

## A Human-Rights Based Approach of Violence against Women

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Every Wednesday, Korean women demonstrate before the Japanese Embassy in Seoul. They are women who have been abused during the Second World War as 'comfort women,' meaning that they have been subjected to forced prostitution or sexual slavery by the Japanese army. It is estimated that approximately 200,000 women have become the victim of this practice. Until today, the Japanese Government has refused to fully acknowledge its responsibility for this abuse and has not solved the question of compensation satisfactorily.<sup>1</sup>

Sexual abuse in conflict situations continues to occur frequently, as well as other violations of women's human rights, such as forced pregnancy and forced abortion. Reports on the former Yugoslavia, Rwanda, the Democratic Republic of Congo and Sudan show that rape

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of women was deliberately used as a weapon of war. It was used to seriously harm specific groups of the population, to humiliate them and to manipulate the composition of the population. The seriousness of the violence was acknowledged in the landmark judgement of the International Criminal Tribunal for Rwanda (ICTR) in Akayesu, in which the ICTR held that rape and sexual violence can constitute genocide if committed with the attempt to destroy a particular group.<sup>2</sup> Also outside the context of conflict situations violence against women occurs. Women experience violence within the family across their life cycles. In some countries lifetime prevalence of intimate partner violence amounts to over 60%.<sup>3</sup>

It seems obvious that such serious infringements of women's bodily integrity constitute violations of their human rights. Indeed, in this era that is the case, but until quite recently many forms of violence against women were not dealt with in terms of human rights violations. Sexual violence in times of conflict was considered to be unavoidable. It was seen as an infringement of a woman's honour, rather than her right to physical integrity. Further, it was seen as a private act of a soldier rather than an act of war carried out in the line of duty, or in the name of the state. The judgements of the Tokyo and Nuremburg Tribunals do not explicitly mention rape.<sup>4</sup> Violence against women in the private sphere was long considered to be their private problem, not a societal problem. It was argued that the perpetrators

were private individuals, not State agents. Since human rights were aimed at protecting individuals against abuse by State authorities, violence by private individuals was considered to fall outside the scope of human rights.<sup>5</sup> Violence against women is a worldwide, large scale phenomenon. Contrary to popular belief, it occurs in all societies, not only in immigrant communities, rural areas, among less educated, poor people and not only in developing countries. This contribution will show how violence against women is a violation of human rights, and how human rights can contribute to combating it. First, we will deal with the concept of 'women's human rights', then we will deal with violence against women in international human rights law, with specific attention for interesting recent developments in regional and international case-law.

### **Women's human rights**

'All human rights are universal, indivisible and interdependent and interrelated.' This has become one of the most frequently cited provisions of the Vienna Declaration, adopted at the conclusion of the World Conference on Human Rights in Vienna, 1993.<sup>6</sup> If all human rights are indeed universal, it seems fundamentally incorrect to use the term 'women's human rights', as this would seem to suggest that women's right would differ from men's rights. Human rights treaties and declarations aim to protect everyone; each instruments reiterates

that any discrimination on the ground of race, colour, religion and sex is prohibited. Everyone is equal before the law and before the court. However, neutral rules do not necessarily offer equal protection to everyone. The impact of laws and practices must therefore be examined and relevant differences must be taken into account to ensure that everyone enjoys genuine and effective protection under human rights instruments. When studying violence against women it becomes quite clear what relevant differences are. The human rights as they have been adopted protect mostly against infringements of rights by the State in the public sphere. For example, police officials may not apply torture to obtain a confession. Yet, physical abuse by a father, mother or husband was not considered to be a human rights issue. Since women's lives have traditionally been predominantly lived in the private sphere, they have encountered violations by intimate partners and family members on a larger scale than men. The emphasis on protection against abuse of power in the public sphere thus ignores the right of women to enjoy equal protection. As phrased by a Dutch scholar, we need more attention for 'women's stories'.<sup>7</sup> International human rights law was to a large extent drawn up from a man's perspective and does not adequately take into account that guarantees to protect men do not necessarily protect women.<sup>8</sup>

There is some fear that the concept of human rights becomes too all encompassing if private acts are considered to be human rights

violations. However, the idea that certain acts fall within the scope of human rights has existed for a long time. Slavery, for example, was one of the first acts to be recognized as a violation of human rights, even though those who hold others in slavery or slavery-like circumstances are private individuals.<sup>9</sup> Also, racial discrimination has already long ago been recognized as a human rights violation,<sup>10</sup> while mainly individuals discriminate against other individuals. The lack of attention for violence against women cannot exclusively be attributed to the public-private divide. The low status of women in society plays a role as well.

Incorporating 'women's stories' implies that the right to life means that family members may not kill a girl or a woman if they consider that she has harmed the honour of the family; the right to health and the right not to be subjected to ill-treatment includes the right not to have one's genitals cut; the right to liberty of movement includes women's right to move freely, without legal or de facto requirements which prevent them from travelling.<sup>11</sup> The right to respect for private life may never go so far as to make the personal invisible.<sup>12</sup> The State is therefore obliged to protect against violations of human rights in the public sphere, as well as in the private sphere. General human rights instruments, such as the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, aim at protecting

all people, women and men, white and coloured, healthy and sick people, old and young people, equally. Practice shows, however, that protection under general instruments only is not sufficient. Additional instruments have been developed to further specify the norms, and additional monitoring mechanisms have been established. Specific instruments exist today aimed at the elimination of racial discrimination, discrimination against women, to protect the rights of children, migrant workers, and, as of recently, disabled people. Further, a specific instrument aims to eradicate torture. The existence of a specific instrument on the elimination of discrimination against women may not constitute an excuse for ignoring women's concerns in other human rights organs. This was, however, what happened in practice. Women's non-governmental organizations made clear that women's human rights were marginalized and that this needed to change.<sup>13</sup> They lobbied intensely and successfully. The 1991 campaign '16 days action of violence against women' connected human rights and violence against women: the sixteen days linked 25 November (the International Day on Violence Against Women) and 10 December (Human Rights Day). Extensive lobbying took place prior to and during the World Conference on Human Rights (Vienna, 1993) and the Fourth World Conference on Women (Beijing, 1994). The slogan 'women's rights are human rights' was in full view, and the term 'human rights of women' became common. It made clear that women

did neither demand a separate status, nor different rights, but that their experiences needed to be taken into account. If not, they cannot fully enjoy all human rights.<sup>14</sup> Specific instruments and procedures can strengthen the general human rights instruments and procedures, and vice versa. It is therefore appropriate that the Vienna Declaration called on all human rights treaty bodies to integrate a gender perspective in their work,<sup>15</sup> and called on the Commission on Human Rights to establish a Special Rapporteur on Violence Against Women, and on the Commission on the Status of Women to draw up an optional protocol to the Women's Convention establishing an individual complaints procedure.<sup>16</sup>

Practice shows improvements. Human rights treaty bodies have adopted general comments, setting out how the provisions in the treaties can be interpreted in a more gender sensitive way so as to cover women's experiences;<sup>17</sup> the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have convicted war criminals for rape and other sexual violence and the International Criminal Court has established a special unit where experts deal with victims who act as witnesses in sexual violence cases. Further, the landmark Security Council Resolution 1325 is worth mentioning. The Council calls on all parties in an armed conflict to adopt special measures to protect women and girls against gender based violence, especially rape and other forms of sexual abuse and

urges not to include such violence in amnesty regulations.<sup>18</sup> Defining violence against women as a human rights violation is not merely a matter of semantics. Human rights norms are fundamental norms that find strong protection in international legally binding instruments. Violation of these norms leads to international accountability of States.

### **Violence against women as a human rights violation**

Violence against women affects many human rights. Where family members kill a woman or girl because her talking to a man who is not her brother or her father damages the honour of the family, the right to life is at stake. When soldiers rape women in an armed conflict, this constitutes torture. Female genital cutting infringes on a girl's right to physical integrity. Intimate partner abuse can constitute cruel or inhuman treatment. Forced sterilization deprives a woman of her right to decide on the number of children she wishes to have. A woman who is locked up in her home is deprived of her right to liberty of person, cannot participate in public life and cannot exercise her right to work. The most commonly used definition of violence against women is: '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.'<sup>19</sup>

It concerns violence against women, because they are women. Its root causes are the structural inequalities between women and men.<sup>20</sup> Cultural, religious and traditional attitudes have resulted in and continue to uphold a subordinate position of women in society. Violence against women is a manifestation of the imbalance of power, and contributes to upholding it. Violence against women is therefore considered to be a form of discrimination against women. The UN Declaration on the Elimination of Violence Against Women states in article 4 that States 'should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.'<sup>21</sup> Both when studying the causes and the consequences of violence against women we see that women's human rights are at stake. Thus, in preventing and combating violence against women, the strengthening of the existing human rights machinery is necessary. The 2006 report of the United Nations Special Rapporteur on Violence against Women, Yakin Ertürk, contains useful examples on an interpretation of human rights that takes the specific needs of women into consideration.<sup>22</sup> Various states have adopted legislation providing for a restraining order for the perpetrators of domestic violence. This measure can be particularly effective in combating violence against women, and can thus contribute to women enjoying their human rights. The obligation to protect women from their assailants, even if these are their intimate partners,

can be derived from the obligation of states to eradicate torture and other cruel, inhuman or degrading treatment, which requires States to take protective measures. So far, the Special Rapporteur does not systematically refer to existing standards. Referring to international legal instruments and the interpretation thereof by the treaty monitoring bodies contributes to a human-rights based approach to violence against women. It emphasises that violence against women is a violation of internationally accepted and protected human rights, and that violation thereof entails consequences. Using human rights norms as a common may facilitate enhanced cooperation between the various independent experts.

### **Violence against women by state officials: direct responsibility**

It is important to make distinguish between the responsibility of States for acts of private persons from the acts of their own agents. A breach of an international norm by a state official, for example a police officer or a prison guard, entails responsibility of the state under international law. The State is even responsible if the official exceeds his or her authority or contravenes instructions.<sup>23</sup> The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment contains concrete obligations for States parties to eliminate torture. The Committee Against Torture, that monitors the implementation of this Convention, has recently adopted some

interesting decisions in individual cases and in concluding observations adopted upon the conclusion of the examination if States parties' reports. These show the relevance of this treaty for combating violence against women. The Convention Against Torture defines in article 1: '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.'

This definition, with its focus on public officials, reflects on the one hand that the drafters of the Convention aimed to protect against repressive state regimes, and on the other hand the relative lack of awareness of the problem of violence against women.<sup>24</sup> To a large extent men and women suffer equally from ill-treatment and torture in prison. Women can become victims of different forms of violence, often sexual abuse such as rape. The Committee Against Torture's has long not applied the Convention in a gender sensitive way. For example, when examining state reports under article 19 of the Convention it rarely asked questions on how women were protected against sexual

abuse in detention facilities. However, recent concluding observations and decisions in individual complaints show that the Committee Against Torture now does take into account women's concerns. In May 2006 the Committee examined the situation in Togo. It expressed its concern about the widespread practice of torture in this State party, and mentioned specifically 'the frequent rape of women by military personnel, often in the presence of members of their families, and the apparent impunity enjoyed by the perpetrators of such acts.'<sup>25</sup> The Committee also dealt with the issue of sexual violence in detention centres. It recommended that women prisoners should be guarded by female prison warders only.<sup>26</sup> The recommendation refers to article 11 of the Convention, that contains, inter alia, the obligation for States parties to keep under systematic review arrangements for the custody and treatment of persons subjected to detention, with a view to preventing torture. Also in the case of Georgia the Committee expressed its concern about female detainees, and recommended the establishment of complaints procedures.<sup>27</sup> The Committee could further contribute to combating gender based violence and deal with women's concerns on a more structural basis. In examining state reports, it could systematically ask questions about the composition of the prison population and the prison staff, it could inquire whether issues such as sexual violence are explicitly dealt with in prison regulations, and whether members of penitentiary complaints commissions complaints

have specific expertise on gender based violence. Non-governmental organizations can play an important role in increasing attention for violence against women by the Committee Against Torture. So far, they have made limited use of the Convention and its supervisory procedures. State violence deserves attention from NGOs as well as the Special Rapporteur on violence against women. Their expertise can contribute to a further gender sensitive interpretation of the Convention Against Torture, and how it can effectively protect women. In so doing, they support the Committee in its work.

### **The obligation to eliminate discrimination**

If State officials commit violence that remains unaddressed by the State authorities, the State can be held accountable under international law. The State can also be held accountable for the failure to amend or abolish discriminatory legislation. The right to equality of women and men and the obligation not to discriminate against women forms part of the core of all human rights treaties, and entails immediate obligations, i.e., obligations the implementation of which cannot be delayed over time. The State should therefore review existing legislation and policy in order to determine whether it is compatible with the principle of equality and non-discrimination. It is under an obligation to repeal laws and rescind policies, administrative measures and programmes that do not conform with the right to equal

treatment and non-discrimination. This obligation does not only relate to direct discrimination, but also to indirect discrimination. This means that States must examine the effect of laws and policies that have been formulated in neutral terms, and establish whether they could have a negative impact on women's enjoyment of their human rights on a basis of equality.<sup>28</sup> Discriminatory legislation can hinder the effective combating of violence against women, as may be illustrated.

In some countries, a rapist's sentence is reduced if he marries his victim. This is based on the perception that in so doing, he restores her honour. However, this goes against the fact that rape is a serious violation of a woman's physical integrity, that should be punished in accordance with the gravity of the crime. In many countries criminal procedure imposes such a high burden of evidence to prove rape, that is as good as impossible to convict a rapist. For example, various countries require the testimony of four men to support the raped woman's testimony. Such testimonies will not be possible in the majority of rape cases. If rape cannot be proved, the women who have submitted the allegation risk being prosecuted for adultery or immoral behaviour. Honour related violence is a serious violation of women's right to be free from violence. Nevertheless, many countries do not offer legal protection of women who allegedly have damaged the family honour, either by not punishing honour related crimes at all, or only imposing a very mild sentence. Human rights treaties

oblige States parties to abolish or amend this type of discriminatory legislation and practices. Maintaining discriminatory laws cannot be justified on the ground of traditions, customs and religion and can lead to international accountability of States. Violence against women is violence that affects women because they are women. Any policy aimed at the elimination of this phenomenon should therefore be embedded in an overall policy aimed at strengthening the position of women in society and aim at the eradication of prejudice, stereotypes and traditional attitudes. International human rights law requires the thorough and consistent review of legislation and policies, and to make amendments if legislation and policies discriminate against women. It is crucial that attention is paid also to legislation that is worded in gender neutral terms, but affects the position of women negatively.

### **State responsibility for violence in the domestic sphere**

The above-violence by State agents and the failure to abolish or amend discriminatory legislation and policy—dealt with situations in which the State bears a direct responsibility for human rights violations. Under circumstances, the State can also be held responsible for domestic violence. The State cannot be expected to prevent each and every instance of domestic violence. Determining responsibility in concrete cases is not always easy; the central question to be answered is whether the state has done enough. International human rights case

law show some good examples on how to determine whether States have violated their obligations under international law. As stated before, States not only have an obligation to prevent and combat violations by State agents, but they must also protect individuals against violations by other individuals. In examining whether or not the State bears responsibility, the principle of 'due diligence' can be applied. The term was introduced in the field of human rights by the Inter-American Court of Human Rights in the Velazquez Rodriguez judgement. According to the Court (...) An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant—the violation can be established even if the identity of the individual perpetrator is unknown. 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. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1 (1) of the Convention. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.<sup>29</sup>

The Court stressed that where the acts of private parties that violate the Convention are not seriously investigated, 'those parties are aided in a sense by the government, thereby making the State responsible on the international plane.'<sup>30</sup> The State is under an obligation to take all appropriate measures to prevent and combat this form of violence against women. Various rights can be at stake, and a comprehensive and all encompassing policy must be developed and implemented. A variety of measures must be taken. It may be necessary to review legislation or to adopt specific legislative measures. For example, marital rape must constitute a criminal offence; a marriage certificate may not constitute an exclusionary ground for a husband to force his wife into sexual activities. Other measures include the enhancement of the gender sensitivity of professional groups such as the police, the prosecutor, the judiciary and health professionals. They have to

have the necessary skills to deal with victims of domestic violence in a professional and sensitive way. Campaigns aimed at enhancing public awareness should address women and men, and should make clear that all forms of violence against women are unacceptable and cannot be justified on the ground of culture, religion, custom or tradition. Protective measures should be taken, such as the establishment of an adequate number of shelters for victims and the possibility to impose restraining orders on perpetrators of domestic violence.

Human rights treaties and the work of treaty monitoring bodies serve as the basis for an interpretation of individual rights and state obligations. Again, the work of the Committee Against Torture serves as an example. At first sight, many violations of women's physical and psychological integrity do not fall within the scope of the Convention Against Torture. The reason is not that the suffering is not severe, or was not inflicted for a specific purpose, but because no state official is involved in the act. Torture and ill-treatment within the meaning of article 1 of the Convention Against Torture requires that the '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.' The term 'acquiescence' provides for the possibility to interpret torture or other cruel, inhuman, or degrading treatment to encompass domestic violence. For a long time now, it is well-known that domestic violence against women is a gross and serious problem.

As Byrnes concludes, if the state does not undertake all appropriate measures for its effective prevention and combating, it can be concluded that the state 'acquiesces' to domestic violence.<sup>31</sup>

Until quite recently, the Committee seemed not to share this view. Its failure to address to domestic violence apparently implied that it did not fall within its mandate. Recent concluding observations indicate a change in this attitude. Upon the consideration of the situation in Togo, the Committee was very positive (it used the term 'applauds') about the adoption of legislation prohibiting female genital mutilation of women and girls.<sup>32</sup> It formulated its concern about the persistence of this practice in certain regions in Togo and stated that Togo 'should take the necessary steps to eradicate the practice of female genital mutilation, including through nationwide awareness-raising campaigns, and to punish the perpetrators of such acts.'<sup>33</sup> The Committee's work contains more examples of this nature, and hopefully the Committee will continue to show its readiness to examine domestic violence issues and to address the States' responsibility to combat it. The Committee has not classified all forms of domestic violence as torture, as has been suggested in academic literature;<sup>34</sup> it has dealt with a number of serious forms of domestic violence under article 16, dealing with cruel, inhuman or degrading treatment or punishment. The consequences of this classification are that a number of the provisions of the Convention Against Torture

cannot be applied, such as the prohibition of refoulement, which prescribes that individuals may not be extradited or expelled to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture, i.e. not other forms of ill-treatment. Nevertheless, the change in the Committee Against Torture's approach to domestic violence constitutes an important step forward. It is possible that it will classify serious forms of domestic violence against women as torture, which will then result in the applicability of all provisions of the Convention.

#### **Appropriate steps to prevent and combat domestic violence-developments in international human rights case-law**

The State can be held accountable at the international level if it has failed to adopt appropriate measures to prevent violations by private persons, or if it has failed to investigate the act and punish the perpetrator. Human rights treaties do not describe in much detail exactly which measures must be taken to implement the relevant treaty provisions. International monitoring bodies therefore play an important role in the assessment of measures that have been taken, and in the formulation of recommendations for measures that can be taken. The treaty bodies deal with concrete situations and can express their position on the effectiveness of existing legislation and the implementation thereof. It can assess whether the State concerned can

be held accountable for its response to acts that have been committed by non-state actors. Below, some examples are presented. In its judgement in *M.C. v. Bulgaria* the European Court of Human Rights examined whether Bulgarian law offered adequate protection against rape. It found that this was not the case. For proving rape, the Bulgarian Criminal Code required evidence not only that a non-consensual sexual act had taken place, but also that force had been used, or that there had been a threat of use of force. The Court examined criminal provisions concerning rape in other Member States of the Council of Europe, and the practice of the International Criminal Tribunal for the former Yugoslavia. It pointed out that

‘in international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The International Criminal Tribunal for the former Yugoslavia has found that, in international criminal law, any sexual penetration without the victim’s consent constitutes rape and that consent must be given voluntarily, as a result of the person’s free will, assessed in the context of the surrounding circumstances (...). While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.’<sup>35</sup> The Court found that

Bulgaria had violated its positive obligations under articles 3 and 8 of the European Convention (the prohibition of torture and inhuman and degrading treatment or punishment and the right to respect for private life, respectively). By ruling that the European Convention requires criminalization and effective prosecution of non-consensual sexual acts, the European Court was very detailed in elaborating the obligations of States, thus restricting their margin of appreciation. While this judgement concerned violence against women in the public sphere, it is equally relevant for the private sphere for offences such as marital rape.

The case of *Siliadin v. France* dealt with another form of violence against women: the exploitation of domestic workers. Article 4 of the European Convention prohibits, *inter alia*, forced and compulsory labour, slavery and servitude. Ms Siliadin was a minor Togolese girl who had been forced to work as a housemaid. She received no salary and had to work for seven days a week. She was a minor girl, working against her will, residing illegally in France, without identity papers, fearing for arrest and deportation. The Court found that she was subjected to forced labour, and had been held in servitude, which means 'an obligation to provide one's services that is imposed by the use of coercion.'<sup>36</sup> The Court found that she had not been held in slavery. While noting that Ms Siliadin had clearly been 'deprived of her personal autonomy, the evidence does not suggest that she' was

held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object".<sup>37</sup> The French Criminal Code did not specifically criminalize slavery and servitude, but concerned more generally exploitation through labour and subjection to working and living conditions that are incompatible with human dignity. As a consequence, Ms Siliadin, who was 'subjected to treatment contrary to Article 4 and held in servitude, was not able to see those responsible for the wrongdoing convicted under the criminal law.'<sup>38</sup> It concluded that the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim and that France had violated its positive obligations under Article 4 of the European Convention.<sup>39</sup>

The European Court of Human Rights, while not labelling these violations as forms of violence against women, thus concretized which measures states must take to provide legal protection against these human rights violations. There have been other cases before the Court in which the legal framework as such did not constitute the problem, but rather the failure by authorities to put an end to a violation. These cases concerned another form of domestic violence, namely serious cases of child abuse, which may nevertheless have relevance for domestic violence against women as it shows the steps which the Court took in determining whether the State had taken adequate

measures in a concrete case. The cases concerned situations in which the authorities were aware of child neglect and abuse. It is standing jurisprudence of the Court that the European Convention obliges 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.'<sup>40</sup> Measures should provide 'effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.'<sup>41</sup>

The Court first examines whether the neglect and/or abuse suffered by children reaches the threshold of inhuman and degrading treatment. In the case of *Z et al. v. the United Kingdom* it established that this was the case, and that local authorities were aware of this treatment and were under a statutory duty to protect the children. They had a range of powers available to them, including the removal of the children from their home. However, the children were only taken into emergency care four and a half years later, at the insistence of the mother. While acknowledging the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life, the Court concluded that the system had failed to protect the children from serious, long-term neglect and abuse and found a violation of Article 3 of the Convention.<sup>42</sup>

The Court did not further explain how it had weighed the two rights involved: the right to respect for family life and the right to be protected against ill-treatment. In another case involving serious child abuse, the Court added that it was not required to be shown that intervention by authorities could actually have prevented the ill-treatment. It stated that 'a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.' In the present case, the Court concluded that 'the pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in this case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered.' It therefore found that Article 3 had been violated.<sup>43</sup> Clearly, abuse by intimate partners falls within the scope of Article 3 of the European Convention. States have an obligation to take 'reasonable steps' to prevent ill-treatment of which they have or ought to have knowledge. Examples of reasonable steps to prevent (continuation of) ill-treatment include protective measures such as shelters for victims and restraining.

In the case of *Maria da Penha v. Brazil*, the Inter-American Commission of Human Rights examined a case of serious wife battering, and found violations of a number of human rights.

A particularly noteworthy aspect of this case is that the Commission pointed out that this case was not an isolated one, but constituted part of a pattern of domestic violence. According to the Commission: 'the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.'<sup>44</sup> While recognizing a number of positive developments, the Commission found that 'ineffective judicial action, impunity, and the inability of victims to obtain compensation provide an example of the lack of commitment to take appropriate action to address domestic violence.'<sup>45</sup> The Commission concluded not only that in this individual case there were shortcomings, but also that the system as a whole was inadequate. It must be noted that in August 2006 Brazil adopted a domestic violence act to prevent and combat domestic violence, that has become known as the 'Maria da Penha Act.'<sup>46</sup>

In a domestic violence case the Committee on the Elimination of Discrimination Against Women concluded that Hungarian law did not

provide adequate protection to a woman, among others because it was not possible to impose a restraining order on her violent ex-partner. The Hungarian court found that it was not possible to deny this perpetrator of domestic violence access to his house, because his right to property could not be restricted. The woman concerned could not find shelter, because one of her children was seriously disabled, and no shelter could accommodate her and her children. As a consequence, the abuse continued. The case pended before court for years and did not result in a conviction to a prison sentence, but merely to a fine. The Committee considered that 'legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.' According to the Committee, 'women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.'<sup>47</sup> The Committee found violation of various provisions of the Women's Convention, among which of the duty to have in place adequate legislation protecting the right to security, to eliminate stereotypes and to guarantee equality in the family.<sup>48</sup>

In considering whether all appropriate measures have been taken, it is thus necessary to take into account general legislative and policy measures, as well as the response in concrete cases. A legislative framework, law enforcement officials and a judiciary that are capable

of responding adequately and in a gender sensitive way to reported cases of violence against women, are the necessary ingredients to strive for the elimination of violence against women. The development of an infrastructure is no more than the beginning of the work. The prevalence of violence against women can only be reduced significantly if the position of women in society is changed.

### **Final remarks**

Violence against women is currently generally considered as a violation of women's human rights; it infringes on fundamental rights such as the right to life, the right to be free from torture, the right to health and the right to an effective remedy. In the light of the seriousness and widespread occurrence it can be considered as a gross and serious violation of human rights, which deserves attention. The problem is prevalent worldwide, not only in developing countries, and not only in lower social classes. An effective policy on violence against women must be based on the existing human rights framework. Monitoring bodies, at the level of the United Nations as well as at the regional level, have begun to apply a gender perspective in their work. It is definitely a good start, which deserves to be intensified. At the same time, experts focussing specifically on women's issues, such as the UN Special Rapporteur on Violence Against Women and non-governmental organizations could make better use of existing human

rights standards. Reference to these norms underscores that violence against women is a human rights violation. This two-tier policy- more attention for women's concerns by 'mainstream' organs and more attention for human rights by women's rights experts- could contribute to a further integration of women's rights and human rights. The term 'women's human rights' should not remain merely a term. A coherent interpretation of internationally protected human rights enhances the credibility and effectiveness of monitoring bodies. The various experts strengthens each others' work if they deal with states in a concerted manner, which contributes to the promotion and protection of human rights.

The application of a human rights approach implies that procedural and substantive human rights norms and the interpretation thereof by the monitoring bodies is adhered to. The rights as they are guaranteed in international instruments encompass all elements of the right to be free from violence and the corresponding obligations of states can be derived from these rights. These obligations follow immediately from the human rights norms; dealing with these obligations in terms of the obligation to act with due diligence may be confusing. Judging state responsibility on the basis of the due diligence standard should be reserved for the acts of non-state actors, such as private persons. The violation of an international norm leads to state accountability at the international level, this could be a violation

of the State's direct responsibility for acts or omissions of its own agents or a failure to act with due diligence when violence has been committed by a private actor. One of the advantages of a human rights approach is that it provides for tools to examine state policy in its entirety; it allows for reviewing whether the system complies with all obligations under international human rights instruments. International monitoring bodies can examine in concrete cases whether the appropriate measures have been taken to prevent violence against women, and whether authorities have responded adequately in cases where violence has occurred. □

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