committee system has also introduced a follow-up procedure whereby the State party is given up to six months to remedy the situation and report back to the committee.

Inquiry: Some committees such as the Committee against Torture (CAT)⁸ and the CEDAW Committee have the competence to conduct inquiries if there are allegations of ‘grave and systematic’ violations of human rights.⁹

General comment/recommendation: The committees also publish their interpretation of the content of human rights provisions known as general comments or recommendations.¹⁰ They provide helpful insights and more information about various treaty provisions to help states and other stakeholders in understanding, and ideally complying with, human right standards.

2.1.4 Universal Periodic Review

The Universal Periodic Review (UPR) is a unique process which involves a periodic review of the human rights records of all 193 UN Member States. The UPR is a significant innovation of the Human Rights Council which is based on equal treatment for all countries. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe. Currently, no other mechanism of this kind exists.¹¹

2.1.5 National implementation

International human rights law has adopted a very flexible approach to the way IHRL is implemented at national level by States parties. States voluntarily ratify or accede to treaties and commit themselves to certain international obligations. Before ratification or accession, states are provided with an opportunity to enter reservations to certain provisions of a given treaty if they wish not to be bound by those provisions. This is why States parties which undertake international obligations without reservations are not allowed to invoke internal law for their failure to comply with human rights obligations. States are not allowed to enter reservations incompatible with the 'object and purpose' of a treaty.¹²

IHRL also does not specify any specific mode for incorporating IHRL into the domestic legal systems of States parties. It allows States parties the flexibility to choose a mode of implementation according to their constitutions. For instance, Article 2(2) of the International Covenant on Civil and Political Rights 1966 states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant [emphasis added].

2.1.6 Domesticating IHRL

There is a great variety of domestic methods for implementing international human rights instruments. Scholars have classified these methods into adoption, incorporation, transformation, passive transformation, and reference. States may apply more than one of these methods. In very broad terms, two systems can be identified: **monism** and **dualism**. In some states, treaty provisions are automatically incorporated into domestic law once they have been ratified and published in the official gazette (i.e. treaties become 'self-executing'). France, Mexico and the Netherlands, for example, work this way. Other states, including the United Kingdom, other Commonwealth countries, and Scandinavian countries, require the express legislative enactment of treaty provisions before they become domestic law.¹³ India and Pakistan are dualist states where domestication of CEDAW and other treaties requires an act of Parliament. Thailand has been broadly categorised as a monist state;¹⁴ however, it functions largely as a dualist state in requiring domestic enabling legislation to transform international obligations into Thai law.¹⁵ For example, Thailand acceded to the UN Convention against Torture¹⁶ in 2007, but the state has yet to enact domestic legislation defining

and criminalising torture. As such, allegations of torture are currently not investigated or prosecuted as torture under Thai law.¹⁷ Cambodia functions as a monist state directly incorporating international law under Article 31 of the Constitution of the Kingdom of Cambodia 2008:

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights.

The Committee on Economic, Social and Cultural Rights (CESCR) has provided guidance on the issue as well:

13. On the basis of available information, it is clear that State practice is mixed. The committee notes that some courts have applied the provisions of the Covenant either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.

14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.¹⁸

2.1.7 IHRL and the judiciary

If international standards are incorporated into national legislation, it is easier for domestic courts and other actors of the justice system to apply them directly. When international human rights treaties have not been formally incorporated into domestic law, national courts can and should use

international human rights standards as guidance in interpreting national law, and thereby achieve human rights application of the domestic norms. In other words, national courts and other actors of the justice system may refer to international and regional human rights norms when interpreting and developing national law, and they may also use international human rights law as the minimum standard of protection that national law should attain.¹⁹

2.1.8 Terminology

The 1969 Vienna Convention on the Law of Treaties (VCLT) deals with various aspects of international law. Article 2 defines various terms:

'Ratification', 'acceptance', 'approval', 'accession' mean in each case the international act so named whereby a state established its consent to be bound by a treaty.

Reservation

Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Good faith

Once a state has ratified or acceded to a treaty without reservations, it is binding on the ratifying/acceding state. Article 26 of VCLT states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Article 27 of VCLT states that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

Customary international law

Customary international is referred to as 'general practice accepted as law'. It consists of two elements: acts of states amounting to settled practice and a belief that the practice is obligatory because of the existence of a rule of law (known as *opinio juris*). Customary law is binding on all states except those consistently objecting to it.

Jus cogens

Jus cogens are a higher class of legal obligation on a State, known as a peremptory norm, in which no derogation is allowed by any State under any circumstance. Commonly recognised examples of *jus cogens* include the prohibition of slavery, genocide, the prohibition of torture, racial discrimination and the use of force by states (when not in self-defence or authorised by the UN Security Council).²⁰ Article 53 of the Vienna Convention on the Law of Treaties states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

2.2 Defining violence against women and girls

2.2.1 CEDAW

Violence against women and girls is not specifically defined by the CEDAW, a treaty specific to women's human rights. But the CEDAW Committee has defined the term 'discrimination' widely. The committee said:

The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.²¹

The committee clearly stated that gender-based violence constitutes discrimination within the meaning of Article 1 of CEDAW. The committee further stated that gender-based violence impairs and nullifies the enjoyment by women of human rights and fundamental freedoms under general international law and human rights law. These rights and freedoms include, among others:

- (a) The right to life;
- (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- (d) The right to liberty and security of person;
- (e) The right to equal protection under the law;
- (f) The right to equality in the family;
- (g) The right to the highest standard attainable of physical and mental health; and
- (h) The right to just and favourable conditions of work.²²

The definition of discrimination under Article 1 is very wide, covering violence and discrimination both in public and private spheres perpetrated by state and non-state actors.

The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.

It is emphasised, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organisation 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.²³

2.2.2 Declaration on the Elimination of Violence against Women 1993

Although not a binding document, Article 1 of the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW) defines violence against women as:

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2 of DEVAW provides a comprehensive definition of violence against women including physical and psychological harm taking place in public and private spheres. It states that violence against women shall be understood to encompass, but is not limited to:

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

The Beijing Declaration and Platform for Action (Beijing Declaration and PFA) was adopted by the Fourth World Conference on Women in 1995 is reflective of international consensus on and commitment to VAWG. The definition of VAW of the Beijing Declaration is a wide one including ‘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.’²⁴

2.2.3 Regional Treaties

There is as yet no regional instrument in the Asia Pacific on human rights or on VAW. Some sub-regional instruments, however, address specific forms of VAW.

ASEAN

Across South-East Asia, the 2013 Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in the ASEAN reaffirms the goals and commitments of ASEAN to eliminating VAW.²⁵ It acknowledges the commitments of individual ASEAN Member States to CEDAW and the Convention on the Rights of the Child 1989. In the Declaration, all ASEAN Member States, individually and collectively, expressed a common resolve to eliminate VAW and violence against children in the region through, among others, measures to strengthen and, where necessary, enact or amend national legislation for the elimination of VAW and children, and to enhance the protection, services, rehabilitation, education and training, recovery and reintegration of survivors/victims.²⁶

SAARC

The South Asian Association for Regional Cooperation (SAARC) adopted in 2002 the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. This recognises the importance of establishing effective regional cooperation for preventing trafficking of women for prostitution and for investigation, detection, interdiction, prosecution and punishment of those responsible for such trafficking.²⁷ Article 1(5) defines ‘persons subjected to trafficking’ as ‘women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means.’

2.3 VAWG as a human rights issue

Violence against women and girls breaches their right to human dignity, right to life and the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.

2.3.1 Human dignity

The 1948 Universal Declaration of Human Rights (UDHR) states that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’²⁸ Article 2 of UDHR states that ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ The 1966 International Covenant on Civil and Political Rights recognises that the rights set out in it ‘derive from the inherent dignity of the human person’²⁹ and that all rights set out in the ICCPR shall be enjoyed without discrimination.³⁰ Article 2 of UDHR prohibits discrimination on the basis of sex, among other grounds:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.3.2 Right to life

Article 3 of UDHR states that ‘everyone has the right to life, liberty and security of person.’ Similarly, Article 6(1) of ICCPR states that ‘every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’

2.3.3 Prohibition of torture etc.

Human rights law prohibits torture in all circumstances. The principle of prohibition against torture has acquired the status of *jus cogens* (Latin: compelling law)³¹ and is binding on all states.³² Article 5 of UDHR states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Article 7 of ICCPR also states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Both UDHR and ICCPR have not defined torture but Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines it comprehensively:

The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in

an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition focuses on torture committed by state officials or those working under their authority but states have obligations under human rights law to prevent and prosecute the commission of torture by non-state actors.

2.4 Obligations under IHRL

States parties voluntarily ratify or accede to human rights treaties. They undertake obligations to implement those treaties they have ratified or acceded to in good faith. This undertaking includes measures necessary for the implementation of treaty provisions at the national level. States parties are required to honour and fulfil their obligations in three ways:

- **Respect:** States must refrain from interfering with the enjoyment of human rights.
- **Protect:** States must prevent private actors or third parties (including state organs) from violating human rights.
- **Fulfil:** States must take positive measures (e.g. legislation, policies, programmes etc.) to ensure the realisation of human rights.

Beyond the obligations to respect, protect and fulfil, States parties are also required to follow the principle of **due diligence**. Article 4(C) of DEVAW stipulates that states parties must ‘exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons’. The principle has been affirmed by the CEDAW Committee³³ in its decisions on individual complaints and is reflected in treaty law as well.³⁴

Although all the treaties discussed below do not expressly address VAWG, they set out robust prohibitions on discrimination on the basis of sex. States’ obligations to eliminate violence against women are enshrined in international and regional treaties and customary international law. In addition, and in many cases pursuant to this international framework, States across the Asia Pacific region have adopted national legislative and policy frameworks which recognise violence against women as a form of discrimination and a human rights violation that is pervasive, systemic and rooted in power imbalances between women and men. In many countries, international human rights norms on the elimination of violence against women have been incorporated into domestic law through interpretations by judicial bodies. Despite the existence of such laws, normative obligations are far from being fully implemented. To underpin their efforts to prevent

violence against women and provide protection to survivors and victims, many states in the region have adopted national action plans to establish the institutional mechanisms, resourcing and monitoring necessary to effectively address this systematic and pervasive issue.³⁵

2.4.1 The Charter of the United Nations 1945

The Charter of the United Nations 1945 introduced the principle of equality as an international human rights standard. Its preamble ‘reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.’³⁶ It enumerates among the purposes and principles of the UN, the promotion of and respect for human rights and for fundamental freedoms for all ‘without distinction as to race, sex, language or religion.’³⁷

Important human rights provisions are contained in Articles 55 and 56 of the Charter. Article 55(c) of the Charter states that ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex and language or religion.’

Article 56 of the Charter states that: ‘All members pledge themselves to take joint and separate action in co-operation with the organizations for the achievements of the purposes set forth in Article 55.’

These provisions constitute the foundation of modern human rights law and impose obligations on Member States to promote human rights and to co-operate with the UN, among other bodies, with a view to defining and codifying those rights.

2.4.2 International Covenant on Civil and Political Rights 1966 (ICCPR)

Article 2(1) of the International Covenant on Civil and Political Rights 1966 requires States parties to undertake ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

The Human Rights Committee of the ICCPR has emphasised states’ obligations to prevent children from ‘being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution.’³⁸

Article 23(3) of ICCPR provides that ‘no marriage shall be entered into without the free and full consent of the intending spouses’. Article 23(4) of the ICCPR sets out that States must ‘take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and

at its dissolution.’ States parties are also required ‘to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.’³⁹

The Human Rights Committee outlines States parties’ positive obligations to protect individuals from interference of their rights by non-state actors. It states that:

*The positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.*⁴⁰

The HRC also notes that there may be circumstances where a failure ‘to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by non-State actors’ will constitute a violation of the ICCPR.⁴¹

2.4.3 International Covenant on Economic, Social and Cultural Rights 1966

The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) requires all States parties to ensure that the rights contained in the Covenant are applied without discrimination on the basis of sex, among other grounds.⁴² Article 3 requires that States parties must ‘ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth’ in the Covenant. Article 7 requires State parties to ensure ‘safe and healthy working conditions’ for all. It implies that States parties are required to provide a working environment free from all forms of violence, harassment and sexual harassment.

The Optional Protocol to the ICESCR (OP-ICESCR) 2008 refers to the UN Charter and UDHR reiterating the principles of equality and non-discrimination stating that everyone is entitled to all the rights and freedoms set forth therein ‘without distinction of any kind, such as race, colour, sex’ etc.⁴³

The Committee on Economic, Social and Cultural Rights has adopted a number of General Comments addressing State parties’ obligations to combat discrimination. For example, while commenting on Article 2(1) of the ICESCR, the committee stated that States parties are required to take ‘all appropriate means, including particularly the adoption of legislative measures’ for fulfilling their obligations. The committee pointed it out that in many instances ‘legislation is highly desirable and in some cases may even be indispensable.’⁴⁴

While commenting on Articles 2(2) and 3 of the ICESCR the committee underlined the equal rights of men and women to the enjoyment of all economic, social and cultural rights, and that ‘the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality.’⁴⁵ General Comment No. 16 also reiterates the principle of equality and provides that the rights set forth in the Covenant are to be enjoyed by men and women ‘on a basis of equality’⁴⁶ and ‘the principle of non-discrimination is the corollary of the principle of equality.’⁴⁷

2.4.4 Convention on the Rights of the Child 1989

Article 19 of the Convention on the Rights of the Child (CRC) requires State parties to ‘take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.’ It further states that these protective measures should include programmes for prevention, protection, and support for child victims.

The First Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OP1-CRC) requires State parties to ensure that children under the age of 18 are not recruited compulsorily in the armed forces.⁴⁸

The Second Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OP2-CRC) requires State parties to prohibit the sale of children for child prostitution and child pornography.⁴⁹

2.4.5 Regional instruments

In addition to international human rights law, regional human rights treaties also define violence against women and girls and impose obligations on States parties to combat VAWG.

ASEAN

In the ASEAN Declaration on Elimination of Violence against Women (ADEVAW) 2013 the ASEAN Member States (which include Cambodia and Thailand), individually and/or collectively, expressed a common resolve to eliminate violence against women and children in the region. They referred to measures to strengthen and, where necessary, enact or amend national laws for the elimination of violence against women and children, and to enhance the protection, services, rehabilitation, education and training, recovery and reintegration of survivors/victims.⁵⁰

SAARC

In South Asia, the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002 (the SAARC Convention) requires State parties to take appropriate measures to include provisions in their domestic jurisdiction to punish trafficking of women and children for the purpose of prostitution.⁵¹

2.5 Obligations of target countries

Annex 2 provides a table showing treaties ratified and/or acceded to by Cambodia, India, Pakistan and Thailand. These four countries are parties to CEDAW and CRC and are thus required to fulfil their obligations in combating violence against women in their jurisdictions. In addition to UN treaties, the target countries are bound by their commitments under regional treaties under the auspices of ASEAN and SAARC.

2.5.1 State organs and their responsibility

The Human Rights Committee states that:

The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'⁵²

The International Law Commission states that 'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'.⁵³ It goes on to say that 'an organ includes any person or entity which has that status in accordance with the internal law of the State'.⁵⁴

The Report of the UN Special Rapporteur on ‘Violence against women, its causes and consequences’⁵⁵ has summarised States’ obligations as follows:

As a general rule, State responsibility is based on acts or omissions committed either by State actors or by actors whose actions are attributable to the State. A longstanding exception to this rule is that a State may incur responsibility where there is a failure to exercise due diligence to prevent or respond to certain acts or omissions of non-State actors. The due diligence standard serves as a tool for rights holders to hold States accountable, by providing an assessment framework for ascertaining what constitutes effective fulfilment of a State’s obligations, and for analyzing its actions or omissions. For due diligence to be satisfied, the formal framework established by the State must also be effective in practice.

2.6 Conclusion

Violence against women and girls violates their basic human rights such as the right to dignity, the right to life, and the right to be free of torture (both physical and psychological) and contravenes the basic principle of non-discrimination. States parties are required to comply with their human rights obligations to prevent VAWG and prosecute perpetrators of violence against women. They are also required to provide effective remedies to victims in the form of damages. The human rights obligations of States parties are the responsibility of all state organs: legislature, executive, judiciary and others.

Notes

- 1 UNHCR, *Human Rights and Refugee Protection: self-study module 5* (Vol. 1, 2005), page 8.
- 2 OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), page 10.
- 3 OHCHR, ‘What are human rights?’ (2016), <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> accessed 31 October 2016.
- 4 Ibid.
- 5 Ibid.
- 6 See Article 21 of CEDAW.
- 7 See Article 1 of OP 1 of the International Covenant on Civil and Political Rights 1966.
- 8 See Article 20 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.
- 9 See Article 8 of OP to CEDAW.
- 10 For instance, see Article 40(4) of the ICCPR.
- 11 UN High Commissioner for Human Rights, ‘Basic facts about the UPR’ (Geneva, 2 February 2017) <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> accessed 2 February 2017.
- 12 See Article 19 (c) of VCLT.
- 13 UNHCR, *Human Rights and Refugee Protection: self-study module 5* (Vol. 1, 2005), page 46.
- 14 Sompong Sucharitkul, ‘National Treaty Law and Practice: Thailand’, in Duncan B. Hollis et al (eds), *National Treaty Law and Practice* (Martinus Nijhoff, Leiden, Boston 2005), page 706.

- 15 Ibid, pages 701–703; Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014), s 23; David Sloss, 'Domestic Application of Treaties', in Santa Clara Law Digital Commons (2011), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs> accessed 25 November 2016.
- 16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. Thailand acceded on 2 October 2007.
- 17 State Report, Thailand UPR, 2016, para 132.
- 18 General Comment No. 9, 1998.
- 19 UNHCR, *Human Rights and Refugee Protection: self-study module 5* (Vol. 1, 2005), page 47.
- 20 Ibid, page 13.
- 21 CEDAW Committee, General Recommendation No. 19, 1992, section 6.
- 22 Ibid, section 7.
- 23 Ibid, section 8–9.
- 24 Beijing Declaration and Platform of Action 1995, para 113.
- 25 Declaration on the Elimination of Violence against Women and Elimination of Violence against Children 2013, see recital 3.
- 26 Ibid, Article 1.
- 27 Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, preamble, recital 6.
- 28 Universal Declaration of Human Rights 1948, preamble, recital 1.
- 29 International Covenant on Civil and Political Rights 1966, preamble, recital 2.
- 30 See Article 26.
- 31 See the Supreme Court of Pakistan decision *Pakistan Muslim League v Federation of Pakistan* PLD 2007 SC 642 where it held that UDHR has acquired customary status and its provisions are binding on Pakistani courts. See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, [99]. It is a paragraph.
- 32 UNHCR, *Human Rights and Refugee Protection: self-study module 5* (Vol. 1, 2005), page 13.
- 33 See CEDAW General Recommendation No. 19, 1992, section 9.
- 34 Christine Chinkin, 'Addressing violence against women in the commonwealth within states' obligations under international law'. *Commonwealth Law Bulletin*, Vol. 40, Issue 3, 2014: Special Issue on the Commonwealth Law Ministers Meeting 2014, pages 471–501.
- 35 Action Aid, *Violence against Women and Girls: International Human Rights Standard* (UK 2011), <https://static1.squarespace.com/static/536c4ee8e4b0b60bc6ca7c74/t/5437eb32e4b02e62e3f6e557/1412950834953/International+Human+Rights+Standards.pdf> accessed 20 November 2015.
- 36 Charter of the United Nations 1945, preamble, recital 3.
- 37 Ibid, Article 1(3).
- 38 Human Rights Committee, General Comment No. 17, 2013, para 3.
- 39 ICCPR, Article 23.
- 40 General Comment No. 31, 2004, para 8.
- 41 Ibid.
- 42 ICESCR, Article 2(2).
- 43 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, see preamble recital 2.
- 44 Committee on Economic, Social and Cultural Rights, General Comment No. 16, 2005, para 3.
- 45 Ibid, para 3.
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- 47 Ibid, para 10.
- 48 The First Optional Protocol to the CRC on the Involvement of Children in Armed Conflict 2000, Article 3.
- 49 The Second Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000, Article 3.

- 50 ASEAN Declaration on Elimination of Violence against Women 2013, Article 1.
- 51 South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, Article 3(2).
- 52 Human Rights Committee, General Comment No. 31, 2004, para 4.
- 53 Article 4 of the International Law Commission draft articles on Responsibility of States for Internationally Wrongful Acts 2001.
- 54 Ibid.
- 55 Rashida Manjoo, 'Report of the Special Rapporteur on violence against women, its causes and consequences' A/HRC/23/49, 14 May 2013.