Women's Rights Are Human Rights:
The Practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights

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Women's Rights Are Human Rights: The Practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights

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To my parents

The turtle makes progress only
when he sticks his neck out.

– Anonymous

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LIST OF ABBREVIATIONS

CEDAW-Convention	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CHR	United Nations Commission on Human Rights
COs	Concluding observations
CSW	United Nations Commission on the Status of Women
DAW	United Nations Division for the Advancement of Women
DRC	Democratic Republic of Congo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
FGM	Female Genital Mutilation
GA	General Assembly
GCs	General Comments
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organisation
OHCHR	Office of the High Commissioner for Human Rights
SC	United Nations Security Council
SR	Summary records
STDs	Sexually Transmitted Diseases
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
WHO	World Health Organisation

CHAPTER 1
INTRODUCTION

1 INTRODUCTION

'Women's rights are human rights' was the famous slogan used by the women's rights movement at the 1993 World Conference on Human Rights in Vienna.[1] The aim was to draw attention to the lack of attention paid by the international human rights system to human rights of women. The women's caucus was successful. The Vienna Declaration and Programme of Action, the outcome document of the World Conference on Human Rights, stresses that human rights of women are an inalienable, integral and indivisible part of universal human rights and to that end they should form an integral part of the United Nations (UN) human rights activities.[2] In its Programme of Action, the World Conference on Human Rights calls upon the human rights monitoring bodies to include the status and human rights of women in their deliberations and findings.[3]

Many years have passed since this landmark event.[4] High time to check the results achieved since 1993: have human rights of women actually become an integral part of *mainstream* international human rights activities? This study examines whether the

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1 See for example Boyle, K., 'Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993', *Political Studies*, vol. 43, 1995, no. 4, p. 91.

2 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part I, para. 18.

3 Ibidem, part II, para. 42.

4 The Vienna Declaration and Programme of Action was adopted by consensus by the World Conference on Human Rights on 25 June 1993. Many authors refer to the Vienna Declaration and Programme of Action as a landmark in terms of public recognition for the lack of attention for human rights of women by the mainstream UN human rights system. See for example Mertus, J. and P. Goldberg, 'A Perspective on Women and International Human Rights after the Vienna Declaration: The Inside/Outside Construct', *New York University Journal of International Law and Politics*, vol. 26, 1994, no. 2, p. 202; Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2, p. 284; Ertürk, Y., 'Turkey's Modern Paradoxes – Identity Politics, Women's Agency, and Universal Rights', *Global Feminism : Transnational Women's Activism, Organizing, and Human Rights*, Ferree, M., and A. Tripp (eds), New York University Press, New York, 2006, p. 81; Sullivan, D., 'Women's Human Rights and the 1993 World Conference on Human Rights', *The American Journal of International Law*, vol. 88, 1994, no. 1, p. 152; O'Hare, U., 'Realizing Human Rights For Women', *Human Rights Quarterly*, vol. 21, 1999, no. 2, p. 364; Stamatopoulou, E., 'Women's Rights and the United Nations', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 1995, p. 36; Former High Commissioner for Human Rights Jose Ayala-Lasso, *Statement at the Plenary of the Fourth World Conference on Women*, Beijing, 1995, http://www.un.org/esa/gopher-data/conf/fwcw/conf/una/950906124120.txt, accessed on 9 June 2009.

work of two human rights monitoring bodies, the UN Human Rights Committee (HRC) and the UN Committee on Economic, Social and Cultural Rights (CESCR), reflects compliance with the request of the 1993 World Conference to include the status and human rights of women in their deliberations and findings. The focus of this study is on matters that affect women's physical integrity.

This chapter starts with providing a background to this study. It gives insight into the reasons for the women's rights movement to choose the UN human rights system as their centre of attention and explains why the 171 states represented at the World Conference acknowledged the claims made by the women's caucus. Subsequently, in section 3, the research question is presented and the content and scope of the study are explained. Section 4 describes the practical relevance of this study and section 5, finally, presents the outline of this book.

2 'WOMEN'S RIGHTS ARE HUMAN RIGHTS' IN CONTEXT

2.1 The UN human rights system and women's rights

'All human beings are born free and equal in dignity and rights.'[5]

The Charter of the UN, which was adopted in 1945 by 51 states, provides the foundation of the international human rights system as we know it today.[6] The Charter and the Universal Declaration of Human Rights (UDHR) that was subsequently drawn up both recognise that *all* human beings have human rights for the simple reason of being human. The Charter forbids discrimination on the basis of race, sex, language, or religion.[7] Likewise, the UDHR lays down that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, including according to sex.[8] The Declaration speaks purposefully of *all human beings*, when it holds in Article 1 that all human beings are born free and equal in dignity and rights. The reference to *all men* in the original draft of the document was heavily contested during the negotiations. All parties involved in the drafting process agreed that women were just as much entitled to the rights laid down in the Declaration as men, and as some members of the drafting committee argued, the terminology of *all men* could be misleading. Mr. Koretsky, the Russian delegate, for example, held that the assumption that *all men* included *all persons* implied a historical reflection on the mastery of men over women. He wanted the wording to be changed so as to make clear that all human

5 Universal Declaration of Human Rights (UDHR), adopted by General Assembly (GA) resolution 217 A (III) of 10 December 1948, art. 1.

6 The Charter of the United Nations (UN) was signed on 26 June 1945, in San Francisco, at the conclusion of the UN Conference on International Organization, and came into force on 24 October 1945.

7 UN Charter, art. 1, para. 3.

8 UDHR, art. 2.

beings were included.[9] Agreement was ultimately found amongst the members on reference to *all human beings*.[10]

The notion that men and women should be able to enjoy their human rights on an equal basis is part of all the main international human rights instruments. Not only the documents that compose the so-called Bill of Human Rights: the UDHR and the two Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) refer explicitly to the principles of non-discrimination and equality, but also the more specialised human rights treaties hold that states parties shall respect and ensure the rights as laid down therein without distinction of any kind.[11] These documents thus grant human rights to women on an equal basis with men.

However, in addition to this *symmetrical* approach to equality, the UN human rights system also includes an instrument that focuses solely on the enjoyment of human rights by women: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention).[12] The CEDAW Convention focuses on the elimination of all forms of discrimination *against women*. Article 1 of the Convention lays down that discrimination is 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. In its substantive articles, the CEDAW Convention addresses various issues that are characteristic of the

9 Morsink, J., 'Women's Rights in the Universal Declaration', *Human Rights Quarterly*, vol. 13, no. 2, 1991, p. 233.

10 Ibidem, pp. 233-236.

11 See art. 2, para. 1 and art. 3 International Covenant on Civil and Political Rights (ICCPR); and art. 2, para. 2 and art. 3 International Covenant on Economic, Social and Cultural Rights (ICESCR). See with regard to the specialised treaties for example art. 2, para. 1 of the International Convention on the Rights of the Child; and art. 1, para. 1 of the International Convention on the Rights of All Migrant Workers and Members of Their Families. See on the matter also Pentikäinen, M., *The applicability of the human rights model to address concerns and the status of women*, The Erik Castrén Institute of International Law and Human Rights Research Reports, Publications of the Faculty of Law University of Helsinki, Helsinki, 1999, p. 17.

12 Adopted on 18 December 1979, entered into force on 3 September 1981; see GA Resolution 34/180, UN doc. A/34/46. Holtmaat notes that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) is asymmetrical in its object and purpose, as it is directed at the elimination of all forms of discrimination against women and not, as is standard in other texts, the elimination of discrimination on ground of sex. As she observes, the latter all guarantee the right not to be discriminated on the basis of the mere fact that one is a man or a woman. This means, she holds, that these norms are symmetrical and formal by nature. Holtmaat, R., *Toward Different Law and Public Policy – The Significance of Article 5 (a) CEDAW for the Elimination of Structural Gender Discrimination*, Dutch Ministry of Social Affairs and Employment, 2004, p. 7. See also Loenen, T., 'Rethinking Sex Equality as a Human Right', *Netherlands Quarterly of Human Rights*, vol. 12, 1994, no. 3, p. 268-270.

lives of women and their enjoyment of human rights. Article 12(2) of the Convention, for example, lays down that:

> ' […] States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.'

Consequently, the UN human rights system aims to promote and protect the enjoyment of human rights by women in two ways: through the principles of non-discrimination and equality in its mainstream human rights treaties and through these principles in a women-specific human rights treaty.[13]

2.2 Other UN instruments on women's rights

In 1946, the Economic and Social Council of the UN (ECOSOC)[14] established a specialised body to deal with 'women's rights': the Commission on the Status of Women (CSW). Originally, the CSW functioned as a sub-commission of the former Commission on Human Rights (CHR).[15] This institutional structure, Parisi notes, 'was the result of a compromise between those feminists who pushed for full incorporation into the existing human rights framework and those who thought that the establishment of a separate body would be the best way to ensure attention to women's rights issues'.[16] Later that same year, however, the CSW received the status of full-fledged Commission so as to become an equal counterpart to the CHR. Amongst those that were against this shift in institutional structure was Eleanor Roosevelt, who at that time was chairperson of the CHR. Roosevelt and other opponents felt that the singling out of a group for *special* rights could lead to stigmatisation, backlash and marginalisation. For them, the preferable alternative was to seek inclusion in the primary UN human rights body rather than trying to establish 'separate but equal' human rights institutional mechanisms for women and men.[17] But proponents of the shift considered this promotion in status to be of crucial importance.

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13 *Mainstream* refers in this context to those human rights treaties that do not focus specifically on the enjoyment of human rights *by women*.

14 The Economic and Social Council (ECOSOC) is an authoritative body in the UN system that serves as the central forum for discussing international economic and social issues. The ECOSOC formulates policy recommendations addressed to member states and the UN system. See http://www.un.org/ecosoc/about/, accessed on 12 May 2009.

15 Following the 2005 report 'In Larger Freedom', by former UN Secretary General Kofi Annan, the UN Commission on Human Rights (CHR) was replaced by the Human Rights Council. See UN doc. A/59/2005, paras. 181-183; and UN doc. A/RES/60/251 of 2006, which establishes the Human Rights Council.

16 Parisi, L., 'Feminist Praxis and Women's Human Rights', *Journal of Human Rights*, vol. 1, 2002, no. 4, p. 572.

17 Ibidem, no. 4, pp. 572-573.

It was Bodil Begtrup, the first Chairperson of the sub-commission that requested the ECOSOC in May 1946 to provide the CSW with full commission status. She noted that:

> 'Women's problems have now for the first time in history to be studied internationally as such and to be given the social importance they ought to have. And it would be, in the opinion of this Sub-Commission of experts in this field, a tragedy to spoil this unique opportunity by confusing the wish and the facts. Some situations can be changed by laws, education, and public opinion, and the time seems to have come for happy changes in conditions of women all over the world (…)'.[18]

In June 1946, the sub-commission formally became the CSW, a body functioning directly under the ECOSOC. Its original tasks were to prepare recommendations and reports to the ECOSOC on the promotion of women's rights in political, economic, social, and educational fields and to make recommendations to the Council on urgent problems that required immediate attention, but its mandate expanded over the years.[19] At present the work of the CSW focuses on the implementation of the Platform for Action adopted at the Beijing Conference on Women in 1995 and the outcome of the twenty-third special session of the General Assembly (GA) held in this respect.[20]

In its first years after coming into being, the CSW played an important role in the drafting process of the UDHR. It revised draft articles that were sent to it for comments and gender-sensitive language, and would argue against references to *men* as a synonym for humanity and phrases like *men are brothers.*[21] In the years to follow, the CSW was involved in promoting women's rights and equality by setting standards and formulating international conventions, and it conducted research to assess the status of women worldwide. In 1963, the UN General Assembly requested the Commission to draft a declaration on the elimination of discrimination against women, which

18 UN Division for the Advancement of Women (DAW), *Short History of the Commission on the Status of Women*, http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf, pp. 1-2, accessed on 12 May 2009.

19 See for example ECOSOC resolution 11 (II), UN doc. E/RES/11 (II), para. 1 and ECOSOC resolution 1987/22, UN doc. E/RES/1987/22, para. 1. See also a short history on the CSW on http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf, accessed on 12 May 2009.

20 DAW, Commission on the Status of Women, http://www.un.org/womenwatch/daw/csw/, accessed on 12 May 2009.

21 Morsink argues that the lack of sexism in the Universal Declaration is primarily due to the aggressive lobbying of Begtrup and the steady pressure of the Soviet delegation. Morsink, J., 'Women's Rights in the Universal Declaration', *Human Rights Quarterly*, vol. 13, 1991, no. 2, p. 231. For a short history on the CSW see also DAW, http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf, accessed on 12 May 2009. Gender refers here to the social construction of differences of men and women and ideas of masculinity and femininity: 'the excess cultural baggage associated with biological sex'. See Charlesworth, H., 'Feminist Methods in International Law', *The American Journal of International Law*, vol. 93, 1999, no. 2, p. 379.

ultimately culminated in the CEDAW Convention, the text of which was prepared by working groups within the Commission.[22]

In addition to the work of the CSW, women's rights are also promoted in specialised treaties, developed under the auspices of the UN, as well as under its predecessor, the League of Nations. These treaties deal with issues of specific concern to women, but are generally not considered to be part of the institutional structure of the UN human rights system.[23] Treaties like the International Convention for the Suppression of the Traffic in Women of Full Age,[24] the International Convention for the Suppression of the Traffic in Women and Children,[25] the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,[26] the Convention on the Nationality of Married Women[27] and the Convention on the Political Rights of Women focus on a variety of issues that are of particular importance to women, but they do not necessarily lay down any human rights norms.[28] Also, the implementation of these treaties is not subjected to periodic monitoring by committees of experts; a feature characteristic of what the Office of the High Commissioner for Human Rights (OHCHR) refers to as *core human rights treaties*.[29]

22 Declaration on the Elimination of Discrimination against Women, UN GA resolution 2263 (XXII), UN doc. A/RES/48/104. For a more elaborate overview of the work of the CSW see also a short history on the CSW on http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf, accessed on 12 May 2009.

23 The Office of the UN High Commissioner for Human Rights (OHCHR) refers to the following international human rights treaties as the core international human rights instruments: the ICCPR; the ICESCR; the International Convention on the Elimination of All Forms of Racial Discrimination; the CEDAW Convention; the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection of All Persons from Enforced Disappearances (not yet entered into force at time of writing); and the Convention on the Rights of Persons with Disabilities. See OHCHR, http://www2.ohchr.org/english/law/index.htm#instruments, accessed on 12 May 2009. See also OHCHR, Fact Sheet 30: *The United Nations Human Rights Treaty System – An Introduction to the Core Human Rights Treaties and Treaty Bodies*, http://www.ohchr.org/Documents/ Publications/ FactSheet30en.pdf, accessed on 12 May 2009.

24 Signed at Geneva, October 11th, 1933.

25 Opened for signature at Geneva from September 30, 1921 to March 31, 1922.

26 Opened for signature at New York on 10 December 1962, the Convention, in accordance with its Article 6, para. 1, came into force on 9 December 1964.

27 Done at New York on 20 February 1957. In accordance with Article 6, the Convention came into force on 11 August 1958.

28 Opened for signature at New York on 31 March 1953. In accordance with Article VI, the Convention came into force on 7 July 1954.

29 See OHCHR, http://www2.ohchr.org/english/law/index.htm#instruments, accessed on 12 May 2009.

2.3 Criticism on the UN human rights system

The discussion on the position of the CSW in the institutional structure of the UN in 1946, as mentioned previously, exemplifies the different ideas that exist amongst those committed to women's rights regarding how to address discrimination of women. Parisi refers in this respect to the *competing feminist agendas* of *non-discrimination* and *special protections* which, she holds, had long-lasting effects in the women's human rights movement.[30] In the eighteenth century, it was Olympe de Gouges who already referred to the paradox of feminism: the dilemma whether women's rights are best protected through general norms or through special norms applicable only to women.[31] As Roosevelt pointed out in the discussion on the status of the CSW, specialisation of certain issues or rights may lead to marginalisation and stigmatisation of women. But proponents of the *special protection approach* on the other hand argue that the risk of addressing women's rights only in a mainstream human rights framework may result in these matters being completely ignored or overlooked.[32]

The criticism voiced on the UN system rings back to both of these feminist agendas. Critics of this international system argue that the specific mechanisms that were established to deal exclusively with the enjoyment of human rights of women has led to the marginalisation of women's rights.[33] Charlesworth observes that the price

30 For example, Parisi holds that because there are a multitude of feminist perspectives (liberal, Marxist, radical, postcolonial, postmodern, etc.), this results in a variety of activist strategies with regard to women's human rights. She observes that the central liberal feminist tenet that spilled over to the post-Second World War period is that men and women are the same in rational ability and capacity for autonomy and self-determination and therefore should be afforded full citizenship and its attendant rights, protections and opportunities. Yet, there were others who argued that women should be conceptualized as a group marked by sexual difference and that special protection was needed to 'level the playing field'; only in that way could women advance in individual self-determination and self-governance. Parisi, L., 'Feminist Praxis and Women's Human Rights', *Journal of Human Rights*, vol. 1, 2002, no. 4, pp. 1-2.

31 Charlesworth, H., 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', *Harvard Human Rights Journal*, vol. 18, 2005, no.1, p. 1. In 'Gender and Nation', Sinha observes that Olympe de Gouges in her 'Declaration of the Rights of Women', of 1791, sought to transcend the construction of sexual difference by claiming equality for men and women. She notes that herein lays the paradox of feminism: even as it challenged the construction of sexual difference on the basis of which women were excluded from political rights, it could not help calling attention to these differences and securing sexual difference in the process. Sinha, M., 'Gender and Nation', *Women's History in Global Perspective*, vol. 1, Smith, B. (ed.), The American Historical Association, 2004, p. 262.

32 See for example Charlesworth, H., 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', *Harvard Human Rights Journal*, vol. 18, 2005, no. 1, p. 1; and Reanda, L., 'Human Rights and Women's Rights: The United Nations Approach', *Human Rights Quarterly*, vol. 3, 1981, no. 2, p. 12.

33 See for example Byrnes, A., 'Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?: Some Current Issues', *Australian Yearbook of International Law*, vol. 12, 1992, pp. 205-206; Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2, p. 285; Johnstone, R., 'Feminist Influences on the United Nations

of creating separate institutional mechanisms for women has been the building of a *women's ghetto* with less power, resources, and priority than the mainstream human rights bodies.[34] This is exemplified by the fact that unlike the other human rights monitoring bodies, which meet in Geneva and are serviced by the former Centre for Human Rights (now OHCHR), the CEDAW Committee, the body that monitors the implementation of the CEDAW Convention, was placed in New York and serviced by the UN Division for the Advancement of Women (DAW).[35] Although the adoption of the CEDAW Convention meant that women's rights were expressly placed in the ambit of international human rights, critics argued that the rights of women were still ignored by the mainstream human rights mechanisms. The claim is that the monitoring bodies of the other human rights treaties do not address blatant violations of women's dignity as gross violations of human rights and leave these issues up to the specialised CEDAW Committee to deal with and that the adoption of the CEDAW Convention has therefore led to the marginalisation of human rights of women.[36] As Charlesworth notes, the existence of special women's institutions such as the CEDAW Convention and the CSW have allowed comparable but male-dominated forums such as the former CHR and the HRC to claim a general mandate that carried greater prestige and power. The effect of this is that women's interests are ghettoised: the creation of *women's institutions* means that mainstream human rights bodies and institutions tend to downplay the application of human rights norms to women on the implicit assumption that women's rights are beyond their concern.[37]

Human Rights Treaty Bodies', *Human Rights Quarterly*, vol. 28, 2006, no. 1, p. 151; Charlesworth, H. and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, 2000, p. 218; Charlesworth, H., 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', *Harvard Human Rights Journal*, vol. 18, 2005, no. 1, p. 1; Reanda, L., 'Human Rights and Women's Rights: The United Nations Approach', *Human Rights Quarterly*, vol. 3, 1981, no. 2, p. 12; Charlesworth, H., 'Transforming the United Men's Club: Feminist Futures for the United Nations', *Transnational Law and Contemporary Problems*, vol. 4, 1994, no. 2, pp. 445-446.

34 Charlesworth, H., 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', *Harvard Human Rights Journal*, vol. 18, 2005, no. 1, p. 1.

35 Since January 2008 the CEDAW Committee is serviced by the OHCHR and meets both in Geneva and New York. See UN doc. A/RES/62/218.

36 Byrnes, A., 'Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?: Some Current Issues', *Australian Yearbook of International Law*, vol. 12, 1992, pp. 205-206; Reanda moreover, speaks of a *ghettoisation* of questions relating to women; the concerns of women will be relegated to mechanisms with generally less resources and power than the mainstream human rights mechanisms. Reanda, L., 'Human rights and women rights: the United Nations approach', *Human Rights Quarterly*, vol. 3, 1981, no. 2, p. 12.

37 Charlesworth, H., 'Transforming the United Nations Men's Club: Feminist Futures for the United Nations', *Transnational Law and Contemporary Problems*, vol. 4, 1994, no. 2, p. 446. See also O'Hare, U., 'Realizing Human Rights for Women', *Human Rights Quarterly*, vol. 21, 1999, no. 2, pp. 367-368; Charlesworth, H., 'What are "Women's International Human Rights"?', Cook, J. (ed), *Human Rights of Women – National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, p. 59.

As is clear from the above, the criticism is that the mainstream human rights instruments do not pay attention to women's rights, or to phrase it differently, to situations that affect the enjoyment of human rights by women. Apparently, the insertion of the principles of non-discrimination and equality into the mainstream international human rights instruments does not necessarily guarantee that human rights of both men *and* women are promoted and protected by the system. Although the provisions of the treaties are framed as available to women and men on the basis of equality, it is successfully argued that they benefit women less than men.[38] The argument put forward is that although the system supposedly recognises human rights of both men and women, in fact it only addresses the rights of the former. In reality human rights are men's rights: the *male* experience is accepted as the norm, or, as Parisi notes, as the *human* experience.[39] Criticism on the UN human rights system holds that abuses, exclusions and constraints that are more typical of women's lives are neither recognised nor protected by mainstream human rights instruments.[40]

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38 Connors, J., *General Human Rights Instruments and their Relevance to Women, Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation – Papers and Statements from the Asia/South Pacific Regional Judicial Colloquium*, Hong Kong, 20-22 May 1996, p. 27.

39 Parisi, L., 'Feminist Praxis and Women's Human Rights', *Journal of Human Rights*, vol. 1, 2002, no. 4, p. 7; See for example also Peterson, S., and L. Parisi, 'Are Women Human? It's not an Academic Question', *Human Rights Fifty Years on: A Reappraisal*, Evans, T. (ed), Manchester University Press, Manchester, 1998, p. 141; Loenen, T., 'Rethinking Sex Equality as a Human Right', *Netherlands Quarterly of Human Rights*, vol. 12, 1994, no. 3, pp. 255-257; and Goldschmidt, J., 'We Need Different Stories – Een ander verhaal in het recht', Tjeenk Willink, Zwolle, 1993, pp. 13-17.

40 See for example Cook, R. (ed), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, pp. 3-4; Charlesworth, H., 'What Are Women's International Human Rights?', Cook, J. (ed), *Human Rights of Women – National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, pp. 59-60; Peterson, V.S., and L. Parisi, 'Are Women Human? It's not an Academic Question', *Human Rights Fifty Years on: A Reappraisal*, T. Evans (ed), Manchester University Press, Manchester, 1998, p. 6; Cook, R., 'Women's International Human Rights Law: The Way Forward', *Human Rights Quarterly*, vol. 15, 1993, no. 2, p. 231; Bunch, C., 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', *Human Rights Quarterly*, vol. 12, 1990, no. 4, p. 487; Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2, p. 283; O'Hare, U., 'Realizing Human Rights for Women', *Human Rights Quarterly*, vol. 21, 1999, no. 2, p. 364; Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, pp. 34-35; Bunch, C., 'Transforming Human Rights from a Feminist Perspective', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J. and A. Wolper (eds), Routledge, London, 1995, p. 11; Sullivan, D., 'The Public/Private Distinction in International Human Rights Law', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J. and A. Wolper (eds), Routledge, London, 2005, p. 126; Charlesworth, H., C. Chinkin, S. Wright, 'Feminist Approaches to International Law', *The American Journal of International Law*, vol. 85, 1991, no. 4, p. 625; Charlesworth, H., 'Human Rights as Men's Rights', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J. and A. Wolper (eds), Routledge, London, 2005, p. 111; Binion, G., 'Human Rights: A Feminist Perspective', *Human Rights Quarterly*, vol. 17, 1995, no. 3, p. 513 and p. 515.

Critics thus argue that behind the myth of universality of norms lies a system that maintains the values and perspectives of only a small group, namely that of benchmark men.[41] The international human rights order seems to proclaim a universal truth that stands above the social and political context in which it is created and functions, a notion that is seriously contested in academic writings.[42] It should be kept in mind that when the UDHR was adopted, only thirty of the original fifty-one member states had given women equal voting rights or permitted them to hold public office.[43] In the period shortly after the Second World War, the most important tenet for women's rights proponents was that men and women are the same in rational ability and capacity for autonomy and self-determination. Their main goal was to achieve equal status in law, and hence for women to be accorded the same rights as men. Their position was therefore focused on the concept of *sameness*, rather than on *difference*.[44] But men and women do not live similar lives. From the moment of birth, human beings are differentiated according to sex, being either a boy or a girl. Sex is the first factor that defines a human being in society, and as such, a human being is placed in a maze of expectations, customs, practices and constraints that determine his/her life. Since the biological and gender-related aspects of men and women differ, so do their lives and their experiences. Although no such thing as *the woman experience* or *the man experience* exists, and although social constructions of man and woman, and of masculinity and femininity, differ across places, cultures, and time, it is possible to draw parallels between the lives of women and the lives of men. The general picture of gender relations throughout the world portrays an asymmetry of power between men and women.[45] This asymmetry translates itself into certain issues which are characteristic of the lives of men, and those which are characteristic of the lives of women.

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41 See for example Spike Peterson, V., and L. Parisi, 'Are Women Human? It's not an Academic Question', *Human Rights Fifty Years on: A Reappraisal*, T. Evans (ed), Manchester University Press, Manchester, 1998, p. 132; Eisler, R., 'Human Rights: Toward an Integrated Theory for Action', *Human Rights Quarterly*, vol. 9, 1987, no. 3, p. 297; Johnstone, R., 'Feminist Influences on the United Nations Human Rights Treaty Bodies', *Human Rights Quarterly*, vol. 28, 2006, no. 1, pp. 149-150.

42 See for example Lacey, N., *Unspeakable Subjects – Feminist Essays in Legal and Social Theory*, Hart Publishing Oxford, 1998, pp. 188-189; McLaughlin, J., *Feminist Social and Political Theory – Contemporary Debates and Dialogues*, Palgrave Macmillan, London, 2003, p. 6; Parisi, L., 'Feminist Praxis and Women's Human Rights', *Journal of Human Rights*, vol. 1, 2002, no. 4, pp. 7-8.

43 DAW, *The Four Global Women's Conferences 1975-1995: Historical Perspective*, www.un.org/womenwatch/daw/followup/session/presskit/hist.htm, accessed on 12 May 2009.

44 Parisi, L., 'Feminist Praxis and Women's Human Rights', *Journal of Human Rights*, vol. 1, 2002, no. 4, p. 2.

45 See for example Bunch, C., ' Transforming Human Rights from a Feminist Perspective', *Women's Rights, Human Rights – International Feminist Perspectives*, Peter, J., and A. Wolper (eds), Routledge, London, 1995, p. 13; *The 1999 World Survey on the Role of Women in Development*, United Nations, New York, 1999, p. ix; and Marshall, J., 'Feminist Jurisprudence: Keeping the Subject Alive', *Feminist Legal Studies*, vol. 14, 2006, no. 1, p. 42.

The concept of *sameness*, as expressed in the international human rights treaties in their reference to non-discrimination and equality, entails that the mainstream UN human rights system does not take into account the different experiences of men and women and fails to tackle structures that perpetuate gender hierarchies. Bunch, amongst others, points out that degrading events commonly identified with the lives of men are addressed in the wording and interpretation of the provisions of the mainstream human rights instruments. Acts of torture and ill treatment, for example during incommunicado detention, and the use of excessive force by security forces are violations cited in both the wording and the interpretation of the two treaties, but experiences like rape and battering, events common to the lives of many women, are not covered by the protection of these provisions.[46]

Criticism was expressed at all major Conferences during the UN Decade for Women, from 1976 till 1985, and culminated at the 1993 Vienna World Conference on Human Rights. Here, 171 states adopted the Vienna Declaration and Programme of Action by consensus and in doing so acknowledged the criticism by the women's rights movement on the UN human rights system.

2.4 The 1993 World Conference on Human Rights

The first World Conference on the status of women was held in Mexico City and coincided with the 1975 International Women's Year. The second conference took place five years later in Copenhagen and was organised to review and appraise the World Plan of Action that had been adopted at the conference in 1975. Then, in 1985, the world conference to review and appraise the achievements of the 'United Nations Decade for Women: equality, development, and peace' was held in Nairobi. It was at these conferences that concerns were voiced about the effect of development aid policies regarding women.[47] Charlesworth notes that the prevailing approach to women and development aid was criticised at these forums for being inadequate, as it identified women as a special interest group within the development sphere needing particular accommodation. Strategies were proposed that encouraged the integration

46 Bunch, C., 'Transforming Human Rights from a Feminist Perspective', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J. and A. Wolper (eds), Routledge, London, 1995, p. 13. See for example also O'Hare, U., 'Realizing Human Rights for Women', *Human Rights Quarterly*, vol. 21, 1999, no. 2, pp. 368-371; Copelon, R., 'Intimate Terror: Understanding Domestic Violence as Torture', Cook, J. (ed), *Human Rights of Women – National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, pp. 116-117.

47 For a more elaborate summary of the activities of the women's rights movement at these Conferences see for example Friedman, E., 'Women's Human Rights: The Emergence of a Movement', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, New York, 1995, pp. 18-35; Zinsser, J., 'From Mexico to Copenhagen to Nairobi: The United Nations Decade for Women, 1975-1985', *Journal of World History*, vol. 13, 2002, no. 1, pp. 139-168; and Brink, M. van den, *Moeders in de Mainstream – Een Genderanalyse van het Werk van het VN-Kinderrechtencomité*, 2006, Wolf Legal Publishers, Nijmegen, pp. 20-32.

of women into the existing structures of development.[48] The Nairobi Conference recognised that women's equality was not an isolated issue and that a woman's perspective and involvement was required on all issues.

This tenet in *mainstreaming women* culminated at the World Conference on Human Rights held in Vienna in 1993. This Conference proved to be a landmark event in terms of public recognition of the lack of attention of the international human rights system for human rights of women. Although the focus of this World Conference was on human rights in general, especially on their universal character, and not on women's rights, a strong lobby managed to place the issue of women's human rights on the agenda of the Conference.[49] The working group on *integration of women's rights into the human rights agenda* made it unequivocally clear to the participating states at the world conference that much of what women experience as everyday abuse in their lives, in the family, in violation of their bodies, and in terms of economic and political deprivation was still largely kept outside the realm of the international human rights community. This while it was common knowledge that women were regularly subjected to battering and torture, humiliation, starvation, sexual harassment and exploitation, forced marriages and pregnancy, compulsory heterosexuality, mutilation and even murder because of being female.[50] As mentioned, the 171 states represented at the World Conference acknowledged this deficiency of the international system and stated in their final declaration and programme of action that the human rights of women and of the girl child were an inalienable, integral and indivisible part of universal human rights, and held that the human rights of women had to be integrated into the mainstream of United Nations system-wide activity and that these issues had to be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms.[51] Most importantly, the claims of the women's rights movement are reflected in a direct call made by the World Conference on Human Rights in the Vienna Declaration and Programme of Action to the monitoring bodies of the international human rights treaties: the Committees are requested to include the status and human rights of women in their deliberations and findings.[52] If executed properly, this request is an important step forward in the process of making women visible in the

48 Charlesworth, H., 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', *Harvard Human Rights Journal*, vol. 18, 2005, no. 1, p. 2.

49 See for example Friedman, E., 'Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s', *Women's Studies International Forum*, vol. 26, 2003, no. 4, pp. 313-314.

50 Bunch, C., 'Strengthening Human Rights of Women', Nowak, M. (ed), *World Conference on Human Rights – The Contribution of NGOs Reports and Documents*, Manzsche Verlags- und Universitatsbuchhandlung, Vienna 1994, p. 33. See also Boyle, K., 'Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993', *Political Studies*, vol. 43, 1995, no. 4, pp. 91-92.

51 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part I, para. 18, and part. II, para. 37. This call was a repetition of the statement made that same year by the CHR in its resolution 1993/46 of 1993, UN doc. E/CN.4/RES/1993/46.

52 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part. II, para. 42.

international human rights framework, promoting their enjoyment of human rights, tackling abuses that take place in the lives of women, and ultimately working towards gender equality.[53]

2.5 Follow-up to the World Conference on Human Rights

The achievement of the women's caucus in Vienna needed a follow-up. Women's interests had to be integrated throughout human rights theory and practice.[54] Since the World Conference of 1993, considerable work has been done to promote the integration of women's rights in the general human rights framework. The GA adopted in December 1993 the Declaration on the on the Elimination of Violence against Women, a document which recognises that violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.[55] Subsequently, in 1994, in follow up to the World Conference on Human Rights and the adoption of the UN Declaration on the Elimination of Violence against Women, the former CHR decided to appoint a Special Rapporteur on Violence against Women, including its causes and consequences.[56] Moreover, the GA, the CSW, the CHR and the Sub-Commission on the Promotion and Protection of Human Rights passed resolutions supporting and encouraging the integration of women into the general human rights work of the UN.[57]

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53 For example, Van den Brink observes that integrating human rights of women in the work of the mainstream UN human rights bodies is an important component of gender mainstreaming, the aim of which is to achieve gender equality. Brink, M. van den, *Moeders in de Mainstream – Een Genderanalyse van het Werk van het VN-Kinderrechtencomité*, 2006, Wolf Legal Publishers, Nijmegen, pp. 35-36, and p. 44. See for example also the report of the expert group meeting on the development of guidelines for the integration of a gender perspective into human rights activities and programmes, UN doc. E/CN.4/1996/105, para. 24.

54 See Bunch, C., 'The Global Campaign for Women's Human Rights: Where Next after Vienna?', *St. John's Law Review*, vol. 69, 1995, p. 177.

55 United Nations Declaration on the Elimination of Violence against Women, 1993, UN doc. A/RES/48/104. In 2005, the GA reiterated the importance of including human rights of women in the mainstream UN human rights activities in its resolution on the 2005 World Summit Outcome. 2005 World Summit Outcome, UN doc. A/RES/60/1, para. 128.

56 The UN Special Rapporteur on Violence against Women, its causes and consequences, is requested to seek and receive information on violence against women, its causes and consequences from governments, treaty bodies, specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organisations, including women's organizations, and to respond effectively to such information; to recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences; and to work closely with other special rapporteurs, special representatives, working groups and independent experts of the former CHR, and since March 2006 of the Human Rights Council, and with the treaty bodies. UN doc. E/CN.4/RES/1994/45, paras. 6 and 7.

57 See for example GA Res. 49/161, UN doc. A/RES/49/161; CSW Res. 37/4, UN doc. E/1993/27; CSW Res. 38/2, UN doc. E/1994/27; CSW Res. 39/5, UN doc. E/1995/26; CSW Res. 40/3, UN doc. E/1996/15; CHR Res. 1993/46, UN doc. E/CN.4/RES/1993/46; CHR Res. 1994/45, UN doc. E/CN.4/

As follow-up to the World Conference, the former UN Centre for Human Rights and the UN Development Fund for Women (UNIFEM) organised an expert group meeting on the development of guidelines for the interpretation of gender perspectives into human rights activities and programmes of the UN.[58] The purpose of the meeting was to assist the former Centre for Human Rights, the monitoring bodies, and other human rights entities concerned in developing an approach and methodology for drafting gender-sensitive guidelines and relevant material for the integration of the human rights of women into their activities and programmes. This meeting and its outcome gave a further impetus for the human rights monitoring bodies to include experiences of women in their interpretation of the provisions of the human rights treaties. The report of the experts stated for example that the Committees had to review the provisions in their respective treaties and the comments and general recommendations made under the various provisions in order to ensure that a gender perspective was integrated into the respective minimum obligations and standards.[59]

In their statements, the monitoring bodies show a willingness to integrate the experiences of women in their work. In response to the appeal of the 171 states at the World Conference in Vienna to include the status and human rights of women in their deliberations and findings, the human rights monitoring bodies have addressed the implementation of women's issues in the meetings of the chairpersons of the human rights bodies.[60] Moreover, the chairpersons of these Committees showed their commitment to integrating the experiences of women at their eighth meeting, by inviting the DAW to prepare a background paper analysing the measures that had been and should be taken by the bodies in order to integrate gender perspectives into their work,[61] and by participating in workshops on the integration of gender perspectives.[62] What is yet to be examined is whether the Committees have actually satisfied the request to include the status and human rights of women in their deliberations and findings in practice. Therefore, the question to be posed is whether the work of the monitoring

RES/1994/45; CHR Res. 1995/85, UN doc. E/CN.4/RES/1995/85; CHR Res. 1995/86, UN doc. E/CN.4/RES/1995/86; CHR Res. 1996/48, UN doc. E/CN.4/RES/1996/48.

58 The expert group meeting was held from 3 to 7 July 1995 at the UN office in Geneva, see UN doc. E/CN.4/1996/105.

59 Report of the expert group meeting on the development of guidelines for the integration of a gender perspective into human rights activities and programmes, UN doc. E/CN.4/1996/105, para. 45.

60 See for example Report of the fifth meeting of persons chairing the human rights treaty bodies, 1994, UN doc. A/49/537, para. 34; Report of the sixth meeting of persons chairing the human rights treaty bodies, 1995, UN doc. A/50/505, paras. 34 and 35; Report of the seventh meeting of persons chairing the human rights treaty bodies, 1996, UN doc. A/51/482, paras. 58-61; Report of the eighth meeting of persons chairing the human rights treaty bodies, 1997, UN doc. A/52/507, paras. 62-64.

61 See UN doc. A/52/507, para. 62. The GA, in resolution 52/118 of 1997, UN doc. A/52/644/Add.1; and the CHR, in resolution 1998/27, UN doc. E/CN.4/RES/1998/27 endorsed the request for the study.

62 For example the workshop convened by the OHCHR, the DAW, and the UN Development Fund for Women (UNIFEM), on gender integration into the human rights system, held in Geneva from 26-28 May 1999.

bodies reflects compliance with this request of the 1993 World Conference on Human Rights.

3 THE STUDY

3.1 The research question

More than fifteen years have passed since the request was made to the human rights treaty monitoring bodies to include the status and human rights of women. It is therefore high time to see whether the work of the Committees reflects compliance with this call of the 1993 World Conference on Human Rights. Although some articles have been published on the matter, no in-depth examination has yet been conducted of all the work of the monitoring bodies.[63]

This study therefore aims to answer the following question:

> Does the work of the HRC and the CESCR regarding matters that affect women's physical integrity reflect compliance with the request of the 1993 World Conference on Human Rights, which calls upon these Committees to include the status and human rights of women in their deliberations and findings?

The research question shows that this study is limited to the work of the HRC and the CESCR; hence it will not analyse the work of *all* human rights monitoring bodies. Moreover, this study does not look into the attention of the HRC and the CESCR for *all* possible issues that specifically affect women and not men: it only focuses on

63 See Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2. pp. 283-333; and Johnstone, R., 'Feminist Influences on the United Nations Human Rights Treaty Bodies', *Human Rights Quarterly*, vol. 28, 2006, no. 1, pp. 148-185. Gallagher observes in her article that 'the need for a more detailed evaluation of the work of each treaty body from a gender perspective should be acknowledged.' She states that the observations she makes in her article as well as the conclusions reached and the recommendations 'are intended to underline the necessity of such further study'. Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2., pp. 296-297. Of a different nature is the book by Pentikäinen. Pentikäinen uses the work of several authors as well as documents of international organisations like the International Labour Organisation (ILO) and the UN, to discuss whether the international systems, by which she means both the regional human rights instruments and those mechanisms established within the framework of the UN, are capable of addressing these concerns of women. Pentikäinen therefore does not analyse the work of these human rights bodies itself and does not examine whether they in effect address certain matters. Pentikäinen, M., *The Applicability of the Human Rights Model to Address Concerns and the Status of Women*, The Erik Castrén Institute of International Law and Human Rights Research Reports, 1/1999, Helsinki, 1999.

issues that affect women's physical integrity. These limitations are explained in the following paragraphs.

3.2 The research objects: the HRC and the CESCR

The Vienna Declaration and Programme of Action requests the human rights monitoring bodies to include the status and human rights of women in their deliberations and findings. In examining whether the work of these bodies reflects compliance with this call, it is important to make a distinction between human rights bodies that have a more general mandate and those whose mandate is more limited in scope. For whereas the bodies with a general range of rights at their disposal may be expected to address a wide range of women's interests, the specialised bodies will necessarily be limited by the scope of their mandate in tackling certain matters. Since the two Covenants cover a wide range of rights, the mandates of the two bodies that monitor the implementation of these Covenants, the HRC and the CESCR, are expected to offer more possibilities to address a variety of issues that affect women's enjoyment of human rights in their work than their specialised counterparts do.

The worldwide influence of the two Covenants on human rights as recognised by various sources is another reason to examine the work of the HRC and the CESCR.[64] For it is these Committees that interpret the provisions of the ICCPR and the ICESCR, respectively. The UDHR, the ICCPR and the ICESCR, together also often referred to as the International Bill of Human Rights, are said to stand out in significance, as they reflect the general range of human rights.[65] Although there are more multilateral human rights treaties, which are usually called *conventions*, there are only two *covenants*.[66] As noted, the conventions have a more limited or focused subject than the two

64 See for example Henkin, L., 'International Law: Politics, Values, and Functions', *Recueil des Cours – Collected Courses of The Hague Academy of International Law*, vol. 216, 1989, pp. 221-223; and OHCHR, *Fact Sheet 2, The International Bill of Human Rights*, http://www.unhchr.ch/html/menu6/2/fs2.htm, accessed on 13 May 2009. A matter that is not addressed in this study, but which is noteworthy also in light of critique from the women's rights movement on the international human rights system is the emphasis arguably placed on civil and political rights as opposed to economic, social, and cultural rights. Women's rights activists have pointed out the importance, especially of economic, social, and cultural rights for women's advancement. This emphasis is exemplified by the existence of two covenants and not one, which is remarkable considering the fact that the UDHR from which the Covenants stem, lays down both categories of rights. And more specifically, the fact that the ICCPR is monitored by a body called the HRC and not the 'Committee on Civil and Political Rights', arguably reflects this difference in (de facto) status. See for example Chinkin, C., and H. Charlesworth, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, Manchester, 2000, p. 237-240; and Hernández-Truyol, B., 'Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution', *Women and International Human Rights Law – Volume 1*, Askin, K., and D. Koenig (eds), Transnational Publishers, New York, 2001, p. 26-28.

65 Ibidem.

66 At present, in addition to the two Covenants, there are seven specialised conventions: the International Convention on the Elimination of All Forms of Racial Discrimination; the CEDAW Convention; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the

Covenants and often develop further the content of rights as laid down in the ICESCR and the ICCPR, or, in some cases, discuss issues that are not mentioned in the latter documents.[67] The influential status of the UDHR and the two Covenants is illustrated for example by the fact that judges of the International Court of Justice have invoked principles contained in these documents as a basis for their decisions.[68] The OHCHR, moreover, observes that in recent years national constitutional and legislative texts have increasingly provided measures of legal protection for those principles; that many national and local laws are clearly modelled on provisions set forth in the UDHR and the International Covenants; and that many important resolutions and decisions adopted by bodies of the UN, including by the General Assembly (GA) and the Security Council (SC), cite the UDHR and one or both of the Covenants as the basis for action.[69] Moreover, the Covenants have been ratified by a large number of states and for that reason they are generally believed to exercise profound influence on the thoughts and actions of individuals and their governments in all parts of the world.[70] Considering the importance of the ICCPR and the ICESCR in the international understanding of human rights, and in light of the criticism expressed by the women's rights movement, it is very important that the bodies that have the authority to interpret these treaties do so in a way that includes women in the realm of human rights. This therefore makes it worthwhile to examine the work of these two Committees, the HRC and the CESCR, on this aspect.

Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Convention on the Rights of Persons with Disabilities; and the Convention for the Protection of All Persons from Enforced Disappearance. At the time of writing, this last Convention has not yet entered into force. See OHCHR, Fact Sheet 30, *The United Nations Human Rights Treaty System – An introduction to the core human rights treaties and the treaty bodies*, http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf, accessed on 3 June 2009.

67 On the significance of the UDHR and the two Covenants see for example Henkin, L., 'International Law: Politics, Values, and Functions', *Recueil des Cours – Collected Courses of The Hague Academy of International Law* , vol. 216, 1989, pp. 221-223; on the worldwide influence of the International Bill of Human Rights see OHCHR, *Fact Sheet 2, The International Bill of Human Rights*, http://www.unhchr.ch/html/menu6/2/fs2.htm, accessed on 13 May 2009.

68 See for example the Advisory Opinion of the International Court of Justice (ICJ) on the Legality of Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 240, para. 25; its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, ICJ Reports 2004, p. 177, para. 103; and its Judgment in the case of Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports 2005, para. 217. See also Zyberi, G., *The Humanitarian Face of the International Court of Justice*, Intersentia, Antwerpen, 2008, pp. 209-229.

69 OHCHR, Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights, pp. 8-9, www.ohchr.org/english/about/publications/docs/fs2.htm#worldwide, accessed on 13 May 2009.

70 OHCHR, Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights, pp. 3-4 and pp 8-9, http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf, accessed on 13 May 2009.

3.3 The scope of the study: matters affecting women's physical integrity

First of all, in order to examine whether the work of the human rights bodies reflects compliance with the request made in the 1993 Vienna Declaration and Programme of Action, it is necessary to determine what the Committees are actually asked to do: what is meant by *including the status and human rights of women*?[71] From the background of the World Conference as presented previously in this chapter, it is clear that the request aims to address the lack of attention of the human rights monitoring bodies for human rights issues that are characteristic of the lives of women as compared to men.[72]

There are several reasons why this study concentrates on those situations and issues that affect women's physical integrity. The first reason is that the focus should be on matters to which both Committees, the HRC and the CESCR, can in theory, considering their mandate, pay attention. As the mandates of both monitoring bodies, the ICCPR and the ICESCR cover provisions related to the physical integrity of human beings, it is prima facie possible for them to address situations that affect this. In this regard one can think of the freedom from torture, cruel, inhuman, or degrading treatment, and the right to privacy as laid down in the ICCPR, or the right to health as codified in the ICESCR.

In addition to this, the World Conference on Human Rights of 1993 explicitly refers in its Declaration and Programme of Action to situations that affect women's physical integrity. The document refers, for example, to gender-based violence and all

71 The results of the preliminary research that was conducted in order to answer this question are presented in Chapter 2.

72 In Chapter 2, which explains the content of this request on the basis of preliminary research, it is explained that both UN documents and related literature make it clear that it is not a number of specific rights as such that need to be included in the work of these bodies, but first and foremost it is the matters that mainly women face, which often stem from human rights violations and which may impair their enjoyment of human rights, that should be addressed by the monitoring bodies. This notion follows primarily from the criticism on the international system of human rights, as it has failed to address the injustices experienced by women. See on this subject for example Charlesworth, H., 'What Are Women's International Human Rights?', *Human Rights of Women – National and International Perspectives*, Cook, R. (ed), University of Pennsylvania Press, Philadelphia, 1994, pp. 59-60; Cook, R., 'Women's International Human Rights Law: The Way Forward', *Human Rights Quarterly*, vol. 15, 1993, no. 2, p. 231; Bunch, C., 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', *Human Rights Quarterly*, vol. 12, 1990, no. 4, p. 487; Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2, p. 283; O'Hare, U., 'Realizing Human Rights for Women', *Human Rights Quarterly*, vol. 21, 1999, no. 2, p. 364; Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, pp. 34-35; Bunch, C., 'Transforming Human Rights from a Feminist Perspective', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 11; Binion, G., 'Human Rights: A Feminist Perspective', *Human Rights Quarterly*, vol. 17, 1995, no. 3, p. 513 and p. 515. Binion notes that defining human rights from the experience of women is a first step in integrating women into the process of operationalising and protecting human rights.

forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, and notes that these are incompatible with the dignity and worth of the human person, and must be eliminated.[73] Moreover, the Vienna Declaration and Programme of Action lays down that:

> 'In particular, the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. The World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.'[74]

The emphasis of the World Conference on Human Rights to address manifestations of violence against women is also exemplified by adoption of the Declaration on the Elimination of Violence against Women by the GA, as well as the appointment of a Special Rapporteur on Violence against Women by the CHR shortly after the World Conference in Vienna.[75] The Vienna Declaration and Programme of Action stresses the importance of the Declaration on the Elimination of Violence against Women by stating that:

> '[T]he World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions.'[76]

Moreover, the Beijing Declaration and Platform for Action, the final document of the Fourth World Conference on Women held in 1995, which builds on the achievements of the women's rights caucus in Vienna of 1993, furthermore explicitly refers to the

73 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part I, para. 18.
74 Ibidem, para. 38.
75 United Nations Declaration on the Elimination of Violence against Women, 1993, UN doc. A/RES/48/104; CHR, resolution 1994/45, UN doc. E/CN.4/RES/1994/45
76 Vienna Declaration, World Conference on Human Rights , Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24, Part I, para. 38.

relation between reproductive issues and human rights.[77] This document states amongst other things that:

> '[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.'[78]

The attention for matters that affect women's physical integrity in these documents illustrates the shared worldwide concern for these issues. With this in mind, it is important to examine whether the two human rights monitoring bodies pay attention to these issues in their work in accordance with the request made in the 1993 Vienna Declaration and Programme.

3.4 The research material: the work of the HRC and the CESCR

It follows from the research question that the research material consists of the *work* of the human rights monitoring bodies. This is also in line with the request made at the 1993 World Conference on Human Rights which requests the bodies to include the status and human rights of women in their *deliberations and findings*. The work of the monitoring bodies consists of different types of documents, each related to the several tasks that the bodies have to monitor the implementation of human rights treaties in the relevant states parties. In monitoring the implementation of the treaties, the human rights bodies necessarily provide an understanding of the treaty provisions in a practical context. Hence the Committees give insight into the exact obligations of states parties and on certain occasions the rights of individuals as they follow from the two Covenants. In order to find an answer to the research question, all documents from 1993 to 2008 that present the interpretation of the Committees of the provisions of the ICCPR and the ICESCR have been examined. In addition, the records of the meetings

77 Beijing Declaration and Platform for Action reiterates many of the statements on women's rights made in the Vienna Declaration and Programme of Action, including the request made to the human right monitoring bodies to include the human rights of women in their work. Beijing Platform for Action, UN doc. A/CONF.177/20 and A/CONF.177/20/Add.1, para. 2 and para. 326. See for example also paras. 8-10, 14, 23 and 31 of the Beijing Declaration. Reference should also be made here to the Programme of Action of the UN International Conference on Population and Development held in Cairo in 1994, which discusses reproductive rights and reproductive health in its chapter VII, UN doc. A/CONF.171.13. The Beijing Declaration and Platform for Action also buils on the results of this Conference on Population and Development.

78 Beijing Platform for Action, UN doc. A/CONF.177/20 and A/CONF.177/20/Add.1, para. 96 bis.

that took place between the Committee members and delegates of states parties in the so-called reporting procedure, the *constructive dialogues*, have been used as clarification material, where necessary.

The main source of information in this study are the *concluding observations* (COs) of the HRC and the CESCR. The COs are documents that present the final remarks of the Committees on the implementation of the respective treaties in states parties, based on the outcome of the respective reporting procedures. The reporting procedure includes a process whereby every so many years, in accordance with their duties as laid down in the human rights covenants states parties must report to the human rights monitoring body on their implementation of the respective human rights treaty. This means that they have to provide the Committee with information on the situation in their country, both de facto, as well as de jure, with regard to the enjoyment of the rights as laid down in the treaty and regarding factors that impair this enjoyment. The human rights monitoring bodies have formulated reporting guidelines in order to inform states parties on what information they should provide in these reports. The state report is sent, through the secretariat, to the monitoring body, which on the basis of this report formulates a list of issues on which it would like clarification regarding the situation in the state party. The state party either replies to this list in writing or does so during the *constructive dialogue*. The constructive dialogue is the next step in the reporting session. A delegation of the state party travels to Geneva or New York to discuss the human rights situation in its country with the Committee. On the basis of the state report, possible *shadow reports* drawn up by non-governmental organisations (NGOs) and this dialogue, the Committee then formulates COs.[79] In these COs it comments on the positive aspects of the implementation of the treaty in the state, but also presents its concerns and its recommendations for change. The COs are therefore highly important for this study. They show whether the HRC and the CESCR also pay attention to issues that are characteristic of the lives of women, and if so, how they do this. For example, they give insight into the human rights obligations formulated by the HRC and the CESCR with respect to these matters.

In addition to the COs, another valuable source of information comes from the general comments (GCs). In these comments, the Committees clarify the actual content of the human rights provisions, for example by explaining the human rights obligations of states parties. The added value of these *general* documents is that the comments of the human rights monitoring bodies do not reflect the positive and negative aspects of the implementation of the treaties in a particular state party, but they apply to *all* states parties. The matters that are addressed in these GCs therefore represent issues that the Committees find of the utmost importance in light of the enjoyment of human rights.

79 *Shadow reports* are reports prepared by non-governmental organisations (NGOs) in which they present their point of view as regards the human rights situation in a state party. See for example the document of the CESCR of 7 July 2000 on NGO participation in the activities of the CESCR, UN doc. E/C.12/2000/6.

Furthermore, the reporting guidelines and lists of issues have been consulted in this study. These provide insight into matters about which the Committee, as part of the reporting procedure, wishes to receive (further) information. Therefore these documents also shed light on the topics that the bodies consider to be worth addressing with respect to monitoring the states parties' compliance with their obligations.

Besides these documents that relate to general implementation and more specifically the implementation of states parties following the reporting procedure, the views of the HRC have been examined. Views are decisions of the Committee in individual complaints procedures. As the CESCR does not yet have an individual complaints procedure at its disposal, only the views of the HRC can be examined.[80]

4 THE RELEVANCE OF THE STUDY

> *'Gender integration into human rights work can have a significant impact on the life and death of women and girls every day in every part of the world. Nothing could be more urgent than improving women's access to human rights at the local level, as we can see from the reports of atrocities that women still suffer in conflicts and in daily life in all too many places.'*[81]

The results of this study provide insight into the question whether the work of the HRC and the CESCR shows awareness of the two Committees of the effects of gender on the enjoyment of human rights and into the question whether they are responding to it by including the specific experiences of women into the realm of human rights to its full extent. A positive answer to the main research question of 'Does the work of the HRC and the CESCR reflect compliance with the request of the 1993 World Conference?' would not only benefit women and their enjoyment of human rights, but also be a valuable result for the UN, as it would indicate that it indeed promotes and protects the enjoyment of human rights of men *and* women.

Women's rights activists turned their attention to the UN human rights system for two reasons: the UN human rights framework was regarded as a powerful tool for women in making political demands, and it was considered a way of redefining social concepts.[82] Friedman observes that the claim of making political demands in the name

80 At the time of writing, the Optional Protocol to the ICESCR, which lays down an individual complaints procedure with regard to the rights enumerated in the ICESCR was adopted by the UN GA (on 10 December 2008), but had not yet entered into force. See UN doc. A/RES/63/117.

81 Bunch, C., 'Integration of Gender into the Human Rights Council', presentation delivered at the UN Human Rights Council, Geneva Interactive Panel, 20 September 2007, http://www.cwgl.rutgers.edu/globalcenter/charlotte/HRCsept2007.pdf, p. 1, accessed on 14 May 2009.

82 See for example Friedman, E., 'Women's Human Rights: The Emergence of a Movement', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge New York, 1995, p. 19; Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, p. 38; Bunch, C., 'Transforming Human Rights from a Feminist Perspective', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J.,

of human rights provides these demands with legitimacy, since human rights are accepted by most governments and entail established protocols.[83] Along the same lines, Okin argues that it enables *the international community* to table the specific issues in no uncertain terms, since most governments do not like to be international pariahs and to have the eyes of the world focus on them only for their worst practices or their failure to prevent practices harmful to women and children.[84] Besides this functional aspect, the human rights framework also represents and reproduces, like all other systems of law, structures and notions of right and wrong present in societies.[85] In a world in which patriarchy dominates, realities of women's lives such as sexual and physical violence are, as mentioned before, often overlooked or considered to be the natural side products of society.[86] Adjusting this system in such a way that it recognises and condemns the injustices done to women throughout the world, therefore provides an opportunity to redefine these existing discriminatory social norms and structures in societies. The results of this study show whether these aims of the women's rights movement are being met. They provide insight into the political demands women can make in the name of human rights and they show whether injustices affecting women are condemned. At the same time, the results may pinpoint areas that still lack attention by the HRC and the CESCR and which would require further action, for example by the women's rights movement.

As mentioned before, women are not the only ones that benefit from a positive answer. If the work of the HRC and the CESCR is shown to be in accordance with the

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and A. Wolper (eds), Routledge New York, 1995, p. 11-17; Cook, R., 'Women's International Human Rights Law: The Way Forward, *Human Rights Quarterly*, vol. 15, 1993, no. 2, p. 232.

83 Friedman, E., 'Women's Human Rights: The Emergence of a Movement', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J and A. Wolper (eds), Routledge New York, 1995, p. 19.

84 Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, p. 38.

85 See for example Hevener Kaufman, N., and S. Lindquist, 'Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination against Women', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge New York, 1995, pp. 115-116; and Lacey, N., *Unspeakable Subjects – Feminist Essays in Legal and Social Theory*, Hart Publishing, Oxford, 1998, pp. 7-8. Charlesworth, Chinkin, and Wright note that feminist jurisprudence derives its theoretical force from immediate experience of the role of the legal system in creating and perpetuating the unequal position of women. Charlesworth, H., C. Chinkin, and S. Wright, 'Feminist Approaches to International Law', *The American Journal of International Law*, vol. 85, 1991, no. 4, p. 613. Similarly, Bartlett holds that feminists have found that neutral rules and procedures tend to drive underground the ideologies of the decision maker, and that these ideologies do not serve women's interests well. Bartlett, K., 'Feminist Legal Methods', *Harvard Law Review*, vol. 103, 1990, no. 4, p. 862.

86 Marshall notes that the realities of women's lives seen at global, national, and local level include sexual and physical violence and abuse. Such violations can be analysed as being gendered, systematic and organised. She holds that the neglect of women's human rights stems from larger societal or even global structures in which patriarchy dominates. Marshall, J., 'Feminist Jurisprudence: Keeping the Subject Alive', *Feminist Legal Studies*, vol. 14, 2006, no. 1, p. 40 and p. 46.

request of the 1993 World Conference, this also benefits the UN. For, as observed previously, the principle of equality of men and women is the basis of this international organisation, which claims to promote and protect the human rights of *all*, men *and* women.[87] It is therefore of pivotal importance that it does in fact promote and protect the rights of all and therefore also addresses those issues that influence the enjoyment of human rights by women.

5 OUTLINE OF THE BOOK

This first chapter of the book has presented the background against which this study was conducted and clarified the choices that were made with regard to research objects, subject, and material. The following chapter sets out how the study was conducted and for that reason also discusses the preliminary question: what is meant by *including the status and human rights of women*? After these two introductory chapters, the results of the study are presented in Chapters 3 to 6. Chapters 3 and 4 discuss the findings with regard to the work of the HRC, and Chapters 5 and 6 present the findings with respect to the work of the CESCR. As the attention of the Committees for matters that affect women's physical integrity can be broadly divided into two categories – attention for pregnancy-related issues and attention for manifestations of physical violence against women – the findings are also presented thematically. Chapters 3 and 5 discuss the attention of the HRC and the CESCR, respectively, for pregnancy-related issues. And Chapters 4 and 6 relate to the attention of the two Committees for manifestations of physical violence against women. At the end of each of these chapters, conclusions are presented with regard to the main research question. In Chapter 7, the overall answer to the research question is presented and some final remarks are made.

87 See on this matter for example also Pentikäinen, M., *The Applicability of the Human Rights Model to Address oncerns and the Status of Women*, The Erik Castrén Institute of International Law and Human Rights Research Reports, Publications of the Faculty of Law University of Helsinki, Helsinki 1999, p. 17.

CHAPTER 2
WOMEN IN THE PICTURE
GENERAL OUTLINE

'The concept of human rights, like all vibrant visions, is not static or the property of any group; rather, its meaning expands as people reconceive of their needs and hopes in relation to it. In this spirit, feminists redefine human rights abuses to include the degradation and violation of women. The specific experiences of women must be added to traditional approaches to human rights in order to make women more visible and to transform the concept and practice of human rights in our culture so that it takes better account of women's lives.'[1]

1 INTRODUCTION

'The specific experiences of women must be added to the traditional approaches to human rights, in order to make women more visible and to transform the concept and practice of human rights in our culture so that it takes better account of women's lives.'[2] This sums up the assignment given to the human rights monitoring bodies by the World Conference on Human Rights in Vienna in 1993, as will be shown in this chapter.

In order to answer the main research question, it is necessary to determine what is asked specifically of the human rights monitoring bodies in the Vienna Declaration and Programme of Action, so as to be able to examine whether the work of the HRC and the CESCR reflects compliance with this request. To obtain a good understanding of this request of the 1993 World Conference on Human Rights and what it actually entails for the human rights monitoring bodies, a variety of documents has been examined. Starting points were the Vienna Declaration and Programme of Action of 1993 and the Beijing Declaration and Platform for Action of 1995. In addition, UN reports were studied that follow up on the request of Vienna and its implications for the Committees. These reports and writings contain input from women's rights experts and for that reason also reflect to some extent the criticism on the UN human rights system that was expressed both at the 1993 World Conference and before that time.[3]

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1 Bunch, C., 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', *Human Rights Quarterly*, vol. 12, 1990, no. 4, p. 487.

2 Ibıdem.

3 For example, Bunch and Cook participated in the expert group meeting on the development of guidelines for the integration of gender perspectives into human rights activities and programmes.

Three documents are of particular importance in this respect: the 1995 report of the expert group meeting on the development of guidelines for the integration of gender perspectives into UN human rights activities and programmes, organised by the former UN Centre for Human Rights and the UNIFEM (Expert Group report); the 1998 report of the DAW on integrating the gender perspective into the work of UN human rights treaty bodies (the DAW report); and the 1999 report of the workshop on gender integration into the human rights system, organised by the OHCHR, DAW, and UNIFEM.[4] Moreover, documents on women's rights, especially in the context of the UN human rights system, have been used to further clarify the request of the 1993 World Conference.[5] This chapter presents the findings regarding the question as to what is asked specifically of the human rights monitoring bodies in the Vienna Declaration and Programme of Action. On the basis of the aforementioned documents, four elements of this request have been identified, each of which represents an assignment for the human rights monitoring bodies. In order for the work of the HRC and the CESCR to reflect compliance with the request of Vienna, it needs to reflect attention

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CHR, *Report of the Expert Group on the Development of Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programmes*, UN doc. E/CN.4/1996/105, pp. 26-28.

4 See CHR, *Report of the Expert Group on the Development of Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programmes*, UN doc. E/CN.4/1996/105; DAW, *Integrating the Gender Perspective into the Work of United Nations Human Rights Treaty Bodies*, UN doc. HRI/MC/1998/6; and UN, Gender Integration into the Human Rights System, Report of the Workshop, 26-28 May 1999.Although many more reports exist on the concept of *gender mainstreaming*, these do not focus (specifically) on mainstreaming a gender perspective in human rights activities and programmes of the UN, and for that reason are not directly relevant in obtaining a good understanding of the meaning of the request of the World Conference on Human Rights of 1993 to the human rights monitoring bodies to include the status and human rights of women in their work. Van den Brink notes in her dissertation of 2006 that gender mainstreaming and integration of human rights of women are not identical processes. Although integration of human rights of women can be considered to be an important component of gender mainstreaming, the concept of gender mainstreaming is broader and reaches beyond the scope of equal enjoyment of human rights: it requires, Van den Brink notes, the integration of gender in all areas of policy making and execution. See Brink, M. van den, *Moeders in de Mainstream – Een Genderanalyse van het Werk van het VN-Kinderrechtencomité*, Wolf Legal Publishers, Nijmegen, 2006, pp. 37-38.

5 See the bibliography for a complete list of materials and writings used. The list includes for example Cook, R. (ed), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994; Cook, R., 'Women's International Human Rights Law: The Way Forward', *Human Rights Quarterly*, vol. 15, 1993, no. 2, pp. 230-261; Bunch, C., 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', *Human Rights Quarterly*, vol. 12, 1990, no. 4, pp. 486-498; Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2, pp. 283-333; O'Hare, U., 'Realizing Human Rights for Women', *Human Rights Quarterly*, vol. 21, 1999, no. 2, pp. 364-402; Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, pp. 32-52; Charlesworth, H., C. Chinkin, S. Wright, 'Feminist Approaches to International Law', *The American Journal of International Law*, vol. 85, 1991, no. 4, pp. 613-645; Peters, J., and A. Wolper (eds), *Women's Rights, Human Rights – International Feminist Perspectives*, Routledge, London, 2005; Binion, G., 'Human Rights: A Feminist Perspective', *Human Rights Quarterly*, vol. 17, 1995, no. 3, pp. 509-526.

of the two Committees for issues that specifically affect women and their enjoyment of human rights (Element I); to display *women-inclusive* human rights obligations for states parties (Element II); to relate issues that specifically affect women and their enjoyment of human rights to discrimination of women where this is applicable (Element III); and to refer to these issues in their work in an integrated manner (Element IV). Besides explaining the framework for this study, this chapter describes why, considering their mandate, it is feasible for the Committees to act in accordance with these four elements of the request of the World Conference, and it explains how the work of the HRC and the CESCR was analysed on these four elements.

2 SPECIFIC EXPERIENCES OF WOMEN

2.1 Element I: address specific experiences of women

Criticism on the UN human rights system, as discussed in Chapter 1, makes it abundantly clear that experiences characteristic of the lives of women should be included in the ambit of human rights.[6] There can be no doubt that the request to include the status and human rights of women as it was made at the 1993 World Conference on Human Rights aims to overcome the lack of attention paid to situations and issues that are of particular concern to women by the international system for the promotion and protection of human rights. As noted in Chapter 1, the Vienna Declaration and

6 As stated in Chapter 1, feminist criticism holds that the *mainstream* human rights instruments do not pay attention to women's rights, or to phrase it differently, to situations that affect the enjoyment of human rights by women. See for example Cook, R. (ed), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, pp. 3-4; Charlesworth, H., 'What Are Women's International Human Rights?', Cook, R. (ed), *Human Rights of Women – National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, p. 59-60; Peterson, V., and L. Parisi, 'Are Women Human? It's Not an Academic Question', *Human Rights Fifty Years on: A Reappraisal*, T. Evans (ed), Manchester University Press, Manchester, 1998, p. 132; Cook, R., 'Women's International Human Rights Law: The Way Forward', *Human Rights Quarterly*, vol. 15, 1993, no. 2, p. 231; Bunch, C., 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', *Human Rights Quarterly*, vol. 12, 1990, no. 4, p. 487; Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2, p. 283; O'Hare, U., 'Realizing Human Rights for Women', *Human Rights Quarterly*, vol. 21, 1999, no. 2, p. 364; Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, pp. 34-35; Bunch, C., 'Transforming Human Rights from a Feminist Perspective', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 11; Sullivan, D., 'The Public/Private Distinction in International Human Rights Law', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J. and A. Wolper (eds), Routledge, London, 2005, p. 126; Charlesworth, H., C. Chinkin, and S. Wright, 'Feminist Approaches to International Law', *The American Journal of International Law*, vol. 85, 1991, no. 4, p. 625; Charlesworth, H., 'Human Rights as Men's Rights', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 111; Binion, G., 'Human Rights: A Feminist Perspective', *Human Rights Quarterly*, vol. 17, 1995, no. 3, p. 513 and p. 515.

Programme of Action explicitly refer to such situations and lay down that murder, systematic rape, sexual slavery, and forced pregnancy are violations of fundamental principles of human rights.[7] Similarly, the Beijing Declaration and Platform for Action, which builds on and reiterates the statements on women's rights as laid down in the Vienna Declaration, holds that violence against women, such as battering, sexual abuse, sexual slavery, forced prostitution and sexual harassment, violates and impairs or nullifies the enjoyment of human rights and fundamental freedoms by women.[8]

The reports of the Expert Group and that of the DAW reaffirm this interpretation of the request of the 1993 World Conference on Human Rights. In its report, the Expert Group criticises the interpretation of human rights instruments by the monitoring bodies, which it holds to reflect the male experience in a world dominated by men. The Expert Group observes that the human rights instruments largely ignore the fact that large numbers of women around the world live with violence or the threat of it on a daily basis.[9] The report refers for example to the interpretation of the right to be free from torture, which fails to encompass violence in the family and does not usually include sexual assault.[10] It notes that in many ways women and men lead different lives, and the human situation is not usually gender neutral. Therefore, an enumeration of human rights must reflect the realities of women's and men's situations and must as such include, for example, reproductive rights and conditions suitable for healthy reproduction.[11] Like the report of the Expert Group, the report of the DAW, by examining the attention of the Committees for *gender issues* in their work, clearly indicates that in order to include the status and human rights of women, it is essential for the human rights monitoring bodies to address those situations or issues that specifically affect women.[12] Moreover, the DAW recommends the human rights monitoring bodies to address a number of specific situations so as to successfully comply with the request of the 1993 World Conference. The DAW refers in this

7 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part II, para. 38.

8 Beijing Declaration and Platform for Action, UN doc. A/CONF.177/20, para. 224. The Beijing Declaration and Platform for Action reiterates many of the statements on women's rights made in the Vienna Declaration and Programme of Action, including the request made to the human right monitoring bodies to include the human rights of women in their work. Beijing Platform for Action, UN doc. A/CONF.177/20 and A/CONF.177/20/Add.1, paras. 2 and 326. See for example also paras. 8-10, 14, 23. 31 of the Beijing Declaration.

9 CHR, *Report of the Expert Group on the Development of Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programmes*, UN doc. E/CN.4/1996/105, para. 20.

10 Ibidem.

11 Ibidem, para. 19.

12 It is evident from the report that the term gender issues is to be understood as being the same thing as situations or issues that specifically affect the lives of women. For example, in its review of the work of the Committee on the Elimination of All Forms of Racial Discrimination, it notes that it addressed *concerns of women or gender issues* in a limited number of concluding observations. DAW, *Integrating the Gender perspective into the Work of United Nations Human Rights Treaty Bodies*, UN doc. HRI/MC/1998/6, paras. 26 and 33.

respect, amongst other things, to marital rape, female genital mutilation (FGM), dowry-related violence, strict dress requirements, and prenatal sex selection.[13]

Consequently, for the work of the HRC and the CESCR to reflect compliance with the request of the Vienna Declaration and Programme of Action, it needs to reflect attention of the two Committees for human rights issues that specifically affect women.

2.2 The mandate of the committees in relation to specific experiences of women

Naturally, the HRC and the CESCR are restricted by the limits of their respective mandates: the ICCPR and the ICESCR. Therefore they can only be expected to address issues that fall within the scope of the provisions of their respective Covenants. This study looks at the attention of the two Committees for matters that affect women's physical integrity. As Chapter 1 explains, both Covenants contain provisions that seek to protect the physical integrity of human beings. The ICCPR, for example, contains provisions on the right to life, the right to be free from torture, cruel, inhuman or degrading treatment, and the right to privacy. The ICESCR accommodates the right to the enjoyment of the highest available standard of health (right to health), for example.[14] In quite a number of texts, issues that affect women's physical integrity are explicitly linked to provisions of these two Covenants. All of these texts indicate that the HRC and the CESCR should, in light of their mandate, address various experiences of women that affect their physical integrity.[15]

2.3 Examining the work of the committees on element I

To see whether the Committees actually address matters that affect women's physical integrity, all the documents in which the Committees provide their interpretation of the

13 Ibidem, paras. 55 and 61.

14 See also Chapter 1, Section 3.3, which explains the limitation of the scope of this study to matters that affect women's physical integrity.

15 See for example Cook, R., 'International Protection of Women's Reproductive Rights', *New York University Journal of International Law and Politics*, vol. 24, 1992, no. 2, pp. 645-727; Packer, C., 'Defining and Delineating the Right to Reproductive Choice', *Nordic Journal of International Law*, vol. 67, 1998, no. 1, pp. 77-95; Cook, R., 'Women's Reproductive Rights', *International Journal of Gynaecology and Obstetrics*, vol. 46, 1994, no. 2, pp. 215-220; Cook, R., 'International Human Rights and Women's Reproductive Health', *Studies in Family Planning*, vol. 24, 1993, no. 2, pp. 73-86; Cook, R., 'Women's International Human Rights Law: The Way Forward', *Human Rights of Women – National and International Perspectives* , Cook, R. (ed), University of Pennsylvania Press, Philadelphia, 1994, pp. 12-15; Charlesworth, H., 'What are "Women's International Human Rights"?', *Human Rights of Women – National and International Perspectives*, Cook, R. (ed), University of Pennsylvania Press, Philadelphia, 1994, pp. 58-84; Copelon, R., 'Intimate Terror: Understanding Domestic Violence as Torture', Cook, J. (ed), *Human Rights of Women – National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, pp. 116-152.

human rights provisions have been studied.[16] As it is impossible to produce an exhaustive list of situations that affect women's physical integrity, attention was paid to issues that involve a direct or indirect harmful effect on women's bodies, for example through the infliction of harm, or as a result of unmet physical needs. UN documents, including the Vienna Declaration and Programme of Action, the Beijing Declaration and Platform for Action, and the UN Declaration on the Elimination of Violence against Women, as well as various literature on women's rights were used to obtain a good understanding of the human rights abuses and constraints that are characteristic of the lives of women.[17]

As there is no exhaustive list on matters that affect women's physical integrity, the study as regards Element I is necessarily of an explorative nature. The results are meant to provide a *general* insight as to whether the HRC and the CESCR are addressing these women-specific human rights concerns.

3 WOMEN-INCLUSIVE HUMAN RIGHTS OBLIGATIONS

3.1 Element II: formulate women-inclusive human rights obligations

These specific experiences of women can be addressed by the human rights monitoring bodies in a variety of ways. Bunch notes that addressing these issues may actually lead to contradictions, for example when rape is identified as a human rights abuse only when it occurs in state custody, but not when committed on the streets or in the home.[18] It is clear from the criticism on the international human rights system that regardless of where a certain action or inaction takes place, or who commits the acts, or is responsible for the omission, these issues should, when affecting the individual enjoyment of human rights, be addressed as human rights abuses by the monitoring bodies.

16 See Chapter 1, Section 3.4.

17 See for example Cook, R. (ed), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994; Cook, R., 'Women's International Human Rights Law: The Way Forward', *Human Rights Quarterly*, vol. 15, 1993, no. 2, pp. 230-261; Bunch, C., 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', *Human Rights Quarterly*, vol. 12, 1990, no. 4, pp. 486-498; Gallagher, A., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2, pp. 283-333 ; O'Hare, U., 'Realizing Human Rights for Women', *Human Rights Quarterly*, vol. 21, 1999, no. 2, pp. 364-402 Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, pp. 32-52; Charlesworth, H., C. Chinkin, S. Wright, 'Feminist Approaches to International Law', *The American Journal of International Law*, vol. 85, 1991, no. 4, pp. 613-645; Peters, J., and A. Wolper (eds), *Women's Rights, Human Rights – International Feminist Perspectives*, Routledge, London, 2005; Binion, G., 'Human Rights: A Feminist Perspective', *Human Rights Quarterly*, vol. 17, 1995, no. 3, pp. 509-526.

18 Bunch, C., 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights', *Human Rights Quarterly*, vol. 12, 1990, no. 4, p. 494.

It is not without reason that the quotation at the beginning of this chapter refers to a *transformation* of the concept and practice of human rights so that it takes better account of women's lives. As Chinkin writes, traditionally human rights law applies only to relations between the state and individuals, through the acts of public officials. Hence, human rights discourse largely excludes abuses committed by private actors for example.[19] This traditional approach to human rights has sparked the criticism that the international human rights system functions on the basis of a false dichotomy between the so-called *public* and *private* spheres.[20] Abuses that occur within the *public sphere* are addressed within the context of human rights, but situations that take place in the *private sphere* fall outside the scope of protection of these norms. And although the division between public and private spheres regularly changes, and reflects political preferences with respect to the level and quality of government intrusion, and although the international human rights system does address a number of issues that could be considered *private*, for example slavery and racial discrimination by non-state actors, critics observe that it is a successful argument in excluding women from the human rights arena.[21] For as they point out, most pervasive harm against women still occurs within what is usually considered to be the *private* realm.[22] This includes violence against women by the hands of non-state actors, as well as poignant situations caused by lack of access to certain services, for example emergency obstetric care.

In order for the human rights monitoring bodies to include the status and human rights of women, this traditional approach to human rights therefore needs to be

19 Chinkin, C., 'A Critique of the Public/Private Dimension', *European Journal of International Law*, vol. 10, 1999, no. 2, p. 389.

20 See for example Charlesworth, H., 'Human Rights as Men's Rights', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 106; Ertürk, Y., 'The Due Diligence Standard: What Does It Entail for Women's Rights', *Due Diligence and its Application to Protect Women from Violence*, Benninger-Budel, C. (ed), Martinus Nijhoff Publishers, Leiden, 2008, pp. 32-34; Sullivan, D., 'The Public/Private Distinction in International Human Rights Law', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 126; Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, p. 36; Binion, G., 'Human Rights: A Feminist Perspective', *Human Rights Quarterly*, vol. 17, 1995, no. 3, pp. 516-517.

21 Chinkin, C., 'A Critique of the Public/Private Dimension', *European Journal of International Law*, vol. 10, 1999, No. 2, pp. 383 and 389; Bunch, C., 'Transforming Human Rights from a Feminist Perspective', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J. and A. Wolper (eds), Routledge, London, 2005, p. 14; Sullivan, D., 'The Public/Private Distinction in International Human Rights Law', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 127.

22 See for example Charlesworth, H., 'Human Rights as Men's Rights', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 106; Sullivan, D., 'The Public/Private Distinction in International Human Rights Law', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 126; Moller Okin, S., 'Feminism, Women's Human Rights, and Cultural Differences', *Hypatia*, vol. 13, 1998, no. 2, p. 36; Binion, G., 'Human Rights: A Feminist Perspective', *Human Rights Quarterly*, vol. 17, 1995, no. 3, pp. 516-517.

transformed into an approach that takes into account the gender-specific circumstances and consequences of human rights abuses and constraints that affect women.[23] Both the reports of the Expert Group and the DAW refer to the nature of human rights obligations for states parties in this respect.[24] Considering the traditional approach to human rights, states have first and foremost an obligation not to intervene where civil rights are at stake and are obliged to perform positive services in regard to their duties under economic, social, and cultural rights.[25] As women are most often confronted with abuses at the hands of individuals in a private capacity, or are unable to enjoy their human rights due to an unmet need in services or goods, the obligation of states parties not to act is of less importance for them.[26] The DAW argues that the obligations of states parties to prevent and redress violations of women's rights need to be further clarified and expanded and to that end, women's different life experiences need to be assessed more explicitly to identify obstacles to the enjoyment of rights. The DAW holds in this regard that the monitoring bodies have an opportunity to bring greater clarity to the obligations of states parties to respect, protect, fulfil, and promote human rights for all.[27] Whereby the obligation to respect requires states parties to refrain from acting contrary to the human rights norms: a state agent for example must not resort to torture, but the obligations to protect, fulfil, and to promote certain rights require activity from the side of the state, for example by prosecuting a rapist, or providing maternal healthcare.[28]

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23 See on this matter also the presentation by Bunch to the Human Rights Council in 2007, in which she refers to a paper conducted by UNIFEM on *Gender Specific Human Rights Research, Analysis and Reporting*. In this paper, UNIFEM notes that in order to examine the effects of gender in regard to human rights abuses four areas need to be taken into account: the form of the abuse can be gender specific; the circumstances in which abuses occur can be gender specific; the consequences of the abuse can be gender specific; and finally there are gender-specific barriers to access to remedies. Bunch, C., 'Integration of Gender into the Human Rights Council', presentation delivered at the UN Human Rights Council, Geneva Interactive Panel, 20 September 2007, p. 3, http://www.cwgl.rutgers.edu/lobalcenter/charlotte/HRCsept2007.pdf, accessed on 14 May 2009.

24 CHR, *Report of the Expert Group on the Development of Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programmes*, UN doc. E/CN.4/1996/105, para. 54; DAW, *Integrating the Gender perspective into the Work of United Nations Human Rights Treaty Bodies*, UN doc. HRI/MC/1998/6, para. 99.

25 See also Nowak who refers to the status theory of Georg Jellinek and the theory of three generations of human rights. Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, p. 48.

26 See for example also Sullivan, D., 'The Public/Private Distinction in International Human Rights Law', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, pp. 126-129.

27 DAW, *Integrating the Gender perspective into the Work of United Nations Human Rights Treaty Bodies*, UN doc. HRI/MC/1998/6, para. 99.

28 This division between various types of human rights obligations is employed for example by Nowak and by Eide. See Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, p. 49; Eide, A., 'Economic, Social, and Cultural Rights as Human Rights', *Economic, Social, and Cultural Rights: A Textbook*, Eide, A. (ed), Martinus Nijhoff Publishers, Dordrecht, 2001, p. 23. Reference to these different types of obligations is also made in the Maastricht

The HRC and the CESCR are therefore requested to formulate obligations for states parties that take into account the gendered characteristics of human rights abuses and constraints that affect women. For the work of the HRC and the CESCR to reflect compliance with the request of the 1993 World Conference on Human Rights, it should display *women-inclusive* human rights obligations for states parties.

3.2 The mandates of the committees in relation to women-inclusive human rights obligations

Whereas economic, social, and cultural rights are traditionally known to imply positive obligations for states parties, especially as regards the obligation to fulfil human rights, this does not hold true for civil and political rights as laid down in the ICCPR.[29] Yet, this does not mean that the HRC *cannot* or *should not* formulate obligations to protect and fulfil human rights. The ICCPR lays down in Article 2, Paragraph 1, that states parties undertake to respect and *ensure* the rights as enumerated in the Covenant. In order to *ensure* these rights, states may be required to take positive action. In the last decades various human rights bodies have recognised positive obligations for states in regard to civil and political rights and held them accountable for not acting in accordance with these. For example in the case of *X and Y versus the Netherlands*, before the European Court of Human Rights (ECtHR), the Netherlands was found to have violated Article 8 of the European Convention on Human Rights (ECHR) on the right to privacy through its failure to provide a remedy within its criminal law for abuse by a private actor.[30] Thus, the Netherlands was found to have violated a civil right for its failure to take a legislative measure. Hence, the Netherlands had a *positive* obligation to provide for such a remedy in its criminal law in this case. Likewise, the Inter-American Court of Human Rights referred, in *Velasquez Rodriguez versus Honduras*, to the duty of states parties to organise the governmental apparatus and all the structures of the state through which public power is exercised in such a way that

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Guidelines on Violations of Economic, Social, and Cultural Rights; the Montreal Principles on Women's Economic, Social, and Cultural Rights; and in the report on sexual and reproductive health by former UN Special Rapporteur on the Right to Health, Paul Hunt. See 'The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights', *Human Rights Quarterly*, vol. 20, 1998, no.3, pp. 693-694; 'The Montreal Principles on Women's Economic, Social, and Cultural Rights', *Human Rights Quarterly*, vol. 26, 2004, no. 3, p. 770; *Report of UN Special Rapporteur Paul Hunt on the right to the enjoyment of the highest attainable standard of physical and mental health*, 16 February 2004, UN doc. E/CN.4/2004/49, paras. 43-44. See also Dankwa, V., C. Flinterman and S. Leckie, 'Commentary on The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights', *Human Rights Quarterly*, vol. 20, 1998, no. 3, pp. 713-715.

29 See for example Nowak, who notes that 'in the early days it was assumed, in accordance with Georg Jellinek's status theory […] and the theory of the three generations of human rights, […], that states, with regard to civil rights, were merely obliged not to intervene whereas concerning economic and social rights they were obliged to perform positive services only. Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, p. 48.

30 ECtHR, *Case of X and Y versus The Netherlands*, application no. 8978/80, judgment of 26 March 1985.

they are capable of juridically ensuring the full enjoyment of all people within the territory of their fundamental rights and freedoms. The Inter-American Court held that the state must exercise *due diligence* to prevent violations and to respond to human rights abuses committed by non-state actors which are therefore not immediately and directly imputable to the state.[31] As Chinkin argues, the opinion of the Court was a landmark decision and sets out a framework for an analysis of state responsibility centred on *positive* duties to protect against violations.[32] Building upon this reasoning, in *Osman versus the United Kingdom,* the ECtHR held that the state could be held responsible for failure by police forces to respond adequately to harassment which culminated in death.[33] The United Kingdom therefore had a responsibility to take action to prevent violations at the hands of all persons, both in public and private capacities, and should investigate, prosecute and punish perpetrators in cases where violations did take place. As these cases point out, by *systematically* failing to provide protection for women against private actors, the state becomes complicit in the violation, and can as such be held responsible.[34] These cases therefore show that also with regard to civil and political rights, positive obligations can be formulated for states parties.

3.3 Examining the work of the committees on element II

The DAW, as noted previously, recommends the human rights monitoring bodies to bring greater clarity to the obligations of states parties to respect, protect, fulfil, and promote human rights for all.[35] This division of human rights obligations is often employed in human rights literature and makes it possible to analyse the obligations as they are formulated by the human rights monitoring bodies in a structured manner.[36]

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31 *Velasquez Rodriguez v. Honduras*, Inter-American Court of Human Rights, Series C, No. 4, Judgement of 29 July 1988.

32 See also Sullivan, D., 'The Public/Private Distinction in International Human Rights Law', *Women's Rights, Human Rights – International Feminist Perspectives*, Peters, J., and A. Wolper (eds), Routledge, London, 2005, p. 130.

33 ECtHR, *Case of Osman versus the United Kingdom*, application no. 87/1997/871/1083, judgment of 28 October 1998. See also Chinkin, C., 'A Critique of the Public/Private Dimension', *European Journal of International Law*, vol. 10, 1999, no. 2, p. 394.

34 Romany, C., 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', *Human Rights of Women – National and International Perspectives* , Cook, R. (ed), University of Pennsylvania Press, Philadelphia, 1994, p. 99.

35 DAW, *Integrating the Gender Perspective into the Work of United Nations Human Rights Treaty Bodies*, UN doc. HRI/MC/1998/6, para. 99.

36 Leckie notes that the delineation of state obligations to respect, protect, and fulfil these rights has received widespread support and is frequently applied to analyses of economic, social, and cultural rights. He notes that this approach probably originated with Henry Shue, but was given broader exposure, at least initially, through the reports and articles of Eide during his tenure as UN Special Rapporteur on the Right to Food in the early 1980s. Leckie, S., 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social, and Cultural Rights', *Human Rights Quarterly*, vol. 20, 1998, no. 1, p. 90-101, and p. 91 at footnote 29. The HRC also refers to this tripar-

Leckie, for example, observes that this methodology of outlining state duties has proven to be a durable means of establishing accountability and has greatly worked towards more clearly identifying, deconstructing, and redressing violations of these rights. He notes that:

> 'Because human rights law must be viewed as constituting an indivisible and organic whole, all human rights contain corresponding obligations to respect, protect, and fulfil the right in question (including civil and political rights). Therefore each type of obligation is subject to violation.'[37]

Therefore, in order to examine whether the work of the HRC and the CESCR displays *women-inclusive* human rights obligations for states parties, the obligations for states parties as they follow from the work of the Committees are organised in accordance with this division of to respect, protect, and to fulfil human rights.

In doing so, the *obligation to respect* is understood as an obligation to refrain from state intervention and was interpreted as entailing not only a negative duty, but it could, in certain circumstances, also entail a positive action by the state.[38] An example of this is a duty upon states not to criminalise abortion when the pregnancy is the result of rape. In principle, this is a negative obligation, since the state is requested *not* to do something. However, when a state has already criminalised abortion in these instances, it is thus requested to change its legislation, and is therefore required to act. *The obligation to protect* is interpreted as an obligation for states to take positive action in order to prevent violations by third parties. Hence, as an obligation for states to take measures aimed at avoiding human rights abuses, and when committed to investigate

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tite division with regard to the obligations of states parties under the ICCPR. See for example GC 31 of the HRC on the nature of the general legal obligation imposed on states parties to the Covenant, UN doc. CCPR/C/21/Rev.1/Add.13, paras. 5-9; the division is also employed by the CEDAW Committee; see for example CEDAW Committee, GC 24, paras. 14-17; and as noted previously, it is also employed in the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights and the Montreal Principles on Women's Economic, Social, and Cultural Rights.

37 Leckie, S., 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social, and Cultural Rights', *Human Rights Quarterly*, vol. 20, 1998, no. 1, pp. 91-92. See for example also Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, pp. 48-49; Eide, A., 'Economic, Social, and Cultural Rights as Human Rights', Economic, Social, and Cultural Rights: A Textbook, Eide, A. (ed), Martinus Nijhoff Publishers, Dordrecht, 2001, p. 23. Former Special Rapporteur on the Right to Health, Hunt, notes in his annual report of 2004 that the analytical framework of obligations to respect, protect, and fulfil is very useful as a way of sharpening legal analysis of, in this case, the right to health. *Report of UN Special Rapporteur Paul Hunt on the right to the enjoyment of the highest attainable standard of physical and mental health*, 16 February 2004, UN doc. E/CN.4/2004/49, paras. 43-44.

38 See Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, p. 48. See also Eide, A., 'Economic, Social, and Cultural Rights as Human Rights', Economic, Social, and Cultural Rights: A Textbook, Eide, A. (ed), Martinus Nijhoff Publishers, Dordrecht, 2001, pp. 23-24.

these and punish the perpetrators.[39] These measures could for example involve criminalisation of certain actions and practices when this would purport a preventive function and impose punishment in accordance with the severity of the crime. And t*he obligation to fulfil* is understood as an obligation for states to take legislative, administrative, judicial, and practical measures that are necessary to ensure that human rights can be enjoyed to the greatest extent possible and guaranteed under all circumstances.[40] An obligation of this nature could for example entail an obligation for states to provide for maternal health care or for shelters for battered women.

On the basis of this division, it is possible to see whether the work of the HRC and the CESCR reflects compliance with the second element of the request of the 1993 World Conference on Human Rights. For in light of this request, on the basis of the aforementioned it is required that the Committees formulate not only obligations to respect, but also to protect and to fulfil. Hereby the obligation to protect proves to be most important in situations where abuses generally occur at the hands of non-state actors, and the obligation to fulfil proves important with regard to those specific women's experiences in which they require certain services and care in order to be able to enjoy their human rights to the greatest extent possible. The analysis on this element of the request of 1993 is therefore directly linked to the characteristics of the human rights abuses and constraints that women experience. First and foremost, the results of the study on this element provide a general insight into the question whether the Committees formulate women-inclusive human rights obligations. Moreover, the results, in combination with relevant literature, UN documents, and other authoritative data on the specifics of these situations, give an indication as to whether the obligations as they are formulated by the HRC and the CESCR are in effect working towards the prevention of these acts or addressing these needs.

4 DISCRIMINATION OF WOMEN

4.1 Element III: link specific experiences of women to discrimination of women where applicable

Issues that affect women's physical integrity often stem from deeply rooted discrimination of women in societies.[41] It is clear from the documents studied that the work of

39 Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, pp. 49-51. See also Eide, A., 'Economic, Social, and Cultural Rights as Human Rights', Economic, Social, and Cultural Rights: A Textbook, Eide, A. (ed), Martinus Nijhoff Publishers, Dordrecht, 2001, pp. 23-24.

40 Ibidem.

41 See for example Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN doc. E/CN.4/2006/61, para. 68. Ertürk argues that control over women's sexuality is often at the heart of cultural and political justifications that sustain and perpetuate violence against women. See also the preamble of the Declaration on the Elimination of Violence against Women, which reads

the human rights monitoring bodies, in order to reflect compliance with the call of the World Conference of 1993, should reflect an awareness of this root cause of human rights abuses and act accordingly. Both the 1993 World Conference on Human Rights and the Fourth World Conference on Women press for the eradication of all forms of discrimination.[42] The Beijing Declaration and Platform for Action, which as noted, builds upon the achievements regarding recognition of human rights of women in the Vienna Declaration, stresses moreover that if the goal of full realisation of human rights for all is to be achieved, international human rights instruments must be applied in such a way as to take more clearly into consideration the systemic and systematic nature of discrimination against women that gender analysis has clearly indicated.[43] The requirement of attention of the human rights monitoring bodies for deeply rooted discrimination against women in relation to specific human rights abuses, is also emphasised by the Expert Group. In its report it stipulates that where a law or policy provides for differential treatment of women and men, any rationale offered in justification should be closely scrutinised to determine whether it is based on underlying discriminatory *assumptions concerning the roles of women and men*.[44] Also, the document lays down that where laws and policies that are apparently non-discriminatory result in discriminatory effects, it is necessary to examine underlying social, cultural, and economic factors. The Expert Group argues that it is necessary to examine whether seemingly non-discriminatory laws and policies are, in fact, being enforced or implemented in a discriminatory manner.[45]

With regard to violence against women, attention should also be drawn to the Declaration on the Elimination of Violence against Women, which, as noted previously, was adopted in follow-up to the 1993 World Conference on Human Rights. This Declaration lays down that states should pursue by all appropriate means and without delay a policy of eliminating violence against women and to this end should, amongst other things, adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferior-

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that 'Recognising that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men', Declaration on the Elimination of Violence against Women, GA resolution 48/104, UN doc. A/RES/48/104 of 20 December 1993, preamble. See for example also Askola, H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Hart Publishing, Oxford, 2007, p. 142.

42 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part I, para. 18 and part II, para. 39; Beijing Declaration and Platform for Action, UN doc. A/CONF.177/20, para. 222; Beijing Declaration and Platform for Action, UN doc. A/CONF.177/20, strategic objective I.2.

43 Beijing Declaration and Platform for Action, UN doc. A/CONF.177/20, para. 222.

44 CHR, *Report of the Expert Group on the Development of Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programmes*, UN doc. E/CN.4/1996/105, para. 48.

45 Ibidem, paras. 49-50.

ity or superiority of either of the sexes and on stereotyped roles for men and women.[46] The Declaration clearly indicates that in order to eliminate violence against women it is not sufficient to tackle the manifestations of discrimination of women alone; the root cause, the unequal status also needs to be addressed.

Consequently, the human rights monitoring bodies are requested to link the specific women's experiences that affect the enjoyment of human rights, where applicable to discrimination of women. Therefore, for the work of the HRC and the CESCR to reflect compliance with the third element of the request of the 1993 World Conference, it should show that where applicable, issues that affect women's physical integrity are linked to systematic and other forms of discrimination of women in society.

4.2 The mandates of the committees in relation to discrimination of women

Element III requires the human rights monitoring bodies to examine whether the women-specific human rights abuses and constraints stem from discrimination of women in societies. Hence, the Committees are requested to explore the root cause of these specific human rights concerns. The HRC and the CESCR are free to address any topic that falls within the realm of the human rights laid down in their respective Covenants. Therefore, as they can address these women-specific human rights abuses and constraints, their mandate not only allows but also requires them to address the root causes of these situations: in order to effectively counteract these human rights concerns, the recommendations of the Committees for states parties need to address them. The mandates of the HRC and the CESCR therefore present no limitations as regards the implementation of Element III in the work of the Committees, but rather necessitate them to act accordingly.

4.3 Examining the work of the committees on element III

In order to examine whether the work of the Committees reflects Element III of the request of the 1993 World Conference, their work is analysed with respect to its attention for three forms of discrimination: direct discrimination; indirect discrimination; and systemic discrimination. The following definitions are employed: *direct discrimination* refers to laws, policies and/or practices that propose unequal treatment for men and women; *indirect discrimination* relates to laws, policies and practices that are prima facie gender neutral, but which have discriminatory effects directed at women; and *systemic discrimination* is used to denote those forms of discrimination that are a consequence of the fact that the structure or organisation of society is based on gender stereotypes which serve to sustain the existing unequal power relations

46 Declaration on the Elimination of Violence against Women, GA resolution 48/104, UN doc. A/RES/48/104 of 20 December 1993, Article 4, sub j.

between the sexes.[47] To illustrate this: if a legal regulation requires two testimonies in for example domestic violence cases when the victim is a woman, but a similar requirement does not exist in cases when the victim is a man, this constitutes a form of direct discrimination, as a direct distinction is made between men and women. Clearly, this legal regulation is also likely to point to more deeply embedded discriminatory attitudes in society against women. Besides addressing this specific situation: if a law discriminates women and perpetuates the unequal status of women in society, the HRC and the CESCR should also explore whether this regulation stems from the deeper-rooted subordinate status of women in society. For whereas direct discrimination only warrants the law to be adjusted or abolished, systemic discrimination requires the state party to take measures to address these underlying harmful gender ideologies that exist in society.

Consequently, the attention of the HRC and the CESCR for manifestations of these three categories of discrimination is analysed on the basis of their attention, where applicable, for discrimination of women as a root cause of human rights abuses and constraints. Attention is paid to the question whether the Committees link these issues explicitly to discrimination of women, and consideration is given to the recommendations they make in regard to these manifestations: do they reveal an awareness of discrimination of women as root cause of the abuse? In respect of the latter aspect, the work of the CEDAW Committee is taken into account. This Committee observes that the reports of states parties to the CEDAW Convention present features that in varying degrees show the existence of stereotyped conceptions of women, owing to socio-cultural factors, that perpetuate discrimination based on sex and hinder the implementation of Article 5 of the Convention. To address this root cause of human rights abuses, the CEDAW Committee:

> 'Urges all States parties effectively to adopt education and public information programmes, which will help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women.'[48]

47 See Holtmaat R., *Toward Different Law and Public Policy – The Significance of Article 5 (a) CEDAW for the Elimination of Structural Gender Discrimination*, Dutch Ministry of Social Affairs and Employment, 2004, p. 90; Loenen, T., 'Rethinking Sex Equality as a Human Right', *Netherlands Quarterly of Human Rights*, vol. 12, 1994, no. 3, pp. 263-270; Oostland, R., Non-Discrimination and Equality – A Comparative Analysis of the Interpretation by the UN Human Rights Committee and the UN Committee on the Elimination of Discrimination against Women, Proefschrift Universiteit Utrecht, 2006, pp. 31-37; Loenen, T., 'Indirect Discrimination: Oscillating Between Containment and Revolution', *Non-Discrimination Law: Comparative Perspectives*, Loenen, T., and P. Rodrigues (eds), Kluwer Law International, The Hague, 1999, pp. 196-198; Frostell, K., and M. Scheinin, 'Women', *Economic, Social, and Cultural Rights: A Textbook*, Eide, A. (ed), Martinus Nijhoff Publishers, Dordrecht, 2001, pp. 333-338.

48 CEDAW Committee, GC 3, UN doc. A/42/38.

Hence, the recommendations of the HRC and the CESCR on these issues should, where applicable, not only address the direct manifestation of discrimination of women, because considering the recommendation of the CEDAW Committee they clearly do not suffice when trying to tackle these issues. The work of the two Committees should also show an awareness, where applicable, of structural discrimination as the main culprit of human rights abuses and constraints and the recommendations of the Committees should provide for an adequate response to it.

5 AN INTEGRATED ADDRESS

5.1 Element IV: no isolated address of specific experiences of women

Criticism of the UN human rights system pointed at the marginalisation of women's rights due to the specialisation of these issues in the international system. The 1993 request to include the status and human rights of women is clearly intended to counteract this *ghettoisation* of women's rights.[49] For that reason, it makes perfect sense that the mainstream human rights monitoring bodies should also refrain from specialising on these issues in separate sections in their work, for that again could lead to stigmatisation and marginalisation.

A clear argument against specialisation of women's rights in the work of the Committees is already found in the Vienna Declaration and Programme of Action, which states that the human rights of women are an inalienable, integral, and indivisible part of universal human rights.[50] This statement is reaffirmed in the Beijing Declaration and Platform for Action, as well as in the report of the Expert Group of 1995.[51] The Expert Group and the DAW, moreover, interpret the statements of the two Conferences as to entail a request for all monitoring bodies to ensure that violations of women's rights are fully reflected *throughout all sections* of their public reports. They note that references to violations against women should not be isolated in one section or referred to only in conjunction with the subject of children.[52] Consequently, for the work of the HRC and the CESCR to reflect compliance with the request of the

49 Some authors refer to the marginalisation of women's rights by the UN human rights system as *ghettoisation*. See for example Charlesworth, H., 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', *Harvard Human Rights Journal*, vol. 18, 2005, no. 1, p. 1; and Reanda, L., 'Human Rights and Women Rights: The United Nations Approach', *Human Rights Quarterly*, vol. 3, 1981, no. 2, p. 12.

50 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part I, para. 18.

51 Beijing Declaration and Platform for Action, UN doc. A/CONF.177/20, para. 213; CHR, *Report of the Expert Group on the Development of Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programmes*, UN doc. E/CN.4/1996/105, para. 9 (a).

52 CHR, *Report of the Expert Group on the Development of Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programmes*, UN doc. E/CN.4/1996/105, para. 32; DAW, *Integrating the Gender perspective into the Work of United Nations Human Rights Treaty Bodies*, UN doc. HRI/MC/1998/6, para. 105.

1993 World Conference, this notion on an integrated address also needs to be reflected in the documents.

5.2 The mandates of the committees in relation to an integrated address

The mandates of the HRC and the CESCR limit the scope of human rights issues that the two Committees can address. Moreover, they provide the boundaries as regards the instruments that the bodies have at their disposal to monitor the implementation of the Covenants in states parties. But the mandates do not place any restrictions on the question in which parts of the documents the human rights issues should be addressed: in separate sections or in an integrated manner. Hence, the mandates of the HRC and the CESCR allow for an integrated address of specific experiences of women, and, considering the common Article 3 in both Covenants that refers to the equal enjoyment of human rights for men and women, the HRC and the CESCR should arguably address these specific women human rights concerns in an integrated manner.

5.3 Examining the work of the committees on element IV

With regard to this fourth and final element of the request of the 1993 World Conference on Human Rights, the structure of the work of the HRC and the CESCR is examined, rather than the content. In order to determine whether the work of the Committees reflects compliance with the 1993 request, attention is paid to the context in which the issues that affect women's physical integrity are addressed by the HRC and the CESCR. It follows from the explanation just presented that in order to conform with the request of the World Conference, the Committees should not refer to these specific issues in separate sections on women, but are requested to address them in a way that is similar to that of other human rights concerns. In this regard this study pays attention to whether the human rights monitoring bodies, when addressing these issues, explicitly refer in that context to substantive human rights provisions; to the principles of non-discrimination and equality as laid down in Articles 2 and 3 of both Covenants; or to no specific provisions. Furthermore, attention is paid to where and in what context these issues are addressed: i.e. are these issues that affect women addressed together with other women-specific matters; are they addressed in a section dealing with rights of other marginalised groups, for example children; or are they addressed together with other human rights concerns?

The results of the analysis of this particular element will show whether the HRC and the CESCR treat women's human rights concerns similarly to other human rights concerns, and consequently whether these issues are integrated into the realm of mainstream human rights.

6 THE FRAMEWORK OF THE STUDY

In summary, this chapter has pinpointed four elements on the basis of which the work of the HRC and the CESCR is examined. The results of this examination will offer the answer to the main research question. In order to determine whether the work of the HRC and the CESCR reflects compliance with the request of the 1993 World Conference on Human Rights to include the status and human rights of women in their deliberations and findings when examining their attention for matters that affect women's physical integrity, the work of the two Committees is analysed on the following elements:

I. Does the work of the HRC and the CESCR reflect attention of the two Committees for issues that affect women's physical integrity?
II. Does the work of the HRC and the CESCR display *women-inclusive* human rights obligations for states parties when examining their attention for matters that affect women's physical integrity?
III. Does the work of the HRC and the CESCR address the link between issues that affect women's physical integrity and discrimination of women in society where this is applicable?
IV. Does the work of the HRC and the CESCR refer to issues that affect women's physical integrity in an integrated manner?

The following chapters present the results of this study. Chapter 7 presents an overall answer to the research question and includes some final remarks.

CHAPTER 3
PREGNANCY AND HUMAN RIGHTS THE HUMAN RIGHTS COMMITTEE

1 INTRODUCTION

This chapter discusses the attention of the HRC for a number of situations or issues that affect a woman's physical integrity and that relate to the issues and experiences that surround a woman's pregnancy, or its prevention. With a mandate that covers the right to life, the right to be free from torture, cruel, inhuman or degrading treatment, and the right to privacy, the HRC appears to be highly competent to address matters so closely entwined with physical integrity as situations concerning a woman's pregnancy are. At the same time, it should be noted that the ICCPR does not contain any provisions that explicitly cover matters related to human reproduction. The Covenant, for example, does not lay down a right to reproductive and maternal health-care.

It is therefore interesting to see that the HRC addresses a number of situations or issues related to pregnancies. These are maternal mortality; forced sterilisation; forced abortion; abortion of female foetuses; and pregnancy in prisons. It should be noted that in this regard the most attention by far is given to maternal mortality, which is evidently a serious point of concern for the HRC.[1] The next section of this chapter describes the statements of the HRC with regard to issues that the Committee addresses with respect to maternal deaths. Attention is paid to the concerns voiced by the Committee regarding these matters and to the recommendations made in this respect. Furthermore the section explains in light of which provisions these issues are brought up. Naturally, the HRC can only address issues that affect or could affect the human rights as laid down in the ICCPR, or which indicate, or could indicate a human rights violation by states parties of the provisions of this Covenant. In the following sections, the results with regard to the other criteria as identified in Chapter 2 are discussed. This means that the statements of the HRC with regard to the aforementioned issues are examined in light of the following: the human rights obligations which the monitoring body formulates for states parties; the Committee's attention for the possible link between these pregnancy-related matters and discrimination of women; and the

1 The World Health Organisation (WHO) defines maternal mortality as the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes. WHO, *Maternal mortality in 2005- Estimates developed by WHO, UNICEF, UNFPA and The World Bank*, 2008, p. 11, http://whqlibdoc.who.int/publications/2007/9789241596213_eng.pdf, accessed on 4 July 2009.

part of its work where it addresses these matters. The last section of this chapter presents a conclusion with regard to the main research question on the basis of the results described.

2 THE HUMAN RIGHTS COMMITTEE AND MATTERS RELATED TO PREGNANCY

2.1 Maternal mortality

2.1.1 Introduction

Most of the situations or issues related to pregnancy that the HRC addresses, be it to prevent a pregnancy or when a woman is pregnant, are brought up in light of the maternal mortality in which these situations result. In GC 28, the HRC indicates that pregnancy-related deaths of women are a matter to be addressed in light of the enjoyment of the right to life. In this GC, the Committee holds that when reporting on the right to life, states parties should provide data on pregnancy-related and childbirth-related deaths of women. Moreover, it lays down that states parties should give information on any measures taken by the state to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.[2] In reference to maternal mortality in states parties, the Committee pays attention to strict national abortion laws, to abortion as a contraceptive method, to the lack of contraceptives, to family-planning services and programmes, to sex education and to maternal healthcare. These specific issues, as well as the Committee's line of reasoning in linking these matters to maternal mortality and subsequently to the right to life as laid down in Article 6 of the ICCPR, are discussed in the following paragraphs.

In addition to the pregnancy-related matters that the HRC addresses in light of maternal mortality, the Committee points in its COs to female genital mutilation (FGM) as a practice that causes maternal deaths. The statements of the Committee on this practice are discussed in Section 2.5 of Chapter 4.

2.1.2 Abortion and maternal mortality

2.1.2.1 Introduction

Maternal mortality is a serious point of concern for the HRC. Although maternal deaths can be the result of many different situations or practices, such as lack or bad quality of maternal healthcare or performing certain dangerous traditional practices on pregnant women, it is noteworthy that the HRC addresses the matter almost exclusively with regard to illegal or unsafe abortions, which make up for 13% of maternal

2 HRC, GC 28, para. 10.

deaths, and hardly addresses any other causes.[3] In GC 28, for example, the HRC requires states parties, when they report on the right to life, to provide information on any measure they have taken to help women prevent unwanted pregnancies and to ensure that they do not have to undergo life-threatening clandestine abortions.[4] Naturally, there are various reasons why women have unsafe abortions. An important explanation is that the pregnancies were unwanted. This particular aspect is addressed by the HRC when it lays down in GC 28 that states have to report on measures they have taken to help women prevent unwanted pregnancies. In its COs, the HRC formulates obligations for states parties regarding family planning services and programmes, sex education, and contraceptives. These will be discussed in the sections following below. In this section, attention is paid to the various reasons addressed by the HRC for women to resort to unsafe abortions and why they do not undergo safe procedures. Hence, this section discusses the statements of the Committee in which it refers to its request in GC 28 to report on the measures the states have taken to ensure that they do not have to undergo life-threatening clandestine abortions. In most occasions, the HRC relates this practice to restrictive laws on abortion or laws that in any other way affect the abortion practice in states parties, for example a conscientious objection clause for medical personnel that enables doctors to refuse to perform an abortion. The Committee recognises that far-reaching or general prohibitions of abortion are the main causes of unsafe abortions.[5]

This section describes these different explanations for unsafe abortions as identified by the HRC, which are therefore principal subjects of its concern. The HRC pays attention to the issue of maternal mortality in quite a number of COs, lists of issues, and in GC 28. In order to provide a clear picture of the dealings of the Committee with this matter, the work of the monitoring body is divided into different paragraphs which reflect on the different reasons for women to turn to unscrupulous abortionists as recognised by the HRC. In the following paragraphs, first the dealings of the HRC on restrictive abortion laws are discussed, then attention is paid to its remarks about

3 The WHO holds that maternal deaths result from a wide range of indirect and direct causes. Most maternal deaths are attributable to direct causes. These follow from complications of pregnancy and childbirth, or are caused by any interventions, omissions, incorrect treatment or events that result from these complications, including complications from (unsafe) abortion. The four other major direct causes are haemorrhage, infection, eclampsia and obstructed labour. The most common cause of maternal death is severe bleeding. Postpartum bleeding can kill even a healthy woman within two hours, if unattended. It is the quickest of maternal killers. WHO, The World Health Report 2005 – Making every mother and child count, 2005, pp. 62-63, http://whqlibdoc.who.int/whr/2005/9241562900.pdf, accessed on 4 July 2009.

4 HRC, GC 28, para. 10.

5 This does not mean that in instances where the HRC only mentions maternal mortality in relation to illegal abortions in its COs, without referring to restrictive laws, it did not address the restrictive laws during the *constructive dialogue*. For example, in the consideration of the report of Zambia, both Committee member Medina Quiroga and Committee member Evatt asked questions about the effect of the criminalisation of abortion in Zambia on the number of illegal abortions, and consequently on the high maternal death rate. SR Zambia 1996, UN doc. CCPR/C/SR.1487, paras. 32 and 52.

restrictive abortion laws in general, and subsequently its statements concerning a prohibition on abortion in certain circumstances as specified by the Committee. Finally, this section looks at other restrictive laws that push women into the arms of illegal practitioners. Secondly, the obstacles to obtaining a legal abortion are described. These obstacles may prevent women from getting an abortion despite the fact that abortion is legally accessible. As a consequence they feel forced to resort to the drastic measure of having an illegal practitioner performing the operation with all risks for their life involved.

2.1.2.2 Restrictive abortion laws

Restrictive national laws that govern the access to abortion in states parties are a matter of concern to the Committee.[6] Frequently in its lists of issues, the HRC questions states parties on their abortion policy. This is for example the case in its list of questions for Mauritius of 2004, where it asks the state party the following:

> 'According to paragraph 24 of the state party's report, regulation 6 of the Medical Council (Code of practice) Regulations 2000 states that life must be respected from the time of conception. Please provide information on the legislation governing abortion and under what circumstances a woman may resort to abortion.'[7]

The dialogue between Mauritius and the HRC and accompanying documents of the Committee serve as a good example of the approach of the HRC in dealing with restrictive abortion laws in states parties. For that reason the statements that the HRC makes in relation to this dialogue are now discussed, before discussing its work on this topic in detail.

In response to the aforementioned question of the HRC, a delegate of the government of Mauritius informed the Committee during the *constructive dialogue* that under Section 235 of the Criminal Code of Mauritius any person who procures, or approves using the means of procuring an abortion or facilitates, or performs an abortion is subject to imprisonment. At the time, the law did not, the delegate noted, provide for any circumstances under which women may legally resort to abortion. He also stated that in 2001, thus four years prior to the dialogue, a task force report had recommended repealing that section of the Criminal Code and replacing it by an Abortion Act which would make abortion lawful in certain circumstances. But the report, the

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6 See for example COs Ireland 2008, para. 13; COs Panama 2008, para. 9; COs Nicaragua 2008, para. 13; COs Poland 2004, para. 8; COs Chile 2007, para. 8; COs Madagascar 2007, para. 14; COs Lesotho 1999, para. 11; COs Cameroon 1999, para. 13. Although the HRC relates restrictive laws on abortion in general to a large number of illegal abortions, there are a few exceptions. In one CO it relates restrictive legislation to a high number of suicides, and in another case, it refers to the many female prisoners this policy has produced. See COs Ecuador 1998, para. 11; and COs Nepal 1994, para. 8. These statements are discussed separately in Section 2.2.2 of this chapter.

7 List of Issues Mauritius 2004, para. 11.

delegate explained, was still being considered by the government.[8] Both Committee member Shearer and Committee member Wieruszewski inquired after the proposed reform. The latter wanted to know what the obstacles were that prevented the legislation on abortion from being enacted. He argued that the Committee's general comments might be a useful tool in expediting the adoption of the proposed Abortion Act.[9] Two delegates of Mauritius responded by stating that religious susceptibilities produced difficulties in adopting the new Abortion Act. They argued that the government was still debating the question of abortion and would be taking a policy decision in the future.[10] The HRC did not find the delegates' answer on the abortion issue satisfactory. In its COs it laid down that

> 'The Committee notes with concern that section 235 of the Penal Code penalises abortion even when the mother's life is in danger, and thus may encourage women to resort to unreliable and illegal abortion, with inherent risks for their life and health (Covenant, art. 6).'[11]

In its COs the HRC argued that the state party should review its legislation to ensure that women are not forced to carry pregnancies to term in violation of the rights guaranteed by the Covenant.[12]

It is not clear what it is precisely that triggers the Committee in addressing restrictive abortion legislation, but its statements in its COs on Paraguay and Bolivia seem to indicate that it is the high maternal mortality rate that induces the HRC to inquire after the state party's legislation on abortion.[13] On the basis of GC 28, states parties are requested, when reporting on their implementation of the right to life, to provide data on pregnancy-related deaths of women. Neither in the reporting guidelines, nor on the basis of the GCs of the HRC, are states parties asked to report on their laws on abortion. This, however, does not mean that states are never questioned on their abortion legislation, as is shown in the example of Mauritius. States can inform the Committee on their abortion policy on their own initiative, but a number of lists of issues also shows that the HRC inquires after the national legislation on abortion.[14]

Consequently, the statements of the HRC, as far as it expresses its concern in its COs on the relation between maternal mortality and restrictive abortion laws show two different angles of addressing the matter. In a number of COs the emphasis is on the

8 SR Mauritius 2005, UN doc. CCPR/C/SR.2261, para. 28.
9 SR Mauritius 2005, UN doc. CCPR/C/SR.2261, paras. 45 and 52.
10 SR Mauritius 2005, UN doc. CCPR/C/SR.2262, paras. 10 and 19.
11 COs Mauritius 2005, para. 9.
12 COs Mauritius 2005, para. 9.
13 In both COs the HRC expresses its concern about the high level of maternal mortality and expresses its regret about the fact that the state party could not provide information about the effect of restrictive abortion laws on this high level of deaths. COs Paraguay 1995, para. 208; COs Bolivia 1997, para. 22.
14 See for example List of Issues Monaco 2008, para. 11; List of Issues Nicaragua 2008, para. 8; List of Issues Panama 2007, para. 5; List of Issues Ireland 2000, para. 11.

maternal death rate, and in others the accent is on the strict laws on abortion. For example, in its COs on Paraguay of 1995, as mentioned previously, the HRC states that:

> 'The Committee expresses its concern about the high level of deaths among expectant mothers referred to in the report. In this regard, it regrets that the state party could not provide information about the effect of the enforcement of abortion laws on this high level of deaths.'[15]

Here the HRC stresses the maternal death rate in the state party as a point of concern. On the other hand, in its COs on Poland of 1999, the Committee notes:

> The Committee notes with concern: (a) strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to life and health of women […].'[16]

The emphasis here is on the strict abortion laws. This difference is also seen in the recommendations of the Committee. In instances where it clearly expresses its concern about the maternal mortality in a state party, it recommends it to reduce the number of maternal deaths, or requires the state party to provide it with more information on the relation between illegal abortions and the high incidence of maternal mortality.[17] In cases where it stresses the restrictive laws governing abortion, the HRC recommends the states parties to amend the law so as to introduce exceptions to the general prohibition of all abortions.[18] In two COs, where the HRC stresses the maternal mortality rate and the criminalisation of abortions, its recommendations are somewhat different and for that reason noteworthy to mention. In its COs for Cameroon, the HRC argues that the state party should take measures to protect the life of all persons, including pregnant women, thus leaving it largely up to the state to decide how it wants to realise this right.[19] But in the COs on Paraguay of 2006 (thus not the COs of 1995 that were previously cited) the Committee is much more precise. Here the HRC notes that it is concerned about the high infant and maternal mortality rates, especially in rural areas, and it reiterates its concern about Paraguay's restrictive abortion laws, which, it argues, induces women to seek unsafe, illegal abortions, at potential risk of their life and health.[20] On that account, it holds that:

15 COs Paraguay 1995, para. 208.
16 COs Poland 1999, para. 11.
17 COs Paraguay 1995, para. 219; COs Senegal 1997, para. 12.
18 COs Chile 1999, para. 15; COs Costa Rica 1999, para. 11; COs Panama 2008, para. 9.
19 In its COs the HRC expresses its concern about the fact that criminalisation of abortion leads to unsafe abortions which account for a high rate of maternal mortality. COs Cameroon 1999, para. 13.
20 COs Paraguay 2006, para. 10.

> 'The state party should take effective action to reduce infant and maternal mortality by, inter alia, revising its legislation on abortion to bring it into line with the Covenant, and ensuring that contraceptives are available to the general public, especially in rural areas.'[21]

Finally, on this particular topic, the recommendations of the HRC for Poland deserve to be mentioned. The Committee was quoted previously, expressing its concern about the strict laws on abortion. Yet, in its recommendations, the HRC does not require the state party to amend its laws, nor does it argue that it should reduce its number of maternal deaths. The Committee lays down that:

> 'The state party should introduce policies and programmes promoting full and non-discriminatory access to all methods of family planning and reintroduce sexual education at public schools.'[22]

An explanation for this may be that in the statements where it expresses its principal subjects of concern, the HRC does not solely address the strict laws on abortion, but refers to the conditions with regard to other pregnancy-related matters in Poland. In these COs it also focuses on the limited accessibility for women to contraceptives, the elimination of sexual education from the school curriculum, and the insufficiency of public family-planning programmes.[23]

The COs on Poland are an exception to the way in which the HRC usually addresses maternal mortality and restrictive abortion laws. Whether it puts the emphasis on the high maternal death rate, or on the criminalisation, or on both, the Committee addresses the matter in separate paragraphs. It tends to either refer to Article 6 explicitly,[24] or it refers to the protection of life, or the risks involved for the lives of individuals.[25] In the COs on Poland, the HRC does not only refer to Article 6, but, most likely related to the fact that it addresses several pregnancy-related issues, the Committee also mentions Articles 3, 9, and 26 of the ICCPR.

In light of the aforementioned, two COs deserve specific attention. In its COs on Senegal, the HRC does not express its concern for maternal mortality and restrictive abortion laws in separate paragraphs, but, as it did in the case of Poland, expresses its concern on a number of different subjects taking place in the state party. However, contrary to its statements on Poland, it does not do so by addressing several pregnancy-related issues. In its COs on Senegal, the Committee expresses its regret about the fact that in the state party certain traditional attitudes with respect to women are

21 Ibidem.
22 COs Poland 1999, para. 11.
23 Ibidem.
24 COs Paraguay 2006, para. 10; COs Poland 1999, para. 11; COs Senegal 1997, para. 12.
25 COs Cameroon 1999, para. 13; COs Costa Rica 1999, para. 11; COs Chile 1999, para. 15. In its COs on Bolivia of 1997 and Paraguay of 1995 the HRC only mentions the high number of maternal deaths. COs Bolivia 1997, para. 22; COs Paraguay 1995, paras. 208 and 219.

not compatible with their dignity as human beings, which continue to hamper their equal enjoyment of the rights embodied in the Covenant. In this respect, the HRC mentions the practice of polygamy, female genital mutilation, and, as was noted before, the high rate of maternal mortality, which, it argues, results from female genital mutilation, from early child birth, and from the strict prohibition of abortion. In this respect it lays down that:

> 'The Committee encourages the state party to launch a systematic campaign to promote popular awareness of persistent negative attitudes towards women and to protect them against all forms of discrimination; it urges the state party to abolish practices prejudicial to women's health and to reduce maternal mortality. […] In light of these concerns, the Committee further recommends that the state party brings its legislation, including family and inheritance laws, into conformity with articles 2 (1), 3, 6, 7, 23, and 26 of the Covenant.'[26]

The COs on Paraguay of 2006 should also be mentioned here, as in this document, and more specifically in its statements on maternal mortality and restrictive abortion laws, the Committee pays special attention to the situation in rural areas. It expresses concern about the high infant and maternal mortality rates, especially in rural areas, and, likewise, argues that the state party should ensure that contraceptives are available to the general public, especially in rural areas.[27]

2.1.2.3 Criminalisation of abortion even in cases of life endangerment

In this section, attention is paid to those COs in which the HRC gives specific attention either in its principal subjects of concern or in its recommendations to a prohibition on abortion even when the life of the pregnant woman is at risk due to the pregnancy, or where it recommends to consider the situation of life endangerment as a specific exception to a general ban on abortion. As opposed to its statements described in the previous paragraph, in the statements presented here the Committee provides more concrete obligations for states parties as regards their abortion policies.

In the previous section the remarks of the Committee on the implementation of the Covenant in Mauritius were presented. There, the Committee notes with concern that Section 235 of the national Penal Code penalises abortion even when the mother's life is in danger.[28] In a number of other COs, the HRC makes similar remarks.[29] For

26 COs Senegal 1997, para. 12.
27 COs Paraguay 2006, para. 10.
28 COs Mauritius 2005, para. 9.
29 COs Lesotho 1999, para. 11; COs Madagascar 2007, para. 14; COs Chile 2007, para. 8; COs Honduras 2006, para. 8. In its COs on Kuwait of 2000, the HRC does not specifically refer to life endangerment, but holds that it is concerned that abortion is a crime and that the law makes no exceptions on humanitarian grounds. Its recommendations, however, strongly indicate that the HRC refers to exceptions when the life of the pregnant woman is at risk. COs Kuwait 2000, paras. 15 and 16.

example, in its COs on Honduras of 2006, the Committee expresses its concern about the unduly restrictive legislation on abortion, particularly in cases where the life of the mother is at risk.[30] In light of these concerns, the HRC formulates some strong recommendations. It argues in these cases that the state party should amend its abortion laws so as to help women avoid unwanted pregnancies and ensure that women need not resort to clandestine abortions, which, it holds, could endanger their lives. Moreover, the Committee states that in these cases, the state party should amend its legislation on abortion in order to bring it into line with the Covenant.[31] In its COs prior to the ones on Honduras of 2006, the Committee uses a milder tone. In its recommendations for Mauritius, the HRC makes a statement similar to that in, for example, its COs on Honduras, be it a bit more subtle. Here it holds that the state party should review its legislation to ensure that women are not forced to carry pregnancies to term in violation of the rights guaranteed by the Covenant.[32] Yet, in its COs on Lesotho and Kuwait, the Committee leaves the states parties more freedom of interpretation. There it recommends the states to consider amending the law so as to provide for situations where the life of the pregnant woman is in danger.[33]

Except for its COs on Lesotho, the HRC explicitly refers to Article 6 in all of these COs where it addresses restrictive abortion laws with a particular focus on life endangerment as a ground for abortion.[34] In its COs on Lesotho, the Committee does not explicitly refer to Article 6 or to the right to life as such, but it does hold that it recommends the state party to review the law of abortion to provide for situations *where the life of the woman is in danger*.[35] In all these cases, the concern of restrictive abortion law is addressed in a separate paragraph. Thus the matter is not, for example, linked to discrimination, to other pregnancy-related concerns, or to other concerns that are generally identified with lives of women.

2.1.2.4 Criminalisation of abortion even when the pregnancy is the result of rape or incest

This section describes the attention of the HRC for exceptions to a ban on abortion in cases where the pregnancy is the result of rape or incest. The Committee refers to these exceptions both in its sections where it lays down its principal subjects of concern and where it states its recommendations. Prior to describing its dealings on this particular

30 COs Honduras 2006, para. 8.

31 COs Honduras 2006, para. 8; COs Nicaragua 2008, para. 13; COs Monaco 2008, para. 10; COs Chile 2007, para. 8; COs Madagascar 2007, para. 14. For the sake of completeness, it is noted that in the latter COs, the HRC argues that the state party *should consider* amending its legislation, as opposed to its more stronger statements in the two former COs in which it talks of *should* bring into line.

32 COs Mauritius 2005, para. 9.

33 COs Lesotho 1999, para. 11; COs Kuwait 2000, para. 16.

34 COs Madagascar 2007, para. 14; COs Chile 2007, para. 8; COs Honduras 2006, para. 8; COs Kuwait 2000, para. 16; COs Mauritius 2005, para. 9.

35 COs Lesotho 1999, para. 11.

topic, it is important to note that the HRC does not necessarily always link this issue to maternal mortality. As will be shown, the Committee also addresses this matter in light of Article 7 as opposed to Article 6 on the right to life, and for that reason does not relate it to maternal mortality. The matter is discussed here as well, however, because often the Committee also refers to Article 6 in its COs when it discusses this specific exception, and because the foregoing sections also deal with restrictive abortion laws.

A clear indication that criminalisation of abortion in cases where the pregnancy is the result of rape is contrary to the enjoyment of Article 7 of the Covenant is provided by GC 28. Here the HRC argues that in order to assess compliance with this article, states parties should inform the Committee on whether they give access to safe abortion to women who became pregnant as a result of rape.[36] Its statements in its dialogue with Peru and its subsequent COs show that this matter does not only affect Article 7, but also Article 6. During the *constructive dialogue* with Peru, Committee member Evatt inquired whether Peruvian legislation still prohibited women who have been raped from having a legal abortion. She heard, so she argued, that illegal abortions were responsible for the very high maternal mortality rate in Peru.[37] The representative of Peru stated that therapeutic abortion to save the mother's life is not punishable under criminal law. In certain situations, such as abortion subsequent to rape, the penalty imposed tended, he argued, to be merely symbolic and moves to decriminalise abortion in such circumstances were underway.[38] Committee member Evatt was not satisfied with the answer; she argued that no doctor would be willing to perform an abortion on a victim of rape because they would be committing a crime, and so abortion by a doctor was not available to rape victims. She pointed out that the Peruvian delegation had stated that clandestine abortion was the biggest cause of maternal mortality. This was, she noted, tantamount to saying that there were many desperate women in Peru choosing to risk their lives in such a procedure. That, according to her, could not be regarded as guaranteeing women equal enjoyment of their rights under the Covenant.[39] In its COs following the dialogue, the Committee expressed concern about the fact that abortion gave rise to a criminal penalty even if the woman was pregnant as a result of rape and about the fact that clandestine abortions were the main cause of maternal mortality. The Committee noted that this meant that women were not only subject to inhuman treatment but that possibly the Peruvian criminal provisions were also incompatible with Articles 3, 6, and 7 of the Covenant.[40]

In its COs on Colombia of 2004, the HRC only refers to Article 6 of the Covenant. It expresses its concern that the existence of legislation criminalising all abortions under the law can lead to situations in which women are obliged to undergo high-risk

36 HRC, GC 28, para. 11.
37 SR Peru 1996, UN doc. CCPR/C/SR.1547, para. 65.
38 SR Peru 1996, UN doc. CCPR/C/SR.1548, para. 30.
39 Ibidem, para. 65.
40 COs Peru 1996, para. 15.

clandestine abortions. It is especially concerned that women who have been victims of rape or incest or whose lives are in danger as a result of their pregnancy may be prosecuted for resorting to such measures. Both in this case, as in its COs on Argentina of 2000, the HRC recommends the state party to amend the law so as to permit abortions in all cases of pregnancy resulting from rape.[41] But in its COs on Peru the HRC formulates a different recommendation. Here it lays down that:

> 'The Committee recommends that the provisions of the Civil and Penal Code should be revised in the light of the obligations laid down in the Covenant, and in particular in its articles 3 and 26. Peru must ensure that laws relating to rape, sexual abuse, and violence against women provide women with effective protection and must take the necessary measures to ensure that women do not risk their life because of the existence of restrictive legal provisions on abortion.'[42]

Although it also refers to the risks imposed on their lives, the Committee places the emphasis in this statement on Articles 3 and 26 of the Covenant, and on that account on equality and non-discrimination, as opposed to its statements in the two other COs where its main focus is an exception to a general ban in light of the full enjoyment of Articles 6 and 7 of the Covenant. The reason for this may be found in the fact that whereas the HRC addresses the matter of restrictive laws in a separate section in the two COs on Colombia and Argentina, it does not do so in the case of Peru.[43] Here, in the same paragraph, it discusses the Peruvian legislation on rape, which, the Committee notes with concern, still contains a provision that exempts a rapist from punishment if he marries his victim and another which classifies rape as an offence subject to civil prosecution. However, it should be noted that in this paragraph, where the HRC expresses its concern as regards legislation on abortion and rape, it explicitly refers to Articles 3, 6, and 7 of the Covenant.[44]

The considerations in the report of Ecuador deserves to be mentioned separately. Like the statements of the HRC as discussed previously, the Committee expresses its concern about the number of pregnant women that die due to restrictive abortion laws. However, in the case of Ecuador the Committee notes that this is not necessarily a result of the fact that women are left to their own devices, and therefore seek refuge with clandestine practitioners, but that it is (partly) the result of the fact that many pregnant women take their own lives. The Committee lays down in its COs that:

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41 COs Argentina 2000, para. 14; COs Colombia 2004, para. 13. It should be noted that in the latter COs, the HRC uses somewhat stronger language as it argues that the state party should ensure that the legislation applicable to abortion is revised so that no criminal offences are involved in the cases as described in its section on its principal subjects of concern.

42 COs Peru 1996, para. 22.

43 The statements of the HRC in its COs on Argentina of 2000 will be discussed in more detail in Section 2.1.2.7. of this chapter on obstacles to a legal abortion.

44 COs Peru 1996, para. 15.

> 'The Committee expresses its concern about the very high number of suicides of young females referred to in the report, which appear in part to be related to the prohibition of abortion.'[45]

The HRC mainly seems to refer to women that have become pregnant as a result of rape. For it subsequently holds that:

> 'In this regard, the Committee regrets the state party's failure to address the resulting problems faced by adolescent girls, in particular rape victims, who suffer the consequences of such acts for the rest of their lives.'[46]

The Committee argues that these situations, from both a legal and a practical standpoint, are incompatible with Articles 3, 6, and 7 of the Covenant and with Article 24 when female minors are involved. It recommends the state party to adopt all necessary legislative and other measures to assist women, and particularly adolescent girls, faced with the problem of unwanted pregnancies to obtain adequate healthcare and education facilities.[47] The Committee addresses this matter in a paragraph solely devoted to this issue.

2.1.2.5 Reporting obligations for doctors and medical personnel

In GC 28, the Committee holds that states may fail to respect women's privacy as protected by Article 17 of the Covenant when they impose a legal duty on doctors and other healthcare personnel to report cases of women who had an abortion. It notes moreover that when such obligations exist, other rights in the Covenant, such as those of Articles 6 and 7, might also be at stake.[48] In light of this latter remark and the fact that in its COs the HRC puts emphasis on the effect of such duties on the right to life, this issue is discussed here, rather than as a separate section.

In two of its COs the Committee deals with a national legal duty imposed on doctors and other healthcare personnel to report women who had an abortion. This is in its COs on Venezuela of 2001 and its COs on Chile of 1999. The *constructive dialogues* that preceded both COs provide a good insight into the reasons for the HRC to address this matter, and are therefore discussed here.

During the considerations of the Chilean report, Committee member Evatt brought up the issue of compulsory reporting of abortions by hospitals.[49] The representative of Chile stated that abortion was a crime in Chile, and that it was thus possible for a woman having an abortion in a public hospital to be reported to the police because of

45 COs Ecuador 1998, para. 11.
46 COs Ecuador 1998, para. 11.
47 Ibidem.
48 HRC, GC 28, para. 20.
49 SR Chile 1999, UN doc. CCPR/C/SR.1734, para. 62.

the civil-service obligation to report all crimes. The representative held, however, that no special instructions to do so had ever been issued, nor had anyone ever been prosecuted.[50] The reply was not satisfactory to the Committee; in its COs it lays down that the legal duty imposed upon healthcare personnel to report on cases of women who have undergone abortions could inhibit women from seeking medical treatment, thereby endangering their lives. The HRC recommends Chile to amend its law so as to protect the confidentiality of medical information.[51] This statement is repeated in the COs on Venezuela of 2001. During the *constructive dialogue* Committee member Kretzmer stated that he had learned that healthcare personnel was obliged to report suspected cases of illegal abortion. That meant, he argued, that women were deterred from using healthcare facilities, and on that account the high rate of maternal mortality appeared to be partly due to the frequency of unsafe illegal abortion.[52] The chairperson of the meeting, Bhagwati, agreed and noted that the HRC was greatly concerned: the policy of healthcare officials being bound by law to report abortions had led to high rates of maternal mortality, which resulted from the reluctance of women to seek help following abortion-related complications.[53] In its COs, the Committee lays down that the state party must adopt the necessary measures to guarantee the right to life for pregnant women who decide to terminate their pregnancies. Moreover the Committee holds that the state party should protect the confidential nature of medical information.[54] In both cases, the Committee addresses the legal duty imposed on healthcare personnel in a separate paragraph on abortion, where it also addresses the restrictive abortion laws of the states parties.[55]

2.1.2.6 Restrictive laws other than on abortion

In one of its COs, the HRC expresses its concern on a law that allows for imprisonment of both mother and father of the unborn child in the event of an unmarried woman becoming pregnant. This, it notes, may induce women to resort to illegal abortion with the attendant risks to the right to life and also to the rights of the child if born under such circumstances. The HRC recommends here the abolition of this law and, as it notes that illegal abortion is a major cause of maternal mortality, recommends that a national review is carried out on the restrictions on abortions. In this context, the Committee not only refers to Articles 6, 23 and 24 (as regards the rights of the child), but also to Articles 3 and 26 of the Covenant on equality and non-discrimination.[56]

50 Ibidem, para. 76.
51 COs Chile 1999, para. 15.
52 SR Venezuela 2001, UN doc. CCPR/C/SR.1900, para. 68.
53 SR Venezuela 2001, UN doc. CCPR/C/SR.1901, para. 15.
54 COs Venezuela 2001, para. 19.
55 COs Chile 1999, para. 15; COs Venezuela 2001, para. 19.
56 COs United Republic of Tanzania 1998, para. 15.

2.1.2.7 Obstacles to a legal abortion

In general the Committee is more inclined to address abortion and maternal mortality in light of the (non-)legal status of abortion in states parties. But in a few COs, it addresses certain obstacles that prevent women from having access to an abortion although the procedure is legal according to national law. For the sake of clarity, this part of the HRC's work is divided into three sections: the statements of the HRC with regard to a conscientious objection clause for doctors and medical personnel; authorisation requirements concerning abortion; and other obstacles.

2.1.2.7.1 Conscientious objection clause

In one of its COs, the Committee pays attention to a national conscientious objection clause for medical practitioners who refuse to perform abortions. The HRC expresses concern in its COs on Poland of 2004 about the lack of information provided by the state party on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. It asks Poland to provide it with further information on this issue.[57]

In these COs, the HRC addresses the matter of conscientious objection in a paragraph that is devoted solely to the topic of abortion. In the same paragraph, it expresses its deep concern about the restrictive abortion laws in Poland, which, it holds, may incite women to seek unsafe, illegal abortions, with the attendant risks to their life and health, and where it also expresses its concern about the actual unavailability of abortion even when the law permits it. It explicitly refers to Article 6 of the Covenant and argues that the state party should liberalise its legislation and practice on abortion.[58]

2.1.2.7.2 Authorisation requirements

GC 28 lays down that a national-law authorisation requirement of the husband for *sterilisation* procedures is contrary to the respect for women's privacy as provided for in Article 17 of the Covenant.[59] Although in this GC the Committee refers only to sterilisation and not to abortion, it makes statements on authorisation requirements of a similar nature in cases of abortion in its COs on Zambia. However, it should be noted that in its COs on Zambia the focus is solely on the approval of physicians and not, for example, of husbands, partners, or fathers.

In the case of Zambia, the HRC states to be concerned that despite progress made, maternal mortality remains high in Zambia. While it notes that considerable efforts have been made by the state party in the area of family planning, the HRC is still concerned that the requirement for three physicians to approve an abortion may

57 COs Poland 2004, para. 8.
58 Ibidem.
59 HRC, GC 28, para. 20.

constitute a significant obstacle for women wishing to undergo legal and therefore safe abortion. In this respect, the HRC refers explicitly to Article 6 of the Covenant, and lays down that it encourages the state party to increase its efforts in combating maternal mortality. The Committee argues that the state party should amend its abortion laws to help women avoid unwanted pregnancies and avoid having to resort to illegal abortions that could put their lives at risk.[60]

2.1.2.7.3 Other obstacles that hinder a legal abortion

The COs on Argentina of 2000 lay down that in cases where abortion procedures can be lawfully performed, all obstacles to obtaining them should be removed.[61] In its COs, the Committee is concerned that the criminalisation of abortion deters medical professionals from performing the procedure without judicial order even when they are permitted to do so by law, inter alia when there are clear health risks for the mother or when pregnancy results from rape and the woman concerned is mentally disabled.[62]

The Committee addresses this matter in a paragraph that solely deals with the status of abortion in Argentina. In the same paragraph the HRC expresses its concern over discriminatory aspects of the laws and policies in force, which, it holds, result in a disproportionate resort to illegal, unsafe abortions by poor women and women living in rural areas. These latter remarks stem from a discussion that took place during the *constructive dialogue*, where Committee member Evatt remarked upon the fact that in certain regions abortion numbers are a lot higher than suggested by the numbers presented. She noted that illegal abortions made up for 43% of the maternal mortality figures and that it mainly affected poor young women. She observed, moreover, that in certain regions in the North, East, and West of the country over 85% of the deaths of young women were the result of an illegal abortion.[63] In its COs, the Committee consequently argues that in cases where abortion procedures may be lawfully performed, all obstacles to obtaining them should be removed. It moreover recommends the state party to take measures to give effect to its Reproductive Health and Responsible Procreation Act of July 2000, based on which family planning counselling and contraceptives are to be provided. This so as to offer real alternatives. The HRC subsequently holds that the laws and policies with regard to family planning should be reviewed on a regular basis by Argentina and finally lays down that women should be given access to family planning methods and sterilisation procedures.[64]

2.1.2.7.4 The case of K.L. versus Peru

Highly noteworthy in this respect are the views of the HRC in the case of K.L versus Peru. In this case, the Committee does not only give recommendations, but finds a

60 COs Zambia 2007, para. 18.
61 COs Argentina 2000, para. 14.
62 Ibidem.
63 SR Argentina 2000, UN doc. CCPR/C/SR.1883, para. 43.
64 COs Argentina 2000, UN doc. CCPR/CO/70/ARG, para. 14.

violation of the right to privacy in regards of a situation in which a legal right to abortion existed, but was not granted. Although the views do not mention a high maternal mortality rate, the case is discussed here for a number of reasons. First of all, the case shows how healthcare personnel is reluctant to perform an abortion or to give authorisation for such a procedure when the law in the state party is very restrictive. Moreover, in this case the refusal to perform an abortion created risks for the life of the mother and on that account could be considered to affect her right to life (similar to maternal mortality). And finally, Peru is reprimanded by the HRC on several occasions on its high maternal death rate in relation to its restrictive abortion legislation and for that reason this case is an illustration of the matters discussed in the COs on Peru. For these reasons, the case of K.L. versus Peru is discussed here, but only in light of the Committee's statements regarding the obstacles to legal abortion and the resulting violations of human rights. Due to the specific nature of the case – it concerns a woman who was a minor when she got pregnant – and because the HRC also gives its findings on a number of other issues besides the obstacles to a legal abortion, the case is discussed in general in Section 2.2.6. of this chapter.

The case of K.L. versus Peru concerns a young woman, K.L., who when she is 3 months pregnant learns from a hospital doctor that she is carrying an anencephalic foetus. The condition of the foetus is fatal for the foetus in all cases and endangers the life of K.L. Following the advice of the hospital doctor, K.L. decides to terminate the pregnancy. In these circumstances this procedure is justified under national law, as it permits therapeutic abortion when this is the only way of saving the life of the pregnant woman or of avoiding serious and permanent damage to her health. But the hospital director refuses to grant K.L. the required authorisation for the procedure, because he is of the opinion that to do so would be unlawful. According to Peruvian law, abortion is punishable by a prison term of no more than three months when it is likely that at birth the child will suffer serious physical or mental defects. The refusal results in the fact that K.L. is forced to carry the pregnancy to term. When the baby is born, K.L. has to breastfeed the baby girl knowing that she will die soon. After four days the baby dies, and K.L falls into a state of deep depression.[65]

K.L., and the organisations that represent her, argue that Peru has violated, amongst others things, Article 17 of the ICCPR. They hold that this article protects women from interference in decisions which affect their bodies and their lives and offers them the opportunity to exercise their right to make independent decisions on their reproductive lives. K.L. points out that the state party has arbitrarily interfered in her private life by taking a decision on her behalf relating to her life and reproductive health which obliged her to carry a pregnancy to term, thereby breaching her right to privacy. She emphasises that the service (of abortion) was available, and that if it had not been for

65 HRC, communication no. 1153/2003, K.L. versus Peru, UN doc. CCPR/C/85/D/1153/2003, paras. 2.1-2.8.

the interference of state officials in her decisions, which enjoyed the protection of the law, she would have been able to terminate the pregnancy.[66]

In response to the comments of K.L., the HRC notes that a public-sector doctor told her that she could either continue with the pregnancy or terminate it in accordance with domestic legislation which allows abortions in cases of risk to the life of the mother. Since the state party has not given any information on this point, the Committee argues that due weight must be given to the claim of K.L. that at the time of this notification of the hospital doctor the conditions for a lawful abortion were present. On that account, the HRC holds that in the circumstances of the case, the refusal to act in accordance with the decision of K.L. to terminate her pregnancy was not justified and amounted to a violation of Article 17 of the Covenant.[67]

2.1.2.8 Abortion as a contraceptive method

In a few COs the HRC brings up abortion in a different setting than that of unsafe abortion resulting from restrictive legislation. In its COs on Moldova, the Committee expresses its concern about the fact that the delegation is unable to answer the question of whether the practice of relying on abortion as a means of contraception is a cause of the high maternal mortality in the state party. It asks the state party to carefully assess the issue of abortion and maternal mortality and to take the necessary measures to reduce the high maternal death rate.[68]

In its COs on Albania of 2004, the Committee states to be concerned about the high rate of abortion and asks the state party to take steps to ensure that abortion is not used as a method of family planning.[69] It is noteworthy that this remark in the latter COs is not made in light of maternal mortality. In this case, the HRC had not requested information on the number of abortions; it was Albania itself that showed in its report that between 20 and 25 percent of the pregnancies in its country are aborted.[70]
The COs on the Republic of Moldova deal with abortion as a contraceptive method in a separate paragraph. This is not the case for the COs on Albania, where the HRC also addresses the high infant mortality and the apparent lack of family planning and social care in some parts of the state party. On that account, the Committee does not only make recommendations regarding the high number of abortions, but also argues that the state party should take the appropriate measures to reduce infant mortality.[71]

66 Ibidem, para. 3.6.
67 Ibidem, para. 6.4.
68 COs Republic of Moldova 2002, para. 18.
69 COs Albania 2004, para. 14.
70 Nor did the lists of issues or the general guidelines demand information on the number of abortions carried out in the state party. See Lists of Issues Albania 2004, UN doc. CCPR/C/82/L/ALB. During the dialogue between the HRC and the delegation from Albania, Committee member Kälin remarked upon this fact from the report. See SR Albania 2004, UN doc. CCPR/C/SR.2228, para. 34.
71 COs Albania 2004, para. 14.

2.1.3 Family planning and maternal mortality

2.1.3.1 Introduction

The HRC does not mention family planning in its GCs. But in its COs the HRC expresses concern about the situation in states parties regarding family planning on several occasions. It is concerned about the insufficiency of public family-planning programmes;[72] the unavailability of family-planning advice and facilities;[73] the inaccessibility of family-planning services;[74] the legal restrictions on the availability of family-planning services;[75] the lack of free family-planning services;[76] and the lack of family-planning services and social care in some parts of the country.[77] In its recommendations, the Committee argues that states parties should introduce policies and programmes that promote full and non-discriminatory access to all methods of family planning;[78] ensure that women have full and equal access to family-planning methods;[79] adopt appropriate family-planning programmes;[80] do away with the legal restrictions on family planning so as to reduce maternal mortality;[81] and should ensure free access to family-planning services and methods.[82]

In almost all instances, the HRC brings up the issue of family-planning programmes and services in light of the responsibility of states to take adequate measures to help women prevent unwanted pregnancies and avoid life-threatening abortions. For example in its COs on Viet Nam of 2002 the Committee argues:

> 'The state party should take adequate measures to help women prevent unwanted pregnancies and avoid resorting to life-threatening abortions, and adopt appropriate family planning programmes to this effect.'[83]

Its reasoning is that unwanted pregnancies, as is seen in its aforementioned statement, lead to life-threatening abortions, which result in maternal mortality. As was observed previously, maternal mortality is an issue that affects the obligations of states under the right to life, as laid down in Article 6 of the ICCPR. The COs on Equatorial Guinea of 2004 offer a good example of this reasoning:

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72 COs Poland 1999, para. 11.
73 COs Mongolia 2000, para. 8.
74 COs Mali 2003, para. 14; COs Democratic Republic of Congo (DRC) 2006, para. 14.
75 COs Equatorial Guinea 2004, para. 9.
76 COs Poland 2004, para. 9.
77 COs Albania 2004, para. 14.
78 COs Poland 1999, para. 11.
79 COs Morocco 1999, para. 13; COs Argentina 2000, para. 14.
80 COs Azerbaijan 2001, para. 16; COs Viet Nam 2002, para. 15; COs Mali 2003, para. 14; COs Lithania 2004, para. 12.
81 COs Equatorial Guinea 2004, para. 9.
82 COs Poland 2004, para. 9.
83 COs Viet Nam 2002, para. 15.

> 'The Committee expresses concern that legal restrictions on the availability of family planning services give rise to high rates of pregnancy and illegal abortion, which are one of the principal causes of maternal mortality.'[84]

And in its COs on Mali of 2003, the Committee noted that:

> 'It [the state party – FvL] should help women avoid unwanted pregnancies, including by strengthening its family planning and sex education programmes, and ensure that they are not forced to undergo clandestine abortions, which endanger their lives.'[85]

Only in its COs on the Democratic Republic of Congo (DRC) of 2006 does the HRC not refer to unwanted pregnancies. In these COs the Committee notes that it remains concerned about the very high maternal and infant mortality rates in the state party, which are due in particular, it notes, to the difficult access to healthcare and family-planning services and the low level of education. It explicitly refers to Article 6 of the Covenant. Consequently, it argues that the DRC should strengthen, in particular, its efforts to increase access to health services and should ensure that healthcare personnel receive better training.[86] The Committee, thus, makes no recommendations as regards the strengthening of family planning as such.

On a number of occasions, the HRC addresses specific family-planning means or services. Its statements regarding sex education and contraceptive methods are described in the following paragraphs.

2.1.3.2 Sex education

The HRC does not discuss sex education in its GCs, but in its COs it touches upon the matter on a few occasions. In two COs on Poland, the HRC expresses its concern about sex education in the state party. In its COs of 1999, the HRC sums up a list of its concerns of pregnancy-related matters in the state party, one of which is the elimination of sexual education from the school curriculum.[87] The HRC argues that the state party has to reintroduce sexual education at public schools.[88] In the dialogue that follows five years later with Poland, the issue of sex education is brought up again. This time the HRC is concerned about the *nature* of sexual education.[89] During the *constructive dialogue* that took place in 2004, representatives of Poland reported that the Ministry of National Education and Sport of Poland provided sex education in all schools, commencing in the fifth grade of primary school. They explained that sex

84 COs Equatorial Guinea 2004, para. 9.
85 COs Mali 2003, para. 14.
86 COs DRC 2006, para. 14.
87 COs Poland 1999, para. 11.
88 COs Poland 1999, para. 11.
89 COs Poland 2004, para. 9.

education covered such issues as contraception and sexual violence.[90] An act of 1993 made sex education for family life compulsory in all schools. But, as the Polish delegate explained, the decision on whether pupils had to participate was left to the parents, because the Ministry of National Education and Sport supports parents' constitutional right to bring up their children in accordance with their beliefs. The Polish delegates informed the HRC that schools were required to present students with reliable and objective information that was free of all forms of prejudice. Moreover, they explained that in 2002, the basic curriculum was extended by the Ministry to cover contraception and to provide counselling for young people. Schools were required to discourage early sexual initiation and premature pregnancy.[91] In reply to a question by Committee member Shearer,[92] one of the Polish representatives stated that about 80% of the students follow the sex education classes. The classes took up to fourteen hours per school year.[93]

The explanation of the delegates on this matter must have been unsatisfactory. The HRC holds in its COs that the state party should ensure that schools include accurate and objective sexual education in their curricula.[94] What it is that *accurate* and *objective* sex education includes it leaves aside.

In two other COs the Committee addresses the status of sex education in states parties. In its COs on Mali of 2003, the HRC argues that the state party should help women avoid unwanted pregnancies, including by strengthening its family-planning and sex-education programmes, and ensure that they are not forced to undergo clandestine abortions, which endanger their lives.[95] The statement was made in light of the high maternal and infant mortality rate in Mali, which the HRC related in particular to the relative inaccessibility of health and family planning services, the poor quality of healthcare provided, the low educational level, and the practice of clandestine abortions in the state party.[96]

As was seen in the comments of the HRC regarding family-planning programmes and services, the Committee links sex education to unwanted pregnancies, which often result in clandestine abortions, which endanger the lives of these women. This is however not necessarily the case in its COs on Poland. As mentioned, the HRC, in its COs on Poland of 1999, listed a number of pregnancy-related concerns, one of them being the elimination of sexual education from the school curriculum. Although its other concerns include the high numbers of clandestine abortions due to strict laws on abortion which have attendant risks to life and health of women, the HRC does not refer to them in its recommendations. In its recommendations, it holds that the state

90 SR Poland 2004, UN doc. CCPR/C/SR.2240, para. 5.
91 Ibidem, para. 38.
92 Ibidem, para. 51.
93 SR Poland 2004, CCPR/C/SR.2241.
94 COs Poland 2004, para. 9.
95 COs Mali 2003, para. 14.
96 Ibidem.

party should introduce policies and programmes promoting full and non-discriminatory access to all methods of family planning and reintroduce sexual education at public schools.[97] In its COs on Poland of 2004 it brings up its concerns on the nature of sex education in the state party together with the family-planning programmes it had adopted. The HRC reiterates its deep concern about the restrictive laws in Poland in a separate paragraph, meaning that it does not expressly relate the two matters to one another.[98]

In its COs on Lithuania of 2004 the HRC raises the issue of sex education not only in light of unwanted pregnancies and abortions among young women, but also in relation to the high number of these women that contract HIV/AIDS. It argues that the state party should take further measures to help women avoid unwanted pregnancies and HIV/AIDS, including strengthening its family-planning and sex-education programmes.[99] A few months later, the Committee addresses sex education again, then solely in light of the problem with HIV/AIDS in the state party. In its COs on Namibia, it holds that it appreciates the efforts undertaken by the state party to combat HIV/AIDS and to provide wider sexual education in this regard, but that these efforts are, however, not adequate in view of the magnitude of the problem. It argues that the state party should pursue its efforts to protect its population from HIV/AIDS.[100]

Finally, the COs on the DRC, which were already mentioned in the previous section on family-planning services and programmes should be briefly cited. Here the Committee holds that due to amongst other things the low level of education, the state party is faced with high maternal death rates. It was already noted that in its recommendations, the HRC makes no reference to any measures relating to sex education.[101]

In all these instances where it touches upon sex education in its COs – in light of HIV/AIDS, maternal mortality, and in order to avoid unwanted pregnancies – the HRC refers explicitly to Article 6: the right to life. It either mentions the article, without expressly mentioning the right to life, or it notes that sex education should be strengthened as a way to avoid unwanted pregnancies in order to ensure that women are not forced to undergo clandestine abortions, which endanger their lives.

2.1.3.3 Contraceptive methods in general

The HRC does not address the issue of contraceptives in its GCs, but in its COs it touches upon the matter on a few occasions. It expresses a number of concerns in this respect. In the case of Georgia, it expresses its concern about the fact that methods of contraception other than abortion are very difficult to obtain in the state party.[102] In its

97 COs Poland 1999, para. 11.
98 COs Poland 2004, para. 9.
99 COs Lithuania 204, para. 12.
100 COs Namibia 2004, para. 10.
101 COs DRC 2006, para. 14.
102 COs Georgia 1997, para. 12.

COs on Hungary it notes that the state party fails to provide sufficient support for family planning through effective means of contraception.[103] And in the COs on Poland of 1999 and 2004, the HRC notes with concern that there is only limited availability of contraceptives for women due to high prices, that access to suitable prescriptions is restricted, and that the number of refundable oral contraceptives has been reduced.[104]

The HRC recommends Hungary in this respect to take steps to protect women's life and health through more effective family planning and contraception.[105] In its COs on Poland of 1999, it makes no recommendations on its contraceptive policy, but in 2004 the HRC argues that the state party should ensure the availability of contraceptives and free access to family-planning services and methods.[106]

In the few COs where the HRC expresses its concerns on the situation in states parties regarding accessibility of contraceptives, the Committee refers to Article 6 of the ICCPR on the right to life. In its COs on Hungary of 2002 it mentions contraception together with the high maternal mortality rate in the state party.[107] In its COs on Poland of 1999, as mentioned in the section on family-planning programmes and services, the HRC sums up a list of concerns. Limited accessibility to contraceptives is one of them.[108] And in its COs on Poland of 2004, the Committee addresses contraception together with family-planning services, but in a different paragraph than the one on maternal mortality and clandestine abortions. These last two issues are mentioned in the previous paragraph of the document.[109] In the COs where the HRC recommends the states parties to ensure access to safe contraception methods, it does so in light of the high maternal mortality rate of women resulting from clandestine abortions.[110]

2.1.3.4. Sterilisation

The COs on Argentina of 2000 pay specific attention to sterilisation as a contraceptive method. The HRC expresses its concern in this document on the discriminatory aspects of the laws and policies in force, which it observes result in disproportionate resort to illegal, unsafe abortions by poor women and women living in rural areas.[111] During the dialogue between representatives of Argentina and the HRC, Committee member Evatt noted that sterilisation was a criminal offence in Argentina and that a judicial order was required in order to undergo the procedure. Evatt linked this restrictive policy to

103 COs Hungary 2002, para. 11.
104 COs Poland 1999, para.11; COs Poland 2004, para. 9.
105 COs Hungary 2002, para. 11.
106 COs Poland 2004, para. 9.
107 COs Hungary 2002, para. 11.
108 COs Poland 1999, para. 11.
109 COs Poland 2004, paras. 8 and 9.
110 COs Colombia 1997, paras. 24 and 37; COs Morocco 1999, para. 13.
111 COs Argentina 2000, para. 14.

the high number of women who resorted to illegal and unsafe abortions, and asked the state party whether it intended to change its policies in this respect, as this would possibly also diminish the need for women to undergo abortions.[112] In its subsequent COs, the HRC argues that women should be given access to family-planning methods and sterilisation procedures.[113]

The foregoing indicates that the HRC makes its statements in light of the number of women who undergo unsafe and illegal abortions, and the high maternal mortality figures. In the COs, the Committee holds that the state party should give effect to its Reproductive Health Act of July 2000, by which family-planning counselling and contraceptives are to be provided, in order to grant women real alternatives.[114]

2.1.4 Maternal healthcare and maternal mortality

Maternal healthcare is not an issue frequently brought up by the HRC. It is only in one CO that the HRC addresses the situation regarding maternal healthcare outside the context of imprisonment.[115] In its COs on Mali of 2003, the Committee notes with concern the high maternal and infant mortality rates in the state party, which it observes are due in particular to the relative inaccessibility of healthcare and family-planning services, *the poor quality of healthcare provided*, the low educational level, and the practice of clandestine abortions.[116] The HRC argues that the state party should strengthen its efforts in guaranteeing the right to life, in particular in ensuring the accessibility of health services, including emergency obstetric care. Moreover, it holds that the state party should ensure that its health workers receive adequate training.[117] On account of the aforementioned, it is clear hat the HRC brings up the issue of maternal healthcare in light of the right to life. Not only does it mention this right explicitly, it also refers to the specific provision of the ICCPR: Article 6.[118]

2.2 Abortion

2.2.1 Introduction

As shown previously in this chapter, the HRC generally brings up the issue of abortion in its COs in relation to high maternal death rates and unsafe abortions. Yet, in a number of incidences it addresses the matter in a different context. This is in relation

112 SR Argentina 2000, UN doc. CCPR/C/SR.1883, para. 44.
113 COs Argentina 2000, para. 14.
114 Ibidem.
115 The statements of the HRC with regard to maternal healthcare in prisons is described in Section 2.4 of this chapter.
116 COs Mali, 2003, para. 14.
117 Ibidem.
118 Ibidem.

to the many convictions of women who had an abortion; the large number of abortions of female foetuses; forced abortions; and access to information on abortion. In addition to this, the Committee addresses the issue in its views in the case of K.L. versus Peru. The statements of the Committee with regard to these matters both in its COs and in its views are discussed in the following paragraphs.

2.2.2 Convictions for illegal abortions

In one of its COs the HRC addresses restrictive national laws on abortion and accompanying prosecution outside the context of maternal mortality. In the COs on Nepal of 1994, the Committee expresses its regret at the high proportion of female prisoners sentenced for offences resulting from unwanted pregnancies.[119]

It touches upon this matter in a paragraph in which it expresses its concern over the de jure and de facto discrimination in Nepal against women. It holds:

> 'The Committee expresses its concern over the situation of women who, despite some advances, continue to be de jure and de facto the object of discrimination as regards marriage, inheritance, transmission of citizenship to children, divorce, education, protection against violence, criminal justice, and wages.'[120]

Moreover, before addressing the matter of female prisoners, it lays down that:

> 'The Committee is also concerned that the average life expectancy of women is shorter than that of men.'[121]

The Committee does not expand on the possible reasons for this, nor does it specifically address any pregnancy-related issues. In its recommendations it does not refer to restrictive abortion laws, but it stresses the need to take appropriate action in order to ensure the effective application of Articles 2 and 3 of the Covenant, particularly through the adoption of administrative and educational measures designed to eliminate traditional practices and customs detrimental to the well-being and status of women and vulnerable groups in Nepalese society.[122]

2.2.3 Abortion of female foetuses

The introductory remarks of GC 28 on Article 3 of the Covenant on the equality of rights between men and women lay down that inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history, and culture,

119 COs Nepal 1994, para. 8.
120 Ibidem.
121 Ibidem.
122 Ibidem, para. 13.

including religious attitudes. In this respect, the Committee notes that the subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. On that account 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. They should, the HRC holds, furnish appropriate information on those aspects of tradition, history, cultural practices, and religious attitudes which jeopardise, or may jeopardise, compliance with Article 3, and indicate what measures they have taken or intend to take to overcome such factors.[123]

The practice of aborting female foetuses is dealt with in one of the COs. In the COs on the Republic of Korea, the Committee is deeply concerned about the laws and practices that encourage and reinforce discriminatory attitudes towards women. The HRC holds that in particular, the head-of-the-family concept both reflects and reinforces a patriarchal society in which women have a subordinate role. The HRC considers the practice of identifying the sex of foetuses, the disproportionate percentage of boys among second and third-born children and the high rate of maternal mortality that apparently arise from the number of unsafe abortions to be deeply disturbing. For that reason it stresses that prevailing social attitudes cannot justify failure by the state party to comply with its obligations under Articles 3 and 26 of the ICCPR, or to ensure equal protection of the law and the equal right of men and women to the enjoyment of all the rights set forth in the Covenant.[124]

2.2.4 Forced abortions

Up until now, the HRC has never addressed the issue of forced abortion in its COs. It does refer to this matter in GC 28, where it makes clear that forced abortion is contrary to the enjoyment of Article 7 of the ICCPR on the right to be free from torture, cruel, inhuman or degrading treatment. In the GC the Committee requests states parties to provide it with information on measures they have taken to prevent forced abortion. It holds that the information provided on all these issues should include measures of protection, including legal remedies, for women whose rights under Article 7 have been violated.[125]

2.2.5 Information on abortion

In its COs on Ireland of 1993, the HRC questions the restrictive laws in Ireland on information on abortion, amongst other things. During the *constructive dialogue*, Committee member Prado Vallejo argued that the Irish legislation on abortion was

123 HRC, GC 28, para. 5.
124 COs Republic of Korea 1999, para. 10.
125 HRC, GC 28, para. 11.

excessively strict, especially, he noted, considering that the mere fact of supplying information on abortion was an offence punishable by law.[126] Prado Vallejo held that this constituted a violation of the right to freedom of expression. Moreover, he stated that many Committee members had also expressed their concern regarding the excessively strict restrictive legalisation on abortion as well as the related issues of the situation of the family and the right to divorce.[127]

The other Committee members indeed shared his concern as they subsequently laid down in the COs that:

> 'With respect to freedom of expression and the right of access to information, the Committee notes with concern that the exercise of those rights is unduly restricted under present laws concerning censorship, blasphemy, and information on abortion.'[128]

The HRC does not address any other pregnancy-related issues in these COs, but in respect of the aforementioned it refers to a number of factors in the state party that affect, or hamper the enjoyment of the right to freedom of expression. In addition to the issues that were cited, the Committee refers to a prohibition of interviews with certain groups, which according to the HRC constitute an infringement of the freedom to receive and impart information as laid down in Article 19, Paragraph 2 of the Covenant. Hence, the Committee does not recommend the state party to take pregnancy-related measures, but it advises Ireland to take the necessary measures to ensure the enjoyment of the freedom of expression as set out in Article 19 of the Covenant. In this regard, the Committee suggests that steps should be taken to repeal strict laws on censorship and ensure judicial review of decisions taken by the national Censorship on Publications Board.[129]

2.2.6 The case on abortion: K.L. versus Peru

The case of K.L. was briefly mentioned in Section *2.1.2.7.4* of this chapter in light of the statements of the Committee with regard to obstacles that de facto hinder the access to a legal abortion. The case is also discussed separately here because it touches upon a number of different aspects related to abortion: abortion when the pregnancy entails a risk for the life of the mother; abortion when the pregnant woman is a minor, abortion when the foetus is diagnosed with a fatal condition, and, which was already addressed, abortion which is not de facto accessible although it is legal in the circumstances of the particular situation. The facts of K.L. versus Peru have been described above in Section *2.1.2.7.4*. In this section, the alleged violations of the Covenant

126 SR Ireland 1993, UN doc. CCPR/C/SR.1236, para. 13.
127 Ibidem, para. 94.
128 COs Ireland 1993, para. 15.
129 COs Ireland 1993, para. 21.

which have not yet been discussed in the previous section and the views of the HRC on these are described.[130]

K.L. claims violations of Articles 2, 3, 6, 7, 17, 24, and 26 of the Covenant. She argues that Article 2 is violated on the basis that Peru failed to comply with its obligation to guarantee the exercise of a right. It should have taken steps, K.L. argues, to respond to the systematic reluctance of the medical community to comply with the legal provision authorising therapeutic abortion and its restrictive interpretation thereof.[131] As regards her claim on the breach of Article 3, she notes that she suffered discrimination in violation of this article in several forms: as regards access to healthcare services, since her different and special needs were ignored because of her sex; in light of discrimination on the exercise of her rights, since although she was entitled to a therapeutic abortion, it was not carried out because of social attitudes and prejudices, thus preventing her from enjoying, amongst other things, the right to privacy and to health; and regarding discrimination in access to the courts, bearing in mind the prejudices of officials in the healthcare system and the judicial system where women are concerned and the lack of appropriate legal means of enforcing respect for the right to obtain a legal abortion when the time-related and other conditions laid down in the law are met.[132] Moreover, K.L. claims a violation of Articles 6 and 7 of the Covenant. As K.L. argues, Peru did not take any steps to ensure that she could safely terminate her pregnancy on the grounds that the foetus was not viable. She holds that the refusal to provide a legal abortion left her with two options which both posed an equal risk to her health and safety: to have a clandestine (and hence highly risky) abortion, or to continue a dangerous and traumatic pregnancy which put her life at risk. Moreover, in light of Article 7, she claims that the fact that she was obliged to continue the pregnancy amounts to cruel and inhuman treatment. In this respect she points to the distress she endured of seeing her daughter's marked deformities and knowing that her life expectancy was short. She states that this was an awful experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy, since she was subjected to an 'extended funeral' for her baby girl, and sank into a deep depression after her death.[133] Finally, besides an alleged violation of Article 17, K.L. claims violation of Articles 24 and 26. She notes that Article 24 was violated since she did not receive the special care she needed from the health authorities as an adolescent girl; Article 26 was breached, she states, because the position of the Peruvian authorities that hers was not a case of

130 Committee member Hipólito Solari-Yrigoyen wrote a dissenting opinion, in which he argues that the facts of the case also reveal a violation of Article 6 of the Covenant on the right to life. HRC, Communication 1153/2003, K.L. versus Peru, UN doc. CCPR/C/85/D/1153/2003, appendix.

131 HRC, Communication 1153/2003, K.L. versus Peru, UN doc. CCPR/C/85/D/1153/2003, para. 3.1.

132 HRC, Communication 1153/2003, K.L. versus Peru, UN doc. CCPR/C/85/D/1153/2003, para. 3.2.

133 Ibidem, paras. 3.3 and 3.4.

therapeutic abortion left her in an unprotected state incompatible with the guarantee of the protection of the law as set out in that article.[134]

In its considerations on the admissibility, the Committee holds that the alleged violations of Articles 26 and 3 have not been properly substantiated. For that reason, K.L.'s claims referring to those articles are declared inadmissible. It does consider the other claims admissible and continues with the merits of the case.[135]

As regards the alleged violation of Article 7, the HRC notes that the situation of mental distress and pain for K.L. could have been foreseen since a hospital doctor had diagnosed anencephaly in the foetus. Yet, the hospital director refused termination. The omission on the part of the state in not enabling K.L. to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The HRC refers in this regard to GC 20, in which it holds that the right set out in Article 7 does not only relate to physical pain, but also to mental suffering. The Committee argues that the protection in this case is especially important when it concerns minors. Consequently, in the absence of information from the state party in this regard, due weight must be given to the complaints of K.L. The HRC considers that the facts before it reveal a violation of Article 7. In light of these findings, it does not find it necessary to consider a possible violation of Article 6.[136]

Finally, regarding the alleged breaches of Articles 24 and 2, the Committee notes the special vulnerability of the claimant as a minor girl, and notes that in the absence of information from the state party, also here due weight must be given to the claim of K.L. that during and after her pregnancy she did not receive the medical and psychological support necessary in the specific circumstances. Consequently, the HRC considers that the facts before it also reveal a violation of Article 24 on the special protection of minors. Moreover, it holds that considering the claim of K.L. that no adequate legal remedy was available, Article 2 was violated in conjunction with Articles 7, 17, and 24.[137]

2.3 Forced sterilisation

Sterilisation is the only contraceptive method that is addressed separately in a number of COs of the HRC and in its GC 28.[138] In Section *2.1.3.4.* of this chapter it was shown that in a few instances the HRC addresses sterilisation as a contraceptive method that should be freely accessible for women.[139] But as is presented in this section, in most

134 Ibidem, paras. 3.7 and 3.8.
135 Ibidem, para. 5.3.
136 Ibidem, para. 6.3.
137 Ibidem, paras. 6.5 and 6.6.
138 On one occasion, in its COs on Poland of 2004, the HRC mentions oral contraceptives. This has been described in the previous section on contraceptive methods in general. COs Poland 2004, para. 9.
139 For the sake of completeness it is noted here that in its COs on Brazil of 1996, the HRC recommends that the state party put in place effective enforcement mechanisms that will ensure the implementation

instances where the HRC addresses the issue of sterilisation it discusses the situation of forced sterilisations in states parties.

In GC 28, the Committee states that in order to assess compliance with Article 7 of the ICCPR on the right to be free from torture and from cruel, inhuman or degrading treatment, states should provide it with information on measures they have taken in order to prevent forced sterilisation.[140] In addition to this GC, the Committee brings up forced sterilisation in a few of its COs. The first time it did so this was in 1996, in the COs on Japan. In this document it acknowledges the abolition of forced sterilisation of disabled women, but lays down that it regrets the fact that the law in the state party has not provided for a right to compensation to persons who had been subjected to forced sterilisation. It recommends in this case that Japan take the necessary legal steps.[141] It is the only incidence, up until now, in which the HRC only mentions the matter of compensation for victims of forced sterilisation, without addressing the existence of the practice in the state party as such.

In the other COs in which the HRC touches upon forced sterilisation, it refers to the practice itself, thus not the lack of compensation, as point of concern. In its COs on Peru of 2000, the Committee expresses its concern about the reports of forced sterilisations, particularly of indigenous women in rural areas and women from the most vulnerable social sectors.[142] In its COs on Slovakia, the HRC states that despite the oral and written answers provided by the delegation, it remains concerned at reports of forced or coerced sterilisation of Roma women. During the consideration of the Slovakian report in 2003, several Committee members expressed their concern about the reports of forced sterilization of Roma women.[143] Committee member Wedgwood observed that it was crucial for the Government to start an investigation into the practice of forced sterilization. If the Government did not seriously tackle the problem and put a stop to it, it would unfortunately be open to accusations of genocide, she said.[144] Representatives of the Slovakian government said that there was no systematic sterilisation and no such government policy. They argued that the government had investigated the charges and had found no truth in them.[145] The HRC, however, remained concerned despite the oral and written answers provided by the Slovakian delegation. In its COs it states to particularly regret the fact that the state party has not clearly denied or admitted breaches of the principle of full and informed consent in its written answers submitted after the oral consideration of the report. The state party consequently has not clearly denied or admitted breaches of the principle of full and

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of a law that prohibits the requirement of pregnancy and *sterilisation* certificates and other discriminatory practices in use. COs Brazil 1996, para. 335.

140 HRC, GC 28, para. 11.

141 COs Japan 1996, para. 31.

142 COs Peru 2000, para. 21.

143 SR Slovakia 2003, CCPR/C/SR.2108, paras. 70, 72, and 73.

144 Ibidem, para. 73.

145 Ibidem, para. 77.

informed consent but has asserted that an investigation related to maternity wards and gynaecology departments of 12 hospitals did not find infringements of 'medical indication' of sterilisation, argues the HRC. The Committee holds that the reference made by the state party in its written answers to 'the fact that not all administrative acts were fulfilled in every case' appears to amount to an implicit admission of breaches of the requirement of informed consent.[146]

In both the COs on Peru and on Slovakia, the HRC recommends the states parties to prevent any instances of sterilisation without full and informed consent.[147] In its COs on Peru, it talks of taking all necessary measures to ensure that persons who undergo surgical contraception procedures are fully informed and give their consent freely.[148]

Although these COs already clearly indicate that forced sterilisation is contrary to the enjoyment of the rights as laid down in the Covenant, and show that states have to take measures to ensure that full and informed consent is given in cases of sterilisation, it is in the COs of 2007 on the Czech Republic that the HRC provides a detailed report as to what is expected of states parties as regards their obligations to prevent forced sterilisations. In this case, the Committee notes with concern that Roma and other women have been subjected to sterilisation without their consent. It states to regret in particular the latitude given to doctors in this regard and the fact that no criminal proceedings have been initiated against perpetrators. Moreover, the Committee expresses its concern on the fact that no compensation mechanism has been established and that victims have not received any compensation. In this respect, the Committee refers not only to Article 7, but also to Articles 2, 3, and 26 of the Covenant. In light of these concerns, the HRC gives a number of recommendations. It holds that:

> 'The state party should:
>
> Implement the recommendations of the Ombudsman's report of 2005;
> Provide mandatory training on patients' human rights to medical professionals and social workers;
> Grant compensation and provide assistance to victims, including legal assistance to those who intend lodging a claim before the courts;
> Initiate criminal proceedings against alleged perpetrators;
> Ensure fully informed consent in all proposed cases of sterilisation and take the necessary measures to prevent involuntary or coercive sterilisation in the future, including written consent forms printed in the Roma language, and explanation of the nature of the proposed medical procedure by a person competent in the patient's language.'[149]

146 COs Slovakia 2003, para. 12.
147 COs Peru 2000, para. 21; COs Slovakia, 2003, para. 12.
148 COs Peru 2000, para. 21.
149 COs Czech Republic 2007, para. 10.

In its COs on Japan and Peru, the HRC does not indicate the relation between the ICCPR and the recommendations it makes. GC 28 and its COs on Slovakia and Czech Republic, however, clarify that forced sterilisation is a topic that affects the right to be free from torture, and from cruel, inhuman or degrading treatment as formulated in Article 7 of the Covenant, the right to equality and non-discrimination, as formulated in Articles 2 and 3, and the right to equality before the law, as stated in Article 26 of the ICCPR. The statements in GC 28 have previously been described; in the COs on Slovakia and Czech Republic the HRC specifically mentions these provisions.[150]

2.4 Pregnancy and detention

In its COs the HRC often pays attention to the conditions of persons deprived of their liberty, including on a number of occasions the healthcare facilities available for these persons. In GC 28, the Committee indicates that such conditions should include facilities for pregnant women. It notes in this GC that as regards Articles 7 and 10 of the ICCPR on the right to be free from torture and the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of all human beings, that pregnant women who are deprived of their liberty should also be guaranteed these rights, in particular during the birth and while caring for their newborn children. Moreover, the HRC states in GC 28 that in light of their obligations under these provisions, states parties should report on facilities to ensure this and on medical care and healthcare for such mothers and their babies.[151]

In its COs, the HRC addresses one aspect of the care provided for pregnant women in prison during childbirth. It does so in its COs on the United States of America, where it expresses its concern about detained women being shackled during childbirth. In this regard it refers to Articles 7 and 10 of the Covenant and recommends the state party to prohibit the shackling of detained women during childbirth.[152]

The Committee does not address this matter in an isolated paragraph. In the same paragraph, the HRC notes that while it welcomes the adoption of the Prison Rape Elimination Act of 2003, it regrets that the state party has not implemented its previous recommendation that legislation allowing male officers to access women's quarters should be amended to at least provide that they should always be accompanied by female officers. This matter will be discussed in Chapter 4, which discusses the work of the HRC as regards matters of physical violence inflicted on women's bodies.

150 COs Slovakia 2003, para. 12.
151 HRC, GC 28, para. 15.
152 COs United States of America 2006, para. 33.

3 PREGNANCY AND HUMAN RIGHTS OBLIGATIONS OF STATES PARTIES

3.1 Introduction

The previous section shows that the HRC addresses different situations or issues related to pregnancy. It does so in light of human rights obligations of states parties under several provisions of the ICCPR: the right to life, Article 6 ICCPR; the right to be free from torture, cruel, inhuman or degrading treatment, Article 7 ICCPR; the right to privacy, Article 17 ICCPR; the right to information, Article 19 ICCPR; and the right of all persons deprived of their liberty to be treated with humanity and respect, Article 10 ICCPR. The HRC also occasionally refers to the right to non-discrimination and equality, Articles 2, 3, and 26 ICCPR. However, in general, the Committee refers to these latter provisions in conjunction with the other (substantive) provisions of the Covenant just mentioned.

This section discusses the human rights obligations of states parties regarding pregnancy-related issues as formulated by the HRC. It is structured in accordance with the related ICCPR provisions and is based on the division of obligations to respect, protect, and fulfil as explained in Chapter 2.

3.2 Pregnancy and the right to life

3.2.1 Pregnancy and the obligation to respect the right to life

States are held to prevent unwanted pregnancies and to avoid that women resort to clandestine abortion practitioners, so as to prevent maternal mortality. This is an obligation that requires positive action. The HRC makes it clear that states parties are held to provide for sex education and access to contraceptive methods. The obligation to prevent maternal mortality, however, also implies a negative duty. Although the HRC does not expressly mention these obligations in its work, it follows from the positive obligations formulated by the HRC that states should also refrain from hindering access to these services. Hence, states parties should not prevent access to family planning, to accurate and objective sex education, to contraceptives, including sterilisation, to abortion if the pregnancy is life-threatening, to abortion if the pregnancy is the result of rape of incest, to abortion when this is legal according to national law, to information on abortion, or to emergency obstetric care. These obligations do not only entail that states should refrain from adopting legislation that hinders access to these services in these situations, but they also indicate that states may not preclude access to these services in practice. Thus, for example, state hospitals must not refuse pregnant women emergency obstetric care. Moreover, besides these obligations that refer to access to a number of services, states should not have a general prohibition of abortion, they should have no reporting obligations of doctors and other health personnel on cases of women who have undergone an abortion and they should not

have excessively restrictive requirements concerning authorisations of doctors and health personnel for abortions.

3.2.2 Pregnancy and the obligation to protect the right to life

The terminology used by the HRC suggests that states parties need to take measures to prevent interference from third parties in the enjoyment of the right to life. It argues, for example, that states parties need to *ensure* free access to family-planning services, which indicates that states need to take steps to prevent third parties from hindering that access. But the Committee hardly ever expressly touches upon the role of third parties in pregnancy-related matters or on the obligation to protect the right to life related to this role. However, as mentioned, its recommendations regarding the right to life indicate that states parties have some obligations to take measures to prevent third parties from affecting the enjoyment of that right. Recommendations in which the HRC argues that states should *ensure* free access to family planning indicate that states parties should take measures to prevent third parties from hindering access to family planning, to contraceptives and to healthcare, including emergency obstetric care. In this light one could also read the statement that in cases where abortion is legal, *all* obstacles to obtaining it should be removed to suggest that states parties are also required to take measures to prevent third parties from obstructing access to this service. At the same time, however, it should be noted that the Committee makes the latter remark in light of the fact that criminalisation of abortion may deter medical professionals from providing the procedure without judicial order even when they are permitted to do so by law. For that reason, it is unclear whether it was in fact the intention of the Committee to formulate a broad obligation that also includes third parties. Considering the fact that, with regard to the right to life, the HRC has never expressly addressed the role of third parties in light of pregnancy-related matters, and taking into account that it mainly focuses on legislative measures, it is unclear whether such an obligation to prevent actions by third parties as yet exists under this provision of the Covenant.

3.2.3 Pregnancy and the obligation to fulfil the right to life

Most of the recommendations that the HRC makes with regard to the obligation of states to prevent maternal mortality can be characterised as obligations to fulfil the right to life. This is because most recommendations, as noted previously, entail obligations to take legislative, administrative, judicial and/or practical measures necessary to ensure that the right to life is implemented to the greatest extent possible.

It follows from the work of the HRC that states parties are not only recommended to introduce policies and programmes that promote full and non-discriminatory access to all methods of family planning, they are also held to ensure free and equal access to family-planning services and methods, including contraceptives, and specifically sterilisation. The question may be whether states parties are held to facilitate access

to these services, or whether they also have to provide for them. There is a difference between the two: states parties are either only held to make family-planning services and contraceptives accessible through legislative measures, or they also bear responsibility for actually providing them. The fact that the HRC uses strong language as it holds that states have to *ensure* access, and the fact that the Committee stresses the issue of family-planning services and methods in many COs, may indicate that states parties are held to *provide* for these services. The same can be said of sex education, which must be part of the school curricula and be objective and accurate. The state must oversee that this actually takes place. Consequently, this obligation is more than one of mere facilitation. The state must not only make sure that sex education *can* be taught, it must make sure that it has taken all necessary measures as can be expected to ensure that this *is* taught in schools.

But the same cannot be said of the access to abortion. Although the Committee requests states parties in a number of COs to amend the law so as to permit abortions in all cases of pregnancy resulting from rape, or to provide for situations where the life of the pregnant woman is in danger, it does not argue that states must ensure that women have access to abortion facilities in these instances. At the same time, some recommendations as regards abortion and the enjoyment of the right to life can be interpreted more broadly. For example, in one of its COs the HRC holds that the state party in question must ensure that women do not risk their life because of the existence of restrictive legal provisions on abortion. This recommendation, could point to an obligation for states parties to take a variety of measures to combat clandestine abortions, which would go further than merely requesting states to allow for abortion in certain conditions under national law. The same is true for the recommendation that states parties must ensure that abortion is not used as a method of family planning, be it in this case a recommendation of a different nature: it is not so much directed at the restrictive abortion law, but at the de facto situation itself. It follows from these different statements that the HRC hints at states having to introduce more liberal abortion legislation so as to prevent maternal mortality, but at the same time it is not willing to make such clear-cut recommendations on the services and facilities this requires as it does with regard to contraceptives and sex education.

In addition to these obligations related to family-planning services and methods, and abortion legislation and practice, the recommendations that refer to maternal healthcare, although very scarce, are similar to the recommendations the HRC makes in regard to family-planning services, sex education and contraceptives. States parties are held to take measures to ensure the accessibility of healthcare services including emergency obstetric care. Moreover, they must ensure that healthcare workers receive adequate training. It is the word *ensure* in its recommendations that indicates that states parties have an obligation to provide for these services.

3.3 Pregnancy and the freedom from torture, cruel, inhuman or degrading treatment

3.3.1 Pregnancy and the obligation to respect the freedom from torture, cruel, inhuman or degrading treatment

It follows from the work of the HRC that states should not prevent access to abortions when the pregnancy is the result of rape or incest. This means, as noted previously, that states should allow for abortions in such circumstances in their national law, and should refrain from hindering access to these services in those situations in practice. Thus a state hospital doctor must not refuse to perform the operation when the pregnancy is the result of rape. It is important to refer to this obligation in light of the freedom from torture, cruel, inhuman or degrading treatment, for this has different implications regarding the obligations of states parties. In theory, following the work of the HRC, refusal in this case would only amount to a violation of the right to life if the situation in the state party is such that many women resort to unsafe abortions for this reason and die as a result of it. For it is the maternal death rate that constitutes the violation of Article 6 ICCPR on the right to life. Yet, in light of Article 7 on the freedom from torture, cruel, inhuman or degrading treatment, such a refusal in itself amounts to an act of cruel or inhuman treatment and would on that account directly constitute a violation of this right. In that sense, the obligation not to hinder access to these services in those situations in practice is one that exists per se when formulated in light of the freedom from torture, cruel, inhuman or degrading treatment.

In addition to access to abortion in situations where the pregnancy results from rape, states are, in light of their obligation to respect the freedom from torture, cruel, inhuman or degrading treatment, held to refrain from forcing women to have an abortion or sterilisation. Moreover, in light of their obligations under this provision, states must not shackle female prisoners during childbirth, they must respect the inherent dignity of pregnant women in prison, and on that account should not hinder access to maternal healthcare for women who are deprived of their liberty.

3.3.2 Pregnancy and the obligation to protect the freedom from torture, cruel, inhuman or degrading treatment

The obligation to protect the freedom from torture, cruel, inhuman or degrading treatment is the only category of obligations in which the HRC explicitly addresses the role of third parties in regard to pregnancy-related matters. It follows from the work of the HRC that states parties are held to prevent forced sterilisation and forced abortion. In its COs the Committee lays down the duty of states to prevent sterilisations without the full prior and informed consent of the woman concerned and it holds that states should, amongst other measures, initiate criminal proceedings against the alleged perpetrators of this crime. It is less evident from the work of the HRC whether the obligation to give access to safe abortion to women who have become pregnant as

a result of rape also entails an obligation to prevent others from obstructing access to these services in such situations. In its COs on the matter, the HRC focuses solely on allowing for the procedure under such circumstances in national law. This suggests that states parties only have to enable abortion in these instances legally and not de facto.

3.3.3 Pregnancy and the obligation to fulfil the freedom from torture, cruel, inhuman or degrading treatment

The previous paragraph refers to two obligations with regard to obstruction of the freedom from torture, cruel, inhuman or degrading treatment by third parties, namely in respect of forced abortion and forced sterilisation. Although the obligations to prevent these practices are obligations to protect and are for that reason discussed in the previous paragraph, the obligations as they are formulated by the Committee in order to combat these practices also entail a duty for states to take measures of a facilitating nature. Regarding forced sterilisation, the HRC does not only recommend mandatory training for medical workers on patients' human rights and to initiate criminal proceedings against alleged perpetrators of forced sterilisation, but it also requests states parties to provide assistance to victims of this practice, including legal assistance and to take the necessary legal steps to provide for a right to compensation for victims of forced sterilisation. With regard to forced abortion, the Committee is less extensive and only indicates that states have to prevent this practice. Arguably, the recommendations on forced sterilisation can also be applied to forced abortion, considering that the HRC discusses both these practices in one sentence as violations of Article 7 in GC 28.

Moreover, as was also mentioned with regard to the obligation to respect the right to life, states parties should give women who have become pregnant as a result of rape access to safe abortion. This obligation indicates that states have to allow for abortion under these circumstances, and consequently must not prohibit abortion when the pregnancy is the result of rape or incest. Although this obligation entails a duty to respect the relevant right, since states are not allowed to interfere, or obstruct, through law, access to an abortion procedure in this situation, it could also involve a duty of states to ensure that such a procedure is available when the pregnancy results from rape or incest. The terminology used of *giving access* may only imply a legal permission, but could also amount to a de facto situation that must be achieved. However, the HRC has never explicitly formulated such an obligation in its COs, nor does it make any statements that would refer to such a duty.

3.4 Pregnancy and the right of all persons deprived of their liberty to be treated with humanity and respect

3.4.1 Pregnancy and the obligation to respect the right of all persons deprived of their liberty to be treated with humanity and respect

With regard to the right of all persons deprived of their liberty to be treated with humanity and respect, the same holds true as what is mentioned in the paragraph on the obligation to respect the right to be free from torture, cruel, inhuman or degrading treatment related to the rights of female prisoners. That is to say that states should not shackle female prisoners during childbirth, that they should respect the inherent dignity of pregnant women in prison (without further clarifying what this entails) and that they should not hinder access to maternal healthcare to women who are deprived of their liberty. In its work the HRC refers to both Article 7 and Article 10, but does not address these pregnancy-related matters solely in light of the obligations that stem from the latter provision. This is, however, not surprising, as the HRC in general, thus also regarding other matters that affect Article 10, refers to both provisions.

3.4.2 Pregnancy and the obligation to protect the right of all persons deprived of their liberty to be treated with humanity and respect

States should ensure healthcare for women in detention who are in labour. This obligation indicates that measures need to be taken by states parties to ensure that these services are provided under all circumstances. It is not surprising that the HRC has in this respect never explicitly addressed the role of third parties, as the provision deals, at least in the interpretation of the HRC, with the rights of persons in detention. Since these institutions are generally state regulated, it is the state, and not third parties, that generally obstruct the enjoyment of human rights in this respect.

3.4.3 Pregnancy and the obligation to fulfil the right of all persons deprived of their liberty to be treated with humanity and respect

Concerning pregnant women in detention, the HRC formulates a clear obligation that necessitates the states parties not only to facilitate certain services, but also to provide them. States parties are held in light of the right of all persons deprived of their liberty to be treated with humanity and respect to ensure maternal healthcare in detention centres.

3.5 Pregnancy and the right to privacy

3.5.1 Pregnancy and the obligation to respect the right to privacy

States parties should not impose a requirement for sterilisation that necessitates the authorisation of a husband in order to undergo this procedure. This follows from the work of the HRC and is a so-called obligation to respect. For it demands states parties *not* to do something. In addition to this, the Committee makes it clear that states should not impose certain other requirements for sterilisation, such as having a certain number of children or being of a certain age. Also it makes clear that they should refrain from imposing a legal duty upon doctors and other heath personnel to report cases of women who have undergone an abortion. Moreover, in light of Article 17 of the Covenant states are also held to refrain from obstructing access to abortion procedures when abortion would be legal according to national law. This obligation was already addressed with respect to the right to life. The HRC refers to both Article 6 and Article 17 with respect to this obligation. Looking at it closely, there is a difference in the scope of the obligation for states parties. When addressed with respect to the right to life, the issue is brought up in reference to maternal mortality as that is what constitutes a violation under the provision, not the abortion itself. This is different when the issue is addressed in light of the right to privacy. Here, when access to a legal abortion is denied by a state official it automatically constitutes a violation of this right. On that account the obligation exists for states parties at all times, regardless of their maternal death rate.

3.5.2 Pregnancy and the obligation to protect the right to privacy

In the case of K.L. versus Peru, the Committee notes that the refusal of the hospital director to authorise an abortion which was legal in the circumstances of the case, was contrary to the enjoyment of Article 17. Hence, the obstruction of a legal abortion constituted a violation of this provision, at least in the circumstances of this case. Although this could suggest an obligation to prevent third parties from hindering access to legal abortion, it should be noted that the case of K.L. is very specific and did not involve a third party, but a state hospital director.

In that respect, the COs on Argentina of 2000 provide a clearer indication that states parties have an obligation to prevent third parties from obstructing access to legal abortions. Here the Committee lays down that in cases where abortion procedures can be lawfully performed, all obstacles to obtaining them should be removed. It makes this remark, however, in light of the criminalisation of abortion in the state party, which deters medical professionals from providing the procedure without judicial order even when they are legally permitted to do so. And more importantly, it does not make this statement in regard to the right to privacy, but only in relation to the right to life. On that account one cannot detect an obligation to protect the right to privacy for states parties in respect to pregnancy-related matters.

3.5.3 Pregnancy and the obligation to fulfil the right to privacy

The obligations of states with regard to the right to privacy as far as pregnancy-related matters are concerned are only of a legislative nature. States are requested to amend the law so as to protect the confidentiality of medical information. Moreover, as already noted, the HRC referred to Article 17 on the right to privacy in the case of K.L. versus Peru. Here it held that in the circumstances of the case, the right to privacy had been violated because K.L. was refused an abortion that was legal in accordance with national law. The COs on Argentina that were just mentioned could be taken mean that not only with respect to the right to life, but also as regards the right to privacy, all obstacles to obtaining a legal abortion should be removed. But the HRC has never formulated such an obligation with respect to the right to privacy. Moreover, it is unclear what such an obligation would entail for states parties. The work of the HRC suggests that states parties have a duty to facilitate a legal abortion by not obstructing access either de jure or de facto, which constitutes an obligation to respect. This does not necessarily mean that they also have to provide these services and thereby have an obligation to fulfil the right to privacy. After all, the case of K.L. versus Peru concerned a state hospital director who obstructed access to an abortion that was legal according to national law, whereas the COs on Argentina, the other incidence in which the HRC formulates this obligation for states, only refer to the strict national abortion laws and on that account to the maternal death rate. Although the latter implies a duty to fulfil, it is unclear what exactly is expected of the state party in order to comply with its obligations. Is the state party requested to provide doctors and medical personnel with more insight into national legislation related to prosecution of abortion, or is it requested to mitigate its strict laws on abortion? Hence, more clarity on the obligation for states to remove all obstacles pertaining to legal abortion is required.

3.6 Pregnancy and the freedom of expression

3.6.1 Pregnancy and the obligation to respect the freedom of expression

The right to freedom of expression includes, as is formulated in Article 19 of the Covenant, the freedom to seek, receive and impart information and ideas of all kinds. The work of the HRC makes it clear that this entails an obligation for states to refrain from imposing strict laws on supplying information on abortion.

3.6.2 Pregnancy and the obligation to protect the freedom of expression

The HRC holds that states should take the necessary measures to ensure the enjoyment of the freedom of expression as set out in Article 19 of the Covenant. It makes this statement in light of the strict legislation in Ireland on supplying information on abortion. For that reason, it is not self-evident that this obligation involves a duty for states parties to prevent third parties from obstructing the supply of information. The

Committee has never, for example, addressed the matter of certain so-called *pro-life* groups who prevent women from obtaining information on abortion procedures.

3.6.3 Pregnancy and the obligation to fulfil the freedom of expression

In reference to what is mentioned in the previous paragraph, the recommendation that states should take the necessary measures to ensure the enjoyment of the freedom of expression does not necessarily entail an obligation to fulfil this right. The state party is requested to amend its strict legislation, but is not held to make sure that information on abortion is available and accessible, for example, or that access to such information is not obstructed.

4 PREGNANCY AND DISCRIMINATION OF WOMEN

4.1 Introduction

Many of the pregnancy-related situations that the HRC discusses in its COs are also addressed in GC 28.[153] As this GC focuses specifically on Article 3 on equality of men and women in relation to the substantive provisions of the Covenant, it is clear that it pays specific attention to the equal enjoyment of the rights as laid down in the Covenant. For that reason it can be argued that the HRC considers non-compliance with the obligations as laid down in that document to be violations of the right to non-discrimination and equality as laid down in Article 3. The Committee notes that it has decided to update its general comment on Article 3 in light of the experience it has gathered in its activities over the last 20 years. The revision, it holds, seeks to take account of the important impact of this article on the enjoyment by women of the human rights protected under the Covenant

This does not, however, mean that the HRC also explicitly links these pregnancy-related issues to discrimination of women in societies. The aforementioned indicates that women and men should be equally able to enjoy their right, and it therefore relates to the concept of *sameness*, but it does not mean that the monitoring bodies also examine whether the issues that affect women are caused by structural discrimination of women in society. Consequently, this section discusses whether the work of the Committee links issues that affect women's physical integrity to discrimination of women where this is applicable. In accordance with what was mentioned in Chapter 2, a distinction is made between direct discrimination, indirect discrimination and systemic discrimination.

153 GC 28 of the HRC replaces its GC 4 of 1981. See HRC, GC 28, UN doc. CCPR/C/21/Rev.1/Add.10, para. 1.

4.2 Pregnancy and direct discrimination

Women suffer various forms of discrimination everywhere around the globe, related to all sorts of issues, including pregnancy-related issues. With regard to direct discrimination, for example, one may think of women who are denied access to contraceptives or to sterilisation procedures for reasons of their sex. Often these situations or regulations bring to mind structural disadvantages for women due to their subordinate status in societies.

As the HRC holds that states parties should ensure that women have full and *equal* access to family-planning methods and introduce policies and programmes that promote *full and non-discriminatory* access to all methods of family planning, it makes it clear that it does not tolerate discrimination, including discrimination regarding pregnancy-related matters. In these recommendations, the HRC refers only to *methods of family planning*, but taking into account the general concerns expressed about discrimination in its COs, the non-discrimination and equality provisions in the Covenant and GC 28, it can be argued that discrimination is also prohibited in regard to the other pregnancy-related services and programmes that the HRC addresses in its work. Yet, it should be noted that the HRC has never explicitly labelled a certain pregnancy-related issue as discrimination of women.

The aforementioned therefore indicates that the HRC considers direct discrimination of women in the area of pregnancy-related services and regulations as contrary to their enjoyment of human rights, but it has never explicitly linked pregnancy-related situations to discrimination of women.

4.3 Pregnancy and indirect discrimination

The HRC's frequently used line of reasoning with regard to pregnancy-related issues, namely that unwanted pregnancies, coupled with restrictive abortion laws, lead to clandestine abortions, which in turn results in maternal mortality, recognises that certain services such as family planning and contraceptives are highly important for women. Lack of these services is, following this line of reasoning, exceedingly detrimental. But although the HRC is clearly aware of the negative effects of the lack of these services for women, it does not explicitly address this matter in regard to discrimination of women. It is only on one occasion that the Committee notes that the effects of a certain policy specifically affect women. This is in its COs on Poland of 2004, where it notes with concern that high prices and restricted access to suitable prescriptions, and the high cost of contraception and reduction in the number of refundable oral contraceptives, respectively, had led to limited accessibility *for women* to contraceptives. But here it does not attribute this injustice experienced by women to discrimination either.

Consequently, as far as situations that may reflect indirect discrimination are concerned, the HRC does not address the matter in this context.

4.4 Pregnancy and systemic discrimination

In GC 28 the HRC notes that inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history, and culture, including religious attitudes, thereby explicitly referring to systemic discrimination of women in societies. In its work, the Committee identifies some practices that result from this inequality. It holds, for example, in this same GC that in some countries the subordinate role of women is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. Not expressly referring to inequality, but in the context of traditional attitudes and related discrimination, on one occasion the Committee also mentions a high maternal mortality rate that results from a strict prohibition on abortion and the high proportion of female prisoners sentenced for offences resulting from unwanted pregnancies.

The work of the HRC shows that the Committee is aware of systemic discrimination of women in relation to certain pregnancy-related matters. But its attention is very limited. It is only in regard to the abortion of female foetuses that it can be argued with certainty that the HRC links this issue to discrimination of women. Consequently, also as regards pregnancy-related issues that may reflect systemic discrimination, it should be concluded that in general the HRC does not link these matters to discrimination of women.

5 THE POSITION OF PREGNANCY IN THE WORK OF THE HRC

In this section the work of the HRC is discussed in light of the final criterion as identified in Chapter 2: addressing matters that affect women in an integrated manner and not in an isolated section dealing solely with issues that concern women for example. In general, the HRC tackles pregnancy-related matters in relation to the substantive provisions of the ICCPR, and most often Article 6, or it addresses the matters together with other human rights related concerns of women without referring explicitly to substantive provisions. It is only on a few occasions that the HRC addresses pregnancy-related matters solely in light of the provisions on non-discrimination and equality.

It is noteworthy that until 2005 the HRC in general combines all specific human rights-related concerns of women, such as pregnancy-related situations, but also issues like violence against women and female genital mutilation. This can be in the same paragraph or in subsequent paragraphs. From 2005, this is different in the COs, where it addresses different concerns of women in different sections of its documents.

Relating the approach of the HRC in addressing these pregnancy-related matters to the call made in Vienna to include the status and human rights of women in its work, it is noteworthy that the Committee does not often address pregnancy-related matters purely in light of non-discrimination and equality. It should also be noted that in the instances where it does touch upon these matters it does not explicitly refer to any substantive provisions either. However, as noted in the previous section on the

obligations of states parties, the HRC does pay attention to pregnancy-related situations in light of a variety of substantive provisions and, especially since 2005, does not combine these issues with other specific women's experiences. In that sense, the matters are addressed in an integrated manner. Therefore, on this point the work of the HRC reflects compliance with the request of the 1993 World Conference on Human Rights.

6 CONCLUSIONS

6.1 The work of the HRC and the request of the 1993 World Conference

The study of the work of the HRC for the four elements of the request of the 1993 World Conference on Human Rights shows that in light of pregnancy-related matters, the HRC pays attention to a variety of issues. To that end, the work reflects compliance with the request of 1993. In light of the issues discussed in this chapter, it is clear that most of the matters that relate to pregnancy are brought up in light of maternal mortality, which is clearly a matter of serious concern to the HRC. Maternal mortality is the leading issue in addressing a number of facilities, services and policies that relate to the prevention of a pregnancy as well as to situations when women are pregnant. The rationale of the HRC in this is that states parties should prevent unwanted pregnancies and consequently avoid that women resort to clandestine abortions, as this would result in high maternal death rates. Therefore states parties are recommended to facilitate reproductive information and sex education and to make contraceptives accessible in their territories. On the same token the HRC also addresses abortion and in particular restrictive abortion laws.

The attention of the HRC for maternal mortality is highly commendable in light of the call made in Vienna in 1993 to include the status and human rights of women. For maternal mortality is a serious problem that affects many women around the world. The World Health Organisation (WHO) notes that every day, 1500 women die from pregnancy-related or childbirth-related complications. In 2005, there were an estimated 536 000 maternal deaths worldwide.[154] The attention for maternal mortality is also noteworthy considering the mandate of the HRC. The notion that states have to prevent maternal mortality and for that reason should facilitate family-planning information and education, and provide access to contraceptives seems far from the original intentions of the drafters of the ICCPR. As was noted previously, the ICCPR does not explicitly refer to any pregnancy-related matters. Nor does the HRC address

154 WHO, Maternal mortality in 2005- Estimates developed by WHO, UNICEF, UNFPA and The World Bank, 2008, p. 1, http://whqlibdoc.who.int/publications/2007/9789241596213_eng.pdf, accessed on 5 July 2009.

the matter in its GC 6 that deals with the right to life.[155] But by using maternal mortality in GC 28 and its COs to address issues such as family-planning programmes, sex education and contraceptives, the HRC provides women with powerful claims to demand such services from states parties.

In addition to this, it is noteworthy that the HRC addresses the topic of abortion, which is still very controversial worldwide. The Committee mainly brings up this issue in reference to unsafe abortions that cause maternal mortality. But it also pays attention to the issue of abortion of female foetuses, abortion as a contraceptive method, and forced abortion. It follows from the statements of the Committee with regard to abortion that it does not consider abortion in itself to be contrary to human rights. For example, abortion is not a violation of the right to life (of the foetus), as is often claimed by so-called *pro-life* groups: groups that oppose the practice of abortion. And the statements of the HRC go further than merely indicating that abortion is not a violation of the rights as laid down in the ICCPR. In light of the obligations of states parties under Article 6 on the right to life, and Article 7 on the right to be free from torture, cruel, inhuman or degrading treatment, states should allow abortion when the pregnancy results from rape or when it endangers the pregnant woman's life. In light of the request made in Vienna this is an important first step in addressing unwanted pregnancies and the need for safe abortions as it is experienced by women worldwide.[156]

Moreover, the study shows that the HRC requests states parties to provide for several pregnancy-related services so as to prevent unwanted pregnancies and consequently to prevent maternal mortality. It follows from the work of the HRC that states parties are requested to facilitate or provide for family-planning programmes and services, including sex education and contraceptives. The focus of the Committee is certainly on obligations for states parties to fulfil the right to life. This is a remarkable and commendable step in light of the call made in 1993 to include the status and human rights of women. For it abandons the idea that the ICCPR, and in this light the right to life, only lays down a negative obligation for the state to respect the right to life. It is also a necessary step when one wants to address maternal mortality effectively. Generally speaking, after all, it is not direct actions by state agents that causes these deaths, but often the lack of action on their part, for example by not ensuring that maternal healthcare is available.

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155 In GC 6, the HRC does refer to infant mortality, but not to maternal mortality. See HRC, GC 6, para. 5; Although GC 14 also deals with the right to life, this comment only discusses nuclear weapons and the right to life. See HRC, GC 14.

156 The WHO reports that each year, throughout the world, approximately 210 million women become pregnant and some 130 million of them go on to deliver live-born infants. The remaining 80 million pregnancies end in stillbirth, or spontaneous or induced abortion. Approximately 42 million pregnancies are voluntarily terminated each year: 22 million within the national legal system and 20 million outside it. WHO, *Unsafe abortions – Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2003*, fifth edition, 2007, p. 12.

Finally, attention should be drawn to the fact that the HRC addresses these pregnancy-related issues in an integrated manner. Consequently, the work of the HRC generally reflects Elements I, II, and IV of the request of the 1993 World Conference on Human Rights to include the status and human rights of women. However, it does not reflect compliance with this request as regards Element III: the assignment to link specific experiences of women to discrimination of women. Element III is scarcely reflected in the work of the HRC, and also with regard to Element II, to formulate women-inclusive human rights obligations, more steps need to be taken in order to fully reflect compliance with the call of the Vienna Declaration.

With regard to Element III, this study shows that the work of the HRC does not reflect compliance with the request of the 1993 World Conference on Human Rights: the HRC pays scarce attention to the link between the pregnancy-related matters and discrimination of women. With the exception of the abortion of female foetuses, the HRC does not touch upon the possible discriminatory contexts of certain issues or situations. Although the HRC indirectly recognises that certain services such as family-planning services and contraceptives are especially important for women, since a lack of them results in maternal mortality, the Committee does not explicitly address the lack of these services as a form of discrimination. Nor does the HRC discuss the fact that a lack of such services may be caused by more deeply rooted inequality in societies in which the lives of women are not valued as highly as the lives of men, and that on that ground not enough money is allocated to provide these services for example. The result of this is not only that the root causes of human rights concerns of women are not uncovered, but also that in those cases where human rights abuses and constraints of women constitute a manifestation of discrimination of women in societies, this source of the human rights problem is not addressed, which means the enjoyment of human rights by women is not effectively promoted or protected.

In addition to the negative results with regard to Element III, the HRC hardly pays any attention to the role of third parties in hampering access to pregnancy-related services, which means that its work does not fully reflect the assignment in Element II. On the one hand, the statements of the Committee in which it holds that states should *ensure* certain services, as mentioned in the previous paragraph, imply that states have a duty to prevent obstruction by third parties. On the other hand, it is remarkable that it has hardly ever explicitly formulated any recommendations for states parties to prevent, criminalise, prosecute and punish cases where third parties affect the enjoyment of human rights with regard to pregnancy-related situations. Consequently, the HRC does not in general formulate obligations for states parties to *protect* the rights of the Covenant in relation to pregnancy-related issues. The foregoing leads to the conclusion that concerning Element II, the work of the HRC does not fully comply with the request of 1993.

6.2 Opportunities in the work of the HRC

6.2.1 Attention for maternal healthcare

As noted before, the HRC addresses many pregnancy-related issues in light of the maternal death rate in states parties. Its reasoning is that maternal mortality is an issue of concern in respect of the right to life. Maternal mortality, the Committee indicates, is caused mainly by unsafe abortions, which in turn are caused by restrictive abortion laws and unwanted pregnancies, which can be prevented by family-planning services, sex education and access to contraceptives. It has already been commended that the HRC pays such considerable attention to maternal mortality and that by adopting this line of reasoning it brings family-planning services and programmes within the realm of the ICCPR. Yet, it is striking that, considering this rationale, the Committee in general only relates maternal mortality to unsafe abortions and hardly pays any attention to maternal healthcare. Surely lack of maternal healthcare is an issue that falls within the ambit of human rights issues that specifically affect women and which should therefore be addressed by the human rights treaty monitoring bodies in regard of the request made in Vienna. As noted previously, every year more than half a million women die due to pregnancy-related and childbirth-related causes. Lack of maternal healthcare, after unsafe abortions, is one of the most important causes of maternal deaths and most maternal deaths and disabilities are preventable.[157] Research shows that women's lives can be saved and their suffering reduced if health systems address serious and life-threatening complications when they occur.[158] Experience from successful maternal healthcare programmes shows that a large part of maternal deaths and suffering could be avoided if all women had the assistance of a skilled health worker during pregnancy and delivery, and access to emergency medical care when complications arise.[159] With maternal mortality being high on its agenda, and lack of maternal healthcare being one of its main causes, the HRC could certainly pay more attention to the status of maternal healthcare in states parties.

6.2.2 Attention for abortion

In addition to this, the HRC pays attention to the issue of abortion. The Committee argues that restrictive abortion laws lead to unsafe abortions which in turn result in

157 Hunt, P. and Bueno de Mesquita, J., Reducing Maternal Mortality – The contribution of the right to the highest attainable standard of health, 2007, http://www.unfpa.org/publications/detail.cfm?ID=356, p. 4, accessed on 4 July 2009.

158 Ransom, E., and N. Yinger, *Making Motherhood Safer – Overcoming Obstacles on the Pathway to care,* Population Reference Bureau, February 2002, http://www.prb.org/pdf/MakMotherhdSafer_Eng.pdf, accessed on 4 July 2009, p. 32.

159 UNFPA, Investing in midwives and others with midwifery skills – Saving the lives of mothers and newborns and improving their health, 2008, http://www.unfpa.org/webdav/site/global/shared/documents/publications/2008/midwives_eng.pdf, pp. 2-3, accessed on 4 July 2009.

maternal deaths. In this respect the HRC indicates, on several occasions, that states parties should allow for abortions when the pregnancy results from rape or when it endangers the pregnant woman's life, but it does not refer to other circumstances in which abortions should be legal. One may wonder why this is the case. Following the rationale of the Committee all unwanted pregnancies may lead to abortion and, when abortion is not legally available, will induce women to undergo an unsafe abortion, regardless of the reasons why women may want to have an abortion. On that account all restrictions on abortion procedures could be considered a matter of concern with regard to the implementation of the right to life and this would entail that states should allow for abortion under all circumstances. But, although this notion follows directly from its line of reasoning as regards the implementation of the right to life in states parties, it appears that so far this is not the road the HRC wishes to take.

To do so would, however, be a first step in recognising the individual right to abortion. A right which at present arguably only exists when the pregnancy results from rape, but not for example when the pregnancy is life-threatening. As far as pregnancy due to rape is concerned, the Committee indicates that states should give women who have become pregnant as a result of rape access to safe abortion. This could mean that states should not only allow for abortion in their national laws, but that they also have to ensure that women have access to abortion when the pregnancy is the result of rape. Strikingly though, the same does not hold true where pregnancies that are life-threatening are concerned. Here the HRC does not argue that states should give access in those circumstances, but follows a line of reasoning that, although it fits with its general rationale of addressing pregnancy-related matters, seems to be beating about the bush. It would seem that one could fairly argue that a woman's right to life implies a right for her to have an abortion when the pregnancy is life-threatening, but this is not a statement that the HRC makes in its work. The Committee argues that when states do not allow for abortion when the pregnancy endangers the life of a woman, women are forced to seek refuge with clandestine practitioners. In doing so, these women risk their lives and this in its turn may result in high maternal death rates, which are contrary to the right to life as laid down in Article 6 of the ICCPR. If one strictly applies this rationale it means that individual women cannot claim a violation of their right to life when national laws prohibit them to undergo an abortion when the pregnancy endangers their life. For it is the number of women dying due to pregnancy-related causes that constitutes a brecah of the state party's obligations under article 6 and not the individual right of a woman that is violated. The case of K.L. versus Peru, in which a woman who carried an anencephalic foetus, which did not only mean that the foetus would either die in the womb or soon after birth, but also endangered the life of the woman, was refused an abortion, offered the HRC a unique opportunity to give clear guidelines as to the interpretation of Article 6 on the right to life with regard to any entitlements when a pregnancy endangers the life of the mother. Yet, the Committee did not address the claim of K.L. that Peru had violated Article 6, but only focused on a violation of Article 7 of the ICCPR on the freedom from torture and from cruel, inhuman or degrading treatment. Consequently, even when a clear opportunity

presented itself to formulate a right to abortion when a pregnancy is life-threatening, the HRC chose not to do so. This is remarkable, for to argue that a right to abortion exists in circumstances where the pregnancy is life-threatening is not a highly controversial statement to make as today, many states in the world allow for abortion under these specific circumstances in their national legislation.[160] In light of the aforementioned, the HRC should consider formulating such a specific right for individuals under the right to life. Clearly, however, since the HRC does not even explicitly recognise a right to abortion when the pregnancy endangers the life of the pregnant woman, recognising a general right to abortion is a bridge too far.

The aforementioned also entails that states parties are not requested to ensure that abortion facilities are accessible for women. However, what is remarkable is that the Committee does not make any similar statements either where it concerns de facto access to abortion where the life of the pregnant woman is in danger or where the pregnancy results from rape, cases in which the HRC holds that states should allow for abortion in their national legislation. Certainly, formulating an obligation of this nature for states parties would fit with the rationale employed by the Committee. For if women are allowed to have access to abortion, but it is de facto impossible for them to have one, they will still be forced to have one in unsafe conditions, which in turn results in maternal deaths.

Similarly, the HRC does not pay any attention to the facilitation of post-abortion care in states parties, which is another matter that the Committee could very well address in light of its line of reasoning as regards the prevention of maternal mortality. A review of the WHO estimates that every year there are in addition to the 65 000 to 70 000 deaths, close to five million women with temporary or permanent disability due to unsafe abortion. The organisation explains that the consequences of complications of unsafe abortion depends amongst other things on the availability and quality of post-abortion care.[161] On the basis of the aforementioned, the HRC could consider addressing and formulating obligations for states parties as regards the de facto accessibility of abortion and post-abortion services, and in addition to this, it could consider formulating a right to abortion, at least under certain circumstances.

160 According to the WHO, 189 states worldwide of the 193 states examined allow for abortion when the pregnancy is life-threatening. See WHO, *Unsafe Abortion – Global and Regional Estimates of the Incidence of Unsafe Abortion and the Associated Mortality in 2003*, 2007, p. 13, http://www.who.int/reproductive-health/publications/unsafeabortion_2003/ua_estimates03.pdf, accessed on 4 July 2009. See for example also Center for Reproductive Rights, *Fact Sheet The World's Abortion Laws*, May 2008, http://reproductiverights.org/sites/crr.civicactions.net/files/pub_fac_abortionlaws2008.pdf, p. 2, accessed on 4 July 2009.

161 See WHO, *Unsafe Abortion – Global and Regional Estimates of the Incidence of Unsafe Abortion and the Associated Mortality in 2003*, 2007, p. 5, http://www.who.int/reproductive-health/publications/unsafeabortion_2003/ua_estimates03.pdf, accessed on 4 July 2009.

CHAPTER 4
PHYSICAL VIOLENCE AGAINST WOMEN AND HUMAN RIGHTS THE HUMAN RIGHTS COMMITTEE

1 INTRODUCTION

The term 'violence against women' as it is used in this study refers to the definition of the concept presented in the UN Declaration on the Elimination of Violence against Women of 1993.[1] This declaration states that 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.'[2] The Declaration lays down that violence against women shall be understood to encompass, but not be 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;
>
> (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.'[3]

In its work, where the HRC pays attention to violence against women it often refers to 'violence against women' as such, without specifying the type of violence, and sometimes refers to one of the specific forms as identified in the UN Declaration. This chapter presents the statements of the Committee with regard to those forms of

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1 The Declaration on the Elimination of Violence against Women was adopted in December 1993 a few months after the World Conference on Human Rights in Vienna. As noted in chapter 1, the Vienna Declaration and Programme of Action stresses the importance of the Declaration on the Elimination of Violence against Women by stating that 'the World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions.' Vienna Declaration, World Conference on Human Rights , Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24, Part I, para. 38

2 United Nations Declaration on the Elimination of Violence against Women, 1993, UN doc. A/RES/48/104.

3 Ibidem, Article 2.

violence against women that affect the physical integrity of women, i.e. in those cases where violence is inflicted on women's bodies. The statements of the Committee are divided into those on rape and other forms of sexual abuse,[4] domestic violence, trafficking in women, sexual harassment, female genital mutilation, and other harmful practices concerning women's bodies.[5] The following section of this chapter describes the statements of the HRC with regard to these issues. Attention is paid to the concerns expressed by the Committee regarding these matters and to the recommendations made in this respect. Furthermore the section lays down in light of which provisions these issues are brought up. For the HRC can only address those issues that affect or could affect the human rights as laid down therein, or which indicate, or could indicate a human rights violation by states parties. In the sections below, the results with regard to the other elements of the request of the 1993 World Conference on Human Rights, as identified in Chapter 2, are discussed and at the end of this chapter, similarly to Chapter 3, conclusions with regard to the main research question are presented.

2. THE HUMAN RIGHTS COMMITTEE AND PHYSICAL VIOLENCE AGAINST WOMEN

2.1 Rape and other forms of sexual abuse

2.1.1 Introduction

GC 28 and the COs of the HRC make it unequivocally clear that rape and other forms of sexual abuse affect the enjoyment of human rights. For that reason states have obligations with regard to the prevention and prosecution of these practices regardless of the situation in which it takes place.[6] The statements of the Committee with regard

4 The HRC does not define rape or sexual abuse. In general, when it concerns abuse in the private sphere, it employs the term sexual abuse when it concerns children, and rape when it concerns women. With regard to rape and sexual abuse in situations of armed conflict and/or by armed forces, or in custody, it uses the terms interchangeably. The recommendations of the HRC with regard to these phenomena are the same.

5 Sexual harassment is also addressed here as it may also affect women's physical integrity. In its statements with regard to sexual harassment the HRC makes no distinction between various forms of harassment and for that reason all statements of the HRC on the matter are discussed in this chapter. The term 'other harmful practices' is not employed by the HRC in its work. It is used here as a residual category for the other forms of physical violence addressed by the Committee. The term is in keeping with the categories of violence against women as mentioned in Article 2 of the UN Declaration on the Elimination of Violence against Women.

6 HRC, GC 28, para. 11. With regard to COs in which the HRC expresses its concern about the incidence of rape and/or other forms of sexual abuse in states parties, see for example COs Russian Federation 1995, para. 14; COs Japan 1998, para. 30; COs Argentina 2000, para. 15; COs Azerbaijan 2001, para. 17; COs Hungary 2002, para. 10; COs Mali 2003, para. 18; COs Iceland 2005, para. 11; COs Zambia 2007, para. 19; COs Russian Federation 2003, para. 13; COs Japan 2008, para. 14. With regard to the

to rape and other forms of sexual abuse can be divided into three situations in which these abuses take place: in the private sphere, this means not in state institutions and/or by state officials; in custody; and in times of armed conflict and/or by armed forces. The statements of the HRC are described in three sections based on this division and each section is thematically subdivided in accordance with the different types of recommendations formulated by the Committee.

2.1.2 Rape in the private sphere

2.1.2.1 Awareness raising

The general public of states parties should be aware of all forms of violence against women. Consequently, as violence against women includes domestic violence, of which marital rape is considered to be a form, as well as rape, the general public should according to the HRC be aware of these phenomena.[7] The HRC requests states parties to start educational campaigns and to organise awareness-raising campaigns to address all forms of violence against women.[8] Also, the Committee holds that women should be aware of the rights and remedies available to them. On that account, it recommends that states start large-scale information campaigns in order to promote awareness on these issues.[9] In addition to this, the HRC argues that mandatory gender-sensitive training in sexual violence should be introduced for judges, prosecutors, police and prison officers.[10]

The HRC addresses the issue of awareness raising in combination with its remarks on violence against women, including domestic violence. In this respect it refers to Articles 3, 6, 7, 9 and 26 of the Covenant. In none of the instances in which it pays attention to awareness in relation to rape does it refer explicitly to the principles of discrimination or equality. Yet, it should be noted that in its COs on Argentina of 2000, the HRC discusses the problem of women's low awareness of their rights and remedies concerning violence against women, including rape, in reference to the traditional attitudes towards women in society. It holds here that:

> 'With regard to article 3 of the Covenant, the Committee is concerned that despite significant advances, traditional attitudes towards women continue to exercise a negative influence on their enjoyment of Covenant rights. The Committee is particularly concerned at the high incidence of violence against women, including rape and domestic violence. Sexual harassment and other manifestations of discrimination in both the public and private sectors are also a matter of concern. The Committee notes as well that

recommendation of the HRC to combat violence against women, including rape, see for example COs Azerbaijan 2001, para. 17; COs Hungary 2002, para. 10; COs Zambia 2007, para. 19.

7 See for example COs Republic of Korea 2006, para. 11; or COs Azerbaijan 2001, para. 17.

8 COs Zimbabwe 1998, para. 14; COs Uzbekistan 2001, para. 19; COs Republic of Korea 2006, para. 11.

9 COs Argentina 2000, para. 15; COs Azerbaijan 2001, para. 17.

10 COs Japan 2008, para. 14.

> information on these matters is not systematically maintained, that women have a low awareness of their rights and the remedies available to them, and that complaints are not being adequately dealt with.'[11]

2.1.2.2 Prosecution and punishment of perpetrators

Cases of rape should be prosecuted and the perpetrators punished. The HRC formulates a number of recommendations in its COs that give effect to this notion. These statements relate to penalisation, investigation and prosecution of rape, and to punishment of the perpetrators.

Before allegations of rape can be investigated, it is required that rape is considered a criminal offence in national legislation. The Committee notes for example in its COs on Uzbekistan of 2001 that the state party should ensure that violence against women constitutes an offence punishable under criminal law.[12] In its COs, as is also remarked upon in the introduction of this chapter, the HRC makes it clear that it considers rape to be a form of violence against women and from this notion it follows that rape should also be a criminal offence according to national law. In other COs the HRC specifies that such a criminalisation of rape also covers rape committed in marriage by husbands.[13] In a number of COs the Committee expresses its concern about the fact that rape in marriage is not an offence.[14] In those cases it does not matter whether the husband and wife are legally separated rape should in all cases be criminalised.[15] This also holds true for other arguments that could be presented in defence of excluding marital rape from the national criminal code. For example, a delegate of Zimbabwe argued in the constructive dialogue with the Committee that:

> 'Marital rape was not recognized in Zimbabwe; since women did not take the initiative in sexual relations and were expected to show a degree of resistance, there was a thin line between consent and rape.'[16]

Committee member Evatt responded to this by stating that the answer provided by the delegation indicated that Zimbabwean women are insufficiently protected. She observed that the issue should be reviewed as a matter of urgency and appropriate

11 COs Argentina 2000, para. 15.
12 COs Uzbekistan 2001, para. 19.
13 COs Republic of Korea 2006, para. 11; COs Greece 2005, para. 7; COs Sri Lanka 2003, para. 20; COs Zimbabwe 1998, para. 14; COs Japan 1998, para. 30.
14 COs India 1997, para. 16; COs Cambodia 1999, para. 17; COs Morocco 1999, para. 14; COs Mongolia 2000, para. 8; COs Republic of Korea 2006, para. 11; COs Greece 2005, para. 7; COs Thailand 2005, para. 12.
15 COs Sri Lanka 2003, para. 20.
16 SR Zimbabwe 1998, UN doc. CCPR/C/SR.1650, para. 25.

amendments should be enacted.[17] In the subsequent COs the Committee holds that the state party should make marital rape a criminal offence.[18]

In addition to this, national legislation on rape should not contain any requirements holding that a woman must be 'honest' for rape to be held to have been committed.[19] In the constructive dialogue between the HRC and delegates from Guatemala, Committee member Medina Quiroga remarked upon the fact that in some Latin American countries, a woman's 'honesty' is a determining factor in a court's verdict on the crime of rape.[20] This is apparently also true for Guatemala. The delegate of this state party noted in response to the remark by member Medina Quiroga that he considered the use of the term 'honest' to be outdated, and that he would welcome legislation to eliminate such terms from the language of the law.[21] Similarly, in its COs on Japan of 2008, the HRC expresses its concern about the narrow definition of rape, which only covers actual sexual intercourse between men and women and requires resistance by victims against the attack. The Committee holds that the state party should broaden the scope of the definition of rape and ensure that incest, sexual abuse other than actual sexual intercourse, as well as rape of men, are considered serious criminal offences. Moreover, it argues that the state party should remove the burden on victims to prove resistance against the assault.[22] Similarly, in its COs on the Former Yugoslav Republic of Macedonia, the HRC notes to be concerned about the undue burden of proof required for a conviction of rape in the legal definition of rape in the state party, which it holds to be detrimental to the protection of victims. It requests the state party to amend its law in this respect.[23]

Besides criminalisation, it is important that cases of rape are investigated. In this respect the Committee makes two recommendations: the state party must ensure that cases are dealt with in an appropriate and systematic manner, and the consent of the victim of rape should not play a crucial role in the process of investigation.[24] In its COs on Colombia of 2004, the Committee expresses its concern about the current rules for prosecuting cases of rape, which require the consent of the victim in order to proceed further. It subsequently holds that the State party should revise its legislation on

17 Ibidem, para. 42.

18 COs Zimbabwe 1998, para. 14. In the COs, the words 'initial rape' are used instead of 'marital rape'. In regard to the summary records in which the Committee and the delegates from Zimbabwe discuss marital rape and not initial rape, I understand initial rape in the COs to mean marital rape.

19 COs Guatemala 2001, para. 24.

20 SR Guatemala 2001, UN doc. CCPR/C/SR.1942, para. 5.

21 Ibidem, para. 10.

22 COs Japan 2008, para. 14.

23 COs Former Yugoslav Republic of Macedonia 2008, para. 10.

24 COs Zambia 2007, para. 19; COs Argentina 2000, para. 15; COs Azerbaijan 2001, para. 17. In the two latter COs the HRC does not recommend that the states ensure that cases are systematically dealt with, but expresses its concern about the fact that complaints are not being adequately dealt with. In its COs on Colombia of 2004, the Committee recommends the state party to revise its legislation with regard to the role of consent of the victim in the process. COs Colombia 2004, para. 14.

investigations into cases of rape with respect to the role of consent of the victim in the process.[25]

Cases of rape should, moreover, be prosecuted. In its COs on Iceland, the HRC remarks upon the high number of reported rapes in the state party in comparison with the number of prosecutions that are conducted on this ground.[26] In respect of the prosecution of rape, the Committee expresses its concern, as mentioned previously, about the fact that the offence of rape requires evidence of resistance by the woman and, on a similar note, the necessity to prove violence in order to obtain a conviction for rape.[27] In its COs on Peru of 1996, the Committee expresses its concern about the fact that the national law classifies rape as an offence prosecutable privately.[28] In its recommendations it holds that Peru must ensure that laws relating to rape, sexual abuse and violence against women provide women with effective protection.[29]

Finally, states are held to punish the perpetrators of acts of rape. On that account, the HRC argues that states must take all appropriate measures to ensure that rape does not go unpunished.[30] Also in this respect, the HRC makes a number of specific recommendations. In a number of COs the HRC expresses its concern about the fact that if the accused marries the victim of rape, even statutory rape, this extinguishes the criminal offence or the sentence issued at the trial.[31] This is for example the case in Venezuela, where, as explained by the Venezuelan delegate during the constructive dialogue, Article 395 of the national Criminal Code discharges persons accused of rape from all criminal liability if married to their victims.[32] Committee members Scheinin and Medina Quiroga responded to this statement and indicated to be very concerned about this policy.[33] In its COs on Venezuela, as well as in other COs where it found similar provisions in national laws, the Committee holds that the state party should immediately repeal this legislation, which it holds to be 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.[34]

Another point of concern with regard to the punishment of rapists is the distinction in punishment between married women and non-married women. During the dialogue on the state report of Paraguay in 1995, Committee member Medina Quiroga noted

25 COs Colombia 2004, para. 14.
26 COs Iceland 2005, para. 11.
27 COs Republic of Korea 1999, para. 11; COs Mongolia 2000, para. 8; COs Japan 2008, para. 14.
28 COs Peru 1996, para. 15. From the COs and the SR of the HRC it is not clear what is meant by 'prosecutable privately'.
29 COs Peru 1996, para. 22.
30 COs Iceland 2005, para. 11; COs Mali 2003, para. 18; COs Japan 2008, para. 14; COs Former Yugoslav Republic of Macedonia 2008, para. 10.
31 COs Uruguay 1998, para. 9; COs Venezuela 2001, para. 20; COs Republic of Guatemala 2001, para. 24; COs Peru 1996, para. 15.
32 SR Venezuela 2001, UN doc. CCPR/C/SR.1900, para. 48.
33 Ibidem, para. 60 and 63.
34 COs Venezuela 2001, para. 20. See also COs Uruguay 1998, para. 9; COs Republic of Korea 1999, para. 11; COs Republic of Guatemala 2001, para. 24.

that according to the report a discriminatory classification of women who had been raped and abducted still existed, since harsher penalties were applied in the case of married women. She argued that such acts constituted above all a violation of the physical integrity of women, and urged the reporting State to revise its legislation in that regard.[35] In the COs, the HRC expresses its concern about the matter as it notes that:

> 'The Committee is concerned that, despite constitutional guarantees for the rights of women, women continue to receive unequal treatment in Paraguay, owing in part to outdated laws that clearly contradict the provisions of the Covenant. These would include laws that are more lenient in instances of infanticide committed to protect the honour of a woman than in ordinary cases of homicide and laws that make distinctions in the punishment accorded to persons who rape or abduct women depending on the marital status of the victim.'[36]

It recommends the state party to review all national legislation on women with a view to modernising the outdated legal standards in force to bring them into line with the relevant provisions of the Covenant. Moreover, the HRC recommends in particular that Paraguay review its laws on criminal offences committed against women.[37]

Finally, in respect of the punishment of rapists, the Committee expresses concern in its COs about the fact that rape committed by a husband separated from his wife incurs a lower penalty than for other rapists. In this case, the HRC recommends that the state party takes further measures to overcome this problem and to protect women from all discriminatory practices, including violence.[38]

Most often the HRC addresses prosecution and punishment of rape in a paragraph on violence against women. In other occasions, it addresses the matter in relation to domestic violence, or in combination with other issues that affect women and which are not necessarily matters of physical violence. In a few COs, the matter of rape, and specifically prosecution and punishment of this crime, is dealt with in an isolated paragraph. In all these instances the Committee discusses the situation of women, and not that of people in general, thus regardless of their sex, or of children. It is only in its COs on Lithuania that the Committee deals with the prosecution of perpetrators of sexual abuse against children and not against women.

The topic of prosecution and punishment of rape is discussed in light of the enjoyment of Articles 3, 7, 9, 23, 26, 2(3), and 24 of the Covenant. Article 24 is mentioned in relation to legal provisions in national law that exempt rapists from punishment if they marry their victim. With regard to this matter, the HRC notes that

35 SR Paraguay 1995, UN doc. CCPR/C/SR.1392, para. 21.
36 COs Paraguay 1995, para. 207.
37 COs Paraguay 1995, para. 218.
38 COs India 1997, para. 16.

in some countries the legal age for marriage for girls is very low.[39] Article 9 is brought forward on two occasions. Interesting in this respect is the comments of the Committee in its COs on Morocco of 1999. Here, the HRC speaks of women's right to personal security in respect of violence against women, including marital rape. It notes that:

> 'The Committee notes with concern that there are no special programmes, legal sanctions or protective measures to counter violence and sexual abuse of women, including marital rape, and that there are aspects of the criminal law (such as the crime of honour defence) which fail to provide equal protection of women's rights under articles 7 and 9 of the Covenant. Legal and protective measures should be adopted to guarantee women's rights to personal security.'[40]

In most COs where the HRC discusses the prosecution and punishment of rape it does not refer specifically to the principles of non-discrimination or equality of women. There are, however, a few exceptions, in which the Committee addresses the matter from this angle. In its COs on Paraguay, for example, the Committee remarks upon the fact that punishment of perpetrators of rape varies according to the marital status of the victim.[41] And in its COs on Cambodia of 1999, the HRC pays attention to systemic discrimination that precedes such violence as it notes that:

> 'The Committee is concerned that prevalent attitudes concerning the subordinate role of women in the family and in society are a substantial obstacle to the equal enjoyment of rights by women, and impede their education and opportunities for employment and full participation in political life. The Committee is also concerned that parents decide upon marriage, that children are forced into marriage, that rape in marriage is not an offence and that the authorities do not provide support to women who complain of domestic violence. The State party, in conformity with its obligations under the Covenant, should ensure greater access to education by women and girls, equal employment opportunities for women, and the full and equal participation of women in political life. It should also take steps to ensure respect for laws prohibiting marriage without full and free consent, and introduce measures to enable women to seek effective protection of the law in case of domestic violence.'[42]

The notion that certain attitudes in society affect the enjoyment of human rights by women is also brought forward in its COs on Argentina, where the Committee remarks upon the fact that it is concerned, with regard to Article 3 of the Covenant, that despite significant advances traditional attitudes towards women continue to exercise a negative influence on their enjoyment of rights. It notes to be particularly concerned about the high incidence of violence against women, including rape and domestic

39 COs Venezuela 2001, para. 20.
40 COs Morocco 1999, para. 14.
41 COs Paraguay 1995, para. 207; see also SR Paraguay 1995, UN doc. CCPR/C/SR.1392, para. 21.
42 COs Cambodia 1999, para. 17.

violence. In this respect it observes, amongst other things, that complaints are not being adequately dealt with.[43]

2.1.2.3 Provisions for victims

Victims of rape should be provided with adequate protection. This includes protection both by the law and in practice. In its COs on the Libyan Arab Jamahiriya of 1998, the Committee notes with concern that the law does not provide adequate protection to women in respect of rape. Hence, states are held to provide women with effective protection.[44] For that reason, the HRC recommends states parties to take specific protection measures, or to adopt appropriate protection mechanisms with respect to violence against women, including rape.[45]

In a number of COs, the Committee further clarifies these protection measures or mechanisms. States parties should provide support to women who are entitled to certain remedies and also initiate or strengthen programmes aimed at providing assistance to victims of rape.[46] With regard to the latter, the Committee holds that the state party should do so with a view to ensuring women's equality before the law and their equal protection of the law. The state party is in that respect recommended to consider allocating responsibility for that purpose to an appropriate high-level governmental body.[47]

Finally, of a slightly different nature, is the recommendation of the HRC to make police officers more sensitive in their handling of allegations of rape and its psychological effects on the victim.[48]

The Committee often addresses the provisions for victims of rape within the context of violence against women. In these instances the HRC expresses its concern about this practice, including about rape and recommends the state party to take measures to enhance the protection of the victim. It refers in this respect to Articles 3 and 26 of the Covenant.

This is different in its COs on the Libyan Arab Jamahiriya where it addresses protection of victims of rape in combination with other issues that are contrary to the equality of men and women, such as inheritance, freedom of movement, acquisition and transmission of nationality, and divorce. Here the Committee notes with concern that inequality between men and women persists and recommends the state party to intensify its efforts to guarantee full equal enjoyment by men and women of all their

43 COs Argentina 2000, para. 15.
44 COs Peru 1996, para. 22.
45 COs Armenia 1998, para. 16; COs Mali 2003, para. 18.
46 COs United Republic of Tanzania 1998, para. 11; COs Russian Federation 1995, para. 33.
47 COs Russian Federation 1995, para. 33.
48 COs Hungary 2002, para. 10.

human rights.[49] In addition, the COs on the Russian Federation of 1995 deserve to be mentioned. Here the Committee places rape, including the protection of victims of rape, in the larger context of the de facto situation of inequality of women in society. In that light, it recommends that greater efforts be made to collect information on the situation of women and the effects on them of the structural political, economic, and social changes taking place.[50]

2.1.3 Rape and other forms of sexual abuse of women in custody

2.1.3.1 Introduction

Rape and other forms of sexual abuse of women in custody or in prison affects the enjoyment of human rights as laid down in the Covenant. The HRC expresses its concern about this practice in a number of its COs.[51] It is noteworthy that the Committee pays attention to both rape and other forms of sexual abuse, although it does not specify these other forms. In its COs the HRC refers either to 'rape', to 'sexual abuse' or to 'rape and other forms of sexual abuse'.[52] This in contrast to the statements of the Committee discussed in the previous section concerning rape in the private sphere. Here, the Committee only refers to 'rape', and only discusses sexual abuse when it concerns children. In addition to this, all the statements of the Committee concerning the incidence of rape and other forms of sexual abuse of women in custody and in prison refer to abuse at the hands of state officials, namely police and other security forces such as prison guards. Hence, it never concerns acts of rape committed by fellow prisoners.

In general, the Committee requests states in this respect to protect the security of women, to take effective measures to guarantee women's safety, and to make resources available to remedy this situation.[53] It also makes, however, more specific recommendations regarding the prevention, prosecution, and punishment of the acts of rape and other forms of sexual abuse, the training of state officials and the rights of victims. These statements are discussed in this section in more detail.

49 COs Libyan Arab Jamahiriya 1998, para. 17.
50 COs Russian Federation 1995, para. 14 and 33.
51 COs Suriname 2004, para. 11; COs The Philippines 2003, para. 11; COs India 1997, para. 23; COs United Republic of Tanzania 1998, para. 20; COs Mexico 1999, para. 16; COs Cambodia 1999, para. 13; COs Venezuela 2001, para. 17.
52 See for example COs United republic of Tanzania 1998, para. 20.
53 COs Mexico 1999, para. 16; COs Venezuela 2001, para. 17; COs United Republic of Tanzania 1998, para. 20.

2.1.3.2 Prevention of rape and sexual abuse of women in custody

States parties are held to adopt and enforce legislative and other measures to prevent rape and other forms of sexual abuse committed in prison and in custody.[54] In addition to the investigation, prosecution and punishment of these crimes, which of course also serve a preventive purpose, the Committee pays attention to a specific practical aspect that is required in the prevention of these acts: female detainees and prisoners should only be guarded by female security staff.[55] In its COs on Zambia of 2007, for example, the Committee notes that while female prisoners are not to be guarded by male officers, it remains concerned about information according to which this rule has sometimes been relaxed, due to a lack of female officers, both in police stations and in prisons. It therefore holds that:

> 'The state party should ensure that any act of violence committed against a prisoner is duly prosecuted and punished, and that women held in police custody or in prisons are never guarded by male officers.'[56]

To that end, states are held to recruit a sufficient number of female officers.[57] In addition, male officers should not be allowed access to women's quarters in prison or custody without being accompanied by women officers. This should be provided for in national legislation.[58] In its COs on the United States of America of 1995, the HRC expresses concern about the practice that allows male prison officers access to women's detention centres, which has led to serious allegations of sexual abuse of women and the invasion of their privacy.[59]

The issue of prevention of rape and other forms of sexual abuse is generally presented as an aspect of the general prison conditions in states parties. On that account in the same paragraphs the HRC also discusses, for example, the overcrowding in prisons and the beating of detainees. In respect of these prison conditions and the enjoyment of human rights, the Committee often refers to Articles 7 and 10 of the Covenant. An exception to be mentioned here are the COs on Canada of 2006. Here, the HRC only discusses in this particular paragraph the situation of female prisoners and in particular that of Aboriginal women, women belonging to ethnic minorities and women with disabilities. The Committee states in these COs to remain concerned about the decision of the authorities to maintain the practice of employing male front-

54 COs The Philippines 2003, para. 11.
55 COs Zambia 2007, para. 20; COs Canada 2006, para. 18; COs United Republic of Tanzania 1998, para. 20; COs Cambodia 1999, para. 13.
56 COs Zambia 2007, para. 20.
57 COs United Republic of Tanzania 1998, para. 20.
58 COs United States of America 1995, para. 299.
59 COs United States of America 1995, para. 285.

line staff in women's institutions and refers in that respect to Articles 2, 3, 10, and 26 of the Covenant.[60]

2.1.3.3 Training of state officials

With regard to the incidence of rape and other forms of sexual abuse of prisoners and detainees, the HRC recommends states parties to give human rights training both to prison officers and to law-enforcement personnel.[61] In these cases it discusses the incidence of rape and other forms of sexual abuse as one of the aspects of ill treatment of detainees. For example, in its COs on Suriname of 2004, the Committee holds that:

> 'While the Committee notes that the State party is taking measures to investigate and punish police officers involved in incidents of ill-treatment of detainees, including beatings and sexual abuse of detainees (especially during the initial stages of detention), it remains concerned that such incidents continue to be reported.'[62]

The Committee speaks of sexual abuse of detainees here, which could indicate that it is concerned about the fact that all detainees are at risk of being abused. But from the records of the constructive dialogue with a delegation from Suriname it is clear that the Committee refers to the situation of female detainees as far as the sexual abuse is concerned. In the SR, Committee member Klein argues that:

> '[T]he delegation said there had been only isolated instances of ill-treatment of detainees, but he had heard that ill-treatment, including the sexual abuse of women, often occurred during the first days of detention. To train law-enforcement officers in human rights matters was quite easily organized and would go some way to solving that problem.'[63]

The HRC makes it clear that Articles 7 and 10 of the Covenant are affected by these practices.

2.1.3.4 Prosecution and punishment of perpetrators

Cases of rape and sexual abuse of female detainees and prisoners should be prosecuted and the perpetrators should be punished. In its COs on the Philippines, the Committee notes with concern that reported cases of abuse have neither been investigated nor prosecuted. It holds that such a situation is conducive to perpetration of further violations of human rights and to a culture of impunity.[64]

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60 COs Canada 2006, para. 18.
61 COs United Republic of Tanzania 1998, para 20; COs Suriname 2004, para. 11.
62 COs Suriname 2004, para. 11.
63 SR Suriname 2002, UN doc. CCPR/C/SR.2054, para. 26.
64 COs The Philippines 2003, para. 11.

The first requirement in this is that women are not deterred from reporting cases of abuse. In a number of COs, the HRC notes with concern that women are afraid of reporting incidences of rape and sexual abuse.[65] In that respect, the Committee holds that states parties should ensure that no pressure is put on women to deter them from reporting such violations.[66] In addition to this it holds that the state party should ensure that there are effective procedures for making complaints.[67]

Besides enhancing the reporting of abuse, states are told to ensure that all allegations of abuse are investigated.[68] In this respect, the HRC makes a number of specific recommendations. It requests the state party to ensure that there are effective procedures for investigating complaints; recommends enacting legislation for mandatory judicial inquiry into cases of rape in police custody; and argues that allegations should be investigated using an independent mechanism.[69]

Finally, with regard to the obligation of states to prosecute and punish acts of rape and other forms of sexual abuse, states are held to ensure that perpetrators are brought to justice.[70] In this regard, the Committee recommends that those held responsible should receive appropriate punishment.[71]

Also with regard to prosecution and punishment of acts of sexual abuse of women in custody and prison, the Committee addresses the matter as an aspect of the prison and custody conditions which are not in conformity with the rights laid down in the Covenant. Consequently, also in this respect, the Committee refers to Articles 7 and 10.

2.1.3.5 Provisions for victims

Only in one occasion does the HRC address the provisions for victims with regard to abuse committed in prisons or custody: in its COs on Suriname of 2004. Here the Committee holds that it remains concerned that incidents of sexual abuse of detainees continue to be reported. It argues that victims of such treatment should receive full reparation, including fair and adequate compensation.[72]

As noted previously, the Committee discusses the matter here in light of the general concern about the prison conditions in Suriname.

65 COs Mexico 1999, para. 16; COs Venezuela 2001, para. 17.
66 COs Mexico 1999, para. 16; COs Venezuela 2001, para. 17.
67 COs Cambodia 1999, para. 13.
68 COs Zambia 2007, para. 20; COs Mexico 1999, para. 16; COs Cambodia 1999, para. 13; COs Venezuela 2001, para. 17; COs The Philippines 2003, para. 11; COs Suriname 2004, para. 11.
69 COs Cambodia 1999, para. 13; COs India 1997, para. 23; COs Suriname 2004, para. 11.
70 COs Suriname 2004, para. 13; COs Zambia 2007, para. 20; COs Mexico 1999, para. 16; COs Cambodia 1999, para. 13; COs The Philippines 2003, para. 11; COs Venezuela 2001, para. 17.
71 COs Suriname 2004, para. 11.
72 COs Suriname 2004, para. 11.

2.1.4 Rape and sexual abuse by armed forces and/or in armed conflict

2.1.4.1 Introduction

Rape and other forms of sexual abuse in times of armed conflict and/or by armed forces are of serious concern to the HRC.[73] For example in its COs on Guatemala, the Committee notes with alarm the information about cases of summary executions, disappearances, torture, rape, and other inhuman or degrading treatment or punishment, arbitrary arrests and detention of persons by members of the army and security forces, or paramilitary and other armed groups or individuals. Hence, the HRC is in this respect not only concerned about sexual abuse committed by state actors, but also by individuals in private capacity.[74] This is also illustrated by a statement in the COs on Sudan of 2007, in which the Committee holds that the state party should ensure that state bodies and agents afford the protection needed by victims of serious violations committed by third parties.[75] In this regard, the state party is requested to take all appropriate measures to guarantee that state agents, including all security forces and militia under state control put a stop to such violations immediately.[76] Moreover, in a number of COs the HRC formulates more specific recommendations in light of rape and other forms of sexual abuse in times of armed conflict and/or by armed forces. These recommendations are discussed in this section in more detail.

2.1.4.2 Prevention of rape and sexual abuse by armed forces and/or in armed conflict

States parties have a duty, also in times of armed conflict, to prevent rape and sexual abuse regardless of who commits these acts. On a general note, the HRC argues that the state party should protect civilians in zones of armed conflict, especially women and children.[77] On a similar note, states are requested to raise awareness of violence against women, including rape.[78] More specifically, the Committee holds in its COs that the state party should educate both the police and the general public about violence against women, that relevant guidelines should be made available to all members of the armed forces, and that human rights training should be made compulsory for all members of the state parties armed forces.[79]

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73 See for example COs Algeria 1998, para. 6; COs Sudan 2007, para. 9; COs Congo 2000, para. 10; COs DRC 2006, para. 13.

74 COs Guatemala 1996, para. 16. See also COs Russian Federation 2003, para. 13; COs Sudan 2007, para. 14.

75 COs Sudan 2007, para. 9.

76 Ibidem.

77 COs DRC 2006, para. 13; in its COs on Congo of 2000, the HRC argues that the state party should give *women* the necessary protection. COs Congo 2000, para. 10.

78 COs Sudan 2007, para. 14.

79 COs DRC 2006, para. 13; COs Sudan 2007, para. 14.

The HRC addresses these preventive measures specifically in relation to sexual abuse of women in conflict zones, and in the COs on the Congo of 2006 in light of sexual abuse of women and children. It considers rape to be a form of violence against women and in this respect refers to Articles 2, 3, 6, 7, and 9 of the Covenant.

2.1.4.3 Prosecution and punishment of perpetrators

Acts of rape and sexual abuse in times of armed conflict and by armed forces should always be prosecuted and punished. On that account the HRC makes a number of recommendations to states parties. Prior to any investigation into allegations of rape, it is necessary that states are aware of these crimes being committed. Reports by victims are crucial for that reason. In its COs on Sudan of 2007, the Committee pays specific attention to the persistence of violence against women and expresses particular concern about the many cases of rape in Darfur. It holds that:

> 'It notes with concern the information from the State party that women do not trust the police, and that women are reticent to report rape to which they have been subjected, which would explain in part the small number of rapes that are reported (arts. 2, 6, and 7 of the Covenant).'[80]

In this regard, the Committee argues that the state party should undertake to review its legislation, in particular its Criminal Code, to ensure that women are not deterred from reporting rape because they fear that their claims will be associated with the crime of adultery.[81]

Another precondition for prosecuting rape is that all cases of rape are investigated.[82] Hence, the HRC holds that states parties should take all appropriate steps to ensure that proper investigations are conducted and, in respect of Sudan, notes that it should do so in cooperation with the International Criminal Court.[83] In the case of Congo, the HRC holds that it should do everything possible to identify the perpetrators of these crimes, and in its COs on Algeria it states that an independent body should determine who the offenders are.[84]

The next step is that the investigations must lead to prosecution of the perpetrators of rape. The Committee argues in its COs that perpetrators of rape should be prosecuted at national or international level and on that account makes a number of specific recommendations.[85] An important aspect that is presented in the COs of the HRC in this regard is that states parties must ensure that abuse and violations, including rape,

80 COs Sudan 2007, para. 14.
81 COs Sudan 2007, para. 14.
82 COs Russian Federation 2003, para. 13.
83 COs Algeria 1998, para. 6; COs Sudan 2007, para. 9.
84 COs Congo 2000, para. 10; COs Algeria 1998, para. 6.
85 COs Russian Federation 2003, para. 13; COs Algeria 1998, para. 6; COs Congo 2000, para. 10; COs Sudan 2007, para. 9.

are not committed with impunity, be it de jure or de facto.[86] In its COs on Sudan, the Committees notes with concern that widespread and systematic serious human rights violations, including rape, continue to be committed with total impunity.[87] In this respect, the Committee remarks on amnesty laws in states parties and on immunity of state officials for certain acts. With regard to the former, the HRC holds that the state party must ensure that no amnesty is granted to anyone believed to have committed, or be committing, crimes of a particularly serious nature, including rape.[88] In its COs on Haiti, for example, the Committee notes with concern that the national Amnesty Act might impede investigations into allegations of human rights violations such as rape and sexual assault, committed by armed forces and agents of national security services. It points out that:

> '[A]n amnesty in wide terms may promote an atmosphere of impunity for perpetrators of human rights violations and undermine efforts to re-establish respect for human rights in Haiti and to prevent a recurrence of the massive human rights violations experienced in the past.'[89]

With regard to immunity of for example state agents, the Committee holds in its COs on Sudan that the state party should undertake to abolish all immunity in the new legislation governing the police, armed forces and national security forces.[90]

With regard to the notion that perpetrators of rape should be prosecuted, the Committee also holds that the charges should correspond with the gravity of the acts as human rights violations. In its COs on the Russian Federation of 2003, the HRC notes with concern that this is not the case.[91] And finally, the COs on the DRC of 2006 deserve to be mentioned. Here, the Committee addresses the situation in which armed forces other than that of the state party itself allegedly committed sexual abuse. The Committee notes in these COs the reports alleging that members of the United Nations Organization Mission in the DRC (MONUC) committed sexual abuse. In this respect it argues that:

> 'The state party should prevail upon the states of origin of MONUC troops suspected of having committed acts of sexual abuse to open inquiries into the matter and take the appropriate measures.'[92]

Finally, with regard to the prosecution and punishment of cases of rape, the Committee pays attention to the punishment of perpetrators. In this respect it notes with concern

86 COs Russian Federation 2003, para. 13; COs Sudan 2007, para. 9.
87 COs Sudan 2007, para. 9.
88 Ibidem.
89 COs Haiti 1995, para. 230.
90 COs Sudan 2007, para. 9.
91 COs Russian Federation 2003, para. 13.
92 COs DRC 2006, para. 13.

in its COs on the Russian Federation of 2003 that the sentences issued do not correspond with the gravity of the acts as human rights violations.[93]

Although the Committee sometimes specifically addresses sexual abuse of women in conflict areas in a separate paragraph, it often pays attention to the matter in a paragraph in which concern for various human rights violations is expressed, such as extrajudicial killings and disappearances by military forces. Sometimes specific reference is made to rape of women and in other instances the Committee lists rape, without referring to the sex of the victim, in a list of human rights violations. The Committee holds that these violations, in respect of the COs mentioned in this section on prosecution and punishment, affect the enjoyment of Articles 2, 3, 6, 7 and 12 of the Covenant.

2.1.4.4 Provisions for victims

Also with regard to rape and sexual abuse in times of armed conflict and/or by armed forces, the state has to take certain measures for the benefit of the victims of these crimes. The Committee holds in this respect that the state party should give women the necessary protection and assistance.[94] For example in its COs on Sudan, the HRC argues that the state party should ensure that state bodies and agents afford the protection needed by victims of serious violations committed by third parties.[95] On a more practical level, the HRC holds that victims of these crimes should be compensated and argues that it must ensure that victims of serious violations of human rights, including rape, are guaranteed appropriate reparation.[96] It is noteworthy that the crimes addressed in these COs are not necessarily committed by state agents or armed forces under state control, but also by third parties. Moreover, the HRC argues in its COs on the Congo of 2000 that it should ensure the reintegration of rape victims into society.[97]

With regard to the context in which these matters are addressed, the same holds true as to what has been said in the previous paragraph on prosecution and punishment of cases of rape and other forms of sexual abuse: the Committee often pays attention to the matter in a paragraph in which concern for various human rights violations are expressed, such as extrajudicial killings and disappearances by military forces. Sometimes specific reference is made to rape of women and in other instances the Committee lists rape, without referring to the sex of the victim, in a list of human rights violations. The Committee holds that these violations, in respect of the COs mentioned in this section on prosecution and punishment, affect the enjoyment of Articles 2, 3, 6, 7 and 12 of the Covenant.

93 COs Russian Federation 2003, para. 13.
94 COs Sudan 2007, para. 9; COs Algeria 1998, para. 6; COs Congo 2000, para. 10.
95 COs Sudan 2007, para. 9.
96 COs Russian Federation 2003, para. 13; COs Sudan 2007, para. 9.
97 COs Congo 2000, para. 10.

2.2 Domestic violence

2.2.1 Introduction

Domestic violence is a matter that affects the enjoyment of human rights as laid down in the Covenant, and particularly the enjoyment of Article 7 on the right to be free from torture, cruel, inhuman or degrading treatment. In GC 28, the Committee notes that in order to assess compliance with Article 7 of the Covenant, as well as with Article 24, which mandates special protection for children, the Committee needs to be provided with information on national laws and practices with regard to domestic and other types of violence against women.[98] The notion that domestic violence is contrary to the enjoyment of human rights is confirmed by the attention of the HRC for the phenomenon in its COs. Here, the HRC frequently expresses its concern about this practice in states parties. It does so by commenting frequently on the prevalence of domestic violence in the state party,[99] and also expresses its concern about the growing number of incidences of domestic violence,[100] the under-reporting of these incidents,[101] the inadequate protection of victims of domestic violence,[102] the lenient sentences,[103] the low number of convictions[104] and the absence of a comprehensive evaluation of the effectiveness of measures to combat domestic violence.[105]

98 HRC, GC 28, para. 11.

99 COs Russian Federation 2003, para. 9; COs Mali 2003, para. 12; COs Thailand 2005, para. 12; COs Mauritius 2005, para. 10; COs Paraguay 2006, para. 9; COs Norway 2006, para. 10; Ukraine 2006, para. 10; COs Yemen 2005, para. 12; COs Slovenia 2005, para. 7; COs Tajikistan 2005, para. 6; COs Kenya 2005, para. 11; COs Sweden 2002, para. 7; COs Yemen 2005, para. 12; COs Georgia 2002, para. 14; COs Uzbekistan 2001, para. 19; COs Azerbaijan 2001, para. 17; COs Zimbabwe 1998, para. 14; COs Albania 2004, para. 10; COs Serbia and Montenegro 2004, para. 17; COs Benin 2004, para. 9; COs Germany 2004, para. 14; COs Slovakia 2003, para. 9; COs Ukraine 2001, para. 10; COs Lithuania 1997, para. 11; COs Uzbekistan 2005, para. 23; COs Madagascar 2007, para. 11; COs Liechtenstein 2004, para. 8; COs Morocco 2004, para. 28; COs Yemen 2002, para. 6; COs El Salvador 2003, para. 15; COs Uganda 2004, para. 11; COs Russian Federation 1995, para. 14; COs Ukraine 1995, para. 11; COs Jamaica 1997, para. 12; COs Former Yugoslav Republic of Macedonia 1998, para. 14; COs Romania 1999, para. 8; COs Czech Republic 2001, para. 14; COs Suriname 2004, para. 12; COs DRC 2006, para. 12; COs Argentina 2000, para. 15; COs Kyrgyzstan 2000, para. 14; COs United Republic of Tanzania 1998, para. 24; COs Colombia 2004, para. 14; COs Republic of Korea 1999, para. 11; COs St Vincent and the Grenadines 2008, para. 12; COs Denmark 2008, para. 8.

100 COs Mongolia 2000, para. 8; COs Costa Rica 1999, para. 12; COs Lithuania 2004, para. 9; COs Nicaragua 2008, para. 12.

101 COs Bosnia and Herzegovina 2006, para. 12; COs Kosovo (Serbia) 2006, para. 11.

102 COs Bosnia and Herzegovina 2006, para. 12; COs Kosovo (Serbia) 2006, para. 11; COs Georgia 2007, para. 8; COs Poland 2004, para. 11; COs Poland 1999, para. 14; COs Ireland 2000, para. 29; COs DRC 2006, para. 12; COs Libyan Arab Jamahiriya 1998, para. 17.

103 COs Bosnia and Herzegovina 2006, para. 12; COs Honduras 2006, para. 7.

104 COs Kosovo (Serbia) 2006, para. 11; COs Uganda 2004, para. 11; COs Namibia 2004, para. 20; COs Colombia 2004, para. 14; COs Ireland 2008, para. 9.

105 COs Kosovo (Serbia) 2006, para. 11.

In most occasions, the HRC addresses domestic violence in a paragraph dedicated only to this topic, and sometimes under the heading of violence against women, in which case it might also refer to other forms of violence against women, such as female genital mutilation. In these paragraphs in which the Committee pays attention to domestic violence it refers to Articles 3, 7, and 26 of the Covenant. When domestic violence amounts to honour killings, the HRC also refers to Article 6 of the Covenant. In some COs, the HRC does not address domestic violence in an individual paragraph, but pays attention to it as being an aspect of inequality in the enjoyment of human rights in the state party. For that reason, it also mentions in the same paragraph other manifestations of inequality, such as inequality in pay or a high level of poverty among women.[106] In a few occasions, the Committee pays attention to the factors that incite domestic violence or that prevent women from reporting such violence.[107] For example, in its COs on Madagascar of 2007, the HRC recommends the state party to address the factors underlying women's vulnerability, including economic dependence on their partners.[108] Another factor mentioned by the HRC is that of outdated attitudes. In its COs on Mauritius of 1996, the HRC recommends the state party to consider, with respect to domestic violence, whether affirmative action measures are necessary to overcome remaining obstacles to equality, such as outdated attitudes concerning the role and status of women.[109]

In general, states parties are requested to combat domestic violence. In order to do so, they must take measures and adopt policies. In some COs the HRC limits itself to generally recommending the state to combat domestic violence, but in many COs it specifies the measures that it expects the state party to take.[110] The COs on Nicaragua of 2008 are noteworthy, because here the HRC urges the state party to maintain and promote opportunities for direct participation by women, both nationally and locally, in decision taking on matters related in particular to violence against women, and ensure that women participate and are represented in civil society.[111] This section discusses the statements of the HRC regarding the measures that states are recommended to take so as to address domestic violence.

106 See for example COs Russian Federation 2003, para. 9.

107 COs Mauritius 2005, para. 10; COs Madagascar 2007, para. 11; COs Canada 2006, para. 23; COs Mauritius 1996, para. 15.

108 COs Madagascar 2007, para. 11.

109 COs Mauritius 1996, para. 15.

110 In the following COs, the HRC requests states parties in general to combat domestic violence, without specifying the measures it recommends the state party to take: COs Mongolia 2000, para. 8; COs Costa Rica 1999, para. 12;

111 COs Nicaragua 2008, para. 12.

2.2.2 Awareness raising

In its COs on Azerbaijan and Argentina, the Committee notes that women have a low level of awareness of their rights and the remedies available to them.[112] Awareness of the general public of domestic violence and the fact that this practice is contrary to the enjoyment of human rights is an important aspect in the fight against this phenomenon. In many COs, the HRC recommends the state party to raise awareness on this matter so as to widely sensitise the general public to it, in order to combat this phenomenon.[113]

On some occasions, the HRC specifies the methods of raising awareness. Hence, it recommends states to initiate the necessary media campaigns,[114] to start educational campaigns or take educational measures and increase educational programmes,[115] and it recommends states to organise an effective information campaign.[116]

2.2.3 Training of state officials

Another important tool in the fight against domestic violence is the training of state officials. In that respect, the Committee expresses, for example in its COs on Poland, concern about training for law-enforcement officers being inadequate.[117] In its recommendations the HRC calls upon states parties to adopt training measures for its officials. Often it refers in this respect to the training of law-enforcement officials, sometimes referring in particular to police officers.[118] But not only should police officers be the addressees of training on domestic violence. Training should, according to the HRC, also be provided to members of the legal profession, including judges and

112 COs Azerbaijan 2001, para. 17; COs Argentina 2000, para. 15.

113 COs Mali 2003, para. 12; COs Thailand 2005, para. 12; COs Paraguay 2006, para. 9; COs Kenya 2005, para. 11; COs Yemen 2005, para. 12; COs Georgia 2002, para. 14; COs Greece 2005, para. 7; COs Republic of Korea 2006, para. 11; COs Uzbekistan 2001, para. 19; COs Sri Lanka 2003, para. 20; COs Benin 2004, para. 9; COs Uzbekistan 2005, para. 23; COs Madagascar 2007, para. 11; COs Yemen 2002, para. 6; COs DRC 2006, para. 12; COs Viet Nam 2002, para. 14; COs Jamaica 1997, para. 12; COs Monaco 2008, para. 9.

114 COs Brazil 2005, para. 11; COs Slovenia 2005, para. 7; COs Albania 2004, para. 10; COs Serbia and Montenegro 2004, para. 17; COs Latvia 2003, para. 13; COs Slovakia 2003, para. 9.

115 COs Brazil 2005, para. 11; COs Slovenia 2005, para. 7; COs Zimbabwe 1998, para. 14; COs Uzbekistan 2005, para. 23; COs Honduras 2006, para. 7; COs Suriname 2004, para. 12; COs Monaco 2008, para. 9.

116 COs Azerbaijan 2001, para. 17; COs Argentina 2000, para. 15; COs Denmark 2008, para. 8.

117 COs Poland 2004, para. 11.

118 COs Mali 2003, para. 12; COs Thailand 2005, para. 12; COs Republic of Korea 2006, para. 11; COs Madagascar 2007, para. 11; COs Guyana 2000, para. 14; COs Tajikistan 2005, para. 6; COs Georgia 2002, para. 14; COs Lithuania 2004, para. 9; COs Ukraine 2001, para. 10; COs Namibia 2004, para. 20; COs DRC 2006, para. 12; COs Republic of San Marino 2008, para. 8; COs Monaco 2008, para. 9.

prosecutors.[119] These should be trained on the application of legislation on domestic violence.[120]

2.2.4 Prosecution and punishment of perpetrators

The persons responsible for committing acts of domestic violence should be prosecuted and appropriately punished, argues the HRC.[121] On that account, the Committee argues in its COs that states parties should adopt a policy of prosecuting and punishing such violence.[122] A primary condition in this is that the officials in charge of investigation procedures are aware of the cases of domestic violence. For that reason it is crucial that women report such incidences. In its COs, the HRC remarks upon the under-reporting of incidents of domestic violence, and notes, for example, in its COs on Madagascar of 2007 that reportedly victims of this phenomenon do not file complaints because of social and family constraints.[123] The Committee argues that states parties should take measures to encourage women to report domestic violence to the authorities and on a similar note holds that it should facilitate the reporting of gender-related crimes.[124] Likewise, in its COs on Mauritius of 2005, the Committee argues that the state party should address obstacles such as economic dependence on their partners that prevent women from reporting such violence.[125]

The next step entails the investigation into complaints of domestic violence. In its COs on Azerbaijan and on Argentina, the HRC expresses its concern about the fact that complaints are not being adequately dealt with.[126] Moreover, it remarks upon the limited number of investigations into domestic violence in its COs on Uganda and Colombia.[127] The Committee holds that state parties should investigate cases of domestic violence and should periodically monitor the number of investigations compared to the number of complaints received.[128]

119 COs Bosnia and Herzegovina 2006, para. 12; COs Kosovo (Serbia) 2006, para. 11; COs Viet Nam 2002, para. 14.
120 COs Bosnia and Herzegovina 2006, para. 12; COs Kosovo (Serbia) 2006, para. 11.
121 COs Paraguay 2006, para. 9; COs Kenya 2005, para. 11; Benin 2004, para. 9; COs Honduras 2006, para. 7; COs Yemen 2002, para. 6; COs Liechtenstein 2004, para. 8; COs Viet Nam 2002, para. 14; COs Uganda 2004, para. 11.
122 COs Mali 2003, para. 12; COs Brazil 2005, para. 11; COs DRC 2006, para. 12; COs Monaco 2008, para. 9.
123 COs Madagascar 2007, para. 11; see also COs Kosovo (Serbia) 2006, para. 11.
124 COs Lithuania 2004, para. 9; COs Kosovo (Serbia) 2006, para. 11.
125 COs Mauritius 2005, para. 10.
126 COs Azerbaijan 2001, para. 17; COs Argentina 2000, para. 15.
127 COs Uganda 2004, para. 11; COs Colombia 2004, para. 14.
128 COs Lithuania 1997, para. 11; COs Colombia 2004, para. 14; COs Nicaragua 2008, para. 12.

The investigation must be followed by prosecution of the alleged perpetrators. The HRC holds that states parties must ensure that those responsible are prosecuted.[129] Consequently, the Committee expresses its concern about the failure of the state party to prosecute perpetrators in several of its COs.[130] In order to do so, the HRC considers it very important that special legislation is adopted that expressly prohibits and punishes domestic violence.[131] In its COs, the HRC on several occasions expresses its concern about a lack of specific legislation on domestic violence in states parties.[132] In addition to this, the Committee expresses its concern in its COs on the Ukraine on the provision in the law of the state party regarding the behaviour of the victim and authorising official warnings to be given to the victim of domestic violence about 'provocative' behaviour.[133] During the constructive dialogue between the HRC and a delegation from Ukraine, Committee member Rodley inquired about information concerning so-called 'victim behaviour' and reports about the police warning persons filing complaints of domestic violence that engaging in such behaviour would serve to mitigate the sentences of offenders.[134] The Ukrainian delegate answered that information concerning so-called 'victim behaviour' would be provided to the Committee in due course.[135] This answer was obviously not satisfactory to the HRC. In its COs it argues that the state party must ensure that any notion of victim behaviour is not used as a form of impunity.[136]

In addition to this, the Committee makes two recommendations with regard to the evidence in cases of domestic violence. In its COs on Bosnia and Herzegovina of 2006, the Committee holds that the state party should introduce standard procedures for the collection of medical evidence of domestic violence.[137] During the dialogue between the Committee and the delegation from Bosnia and Herzegovina, Committee member Wieruszewski expressed his concern about the lack of effective assistance for victims of domestic violence and the difficulties in obtaining medical evidence. It

129 COs Paraguay 2006, para. 9; COs Kenya 2005, para. 11; COs Benin 2004, para. 9; COs Georgia 2007, para. 8; COs Lithuania 1997, para. 11; COs Honduras 2006, para. 7; COs Yemen 2002, para. 6; COs Guyana 2000, para. 14.

130 COs DRC 2006, para. 12; COs Mongolia 2000, para. 8; COs Republic of Korea 2006, para. 11; COs Uganda 2004, para. 11; COs Namibia 2004, para. 20.

131 COs Mali 2003, para. 12; COs Costa Rica 1999, para. 12; COs Brazil 2005, para. 11; COs Yemen 2005, para. 12; COs Slovenia 2005, para. 7; COs Georgia 2002, para. 14; COs Greece 2005, para. 7; COs Lithuania 2004, para. 9; COs Sri Lanka 2003, para. 20; COs Kyrgyzstan 2000, para. 14; COs United Republic of Tanzania 1998, para. 24; COs Guatemala 1996, para. 21.

132 COs Thailand 2005, para. 12; COs Brazil 2005, para. 11; COs Slovenia 2005, para. 7; COs Greece 2005, para. 7; COs Republic of Korea 2006, para. 11; COs Uzbekistan 2001, para. 19; COs Lithuania 2004, para. 9; COs Sri Lanka 2003, para. 20; COs Gambia 2004, para. 16; COs Yemen 1995, para. 255; COs Armenia 1998, para. 16.

133 COs Ukraine 2006, para. 10.

134 SR Ukraine 2006, UN doc. CCPR/C/SR.2408, para. 20.

135 Ibidem, para. 22.

136 COs Ukraine 2006, para. 10.

137 COs Bosnia and Herzegovina 2006, para. 12.

would be useful to know whether measures had been taken to create a standard procedure for gathering medical evidence and provide relevant training for hospital staff.[138] The delegation responded by arguing that:

> '[L]es fonctionnaires de police et les autres agents qui sont en contact avec la victime sont tenus d'établir un rapport contenant, entre autres éléments, les conclusions d'un examen médical de l'intéressé. Toutefois, il n'est guère possible de contraindre une personne à se soumettre à un tel examen, et des activités de sensibilisation des femmes sont menées pour qu'elles comprennent l'importance de leur coopération avec les autorités dans ce domaine.'[139]

Committee member Wieruszewski was not satisfied and stressed the importance of a harmonised legal procedure for the gathering of evidence in cases of domestic violence, as he held that:

> '[L]a délégation n'a pas précisé s'il existait une procédure légale uniformisée pour la collecte d'éléments de preuve par le personnel médical qui examine les victimes. Une telle procédure est pourtant essentielle pour garantir que les coupables seront poursuivis. Des directives claires et une formation appropriée des personnes concernées devraient être mises en place.'[140]

Consequently, in the COs, the HRC argues that standard procedures on the collection of medical evidence in cases of domestic violence should be introduced.

The other comment presented by the Committee in light of the evidence with regard to the prosecution of domestic violence concerns the situation in Cyprus as reported on in 1998. Here, the Committee argues that the law on evidence should take into account the possibility of eliminating obstacles to a spouse providing testimony against another spouse on domestic violence.[141] The remark originates from a discussion between the Committee and the Cypriot delegation, in which the latter explained that a committee was finalising amendments to the law on domestic violence, in order to relax some of the rigid rules on the admissibility of evidence in such cases.[142]

The last aspect with regard to the statements of the HRC in respect of the prosecution and punishment of perpetrators of domestic violence relates to punishment. In several COs, the Committee expresses its concern about the fact that perpetrators go unpunished.[143] It calls upon states parties to ensure that those responsible for domestic

138 SR Bosnia and Herzegovina 2006, UN doc. CCPR/C/SR.2402, para. 33.
139 SR Bosnia and Herzegovina 2006, UN doc. CCPR/C/SR.2403, para. 19. An English translation was not available at the time of writing.
140 Ibidem, para. 46.
141 COs Cyprus 1998, para. 12.
142 SR Cyprus 1998, UN doc. CCPR/C/SR.1647, para. 70.
143 COs Paraguay 2006, para. 9; COs Uganda 2004, para. 11; COs Honduras 2006, para. 7; COs Kosovo (Serbia) 2006, para. 11.

violence are appropriately punished and, in its COs on Colombia, recommends monitoring the number of convictions compared to the number of complaints received.[144]

2.2.5 Provisions for victims

The Committee pays considerable attention to the provisions that need to be introduced for the benefit of the victims of domestic violence. In its CO it frequently expresses its concern about failure by national authorities to take care of the victims, to assist and to support them.[145] In this respect it notes that restraining orders and temporary arrests are not widely used, or not very effective,[146] it remarks upon the shortage of shelters for victims,[147] and on the fact that crisis centres are unavailable for women who are over the age of 35.[148] Moreover, it expresses concern about the limited capacity of victim support[149] and about the fact that no victims have been compensated or that there is lack of any protective remedy in civil courts.[150]

On that account, the Committee holds that states parties should provide for a framework or should take measures in order to ensure that victims are properly protected.[151] Hence, states are requested to assist and support victims of domestic violence.[152] And along those lines the Committee requests Bosnia and Herzegovina, Slovenia and Kosovo (Serbia) to adopt or to enhance their victim support programmes.[153] States are also recommended to establish crisis-centre hotlines,[154] to establish victim support centres equipped with medical, psychological, and legal facilities, including shelters for battered spouses and children,[155] to provide police protection for victims,[156] to ensure that social and medical centres for rehabilitation are available to

144 COs Paraguay 2006, para. 9; COs Honduras 2006, para. 7; COs Madagascar 2007, para. 11; COs Liechtenstein 2004, para. 8; COs Colombia 2004, para. 14.
145 COs Mali 2003, para. 12; COs Libyan Arab Jamahiriya 1998, para. 17; COs Cambodia 1999, para. 17; COs Bosnia and Herzegovina 2006, para. 12.
146 COs Poland 2004, para. 11; COs Iceland 2005, para. 12.
147 COs Poland 1999, para. 14.
148 COs Ukraine 2006, para. 10.
149 COs Kosovo (Serbia) 2006, para. 11.
150 COs Namibia 2004, para. 20; COs Poland 1999, para. 14.
151 COs Mali 2003, para. 12; COs Greece 2005, para. 7; COs Georgia 2007, para. 8; COs DRC 2006, para. 12; COs Iceland 2005, para. 12.
152 COs Brazil 2005, para. 11; COs Sweden 2002, para. 7; COs Zimbabwe 1998, para. 14; COs Benin 2004, para. 9; COs Lithuania 2004, para. 9; COs Madagascar 2007, para. 11; COs Yemen 2002, para. 6; COs Russian Federation 1995, para. 33; COs Ukraine 1995, para. 22.
153 COs Bosnia and Herzegovina 2006, para. 12; COs Slovenia 2005, para. 7; COs Kosovo (Serbia) 2006, para. 11.
154 COs Thailand 2005, para. 12; COs Albania 2004, para. 10; COs Serbia and Montenegro 2004, para. 17; COs Latvia 2003, para. 13; COs Slovakia 2003, para. 9.
155 COs Slovakia 2003, para. 9; COs Thailand 2005, para. 12; COs Albania 2004, para. 10; COs Serbia and Montenegro 2004, para. 17; COs Latvia 2003, para. 13; COs Lithuania 2004, para. 9; COs Georgia 2007, para. 8; COs Poland 2004, para. 11; COs Nicaragua 2008, para. 12.
156 COs Nicaragua 2008, para. 12.

all victims,[157] to allow the victims effective access to justice,[158] and to provide material and psychological relief to the victims.[159] Also, states should ensure that restraining orders are available and facilitate the obtaining of these against perpetrators,[160] they should take action to provide access to protective measures before the courts,[161] ensure effective remedies and enhance access to these,[162] and introduce standard procedures for the collection of medical evidence.[163]

2.2.6 Evaluation of measures

In two COs, the Committee formulates an obligation for several states parties that so far have not been brought up in light of domestic violence. In its COs on Kosovo (Serbia), the Committee expresses its concern about the absence of a comprehensive evaluation of the effectiveness of measures to combat domestic violence.[164] And similarly, in its COs on the Republic of Korea of 2006, the Committee argues that the state party should assess the effectiveness of the measures that it has taken to combat domestic violence.[165]

2.3 Trafficking in women

2.3.1 Introduction

Trafficking is a phenomenon that is incompatible with the rights as they are formulated in the ICCPR. In GC 28, the Committee holds that with regard to their obligations under Article 8 of the Covenant which holds that no one shall be held in slavery or in servitude, or be required to perform forced or compulsory labour, states parties should inform the HRC of measures taken to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. Also, it notes here that states parties from which women and children are recruited and taken, and states parties where they end up 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.[166]

157 COs Ukraine 2006, para. 10; COs Ireland 2008, para. 9.
158 COs Nicaragua 2008, para. 12; COs Canada 2006, para. 23.
159 COs Liechtenstein 2004, para. 8; COs Uganda 2004, para. 11; COs Kyrgyzstan 2000, para. 14.
160 COs Kosovo (Serbia) 2006, para. 11; COs Poland 2004, para. 11.
161 COs Romania 1999, para. 8.
162 COs Kosovo (Serbia) 2006, para. 11; COs Jamaica 1997, para. 12; COs Former Yugoslav Repubic of Macedonia 1998, para. 14; COs Ireland 2000, para. 29, COs Bosnia and Herzegovina 2006, para. 12.
163 COs Bosnia and Herzegovina 2006, para. 12.
164 COs Kosovo (Serbia) 2006, para. 11.
165 COs Republic of Korea 2006, para. 11.
166 HRC, GC 28, para. 12.

In many COs, the HRC expresses its concern about the instances of trafficking, thereby referring in many occasions to trafficking 'in women', 'in children', or to trafficking 'in women and children'. It only scarcely refers to trafficking in men, but does occasionally mention trafficking in human beings in general.[167] In most instances, where the Committee refers to the purpose of the trafficking, it concerns sexual exploitation, but it also mentions in some COs forced labour either for domestic purposes or for serving in armed militias.

Since, as noted before, the HRC considers trafficking to be contrary to the enjoyment of the rights formulated in the ICCPR, states are requested to collect data on the phenomenon in the state and to take measures in order to combat this practice.[168] On that account, the HRC requests Japan in its COs of 2008 to intensify its efforts to identify victims of trafficking.[169] Also, the Committee praises states in its COs on their efforts to fight this phenomenon. For example when states have enacted legislation on trafficking in human beings, or have taken initiatives in order to ensure better protection for the victims of trafficking.[170] The recommendations formulated by the HRC as regards these measures can be divided into four types of actions: raising awareness, prosecuting and punishing the perpetrators, providing or facilitating certain services for victims, and cooperating with other states to eliminate trafficking. In addition to this, it is noteworthy that in its COs on Ireland of 2008, the HRC holds that the state party should continue to combat trafficking in particular by reducing the demand for trafficking.[171] It should be noted that the HRC does not formulate specific measures in all COs, but argues in general terms that states have to combat this practice, without describing specific measures states have to take.

In general, the Committee addresses the phenomenon of trafficking as a matter that affects Article 8 of the ICCPR, as this is the article brought up in GC 28. Also, the HRC quite often refers to Article 3 in combination with Article 8, but usually does not pay express attention to the issue as a matter that is contrary to the principles of non-discrimination and equality. In only two COs does the Committee relate trafficking to discrimination: in its COs on Nepal of 1994, it notes that:

> '[T]he non-discrimination clauses in article 11 of the Constitution do not cover all the grounds provided for in article 2 and 26 of the Covenant. It is particularly disturbed by the fact that the principle of non-discrimination and equality of rights suffers serious violations in practice and deplores inadequacies in the implementation of the prohibition of the system of castes. The persistence of practices of debt bondage, trafficking in

167 As regards *human* trafficking see for example COs Japan 2008, para. 23; COs Botswana 2008, para. 16.
168 See for example COs Mali 2003, para. 17; COs Iceland 2005, para. 13; COs Nepal 1994, para. 14; COs Croatia 2001, para. 12; COs Norway 2006, para. 12; COs Austria 2007, para. 14; COs Japan 2008, para. 23; COs St. Vincent and the Grenadines 2008, para. 13.
169 COs Japan 2008, para. 23.
170 See for example COs Latvia 2003, para. 4; COs Finland 2004, para. 3; COs Bosnia and Herzegovina 2006, para. 7; COs Luxembourg 2003, para. 3; COs Japan 2008, para. 23.
171 COs Ireland 2008, para. 16.

> women, child labour, and imprisonment on the ground of inability to fulfil a contractual liability constitute clear violations of several provisions of the Covenant.'[172]

And in its COs on Mongolia, the Committee holds that:

> 'Many areas of concern remain in relation to discrimination against women and the inability of women fully to enjoy Covenant rights (arts. 3 and 26 of the Covenant). In particular, attention has been drawn to:
> […]
> Failure to prosecute persons engaged in organising prostitution or to adopt effective measures to combat trafficking in women.'[173]

Besides this, in a few instances the Committee also relates trafficking to Article 26, in combination with Articles 3 and 8. This is the case in its COs on the Netherlands of 2001, where it expresses its concern about the continuing reports of sexual exploitation of significant numbers of foreign women in the state party.[174] And in its remarks on Brazil in 2005 and Albania in 2004, where it addresses the lack of witness and victims protection mechanisms in respect of trafficking, and involvement of state actors in this practice.[175] Moreover, the Committee often refers to Article 24 in those cases where it addresses trafficking in children.[176]

Finally, reference should be made to the COs on Ireland of 2008, where the HRC invites the state party to consider ratifying the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[177]

2.3.2 Awareness raising

It follows from the COs that both the general public and state officials, such as judges and law-enforcement officials, should be aware of the phenomenon of trafficking in women and children and on the unlawful nature of it.[178] In this regard it does not suffice if the dissemination of information on this practice is provided solely by (international) NGOs, but it requires adequate involvement from the state, as was

172 COs Nepal 1994, para. 7.
173 COs Mongolia 2000, para. 8.
174 COs the Netherlands 2001, para. 10.
175 COs Brazil 2005, para. 15; COs Albania 2004, para. 15.
176 See for example COs Serbia and Montenegro 2004, para. 16; COs Benin 2004, para. 24; COs Albania 2004, para. 15; COs Thailand 2005, para. 20; COs Tajikistan 2005, para. 24; COs Costa Rica 2007, para. 12; COs Czech Republic 2007, para. 12.
177 COs Ireland 2008, para. 16.
178 COs Serbia and Montenegro 2004, para. 16; COs Costa Rica 2007, para. 12; COs Nepal 1994, para. 14; COs Benin 2004, para. 24; COs Bosnia and Herzegovina 2006, para. 16; COs Former Yugoslav Republic of Macedonia 2008, para. 13; COs Nicaragua 2008, para. 9.

remarked upon by the HRC in its COs on Serbia and Montenegro in 2004.[179] Where the HRC recommends specific methods, it holds that this awareness may, where it concerns state officials, be promoted by intensive training on the application of anti-trafficking standards, but that it could also need educational measures in general.[180]

2.3.3 Prosecution and punishment of perpetrators

It is clear that according to the HRC trafficking is a serious violation of human rights. For this reason, it is not surprising to note that failure to prosecute and punish the perpetrators of this crime is of concern to the Committee. It expresses this concern in a number of COs, such as in those on Macau (Portugal), where it notes to be extremely concerned about the lack of action by the authorities in preventing and penalising the exploitation of trafficked women.[181] On that account, the HRC welcomes the developments in Argentina and Italy where, the Committee notes, these violations are brought to trial.[182] In order to combat trafficking, states are requested to ensure the enforcement of relevant legislation, which entails enforcement of specific legislation on the prohibition and punishment of trafficking.[183] For example in its COs on Georgia of 2002, where it expresses its concern about the continuation of practices which involve trafficking in women, it holds that:

> 'The state party should take measures to prevent and combat this practice by enacting a law penalising trafficking in women, and should fully implement the provisions of article 8 of the Covenant. The Committee recommends that preventive measures be taken to eradicate trafficking in women and provide rehabilitation programmes for the victims. The laws and policies of the state party should provide protection and support for the victims.'[184]

This enforcement involves the active investigation of incidences of trafficking and the prosecution of perpetrators of trafficking.[185] In a few COs, the HRC remarks upon the involvement of state officials in the practice of trafficking. It notes on this account,

179 COs Serbia and Montenegro 2004, para. 16.

180 COs Nepal 1994, para. 14; COs Bosnia and Herzegovina 2006, para. 16.

181 COs Macau (Portugal) 1997, para. 13; for examples of other COs where the HRC expresses its concern about the lack of prosecution and punishment of traffickers see COs Kenya 2005, para. 25 (here it concerned trafficking in children); COs Kosovo (Serbia) 2006, para. 16; COs Lithuania 2004, para. 14; COs Costa Rica 2007, para. 12; COs Bosnia and Herzegovina 2006, para. 16.

182 COs Argentina 2000, para. 5; COs Italy 1998, para. 5.

183 COs The Philippines 2003, para. 13; COs Kyrgyzstan 2000, para. 14; COs Kenya 2005, para. 25; COs Georgia 2002, para. 15; COs Barbados 2007, para. 8; COs Nicaragua 2008, para. 9.

184 COs Georgia 2002, para. 15.

185 COs Kenya 2005, para. 25; COs Israel 1998, para. 16; COs Kosovo (Serbia) 2006, para. 16; COs Mali 2003, para. 17; COs Kyrgyzstan 2000, para. 14; COs Mongolia 2000, para. 8; COs Cambodia 1999, para. 16; COs Ukraine 2001, para. 18; COs Benin 2004, para. 24; COs Albania 2004, para. 15; COs Thailand 2005, para. 20; COs Slovenia 2005, para. 11; COs Brazil 2005, para. 15.

that the state should enforce anti-corruption measures in respect of law-enforcement officers,[186] should ensure that no state actors are involved[187] and, in the case of Kosovo (Serbia), where it found that UNMIK and KFOR personnel was involved in trafficking, to investigate and prosecute these persons.[188] Moreover, the Committee holds in many COs that the state party should impose sanctions on those found responsible.[189] The state should ensure that these penalties are commensurate with the seriousness of the acts and are imposed on anyone engaging in trafficking.[190]

2.3.4 Provisions for victims

In its COs, the HRC expresses its concern about the insufficient measures that have been taken by states parties with regard to providing assistance and support to the victims of trafficking and about the fact that no effective measures are being taken, for example by immigration and police officials, to protect these women.[191] In a number of COs, the Committee specifies these concerns by addressing the lack of certain services in states parties. In this respect it notes with concern that often victims of trafficking are not informed of their rights and denied access to a lawyer or interpreter upon arrest.[192] It also notes to regret that women are not protected as victims of trafficking, but are likely to be penalised for their illegal presence by deportation.[193] On a similar note, the Committee expresses its concern about the fact that residence permits are not granted to victims of trafficking unless they collaborate with the legal authorities,[194] and at the practice of expelling trafficked persons from the country without appropriate arrangements for their care.[195] In a few other COs, moreover, the HRC remarks upon the lack of effective witness and victim protection mechanisms.[196]

In respect of these concerns and more in general with regard to the obligation to combat trafficking, the HRC formulates a number of recommendations regarding the protection and assistance of victims of trafficking. In a number of COs, the Committee

186 COs Cambodia 1999, para. 16; COs Bosnia and Herzegovina 2006, para. 16.
187 COs Russian Federation 2003, para. 10; COs Tajikistan 2005, para. 24; COs Botswana 2008, para. 16.
188 COs Kosovo (Serbia) 2006, para. 16.
189 COs Thailand 2005, para. 20; COs Slovenia 2005, para. 11; COs Costa Rica 2007, para. 12; COs the Philippines 2003, para. 13; COs Israel 1998, para. 16; COs Czech Republic 2001, para. 13; COs Azerbaijan 2001, para. 15; COs Macau (Portugal) 1997, para. 19; COs Kyrgyzstan 2000, para. 14; COs Ukraine 2001, para. 18; COs Slovakia 2003, para 10; COs Lithuania 2004, para. 14; COs Serbia and Montenegro 2004, para. 16; COs Albania 2004, para. 15.
190 COs Costa Rica 2007, para. 12; COs Japan 2008, para. 23; COs Nicaragua 2008, para. 9.
191 COs the Philippines 2003, para. 13; COs Macau (Portugal) 1997, para. 13; COs Macau (Portugal) 1999, para. 11; COs Greece 2005, para. 10; COs Japan 2008, para. 23; COs Ireland 2008, para. 16.
192 COs Kosovo (Serbia) 2006, para. 16.
193 COs Israel 1998, para. 16.
194 COs Belgium 2004, para. 15; COs Ireland 2008, para. 16.
195 COs Yemen 2005, para. 17; COs Austria 2007, para. 14.
196 COs Serbia and Montenegro 2004, para. 16; COs Albania 2004, para. 15; COs Slovenia 2005, para. 11; COs Brazil 2005, para. 15.

argues that states parties should provide assistance, protection, and support to trafficked women, without specifying these measures.[197] In other COs, however, it does provide some more precise recommendations. It follows from these COs that states parties should allocate sufficient funds from state budgets for victim support,[198] that they should set up rehabilitation programmes for the victims[199] and ensure adequate access by victims to lawyers and interpreters, healthcare, and counselling,[200] that they should ensure protection so that they may have a place of refuge,[201] ensure that victims are able to pursue legal remedies against the perpetrators,[202] provide the victims with an opportunity to stay in the state party in order to give evidence against the person responsible for the trafficking in criminal or civil proceedings,[203] provide redress,[204] grant residence permits where appropriate on the basis of humanitarian considerations,[205] and provide for gender-specific training to sensitise the officials involved with problems faced by victims of trafficking.[206]

2.3.5 Cooperation with other states

The Committee recognises that trafficking is a trans-national problem. It notes in its COs on Slovakia of 2003:

197 COs Czech Republic 2001, para. 13; COs Macau (Portugal) 1997, para. 19; COs Macau (Portugal) 1999, para. 11; COs Kenya 2005, para. 25; COs Belgium 2004, para. 15; COs Kosovo (Serbia) 2006, para. 16; COs Costa Rica 2007, para. 12; COs Georgia 2002, [c146], para. 15; COs Slovakia 2003, [c162], para. 10; COs Russian Federation 2003, para. 10; COs Germany 2004, para. 18; COs Serbia and Montenegro 2004, para. 16; COs Albania 2004, para. 15; COs Greece 2005, para. 10; COs Thailand 2005, para. 20; COs Tajikistan 2005, para. 24; COs Slovenia 2005, para. 11; COs Brazil 2005, para. 15; COs Paraguay 2006, para. 13; COs Barbados 2007, para. 8; COs Nicaragua 2008, para. 9.

198 COs Bosnia and Herzegovina 2006, para. 16.

199 COs Israel 1998, para. 16; COs Venezuela 2001, para. 16; COs Mexico 1999, para. 15 (it should be noted that this statement was made with regard to trafficking in children); COs Macau (Portugal) 1999, para. 11; COs Georgia 2002, para. 15; COs Russian Federation 2003, para. 10; COs Slovenia 2005, para. 11; COs Japan 2008, para. 23.

200 COs Kosovo (Serbia) 2006, para. 16; COs Japan 2008, para. 23.

201 COs Czech Republic 2001, para. 13; COs Macau (Portugal) 1997, para. 19; COs Slovakia 2003, para. 10; COs Albania 2004, para. 15; COs Lithuania 2004, para. 14; COs Serbia and Montenegro 2004, para. 16; COs Greece 2005, para. 10; COs Thailand 2005, para. 20; COs Slovenia 2005, para. 11; COs Costa Rica 2007, para. 12; COs Japan 2008, para. 23.

202 COs Israel 1998, para. 16.

203 COs Albania 2004, para. 15; COs Czech Republic 2001, para. 13; COs Macau (Portugal) 1997, para. 19; COs Slovakia 2003, para. 10; COs Lithuania 2004, para. 14; COs Serbia and Montenegro 2004, para. 16; COs Greece 2005, para. 10; COs Thailand 2005, para. 20; COs Slovenia 2005, para. 11; COs Bosnia and Herzegovina 2006, para. 16 (this statement concerned witness protection mechanisms in this respect); COs Costa Rica 2007, para. 12.

204 COs Brazil 2005, para. 15; COs Paraguay 2006, para. 13.

205 COs Norway 2006, para. 12.

206 COs the Philippines 2003, para. 13.

> 'Trafficking is an international crime and therefore not only concerns women trafficked out of Slovakia, but also those trafficked into Slovakia from neighbouring countries.'[207]

In line with this international nature of the crime, the HRC argues in a number of COs that the state party should cooperate with other states in order to eliminate trafficking across national borders.[208]

2.4 Sexual harassment

Sexual harassment is contrary to the enjoyment of human rights as laid down in the ICCPR. The HRC expresses its concern about the matter in a number of its COs.[209] In its COs on Chile of 1999, it declares for example, to be concerned about the large number of instances of sexual harassment in the workplace.[210] But its concern does not only relate to harassment in the workplace, it also covers other sectors. In its COs on Argentina it notes, for example, that:

> '[S]exual harassment and other manifestations of discrimination in both the public and private sectors are also a matter of concern.'[211]

And in its COs on the Philippines of 2003, it addresses the incidences of harassment against detainees.[212]

With regard to sexual harassment, states are held to provide the general public with a certain notion of their rights and the remedies available to them in cases where their rights are violated. In its COs on Argentina the HRC recommends on that account that the state party should start a large-scale campaign to promote awareness among women of their rights and the remedies available to them.[213] On a similar note, it argues in its COs on Hungary that training and education in human rights are essential at all levels and in all sectors of society in order to ban violence against women.[214]

In addition to this, states are held to collect and maintain reliable data on the incidence of violence and discrimination against women in all its forms, one of which, as the Committee believes, is sexual harassment.[215] Also, they should take measures,

207 COs Slovakia 2003, para. 10.
208 COs Slovakia 2003, para. 10; COs Lithuania 2004, para. 14; COs Albania 2004, para. 15; COs Tajikistan 2005, para. 24; COs Brazil 2005, para. 15.
209 COs the Philippines 2003, para. 11; COs Hungary 2002, para. 10; COs Argentina 2000, para. 15; COs Guatemala 1996, paras. 21 and 33; COs Chile 1999, para. 18; COs Trinidad and Tobago 2000, para. 12; COs Japan 2008, para. 13.
210 COs Chile 1999, para. 18.
211 COs Argentina 2000, para. 15.
212 COs The Philippines 2003, para. 11.
213 COs Argentina 2000, para. 15.
214 COs Hungary 2002, para. 10.
215 COs Argentina 2000, para. 15.

legal and other, to prevent these violations.[216] For that reason, states are told to conduct prompt and impartial investigations into these crimes, and prosecute and punish the perpetrators.[217] Hence, sexual harassment should also be established as an offence punishable by law.[218] On that account, the Committee welcomes the criminalisation of sexual harassment as part of the major legislative changes that were introduced in Chile following the recommendations of the HRC in its COs on the state party in 2007, and also notes with satisfaction the amendment of the Equal Employment Opportunities Law in Israel, which places the burden of proof upon the employer in civil harassment suits.[219]

In the instances where the Committee refers to articles in the Covenant affected by sexual harassment, it cites Articles 3, 6, 7, 9 and 26. It should be noted, however, that in some of these cases the HRC does not only address sexual harassment, but also extrajudicial killings (hence Article 6), arbitrary detention, intimidation and abuse, violence against women, and rape.[220]

2.5 Female genital mutilation

2.5.1 Introduction

Female genital mutilation is contrary to the rights as laid down in the Covenant.[221] In GC 28, the HRC holds that states parties in which the practice of genital mutilation is performed should provide information on its extent and on any measures it has taken to eliminate it. This information should, according to the HRC, include measures, including legal remedies, to protect women whose rights under Article 7 have been violated.[222] In line with its GC, the HRC expresses its concern about reports of the practice in states parties in a number of COs.[223] In general, the Committee does not make any reference to the age of the victims of FGM. It is only in its COs on Sudan of 1997 that it notes to be particularly concerned because female minors are made to undergo FGM. The Committee observes that these minors may suffer the consequences of the procedure their whole life.[224] In its COs on Kenya of 2005, the HRC

216 COs the Philippines 2003, para. 11.
217 Ibidem.
218 COs Guatemala 1996, para. 33; COs Chile 1999, para. 18; COs Japan 2008, para. 13.
219 COs Chile 2007, para. 3; COs Israel 1998, para. 8.
220 COs the Philippines 2003, para. 11; COs Hungary 2002, para. 10.
221 See for example COs Zimbabwe 1998, para. 12.
222 HRC, GC 28, para. 11.
223 COs Yemen 1995, para. 255; COs Sudan 1997, para. 10; COs Yemen 2002, para. 6; COs Egypt 2002, para. 11; COs Mali 2003, para. 11; COs Uganda 2004, para. 10; COs Gambia 2004, para. 10; COs Benin 2004, para. 11; COs Kenya 2005, para. 12; COs Central African Republic (CAR) 2006, para. 11; COs Norway 2006, para. 12; COs Sudan 2007, para. 15.
224 COs Sudan 1997, para. 10.

pays particular attention to the criminalisation of FGM on adults. It notes with concern that there is no legal prohibition of FGM for adults.[225]

FGM is, so it follows from the COs, problematic with regard to the enjoyment of human rights for various reasons. In two COs, the Committee remarks upon the high number of maternal deaths, which it argues is, or may be the consequence of FGM.[226] In other COs the Committee holds that FGM is not compatible with the notion of human dignity and argues that the practice hampers the equal enjoyment of the rights of women as embodied in the Covenant.[227] Moreover, in its COs on Senegal, the HRC refers to the effects of the practice on women's health, as it recommends the state party to abolish practices prejudicial to women's health.[228] In respect of the provisions of the Covenant that are at stake as far as FGM is concerned, the HRC refers to Articles 2(1), 3, 6, 7 and 24 of the Covenant.

In addition to abolishing practices that are prejudicial to women's health, the Committee urges states parties in its COs to adopt adequate measures to prevent and eliminate prevailing social attitudes and cultural and religious practices that hamper the realisation of human rights by women. The HRC considers FGM to be such a practice.[229] Moreover, in its COs on Yemen, it notes that the state party should formulate specific plans to eradicate FGM.[230]

2.5.2 Prosecution of perpetrators

States parties should ensure that offenders of FGM are prosecuted.[231] From its COs on Yemen of 2005, it appears that by 'offenders' it means the persons actually performing the practice and not the women who undergo this procedure. The HRC holds in these COs that the state party should increase its efforts to eradicate FGM and enact a law prohibiting all persons from carrying out the practice.[232]

In other COs as well, states are requested to adopt specific legislation that criminalises FGM.[233] For example in its COs on the Central African Republic (CAR) of 2006 it argues that:

225 COs Kenya 2005, para. 12.
226 COs Sudan 1997, para. 10; COs Senegal 1997, para. 12.
227 COs Senegal 1997, para. 12; See also COs CAR 2006, para. 11; COs Sudan 2007, para. 15.
228 COs Senegal 1997, para. 12.
229 COs Zimbabwe 1998, para. 12; COs Yemen 2002, para. 6; COs Egypt 2002, para. 11; COs Uganda 2004, para. 10; COs Gambia 2004, para. 10; COs Benin 2004, para. 11; COs Yemen 2005, para. 11; COs Norway 2006, para. 12.
230 COs Yemen 1995, para. 255.
231 COs Sweden 2002, para. 8; COs Yemen 2002, para. 6; COs Benin 2004, para. 11; COs Sudan 2007, para. 15.
232 COs Yemen 2005, para. 11.
233 COs Sudan 1997, para. 10; COs Zimbabwe 1998, para. 12; COs Mali 2003, para. 11; COs Uganda 2004, para. 10; COs Yemen 2005, para. 11; COs CAR 2006, para. 11; COs Sudan 2007, para. 15.

> 'The state party should take measures to criminalise female genital mutilation and ensure that the perpetrators are brought to justice.'[234]

On that account, the Committee notes with appreciation that the United Republic of Tanzania has changed its laws so as to criminalise the practice of FGM.[235] From the COs of the HRC it is clear that criminalisation of FGM requires a specific law on the phenomenon in national legislation.[236] Moreover, this penal law should not only cover FGM on minors, but also on adults. In its COs on Kenya of 2005, the Committee expresses its concern about the fact that there is no legal prohibition of FGM for adults and argues that the state party should enact legislation to that end.[237]

2.5.3 Awareness raising

Criminalisation of FGM is not sufficient to eradicate the practice. In its COs on Benin of 2004, the Committee notes that the state party should also effectively ban FGM by means of more awareness campaigns.[238] The SR show that during the constructive dialogue with Benin, Committee member Wieruszewski noted that:

> 'To eradicate traditions by legal means was extremely difficult and therefore raising awareness among law enforcement officers was only part of the solution to the problem. He wondered if any efforts were being made to eliminate the root causes of FGM.'[239]

Awareness-raising campaigns should target different groups: not only law-enforcement officials should be aware of the fact that FGM is contrary to women's rights, but also the general public. The HRC notes in its COs on CAR in 2006:

> 'The state party should step up its efforts to mobilise public opinion against female genital mutilation, in particular in communities where the practice remains widespread.'[240]

The Committee argues that states parties should pursue social and educational campaigns in order to eliminate the practice and to promote a human rights culture within society along with greater awareness of the rights of women.[241] Along those lines, it encourages Senegal to launch a systematic campaign to promote popular awareness

234 COs CAR 2006, para. 11.
235 COs United Republic of Tanzania 1998, para. 11.
236 COs Senegal 1997, para. 12; COs Mali 2003, para. 11; COs Yemen 2005, para. 11; COs CAR 2006, para. 11.
237 COs Kenya 2005, para. 12.
238 COs Benin 2004, para. 11.
239 SR Benin 2004, UN doc. CCPR/C/SR.2232, para. 62.
240 COs CAR 2006, para. 11.
241 COs the Sudan 1997, para 10; COs Kenya 2005, para. 12; COs Yemen 2002, para. 6.

of persistent negative attitudes towards women and requests Gambia to encourage radio and television broadcasts designed to combat the practice of FGM.[242]

2.5.4 Asylum claims

In two COs, the Committee pays attention to a number of services that should be available for victims of FGM or for persons who run the risk of being victimised. In its COs on the Netherlands of 2001, the HRC expresses its concern about the fact that a well-founded fear of genital mutilation or other traditional practices in the country of origin that infringe the physical integrity or health of women does not always result in favourable asylum decisions. It holds in this respect that the state party should ensure that the female persons concerned enjoy the required protection under Article 7 of the Covenant.[243]

Similarly, in its COs on Norway of 2006, the HRC argues that the state party should effectively protect victims of FGM, inter alia by granting residence permits where appropriate on the basis of humanitarian considerations.[244]

2.6 Other harmful practices

2.6.1 'Honour crimes'

In GC 28 the Committee notes that the right to equality before the law and freedom from discrimination as it is protected by Article 26 of the Covenant requires states to act against discrimination by public and private agencies in all fields. In this respect it holds that so-called 'honour crimes' which remain unpunished constitute a serious violation of the Covenant and in particular of Article 6, 14 and 26.[245]

In its COs the Committee also addresses the failure to adequately prosecute and punish honour crimes. It notes that toleration of crimes of honour adds to the existing inequality between the sexes.[246] It argues that states have to eliminate any discrimination against women in their national penal codes and that offenders should be prosecuted.[247] Similarly, in its COs on Iraq of 1997, the HRC welcomes the repeal of the Revolutionary Command Council Decree No. 111 of 1990, which exempted from prosecution certain 'crimes of honour' involving the killing of female relatives.[248]

242 COs Senegal 1997, para. 12; COs Gambia 2004, para. 10.
243 COs the Netherlands 2001, para. 11.
244 COs Norway 2006, para. 12.
245 HRC, GC 28, para. 31.
246 COs Kuwait 2000, para. 7; COs Morocco 1999, para. 14; COs Syrian Arab Republic 2005, para. 16.
247 COs Sweden 2002, para. 8; COs Kuwait 2000, para. 7; COs Syrian Arab republic 2005, para. 16.
248 COs Iraq 1997, para. 6.

2.6.2 Female infanticide

The HRC makes it clear that female infanticide violates women's right to life and for that reason in GC 28 it requests information from states parties on the measures they have taken to protect women from this practice.[249] In its COs on India of 1997, the Committee addresses this phenomenon and expresses its concern about the fact that giving male children preferred treatment still persists. It notes that it deplores that practices such as foeticide and infanticide of females continue and recommends that the government take further measures to protect women from all discriminatory practices, including violence.[250]

2.6.3 Dowry-related violence

In GC 28, the Committee holds that dowry killings are a phenomenon that is contrary to the right to life. Hence, states have to take measures to protect women from these practices.[251] Again in its COs on India of 1997 it pays attention to the matter, noting that it remains gravely concerned that legislative measures are not sufficient and that measures designed to change the attitudes which allow such practices should be taken.[252]

2.6.4 'Sati'

Sati is the self-immolation of widows as it is practised by some Hindu communities. The HRC considers this practice to be contrary to the enjoyment of human rights. The Committee notes in GC 28 that the burning of widows constitutes a violation of the right to life.[253] In the COs on India the Committee notes that:

> 'While acknowledging measures taken to outlaw child marriages (Child Marriages Restraint Act), the practice of dowry and dowry related violence (Dowry Prohibition Act and the Penal Code) and sati self-immolation of widows (Commission of Sati (Prevention) Act), the Committee remains gravely concerned that legislative measures are not sufficient and that measures designed to change the attitudes which allow such practices should be taken'.[254]

249 HRC, GC 28, para. 10.
250 COs India 1997, para. 16.
251 HRC, GC 28, para. 10.
252 COs India 1997, para. 16.
253 HRC, GC 28, para. 10.
254 COs India 1997, para. 16.

2.6.5 Pledging of girls for economic and cultural appeasement

The Devadasi system in India is a system where young girls are pledged for life to temples at an early age by their parents. The girls are pledged to a god or a goddess and become temple prostitutes.[255] The Committee pays attention to this practice in its COs. It notes in its COs on India that there is no national legislation to outlaw the practice of Devadasi, and that the regulation of this is left to states. It expresses its concern about the fact that the practice seems to continue and that not all states have effective legislation against it and emphasises that the practice is incompatible with the Covenant. For that reason, it recommends the state party to urgently take all measures necessary to eradicate the practice of Devadasi.[256]

Pledging of girls for economic gain is a matter that is also tackled by the HRC in its COs on Zimbabwe of 1998. Here the Committee expresses its concern about continued practices, which it holds to be in violation of various provisions of the Covenant, including Articles 3 and 24. One of the practices it mentions in this respect is kuzvarita, the pledging of girls for economic gain. In respect of these practices, the HRC urges the state party to adopt adequate measures to prevent and eliminate prevailing social attitudes and cultural and religious practices hampering the realisation of human rights by women.[257]

2.6.6 'Comfort women'

In its COs on Japan of 2008, the HRC expresses its concern about the fact that the state party does not accept its responsibility for the 'comfort women' system during the Second World War. It notes that perpetrators have not been prosecuted, and that the compensation provided to victims is financed by private donations rather than public funds and is insufficient. It also argues that few history textbooks contain references to the 'comfort women' issue, and that some politicians and mass media continue to defame victims or deny the events.

The HRC holds that the state party should accept legal responsibility and apologise unreservedly for the 'comfort women' system in a way that is acceptable to the majority of victims and restores their dignity. It argues, moreover, that the state party should prosecute perpetrators who are still alive, take immediate and effective legislative and administrative measures to compensate adequately all survivors as a matter of right, educate students and the general public about the issue, and refute and sanction any attempt to defame victims or to deny the events. In this respect, the HRC refers to Articles 7 and 8 of the Covenant.[258]

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255 *Cultural Practices in the Family that are Violent Towards Women*, Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences, 2002, UN doc. E/CN.4/2002/83, para. 38.

256 COs India 1997, para. 32.

257 COs Zimbabwe 1998, para. 12.

258 COs Japan 2008, para. 22.

3 PHYSICAL VIOLENCE AGAINST WOMEN AND HUMAN RIGHTS OBLIGATIONS OF STATES PARTIES

3.1 Introduction

This section discusses the human rights obligations formulated by the HRC in its GCs and COs with regard to the situations discussed in the previous section. In accordance with what is stated in Chapter 2, a division is used between the obligation to respect, the obligation to protect, and the obligation to fulfil the rights as laid down in the ICCPR. Unlike the structure employed in Chapter 3, the obligations are presented here in accordance with the different forms of violence they refer to and not in light of the provisions they are based on.[259]

3.2 Physical violence against women and the obligation to respect the human rights enshrined in the ICCPR

3.2.1 Rape and other forms of sexual abuse and the obligation to respect

From the work of the HRC it is clear that rape and other forms of sexual abuse are contrary to the enjoyment of human rights as laid down in the ICCPR. For that reason, the Committee requests states parties to combat these practices. In general, the duty to combat a certain practice first and foremost entails an obligation to protect, in this case an obligation to protect women from being raped. However, the HRC also formulates a number of recommendations that fall under the heading of the obligation to respect the rights enshrined in the Covenant. The most evident obligation, although not expressly mentioned as such by the Committee, is that the state party should not commit any acts of rape itself. This means that state officials, for example prison guards or militia, must not rape or sexually abuse women.

In its COs, the HRC does not make a distinction between state officials committing rape or third parties committing rape, with regard to the obligation to combat this practice. Rape is always contrary to the enjoyment of human rights and should for that reason always be prosecuted. This entails another obligation to respect: states should not grant amnesty or immunity to perpetrators of rape. No amnesty should be granted to anyone believed to have committed or be committing crimes of a particularly

259 Whereas Chapter 3 presents a discussion on the human rights obligations in accordance with the respective provisions of the ICCPR that are affected by these matters, this section discusses the human rights obligations in light of the forms of physical violence to which they relate. The reason for this is that the attention of the HRC for physical violence against women is a lot more elaborate than that for pregnancy-related matters and, moreover, is a lot more detailed. A different structure is required here in order to get a clear picture of the obligations of states parties with regard to these matters, as many of these issues affect several provisions, which would, for a structure similar to Chapter 3, lead to repetition of many of the obligations in various paragraphs. At the same time, it is not desirable to structure Chapter 3 differently, as this would cause a lot of repetition of obligations in that chapter.

serious nature. The HRC holds that rape is such a crime and consequently no amnesty should be granted to the perpetrators. Moreover, the positive duty of states to prosecute cases of rape entails that cases of rape should be reported. Hence, women should not be deterred from reporting these incidences. The HRC addresses this situation with regard to women in custody: a situation in which women are most vulnerable to be pressured by state authorities not to report cases of rape. Here the Committee holds that states have to ensure that no pressure is put on women not to report cases of rape. Consequently prison staff or law-enforcement personnel working as state agents must not silence women with regard to filing a complaint about rape.

3.2.2 Domestic violence and the obligation to respect

With respect to domestic violence, the duties of states as expressly formulated by the HRC do not contain any obligation to respect. This is not surprising. The term 'domestic' indicates that this type of violence takes place outside the scope of action by state agents and therefore does not entail an obligation for states not to act. An obligation to respect the rights enshrined in the Covenant with regard to domestic violence could be that a state should not adopt any laws that encourage husbands to beat their partners, for example as a form of punishment.[260] It follows from the work of the HRC that it would consider any such laws contrary to the rights as laid down in the Covenant and would formulate an obligation for the state party to abolish such laws. Perhaps a more interesting point of discussion would be whether states parties are allowed to let perpetrators of domestic violence go unpunished when these persons are granted immunity. With regard to rape, the HRC holds that this is not the case, but it has never made similar statements with respect to domestic violence. Considering the fact that the Committee finds domestic violence to be contrary to Article 7 on the right to be free from torture, cruel, inhuman or degrading treatment, it is not likely that it would accept a defence of immunity in cases where domestic violence is not prosecuted.

A last point of speculation is whether the state party violates its obligations under the Covenant when its officials obstruct women in filing complaints of domestic violence, for example, by pointing out a certain type of 'victim behaviour' as was discussed during the constructive dialogue between the HRC and the delegation from Ukraine. State officials making statements regarding the behaviour of a victim may prevent women who are victims of domestic violence from filing complaints. The statements of the HRC in regard to rape and domestic violence suggest that the state party has an obligation to ensure that its officials do not deter women from filing complaints and therefore that they make no statements with regard to 'victim behav-

260 For example, the CESCR condemns in its COs on Nigeria of 1998 the continuing existence of legal provisions which permit the 'chastisement' of women by their husbands. CESCR, COs Nigeria 1998, para. 21.

iour'. But it should be noted that the Committee has never made any explicit statements to this end.

3.2.3 Trafficking and the obligation to respect

Trafficking, like rape in the private sphere, and domestic violence often involve non-state actors. Yet trafficking, with its transnational character, is a practice that also partly exists by the grace of corrupt state officials such as border officials or immigration officers. Perhaps this is the reason why with regard to trafficking, as opposed to rape and domestic violence, the HRC expressly formulates the obligation of states parties to ensure that no state actors are involved in this phenomenon. Although the obligation is formulated as a positive obligation and would therefore have the character of an obligation to protect or to fulfil, it is in fact an obligation to respect, for what the Committee actually states is that the state must not traffic in women, or men and children for that matter, or be part of the process at any stage. But there are more obligations that have the character of 'to respect', thus with a duty for state actors *not* to do something formulated by the HRC. This also has to do with the transnational character of the crime of trafficking. That is that the women trafficked through and into states are in those countries illegally, which makes them especially vulnerable, not only for violations of their rights by third parties, but also for actions by state agents. This is a reference to the risk that many trafficked women run of being penalised for their illegal stay in the state party as opposed to being provided with protection, support and assistance. The Committee pays attention to this aspect of trafficking as it expresses its concern about the practice of expelling trafficked persons from the country without appropriate arrangements for their care. This statement and similar remarks by the HRC may indicate an obligation for states parties not to deport victims of trafficking if this is contrary to the protection of their rights, thus as part of states parties' obligation to respect the rights contained in the Covenant. This interpretation of the statements of the HRC is supported by its recommendation to grant residence permits where appropriate on the basis of humanitarian considerations.

3.2.4 Sexual harassment and the obligation to respect

With regard to sexual harassment, states parties also have the obligation to refrain from certain actions. Sexual harassment is considered to be a problem with regard to the enjoyment of human rights whether it takes place in the private or in the public sphere. On that account, state agents must not engage in any activities that constitute sexual harassment. It should be noted that the HRC does not specify what actions would amount to such type of behaviour. In regard to sexual harassment by state agents, the Committee refers to the situation in which such behaviour, due to the specific conditions in which these women find themselves, easily occurs: in custody or in prison. The HRC explicitly addresses the incidences of harassment against detainees.

3.2.5 FGM and the obligation to respect

FGM is a practice that is generally performed by non-state actors. On that account states parties mainly have, with regard to this convention, an obligation to protect individuals against this practice. But medicalisation of the practice in states entails that state officials may also conduct the procedure, for this would be the case if such a procedure took place in a state hospital.[261] The HRC makes it clear that FGM is contrary to the enjoyment of human rights under all circumstances, and should for that reason be eliminated. Although the Committee does not expressly formulate such an obligation, states do not just have a duty to protect individuals from third parties, but also have an obligation to respect, because it should not engage in the procedure itself, for example by performing the practice in state hospitals. Yet, the HRC has never addressed the medicalisation of FGM in states parties, despite the fact that in quite a number of states trained healthcare personnel, often in healthcare facilities, perform the practice.[262]

3.2.6 Other harmful practices and the obligation to respect

A clear example of an obligation to respect the rights as laid down in the Covenant, and in particular those enumerated in Articles 6, 14, and 26, is provided by the statements of the HRC with regard to so-called 'honour crimes'. With regard to these types of crimes, in which the perpetrator receives a reduced sentence or is not convicted at all because they acted in order to save their or their family's honour, the HRC notes that states have to eliminate any discrimination against women in the national

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261 On medicalisation of FGM see for example Morris, K., 'Feature Issues on female genital mutilation/cutting – progress and parallels', *Lancet*, vol. 368, 2006, p. s65. Morris quotes a WHO team that states that: 'medicalisation of FGM is happening on a large scale, and is promoted by some governments, non-governmental organisations, and researchers, often as a harm-reduction strategy'. The UNFPA report entitled 'A Holistic Approach to the Abandonment of Female Genital Mutilation/Cutting', notes that '[r]ecently, the percentage of girls whose FGM/C is performed by medical personnel has increased, as more parents try to minimize the immediate health effects or complications, including bleeding and pain.' UNFPA, 'A Holistic Approach to the Abandonment of Female Genital Mutilation/Cutting', 2007, http://www.unfpa.org/gender/practices1.htm, accessed on 4 July 2009.

262 See for example Hosken, F., 'The Medicalisation of FGM: A Human Rights Violation', *Women's International Network News*, vol. 25, no. 2, p. 1; and WHO, *Eliminating Female Genital Mutilation – An interagency statement*, http://www.who.int/reproductivehealth/publications/fgm/9789241596442/en/index.html, accessed on 4 July 2009, p. 12. The 2005 report of the United Nations Children's Fund (UNICEF) on the practice indicates that this is particularly the case in Egypt, Guinea, Kenya, Nigeria, Northern Sudan and Yemen, where the medicalisation of the practice has dramatically increased in recent years. In all these countries one third or more of the women with at least one daughter circumcised indicate that trained healthcare personnel performed the procedure. In Egypt, for example, 94 per cent of daughters are found to have undergone FGM performed by trained healthcare personnel, while this was the case for 79 per cent of mothers. UNICEF, *Female Genital Mutilation/Cutting – A Statistical Exploration*, UNICEF, 2005, http://www.unicef.org/publications/files/FGM-C_final_10_October.pdf, accessed on 4 July 2009, p. 13.

penal codes and that perpetrators should be prosecuted. Hence states do not act in accordance with their obligation to respect and ensure the rights contained in the Covenant, and more specifically do not live up to their obligation to respect the rights as laid down therein when their national laws contain provisions that exempt perpetrators or reduces their sentences in those cases where these crimes are committed for reasons of honour.

3.3 Physical violence against women and the obligation to protect the human rights enshrined in the ICCPR

3.3.1 Rape and other forms of sexual abuse and the obligation to protect

The general obligation of states parties with regard to violence against women and consequently also with regard to rape and other forms of sexual abuse is to combat these phenomena. As rape, particularly outside the context of conflict situations, is often not directly committed by state actors, but by third parties, the duties of states with regard to this practice mainly involve obligations to protect. The recommendations of the HRC with regard to rape as they are formulated in the COs cover the whole spectrum of duties with respect to the obligation to protect. This means that states parties are requested to investigate, prosecute and punish cases of rape. States must adopt specific legislation that criminalises rape in all circumstances. Thus, rape committed by a marital partner must be prohibited. Naturally, this is the first requirement in the prosecution of rape and the easiest requirement for the HRC to assess, for it only needs to examine national legislation on this practice in order to determine whether a state party has taken all the requested measures so as to live up to its obligations under the Covenant. The following steps are a bit more difficult to examine for the HRC. States are requested to investigate all cases of rape, to prosecute them and to punish the perpetrators in a way that is consistent with the serious nature of the crime. The Committee makes it clear that the obligations of states in this respect are far-reaching: cases must be investigated, prosecuted and appropriately punished. In this respect, the Committee pays particular attention to legislation that is contrary to these duties. That is, for example, legislation in which the perpetrator of the act of rape goes free when he marries his victim, or when the case of rape is only prosecuted in case the woman raped is considered to be ‘honest’. All such legal obstacles to the investigation, prosecution and punishment of rape necessarily imply that the state fails to act in accordance with its obligation to protect.

3.3.2 Domestic violence and the obligation to protect

States have an obligation to combat domestic violence. In general, this obligation is an obligation to protect, for as the term ‘domestic’ indicates it concerns actions that take place in the private sphere without interference by state organs. As the next section on the obligation to fulfil shows, states parties have to provide for a number

of facilities with regard to this phenomenon, although it could be argued that many of these duties also serve a protective function, yet the core obligations of the states with regard to domestic violence concern the prosecution and punishment of such violence. Although women may be aware of their rights and the general public may be familiar with the phenomenon, as long as domestic violence remains unpunished and thus implicitly allowed, it will continue to be accepted as part of a socially accepted practice. Consequently, in most of the COs in which the HRC addresses domestic violence, it formulates recommendations that deal with the obligation to protect with regard to domestic violence and on that account with the duties of states to prosecute and punish the perpetrators of these crimes. On a policy level, thus not in relation to individual cases, states have to adopt a policy of prosecuting and punishing domestic violence and take measures so as to encourage women to report these crimes. With regard to the actual individual crimes that are committed, states parties have the responsibility to investigate the complaints filed, prosecute these cases, taking into account that in order to do so specific legislation must be enacted, and finally, states must ensure that those responsible are appropriately punished. Thus, as it is clear that domestic violence must not be surrounded by a veil of impunity, the message is that it is a serious crime that must lead to prosecution and punishment in order for a state to live up to its obligations under the Covenant.

3.3.3 Trafficking and the obligation to protect

The same holds true for trafficking, a practice that is considered contrary to the right to be free from slavery, servitude and from forced or compulsory labour. States are requested to combat trafficking and on that account they are recommended to actively investigate cases of trafficking, prosecute perpetrators of these crimes and impose appropriate sanctions on those found responsible. It is unclear whether an obligation to investigate exists at all times, i.e. without prior complaints having been filed. It is possible that due to the specific nature of the practice and the risks attached to filing complaints for victims, a general obligation (could) exist for states parties to investigate cases pro-actively, but the HRC has never made any statements about this.

3.3.4 Sexual harassment and the obligation to protect

Sexual harassment is contrary to the enjoyment of human rights and should for that reason be eliminated. As noted, the HRC does not specify its interpretation of sexual harassment. It holds that states parties should establish sexual harassment as an offence punishable by law, but it does not indicate what type of behaviour falls within the definition of sexual harassment. Like rape, domestic violence and trafficking, sexual harassment is considered to be a form of violence against women and should for that reason be fought. For that reason, states are held to investigate cases of harassment, prosecute perpetrators and punish them accordingly. It is unclear whether a specific policy in that regard should be followed. Unlike its comments on domestic violence,

the Committee pays no attention to the difficulties women may face in reporting harassment, for example, the dependency on their job and the risk of loosing it if they filed a complaint. Nor does it pay attention to access to a lawyer, for example, or a confidential procedure for women in custody or prison so as to file complaints of sexual harassment.

3.3.5 FGM and the obligation to protect

FGM is another practice that needs to be fought by, amongst other things, criminalisation and prosecution. Hence, states must criminalise FGM in their national legislation. The HRC does not specify its interpretation of the term FGM and for that reason it appears that all forms of FGM, including the so-called 'stitch' should be criminalised. It is only in its COs on Sudan of 2007 that the Committee refers specifically to type III female genital mutilation under the World Health Organization's classification.[263] It is interesting to note that contrary to the other forms of violence that were previously addressed, the HRC does not pay attention to the punishment of the perpetrators when it concerns FGM. It just notes that they need to be prosecuted. On what basis this needs to take place is unclear. It is not to be expected that many women that underwent the procedure, or third parties for that matter, will report cases of FGM. After all, FGM is a procedure that is mainly practiced for reasons of tradition and societal necessity, and for that reason generally speaking it is different from for example domestic violence. With regard to the previously mentioned forms of violence against women, societies in general do not approve of those practices, although they may bury their heads in the sand, but in societies in which FGM takes place it is generally approved of.[264] Therefore, as it is not to be expected that persons will report cases of FGM, the question of how to investigate them is interesting. It is a matter that until now has remained unaddressed by the HRC.

3.3.6 Other harmful practices and the obligation to protect

Finally, there are several other harmful practices which according to the HRC should be criminalised and incidences of these conventions prosecuted. This is the case for so-called 'honour crimes' and for the pledging of girls for economic and cultural appeasement, often referred to as the practice of Devadasi.[265] Although the Committee

263 COs Sudan 2007, para. 15. For a detailed explanation and sub-divisions of the types of FGM see WHO, 'Eliminating Female genital mutilation – An interagency statement', http://www.who.int/ reproductive health/publications/fgm/9789241596442/en/index.html, accessed on 4 July 2009, annex 2.

264 See for example Obiora, L., 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision', *Case Western Reserve law Review*, vol. 47, 1997, no. 2, p. 284.

265 In Zimbabwe, this practice is called Kuzavarita, but it should be noted that in its COs on Zimbabwe, the HRC does not expressly recommend criminalisation and prosecution of this practice. COs Zimbabwe 1998, para. 12.

also pays attention to some other harmful practices, namely female infanticide, dowry-related violence and sati, it does not expressly address any duty of states parties to prosecute them. Yet, its recommendation that states should protect women from these practices seems to indicate that this is in fact the case.

3.4 Physical violence against women and the obligation to fulfil the rights enshrined in the ICCPR

3.4.1 Rape and other forms of sexual abuse and the obligation to fulfil

States parties have to fulfil the rights as laid down in the Covenant. This can be done by way of facilitation or by direct provision.[266] Although the main obligation with regard to rape and other forms of sexual abuse is to combat these phenomena and consequently is an obligation to protect women from violations of their rights, the HRC also formulates a number of recommendations that represent obligations to fulfil the rights enshrined in the Covenant. These obligations to fulfil can be divided into two categories; duties that exist at all times in order to prevent rape and other forms of sexual abuse, and duties that exist when rape or another form of sexual abuse has taken place and that relate to the care for the victims of these practices. With regard to the former, the duty to prevent rape, although not mentioned as such by the HRC, is that of awareness raising. In this respect, states parties are requested to raise awareness among the general public of all forms of violence against women, which includes the practice of rape. Presumably, the notion is that rape should not be a hidden phenomenon that people do not talk about and thereby remains unaddressed and a private matter. It should be general knowledge that rape is not to be accepted. This also applies to the fact that with regard to rape in custody the HRC recommends states parties to give human rights training to prison officers and to law-enforcement personnel. It follows from the COs of the HRC that this training should provide the state agents with knowledge of human rights matters. In addition to this, women should be made aware of the rights and the remedies available to them. In order to raise awareness the HRC proposes two means: educational campaigns and large-scale information campaigns or awareness campaigns.

In addition, states must provide assistance and support to victims of rape. On that account they must adopt protection mechanisms. But mere protection is not sufficient. Victims of rape must be guaranteed reintegration into society and, moreover, receive full reparation. With regard to the latter, it is noteworthy that in this case the HRC does not specify that the perpetrators need to be state actors. At least as far as rape committed during armed conflict is concerned, as was evidently the case in the Russian Federation and Sudan according to the relevant COs, rape was also committed by third parties, as is remarked by the Committee. Whether compensation is also required in

266 See Chapter 2, Section 3.3.

those cases where rape takes place outside the context of armed conflict, in the private realm, by non-state actors, remains to be seen. The HRC has so far never made any statements with regard to reparation for rape in that context. Yet, it could theoretically be argued that states could be held responsible and consequently required to provide compensation in case they have neglected their obligations to combat rape. Moreover, with respect to the general obligation to combat rape and more specifically to prosecute perpetrators of this crime, states are held to establish effective procedures for filing complaints of rape for women in custody. This statement is in line with the notion of the HRC that women should not be deterred from reporting cases of rape, as was noted as part of the obligation to respect. It is a prerequisite in the investigation, prosecution and punishment of these acts.

3.4.2 Domestic violence and the obligation to fulfil

Like its statements on rape, the recommendations of the HRC with regard to domestic violence and specifically those that represent obligations to fulfil can be divided into two categories: those that aim to promote a certain awareness and those that focus on the entitlements of victims of domestic violence. The recommendations with respect to awareness raising and the training of state officials with regard to domestic violence resemble those made in connection to rape. The measures related to the victims of domestic violence, however, are more elaborate than those made with respect to rape. In addition to establishing crisis-centre hotlines and shelters, states parties are requested to establish victim support centres equipped with medical, psychological and legal facilities. Moreover, states are recommended to ensure that social and medical centres for rehabilitation are available to all victims. Another important aspect in light of the prevention of repetitive incidences of domestic violence is the obligation to ensure that restraining orders are available. And, like its recommendations with regard to rape, states parties have to ensure effective remedies for victims.

3.4.3 Trafficking and the obligation to fulfil

Similar to its statements with regard to rape and domestic violence, the HRC recommends states to raise awareness of the phenomenon of trafficking on the one hand and requests it to take certain measures with respect to the victims on the other hand. The Committee holds that states parties should provide protection, assistance and support to victims of trafficking. In addition to this, victims should have the possibility to pursue legal remedies against their perpetrators and on that account must be ensured adequate access to lawyers, but also to interpreters, healthcare and counselling. As was already mentioned, the Committee also argues that residence permits must be granted where appropriate for humanitarian reasons. It is unclear whether states parties have a duty to actively search for victims of trafficking so as to provide them with the necessary assistance and support, or whether victims only become known to the authorities when they file a complaint or when they are apprehended by the police.

Due to the characteristics of trafficking, which include the illegal status of the victim in the state party and the dependent position victims find themselves in with regard to their exploiter, victims often cannot turn to the authorities, or are too afraid. The HRC pays no attention to this aspect of trafficking.

3.4.4 Sexual harassment and the obligation to fulfil

With regard to sexual harassment, states parties also have a duty to make women aware of their rights and remedies with regard to this phenomenon. On that account they must start large-scale campaigns and provide human rights training to its agents. Raising awareness and providing human rights training, however, are the only obligations formulated with respect to sexual harassment that constitute obligations to fulfil the rights enshrined in the Covenant. Hence, the HRC does not pay attention to possibilities in civil law to claim reparations and compensation in cases of sexual harassment.

3.4.5 FGM and the obligation to fulfil

The obligation to fulfil the rights enshrined in the Covenant is also addressed by the HRC in regard of FGM. With regard to this practice, the HRC formulates a duty for states parties to raise awareness amongst both law-enforcement officers and the general public regarding the phenomenon and the fact that it is contrary to the enjoyment of human rights. This recommendation is similar to the recommendations with regard to the forms of violence against women that were previously described. Yet, in one CO, the HRC makes a different suggestion with respect to raising awareness, which deserves to be mentioned. In its COs on Senegal it encourages the state party to promote popular awareness of the persistent negative attitudes towards women. The recommendation is in keeping with the remark of Committee member Wieruszewski during the dialogue with Benin in which he wondered whether any efforts had been made in the state party to eliminate the root causes of FGM. Such a reference to the underlying causes of FGM and a duty for states to tackle them, for example by awareness-raising campaigns, has never been made by the HRC in any of its COs, except for its COs on Senegal.

In addition to raising awareness, the Committee formulates another duty for states parties that falls under their obligation to fulfil the rights as laid down in the Covenant. In respect of Article 7 on the right to be free from torture, cruel, inhuman or degrading treatment, the states parties are held to grant residence permits on the basis of humanitarian considerations, that is if a person that seeks asylum has a well-founded fear of being subjected to such a practice. It is clear that the HRC considers FGM to be such a practice and for that reason women that have a well-founded fear of being subjected to such a practice should be offered protection. The duty of states parties to provide for certain provisions or protective measures is, however, rather weak. In addition to the duty of states parties to prosecute perpetrators of FGM, which was discussed in the

previous section on the obligation to protect, the Committee only formulates in its COs an obligation for the protection of victims of FGM who are female refugees, that is with regard to asylum claims as just discussed. Unlike its recommendations with regard to the other forms of violence against women that were previously discussed, the HRC pays no attention to facilities for victims in general. Thus it does not, for example, formulate a duty for states parties to ensure medical facilities in case of complications, psychological support or a place of refuge if a woman flees from a situation in which she fears such a procedure will be forced upon her. The only exception to this is provided in GC 28 in which the Committee in more general terms indicates that measures to eliminate FGM should include measures of protection, including legal remedies.

3.4.6 Other harmful practices and the obligation to fulfil

Both with regard to dowry-related violence and 'sati', the HRC holds that the state party, India, should take measures designed to change the attitudes which allow such practices. The Committee does not specify the measures that it recommends the state party to take to this end, and since it does not make similar recommendations in respect of these practices in any other document, it is not clear what measures states parties could take to bring about such a change in attitudes. Recommendations, however, on the other forms of violence mentioned in this chapter indicate that the most likely measure to do so would be to raise awareness. This could be done by raising awareness on women's rights, for example, as is suggested by the HRC with regard to FGM.

4 PHYSICAL VIOLENCE AGAINST WOMEN AND DISCRIMINATION OF WOMEN

> *'Violence or the threat of violence is a basic tenet of patriarchal gender order where cultures converge in enforcing and sustaining control over women.'*[267]

4.1 Introduction

The HRC addresses the forms of physical violence against women as discussed in this chapter not only in its COs, but also in GC 28 which focuses on the equal enjoyment of human rights of men and women. The Committee therefore recognises the link between equality of men and women in the enjoyment of human rights and the matters discussed. Yet the question is whether the HRC also links the manifestations of violence against women to discrimination of women. As was done in Chapter 3, this

267 Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN doc. E/CN.4/2006/61, para. 68.

section discusses whether the HRC pays specific attention to direct, indirect and systemic discrimination in relation to the issues of physical violence against women described in this chapter.

4.2 Physical violence against women and direct discrimination

The HRC recognises that violence against women constitutes discrimination of women. In a few COs it explicitly addresses the problem as such.[268] But the Committee never links any of the specific situations as regards physical violence against women to direct discrimination of women.

Yet certain policies or practices that deal with these forms of violence could not amount to direct discrimination. For example, a policy that stipulates that the perpetrator in a rape or domestic violence case can only be convicted when the testimony of a female victim is accompanied by that of other witnesses, whilst this is not the case for testimonies by male victims, is clearly directly discriminatory as it makes a distinction between a testimony by a woman and that by a man. Similarly, direct discrimination is caused by laws that make distinctions between groups of women, for example on the basis of their age or with regard to their marital status. Whereas the HRC does not address direct discrimination in the former form, that is direct discrimination between men and women, it does pay attention to the latter forms in which distinctions are made between groups of women. As noted in the descriptive part of this chapter, the HRC pays attention to distinction in punishment of perpetrators of rape in relation to the marital status of the victim, and argues in its COs on Ukraine that crisis centres for battered women should not only be available for women under 35 years old, but for women of all ages. This does not mean that the Committee considers direct discrimination of men and women with regard to violence against women acceptable. It is safe to say that it follows from its GC 28 and its COs that direct discrimination between men and women is not allowed as it is contrary to the Covenant. It is noteworthy, however, that the Committee has never explicitly made any remarks on this matter.

4.3 Physical violence against women and indirect discrimination

Laws, policies, or practices which are prima facie gender neutral do not distinguish between men and women as such, but may still have discriminatory effects. Naturally this also holds true for policies and practices regarding violence against women. For example, a law that only criminalises physical violence in the public sphere, does not recognise that violence affecting women often takes place in the domestic sphere of home and family. The HRC does not analyse laws and policies regarding violence against women on their possible discriminatory effects. It does, however, argue that

268 The COs on Mongolia of 2000 are a good example of this: COs Mongolia 2000, para. 8.

states by adopting such laws and policies should provide for certain matters, such as shelters for victims of domestic violence. And on that account a policy regulation such as a cutback in funding for shelters could be addressed by the Committee, albeit not explicitly as a matter of indirect discrimination but as a failure of the state party to live up to its obligations under the substantive provisions contained in the ICCPR.

There are also other factors in society that may entail de facto inequality of women, which in turn leads to violence against them. In its COs on the Russian Federation of 1995, the HRC addresses this matter. It implies here that the effects of the structural political, economic, and social changes that take place bear heavier on women than they do on men. Here, it remarks upon the de facto situation of inequality of women in society in which this arguably results. Subsequently, it places rape and the protection of victims of rape in the state party within the larger context of this unequal situation. Here a prima facie gender-neutral process of structural political change entails a de facto unequal position for women which, in turn, manifests itself in incidences of rape, amongst other things. The COs of the HRC on the Russian Federation provide the only occasion in which the Committee specifically addresses a policy or practice that is in principle gender-neutral but that is, or could be, discriminatory in effect.

4.4 Physical violence against women and systemic discrimination

In GC 28, the HRC notes that inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history, and culture. It argues that the subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. However, it does not point out any other manifestations resulting from this unequal position of women in society. Hence, in this GC it does not relate violence against women to the discrimination that is entrenched in the structures and institutions of society by which it is caused.

But in its COs, the Committee does address certain expressions of systemic discrimination. In its COs on Argentina of 2000, it refers to the traditional attitudes towards women which continue to exercise a negative influence on their enjoyment of Covenant rights. In its COs on Mauritius, the HRC recommends the state party to consider, with respect to domestic violence, whether affirmative action measures are necessary to overcome remaining obstacles to equality such as, it notes, outdated attitudes concerning the role and status of women.[269] Moreover, in its COs on India of 1997, the HRC recommends the state party to change the attitudes which allow certain traditional practices that are harmful to women.[270] Consequently, the HRC sometimes recommends states to tackle the underlying gender ideologies that exist in society and that reinforce violence against women. But it should be noted that this is only done

269 COs Argentina 2000, para. 15; COs Mauritius 1996, para. 15.
270 COs India 1997, para. 16.

very sporadically. This is true even with regard to the practice of FGM, of which many state delegates themselves noted during the constructive dialogues with the HRC that combating the practice requires a change in traditional attitudes, but to which the HRC in its corresponding COs does not refer, or recommends the states in question to address these root causes.[271] Although it should be noted that in a number of COs, the HRC does refer to *harmful traditional attitudes* in society that should be addressed, it does not do so specifically in reference to FGM. The general trend with regard to the elimination of violence against women is not to address its possible root cause of discrimination of women In societies, but rather the investigation, prosecution and punishment of these crimes and on the facilities that should be available for victims.

For the sake of completeness, it should be noted that the Committee refers in its COs on Madagascar of 2007 to economic dependence on their partners as an underlying factor for women's vulnerability , but it does not dig any deeper to examine the causes of this economic dependency, nor does it request the state party to do so and to address them.

5 THE POSITION OF PHYSICAL VIOLENCE AGAINST WOMEN IN THE WORK OF THE HRC

The call made in the Vienna Declaration and Programme of Action to the human rights monitoring bodies to include the status and human rights of women in their work entailed, amongst other things, a request to address these matters in the same manner as other 'traditional' human rights concerns are dealt with, that is to say consistently under each of the provisions that they affect, and not in an isolated manner, for example under the heading of 'women and children'.

Most of the issues discussed in this chapter are addressed individually in a separate paragraph, thus a paragraph for example on domestic violence or on trafficking. Some issues are often dealt with together. For example, the HRC will often express its concern about violence against women and then refer to the incidences of rape and of domestic violence. This is different, however, when it concerns actions by state officials, or in situations of armed conflict. In regard to these situations, the Committee addresses several issues in a paragraph that are all carried out by state agents and which constitute human rights violations. For example, with regard to rape in custody, the HRC addresses rape in a paragraph in which it discusses the prison conditions of a state party. Hence, it will not only pay attention to the incidences of rape in those circumstances, but also addresses, for example, overcrowding or the beating of detainees. The same holds true for rape in armed conflict or by armed forces. Here the

271 See for example the statements of the delegates in the dialogue with Sudan, SR Sudan 2007, UN doc. CCPR/C/SR.2459, para. 47, where the delegate spoke of an *ingrained social tradition*; and with CAR, SR CAR 2006, UN doc. CCPR/C/SR.2374, para. 10.

Committee addresses the violations that occur in the conflict area, not just paying attention to the rape of women that takes place.

In addition to this, trafficking, FGM and other phenomena that are addressed in this chapter under the heading of 'other harmful practices' are issues that are generally addressed separately.[272] As is noted in the description, in respect of trafficking, the HRC sometimes refers explicitly to women, sometimes only to children and in a number of occasions to 'women and children'. In those cases where it takes note of the purpose of trafficking, it generally concerns the purpose of sexual exploitation. In cases where the HRC also addresses trafficking in men, this is done in the same paragraph. Consequently, it is the matter of trafficking that is addressed and not so much who is being trafficked. The forms of violence against women as discussed in this chapter are therefore not addressed solely in a paragraph that deals with 'women issues' or 'women and children'. They are addressed, although individually, throughout the text of the COs as matters affecting several substantive provisions of the Covenant. Finally, it should be noted that the HRC hardly pays any attention to sexual exploitation of women outside the context of trafficking and on that account no conclusive statements can be made with regard to the context in which the HRC addresses these matters. In the three COs in which it pays attention to this phenomenon without referring to trafficking, it concerns three very different situations.

6 CONCLUSIONS

6.1 The work of the HRC and the request of the 1993 World Conference

The work of the HRC on physical violence against women shows that the Committee pays attention to situations that affect women's physical integrity. Moreover, following the research criteria identified in Chapter 2, the work of the Committee reflects compliance with the request made at the World Conference on Human Rights in 1993 on three of the four elements. The first element of the request made in Vienna requires the HRC to address those issues that are characteristic of the lives of women and which affect human rights. The study shows that the HRC pays attention to violence against women in general, i.e. without specifying it, and to many specific manifestations of violence. In its work it addresses rape and other forms of sexual abuse, domestic violence, trafficking, sexual harassment, female genital mutilation, honour crimes, female infanticide, dowry-related violence, sati and the pledging of girls. Hence, it addresses most of the issues that are mentioned in the UN Declaration on the Elimination of Violence against Women of 1993.

In order to combat these manifestations of violence, the HRC formulates different types of obligations for states parties. Hence, the work of the HRC also reflects compliance with the second element of the Vienna request: to not just formulate

272 In a number of COs FGM is addressed together with other forms of violence against women.

obligations for states to respect the human rights, but also to request them to take action to ensure them: to protect and to fulfil the rights enshrined in the Covenant. By far most obligations relating to the forms of physical violence against women addressed by the Committee fall under the heading of obligations to protect the rights of the ICCPR. States parties are recommended or even urged to criminalise various forms of violence, to prosecute the perpetrators and to punish them. But the recommendations also imply obligations to respect and to fulfil. It is noteworthy that the Committee in this respect not only recommends states to facilitate or provide for certain services, but that it also pays attention to the situation of women who have fled from violence, be it in the state party itself or from another country, and who may require a residence permit. Both with regard to trafficking and to FGM, the HRC, in a few COs, brings up the issue of residence for women who are affected by these phenomena.

And finally, the Committee does not address these manifestations of physical violence in an isolated section of its work, for example under the heading of 'women' or 'women and children', but pays attention to the various types of abuses throughout its COs. For that reason, the work of the HRC is also in line with the fourth element of the call made in Vienna. Consequently, for the bigger part, the HRC addresses situations that affect women's physical integrity in accordance with the request made in Vienna in 1993 to include the status and human rights of women.

Yet, it follows from the aforementioned that although the Committee already does a lot as regards physical violence against women, more needs to be done in order for the work of the HRC to fully reflect compliance the request of the 1993 World Conference. The third element, linking the manifestations of violence against women to discrimination of women in states parties, where applicable, is lacking in the work of the HRC, with a few exceptions. Although the Committee indicates that the forms of physical violence against women as described in this chapter constitute discrimination, as most of the issues are discussed in GC 28, which deals with equality of rights of men and women, and it often refers to Article 3 on the right to equality of men and women in its COs when it addresses these matters, the HRC does not expressly link these issues to discrimination of women in society. As mentioned, it is only in a few COs that the Committee brings up harmful gender ideologies in the context of physical violence against women. Nor do the obligations that the HRC formulates for states parties in respect of these issues indicate that in order to address violence against women, discrimination of women in societies needs to be tackled as well. For, as shown, the general trend with regard to the elimination of violence against women is not to focus on discrimination as a possible root cause, but rather on the investigation, prosecution and punishment of these crimes and on the facilities that should be available for victims. In that sense, the Committee only requests states parties to address the symptom of the disease, the manifestation of physical violence, but not the disease itself: gender inequality.

6.2 Opportunities in the work of the HRC

6.2.1 Attention for harmful Western beauty practices

The attention of the HRC for certain issues and the obligations that the Committee formulates for states parties shows that there is room for addressing a number of other issues that are also argued to affect women's human rights. A number of authors have referred to *Western beauty practices* as being harmful practices.[273] These *Western beauty practices* involve the modification of the female body, for example by excessive dieting, breast implants, liposuction or labiaplasty. It could be argued that these practices, like the phenomena addressed by the HRC, also result from ingrained gender inequality or harmful gender ideologies, and like the practices addressed by the HRC these Western practices fall within the definition of 'harmful traditional practice' as it is used for example by the UN in Fact Sheet 23 of the Office of the High Commissioner on Human Rights.[274] In light of the request made in Vienna in 1993, the notion that Western beauty practices constitute harmful practices invigorates the claim that the Committee should pay attention to these phenomena in its work. And considering the fact that the Committee already addresses other harmful practices which are argued to be of a similar nature, it appears that it can do so in light of its mandate.[275]

6.2.2 Attention for obstacles in obtaining justice and remedies

This chapter also shows that the HRC pays much attention to the criminalisation and prosecution of various forms of physical violence against women. As noted previously, this is an important aspect in fighting these phenomena and consequently commend-

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273 See on this matter the reports of the two former UN Special Rapporteurs on Violence against Women: Coomaraswamy and Ertürk: CHR, *Integration of the Human Rights of Women and the Gender Perspective*, 2002, UN doc. E/CN.4/2002/83, p. 27; Report of the Special Rapporteur on violence against women, Yakin Ertürk, *Intersections between culture and violence against women*, 2007, UN doc. A/HRC/4/34, paras. 47-48. See also Winter, B., D. Thompson, S. Jeffreys, 'The UN Approach to harmful Traditional Practices', *International Feminist Journal of Politics*, vol. 4, no. 1, pp. 72-94; Jeffreys, S., *Beauty and Misogyny: harmful cultural practices in the west*, Routledge, London, 2005; Howard, R., 'Health Costs of Social Degradation and female Self-Mutilation in North America', *Human Rights in the Twenty-First Century: A Global Challenge*, Mahoney, K., and P. Mahoney (eds), Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 503-516.

274 Jeffreys observes that beauty practices are the main instrument by which the 'difference' between the sexes is created and maintained. She observes that they create the stereotyped role for women of being sex and beauty objects having to spend inordinate amounts of time and money on makeup, hairstyles, depilation, creams and potions, fashion, botox, and cosmetic surgery. Jeffreys, S., *Beauty and Misogyny: harmful cultural practices in the west*, Routledge, London, 2005, pp. 29-30. See also OHCHR, UN Fact Sheet No. 23, *Harmful Traditional Practices affecting the Health of Women and Children*.

275 Howard for example compares the beauty practices of the West with FGM. Howard, R.E., 'Health Costs of Social Degradation and female Self-Mutilation in North America', *Human Rights in the Twenty-First Century: A Global Challenge*, Mahoney, K.E., and P. Mahoney (eds), Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 503-516.

able in light of the request made in Vienna in 1993. But given the importance attached by the HRC to the criminalisation of these forms of violence, it can be questioned why the Committee does not pay more attention to the obstacles that may prevent the actual prosecutions of manifestations of physical violence, and which therefore in themselves may affect the international human rights norms as laid down in the ICCPR.[276] These obstacles are not only found in de facto situations, such as the fact that for various reasons victims of violence are often unwilling to report incidences of abuse, but they can also be traced back to national laws. As far as the de facto obstacles are concerned, trafficking serves as a good example. Many of the victims of trafficking will not, for various reasons such as fear of repercussions or no freedom to leave the house without a so-called controller, file a complaint with the authorities.[277]

Criminal law, in turn, may require evidence of resistance or harm in the case of rape, require a woman to be married, or *honest*, in order to prosecute a rape case, or national law may either have too broad or too narrow definitions of trafficking, with serious implications for the actual victims of trafficking as well as those who argue that they work as sex workers voluntarily.[278] On the basis of national law, for example, trafficked women may be identified as smuggled migrants rather than trafficked persons. And as Gallagher notes, it certainly matters whether someone is identified as a victim of trafficking, as opposed to, for example, a smuggled migrant, for the difference in terms of rights and entitlements is substantial.[279] Not only do these issues

276 The paper by UNIFEM on a methodology for *Gender Specific Human Rights Research, Analysis, and Reporting*, as referred to by Bunch in her presentation to the UN Human Rights Council in 2007, proposes an examination of the effects of gender on four areas. The fourth area is that of the gender-specific barriers of access to remedies, such as lack of women's access to legal action or lack of economic resources. Bunch, C., 'Integration of Gender into the Human Rights Council', presentation delivered at the UN Human Rights Council, Geneva Interactive Panel, 20 September 2007, p. 3, http://www.cwgl.rutgers.edu/globalcenter/charlotte/HRCsept2007.pdf, accessed on 15 May 2009.

277 See for example Gallagher, A.M., 'Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination', *Georgetown Immigration Law Journal*, vol. 19, no. 1, pp. 99-123.

278 See on the matter of trafficking for example Askola, H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Hart Publishing, Oxford, pp. 32 – 34. With regard to rape see for example Viki, G.J., and D. Abrams, 'But She Was Unfaithful: Benevolent Sexism and Reactions to Rape Victims Who Violate Traditional Gender Role Expectations', *Sex Roles*, vol. 47, 2002, nos. 5/6, p. 289, which argues that research shows that rape victims who can be viewed as violating social norms concerning appropriate conduct for women, are attributed more blame than those who do not. See on this matter also Stevenson, K., 'Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases', *Feminist Legal Studies*, vol. 8, 2000, no. 3, pp. 343-344.

279 Gallagher, A.T., *Human Trafficking: International Law and International Responsibility*, PhD dissertation 2006, p. 285. Gallagher notes that in contrast to the Trafficking Protocol, states parties to the Migrant Smuggling Protocol will not be required to consider the possibility of permitting victims to remain in their territories temporarily or permanently. Moreover, there is no requirement for either the state of origin or the state of destination to take account of smuggled migrants in the repatriation process. Gallagher holds that the situation is even more poignant for trafficked persons who are identified merely as illegal or undocumented immigrants. These, she argues, are in most cases detained and quickly deported.

hinder the actual prosecution and punishment of certain acts, they could also, in themselves, constitute discrimination of women. This strengthens the idea that the HRC should, also in light of the request of 1993, pay attention to these issues.

6.2.3 Taking into account the specific characteristics of FGM

Human rights obligations have to be women-inclusive, and to that end the gender-specific characteristics of human rights abuses need to be taken into account. The HRC addresses FGM similarly to the other manifestations of physical violence discussed in this chapter. This means that the main recommendation for states parties with regard to FGM is to criminalise this practice. This recommendation is in keeping with reports of many organisations that fight FGM and which hold that criminalisation of a phenomenon facilitates a change in societal attitudes towards the practice.[280] It fits in with the recommendations of the CEDAW Committee with regard to this practice. This Committee holds, for example, in its general recommendation 24 that states parties should ensure the enactment and effective enforcement of laws that prohibit female genital mutilation.[281]

Yet, some comments are in order. For it can be questioned whether the Committee sufficiently takes into account that FGM is known to usually be performed for socio-cultural reasons by predominantly female private actors with apparent consent of the circumcised or her proxy.[282] If this is the case, this raises questions with regard to the prosecution of this phenomenon: for who will start the investigations, considering the fact that the practice is generally approved of by the society in which it takes place and people will therefore not often report incidences to the authorities?

Since FGM is not completely analogous to violent coercion of women by men, but a tradition that is performed for socio-cultural reasons, such as a rite of passage into womanhood and marriage ability and to curb sexual desire, it can be questioned whether criminalisation is the only or best means to combat this practice. Looking at organisations that operate in the field, it is evident that they also look for alternatives.[283] These may come in the form of medicalisation of the practice, which would be contrary to the obligation to respect as it is discussed in the previous section, but also in the form of symbolic interventions that do not involve cutting of the female

280 See for example WHO, 'Eliminating Female Genital Mutilation – An interagency statement', http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf, accessed on 15 May 2009, pp. 16-17. See also Packer, C., *Using Human Rights to Change Tradition – Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa*, Intersentia, Antwerpen, 2002.

281 CEDAW Committee, GC 24, para. 15.

282 Obiora, L., 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision', *Case Western Reserve law Review*, vol. 47, 1997, no. 2, p. 284.

283 See for reasons for the practice for example the report of UNFPA entitled 'A Holistic Approach to the Abandonment of Female Genital Mutilation/Cutting', published in 2007, http://www.unfpa.org/gender/practices1.htm, accessed on 31 February 2009.

genitalia.[284] The HRC does not address the matter of symbolic alternatives and does not formulate a duty for states parties to promote alternatives to FGM. The Committee does address the situation of the perpetrator. But it does so only in regard of prosecution of the person who performs this procedure. It has been questioned in several studies whether prosecution of the perpetrator is the most effective way to prevent FGM. The UNFPA report on FGM of 2007, for example, describes as a good practice the working with ex-circumcisers and practitioners to design credit programmes for alternative livelihoods. Perhaps a combination of the two approaches would be most beneficial in combating the practice: to offer alternatives or compensation to circumcisers and to institute proceedings against those that continue to practise FGM. As the focus of the HRC with regard to the elimination of FGM is mainly on criminalisation, it could be worthwhile to also pay more attention to the societal context and alternative practices so as to prevent the practice.

284 See for example Morris, K., 'Feature Issues on female genital mutilation/cutting – progress and parallels', *Lancet*, vol. 368, 2006, p. s65.

CHAPTER 5
PREGNANCY AND HUMAN RIGHTS THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1 INTRODUCTION

Whereas the two previous chapters discussed the work of the HRC, this chapter and the next chapter pay attention to the work of the CESCR with regard to the main research question. Like Chapter 3, the present chapter focuses on situations or issues that are related to pregnancy, comprising issues related to the prevention of a pregnancy, as well as situations where women are pregnant.

The mandate of the CESCR, the ICESCR, covers the right to the highest attainable standard of health. The Committee makes it clear in GC 14 and in its COs that this right includes a right to reproductive and maternal health. The Committee refers to many specific services and facilities that need to be available in states parties so as to comply with their obligations with regard to this right. In this respect the CESCR pays attention to for example national sexual and reproductive health programmes, family-planning services, sex education, contraceptive methods, and maternal healthcare.[1] In GC 14 the Committee lays down that:

> 'The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child […] may be understood as requiring measures to improve child and *maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information*.'[2] [Emphasis added]

Consequently, when these services or programmes are not available in states parties, this may mean that these states are not acting in accordance with their human rights obligations under the ICESCR.

In addition to examining the status as regards reproductive and maternal healthcare–related services in states parties, the Committee also addresses a number of specific situations that affect this right. In its work it refers to unsafe abortions, obstacles to a legal abortion and teenage pregnancies. In general, it links these matters explicitly to maternal mortality. Hence, in its work the Committee addresses both the facilities and programmes that need to be available in states parties so as to attain the

1 In a few instances, the CESCR refers to Article 10 on protection of the family, in regard to pregnancy-related matters. But this is only done explicitly in its lists of issues and rarely in its COs.

2 CESCR, GC 14, para. 14.

highest standard of reproductive and maternal health and it addresses a number of specific situations in which this state of health is affected. In addition to these matters that are discussed either explicitly or implicitly in light of maternal health and maternal mortality, the CESCR pays attention to a number of issues that are not necessarily addressed in light of *maternal* health. These are: forced sterilisation, abortion as a contraceptive method and abortion of female foetuses. Since the CESCR can, in light of its mandate, directly address certain reproductive and maternal health-related services and does not need to refer to certain situations in which the rights as laid down in their mandate are affected, the descriptive part of this chapter follows a slightly different structure from that of Chapter 3, which discusses the work of the HRC.

The next section of this chapter describes the work of the CESCR as regards the aforementioned issues. First, attention is paid to the issues that the Committee brings up with regard to maternal health and maternal mortality and second, attention is paid to the other matters related to situations which are related to pregnancy but which are not necessarily addressed in light of *maternal* health. In the subsequent sections, the results with regard to the other criteria as identified in Chapter 2 are discussed. As in the previous two chapters, the final section presents a conclusion with regard to the main research question.

2 THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND MATTERS RELATED TO PREGNANCY

2.1 Maternal health and associated mortality

2.1.1 Introduction

In the previous section it was noted that the CESCR addresses a number of reproductive and maternal health-related services and programmes which are required to attain the highest available standard of (reproductive and maternal) health. In addition to this, the Committee pays attention to a number of specific situations that affect the right to the highest available standard of health. These are: unsafe abortion, obstacles to a legal abortion and teenage pregnancies. The reproductive and maternal health-related services and programmes, as well as the specific health-affecting situations are often explicitly linked by the CESCR to maternal mortality. It thereby indicates that maternal mortality is a serious problem in regard to the right to health. In this section, attention is first paid to the statements of the CESCR on the facilities and programmes that should be available in states parties so as to attain this highest standard of health and to prevent associated mortality. Subsequently, the statements and accompanying recommendations of the Committee with regard to specific situations in which harm is inflicted on women's bodies, such as unsafe abortions and teenage pregnancies, are described.

2.1.2 National comprehensive sexual and reproductive health programmes

States parties to the ICESCR are held to adopt a national health policy with a detailed plan for realising the right to health.[3] Both from GC 14 and from the COs of the CESCR, it is clear that such a national policy should also include a policy on sexual and reproductive health. In GC 14, the Committee notes that public health infrastructures should provide for sexual and reproductive healthcare services, including safe motherhood, particularly in rural areas.[4] In its COs, the CESCR expresses its concern about the lack of comprehensive sexual and reproductive health programmes in states parties or their inadequacy.[5] For example, in its COs on Honduras, the Committee expresses its concern about the problems encountered by the state party in its efforts to implement its reproductive health policy.[6] A representative of the Honduras government had explained during the constructive dialogue between the CESCR and the state party that the Catholic Church and certain organisations fiercely opposed the reproductive health policy of the Ministry of Health.[7] The Committee subsequently recommends in its COs that Honduras continue to implement its reproductive health policy.[8]

In its other COs, the CESCR urges states parties to adopt and implement a national sexual and reproductive health programme, or, in those instances where these national policies prove to be insufficient, recommends to intensify or reinforce the implementation of national programmes.[9] In its COs on Guatemala of 2003, for example, the CESCR recommends that the state party takes measures to reduce child mortality and maternal mortality, and in particular intensify the implementation of its National Sexual and Reproductive Health Programme.[10]

The issue of national reproductive health policies is usually brought up in combination with, or in direct reference to, high maternal death rates or, in some instances, illegal abortions. For example, in its COs on Nepal of 2001 the Committee notes:

> 'The Committee urges the state party to take remedial action to address the problems of clandestine abortions, unwanted pregnancies, and the high rate of maternal mortality. In this regard, the Committee urges the state party to reinforce reproductive and sexual health programmes, in particular in rural areas, and to allow abortion when pregnancies are life threatening or a result of rape or incest.'[11]

3 CESCR, GC 14, paras. 36 and 43.
4 Ibidem, para. 36.
5 COs Yemen 2003, paras. 15 and 34; COs Azerbaijan 2004, paras. 30 and 56; COs Kuwait 2004, paras. 23 and 43; COs Cameroon 1999, para. 25.
6 COs Honduras 2001, para. 27.
7 SR Honduras 2001, UN doc. E/C.12/2001/SR.8, para. 23.
8 COs Honduras 2001, para. 48.
9 COs Yemen 2003, para. 34; COs Colombia 2001, para. 45; COs Bolivia 2001, para. 43; COs Guatemala 2003, para. 43; COs Nepal 2001, para. 55.
10 COs Guatemala, 2003, para. 43.
11 COs Nepal 2001, para. 55.

In one instance, the matter was addressed together with the increase of the incidence of sexually transmitted diseases (STDs) and HIV/AIDS.

In a few COs, the Committee pays explicit attention to the situation in rural areas.[12] In its COs on Yemen of 2003, for example, it expresses its concern about the high rate of infant mortality and maternal mortality and the insufficient availability of healthcare services, especially for women in rural areas.[13] It is clear from both GC 14 and the COs that the CESCR addresses the issue in light of the provision on the right to health.

From GC 14 and the COs, three important features of such a national sexual and reproductive health programme come to the fore: access to family-planning services and information; public awareness-raising campaigns; and sex education in school curricula. These three features will be discussed separately in the following paragraphs.

2.1.3 Family-planning services and information

In GC 14, the CESCR states that it interprets the right to health as an inclusive right extending not only to timely and appropriate healthcare, but also to the underlying determinants of health, such as access to health-related education and information, including on sexual and reproductive health.[14] It holds that the provisions for the reduction of the rate of stillbirths and of infant mortality and for the healthy development of the child laid down in Article 12 of the ICESCR may be understood as requiring measures to improve sexual and reproductive healthcare services, including access to family planning and access to information.[15] Moreover, in the section of the GC on women and the right to health, the Committee argues that the realisation of women's right to health requires the removal of all barriers interfering with access to healthcare services, education and information, including in the field of sexual and reproductive health.[16]

In addition to this, in its COs, the CESCR recommends to make family-planning services available to everyone,[17] to facilitate access to sexual and reproductive healthcare services, including access to family planning and information,[18] that family-planning services be provided by the public healthcare system,[19] that user fees for public and private family-planning services be eliminated,[20] that states parties support sexual and reproductive healthcare services,[21] and to review existing family-planning

12 COs Nepal 2001, para. 55; COs Yemen 2003, para. 15
13 COs Yemen 2003, para. 15.
14 CESCR, GC 14, para. 11.
15 Ibidem, para. 14.
16 Ibidem. para. 21.
17 COs Poland 1998, para. 20; COs India 2008, para. 77.
18 COs Philippines 2008, para. 31 ; COs Angola 2008, para. 37; COs Kenya 2008, para. 33; COs UNMIK 2008, para. 24; COs Former Yugoslav Republic of Macedonia 2008, para. 46.
19 COs Poland 2002, para. 50.
20 COs Kenya 2008, para. 33.
21 COs Malta 2004, para. 42.

policies with a view to increasing access to information concerning contraceptives through educational programmes.[22] The CESCR stresses in GC 14 that states parties should refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information.[23] Moreover, it holds that states are obliged to ensure that harmful social or traditional practices do not interfere with access to family planning, and that they should ensure that third parties do not limit people's access to health-related information and services.[24]

From both GC 14 and the COs it is clear that family-planning services and information are issues to be addressed in light of the right to health, irrespective of whether the state party has a high maternal death rate. On that account, the matter is only sporadically brought to attention in combination with maternal mortality.[25]

2.1.4 Public awareness-raising campaigns[26]

A limited or low level of knowledge by the general public of sexual and reproductive health issues is a matter of concern to the CESCR, as it demonstrates for example in its COs on Georgia and Azerbaijan.[27] For that reason, the Committee also deplores the lack of awareness-raising efforts concerning sexual and reproductive health in Benin.[28] In the latter case, the Committee recommends Benin to take steps to improve the awareness and knowledge of the public about reproductive health issues.[29] Whereas Georgia is urged to start programmes on sexual and reproductive education, Azerbaijan is recommended to develop a comprehensive sexual and reproductive health programme, including a public awareness-raising campaign about safe contraceptive methods.[30]

The recommendation to develop public awareness-raising campaigns is formulated in more COs, but is also formulated as an obligation for states parties as regards their

22 COs Cameroon 1999, para. 45.
23 CESCR, GC 14, para. 34.
24 Ibidem, para. 35.
25 See for example COs Philippines 2008, para. 31.
26 The CESCR does not only address the issue of information campaigns in light of matters of pregnancy and childbirth, but also as regards, amongst others, STDs, including HIV/AIDS, domestic violence, and harmful practices. This section only addresses the statements of the CESCR that it made specifically related to information campaigns on sexual and reproductive health in general or regarding pregnancy and childbirth.
27 COs Azerbaijan 2004, para. 30; COs Georgia 2000, para. 18. See also Lists of Issues Georgia 2002, para. 36, in which the Committee asks for information on what measures the state party had taken with respect to the improvement of awareness and knowledge of the public with regard to reproductive and sexual health. Or see List of Issues Austria 2004, para. 30, in which it asked for information on steps taken by the state to improve public awareness on matters pertaining to sexual and reproductive health.
28 COs Benin 2002, para. 23.
29 COs Benin 2002, para. 30. See on raising public awareness also COs Angola 2008, para. 37.
30 COs Georgia 2000, para. 42; COs Azerbaijan 2004, para. 56.

duty to fulfil the right to health in one of its GCs.[31] In GC 14, the CESCR notes that this duty includes information campaigns, in particular with respect to, inter alia, sexual and reproductive health.[32] In a few COs, the Committee recommends states parties to organise or intensify its educational campaign regarding women's sexual and reproductive health.[33] This is, for example, the case in the COs on Guatemala, where the CESCR recommends the state party to take measures to reduce child mortality and maternal mortality.[34]

It is clear from GC 14 that public awareness-raising campaigns are a matter to be taken up in light of the obligations of states with respect to the right to health. In its COs the issue is often addressed in combination with the high maternal death rate. Although a high maternal mortality rate necessitates such information campaigns, the COs on Georgia indicate that these campaigns should also be facilitated or provided for when states do not have many maternal deaths. In these COs, the Committee expresses its concern about the limited knowledge on pregnancy-related matters, without referring to any effects this may have on for example the number of illegal abortions or maternal mortality.

2.1.5 Sex education

The previous paragraph states that the CESCR interprets the right to health as an inclusive right extending not only to timely and appropriate healthcare but also to the underlying determinants of health. In this respect, the Committee considers access to health-related education, including on sexual and reproductive health, to be an element of this right.[35]

In its COs, the CESCR recommends states to include or ensure reliable and informative sexual and reproductive health education in school curricula.[36] For example, in its COs on El Salvador, the Committee states that:

> 'The Committee recommends that school curricula openly address the subjects of sex education and family planning in order to spread information on early pregnancy and the transmission of HIV/AIDS.'[37]

31 See next to the COs on Benin, Georgia, and Azerbaijan, as mentioned in the previous, also COs Kenya 2008, para. 33.
32 CESCR, GC 14, para. 36.
33 COs Bolivia 2001, para. 43; COs Guatemala 2003, para. 43; COs Mexico 1999, para. 43.
34 COs Guatemala 2003, para. 43.
35 CESCR, GC 14, para. 11.
36 COs Poland 1998, para. 20; COs Mexico 1999, para. 43; COs Jamaica 2001, para. 30; COs Senegal 2001, para. 47; COs Bolivia 2001, para. 43; COs Poland 2002, para. 50; COs Benin 2002, para. 42; COs Guatemala 2003, para. 43; COs Chile 2004, para. 54; COs Angola 2008, para. 37; COs Kenya 2008, para. 33 ; COs Bolivia 2008, para. 27 ; COs India 2008, para. 77 ; COs Paraguay 2008, para. 32.
37 COs El Salvador 2007, para. 44.

In those cases where it finds education on these subjects inadequate, it recommends the state to strengthen its education programmes on sexual and reproductive health.[38]

Especially in light of the realisation of women's right to health, the CESCR notes in GC 14 that all barriers interfering with access to education on sexual and reproductive health should be removed.[39] It also indicates in its COs that it is not only women that should be targeted by education on these topics. In its COs on Honduras, the Committee notes with concern that educational programmes on these matters often only target women. It holds here that the state party should develop training programmes for both men and women.[40]

Finally, the CESCR argues, as is also mentioned in the previous paragraph on family planning, that states should, in light of the obligation to respect the right to health, refrain from censoring, withholding or intentionally misrepresenting sexual education.[41]

It is clear that the CESCR makes its comments in GC 14 in light of the right to health, as has already been frequently cited. Its statements in its COs on sex education are also made in light of the compliance of states parties with their obligations under the right to health. In its COs on Poland of 1998, the Committee states, for example, that:

> 'The Committee recommends that every effort be made to ensure women's right to health, in particular reproductive health. It recommends that family planning services be made available to all persons, including counselling on safe alternatives to contraception and reliable and informative sex education for school-age children.'[42]

However, in most COs the CESCR does not explicitly refer to the right to health as such. In almost all of its COs where it addresses sex education, it addresses the subject in light of the high rate of maternal mortality in the state party as a result of illegal abortions of unwanted pregnancies.[43] The fact that educational programmes often only target women, as brought up in the COs on Honduras, is addressed together with the high rate of teenage pregnancies in the state party.[44] In a few COs, from 2004 onwards, the Committee addresses sex education not only in light of maternal health, but also with respect to the spread of STDs and HIV/AIDS.[45]

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38 COs Poland 2002, para. 28; COs Malta 2004, para. 42.
39 CESCR, GC 14, para. 21.
40 COs Honduras 2001, para. 27 and 48.
41 CESCR, GC 14, para. 34.
42 COs Poland 1998, para. 20.
43 COs Mexico 1999, para. 29; COs Jamaica 2001, para. 17; COs Senegal 2001, para. 47; COs Bolivia 2001, para. 43; COs Guatemala 2003, para. 43; COs Benin 2002, para. 23.
44 COs Honduras 2001, para. 27.
45 COs Chile 2004, para. 54; COs El Salvador 2007, para. 44; COs Libyan Arab Jamahiriya 2006, para. 36. In the latter document, the CESCR addresses sex education only in light of the spread of STDs and HIV/AIDS.

2.1.6 Access to contraceptive methods

Limited access to contraceptives or no access to affordable contraceptive methods is a matter of concern to the CESCR.[46] In its COs on Armenia, the Committee notes that the high cost of contraceptives leads to abortion being the most commonly used means of family planning.[47] On a similar note, the CESCR observes in its COs on the Philippines of 2008 that the low rates of contraceptives use and the difficulties in obtaining access to artificial methods of contraception, contribute to the high rates of teenage pregnancies and maternal deaths in the state party.[48] In GC 14, the Committee holds that states should refrain from limiting people's access to contraceptives.[49] But states should not only refrain from limiting access: limited access is a general point of concern, as is the limited knowledge among the general public of states with regard to the availability and use of contraceptives.[50]

In this respect, states are recommended to improve the awareness and knowledge of the public about reproductive health issues, and to develop reproductive health programmes including public awareness-raising campaigns about safe contraceptive methods.[51] In a number of other COs, either in relation to the number of unsafe abortions, the maternal mortality rate, or the fact that abortion was commonly used as a contraceptive method, the Committee also recommends states parties to strengthen their efforts to promote awareness of contraceptive methods.[52] Moreover, the CESCR holds that states should increase access to information on contraceptives,[53] make counselling on safe alternatives to contraception available to all,[54] make contraceptives available at affordable prices[55] and facilitate access to contraceptives by adolescents where appropriate.[56] In a few COs, moreover, the CESCR recommends that the state party adequately fund free distribution of contraceptives.[57] In its COs on Honduras the Committee notes with concern the problems encountered in the distribution and use of condoms as a result of resistance by certain groups.[58] In this case, it recommends

46 COs Poland 1998, para. 12; COs Mongolia 1999, para. 15; COs Poland 2002, para. 28; COs Philippines 2008, para. 31; COs Kenya 2008, para. 33.
47 COs Armenia 1999, para. 15. The matter of abortion being used as a contraceptive method is discussed in Section 2.3.
48 COs Philippines 2008, para. 31.
49 CESCR, GC 14, para. 34.
50 COs Mongolia 1999, para. 15; COs Georgia 2000, para. 18; COs Azerbaijan 2004, para. 30.
51 COs Georgia 2000, para. 30; COs Azerbaijan 2004, para. 56.
52 COs Russian Federation 2003, para. 63; COs Chile 2004, para. 54; COs Estonia 2002, para. 53.
53 COs Cameroon 1999, para. 45.
54 COs Poland 1998, para. 20.
55 COs Poland 2002, para. 50; COs UNMIK 2008, para. 24.
56 COs Jamaica 2001, para. 30.
57 COs Angola 2008, para. 37; COs Kenya 2008, para. 33.
58 COs Honduras 2001, para. 27.

the state party to implement its reproductive health policy, and on that account does not specifically address the availability of condoms as such.[59]

In its list of issues for Brazil in 2002, the CESCR inquires what forms of contraception are available, in particular for women.[60] A delegate from Brazil replied that under the Federal Family Planning Act health professionals were obliged to offer a full range of contraceptive methods. A colleague added that types of contraception available in Brazil included condoms, the diaphragm, the pill, the intra-uterine device and sterilisation. It is noteworthy that his colleague delegate had stated previously that the national Act placed strict conditions on sterilisation procedures. Amongst other things, only men and women who had at least two living children could be sterilised.[61] The Committee makes no statements about this restriction to sterilisation procedures in its COs. It only urges the state party to continue its prevention and care efforts in the field of health by providing sexual and reproductive healthcare services to the population, with particular emphasis on those for women, young people and children.[62] A similar inquiry is made by the CESCR in its list of issues for Jordan in 1999. Here it asks the state party to provide it with information on the birth control policy of Jordan and on the methods employed to this end.[63] It does not address this matter in its subsequent COs.

Although not always explicitly, the CESCR indicates that it addresses accessibility and availability of contraceptives in light of the right to health. Not only does it address the duty of states to refrain from limiting access to contraceptives in GC 14 on the right to health, it also explicitly refers to this right in its COs on Poland, where it holds that states should make every effort to ensure women's right to health, and should make counselling on safe alternatives to contraception available.[64] In the other COs the CESCR constantly refers to (sexual and reproductive) health,[65] to maternal mortality rates,[66] teenage pregnancies,[67] unsafe abortions,[68] the use of abortion as a contraceptive method[69] and on one occasion the HIV/AIDS epidemic.[70]

59 Ibidem, para. 48.
60 List of Issues Brazil 2002, para. 42.
61 SR Brazil 2003, UN doc. E/CN.12/2003/SR.8, para. 18.
62 COs Brazil 2003, para. 62.
63 List of Issues Jordan 1999, para. 28.
64 COs Poland 1998, para. 20.
65 COs Mongolia 2000, para. 15; COs Georgia 2000, para. 18; COs Jamaica 2001, para. 17; COs Honduras 2001, para. 27; COs Poland 2002, para. 28; COs Estonia 2002, para. 30; COs Republic of Moldova 2003, para. 49; COs Azerbaijan 2004, para. 56.
66 COs Cameroon 1999, para. 25 and 45; COs Mongolia 2000, para. 15; COs Jamaica 2001, para. 17; COs Russian Federation 2003, para. 35; COs Azerbaijan 2004, para. 56.
67 COs Cameroon 1999, para. 45: COs Jamaica 2001, para. 17; COs Honduras 2001, para. 27.
68 COs Jamaica 2001, para. 17 and 18; COs Russian Federation 2003, para. 35.
69 COs Armenia 1999, para. 15 and 19; COs Estonia 2002, para. 30; COs Republic of Moldova 2003, para. 49; COs Azerbaijan 2004, para. 56; COs Lithuania 2004, para. 50.
70 COs Cameroon 1999, para. 45; COs Azerbaijan 2004, para. 56.

2.1.7 Maternal healthcare

To ensure access to maternal healthcare is one of the core obligations of states parties under the right to health.[71] In GC 14, the CESCR notes that the provision about reduction of the rate of stillbirths and that of infant mortality and about the healthy development of the child as laid down in Article 12 of the ICESCR may be understood as requiring measures to improve children's health and maternal health, including access to pre- and post-natal care and emergency obstetric services.[72] On that account, in its reporting guidelines the CESCR requests information from states parties on the proportion of pregnant women that have access to trained personnel during pregnancy and the proportion attended by such personnel during delivery. In this light, it also asks states to provide figures on the maternal mortality rate, both before and after childbirth.[73] Following this provision, the CESCR expresses its concern in its COs about the fact that women do not receive adequate medical care,[74] about the health of pregnant women, in particular the relatively high maternal mortality rate, and the high adolescent pregnancy figures[75] and the high rate of maternal mortality which is attributed, inter alia, to the absence of medical assistance during childbirth.[76]

In GC 14 the CESCR formulates a number of general obligations for states parties that also include measures to address the maternal healthcare situation. It holds that in order to eliminate discrimination against women, states have to develop policies so as to provide access to a full range of high-quality and affordable healthcare, including sexual and reproductive services.[77] Moreover, in order to realise women's right to health, GC 14 requires states to remove all barriers that interfere with access to healthcare services, education and information, including in the area of sexual and reproductive health.[78] Following these lines, the CESCR also formulates a more specific obligation, namely that states are obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care.[79] The notion of interference by third parties was already mentioned before in the description of the work of the CESCR on reproductive information and education. Its statement on this issue in GC 14 is also relevant in this section, as the Committee holds that states should ensure that third parties do not limit people's access to health-related

71 CESCR, GC 14, para. 44 (a).
72 Ibidem, para. 14.
73 CESCR, Revised general guidelines regarding the form and content of reports to be submitted by states parties under Articles 16 and 17 of the ICESCR, 17 June 1991, UN doc. E/C.12/1991/1, Article 12 of the Covenant, para. 4 (g).
74 COs Azerbaijan 1997, para. 22.
75 COs Argentina 1999, para. 24.
76 COs Bolivia 2001, para. 23; COs Kenya 2008, para. 32.
77 CESCR, GC 14, para. 21.
78 Ibidem.
79 Ibidem, para. 35.

information and *services*.[80] As regards the obligations, and corresponding responsibility, the Committee states in its GC 14 that public health infrastructures should provide for sexual and reproductive healthcare services, including safe motherhood, particularly in rural areas,[81] that states should ensure reproductive maternal (prenatal, as well as post-natal) and children's healthcare,[82] and, moreover, that states should refrain from limiting access to means of maintaining sexual and reproductive health.[83] In addition to this, the Committee notes in GC 16 that Article 12 requires states parties to remove legal restrictions on reproductive health provisions, and to provide for adequate training for healthcare workers to deal with women's health issues.[84]

In its COs, the CESCR generally calls upon states to take measures to reduce the maternal mortality rate which is often the result from illegal abortion, but also by the conditions of maternal healthcare, such as that of unassisted childbirth.[85] In a few instances, the CESCR specifically recommends states parties for that reason to ensure access to adequate maternal healthcare services.[86] Noteworthy in this respect are the COs of the Committee on Kenya of 2008, in which the Committee lays down specific recommendations for the state party in regard to maternal healthcare. It recommends Kenya to

> '[T]ake immediate measures to ensure that (a) all pregnant women, including poor women, older women and women with HIV/AIDS, have affordable access to skilled care free from abuse during pregnancy, delivery, postpartum, postnatal periods, and to care of the newborn, including in remote rural areas; (b) the waiver of maternity fees in public hospitals and health facilities is effectively enforced without compromising the quality of services; […] (d) pregnant women with HIV/AIDS are not refused treatment, segregated in separate hospital wards, forced to undergo HIV/AIDS testing, and discriminated or abused by health workers, and that they are informed about and have free access to antiretroviral medication during pregnancy, labour and after birth, including for their children[…].'[87]

Only in one instance does the Committee not refer to maternal mortality in its recommendations when it addresses maternal healthcare. In its COs on Azerbaijan it notes that women are not receiving adequate medical care during pregnancy and childbirth.

80 Ibidem.
81 Ibidem, para. 44.
82 CESCR, GC 14, para. 36.
83 Ibidem, para. 34.
84 CESCR, GC 16, E/C.12/2005/4, para. 29.
85 COs Argentina 1999, para. 38; COs Bolivia 2001, para. 43; COs Democratic People's Republic of Korea 2003, para. 44; COs Nepal 2008, para. 25. In its COs on Nepal, the CESCR does not refer to *maternal* healthcare, but to limited access to healthcare which results in alarmingly high rates of maternal mortality and infant mortality.
86 COs Kenya 2008, para. 32; COs UNMIK 2008, para. 24.
87 COs Kenya 2008, para. 32.

It recommends the state to ensure that all women receive adequate medical care during pregnancy and childbirth.[88]

In its COs on Mexico of 2006, the CESCR refers explicitly to the lack of access to reproductive healthcare services and education in rural areas and in indigenous communities. It argues here that the state party has to ensure full access for everyone, especially girls and young women, to reproductive healthcare services and education, especially in rural areas and in indigenous communities.[89]

In general, the CESCR brings up maternal healthcare in the context of the right to health. Yet, on one occasion, in the COs on Azerbaijan of 1997, the CESCR expresses its regret over the maternal healthcare situation in reference to Article 10 of the Covenant, which deals with protection of the family.[90]

2.1.8 Unsafe abortions

2.1.8.1 Unsafe abortions as a general point of concern

A major point of concern to the CESCR are clandestine or unsafe abortions.[91] In its COs on Colombia, for example, it states to be deeply concerned about the low status of women's sexual and reproductive health rights and in particular about the increased incidence of illegal abortions.[92]

In almost all of its COs in which the Committee brings up unsafe abortions, it makes clear it that these practices are problematic because they result in high maternal death rates.[93] It is noteworthy that the CESCR almost never refers to the problem of maternal morbidity that results from unsafe abortions. Only in its COs on Chile of 2004, the CESCR expresses its concern about the large number of women who are hospitalised for abortion complications every year.[94] In its COs on Jamaica, the Committee expresses concern about the rising incidence of teenage pregnancies, leading to higher mortality rates related to abortion of unwanted pregnancies and to higher drop-out rates for girls who leave school to take care of their babies. It expresses its concern, moreover, about the fact that clandestine abortion is the cause of a large number of deaths due to infections and complications from procedures per-

88 COs Azerbaijan 1997, paras. 22 and 36.
89 COs Mexico 2006, paras. 25 and 44.
90 COs Azerbaijan, 1997, para. 22.
91 See for example COs Cameroon 1999, para. 25; COs Mauritius 1994, para. 15; COs Philippines 2008, para. 31; COs Kenya 2008, para. 33 ; COs UNMIK 2008, para. 24; COs Bolivia 2008, para. 14 ; COs Paraguay 2008, para. 21.
92 COs Colombia 2001, para. 24.
93 COs Russian Federation 2003, para. 35; COs Brazil 2003, para. 27; COs Mauritius 1994, para. 15; COs Cameroon 1999, para. 25; COs Mexico 1999, para. 29; COs Jamaica 2001, para. 17 and 18; COs Senegal 2001, para. 26; COs Nepal 2001, para. 32; COs Bolivia 2001, para. 23; COs Trinidad and Tobago 2002, para. 23; COs Panama 2001, para. 20; COs Mexico 2006, para. 25.
94 COs Chile, 2004, para. 26.

formed under unsanitary conditions by untrained personnel and that it is one of the leading factors in the high maternal mortality rate in the state party.[95]

In a few COs the CESCR notes that the rates of maternal mortality are especially high in rural areas.[96] Thus, for example, in the case of Nepal, where abortion is completely prohibited, the CESCR expresses its deep concern about the high rates of maternal mortality in general, and especially in rural areas, noting that this is mainly due to unsafe and illegal abortions. It also notes with deep concern that the female life expectancy in Nepal is lower than the male life expectancy.[97]

The CESCR recommends states to address the problem of clandestine abortions and to bring about a reduction of the number of deaths caused by this practice.[98] It calls upon states parties to monitor the female mortality rate closely and mentions some particular measures to bring about such a reduction, that is to say: to intensify the implementation of the national sexual and reproductive health programme, to organize educational campaigns regarding women's sexual and reproductive health, to include such subjects in school curricula, and to expand the availability and accessibility of reproductive and sexual health information and services.[99] The Committee urges the states parties to ensure that abortions are carried out under adequate medical and sanitary conditions and, as mentioned previously, requests them to take legislative and other measures, including a review of present legislation, to protect women from the effects of clandestine and unsafe abortions.[100] It is noteworthy that to this end, the CESCR recommends Kenya and UNMIK in its COs of 2008 to ensure access for all, including adolescents, to safe abortion services.[101] Yet, based on its context, it appears that one should not read a general obligation into this statement for states parties to ensure access to safe abortion services under all circumstances. It should be noted that it makes these statements in its COs on Kenya in reference to its concern about the limited access to sexual and reproductive healthcare services in the state party, and the unsafe abortions caused by this, especially in rural areas and deprived urban areas.[102] And also in its COs on UNMIK, reference is especially made to rural areas.[103] It therefore seems that the CESCR refers to an obligation for states parties that where abortion is legal, it should be accessible under safe circumstances.

95 COs Jamaica 2001, para. 17 and 18.

96 COs Nepal 2001, para. 32; COs Kenya 2008, para. 33; In COs Brazil 2003, para. 27, the Committee noted with concern the high rate of maternal mortality from illegal abortions in the *Northern* regions where women had insufficient access to healthcare facilities.

97 COs Nepal 2001, para. 32.

98 COs Mexico 1999, para. 43; COs Senegal 2001, para. 47; COs Panama 2001, para. 37; COs Nepal 2001, para. 55; COs Bolivia 2001, para. 43.

99 COs Mexico 1999, para. 43; COs Spain 2004, para. 40; COs Senegal 2001, para. 47; COs Panama 2001, para. 37; COs Bolivia 2001, para. 43; COs Kenya 2008, para. 33.

100 COs Russian Federation 2003, para. 63; COs Brazil 2003, para. 51; COs Azerbaijan 2004, para. 56; COs Spain 2004, para. 40.

101 COs Kenya 2008, para. 33; COs UNMIK 2008, para. 24.

102 COs Kenya 2008, para. 33.

103 COs UNMIK 2008, para. 30.

2.1.8.2 Unsafe abortions due to restrictive abortion laws

In line with its concerns about unsafe abortions, the CESCR criticises broad prohibitions of abortion in the law of states parties. In a number of lists of issues the Committee inquires after the legal status of abortion in the state party and subsequently addresses their restrictive abortion laws in its COs.[104] In its lists and its COs the Committee observes that restrictive abortion laws lead to clandestine abortions, which, as was set forth in the previous paragraph, lead to health risks for women and to maternal deaths.[105] In its COs on Poland of 2002, for example, the CESCR states to be concerned about the restrictive abortion laws, which, it notes, resulted in a large number of women risking their health by resorting to clandestine abortions.[106] In its COs on Chile, as mentioned in the previous section on clandestine abortions, the CESCR notes with concern the consequences for women's health caused by the legal prohibition on abortion without exceptions. In this respect it argues that the large number of women that are hospitalised for abortion complications every year is an indication of this problem.[107]

In its lists of issues, the Committee sometimes asks states to provide it with statistics on the number of illegal abortions, or the number of court decisions issued concerning these abortions, when the state party has restrictive abortions laws.[108] For example, in its list for Algeria of 2001, the CESCR asks the state:

> 'In view of the law authorising only therapeutic abortion, please provide information on the extent of illegal abortions and the number of persons prosecuted in this connection over the last five years. Please also provide information on protection to women who are forced to have illegal abortions.'[109]

The CESCR clearly expresses its objections to a complete ban on abortion.[110] In its COs on Nepal of 2001, it states to *note with alarm* that abortion is absolutely illegal and is considered a criminal offence, punishable by severe sentences, and cannot be carried out even when the pregnancy is life threatening or the result of rape or incest.[111] In cases like these, where states parties have such restrictive legislation on abortion, the Committee recommends or urges states to review their legislation on abortion and

104 List of Issues Portugal 1999, para. 20; List of Issues Poland 2001, para. 16; List of Issues Democratic People's Republic of Korea 2002, para. 14; list of Issues Chile 2003, para. 29.
105 List of Issues Portugal 1999, para. 21; List of Issues Algeria 2001, para. 25; List of Issues Poland 2001, para. 16; COs Poland 2002, para. 29; COs Poland 1998, para. 12; COs Chile 2004, para. 26.
106 COs Poland 2002, para. 29.
107 COs Chile 2004, para. 26.
108 List of Issues Portugal 1999, para. 21; List of Issues Algeria 2001, para. 25; List of Issues Ireland 2001, para. 29; List of Issues Poland 2001, para. 16.
109 List of Issues Algeria 2001, para. 25.
110 COs Nepal 2001, para. 33; COs Malta 2004, para. 41; COs Chile 2004, para. 26; COs Monaco 2006, para. 15; COs El Salvador 2007, para. 25; COs Philippines 2008, para. 31.
111 COs Nepal 2001, para. 33; COs Philippines 2008, para. 31.

to consider exceptions to the general prohibition of abortion for cases when pregnancies are life threatening or the result of rape or incest.[112]

2.1.9 Obstacles to legal abortion

In only one of its COs, the CESCR addresses the obstruction of access to legal abortion. That is in its dealings with the implementation of the Covenant in Mexico, where it expresses its concern about the obstruction of access to legal abortion after rape. It notes that such obstruction takes place in the form of misinformation, lack of clear guidelines, abusive behaviour directed at pregnant rape victims by public prosecutors and healthcare personnel, and legal impediments in cases of incest.[113] In this respect, the Committee recommends the state party to ensure and monitor the full access of rape victims to legal abortion.[114]

2.1.10 Teenage pregnancies

In various COs, the CESCR expresses its concern about the rate of teenage pregnancies in states parties,[115] referring to pregnancies amongst 'females of school age'.[116] In its COs on the Philippines, the Committee refers to the causes of teenage pregnancies in the state party as it notes that:

> 'The Committee is also concerned about the inadequate reproductive health services and information, the low rates of contraceptive use and the difficulties in obtaining access to artificial methods of contraception, which contribute to the high rates of teenage pregnancies and maternal deaths existing in the State party. (art. 12).'[117]

The Committee argues that teenage pregnancies are harmful to the health of the child and the mother.[118] In its COs on Jamaica, it observes that they lead to higher mortality rates in the state party due to the related abortion of unwanted pregnancies.[119] More-

112 COs Malta 2004, para. 41; COs Chile 2004, para. 53; COs Monaco 2006, para. 23; COs Philippines 2008, para. 31; COs El Salvador 2007, para. 44; COs Nepal 2001, para. 55. In the latter COs the CESCR did not urge the state party to *consider* exceptions, but urged the state party *to allow for;* COs Kenya 2008, para. 33.

113 COs Mexico 2006, para. 25.

114 COs Mexico 2006, para. 44.

115 COs Mauritius 1995, para. 13; COs Saint Vincent and The Grenadines 1997, para. 26; COs Honduras 2001, para. 27; COs Jamaica 2001, para. 17; COs Ecuador 2004, para. 29; COs Former Yugoslav Republic of Macedonia 2006, para. 26; COs Costa Rica 2007, para. 25; COs Philippines 2008, para. 31; COs Costa Rica 2008, para. 25.

116 COs Saint Vincent and The Grenadines 1997, para. 26.

117 COs Philippines 2008, para. 31.

118 COs Saint Vincent and the Grenadines 1997, para. 26.

119 COs Jamaica 2001, para. 17.

over, the CESCR notes in several COs that teenage pregnancies deprive the young women concerned of their opportunity to continue their education.[120]

The Committee recommends states parties to take measures to address the problem of teenage pregnancies.[121] In the case of Costa Rica, the CESCR makes a very general statement urging the state party to take preventive measures to address the problem of the high rate of teenage pregnancies.[122] But in other COs it formulates more specific recommendations. It recommends Mauritius for example to conduct:

> '[A]n in depth study and analysis of the situation of child abuse, child prostitution, domestic violence against women, *teenage pregnancy*, abortion, suicide as well as alcohol and drug abuse, and how State party can best protect and ensure the economic, social and cultural rights of the population of Mauritius affected by those problems. In relation to this, the State party should, inter alia, initiate efforts to gather statistics and other information relevant to the situation.'[123] [Emphasis added]

In various COs, the CESCR recommends states parties to implement a reproductive health policy and to provide and enhance access to sexual and reproductive healthcare services.[124] In this respect it emphasises that the focus of such programmes should be on women and on young persons.[125] In its COs on the Former Yugoslav Republic of Macedonia, the Committee holds that these services should include gynaecological and counselling services, and that particular attention should be paid to access to these services in rural areas and in communities where Roma and other disadvantaged and marginalised individuals or groups live.[126] In its COs on Jamaica, the Committee specifically urges the state party to facilitate access to contraceptives for adolescents where appropriate.[127] In addition to these measures that focus on the availability of reproductive healthcare services, the CESCR addresses in a few COs the aspect of sexual and reproductive awareness amongst men and women. It recommends states parties to develop training programmes and counselling services for both men and

120 COs Saint Vincent and the Grenadines 1997, para. 26; COs Honduras 2001, para. 27; COs Jamaica 2001, para. 17.

121 COs Costa Rica 2007, para. 46; COs Mauritius 1995, para. 18; COs Former Yugoslav Republic of Macedonia 2006, para. 46; COs Honduras 2001, para. 48; COs Ecuador 2004, para. 54 ; COs Philippines 2008, para. 31 ; COs Jamaica 2001, para. 30.

122 COs Costa Rica 2008, para. 46.

123 COs Mauritius 1995, para. 18.

124 COs Honduras 2001, para. 48; COs Former Yugoslav Republic of Macedonia 2006, para. 46; COs Philippines 2008, para. 31; COs Ecuador 2004, para. 54.

125 COs Honduras 2001, para. 48 ; COs Ecuador 2004, para. 54

126 COs Former Yugoslav Republic of Macedonia 2006, para. 46.

127 COs Jamaica 2001, para. 30.

women and urges them to ensure the provision of education on sexual and reproductive health.[128]

2.2 Forced sterilisation

In GC 14, the CESCR notes that the right to health includes a right to control one's body and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.[129] Although it does not explicitly mention forced sterilisation, this procedure can clearly be regarded as a form of non-consensual medical treatment, and is consequently contrary to the enjoyment of the right to health.

Yet, in general, the CESCR does not address this procedure in its COs. It is only in one case that the Committee touches upon the matter. During the considerations regarding the initial report of Brazil in 2002 and 2003, the CESCR received a report by Brazil's Civil Society and Congress, which held that sterilisation was a population policy of the state party and that often poor women were sterilised even without their knowledge or consent.[130] In its list of issues, the Committee asks the Brazilian delegation to clarify this information.[131] A delegate from Brazil replied that there had been isolated cases in the 1970s. In the 1980s, sterilisation had become the most popular form of contraception. As mentioned previously, healthcare professionals were obliged under the 1996 Federal Family Planning Act, in force at the time, to offer a full range of contraceptive methods. The Act, as noted in the previous section, placed strict conditions on sterilisation procedures: among other things, only men and women who had full legal capacity and at least two living children could be sterilised, and then only provided that they had received full information on other forms of contraception and on the irreversible nature of sterilisation. Healthcare professionals who did not comply with the law were liable to prosecution, the delegate said.[132] Another delegate, who subsequently had the floor, stated that while forced sterilisation might still be carried out by certain doctors and clinics, it had been criminalised. He continued by stating that in order to reduce the number of abortions, the Ministry of Health conducted information campaigns designed to avert unwanted pregnancies, especially among women with low incomes.[133] Evidently, the CESCR was not satisfied with the answers provided by the two delegates. In its COs it expresses concern about the persistence of forced sterilisation and urges the state party to continue its prevention

128 COs Honduras 2001, para. 48; COs Jamaica 2001, para. 30 ; COs Former Yugoslav Republic of Macedonia 2006, para. 46. It should be noted for the sake of completeness that in the COs on the Former Yugoslav Republic of Macedonia, the CESCR does not *urge* the state party to take these measures, but *recommends* it to do so.

129 CESCR, GC 14, para. 8.

130 List of Issues Brazil 2002, para. 1.

131 Ibidem, para. 27.

132 SR Brazil 2003, UN doc. E/CN.12/2003/SR.8, para. 18.

133 Ibidem , para. 23.

and care efforts in the field of health by providing sexual and reproductive healthcare services to the population, with particular emphasis on those for women, young people and children.[134]

As is evident from the aforementioned, the Committee discusses forced sterilisation in regard to the enjoyment of the right to health. Moreover, in its COs on Brazil, it addresses maternal mortality as a result of illegal abortions in the same paragraph.

2.3 Abortion as contraceptive method

The CESCR considers the use of abortion as a means of contraception to be a serious problem. It expresses its concern about this practice in a number of COs.[135] One of its statements in this regard is in its COs on Armenia of 1999. In its state report, Armenia informs the CESCR that due to inadequate education and the high cost of contraceptives, 39.4 % of all pregnancies in 1992 were terminated by an abortion.[136] The CESCR states to be alarmed by the fact that abortion remains to be the most commonly used means of family planning in Armenia and recommends the state party to set up family-planning programmes *for women***,** in particular to decrease the incidence of abortion.[137]

In other COs where the CESCR states to be particularly concerned that a high proportion of women resort to abortion as the principal method of birth control, it calls for public awareness-raising campaigns about sexual and reproductive health and about safe contraceptive methods.[138] It recommends Azerbaijan, for example, to develop a comprehensive sexual and reproductive health programme, including a public awareness-raising campaign about safe contraceptive methods.[139]

2.4 Abortion of female foetuses

In its dialogue with the Republic of Korea, the CESCR notes with deep concern the continued unequal status of women in the state party. It holds that persisting problems in this respect include the traditional preference for sons, which manifests itself in a high incidence of induced abortions of female foetuses that, according to the Committee, 'threaten the reproductive rights of women'.[140] The CESCR recommends the Republic of Korea insofar as traditional practices pose an obstacle to the fulfilment of some rights or perpetuate discrimination of any kind, including the preference for sons

134 COs Brazil 2003, paras. 27 and 62.
135 COs Azerbaijan 2004, para. 30; COs Armenia 1999, para. 15; COs Estonia 2002, para. 30; COs Republic of Moldova 2003, para. 49.
136 CESCR, Initial report of Armenia, 05/12/98, UN doc. E/1990/5/Add.36, para. 233.
137 CESCR, COs Armenia 1999, paras. 15 and 19.
138 COs Republic of Moldova 2003, para. 49; COs Azerbaijan 2004, para. 56; COs Estonia 2002, para. 53; COs Republic of Moldova 2003, para. 49; COs Lithuania 2004, para. 50.
139 COs Azerbaijan 2004, para. 56.
140 COs Republic of Korea 2001, para. 16.

and the abortion of female foetuses, to carry out large-scale public campaigns to promote understanding among the general public of human rights.[141]

In its COs on India of 2008, the CESCR expresses its concern about weak enforcement of the Pre-conception and Prenatal Diagnostic Technique (Prohibition of Sex Selection) Act, which it notes, has resulted in the high rate of abortions of female foetuses and a skewed sex ratio which continues to worsen. It recommends the state party to sensitise and train medical professionals on the criminal nature of sex selection with a view to ensuring stringent enforcement of the Prohibition of Sex Selection Act.[142]

In the same paragraph the Committee also notes with concern that the unequal status of women manifests itself in the patriarchal head-of-the-family system (ho-ju) as defined in law, in the high incidence of domestic violence, in the relatively low access by women to tertiary education, discrimination against women and sexual harassment at the workplace, and a large gap in the average salaries paid to women and to men.[143] With respect to these concerns the Committee does not explicitly refer to any provisions of the ICESCR.

3 PREGNANCY AND HUMAN RIGHTS OBLIGATIONS OF STATES PARTIES

3.1 Introduction

The obligations that are based on the rights enshrined in the ICESCR and are related to pregnancy-related matters mostly concern obligations to fulfil the rights as laid down in the Covenant, first and foremost the right to health. In this section the duties of states as regards their obligations to respect, protect and fulfil the rights enshrined in the Covenant with regard to pregnancy-related situations are discussed. As noted, the obligations follow, in general, from the provision on the right to health in the ICESCR. In a few instances, the CESCR refers to Article 10 on protection of the family, in regard to pregnancy-related matters. But this is only done explicitly in its lists of issues and almost never in its COs. For the sake of clarity, this section refers to the obligations that result from the right to health. Considering the fact that the CESCR, unlike the HRC, does not address pregnancy-related issues in its COs in light of different provisions, this section is slightly different in structure from that on pregnancy and human rights obligations of states parties discussed in Section 3 of Chapter 3 of this book, where the obligations are presented in regard to each of the different provisions that they are based on.

141 Ibidem, para. 43.
142 COs India 2008, paras. 17 and 56.
143 COs Republic of Korea 2001, para. 16.

3.2 Pregnancy and the obligation to respect the right to health

The introduction to this section states that the obligations that are based on the ICESCR and that relate to pregnancy-related situations mostly concern obligations to fulfil the rights in the Covenant. It follows from these obligations to fulfil and also the obligations to protect the rights of the ICESCR, which are discussed in the next two paragraphs, that states should refrain from performing certain actions, in order not to hinder, for example, the access to contraceptives as it should be facilitated. The CESCR makes it clear that in light of the obligation to respect, states should refrain from limiting access to family-planning services and methods, sex education, and maternal healthcare, as this would naturally be contrary to their obligation to ensure access to these services as will be described in the next paragraph on the obligation to fulfil the rights as laid down in the Covenant. Yet, in a few instances, the Committee also expressly addresses the obligation to respect the right to health, for example, when it argues that states should refrain from limiting the access to means of maintaining sexual and reproductive health.

In addition to limiting access, it follows from the fact that the CESCR considers forced sterilisation a point of concern that states parties themselves should not be involved in such a practice, or promote it.

With regard to abortion, the story is a different one. In principle, states are free to determine their own abortion policies. The work of the Committee indicates that states should refrain from imposing a general ban on abortion, for this pushes women into the arms of illegal abortionists. But it should be noted that a general prohibition of abortion is not necessarily a point of concern. The CESCR does not consistently inquire after the legislation on abortion in states parties and it does not request information on national abortion laws in its GCs. In GC 14 on the right to health, for example, the CESCR does not mention abortion or any other terms to that effect.

The notion that states are recommended to consider exceptions to a general prohibition on abortion for cases when pregnancies are life-threatening or the result of rape or incest, indicates that states are requested to refrain from prohibiting abortions in those circumstances, but in theory a general prohibition of abortion would only constitute a violation of the ICESCR or, more precisely, the right to health, if such a ban results in maternal morbidity or mortality.

3.3 Pregnancy and the obligation to protect the right to health

The CESCR considers reproductive and maternal health to be elements of the general right to health. On that account, states are not only held to fulfil this right, but, as is formulated in GC 14, also to protect this right.

In its work, the Committee explicitly refers to this obligation with regard to reproductive health. Not only does it note that states parties must ensure that third parties do not limit people's access to health-related information and education, it also specifically lays down that states are required to remove all barriers that interfere with

the access to healthcare services, education and information, including in the area of sexual and reproductive health. Moreover, the CESCR makes it clear in its COs that states should implement a reproductive health policy, despite opposition by certain groups, including religious groups, and it notes that states must ensure that harmful social or traditional practices do not interfere with access to family planning. Consequently, the responsibility of states to take measures to prevent actions from third parties in the so-called private sphere is far-reaching: states parties must ensure that they do not obstruct access to these services. Although the Committee does not explicitly address it, the same can arguably be said about hindering access to contraceptives. The CESCR argues that contraceptives should be affordable and accessible. Although it has never expressly held that states must *ensure* access to contraceptives, it makes it clear that it considers contraception an aspect of reproductive health and for that reason states parties are held to prevent obstruction by third parties to access of these family-planning methods.

The same, however, cannot be said of abortion. This is the result of the fact that states are not requested to ensure access to abortion services under all circumstances. Only if the pregnancy is the result of rape and if abortion is considered to be legal under national law, states arguably have such an obligation. For, although the CESCR has never expressly mentioned the role of third parties on this aspect, it does argue in this circumstance that the state must ensure and monitor full access to legal abortion. Since the state is, in principle, free to decide upon its abortion policies and abortion is thus in itself not a factor that necessarily affects the enjoyment of human rights, the CESCR does not discuss the role of third parties and the accompanying duties of state to protect the enjoyment of rights. What is striking here is that for this reason, the Committee also pays no attention to other obstacles that may prevent the resort to a legal abortion. Thus, it does, for example, not address excessive authorisation requirements for undergoing an abortion.

3.4 Pregnancy and the obligation to fulfil the right to health

Reproductive and maternal health are elements of people's health and for that reason part of the right to health as laid down in the ICESCR. On that account states are requested to take all measures necessary to guarantee the highest standard of reproductive and maternal health.

In its work, the CESCR formulates a number of obligations that indicate far-reaching responsibilities for states regarding their obligation to fulfil the right to health. States must *ensure* full access by everyone to reproductive healthcare services and education, *ensure* maternal healthcare, *ensure* that all women receive adequate medical care during pregnancy and childbirth, *ensure* reliable and informative sexual and reproductive health education in school curricula, and contraceptives *should* be accessible. It is clear that the CESCR considers family planning, including access to family-planning methods and sex education, and maternal healthcare to be matters that demand state regulation. The CESCR argues on that account that states should adopt

and implement a policy on sexual and reproductive health. Hence, it is evident that family planning and maternal healthcare are matters for which states bear responsibility and which it consequently cannot leave up to individual states to arrange themselves. Moreover, the formulation of the CESCR indicates, as noted, that states are not easily let off the hook when individuals do not have access to, for example, family-planning services. States are held to ensure these services. It is up to each individual state to consider what measures it needs to take in order to guarantee them.

The far-reaching responsibilities of states regarding the obligation to fulfil the rights contained in the Covenant do not apply to abortion. As mentioned, the CESCR in general does not consider abortion to be an aspect that should be addressed in light of the enjoyment of the rights as laid down in the Covenant. It is only when abortion creates health-related problems or when only female foetuses are aborted that the CESCR addresses the matter. Consequently, it does not follow from the work of the CESCR that there is an individual right to abortion under the ICESCR. The aforementioned also indicates that abortions are not contrary to the enjoyment of the rights laid down in the Covenant, provided that abortion is not used as a contraceptive method and that it is only female foetuses that are aborted. As far as the obligation to fulfil is concerned, the aforementioned indicates that states parties are not necessarily requested to ensure access to abortion services. States parties are only required to do so when it concerns rape victims and when national laws allow for abortion in the specific circumstances. This indicates that in principle the CESCR leaves it up to states to determine if and how it regulates abortion. But this freedom is limited to some extent: as regards the enjoyment of the right to health, states are held to prevent clandestine and unsafe abortions, and, on that account, states are requested to take legislative and other measures to that effect. In line with this notion, states must ensure that abortions are carried out under adequate medical and sanitary conditions. Thus, states are free to determine their own abortion policies as long as they do not force women to seek refuge with clandestine practitioners. As a general prohibition will undoubtedly result in many illegal abortions, the CESCR holds that in those cases states should consider exceptions to the general prohibition for cases when pregnancies are life-threatening or the result of rape or incest. It should be noted that the Committee only recommends states to consider exceptions to a ban on abortion in these two cases. This despite the fact that there clearly are more situations that may force women to undergo an abortion, even if it has to be an unsafe abortion due to restrictive laws.

Moreover, it is noteworthy that the CESCR hardly ever requests state parties to ensure access to abortion services in these instances. Contrary to the obligations of states as regards family planning and maternal healthcare, the state has a lot more freedom as to what measures it wishes to take to reduce clandestine abortions. Considering the terminology employed by the CESCR, a state is likely to have violated its obligations under the right to health when women do not have access to maternal healthcare, but this is not necessarily the case when women do not have access to abortion facilities. Yet its latest statements in its COs on Kenya and UNMIK of 2008 should not be overlooked, as they may prove to be indications of a different approach

for the future. In these statements, as noted in Section 2.1.8.1, the CESCR recommends the states parties to ensure access to safe abortions. Although from the context it is clear that the aim of the Committee is not to enforce a general right to abortion, it is clear that at least when abortion is legal, it should be accessible, so as to reduce the number of unsafe abortions. The fact remains, however, that the CESCR generally does not refer to an obligation for states parties to ensure that abortion is available, accessible and of good quality when the pregnancy is the result of rape of endangers the life of the pregnant woman.

In addition to clandestine abortions, the CESCR addresses the use of abortion as a contraceptive method. This indicates that in light of the ICESCR states bear at least some responsibility to fight these practices. It is interesting to note that in these instances the CESCR does not criticise the abortion policies of the state party, but focuses on the lack of information and access to safe contraceptives available in the state party. Thus, also in this respect, the state party is in principle free to determine its own abortion policies.

Finally, concerning abortion, some attention should be paid to the remarks of the Committee regarding the practice of aborting female foetuses. Like its statements concerning the practice of using abortion as a contraceptive method, it does not question the abortion policy of the state party, but focuses on the unequal status of men and women in society that causes this practice. The recommendation of the Committee does as such not concern the abortion policy, but focuses on the general understanding of the public of human rights, of which the state has to promote awareness. The state is thus not requested to prevent the practice of aborting female foetuses directly or to take criminal legislative measures to that effect.

4 PREGNANCY AND DISCRIMINATION OF WOMEN

4.1 Introduction

The principles of non-discrimination and equality are laid down in Articles 2 and 3 of the ICESCR and are thus explicit parts of the mandate of the CESCR. The importance of these principles is reflected throughout the work of the Committee, both in its COs and in its GCs where it pays attention to discrimination with regard to the matters discussed. In GC 14 on the right to health, the Committee makes specific comments with regard to discrimination and the right to health.[144] These comments reflect the prohibition of discrimination in all its forms, including discrimination according to race or sexual orientation, in addition to discrimination according to sex. The statements of the CESCR do not specifically focus on situations that women encounter and

144 See, for example, paras. 18 and 19 of this GC, which explicitly refer to non-discrimination and equal treatment. CESCR, GC 14, UN doc. E/C.12/200/4.

that affect their right to health and could reflect discrimination. Paragraph 18 of the GC reads, for example:

> 'By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.'[145]

In addition to GC 14, GC 16 exclusively deals with the equal right of men and women to the enjoyment of all economic, social and cultural rights. Here, the Committee notes that the equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognised under international law. Moreover, it argues that women are often denied equal enjoyment of their human rights, in particular by virtue of the lower status attributed to them by tradition and custom, or as a result of overt or covert discrimination.[146] It is interesting to note that the CESCR applies in this respect the definition of the CEDAW with regard to discrimination against women. It explicitly refers to this interpretation of the term in GC 16. The CEDAW definition, as presented in Chapter 2, holds that discrimination against women is 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.[147] The CESCR thus indicates that it employs a broad understanding of the principle of non-discrimination.

This does, however, not mean that the CESCR pays specific attention to the relation between certain pregnancy-related issues, be it de facto situations, laws or policies, and the discrimination of women. This section discusses the work of the Committee regarding its attention for direct discrimination, indirect discrimination and systemic discrimination in light of the pregnancy-related issues it addresses.

4.2 Pregnancy and direct discrimination

Throughout the world women suffer discrimination in many forms, also with regard to pregnancy-related matters. With respect to forms of direct discrimination women are, because of their sex, for example, denied contraceptives or withheld access to objective sex education.

145 CESCR, GC 14, UN doc. E/C.12/2000/4, para. 18.
146 CESCR, GC 16, UN doc. E.C.12/2005/4, paras. 1 and 5.
147 CESCR, GC 16, UN doc. E.C.12/2005/4, para. 11.

In GC 16, the CESCR notes that direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.[148] In this GC, the CESCR lays down that the implementation of Article 3 on equality between men and women, in relation to Article 12 on the right to health, requires at the least the removal of legal and other obstacles that prevent men and women from accessing and benefiting from healthcare on a basis of equality. It holds that this includes, inter alia, the removal of legal restrictions on reproductive health provisions. In GC 14 and its COs the CESCR specifies this notion and argues that states have to *ensure* access to these pregnancy-related facilities. On that account states parties are also held to prevent third parties from obstructing access and to guarantee access to these services for all. This follows not only from the provisions of the Covenant on non-discrimination and equality and GC 14, but also from the fact that in a number of COs the Committee itself analyses if women also had access to certain services. It asks Brazil for example in its lists of 2002 what forms of contraception are available, *in particular for women*. And with regard to women that use abortion as a contraceptive method, it requests the state party to set up family-planning programmes *for women*.

When the CESCR addresses these reproductive matters it does so in light of the right to health and not with regard to discrimination. Thus in general, it does not argue that when women are not granted access to certain services this constitutes discrimination. That is not to say that it would not consider this to be discrimination, but it has never addressed the matter as such. There is arguably one exception to this, be it that also in this case the Committee does not explicitly refer to discrimination or that it is related to a situation in which women are denied access to services on the basis of their sex. In its COs on Honduras of 2001, the CESCR notes with concern that educational programmes on sexual and reproductive matters often only target women. It holds that Honduras should develop training programmes for both men and women. Hence, in this case, the discrimination lies in the fact that the programmes *only* target women.

It should thus be concluded that the Committee has never explicitly referred to direct discrimination in those situations where it addresses pregnancy-related matters. This despite the fact that it is evidently contrary to the enjoyment of the rights as laid down in the Covenant, as is also emphasised by the comments of the Committee in GC 16.

4.3 Pregnancy and indirect discrimination

Only women have the capacity to get pregnant and give birth. Hence, it is only women that require certain services, such as maternal healthcare. When a state does not provide for such services, although arguably for prima facie objective reasons, this may constitute discrimination of women indirectly. Moreover, due to their characteris-

148 Ibidem, para. 12.

tic reproductive functions, women will feel the consequences of the lack of family-planning services, contraception and sex education, for example, much more strongly than men, as it is women who risk having to carry a pregnancy against their will. For that reason, also seemingly objective pregnancy-related policies may in effect constitute indirect discrimination.

In GC 14, the CESCR shows that it is also particularly concerned about the enjoyment of the right to health by women and it pays specific attention to their needs regarding the enjoyment of this right. It notes that in order to eliminate discrimination against women, states have to develop policies so as to provide access to a full range of high-quality and affordable healthcare, including sexual and reproductive services. In its COs, the Committee never expressly refers to indirect discrimination regarding reproductive matters. However, it should be noted that the CESCR does request states to ensure access to reproductive and maternal healthcare services for all. Hence, it does address the matter of access to these services for women, but not as a matter of discrimination but rather (solely) as an impediment of the right to health.

This is different when it concerns abortion. It could be argued that, for example, restrictive abortion laws ultimately discriminate against women. After all, it is women who suffer the consequences of an unwanted pregnancy even more when they have to turn to clandestine practitioners. The CESCR never addresses abortion in such a way. This is not very surprising, considering the fact that it does not necessarily consider abortion to be a matter that falls within the realm of the human rights laid down in the ICESCR. For if restrictive abortion legislation were considered a form of discrimination this could in effect indicate that states should in principle allow abortion, which is not a point of view shared by the CESCR, at least not until now.

4.4 Pregnancy and systemic discrimination

Usually practices and policies reflect the norms and morals present in a society. These practices and policies may therefore also reflect the unequal status that men and women have in that particular context. This unequal status may manifest itself in, for example, the role often attached to women as those of mothers and bearers of children. On that account, women may be refused contraceptives, including sterilisation, or access to these facilities could be subjected to restrictive and possibly discriminatory requirements.

In GC 16, the CESCR notes, as mentioned in the introduction, that women are often denied equal enjoyment of their human rights, in particular by virtue of the lower status attributed to them by tradition and custom.[149] Moreover, it holds that gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, such as freedom to act and to be recognised as autonomous, fully capable adults, to fully participate in economic, social and

149 CESCR, GC 16, para. 5.

political development, and to make decisions concerning their circumstances and conditions. This is certainly true for pregnancy-related situations, where, for example, policies may imply or are even based on the premise that women should not make their own decisions regarding their reproductive lives.[150] Yet, the CESCR hardly ever links pregnancy-related issues in its COs to systemic discrimination of women. Although the Committee makes it clear that traditions, cultural ideas or customs should not prevent access for women to reproductive and maternal healthcare facilities and education as it requests states parties to ensure access for all to these services and notes in GC 14 that states must ensure that harmful social or traditional practices do not interfere with access to family planning or pre- and postnatal care. The CESCR hardly ever explicitly refers to gender inequality as a root cause for lack of reproductive and maternal health-related services. Only abortion of female foetuses is explicitly linked to the unequal status of women in societies. Similarly, the Committee does not address other important factors that may denote manifestations of systemic discrimination. Although the CESCR pays considerable attention to maternal mortality, and on a far smaller scale to maternal morbidity, it never questions these deaths in light of neglect by states parties of preventable causes of women's mortality and morbidity and as part of a larger social phenomenon of systemic discrimination against women.[151]

5 THE POSITION OF PREGNANCY IN THE WORK OF THE CESCR

In this section the work of the CESCR is discussed in light of the final criterion as identified in Chapter 2: an integral address of matters that affect women and which could indicate violations of human rights. The CESCR appears to address pregnancy-related issues first and foremost in light of the right to health and in a few instances in regard to the right to protection of the family. It usually refers to maternal mortality, but as was shown, this is not a prerequisite for addressing these issues. It also pays attention, for example, to reproductive facilities and clandestine abortions without explicitly linking them to maternal deaths. The Committee brings up these issues in light of the substantive provisions of the Covenant and not solely as 'women's issues'. Although a special section in GC 14 is dedicated to women and health, this does not mean that women's concerns are only addressed here. Throughout the GC as well as in its COs, different issues that affect women and their reproductive lives are addressed. For that reason it can be stated that the CESCR acts in conformity with this

150 See for example the report of UN Special Rapporteur on Violence against Women, Yakin Ertürk, of 2007 on intersections between violence and culture. Ertürk refers here to seemingly trivial cultural practices which complement gender ideologies that prioritize women's reproductive roles and reinforce, albeit in discrete forms, women's subordination. Report of the UN Special Rapporteur on Violence against Women, Yakin Ertürk, *Intersections between violence and culture*, UN doc. A/HRC/4/34, para. 47.

151 See also Cook, R., 'International Protection of Women's Reproductive Rights', *New York University Journal of International Law and Politics*, vol. 24, no. 2, p. 651.

aspect of the request of the World Conference on Human Rights to include the status and human rights of women.

6 CONCLUSIONS

6.1 The work of the CESCR and the request of the 1993 World Conference

The work of the CESCR on pregnancy-related issues reflects compliance with almost three out of the four elements of the request of the World Conference on Human Rights as identified in Chapter 2. This chapter shows that the CESCR addresses a variety of issues that are characteristic of the lives of women. The Committee does not only pay attention to certain pregnancy-related issues, it also specifically focuses on the availability of reproductive and maternal healthcare services in states parties. As it makes it clear that reproductive and maternal health are important components of the right to health as laid down in the ICESCR, the Committee pays attention to national sexual and reproductive health programmes, family-planning services, sex education, contraceptive methods and maternal healthcare. In addition to this it addresses unsafe abortions, obstacles to legal abortion, teenage pregnancies, forced sterilisation, abortion as a contraceptive method and abortion of female foetuses as issues of concern.

Since the CESCR pays a lot of attention to reproductive and maternal health-related services that need to be available and accessible in states parties, the recommendations in its COs often reflect an obligation to fulfil the rights as laid down in the Covenant, and, as was noted, in particular the right to health. With regard to the ICESCR, states have far-reaching obligations to facilitate and provide for reproductive and maternal healthcare services. States must *ensure* full access by everyone to reproductive healthcare services and education, *ensure* maternal healthcare, *ensure* that all women receive adequate medical care during pregnancy and childbirth, *ensure* reliable and informative sexual and reproductive health education in school curricula, and contraceptives *should* be accessible. The focus of the Committee here is certainly on obligations for states parties to fulfil the right to health and in that sense very much in line with the 1993 Vienna request to include the status and human rights of women in its work. Moreover, the CESCR holds that states parties should ensure that third parties do not obstruct access to reproductive and maternal health-related services.

Finally, it should be noted that the CESCR does not address these pregnancy-related issues in separate sections that only deal with women or with *vulnerable groups*, for example. Therefore, also on that account the work of the CESCR appears to be fully in line with the request made in Vienna in 1993.

But, similar to the work of the HRC, the work of the CESCR does not reflect compliance with the request of the World Conference on Human Rights in regard to Element III. In general, the Committee does not link pregnancy-related issues to discrimination of women. Although the CESCR observes in GC 16 that women are often denied equal enjoyment of their human rights, in particular by virtue of the lower status attributed to them by tradition and custom, it generally does not label the

pregnancy-related issues that it addresses as manifestations of deeply ingrained discrimination in societies or as expressions of the unequal, subordinate status of women. The only exception to this is in its COs on Korea, which shows that the CESCR at least recognises that certain concerns can be manifestations of systemic discrimination. In these COs, the Committee addresses abortion of female foetuses as manifestations of the unequal status of women in the state party.

It follows from the aforementioned lack of attention for the relation between certain issues characteristic of women's lives and their possible discrimination that the recommendations in its COS are not directed at eliminating possible deeply rooted discrimination against women, but focus on tackling the matters themselves. Thus the recommendations aim to combat the symptoms – the manifestations of the systemic discrimination, for example unsafe abortions – rather than their cause – the possibly deeply ingrained discrimination of women. As was shown, the CESCR recommends states to ensure that certain reproductive and maternal healthcare related services are available, but with the exception of abortion of female foetuses, it does not recommend states to address the discriminatory attitudes and ideas present in societies.

In addition to this, in regard to pregnancy-related matters, more steps need to be taken by the CESCR in order to fully reflect the second element of the Vienna request. Although the CESCR formulates many different recommendations for states parties so as to *fulfil* their obligations under the Covenant, the number of recommendations that reflect an obligation to *protect* these rights is limited. As far as the Vienna request is concerned it is important that all types of obligations – to respect, to protect, and to fulfil – are covered so as to effectively tackle certain issues that are characteristic of women's lives. The CESCR makes it clear in its work that states parties must ensure that reproductive and maternal healthcare facilities and methods are accessible and available. This indicates that states also have a duty to prevent third parties from hindering access to these services and in a few instances, the Committee also specifically refers to this obligation, for example when it holds that a state should implement a national reproductive health policy despite fierce opposition by religious groups. Yet, the CESCR has never made any specific recommendations explaining how states should protect the right to health, thus as regards how states should prevent third parties from obstructing access to these services. Hence, the Committee does not refer to an obligation of states to criminalise certain actions and to prosecute and punish the perpetrators of these actions. The CESCR does not formulate any obligation of that kind in light of pregnancy-related matters or with regard to situations in which a certain pregnancy-related practice is forced on women, such as forced sterilisation or abortion. The latter issue is not mentioned at all by the Committee and the former is addressed in only one of its COs. And there also, the CESCR does not argue that the state party should criminalise forced sterilisation and prosecute the perpetrators, but instead urges the state party to continue its prevention and care efforts by providing sexual and reproductive healthcare services to the population. Consequently, the work of the CESCR does not fully reflect compliance with the request of the 1993 World Conference. More work certainly needs to be done in regard to Element III – linking

pregnancy-related issues, where applicable, to discrimination of women in societies – but more action also needs to be taken as regards Element II – formulating women-inclusive human rights obligations for states parties.

6.2 Opportunities in the work of the CESCR

6.2.1 Attention for a right to abortion

Similarly to the HRC, the CESCR generally addresses abortion only when it concerns unsafe abortions, and when it addresses the de jure situation on abortion in states parties the CESCR, like the HRC, only explicitly requests states parties to allow for abortion when the pregnancy is the result of rape or when it endangers the life of the pregnant woman. Yet, the rationale employed by the Committee in addressing abortion shows that it could formulate more far-reaching obligations for states parties in this respect and could actually go as far as to indicate that women have a right to abortion under the ICESCR when the unwanted pregnancy affects their physical and/or mental health.

The ICESCR pays attention to unsafe abortion as an issue that leads to maternal mortality, which in turn is not in conformity with the right to health. Hence, the CESCR employs a similar line of argument as the HRC. Consequently, the arguments presented in Chapter 3 regarding the recommendations of the Committee to allow for abortion in national laws when the pregnancy is the result of rape or when it endangers the life of the pregnant woman also hold true here. These are not the only situations where women, who cannot have an abortion due to strict regulations, turn to unsafe practitioners. Hence, the argument brought forward in Chapter 3 can also be presented here: following the rationale of the Committee all unwanted pregnancies may lead to abortions and, when abortion is not legally available, will induce women to undergo an unsafe abortion, regardless of the reasons why women may want to have an abortion. On that account all restrictions on abortion procedures could be considered a matter of concern with regard to the implementation of the right to health and this would entail that states should allow for abortion under all circumstances. Although the CESCR recognises that strict abortion laws are problematic it has never, though probably not very surprisingly in light of the universal controversy surrounding the topic, formulated an obligation for states parties to allow for abortion. For the sake of completeness it should be noted here, however, that the focus of the CESCR, unlike that of the HRC, is much more on the de facto situation of unsafe abortion than on the de jure aspect of it, and its lack of attention for exceptions to abortion bans is therefore not very unexpected.

But unlike the HRC, the CESCR has other ways of addressing abortion. For Article 12 of the ICESCR explicitly refers to the right of the highest attainable standard of both physical and *mental* health. One could argue that an unwanted pregnancy may severely affect a woman's mental health and on that account necessitate an abortion. It is an aspect that so far has not been addressed by the Committee, probably for the

very same reason as what was just mentioned: to do so would indicate that a right to abortion exists when the mental condition of pregnant women necessitates it.

6.2.2 Attention for the availability of abortion services

The lack of addressing abortion in light of the health condition of the women concerned and only from the angle of maternal mortality also brings up another issue. Although the Committee pays much attention to the different reproductive and maternal healthcare services that should be available in states parties, it hardly addresses the availability of abortion services in states parties. Hence it does not, for example, explicitly formulate an obligation for states parties to provide for or facilitate them. The CESCR generally does not question states parties on whether women have access to abortion services, also in situations where this would be legal according to national law. It is, until 2008, only in its COs on Mexico of 2006 that it expresses its concern about the obstruction of access to legal abortion when the pregnancy was the result of rape. It notes that the obstruction took place in the form of misinformation, lack of clear guidelines, abusive behaviour directed at pregnant rape victims by public prosecutors and healthcare personnel, and legal impediments in cases of incest. And consequently, the Committee does not hold that abortion should be available and accessible when legal, but it holds that the state party should ensure that *rape victims* have access to legal abortion.

It is interesting to see that the Committee, in 2008, recommends in two of its COs to ensure access to safe abortion. As explained previously, from the context it appears that the CESCR refers to access in situations where abortion is legal under national law. It is important that the Committee continues this practice of recommending this measure for states parties and it is remarkable that the CESCR did not pay attention to the fact whether abortion is actually accessible in practice sooner, also in cases where abortion was legal according to national law. Instead of recommending states parties to consider exceptions to a complete ban on abortion, the Committee could recommend states to ensure that abortion is at least accessible, acceptable, available and of good quality when the life or health of the pregnant woman is at stake, or when the pregnancy is the result of rape, or under any other conditions when abortion is considered legal under national law. These recommendations would also be in line with its recommendations regarding the other reproductive and maternal healthcare matters discussed in this chapter, where the CESCR holds that states have to ensure access to those specific healthcare services.

6.2.3 Attention for post-abortion care

In addition to the aforementioned as regards abortion facilities, attention needs to be drawn to the lack of attention of the CESCR for the availability of care for women who suffer the consequences of an unsafe abortion. Unsafe abortions do not only result in mortality, for women may survive, but they also cause morbidity that women are likely

to suffer from for the rest of their lives. A study of the WHO in which the impact of mortality and morbidity due to unsafe abortion was combined, estimated that every year, there are 65 000 to 70 000 deaths and close to five million women with temporary or permanent disability due to unsafe abortion. The WHO observes that altogether some 24 million women currently suffer secondary infertility caused by an unsafe abortion.[152] The organisation explains that the outcome of complications of unsafe abortion depends on the availability and quality of post-abortion care, but also on women's willingness to turn to medical services and the readiness of medical staff to promptly deal with the complications. Consequently, the fact that the CESCR does not pay attention to post-abortion services entails that it does not formulate a number of obligations that could prove to be of vital importance with respect to the right to health of women who have had an illegal abortion. The importance lies in the fact that to help these women, post-abortion care should be available and accessible and for that reason barriers that prevent women from seeking this type of care should be removed. A specific barrier, which is addressed by the HRC, albeit not elaborately, is that of a duty placed on medical staff to report cases of women who have had an abortion. The CESCR does not address this matter in its work.

It is clear from the foregoing that access to and availability of post-abortion care for women who suffer from complications is a matter that affects the right to health. For that reason, the CESCR should consider formulating obligations for states parties to facilitate or provide for these abortion-related services.

152 According to the WHO, 189 states worldwide of the 193 states examined allow for abortion when the pregnancy is life threatening. See WHO, *Unsafe Abortion – Global and Regional Estimates of the Incidence of Unsafe Abortion and the Associated Mortality in 2003*, 2007, p. 16, http://www.who.int/reproductive-health/publications/unsafeabortion_2003/ua_estimates03.pdf, accessed on 4 July 2009.

CHAPTER 6
PHYSICAL VIOLENCE AGAINST WOMEN AND HUMAN RIGHTS THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1 INTRODUCTION

In its work, the CESCR pays attention to violence against women in general and to several of the specific forms identified in the UN Declaration.[1] This chapter presents the statements of the Committee with regard to the forms of violence against women which affect women's physical integrity. The CESCR does not often explicitly link these manifestations of violence to specific provisions of the Covenant, but the occasions where it does indicate that the matters discussed in this chapter are mainly addressed in light of Articles 10 and 12 of the ICESCR, on the protection of the family and the right to health, respectively. The description as it is presented in the following section refers to the provisions to which the Committee refers.

The subsequent sections have a similar structure as the one maintained in the previous chapters. This means that the statements of the CESCR with regard to the aforementioned issues are examined in light of the research criteria identified. This analysis will be followed by a conclusion.

2 THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND PHYSICAL VIOLENCE AGAINST WOMEN

2.1 Sexual violence

Sexual violence is clearly a matter that affects the enjoyment of the rights laid down in the Covenant, but only in six COs is the matter addressed by the CESCR without referring to a specific form of sexual violence, like rape. When the Committee explicitly talks of *sexual violence*, it usually does so in combination with domestic violence. In those instances, the Committee expresses its concern about the incidence of sexual and domestic violence and about the lack of measures taken to combat these phenome-

1 As noted in chapter 4, the term 'violence against women' as it is used in this book refers to the definition of the concept presented in the UN Declaration on the Elimination of Violence against Women. This declaration states that 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'. UN Declaration on the Elimination of Violence against Women, 1993, UN doc. A/RES/48/104.

na as well as the lack of legislation to criminalise such violence.[2] In these cases, it calls upon the states parties to take effective measures to combat the practices, including the enforcement of existing legislation and the extension of national awareness campaigns, and to provide adequate protection for the victims of these practices.[3] Noteworthy are in this respect the COs on the Philippines of 2008. Here the Committee is not concerned with sexual violence taking place in the state party itself, but with the fact that female migrant workers from the Philippines, especially those employed as domestic workers, nurses and care givers, often become victims of psychological abuse, physical and sexual violence and slavery-like working conditions in the countries where they work. It refers in this respect to Articles 6, 7 and 10 of the Covenant. The Committee holds to be concerned that these women, in particular those with an irregular status, encounter obstacles in obtaining legal protection and redress in cases of discriminatory treatment and abuse at the workplace and it recommends that:

> '[T]he State party implement effective policies to protect the rights of overseas Filipino workers (OFWs), inter alia, by
> (a) Improving existing services, such as counselling and medical assistance, provided by the Office for the Legal Assistance for Migrant Workers Affairs and diplomatic missions in countries of destination;
> (b) Concluding and invoking bilateral agreements with those countries of destination where discriminatory treatment and abuse are more frequent; and
> (c) Providing legal and consular assistance to its nationals seeking justice in case of discriminatory treatment and abuse at the workplace, including rape and sexual violence against women migrant workers, and ensuring that reports are investigated by competent authorities of the countries of destination.'[4]

In two instances, the CESCR addresses sexual violence in a different setting, namely in relation to armed conflict. In its COs on Bosnia and Herzegovina of 2006 the Committee notes to be gravely concerned about the absence of a coherent strategy to support victims of sexual violence suffered during the armed conflict and observes that national laws pertaining to civilian war victims are gender-insensitive and provide inadequate social protection for victims of sexual violence. It subsequently recommends that the state party ensure that victims of sexual violence suffered during the armed conflict of 1992-1995 obtain the status of civilian war victims, to devise and implement a coherent strategy at state level to protect the economic, social and cultural rights of victims of sexual violence and their family members, and to ensure the participation of victims of sexual violence in any decision-making processes affecting them.[5] Similarly in its COs on Serbia and Montenegro, the CESCR requests the state

2 COs Jamaica 2001, para. 14; COs Brazil 2003, para. 29; COs Trinidad and Tobago 2002, para. 30; COs Yemen 2003, para. 14.
3 COs Trinidad and Tobago 2002, para. 45; COs Yemen 2003, para. 33.
4 COs Philippines 2008, para. 21.
5 COs Bosnia and Herzegovina 2006, paras. 19 and 41.

party to ensure the provision of adequate counselling and other assistance to victims of physical and sexual violence and other traumatizing experiences related to armed conflict, in particular women and children.[6]

2.2 Rape[7]

2.2.1 Introduction

The Committee is concerned about the incidence of rape in states parties, in particular about marital rape. It expresses its concern about the matter and about the lack or inadequacy of legislation and policies on rape.[8] In its COs the CESCR strongly recommends the state parties to adopt legislation and other measures to combat spousal rape and to conduct a comprehensive review of the situation of women in all aspects of life, as members of the family, in the workforce and as public servants, in order to assess those situations in which women are at a disadvantage and to develop appropriate laws and policies to address their inequality.[9] In the latter COs it observes with concern that despite the welcome inclusion of offences of sexual violence in the reformed Criminal Code of 1999 and the offences of marital rape and domestic violence in the new Family Law of that same year, the lack of sensitisation concerning such crimes among the police and the lack of effective procedures to deal with those crimes leave women with little practical protection against violence in the home. The Committee recommends the state party to review all policies, laws and practices in the light of their potential effects on women and to take appropriate measures to ensure that women are not disadvantaged.[10]

In general, the Committee addresses the issue of marital rape together with domestic violence.[11] It does not refer to any specific provisions of the Covenant, from which an obligation to combat rape or marital rape is derived. Yet in its COs on the Republic in Congo, the CESCR presents rape as an aspect of discrimination against women. It notes here to be concerned about discrimination against women. It observes that marriage and family laws overtly discriminate against women as, for instance, adultery

6 COs Serbia and Montenegro 2005, para. 63.

7 This chapter does not discuss the statements of the CESCR on 'sexual abuse', for in general the Committee only speaks of 'sexual abuse' when it concerns children. Only in two COs does it not refer explicitly to this category of victims in relation to sexual abuse. In its COs on Kenya of 1993, the CESCR expresses its concern that the policies of the Kenyan government to ensure the protection of the economic, social and cultural rights of women and to discourage violence against, and sexual abuse of, women do not appear to be adequate. It makes no specific recommendations in relation to this concern. Furthermore, the Committee refers in its COs on Zambia of 2005 to sexual abuse without referring to any particular victims. Consequently, sexual abuse as such will not be dealt with in this description. See COs Kenya 1993, para. 20; and COs Zambia 2005, para. 7.

8 COs Greece 2004, para. 16; COs Georgia 2002, para. 18.

9 COs Syrian Arab Republic 2001, para. 40; COs UNMIK 2008, para. 23; COs Croatia 2001, para. 26.

10 COs Croatia 2001, para. 24.

11 See for example COs Greece 2004, para. 37; COs Jordan 2000, para. 16; COs Egypt 2000, para. 20.

is illegal for women but, in certain circumstances, not for men and while the national legal code provides that 30 per cent of the deceased husband's estate goes to the wife, in practice the wife often loses all rights of inheritance. Moreover, it notes in this respect that domestic violence, including rape and beatings, is widespread but rarely reported, and that there are no legal provisions for punishing the offenders. The Committee urges the state party to address the inequalities affecting women in society with a view to eliminating them, inter alia by adopting and enforcing appropriate legislative and administrative measures.[12] In its COs on Nigeria of 1998, the Committee addresses the matter of rape in a different setting. Here it expresses its deep concern about the rising number of homeless women and young girls, who are forced to sleep in the streets where they are vulnerable to rape and other forms of violence.[13] In the following paragraph the more specific recommendations with regard to rape and marital rape are discussed.

2.2.2 Awareness raising and training

The Committee urges states parties in a number of COs to combat rape through information campaigns and educational programmes. In most instances it refers to information on *marital* rape.[14] These information campaigns should be directed at medical personnel and law-enforcement officers as well as the general public. The campaigns are intended to raise awareness of the problem and to sensitise the public to the criminal nature of such acts.

2.2.3 Prosecution and punishment

Rape, including marital rape, is a criminal offence and should be prohibited in the national criminal codes of states parties. In several of its COs, the CESCR expresses its concern about the fact that marital rape is not criminalised and urges states parties to make marital rape a criminal offence.[15] In this respect, what is important is the definition given to rape in the national criminal code. In its COs on Ecuador of 2004 the Committee notes with concern the narrow definition of rape as a criminal offence in the Ecuadorian criminal code. During the constructive dialogue with the state party, Committee member Malinverni had observed that the definition of rape in the national penal code of Ecuador was very limited: victims either had to be under the age of 12 years or unable to offer any resistance. He noted that it was therefore very difficult for

12 COs Congo 2000, paras. 17 and 26.

13 COs Nigeria 1998, para. 23.

14 COs Greece 2004, para. 37; COs Georgia 2002, para. 36; COs Egypt 2000, para. 35; COs Liechtenstein 2006, para. 33. It is only in its COs on Georgia of 2002 that the CESCR refers to rape and not to marital rape.

15 COs Jordan 2000, paras. 16 and 31; COs Egypt 2000, paras. 20 and 35; COs Mongolia 2000, para. 23; COs Greece 2004, para. 37; COs UNMIK 2008, para. 23.

women to prove that they had been raped, and consequently the majority of cases went unreported.[16] In its COs, the Committee therefore urges the state party to amend its criminal code with a view to redefining the crime of rape to reflect international standards.[17] Similarly, the CESCR expresses its deep concern about the requirement of proof of penetration and active resistance by victims for convictions of rape in its COs on the Former Yugoslav Republic of Macedonia in 2008.[18] It recommends the state party to consider amending its Criminal Code, with a view to removing the requirement of proof of penetration and active resistance by victims for convictions of rape.[19]

Another important aspect of the prosecution and punishment of acts of rape is that they need to be reported. The CESCR expresses its concern in its COs that rape is rarely reported.[20] It observes that this is both for cultural reasons as well as the economic dependency of wives on their husbands.[21] The Committee argues that attention should be given to addressing and overcoming socio-cultural barriers that inhibit victims of rape from seeking assistance and recommends that adequate procedures and mechanisms be established to receive complaints and to monitor, investigate and prosecute instances of abuse.[22]

Finally, the CESCR pays attention to the punishment of the perpetrators of rape.[23] In its COs on Georgia it notes with concern the de facto impunity with which rape is committed and in its COs on the Republic of the Congo it expresses its concern that there are no legal provisions for punishing the offenders of this act.[24] In its COs on the Philippines, the CESCR observes that rape, including marital rape, is criminalised, but that subsequent forgiveness of the wife extinguishes criminal liability. The Committee notes to be concerned about this and recommends that the state party repeal this possibility of extinguishing criminal liability in these circumstances.[25] In addition to this, the CESCR recommends Jordan to provide for appropriate penalties for perpetrators of marital rape.[26]

16 SR Ecuador 2004, UN doc. E/C.12/2004/SR.16, para. 74.
17 COs Ecuador 2004, paras. 25 and 50.
18 COs Former Yugoslav Republic of Macedonia 2008, para. 19.
19 Ibidem, para. 39.
20 COs Congo 2000, para. 17; COs Greece 2004, para. 16; COs Former Yugoslav Republic of Macedonia 2008, para. 19.
21 COs Greece 2004, para. 16.
22 COs Jordan 2000, para. 31.
23 See for example COs Georgia 2002, para. 18; COs Congo 2000, para. 17; COs Philippines 2008, para. 25; COs Former Yugoslav Republic of Macedonia 2008, para. 19.
24 COs Georgia 2002, para. 18; COs Congo 2000, para. 17.
25 COs Philippines 2008, para. 25.
26 COs Jordan 2000, para. 31.

2.2.4 Provisions for victims

The Committee urges states parties to strengthen their assistance to victims of marital rape and strongly recommends to provide them with adequate protection.[27] On a more specific note it urges Mongolia in its COs of 2000 to provide victims with shelters and recommends Jordan in that same year to strengthen its programmes for the rehabilitation and reintegration of rape victims.[28]

2.3 Sexual exploitation

2.3.1 Introduction

Sexual exploitation is a matter of concern to the CESCR. In several COs it expresses its concern about the problem of both trafficking in women as well as the sexual exploitation of women and children in the states parties.[29] In its COs on Germany the Committee makes a slightly different statement as it observes that widespread pornography is of particular concern as it seems to be linked with the exploitation of children and women.[30] In light of the problem of sexual exploitation, the CESCR urges Slovakia to adopt preventive programmes to combat this phenomenon and encourages Denmark to continue and strengthen its efforts to address these problems.[31] Along the same lines, the Committee welcomes legislation and policies adopted by states parties in order to combat sexual exploitation.[32]

In its COs on Cyprus, the Committee does not refer to sexual exploitation as such, but to forced prostitution. It urges the state party to closely monitor the phenomenon of forced prostitution with a view to rescuing victims who are trapped or forced into it and to protecting their rights under the Covenant.[33]

Finally, the comments of the Committee in its COs on Sweden deserve to be mentioned. Here it notes with regret that sexual exploitation of minors and women committed by Swedish citizens abroad is only punishable if the requirement of dual criminality is fulfilled and consequently urges the state party to repeal this requirement.[34]

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27 COs Greece 2004, para. 37; COs Liechtenstein 2006, para. 33; COs Syrian Arab Republic 2001, para. 40.
28 COs Mongolia 2000, para. 23; COs Jordan 2000, para. 31.
29 COs Slovakia 2002, para. 16; COs Ukraine 2001, para. 11; COs Costa Rica 2008, para. 24.
30 COs Germany 1998, para. 21.
31 COs Slovakia 2002, para. 30; COs Denmark 2004, para. 32.
32 COs Luxembourg 2003, para. 12; COs France 2001, para. 10; COs Germany 2001, para. 11. In its COs on Germany the CESCR lays down that it recognises the progress achieved against commercial sexual exploitation.
33 COs Cyprus 1998, para. 21.
34 COs Sweden 2001, paras. 23 and 39.

In the cases in which the Committee addresses sexual exploitation, in most cases it refers to sexual exploitation of children.[35] It is only in the few COs discussed here that it refers to sexual exploitation of women and children, yet it never speaks solely of sexual exploitation of women. By addressing the matter of sexual exploitation, it is clear that it is a phenomenon that affects the rights as laid down in the ICESCR. The Committee, however, does not refer to any specific provisions of the Covenant which are affected by the practice, nor does it expressly relate the phenomenon to the principles of non-discrimination and equality.

In a few of its COs the Committee addresses issues that are closely related to sexual exploitation, namely sex tourism and (forced) prostitution;[36] its statements with regard to these issues are discussed in the following two paragraphs.

2.3.2 Sex tourism

In a few instances, the Committee directly or indirectly expresses its concern about sex tourism.[37] In its COs on Jamaica of 2001, the CESCR lays down that it is deeply concerned about the lack of laws, policies and programmes that explicitly address the proliferation of sex tourism and its consequences, which include sexual exploitation and prostitution of women and children and the spread of sexually transmitted diseases.[38] In these COs as well as in those on the Dominican Republic and Nepal, the Committee explicitly directs its concern to the spread of HIV/AIDS in the states parties and attributes it, at least to some extent, to sex tourism.[39] For example in its COs on Jamaica, the Committee notes to be concerned that the prevalence of HIV infection among girls in their late teens is twice that of older women according to UNAIDS, which monitors this subject, and attributes this phenomenon to young women participating in the sex tourism trade.[40] In regard to the spread of HIV/AIDS, the Committee stresses the need to adopt new adequate legislative and social measures. It recommends in particular the launching of a specific and explicit information campaign on HIV/AIDS, its causes and prevention measures.[41] With regard to the sex tourism trade, the CESCR holds in its COs on Jamaica that it recommends the state

35 See for example COs Philippines 2008, para. 27.

36 It does not necessarily follow from the work of the CESCR that it considers prostitution a form of sexual exploitation or violence against women. Yet the fact that the Committee addresses the issue of prostitution in its COs on Sweden, as will be discussed in Paragraph 2.3.3. of this chapter, without referring to use of force, indicates that the phenomenon affects the rights of the ICESCR. For that reason, and because of the relation of prostitution to sex tourism, the topic is discussed here. There is no intention to make any statements as to whether prostitution should or should not be considered a form of sexual exploitation.

37 COs Jamaica 2001, para. 13; COs Dominican Republic 1997, para. 27; COs Nepal 2001, para. 35; COs Costa Rica 2008, para. 24.

38 COs Jamaica 2001, para. 13.

39 COs Dominican Republic 1997, para. 27; COs Jamaica 2001, para. 16; COs Nepal 2001, para. 35.

40 COs Jamaica 2001, para. 16.

41 COs Dominican Republic 1997, para. 44.

party to urgently take legislative and administrative measures to prohibit and penalise sex tourism and the exploitation of women and children in this regard.[42]

2.3.3 (Forced) prostitution

Only in three COs does the Committee explicitly refer to prostitution of women. This is in it COs on Sweden of 2001, where it welcomes the fact that the state party is committed to combating prostitution by strengthening its efforts to prevent trafficking in persons and by making the buying or even soliciting of sexual services a criminal offence,[43] in its COs on Cyprus of 1998, where it expresses its concern about the phenomenon of forced prostitution,[44] and in its COs on Nepal of 2008, where it expresses its concern about *Badi*, referring to widespread prostitution amongst the *Badi* caste, which it considers to be a *harmful traditional practice*.[45] With regard to the practice of *Badi*, the Committee urges the state party to strictly enforce the law prohibiting harmful practices that violate the rights of women and girls.[46] In its COs on the People's Republic of China, the CESCR also mentions the sale of women. Here it expresses its concern about the sale of women and children and links this problem to sexual exploitation of these women and children. On that account it does not make any recommendations with regard to prostitution as such, but urges the state party to adopt legislation that specifically criminalises the trafficking of human beings and to establish mechanisms to effectively monitor its strict enforcement and provide protection and assistance to victims of sexual exploitation.[47]

2.4 Domestic violence

2.4.1 Introduction

Domestic violence is a phenomenon that should be prevented and combated by states parties. The matter is addressed in specific terms in two General Comments of the Committee in which it notes, amongst other things, that failure to protect women against violence constitutes a violation of the obligation to the right to health, and that states parties are, when implementing Article 3, in relation to Article 10, required to provide victims of domestic violence with access to safe housing, remedies and redress for physical, mental and emotional damage.[48] It is clear from the COs that the Committee wishes to be informed by states parties on the incidence of domestic violence in

42 COs Jamaica 2001, para. 26.
43 COs Sweden 2001, para. 11.
44 COs Cyprus 1998, para. 21. These COs are discussed in the paragraph on sexual exploitation.
45 COs Nepal 2008, para. 15.
46 Ibidem, para. 34.
47 COs People's Republic of China 2005, paras. 19, 29, and 58.
48 CESCR, GC 14, para. 51; CESCR, GC 16, para. 27.

their territories and the measures they have taken to combat this phenomenon. It is in quite a number of these documents that it expresses its discontent at the fact that it has not received sufficient information on these matters and requests these states to provide such information in their next report to the Committee.[49] In a number of COs, the Committee commends states parties on the policies and legislation they have adopted in order to fight and eradicate this phenomenon.[50] But in many COs it also expresses its concern about the incidence of domestic violence in states parties and the lack of attention devoted to the matter by state authorities.[51] States parties are encouraged to collect statistical data and to carry out an in-depth study and analysis on domestic violence so as to identify the magnitude of the phenomenon and on how best to protect and ensure the rights of persons affected by these problems.[52] Yet, an in-depth study and the gathering of statistical data are not sufficient to guarantee the

49 COs Uruguay 1997, para. 14; COs Norway 1997, para. 222; COs Finland 1996, para. 16; COs Mauritius 1996, para. 240; COs Paraguay 1996, para. 10; COs Sweden 1995, para. 10; COs Bulgaria 1999, para. 31; COs Switzerland 1998, para. 34; COs Cyprus 1998, para. 23; COs Netherlands 1998, para. 26; COs Azerbaijan 1997, para. 37; COs United Kingdom of Great Britain and Northern Ireland 1997, para. 26; COs Suriname 1995, para. 53; COs Jamaica 2001, para. 27; COs Venezuela 2001, para. 26; COs Bolivia 2001, para. 37; COs Finland 2000, paras. 17 and 30; COs Liechtenstein 2006, para. 33; COs Denmark 2004, para. 30; COs Italy 2004, para. 43; COs Azerbaijan 2004, para. 23 and 49; COs Finland 1996, para. 23; COs Japan 2001, para. 43; COs Poland 2002, para. 25; COs People's Republic of China 2005, para. 57; COs Angola 2008, para. 24; COs Kenya 2008, para. 22; COs San Marino 2008, para. 29.

50 COs Cyprus 1998, para. 9; COs Poland 1998, para. 7; COs Dominican Republic 1996, para. 8; COs Norway 1995, para. 13; COs Sweden 2001, para. 10; COs France 2001, para. 8; COs Canada 1993, para. 7; COs Austria 2006, para. 6; COs Spain 2004, para. 5; COs Ireland 2002, para. 7; COs Trinidad and Tobago 2002, para. 6.

51 COs Switzerland 1998, para. 19; COs Israel 1998, para. 31; COs Cyprus 1998, para. 15; COs Sri Lanka 1998, para. 14; COs Poland 1998, para. 13; COs Dominican Republic 1997, para. 22; COs United Kingdom of Great Britain and Northern Ireland 1997, para. 14; COs Saint Vincent and the Grenadines 1997, para. 15; COs Russian federation 1997, para. 16; COs Dominican Republic 1997 para. 23; COs Mauritius 1996, para. 40; COs Guatemala 1996, para. 16; COs Guinea 1996, para. 19; COs Mauritius 1995, para. 13; COs Algeria 1995, paras. 294 and 296; COs Republic of Moldova 2003, para. 20; COs Guatemala 2003, para. 21; COs Algeria 2001, para. 17; COs Jamaica 2001, para. 14; COs Syrian Arab Republic 2001, para. 24; COs Panama 2001, para. 16; COs Nepal 2001, para. 19; COs Japan 2001, para. 16; COs Yemen 2003, para. 14; COs Senegal 2001, para. 25; Venezuela 2001, para. 16; COs Honduras 2001, para. 21; COs Finland 2000, para. 17; COs Portugal 2000, para. 12; COs Egypt 2000, para. 20; COs Liechtenstein 2006, para. 17; COs Mexico 2006, para. 19; COs Philippines 1995, para. 11; COs Azerbaijan 2004, para. 23; COs Ecuador 2004, para. 25; COs Lithuania 2004, para. 21; COs Greece 2004, para. 16; COs Uzbekistan 2006, para. 24; COs Norway 2005, para. 15; COs Serbia and Montenegro 2005, para. 23; COs Spain 2004, para. 17; COs Russian Federation 2003, para. 24; COs Brazil 2003, para. 29; COs New Zealand 2003, para. 15; COs Iceland 2003, para. 15; COs Slovakia 2002, para. 15; COs Poland 2002, para. 25; COs Georgia 2002, para. 18; COs Solomon Islands 2002, para. 10; COs Czech Republic 2002, para. 17; COs United Kingdom of Great Britain and Northern Ireland 2002, para. 17; COs Trinidad and Tobago 2002, para. 22 and 30; COs People's Republic of China 2005, para. 28 and 112; COs Kenya 2008, para. 22; COs UNMIK 2008, para. 23; COs Nicaragua 2008, para. 21; COs Ukraine 2008, para. 19 ; COs Paraguay 2008, para. 12 ; COs Latvia 2008, para. 21 ; COs Former Yugoslav Republic of Macedonia 2008, para. 19; COs Nepal 2008, para. 11.

52 COs Norway 1997, para. 225; COs Mauritius 1996, para. 245; COs Mauritius 1995, para. 13.

enjoyment of the rights laid down in the ICESCR. The Committee calls upon states parties to adopt appropriate legislation, policies and measures to prevent and tackle domestic violence and urges states that already have such mechanisms in place to intensify their efforts to combat the phenomenon more effectively.[53]

It follows from both the General Comments and the COs that domestic violence is a matter that affects Articles 10 and 12 of the Covenant concerning protection of the family and the right to the highest attainable standard of health, respectively. At the same time, violation of other rights may instigate or perpetuate domestic violence. The Committee notes for example in its COs on Canada of 1998 that the unavailability of affordable and appropriate housing creates an obstacle to women escaping domestic violence.[54]

In GC 16, the Committee argues that gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. It notes that states parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence by private actors.[55]

2.4.2 Awareness raising

The CESCR lays down in GC 14 that one of the specific duties of states parties with respect to their obligation to fulfil the right to health is their obligation to promote information campaigns with regard to domestic violence.[56] The obligation to start national awareness campaigns with respect to domestic violence is found in a number of COs.[57] The Committee indicates that states parties should promote or initiate

53 COs Cameroon 1999, para. 34; COs Uruguay 1997, para. 23; COs Paraguay 1996, para. 23; COs Suriname 1995, para. 16; COs Syrian Arab Republic 2001, para. 40; COs Cyprus 1998, para. 23; COs Netherlands 1998, para. 26; COs Dominican Republic 1997, para. 39; COs Algeria 2001, para. 33; COs Guinea 1996, para. 19; COs Argentina 1999, para. 39; COs Mexico 1999, para. 40; COs Finland, para. 23; COs Sweden 1995, para. 13; COs Estonia 2002, para. 41; COs Israel 1998, para. 44; COs Yemen 2003, para. 33; COs Guatemala 2003, para. 39; COs Ukraine 2001, para. 28; COs Venezuela 2001, para. 26; COs Egypt 2000, para. 35; COs Ecuador 2004, para. 50; COs Lithuania 2004, para. 43; COs Serbia and Montenegro 2005, para. 23; COs Spain 2004, para. 34; COs Russian Federation 2003, para. 52; COs Brazil 2003, para. 53; COs New Zealand 2003, para. 30; COs Slovakia 2002, para. 29; COs Poland 2002, para. 47; COs Georgia 2002, para. 36; COs Solomon Islands 2002, para. 23; COs United Kingdom of Great Britain and Northern Ireland 2002, para. 35; COs People's Republic of China 2005, para. 122.

54 COs Canada 1998, para. 28.

55 CESCR, GC 16, para. 27.

56 CESCR, GC 14, para. 36.

57 COs Algeria 1995, para. 301; COs Senegal 2001, para. 46; COs Italy 2000, para. 27; COs Italy 2004, para. 43; COs Brazil 2003, para. 53; COs Trinidad and Tobago 2003, para. 45; COs Mexico 2006, para. 38; COs Mongolia 2001, para. 23; COs Georgia 2002, para. 36; COs Guatemala 2003, para. 21 and 39; COs Algeria 2001, para. 17 and 33; COs Egypt 2000, para. 35; COs Liechtenstein 2006, para. 33; COs Uzbekistan 2006, para. 24 and 55; COs Angola 2008, para. 24; COs Kenya 2008, para. 22; COs Latvia 2008, para. 46.

awareness-raising campaigns so as to prevent and combat domestic violence.[58] Moreover, in its COs on Kosovo, the CESCR recommends the education of both healthcare workers and the general public on the need to report cases of domestic violence.[59] In discussing awareness-raising efforts regarding domestic violence, the Committee focuses either on the phenomenon itself or on the traditional customs and attitudes that underlie this practice. For example, in its COs on Guatemala of 2003 the CESCR urges the state party to combat violence against women, both within and outside the family, through, amongst other things, awareness-raising campaigns designed to combat the negative traditional practices and prejudices and their effects and consequences.[60] In its statements with regard to awareness raising regarding domestic violence, the Committee holds that states parties should inform the public about the practice as such, its criminal nature, or its consequences.[61] The campaigns should be directed at the general public.[62]

2.4.3 Training

In order to combat violence against women, the Committee finds it important that law-enforcement officials and members of the judiciary are provided with training on the criminal nature of this act.[63] On that account it expresses its concern about the lack of sensitisation concerning domestic violence among the police, which, it argues, leaves women with little practical protection against violence in the home.[64] The Committee notes that lack of appropriate training of police and other law-enforcement personnel is one of the causes of a lack of implementation of legislation on domestic violence

58 COs Algeria 1995, para. 301; COs Senegal 2001, para. 46; COs Italy 2000, para. 27; COs Italy 2004, para. 43; COs Georgia 2002, para. 36; COs Mongolia 2001, para. 23; COs Egypt 2000, para. 35; COs Liechtenstein 2006, para. 33; COs Uzbekistan 2006, para. 55; COs Nepal 2008, para. 35. In the case of Nepal, the CESCR speaks of starting a *major* information campaign to raise awareness.

59 COs UNMIK 2008, para. 23.

60 COs Guatemala 2003, paras. 21 and 39. Other COs in which the CESCR refers to traditional customs and attitudes are those on Suriname and Bolivia: COs Suriname 1995, para. 16; COs Bolivia 2001, para. 37. It should be noted here that in its COs on Suriname and Bolivia, the CESCR expresses its concern on violence against women and not specifically on domestic violence.

61 COs Liechtenstein 2006, para. 33; COs Mongolia 2001, para. 23; COs Georgia 2002, para. 36; COs Italy 2004, para. 43; COs Angola 2008, para. 24; COs Kenya 2008, para. 22.

62 COs Italy 2004, para. 43; COs Algeria 2001, para. 33.

63 COs Morocco 2006, para. 50; COs Denmark 2004, para. 30; COs People's Republic of China 2005, paras. 57 and 122; COs Algeria 2001, para. 33; COs Italy 2000, para. 27; COs Georgia 2002, para. 36; COs Solomon Islands 2002, para. 23; COs Russian Federation 2003, para. 52; COs Slovenia 2006, para. 34; COs Lithuania 2004, para. 43; COs Azerbaijan 2004, para. 49; COs Mexico 2006, para. 38; COs Georgia 2002, para. 36; COs Angola 2008, para. 24; COs Kenya 2008, para. 22; COs UNMIK 2008, para. 23; in its COs on Nicaragua, the CESCR recommends training for the police on women's rights: COs Nicaragua 2008, para. 21; COs Bolivia 2008, para. 33; COs Ukraine 2008, para. 42; COs Latvia 2008, para. 46 ; COs Nepal 2008, para. 35.

64 COs Croatia 2001, para. 13.

and for that reason strongly recommends that these state officials are given better training so as to disseminate and implement existing legislation on this crime.[65]

But the attention of the CESCR with regard to training concerning domestic violence is not only directed at education of law-enforcement personnel and members of the judiciary. In a few other COs it also addresses training of care workers and medical personnel.[66] For example in its COs on Jordan of 2000, the Committee recommends the training of law-enforcement officials, care workers, judges and healthcare professionals in identification, reporting and management of cases of abuse.[67] Consequently, these professionals should be informed on more than just the criminal nature of domestic violence. In a few other COs, the Committee also refers to education on the causes of these acts and on the specific needs and rights of the victims.[68] Moreover, the Committee observes in its COs on Brazil that the state party should ensure that the police are trained to handle violence against women, including domestic violence.[69]

2.4.4 Prosecution and punishment of perpetrators

The Committee holds in GC 16 that states parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.[70] Moreover, in GC 14 on the right to health, the CESCR observes that violations of the obligation to protect the right to health follow, amongst other things, from the failure of the state to protect women against violence or to prosecute perpetrators.[71]

In its COs it makes similar statements with regard to the situation in states parties. An important prerequisite for the prosecution and punishment of domestic violence is legislation criminalising such acts. In many COs, the CESCR expresses its concern about the lack of legislation on domestic violence.[72] Hence, it requests states parties

65 COs Panama 2001, para. 33; COs Honduras 2001, paras. 21 and 41.

66 COs Jordan 2000, paras. 16 and 32; COs Liechtenstein 2006, para. 33; COs Greece 2004, para. 37; COs Nepal 2008, para. 35.

67 COs Jordan 2000, paras. 16 and 32.

68 COs Bosnia and Herzegovina 2006, para. 43; COs Uzbekistan 2006, para. 55.

69 COs Brazil 2003, paras. 29 and 53.

70 CESCR, GC 16, para. 27.

71 CESCR, GC 14, para. 51.

72 COs Norway 2005, para 15; COs Malta 2004, para. 19; COs Slovenia 2006, para. 18; COs Morocco 2006, para. 23; COs Guatemala 2003, para. 21; COs Denmark 2004, para. 17; COs Ecuador 2004, para. 25; COs Uzbekistan 2006, para. 24; COs Syrian Arab Republic 2001, para. 24; COs Yemen 2003, para. 14; COs Iceland 2003, para. 15; COs Democratic People's Republic of Korea 2003, para. 39; COs Republic of Moldova 2003, para. 20; Nepal 2001, para. 19; COs Honduras 2001, para. 21; COs Monaco 2006, para. 14; Georgia 2002, para. 18; COs Czech Republic 2002, para. 17; COs Angola 2008, para. 24; COs Kenya 2008, para. 22; COs Sweden 2008, para. 21; COs Bolivia 2008, para. 20; COs Ukraine 2008, para. 19; COs Belgium 2008, para. 18; COs Latvia 2008, para. 21; COs Nepal 2008, para. 11.

to introduce specific legislation to prohibit domestic violence.[73] In addition to this, a few states expressly allow corporal punishment, or beating within the family. In its COs on Nigeria, the Committee condemns the existence of legal provisions which permit the beating or 'chastisement' of women by their husbands.[74] This comment followed from a discussion during the constructive dialogue between the CESCR and the delegation from Nigeria. Here Committee member Bonoandandan had said that according to many sources, the situation of the family, women and children in Nigeria was of great concern. She observed that with regard to domestic violence, Section 55 of the national penal code of the state party entitled husbands to beat their wives, that violence against women was very common and that the police rarely intervened.[75] A member of the Nigerian delegation replied by stating the following:

> 'With regard to domestic violence, traditional African society gave a man the right to administer corporal punishment to his wife, but there again, it was not government policy to encourage such practices, and if the punishment went beyond a certain limit, the man was liable to criminal proceedings for assault and battery. Battered women in Nigeria could file a complaint with the competent department of the Ministry of Women's Affairs, which normally took appropriate action.'[76]

As to the subject of chastisement, the Committee makes similar observations in its COs on Malta. Here the CESCR notes that corporal punishment within the family, in the form of 'reasonable chastisement', is not prohibited by law. In its COs, the CESCR encourages the state party for that reason to consider an explicit prohibition of this type of punishment.[77]

Another important feature of the prosecution of domestic violence is that cases of these acts need to be reported to the authorities. In a few COs, the Committee expresses its concern about the fact that many incidences of domestic violence go unreported.[78] In its COs on Greece of 2004, for example, the CESCR notes that:

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73 COs Russian Federation 2003, para. 24; COs Monaco 2006, para. 22; COs Italy 2000, paras. 6 and 27; COs Denmark 2004, para. 30; COs Morocco 2006, para. 50; COs Lithuania 2004, para. 43; COs Honduras 2001, para. 41; COs Iceland 2003, para. 25; COs Nepal 2001, para. 44; COs Mexico 2006, para. 38; COs Cameroon 1999, para. 34; COs Norway 2005, para. 34; COs Greece 2004, para. 37; COs Slovenia 2006, para. 34; COs Uzbekistan 2006, para. 55; COs Russian Federation 1997, para. 32; COs Georgia 2002, para. 36; COs Czech Republic 2002, para. 36; COs People's Republic of China, para. 122; COs Angola 2008, para. 24; COs Kenya 2008, para. 22; COs Sweden 2008, para. 21; COs Bolivia 2008, para. 33; COs Ukraine 2008, para. 42; COs Belgium 2008, para. 32 ; COs Latvia 2008, para. 46; COs Nepal 2008, para. 35.

74 COs Nigeria 1998, para. 21.

75 SR Nigeria 1998, UN doc. E/C.12/1998/SR.7, paras. 32 and 35.

76 Ibidem, para. 48.

77 COs Malta 2004, paras. 22 and 40.

78 COs Estonia 2002, para. 18; COs Italy 2004, para. 22; COs Bosnia and Herzegovina 2006, para. 21; COs Greece 2004, para. 16; COs Kenya 2008, para. 22; COs UNMIK 2008, para. 23; COs Former Yugoslav Republic of Macedonia 2008, para. 19.

> '[T]he Committee expresses its concern about the high incidence of domestic violence and marital rape, which often remain unreported for cultural reasons and the economic dependency of wives on their husbands.'[79]

The Committee generally makes no express recommendations with regard to this underreporting or on how states parties should tackle this problem, but there are a few exceptions in which it does do so. This is the case in its COs on Kenya, Kosovo (UNMIK), and the Former Yugoslav Republic of Macedonia, all of 2008. In its COs on Kenya, the CESCR recommends the state party to relax the sanctions for false allegations in Section 38 of the Sexual Offences Act of 2006 and to preclude its application in cases where acquittals are not necessarily based on the falseness of the complainant's allegations.[80] In its COs on Kosovo, the Committee recommends the state party, as mentioned previously, to educate healthcare workers and the public on the need to report cases of domestic violence.[81] And in the recommendations for the Former Yugoslav Republic of Macedonia, the CESCR urges the state party to encourage reporting of domestic violence through enhanced victim assistance and sensitisation of healthcare professionals and other professionals working with victims of domestic violence.[82]

Moreover, prior to prosecution, cases should be investigated. In its COs on Togo, the Committee notes with concern that the police rarely intervene in domestic violence cases.[83] It is, however, only in a few COs that the CESCR expressly addresses the duty of investigation.[84] It makes no specific recommendations in these COS with regard to the investigation of domestic violence cases.

In contrast, more comments are made by the CESCR with regard to the actual prosecution of these acts. In its COs on Jamaica, the Committee holds that the fact that domestic violence is committed with impunity constitutes a serious violation by the state party of its Covenant obligations.[85] Similarly, in several other COs the Committee expresses its concern about the lack of enforcement of legislation on domestic violence, and calls upon states parties to bring charges against the perpetrators of these acts.[86]

Finally with respect to prosecution and punishment, the Committee makes a number of statements as regards the platform competent to convict perpetrators. It is

79 COs Greece 2004, para. 16.
80 COs Kenya 2008, para. 22.
81 COs UNMIK 2008, para. 23.
82 COs Former Yugoslav Republic of Macedonia 2008, para. 39.
83 COs Togo 2001, para. 14.
84 See for example also COs Bosnia and Herzegovina 2006, para. 21; COs Ukraine 2008, para. 19; and COs Former Yugoslav Republic of Macedonia 2008, para. 19.
85 COs Jamaica 2001, para. 14.
86 COs Russian Federation 1997, paras. 16 and 32; COs Senegal 2001, paras. 6, 25, and 46; COs Panama 2001, paras. 16 and 33; COs Japan 2001, para. 43; COs Ecuador 2004, para. 50; COs Bosnia and Herzegovina 2006, para. 43; COs Luxembourg 2003, para. 36; COs Trinidad and Tobago 2002, para. 45; COs UNMIK 2008, para. 23; COs Sweden 2008, para. 21.

noteworthy that in two COs, the Committee welcomes the setting up, or the proposed establishment, of a special court to deal specifically with matters involving domestic violence. This is done in its COs on the Dominican Republic of 1997, and of Saint Vincent and the Grenadines of that same year.[87] Besides applauding these positive developments, the CESCR expresses its concern about the punishment of perpetrators. In its COs on Algeria of 1995 and 2001, the Committee observes that domestic violence is insufficiently addressed by the state party in terms of punishment and in its COs on Sweden of 1995 it draws attention to the need to ensure the introduction of appropriate penalties for domestic violence.[88] Along the same lines, it recommends Japan and Mexico in its COs to define and implement effective sanctions for the persons responsible for the violence, and in its COs on Paraguay, the CESCR makes it clear that a fine does not suffice.[89] In addition to this, in its COs on Greece of 2004 the CESCR strongly recommends the state party to provide information on the number and outcome of court cases related to these acts, and it recommends Kosovo to review its sentencing policies in this respect.[90]

2.4.5 Provisions for victims

The Committee pays considerable attention to the situation of victims of domestic violence and the laws and policies of the state party to alleviate their conditions. In its COs, the CESCR calls upon states parties to provide protection, assistance and support to victims of domestic violence.[91] In this respect, it pays specific attention to the availability and accessibility of shelters or crisis centres where victims of domestic violence can find safe housing.[92] On that account it welcomes the establishment of

87 COs Dominican Republic 1997, para. 5; COs Saint Vincent and the Grenadines 1997, para. 10.

88 COs Algeria 1995, para. 296; COs Algeria 2001, para. 17; COs Sweden 1995, para. 11.

89 COs Paraguay 2008, paras. 12 and 23.

90 COs Japan 2001, para. 43; COs Mexico 2006, para. 14; COs Greece 2004, para. 37; COs UNMIK 2008, para. 23.

91 COs Iceland 1999, para. 8; COs Cyprus 1998, para. 15; COs Russian Federation 1997, paras. 16 and 32; COs Norway 1995, para. 13; COs Finland 1996, para. 6; COs Azerbaijan 2004, para. 49; COs Russian Federation 2003, para. 52; COs People's Republic of China 2005, para. 122; COs Yemen 2003, para. 33; COs Syrian Arab Republic 2001, para. 40; COs El Salvador 2007, para. 41; COs Monaco 2006, para. 22; COs Lithuania 2004, para. 43; COs Liechtenstein 2006, para. 33; COs Mexico 2006, para. 38; COs Denmark 2004, para. 31; COs Lithuania 2004, para. 21; COs Slovenia 2006, para. 18; COs Russian Federation 2003, para. 24; COs People's Republic of China 2005, para. 112; COs Greece 2004, para. 37; COs Bosnia and Herzegovina 2006, para. 21; COs Uzbekistan 2006, para. 55; COs Slovakia 2002, para. 29; COs Solomon Islands 2002, para. 23; COs UNMIK 2008, para. 23.

92 COs Canada 1998, paras. 42 and 54; COs Cyprus 1998, para. 23; COs Poland 1998, para. 13; COs Norway 1995, para. 13; COs Finland 1996, para. 6; COs Estonia 2002, para. 41; COs Azerbaijan 2004, para. 49; COs Russian Federation 2003, para. 52; COs People Republic of China 2005, para. 122; COs Republic of Moldova 2003, para. 20; COs Hong Kong (People's Republic of China) 2001, para. 6; COs Jordan 2000, para. 32; COs Mongolia 2000, para. 23; COs Italy 2000, para. 27; COs Greece 2004, para. 37; COs Uzbekistan 2006, para. 55; COs Poland 2002, para. 47; COs United Kingdom of Great Britain and Northern Ireland 2002, para. 35; COs Nicaragua 2008, para. 21.

crisis centres in Norway, Finland and Hong Kong (People's Republic of China),[93] and expresses its concern about the lack of such facilities in Poland and the Republic of Moldova.[94] The Committee requests states parties to ensure the availability and accessibility of crisis centres,[95] to increase the capacity and number of shelters[96] and to ensure that these shelters are available at levels that ensure the right to an adequate standard of living.[97] To this end it recommends to strengthen programmes, cooperate with civil society initiatives and to increase budget allocations.[98] The COs of the Committee on Canada of 1998 are interesting here. The Committee does not quite argue that domestic violence affects the enjoyment of, for example, the right to health, but observes that violations of other rights may perpetuate domestic violence, as victims are unable to escape from this situation. The Committee holds that:

> 'The Committee is concerned that the significant reductions in provincial social assistance programmes, the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing create obstacles to women escaping domestic violence. Many women are forced, as a result of those obstacles, to choose between returning to or staying in a violent situation, on the one hand, or homelessness and inadequate food and clothing for themselves and their children, on the other.'[99]

It recommends Canada to change federal and provincial agreements such as to ensure that services such as mental healthcare, home care, childcare and attendant care, shelters for battered women and legal aid for non-criminal matters are available at levels that ensure the right to an adequate standard of living, and moreover suggests that a greater proportion of federal, provincial and territorial budgets be directed specifically to measures to address women's poverty and the poverty of their children, affordable day care, and legal aid for family matters. It holds that measures to establish adequate support for shelters for battered women, care-giving services and women's non-governmental organizations should also be implemented.[100] In addition to this, in its COs on Ukraine of 2008, the HRC expresses its grave concern about the fact that persons over 35 years of age are excluded from temporary shelters and from social and

93 COs Norway 1995, para. 13; COs Finland 1996, para. 6; COs People Republic of China (Hong Kong) 2001, para. 6.
94 COs Poland 1998, para. 13; COs Republic of Moldova 2003, para. 20.
95 COs Cyprus 1998, para. 23; COs Mongolia 2000, para. 23; COs Italy 2000, para. 27; COs Greece 2004, para. 37; COs Uzbekistan 2006, para. 55; COs Estonia 2002, para. 42; COs Azerbaijan 2004, para. 49; COs Russian Federation 2003, para. 52; COs People's Republic of China 2005, para. 122; United Kingdom of Great Britain and Northern Ireland 2002, para. 35 ; COs Bolivia 2008, para. 33 ; COs Ukraine 2008, para. 42.
96 COs UNMIK 2008, para. 23.
97 COs Canada 1998, para. 42.
98 COs Poland 2002, para. 47; COs Jordan 2000, para. 32; COs UNMIK 2008, para. 23.
99 COs Canada 1998, para. 28.
100 Ibidem, paras. 42 and 54.

medical rehabilitation centres for victims of domestic violence.[101] It therefore urges the state party to intensify its efforts to increase the capacity of such centres and to open new temporary shelters and social and medical rehabilitation centres for victims of violence, and ensure that such centres and assistance are also accessible to persons over 35.[102]

Besides shelters, the Committee pays specific attention to a number of other facilities that should be available for victims of domestic violence. In its COs its deplores the lack of certain other facilities, such as counselling services, and is concerned that healthcare services are inadequate to support women who are victims of domestic violence, as they fail to offer any type of treatment programmes.[103] The CESCR welcomes the setting up of telephone hotlines and support centres to provide psychological help to victims of violence and to inform them about the social and medical help and legal assistance available to them.[104] It recommends states parties to provide for services such as counselling and medical, psychological and legal assistance.[105] Moreover, the CESCR pays attention to the right of compensation for victims of this type of violence. In its COs it regrets the lack of information on remedies from states parties and requests detailed information on this subject in the following periodic reports.[106] In its COs on Mongolia, the CESCR states that it deplores the inefficiency of remedies for victims of domestic violence and in its COs on Togo it expresses its concern that mechanisms for redress in these types of cases are inadequately used.[107] Along those lines, the Committee recommends that adequate information be provided to the victims of family violence with regard to their right to obtain compensation and urges the state party to provide victims with adequate remedies.[108]

In one of its COs the Committee addresses another matter: that of rehabilitation of victims of domestic violence. It does, however, not expound on the matter, but notes in its COs on Finland that the national report lacks information on this point. Although this indicates that rehabilitation is a matter of concern with regard to domestic violence it is not clear whether states parties have an actual duty to provide such services. Besides rehabilitation of victims, the CESCR also refers to rehabilitation programmes for perpetrators in its COs on Ukraine of 2008, where it urges the state party to adopt rehabilitation programmes for perpetrators.[109]

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101 COs Ukraine 2008, para. 19.
102 Ibidem, para. 42.
103 COs Poland 1998, para. 13; COs Mongolia 2000, para. 12; COs Bosnia and Herzegovina 2006, para. 21.
104 COs Norway 1995, para. 13; COs El Salvador 1996, para. 9.
105 COs Estonia 2002, para. 41; COs Jordan 2000, para. 12; COs Mexico 2006, para. 38; COs Uzbekistan 2006, para. 55; COs Serbia and Montenegro 2005, para. 50; COs Poland 2002, para. 47; COs Solomon Islands 2002, para. 23.
106 COs Finland 2000, paras. 17 and 30; COs People's Republic of China 2005, para. 57.
107 COs Mongolia 2000, para. 12; COs Togo 2001, para. 14.
108 COs Algeria 1995, para. 301; COs Mexico 2006, para. 38; COs Philippines 1995, para. 29; COs Mongolia 2000, para. 23.
109 COs Ukraine 2008, para. 42.

In addition to this the Committee makes an interesting statement in its COs on Denmark of 2004. Here the Committee is concerned about the reports of cases of ill treatment, particularly of migrant women, at the hands of their spouses or partners, which often remain unreported for reasons of economic dependency and fear of deportation. The Committee notes that the situation has exacerbated due to the 2002 amendment to the Aliens Act, which increased the required number of years of residence to seven before a permanent residence permit may be obtained by migrant women married to Danish citizens. The Committee recommends the state party to enforce appropriate mechanisms so that victims of domestic violence are not prevented from seeking assistance for fear of deportation or expulsion from Denmark.[110]

Another provision for victims that deserves to be mentioned is that of protection or banning orders against perpetrators. The CESCR pays attention to this facility in its COs. It welcomes national act 27/2003 of Spain which regulates protection orders and argues in the case of Mexico that the state party should provide for banning orders.[111] And in its COs on Nicaragua, the Committee recommends the state party to provide police protection to victims of domestic violence.[112] Moreover, the comments of the CESCR in its COs on Luxembourg are noteworthy, where it recommends the state party to enact a draft law by which a violent spouse may be forced to leave the family home as soon as possible, and so are its COs on Kosovo of 2008, where the CESCR recommends UNMIK to enforce time limits for issuing protection orders.[113]

Finally, attention should be drawn to two other recommendations that are formulated by the Committee in its COs on Nicaragua of 2008. It urges the state party to take immediate steps to allow victims of domestic violence effective access to justice, and to maintain and promote forums for direct participation by women in decision-making bodies at the local and national levels, particularly in respect of violence against women, and to ensure their participation in and representation by civil society.[114]

2.5 Trafficking in women

2.5.1 Introduction

The CESCR expresses its concern in its COs about the issue of trafficking in human beings and requests states parties to adopt specific legislation and effective measures to combat the phenomenon.[115] For example in its COs on Slovenia of 2006, the Com

110 COs Denmark 2004, paras. 18 and 31.
111 COs Mexico 2006, para. 38; COs Spain 2004, para. 5.
112 COs Nicaragua 2008, para. 21.
113 COs Luxembourg 2003, para. 36; COs UNMIK 2008, para. 23.
114 COs Nicaragua 2008, para. 21.
115 COs Germany 1998, paras. 20 and 32; COs Denmark 2004, para. 32; COs Azerbaijan 2004, paras. 24 and 50; COs Ecuador 2004, paras. 24 and 49; COs Lithuania 2004, para. 19; COs Greece 2004, para. 18; COs Kuwait 2004, paras. 21 and 41; COs Russian Federation 2003, paras. 23 and 51; COs Brazil 2003, paras. 30 and 54; COs Slovakia 2002, paras. 16 and 30; COs Poland 2002, paras. 24 and 46; COs

mittee notes with concern that trafficking in women and children is a serious problem in the state party, which, it observes, is a country of origin, transit and destination for the trafficking of women and children. The CESCR calls on Slovenia to:

> '[T]ake effective measures to combat trafficking in persons, particularly trafficking in women and children, including by ensuring that those responsible for such trafficking are prosecuted. The Committee recommends that the State party should set up services to help the victims of trafficking and take steps to make law-enforcers and the general public more aware of the seriousness of the problem and to sensitize them of the needs of the victims. The Committee also recommends that the State party facilitate the participation of non-governmental organizations in the working group dealing with this issue. In addition, the Committee recommends that the State party should ratify the Council of Europe Convention on Action against Trafficking in Human Beings (No. 197). It also requests the State party to report to it, in its next periodic report, on progress in this regard.'[116]

At the same time, the Committee welcomes measures taken by states parties to combat trafficking in persons.[117] In its COs on Israel of 2003 for example it notes with appreciation the efforts taken by the state party to address the problem of trafficking and exploitation of persons, such as the criminalisation of trafficking, increased penalties for trafficking of minors, and the enhanced cooperation between government agencies to combat trafficking with a victim-sensitive approach.[118]

In most instances in which the Committee refers to the cause of trafficking it is that of sexual exploitation. It is in a few COs that it observes that persons are trafficked for reasons of marriage and non-consensual labour.[119] Usually the CESCR refers to trafficking in persons, although it also speaks of trafficking of women, women and children, or, in a few instances, only of trafficking in children. The Committee generally does not relate the practice of trafficking to any specific provision of the Covenant. Hence it is not clear which provisions are affected by the phenomenon or with regard to which provisions states parties are held to combat this practice. In one instance, the CESCR observes that the HIV/AIDS epidemic in the state party is

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Czech Republic 2002, paras. 18 and 37; COs Benin 2002, paras. 18 and 37; COs Estonia 2002, paras. 19 and 42; COs Republic of Moldova 2003, paras. 19 and 41; COs Venezuela 2001, para. 89; COs Togo 2001, para. 14; COs Portugal 2000, para. 22; COs Italy 2000, paras. 15 and 28; COs Slovenia 2006, paras. 17 and 33; COs Serbia and Montenegro 2005, paras. 25 and 52; COs People's Republic of China 2005, paras. 85 and 113; COs Philippines 2008, para. 26; COs Ukraine 2008, para. 20; COs Former Yugoslav Republic of Macedonia 2008, para. 20; COs Nepal 2008, para. 11.

116 COs Slovenia 2006, paras. 17 and 33.

117 COs Denmark 2004, para. 10; COs Italy 2004, para. 5; COs Luxembourg 2003, para. 12; COs Israel 2003, para. 10; COs France 2001, para. 10; COs Ukraine 2001, para. 6; COs Nepal 2001, para. 8; COs Togo 2001, para. 10; COs Italy 2000, para. 109; COs Austria 2006, para. 6; COs Norway 2005, para. 8; COs Philippines 2008, para. 5; COs Latvia 2008, para. 22.

118 COs Israel 2003, para. 10.

119 See COs Philippines 2008, para. 26; COs Kenya 2008, para. 24.

spreading at an alarming rate due to commercial sex and trafficking of women and children, and sex tourism.[120] In this specific circumstance trafficking could thus be related to the right to health as it is laid down in the ICESCR. Yet this is only mentioned once by the Committee and it is only one of the many consequences of trafficking. In addition, in its COs on the Philippines of 2008, the CESCR relates trafficking of women and children for the purposes of sexual exploitation and forced labour to Article 10 of the ICESCR on the protection of the family.[121] Moreover, the CESCR brings up trafficking in the light of discrimination. In its COs on Paraguay, the Committee recommends that the state party take whatever positive measure necessary to eliminate discrimination suffered by women in vulnerable situations, such as women in rural areas, including the elaboration of a comprehensive public policy to combat trafficking in persons and to provide protection and assistance to victims.[122]

It is noteworthy that in a number of COs the CESCR recommends states parties to ratify international instruments that specifically deal with trafficking, such as the Protocol to Prevent, Suppress and Punish Trafficking in persons, especially Women and Children that accompanies the United Nations Convention against Transnational Organised Crime, and the Council of Europe Convention on Action against Trafficking in Human Beings.[123]

Like in its comments on Slovenia, in its COs the Committee also makes more specific recommendations to states parties as to which measures to take so as to fight trafficking in human beings. In the following paragraphs, these recommendations are discussed in more detail.

2.5.2 Awareness raising and training

Raising awareness amongst law enforcers and the general public is considered to be important by the CESCR. Yet, it is only in a few COs that the Committee refers to awareness raising in relation to the phenomenon of trafficking.[124] This is the case, for example, in its COs on Togo, where the Committee acknowledges the efforts taken by the state party to address the problems of trafficking in children, which it did by organising awareness campaigns and workshops.[125] In addition to this, the Committee recommends states parties to support programmes and information campaigns to

120 COs Nepal 2001, para. 35.
121 COs Philippines 2008, para. 26.
122 COs Paraguay 2008, para. 25.
123 COs Chile 2004, para.49; COs Kuwait 2004, para. 41; COs Poland 2002, para. 46; COs Estonia 2002, para. 42; COs Slovenia 2006, para. 33. In its COs On Denmark and Norway, the CESCR welcomes the ratification of the United Nations Convention against Transnational Organised Crime and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, COs Denmark 2004, para. 10; COs Norway 2005, para. 8.
124 COs Togo 2001, para. 10; COs Philippines 2008, para. 26 ; COs Kenya 2008, para. 24.
125 COs Togo 2001, para. 10. The CESCR also refers to the practice of FGM which was combated by the state party in the same manner.

prevent trafficking and to provide mandatory training for law-enforcement officials, prosecutors and judges on the anti-trafficking legislation.[126] Similarly, in its COs on Slovenia and Serbia and Montenegro, the CESCR urges the state parties to take steps to make both law-enforcement officials and the general public more aware of the seriousness of trafficking and to sensitise them of the needs of the victims.[127] With regard to the latter recommendation, moreover, the Committee makes some specific recommendations with respect to the awareness of state officials. In a number of COs, the CESCR strongly recommends training these officers and the judiciary. Not only does the Committee hold that adequate training is required so as to combat trafficking in persons, but also that it is necessary so as to ensure that officers and judges are sensitised to the rights and needs of the victims.[128] In its COs on Ukraine of 2008, the Committee holds that this training should be mandatory.[129] Moreover, in its COs on Kenya, the Committee makes it clear that besides police, prosecutors and judges, also healthcare and social workers need to receive training on the strict application of trafficking legislation.[130]

2.5.3 Prosecution and punishment of perpetrators

The CESCR pays attention to a number of aspects of the process of prosecution and punishment of persons responsible for the trafficking in human beings in its COs. First of all, it refers in several of its COs to specific legislation that criminalises this phenomenon. The Committee commends Israel and Norway on their efforts to address the problem of trafficking by, inter alia, criminalising trafficking, but also notes with regret that Azerbaijan and Uzbekistan have no legislation that specifically criminalises this practice.[131] The CESCR urges states parties to adopt legislation that specifically criminalises trafficking of human beings.[132]

In addition to criminalisation, the Committee is concerned about the prosecution of perpetrators of trafficking.[133] In its COs the CESCR recommends state parties to pursue enforcement of criminal laws so as to strengthen efforts to combat trafficking in women and children.[134] In several COs the Committee recommends that the state party take effective measures in order to combat trafficking in persons, e.g. by ensur-

126 COs Philippines 2008, para. 26 ; COs UNMIK 2008, para. 24; COs Costa Rica 2008, para. 45; COs Latvia 2008, para. 47; COs Former Yugoslav Republic of Macedonia 2008, para. 40.
127 COs Slovenia 2006, para. 33; COs Serbia and Montenegro 2005, para. 52.
128 COs Georgia 2002, para. 37; COs Germany 2001, para. 43; COs Uzbekistan 2006, para. 56.
129 COs Ukraine 2008, para. 43.
130 COs Kenya 2008, para. 24.
131 COs Israel 2003, para. 10; COs Norway 2005, para. 8; COs Azerbaijan 2004, para. 24; COs Uzbekistan 2006, para. 25.
132 COs Azerbaijan 2004, para. 50; COs Uzbekistan 2006, para. 56; COs Sweden 2001, para. 36; COs France 2001, para. 22; COs People's Republic of China 2005, para. 58.
133 See COs Philippines 2008, para. 26; COs Kenya 2008, para. 24.
134 COs Ukraine 2001, para. 29; COs Latvia 2008, para. 47.

ing that those responsible for trafficking are prosecuted.[135] In its COs on the Russian Federation, it encourages the state party to proceed with the adoption of proposed legislative amendments and of the draft act 'On Counteracting the Trafficking of People' which aims at providing more effective protection for victims and ensuring the prosecution of traffickers.[136] Similarly it notes with regard to the People's Republic of China that prosecution of traffickers has generally not been very effective and it urges Serbia and Montenegro to prosecute and punish perpetrators and corrupted law-enforcement officials involved in trafficking.[137]

Finally, the Committee addresses the aspect of punishment of the traffickers.[138] In its COs it requests information from states parties on the types of sanctions that are imposed and argues that appropriate penalties should be imposed on those who are guilty of trafficking in human beings.[139] To that end it requests UNMIK, for example, to review its sentencing policies and notes with appreciation the increased penalties for trafficking in minors in its COs on Israel.[140] Also, the Committee makes it clear that it is the *perpetrators* of trafficking that should be punished and not the victims, as it notes in its COs on Ukraine that the state party should ensure that victims are not penalised.[141]

2.5.4 Provisions for victims

The CESCR pays considerable attention to the situation of victims of trafficking. The comments of the Committee on Germany in 2001 provide a good example. It notes here that it is concerned that victims of trafficking, in particular women, are doubly victimised owing to a lack of sensitisation of police, judges and public prosecutors, a lack of appropriate care for the victims and the risks and dangers awaiting upon deportation to their home countries. It strongly recommends the state party to provide better protection and appropriate care, and to ensure that the victims can claim redress before courts of law.[142] It was shown in the paragraph on awareness that the Committee addresses the sensitisation of state officials more often. Also, it refers to care and protection of victims in other COs, as well as making several comments with regard to deportation of victims in a number of these documents.

135 COs Kuwait 2004, para. 41; COs Poland 2002, para. 46; COs Georgia 2002, para. 37; COs Estonia 2002, para. 42; COs Slovenia 2006, para. 33.
136 COs Russian Federation 2003, para. 51.
137 COs People's Republic of China 2005, para. 113; COs Serbia and Montenegro 2005, para. 52.
138 See for example COs Serbia and Montenegro 2005, para. 52.
139 COs Mexico 2006, para. 39; COs Bosnia and Herzegovina 2006, para. 44; COs Portugal 2000, para. 22; COs Kenya 2008, para. 24; COs UNMIK 2008, para. 24; COs Ukraine 2008, para. 20.
140 COs UNMIK 2008, para. 24; COs Israel 2003, para. 10.
141 COs Ukraine 2001, para. 29.
142 COs Germany 2001, paras. 25 and 43.

In a number of COs the Committee recommends states parties to provide for assistance and support for victims of trafficking.[143] States are requested to establish support services, which should provide for medical, psychological and legal support for victims, they should ensure that victims of trafficking have access to crisis centres where they can receive assistance, allocate sufficient funds for assisting and rehabilitating victims, as well as for witness protection programmes, and they must ensure that these persons can claim redress before courts of law.[144] In its COs on Bosnia and Herzegovina, the Committee makes some more specific recommendations with regard to the personnel that perform these services. It expresses its deep concern in these COs about the lack of qualified personnel, including medical and psychological staff, working at the social welfare centres that are responsible for the protection of victims of trafficking, especially women and children. It urges the state party to ensure that adequate funds be allocated to the social welfare centres and that the number of social workers, psychologists and other qualified personnel of these centres be increased in order to better respond to the specific needs of these victims. Moreover, it recommends the state party to train the medical and psychological staff of the social welfare centres on the specific needs of victims of trafficking.[145] In its COs on Ukraine, the CESCR recommends the state party to ensure a restrictive licensing policy and effective inspections for tourist and marriage agencies.[146]

The deportation of trafficked persons to their countries of origin as it is addressed in the COs on Germany was also brought forward in several other COs. In its comments on Greece in 2004, the CESCR expresses its concern that trafficked women are often deported to their countries of origin rather than granted a residence permit, reportedly in an expeditious manner and without the procedural safeguards. In both these COs as well as in those on the People's Republic of China the Committee urges the states parties to ensure respect for the necessary procedural safeguards when deporting victims of trafficking in persons, and particularly, it notes, when such victims are minors.[147]

The return of trafficked persons into society is also an aspect that is given attention by the Committee. It recommends Nepal to strengthen its measures to allow the return,

143 COs Kuwait 2004, para. 41; COs Slovenia 2006, para. 33; COs Uzbekistan 2006, para. 56; COs Serbia and Montenegro 2005, para. 52; COs People's Republic of China 2005, para. 97; COs Latvia 2008, para. 47. In its COs on Mexico of 2006, the CESCR requests the state party to provide information on assistance provided to victims in the next periodic report, thereby indicating that assistance is an aspect of the implementation of the Covenant. COs Mexico 2006, para. 39; COs Ukraine 2008, para. 43.

144 COs Uzbekistan 2006, para. 56; COs Serbia and Montenegro 2005, para. 52; COs People's Republic of China 2005, para. 97; COs Philippines 2008, para. 26; COs Lithuania 2004, para. 41; COs Russian Federation 2003, para. 51; COs Latvia 2008, para. 47; COs Former Yugoslav Republic of Macedonia 2008, para. 40.

145 COs Bosnia and Herzegovina 2006, paras. 17, 22, 38 and 44.

146 COs Ukraine 2008, para. 43.

147 COs Greece 2004, paras. 18 and 39; COs People's Republic of China 2005, para. 97.

rehabilitation and reintegration into society of trafficked women.[148] Moreover, in two other COs it urges to take and implement measures to combat trafficking, including by rehabilitation programmes for victims.[149] In addition, the Committee observes in its COs on the Republic of Moldova that the state party should combat trafficking by improving job possibilities and assistance to women living in poverty.[150] This remark is based on a statement by a delegate of the Republic during the constructive dialogue with the Committee. The delegate had informed the CESCR that with respect to unemployment the government's goal was to create as many jobs as possible. He explained that a number of job creation programmes had been set up, some with the assistance of international organizations, and that a programme had been launched to assist victims of human trafficking in finding employment.[151]

2.5.5 Cooperation

The CESCR recognises the fact that trafficking is often a phenomenon that transcends national boundaries. In several COs it refers to the status of the state party as a country of origin, of transit, of destination, or a combination of these.[152] For example in its COs on Azerbaijan of 2004 the Committee observes that the state party is a country of origin and destination, as well as a transit point for trafficking in persons.[153] A practice that is characterised by such a transnational nature necessitates an internationally combined effort in order to be combated, or so the Committee seems to think. For in its COs it calls upon several states to cooperate with other states parties in order to fight this phenomenon.[154] In its COs on the Republic of Moldova, for example, the Committee encourages the state party to seek international assistance and strengthen regional cooperation with countries to which Moldavian citizens are trafficked.[155] Similarly, it urges Greece to continue and intensify its cooperation with neighbouring countries in combating trafficking in persons.[156] It is, however, not only cooperation with other states that is recommended in light of the fight against trafficking. In its COs on Ukraine, the CESCR encourages the state party to reinforce its cooperation with international and regional organisations, also on a bilateral basis, and in its COs

148 COs Nepal 2001, para. 45.
149 COs Georgia 2002, para. 37; COs Ukraine 2001, para. 29.
150 COs Republic of Moldova 2003, para. 41.
151 SR Republic of Moldova 2003, UN doc. E/C.12/2003/SR.32, para. 65.
152 COs Azerbaijan 2004, para. 24; COs Lithuania 2004, para. 19; COs Benin 2002, para. 18; COs Croatia 2001, para. 14; COs Uzbekistan 2006, para. 25; COs Norway 2005, para. 17.
153 COs Azerbaijan 2004, para. 24.
154 COs Lithuania 2004, para. 41; COs Greece 2004, para. 39; COs Slovakia 2002, para. 30; COs Benin 2002, paras. 18 and 37; COs Republic of Moldova 2003, para. 41.
155 COs Republic of Moldova 2003, para. 41.
156 COs Greece 2004, para. 39.

on Slovenia it recommends the state party to facilitate participation of non-governmental organisations in the national working group dealing with trafficking in persons.[157]

2.6 Sexual harassment

2.6.1 Introduction

In a number of COs the Committee expresses its concern about sexual harassment or about the fact that there are no specific regulations in the state party with regard to this practice.[158] It calls upon states parties to prevent and combat incidents of sexual harassment.[159] In most of these instances the Committee refers to sexual harassment in the workplace. It never makes statements with regard to other areas in which harassment may take place, such as for example in detention centres. Sexual harassment is on several occasions discussed in light of the unequal status of women in society.[160] For example in its COs on the Republic of Korea, the Committee notes that:

> '[T]he Committee notes with deep concern the continued unequal status of women. Persisting problems include the traditional preference for sons, which is manifested in a high incidence of induced abortions of girl foetuses that threaten the reproductive rights of women; the patriarchal head-of-family system (hoju) as defined in law; the high incidence of domestic violence; the relatively low access by women to tertiary education; discrimination against women and sexual harassment in the workplace; and a large gap in the average salaries paid to women and to men.'[161]

Similarly, in its COs on Mongolia of 2000 the CESCR calls upon the state party to efficiently enforce labour legislation prohibiting discrimination against women in employment, such as the criminalisation of sexual harassment.[162] The attention of the CESCR for sexual harassment as an aspect of discrimination against women indicates

157 COs Ukraine 2001, para. 29; COs Slovenia 2006, para. 33.

158 COs Cameroon 1999, para. 18; COs Poland 1998, para. 13; COs Chile 2004, para. 21; COs Russian Federation 2003, para. 20; COs Poland 2002, para. 18; COs Georgia 2002, para. 18; COs Guatemala 2003, para. 408; COs Georgia 2000, para. 89; COs Croatia 2001, para. 13; COs Panama 2001, para. 16; COs Ukraine 2001, para. 10; COs Japan 2001, para. 16; COs Republic of Korea 2001, para. 16; COs Mongolia 2000, para. 12; COs Mexico 2006, para. 11; COs Slovenia 2006, para. 14; COs People's Republic of China 2005, para. 110; COs Kenya 2008, para. 17; COs Nicaragua 2008, para. 17; COs Bolivia 2008, para. 14; COs Latvia 2008, para. 17; COs Former Yugoslav Republic of Macedonia 2008, para. 14.

159 COs Cameroon 1999, para. 34; COs Georgia 2002, para. 36; COs Guatemala 2003, para. 16; COs Croatia 2001, para. 25; COs Ukraine 2001, para. 28; COs Mexico 2006, para. 29; COs Slovenia 2006, para. 29.

160 COs Iraq 1997, para. 6; COs Croatia 2001, para. 25; COs Ukraine 2001, para. 10; COs Republic of Korea 2001, para. 16; COs Mongolia 2000, para. 23; COs People's Republic of China 2005, para. 17; COs Philippines 2008, para. 5; COs Kenya 2008, para. 17.

161 COs Republic of Korea 2001, para. 16.

162 COs Mongolia 2000, para. 23.

that this practice is a matter that affects Article 3 of the Covenant. Yet, the Committee never makes any express statements with regard to the relation between sexual harassment and any of the provisions of the Covenant. The phenomenon is usually addressed in light of gender inequality or together with forms of violence against women such as domestic violence or rape. In a number of instances, the matter is also discussed separately.

Although in most instances where it addresses sexual harassment the Committee calls upon states parties to adopt legislation to tackle the matter, it also makes some other specific recommendations with respect to dealing with the phenomenon. These recommendations are discussed in the following paragraphs.

2.6.2 Awareness raising and training

In two COs the Committee calls upon the state party in question to develop programmes aimed at raising awareness of sexual harassment. In its COs on Georgia of 2002, the Committee expresses its serious concern about the inadequacy or even lack of legislation and policies on domestic violence, rape or sexual harassment, and on that account encourages the state party to develop programmes aimed at raising awareness of these problems.[163] In its COs on the People's Republic of China of 2005, the Committee notes with concern the persistence of gender inequalities in the state party, particularly with regard to employment and participation in decision making. It strongly recommends the People's Republic for that reason to take effective public education measures, including awareness-raising programmes designed to eliminate gender-based prejudices and traditional practices that are harmful to women and girls.[164] Moreover, the Committee refers in its COs on Georgia not only to raising awareness of the general public, but also encourages the state party to develop programmes aimed at the education of law-enforcement officials and the judiciary on these problems.[165]

2.6.3 Prosecution and punishment of perpetrators

In many of the COs in which the CESCR brings up the issue of sexual harassment it does so by expressing its concern about the fact that the state party lacks legislation that prohibits sexual harassment.[166] For example in its COs on Slovenia of 2006, the Committee observes with concern that sexual harassment in the workplace is not

163 COs Georgia 2002, paras. 18 and 36.

164 COs People's Republic of China 2005, paras. 17 and 49.

165 COs Georgia 2002, para. 36.

166 COs Cameroon 1999, para. 18; COs Chile 2004, para. 21; COs Georgia 2002, para. 18; COs Croatia 2001, para. 13; COs Morocco 2006, para. 24; COs Slovenia 2006, para. 14; COs People's Republic of China 2005, para. 110; COs Latvia 2008, para. 17; COs Former Yugoslav Republic of Macedonia 2008, para. 14.

classified as a specific offence and that for this reason victims may not be adequately protected.[167] It recommends states parties to enact legislation to criminalise sexual harassment and in this respect notes in its COs on Morocco that it is not sufficient to regard sexual harassment as serious misconduct under the national Labour Code, but that it should also be an offence under the Criminal Code.[168]

In general, the Committee pays no attention to the actual prosecution of sexual harassment. It makes no comments for example on the number of investigations, prosecutions or court cases. Only in one of its COs does it address the matter of prosecution when it expresses its serious concern about the de facto impunity with which sexual harassment, as well as rape and domestic violence, are committed in Georgia.[169] Interesting to note are also the comments of the CESCR on Liechtenstein of 2006, in which it encourages the state party to adopt the proposed amendment to the Gender Equality Act which would shift the burden of proof to the employer in cases of sexual harassment.[170]

2.6.4 Provisions for victims

Only in its COs on Georgia of 2002 does the Committee address a provision for victims of sexual harassment: effective remedies. In the relevant COs the CESCR recommends that the state party adopt adequate legislation and policies to address and to ensure effective remedies concerning domestic violence, rape and sexual harassment.[171]

2.7 Female genital mutilation

2.7.1 Introduction

FGM is a practice incompatible with the human rights of women, especially with the right to health.[172] In its GC on the right to health, the Committee observes that there is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, *FGM* and preferential feeding and care of male children.[173] Moreover it notes in this

167 COs Slovenia 2006, para. 14.
168 COs Morocco 2006, paras. 24 and 52. Other COs in which the CESCR recommends states parties to criminalise sexual harassment in national legislation: COs Cameroon 1999, para. 34; COs Poland 1998, para. 21; COs Chile 2004, para. 45; COs Russian Federation 2003, para. 48; COs Poland 2002, para. 40; COs Guatemala 2003, para. 426; COs Croatia 2001, para. 25; COs Mongolia 2000, para. 23; COs Slovenia 2006, para. 29; COs People's Republic of China 2005, para. 120; COs Nicaragua 2008, para. 17; COs Latvia 2008, para. 43; COs Former Yugoslav Republic of Macedonia 2008, para. 34.
169 COs Georgia 2002, para. 36.
170 COs Liechtenstein 2006, para. 26.
171 COs Georgia 2002, para. 36.
172 COs Nigeria 1998, para. 20.
173 CESCR, GC 14, para. 22.

GC that with regard to the obligations to protect the right to health, states are also obliged to prevent third parties from coercing women to undergo traditional practices, like FGM.[174] In particular, the CESCR observes that FGM has serious consequences for the physical, psychological and social health of women.[175] In its COs it refers to FGM as a continuous, degrading and dangerous practice,[176] as a traditional or customary practice[177] and as an ingrained harmful tradition.[178] It is for that reason that states parties are requested to take active measures to combat FGM, both in law and in practice.[179] In a number of COs, the CESCR provides more specific recommendations with regard to what measures to take in order to combat this practice. These will be discussed in the following paragraphs.

2.7.2 Awareness raising and training

In its COs on Togo of 2001, the Committee acknowledges the efforts made by the state party to address the problems of both trafficking in children and FGM by, inter alia, organising awareness campaigns and workshops.[180] In its COs on Cameroon, adopted two years prior to those on Togo, the CESCR notes to deplore the inadequacy of measures taken by the government of Cameroon to combat, especially by means of educational programmes, the enduring practice of FGM, which, it observes, is generally practised on young women and girls in the far North and South-West provinces of the state party.[181] Along the same lines, the Committee urges Senegal in its COs of 2001 to take measures to combat FGM by all means available, including national education programmes, and in its COs on Kenya of 2008, the CESCR recommends the state party to educate parents, especially mothers, children and community leaders on the harmful effects of FGM and to combat traditional beliefs about the usefulness of female genital mutilation for the promotion of marriage prospects of girls.[182] It is noteworthy that the CESCR in its COs on Kenya also recommends the state party, moreover, to continue promoting alternative rite of passage ceremonies.[183]

In addition to this, the Committee recommends Kenya to train the police, prosecutors and judges on the strict application of laws prohibiting FGM.[184]

174 Ibidem, para. 35.
175 COs Guinea 1996, para. 22.
176 COs Nigeria 1998, para. 39.
177 COs Cameroon 1999, para. 33; COs Mali 1994, para. 14; COs Senegal 2001, para. 39.
178 COs Sudan 2000, para. 38.
179 COs Cameroon 1999, para. 33; COs Nigeria 1998, para. 39; COs Togo 2001, para. 14; COs Sudan 2000, para. 38.
180 COs Togo 2001, para. 10.
181 COs Cameroon 1999, para. 15.
182 COs Senegal 2001, para. 39; COs Kenya 2008, para. 23.
183 COs Kenya 2008, para. 23.
184 Ibidem, para. 23.

2.7.3 Prosecution and punishment of perpetrators

States parties are urged to make FGM an offence punishable by law.[185] In GC 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, the CESCR holds that Article 12 of the Covenant on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health at the very least requires the removal of legal and other obstacles that prevent men and women from accessing and benefiting from healthcare on a basis of equality. The Committee notes that this also includes the prohibition of FGM. This means criminalising FGM regardless of where the procedure is performed, be it in hospitals or outside medical institutions. In its COs on Egypt, the Committee notes with concern that although the state party has taken initial steps against the practice of FGM by criminalising it outside of hospitals by persons without a medical qualification, it has not made the practice by medical practitioners a criminal offence.[186] Moreover, FGM is to be criminalised regardless of whether the practice is performed on children or on adult women. In its COs on Kenya of 2008, the Committee notes with concern that the state party prohibits FGM only if it concerns children, and it subsequently recommends it to adopt legislation criminalising FGM of all adult women.[187] The next step is that incidences of FGM must be prosecuted. In its COs, the CESCR observes with concern that in spite of legislation banning FGM, it is still practised with impunity by certain ethnic groups and in certain regions.[188] Consequently, it urges the state party to enact or enforce the national legislation that prohibits FGM.[189] Finally, the Committee makes one statement with regard to the final stage of prosecution: the court cases. In its COs on France, the CESCR welcomes the recent court decisions convicting perpetrators of FGM.[190] It is interesting in this respect to note that the CESCR also pays attention to the position of the practitioner. Although it holds that practitioners should be prosecuted in case they perform FGM, it also invites Benin in its COs of 2002 to redouble its efforts to end FGM through, amongst other things, programmes of education and financial support for practitioners of excision who cease their activities.[191]

2.7.4 Provisions for victims

In one of its COs the Committee slightly touches upon the needs of victims. In its COs on Benin of 2002, the CESCR lays down that it enjoins the state party to establish

185 COs Cameroon 1999, para. 33; COs Benin 2002, para. 31.
186 COs Egypt 2000, para. 16.
187 COs Kenya 2008, para. 23.
188 COs Senegal 2001, para. 24. See also COs Mali 1994, para. 14.
189 COs Senegal 2001, para. 39.
190 COs France 2001, para. 7.
191 COs Benin 2002, para. 31.

mechanisms for the protection of women. It does not specify what these mechanisms would entail.[192]

2.7.5 Cooperation

In its COs on Egypt, the CESCR encourages the state party to seek technical assistance from the WHO with regard to the total eradication of FGM in the country.[193] It is the only instance in which the CESCR addresses the matter of cooperation in relation to this practice.

2.8 Other harmful practices

2.8.1 'Honour crimes'

The CESCR holds that so-called honour crimes reflect the persistent discrimination of women in society.[194] For that reason, it strongly recommends the Syrian Arab Republic in its COs of 2001 to take effective measures to incorporate a gender equality perspective in both legislation and in governmental policies and administrative programmes with a view to ensuring equality of men and women in particular with regard to, amongst other issues, honour crimes.[195] In its COs on Jordan, moreover, the Committee expresses its concern about the fact that crimes against women perpetrated in the name of honour go unpunished and recommends that law-enforcement officials, care workers, judges and healthcare professionals are trained in the identification, reporting and management of cases of abuse. It also recommends the state party to continue its support and cooperate with civil society initiatives, including hotlines, shelters and counselling services.[196]

2.8.2 Pledging of girls

The practice of Deuki in Nepal is a tradition in which girls are dedicated to a god or goddess and become temple prostitutes. The Committee notes in its COs that Nepal has adopted measures to abolish the practice and to punish those responsible, and urges the state party to enact or enforce this legislation. It holds that the practice of Deuki violates the rights of women and girls and requests the state to take measures to combat the practice by all means available, including national educational programmes.[197]

192 COs Benin 2002, para. 31.
193 COs Egypt 2000, para. 32.
194 COs Tunisia 1999, para. 4; COs Syrian Arab Republic 2001, para. 14.
195 COs Syrian Arab Republic 2001, para. 31.
196 COs Jordan 2000, paras. 17 and 32.
197 COs Nepal 2001, paras. 18 and 43; COs Nepal 2008, paras. 15 and 34.

2.8.3 Widow cleansing

In its COs on Zambia of 2005, the Committee raises the matter of widow cleansing, a phenomenon which it refers to as a harmful traditional practice. Widow cleansing is, according to the United Nations Population Fund, a traditional practice in which widows are expected to have sexual relations, often with a relative of their late husband, in order to secure property within the family.[198] The Committee expresses in its COs its concern about the harsh living conditions of widows and female orphans due to, among other things, harmful practices such as 'widow cleansing'. It recommends that the state party take adequate measures to address the difficulties faced by widows and orphans, and in particular to eliminate harmful practices.[199]

2.8.4 Eating disorders

In its COs on Norway of 2005, the CESCR expresses its concern about the high incidence of eating disorders among adolescents in the state party. The Committee recommends Norway to continue and strengthen the measures it has taken to implement the coherent strategy it developed in 2000 against eating disorders.[200]

2.8.5 Flagellation or lashing of women

In its COs on Sudan of 2000, the Committee states to be gravely concerned about the occurrence of flagellation or lashing of women for wearing allegedly indecent clothing or for being out in the street after dusk. It notes that this has seriously limited the freedom of movement and expression of women and recommends the state party to develop specific measures to eliminate ingrained harmful traditions, customs and prejudices against women, such as the limitation of their freedom of movement and expression and any obstacles that hinder women's full participation in society.[201]

2.8.6 Murder on women

In its COs on Nicaragua of 2008, the Committee expresses concern about the increase of murders on women. It brings up this issue in a separate paragraph, thus not together with domestic violence, for example, and refers to Article 10 of the Covenant that deals with the protection of the family. The CESCR recommends the state party in this

198 UNFPA, UNIFEM, UNAIDS, *Women and HIV/AIDS: Confronting the Crisis*, http://www.unfpa.org/hiv/women/report/chapter7.html, accessed on 4 July 2009.
199 COs Zambia 2005, paras. 23 and 45.
200 COs Norway 2005, paras. 21 and 41.
201 COs Sudan 2000, paras. 24 and 38.

respect to take immediate and effective measures to put a stop to murder on women and in particular to prosecute and punish the perpetrators.[202]

3 PHYSICAL VIOLENCE AGAINST WOMEN AND HUMAN RIGHTS OBLIGATIONS OF STATES PARTIES

3.1 Introduction

This section discusses the human rights obligations formulated by the CESCR in its GCs and COs in light of the obligation to respect, the obligation to protect and the obligation to fulfil the rights as laid down in the ICCPR.[203] The structure of this section is different from that of Section 3 of Chapter 5 which deals with pregnancy and human rights obligations of states parties. Whereas Chapter 5 presents a discussion on the human rights obligations in accordance with the respective provision of the ICESCR that is affected by these matters, i.e. the right to health, this section discusses the human rights obligations in light of the forms of physical violence they relate to.[204]

3.2 Physical violence against women and the obligation to respect the human rights enshrined in the ICESCR

3.2.1 Sexual violence and the obligation to respect

The Committee addresses sexual violence only in a few COs and when it does, it generally addresses the matter together with domestic violence. This is an indication that it is mainly concerned with sexual violence at the hands of private individuals and not state agents. Moreover, the Committee hardly ever explicitly focuses on situations in which sexual violence at the hands of state agents is not uncommon, for example in times of armed conflict or when women are detained in prison. Yet, the Committee does not specify in which context it denounces sexual violence and it is to be expected that it will as much, if not more, disapprove of sexual violence at the hands of state officials as it does of such acts committed by third parties. States are requested to

202 COs Nicaragua 2008, para. 20.

203 Chapter 2 discusses the interpretation given to these three categories, see Section 3.3. of this chapter.

204 There are various reasons for this difference in structure. The recommendations in regard to physical violence against women are a lot more detailed than as regards pregnancy-related issues. In order to get a clear picture of the obligations of states parties with regard to physical violence against women, it is important to distinguish the obligations in accordance with the different forms of violence to which they refer and not to discuss them in light of the provisions they are based on. At the same time it is not desirable to structure the section on pregnancy and human rights obligations differently in Chapter 5. This would be problematic as many pregnancy-related issues are addressed in light of maternal mortality and therefore in light of Article 12 of the ICESCR. A similar structure as the one in this chapter to discuss the human rights obligations of states parties would constitute a lot of repetition for that reason.

combat sexual violence, and whilst this mainly involves an obligation to protect individuals, it also follows from this that state agents should not commit these acts themselves. Thus although not explicitly stated, one can read an obligation to respect into the COs of the Committee with regard to sexual violence: states agents, be it law-enforcement officers, militia or prison guards, should not commit any of such acts.

3.2.2 Rape and the obligation to respect

The Committee focuses mainly on the problem of marital rape. Consequently it is not so much concerned about actions by state agents as it is about actions of third parties, namely partners and spouses. In its COs, for example, the CESCR does not address rape by prison guards or militia, acts for which the state could be held responsible. Also, it does not focus on the role of law-enforcement officers in the prosecution process, for example by directly or indirectly preventing women to file a complaint. This explains to a large extent why the CESCR does not formulate any recommendations in its COs that would fall under the heading of obligations to respect the rights enshrined in the Covenant.

3.2.3 Sexual exploitation and the obligation to respect

States parties are requested to adopt legislation and policies so as to combat sexual exploitation of women and children. This recommendation mainly involves an obligation for states to actively protect the enjoyment of the rights as laid down in the Covenant, and not an obligation to refrain from certain actions. Only one of its recommendations with regard to sexual exploitation can be considered as an obligation to respect: the call of the CESCR to Sweden to repeal its requirement of dual criminality in cases of sexual exploitation of minors and women committed abroad. It follows from this remark that such a requirement in national law is contrary, either directly or indirectly, to the enjoyment of the rights as laid down in the ICESCR.

Another statement formulated by the Committee in its COs on Sweden is also noteworthy. It welcomes the fact that the state party is committed to combating prostitution. Sweden does this, amongst other things, by making the buying or even soliciting of sexual services a criminal offence. This remark could indicate that the CESCR does not consider prostitution to be a form of employment that women should be able to perform freely as in line with Article 6 of the Covenant that recognises the right to work, which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept. For if this were the case, such a legislative measure would surely affect this right, as it makes working in this field legally impossible. This means that states parties do not have a duty to allow for prostitution in its national legislation, and on that account do not have an obligation to respect the rights contained in the Covenant, as for example the right to work.

3.2.4 Domestic violence and the obligation to respect

The Committee notes in GC 16 that states parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.[205] This notion implies obligations for states to protect and fulfil the rights as laid down in the Covenant, but not explicitly an obligation to respect them as it clearly focuses on actions of *private* actors.

Yet, the CESCR does formulate an obligation to respect these rights in its COs with regard to domestic violence. In its work the Committee condemns the existence of legal provisions in Nigeria and Malta which permit the beating or 'chastisement' of women by their husbands. Although it does not expressly formulate a recommendation for the state party to repeal this legislation, it is clear from the fact that it uses strong words such as 'condemn' that this type of legislation affects the enjoyment of human rights. On that account states are held not to adopt laws of this kind. This example is, however, the only incidence in which an obligation to respect is explicitly formulated. On the one hand this is not surprising, for the term 'domestic violence' already implies that it concerns violence committed by *private* actors. But what could still be addressed is the possible role of law-enforcement officers in the underreporting of acts of domestic violence. The Committee observes that in a few states parties cases are rarely reported, but it does not wonder whether law enforcers may possibly play a role in this by preventing in several ways that women file complaints.

3.2.5 Trafficking and the obligation to respect

The Committee calls upon states parties to combat trafficking and for that reason to prosecute those responsible for these acts. Although the act of trafficking is often instigated and carried out by non-state actors, the phenomenon could not exist in its present magnitude without the help of corrupt state officials, such as border police. It follows implicitly from the notion that those responsible for trafficking should be prosecuted that state officials themselves should also avoid getting involved in these acts. This notion is confirmed by a statement of the CESCR in its COs on Serbia and Montenegro, in which it urges the state party to prosecute and punish corrupted law-enforcement officials involved in trafficking.

In addition to this the Committee pays attention to the deportation of victims of trafficking to their country of origin. In this respect the Committee holds that states parties should ensure the respect for the necessary procedural safeguards when deporting victims of trafficking in persons, an obligation to fulfil. Yet it does not expressly formulate a negative obligation for states not to deport victims of trafficking when their safety requires them not to do so.

205 CESCR, GC 16, para. 27.

3.2.6 Sexual harassment and the obligation to respect

The Committee formulates no recommendations for states parties that would fall under the heading of obligations to respect with regard to sexual harassment. It mostly addresses the phenomenon in light of sexual harassment in the workplace, but pays no attention to harassment in state institutions such as detention centres and state hospitals. Sexual harassment is contrary to the enjoyment of human rights and should for that reason be combated. It follows from this that state officials themselves should also avoid getting involved in any of such acts. Yet the CESCR has never explicitly addressed this obligation in its work.

3.2.7 Female genital mutilation and the obligation to respect

States parties should combat FGM and should do so under all circumstances, regardless of where the practice takes place. This means that FGM should also be prohibited when performed in hospitals, including state hospitals. From this notion, one can conclude that the Committee opposes medicalisation of FGM as it is known in a number of states.[206] Although the Committee has never explicitly used the term 'medicalisation' in its COs, it does note with concern in its COs on Egypt that it has not made FGM by medical practitioners a criminal offence.

3.2.8 Other harmful practices and the obligation to respect

The CESCR does not explicitly formulate any recommendations with regard to other harmful practices that would fall within the context of obligations to respect. The Committee does pay attention to honour crimes and excessive punishment, but only makes comments to de facto situations. Thus it observes that crimes committed in the name of honour go unpunished and that women are lashed for wearing allegedly indecent clothing or being out in the street after dark. Yet it does not address the legislation that allows this punishment. To do so would create an obligation for states parties to annul such laws, a recommendation that can be implied from the comments of the Committee.

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206 See for example Hosken, F., 'The Medicalization of FGM: A Human Rights Violation', *Women's International Network News*, vol. 25, no. 2, p. 1; and WHO, 'Eliminating Female Genital Mutilation – An Interagency Statement', http://www.who.int/reproductivehealth/publications/fgm/ 9789241596442/en/ index.html accessed on 4 July 2009, p. 12. The 2005 report of UNICEF on the practice indicates that this is particularly the case in Egypt, Guinea, Kenya, Nigeria, Northern Sudan and Yemen, where the medicalisation of the practice has dramatically increased in recent years. In all these countries one third or more of the women with at least one daughter circumcised indicate that trained healthcare personnel conducted the procedure. In Egypt, for example, 94 per cent of daughters are found to have undergone FGM conducted by trained healthcare personnel, while this was the case for 79 per cent of mothers. UNICEF, 'Female Genital Mutilation/Cutting – A Statistical Exploration', UNICEF, 2005, http: //www.unicef.org/publications/files/FGM-C_final_10_October.pdf, accessed on 4 July 2009, p. 13.

3.3 Physical violence against women and the obligation to protect the human rights enshrined in the ICESCR

'States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.'[207]

3.3.1 Sexual violence and the obligation to protect

When the Committee refers to sexual violence in general, it makes no specific recommendation with regard to the obligation to protect the rights contained in the Covenant against interference by all. The only, general, duty that it formulates is that this type of violence must be combated and that to this end existing legislation must be enforced. From this notion, as well as its concern about the lack of specific legislation on sexual violence, it follows that sexual violence should be criminalised in national laws. More specific recommendations are formulated by the CESCR with regard to the specific forms of sexual violence that it discusses. These will be addressed in more detail in the following paragraphs.

3.3.2 Rape and the obligation to protect

Rape is a crime and should on that account be criminalised and prosecuted, this much follows from the work of the CESCR. It should be noted that this holds true for rape committed by third parties, for example partners, but that the Committee has never explicitly addressed the role of state officials in incidences of rape and consequently has never addressed the prosecution of such actors. One may assume, however, that when the state party has an explicit duty to prosecute non-state officials it also has an obligation to do so with regard to its own staff.

In its attention for the prosecution of rape, the CESCR refers to the whole range of aspects that come with it, from the criminalisation of the abuse to the appropriate penalisation of the perpetrators. It is noteworthy that the Committee pays specific attention to the definition of rape in national laws and that with regard to the reporting of rape, it addresses the reasons as to why women often choose not to report cases. This could be due to the economic dependency of wives on their partners. The CESCR holds that socio-cultural barriers that inhibit victims from seeking assistance must be overcome.

207 CESCR, GC 16, para. 27.

3.3.3 Sexual exploitation and the obligation to protect

The recommendations with regard to sexual exploitation and the obligation to protect are rather limited, but two comments that it makes in this regard are remarkable. Both statements are made in the COs on Sweden and concern the phenomenon of prostitution. Sweden does not just combat *sexual exploitation*, but also *prostitution*. The state party has made the buying and soliciting of sexual services a criminal offence. The CESCR clearly approves of this step as it holds in its COs to welcome this measure taken by the state party. In this respect attention should be drawn to the COs on the Netherlands of 2006, where the CESCR does not make any statements on the Dutch prostitution policy.[208] This is noteworthy, since the Dutch prostitution policy, which considers prostitution to be legal, is the complete opposite of that of Sweden, and could on that account be contrary to the rights laid down in the ICESCR.

The other statement of the CESCR in its COs on Sweden is less controversial, but still worth mentioning. It comes down to the fact that sexual exploitation must always be prosecuted, also when it is committed abroad. The requirement of dual criminality to prosecute perpetrators should not prevent punishment, and for that reason the Committee holds in these COs that this requirement must be repealed. Besides this, the CESCR makes a more general remark with respect to sex tourism in its COs on Jamaica, which it holds should be prohibited and penalised.

3.3.4 Domestic violence and the obligation to protect

Domestic violence first and foremost needs to be tackled by criminalisation and prosecution, that much is clear from the GCs and COs of the Committee. Especially the focus on the obligation to protect women from violence and to prosecute the perpetrators in GCs 14 and 16 illustrates this notion. Consequently, the CESCR addresses the whole range of aspects of prosecution in its COs from criminalisation of domestic violence to appropriate punishment. Some remarks can be made to its approach to the prosecution of domestic violence.

With regard to criminalisation of the phenomenon, it is noteworthy that the CESCR pays attention to corporal punishment taking place within the family. The monitoring body makes it clear that chastisement of women by their partners is not to be accepted and could, although not explicitly identified as such, be considered to fall within the ambit of domestic violence. In doing so, the Committee gives a clear signal that any form of physical violence in the family is contrary to the enjoyment of human rights and should be fought.

Another important aspect concerns the reporting, or in fact, underreporting of cases of domestic violence. In two COs the CESCR addresses the causes of this problem. In its COs on Greece this is the economic dependency of wives on their husbands, and

208 COs The Netherlands 2006, UN doc. E/C.12/NLD/CO/3.

in the comments on Denmark it is, besides economic dependency, also the fear of migrant women of being deported. The latter reason is partly related to the strict immigration policy of the state party. Although the Committee makes no recommendations with regard to the situation of economic dependency, with respect to the strict Danish immigration policy it does recommend the enforcement of appropriate mechanisms so that victims of domestic violence are not prevented from seeking assistance for fear of deportation or expulsion from the state party.

In addition to this, as noted, the Committee pays attention to the investigation, prosecution and punishment of domestic violence. It follows from the COs that domestic violence should not go unpunished. However, the Committee has never addressed this matter explicitly in its work, although that would have been expected, considering the remarks that the Committee makes in regard to the prosecution of other forms of violence against women, stating that perpetrators should not go free or get any reduction of sentence for reasons of victim behaviour.

3.3.5 Trafficking and the obligation to protect

Trafficking, like the other forms of violence against women described, needs to be criminalised and perpetrators need to be prosecuted. It is interesting to note that the CESCR recommends states parties to ratify international instruments that specifically deal with trafficking, such as the Protocol to Prevent, Suppress and Punish Trafficking in persons, especially Women and Children that accompanies the UN Convention against Transnational Organised Crime, and the Council of Europe Convention on Action against Trafficking in Human Beings. These Conventions lay down specific obligations for states with regard to the criminalisation of trafficking, and the prosecution and punishment of its perpetrators.

Although the Committee argues that states should criminalise trafficking, it does not explicitly refer to any definition of trafficking that should be laid down in national laws. Yet, the CESCR recommends states parties to ratify the aforementioned conventions which lay down a definition of trafficking. In addition to this, the Committee pays considerable attention to the prosecution of trafficking and the punishment of its perpetrators. Yet, not that much attention is paid to possible hurdles that may hinder the effective prosecution of this crime. Victims of trafficking are, especially due to their often-illegal status in states parties, not likely to file a complaint of cases of trafficking with the national authorities, nor are they likely to be willing to cooperate in the prosecution process by, for example, testifying against possible perpetrators. These characteristics of trafficking and its victims are not addressed by the CESCR in its work.

3.3.6 Sexual harassment and the obligation to protect

Sexual harassment should be criminalized according to the CESCR. But whereas the Committee addresses the criminalisation of the practice in almost a dozen COs, it,

remarkably, hardly pays any attention to the actual prosecution of sexual harassment. One may of course assume that cases should be prosecuted, not only because the Committee requests states to prohibit this practice in its legislation, but also because it expresses its concern about the de facto impunity with which sexual harassment is committed in Georgia, for example. Yet the Committee has never explicitly formulated this obligation in its COs. As a consequence also no attention is paid to the factors that may prevent women from reporting these crimes or the procedural issues that make successful prosecution of perpetrators difficult. Although in respect of the latter comment, it should be noted for the sake of completeness that the CESCR did encourage Liechtenstein in 2006 to adopt the proposed amendment to the Gender Equality Act which would extend the burden of proof to the employer.

3.3.7 FGM and the obligation to protect

FGM, regardless of where the procedure is performed, whether in the private sphere with a non-sterile razorblade or in a hospital with clean materials, must be prohibited and must be prosecuted. The Committee does not refer to different types of FGM as they have been identified by the WHO, for example, but its strong condemnation of the practice *under all circumstances* offers a clear indication that all forms of FGM should be criminalised in national legislation.[209] In this respect FGM is not treated differently than any of the other forms of violence against women.

3.3.8 Other harmful practices and the obligation to protect

It follows from the COs that honour crimes and the pledging of girls should be prosecuted, as with regard to both phenomena it refers to the punishment of those responsible. With respect to widow cleansing and eating disorders, it does not make statements to this end. Whereas widow cleansing should be eliminated and one may therefore assume that this practice must also be fought through criminal means, the latter issue of eating disorders is a more problematic topic in that regard.

3.4 Physical violence against women and the obligation to fulfil the rights enshrined in the ICESCR

3.4.1 Sexual violence and the obligation to fulfil

Although the CESCR addresses sexual violence in general, thus without specifying the form of violence, it is only in a few COs that it formulates some recommendations that

209 For a detailed explanation and overview of the different categories of FGM see WHO, 'Eliminating Female Genital Mutilation – An Interagency Statement', http://www.who.int/reproductivehealth/publications/ fgm/9789241596442/en/index.html, accessed on 4 July 2009, Annex 2.

fall within the ambit of obligations to fulfil. Thus, only in a few COs it recommends states parties to take certain measures to provide for certain facilities and basic needs. The Committee encourages states to implement or strengthen national awareness campaigns and to provide for adequate protection, support, counselling and other assistance for victims. And, in its COs on Bosnia and Herzegovina, it holds that the state party should ensure the participation of victims in any decision-making process affecting them.

The Committee makes general recommendations, thus leaving it up to the state party to decide which concrete measures to take in relation to the prevention of sexual violence and the provisions of its victims. For that reason, for example, it does not mention shelters for women escaping this type of violence or possibilities for victims of claiming redress. Yet, the Committee does make such more specific recommendations in light of the specific forms of violence it addresses in its work, such as rape, as will be discussed in the following paragraphs.

3.4.2 Rape and the obligation to fulfil

The CESCR does not often address rape, and when it does, it generally addresses marital rape and formulates recommendations that mainly entail criminalisation of the act. Yet, in a few COs it requests states to take certain measures that entail providing certain programmes or facilities. States are urged to combat rape through information campaigns and educational programmes. This is done with a view to sensitising both professionals dealing with the problem as well as the general public to the phenomenon and to the criminal nature of such acts. This means that campaigns and programmes are not directed at eliminating certain socio-cultural patterns that could instigate or perpetuate the incidences of these acts, but that they should focus on the acts themselves and the fact that they are in violation of the law. Yet, some aspects related to these root causes of rape are addressed by the CESCR, not as factors that instigate or perpetuate the practice, but as barriers that inhibit victims of rape from seeking assistance. In its COs on Jordan, the Committee notes that attention should be given to addressing and overcoming these socio-cultural barriers, but it leaves aside just how to do that. Hence, the Committee recognises that certain expectations and ideas characteristic of a particular society may inhibit women from seeking help, but it does not pay attention to the fact that these same patterns could also cause or aggravate these crimes.

Besides addressing these socio-cultural barriers, the CESCR also pays attention to a number of facilities that should be available for victims of rape, although the Committee does not specify which facilities should be available and uses rather general terms to indicate that certain services should be provided. The CESCR holds that states should strengthen their assistance to victims of rape, provide them with adequate protection, and strengthen their programmes for rehabilitation and reintegration. It is only in one CO that the Committee recommends a specific type of facility for victims: to provide them with shelters. As noted, the attention of the Committee for rape is

quite limited and this would explain why not more attention is given to the availability and accessibility of certain services, such as telephone hotlines and possibilities for redress. Yet one may wonder why the CESCR pays so little attention to rape, and hardly any attention to rape that takes place outside the domestic sphere.

3.4.3 Sexual exploitation and the obligation to fulfil

The recommendations of the Committee with regard to sexual exploitation mainly focus on criminalisation of the phenomenon. In addition, it formulates a few general recommendations with regard to the situation of the victims. It holds that the states parties in question should rescue victims of forced prostitution, provide protection and assistance to victims of sexual exploitation, and should adopt social measures. But it does not specify these obligations, and consequently does not argue that states have to provide for certain facilities and services, for example with regard to rehabilitation, integration and redress.

3.4.4 Domestic violence and the obligation to fulfil

The recommendations of the Committee with regard to domestic violence can be divided between those that address the general public, those that focus on the professionals that encounter domestic violence in their work, and those that are directed at the victims of this phenomenon. With regard to the recommendations that are directed at the general public, their function is mainly a preventive one. The CESCR calls upon states parties to promote or initiate information campaigns on domestic violence. It is interesting to note that the Committee does not only refer to information about the phenomenon itself, but in its COs on Guatemala, for example, it also argues that information must be distributed so as to combat the negative customs and attitudes that instigate or perpetuate this practice.

In addition to this, professionals that could be expected to deal with domestic violence should also be made aware of the phenomenon and its criminal nature. Law-enforcement officials, members of the judiciary, care workers and medical personnel should be trained in the identification, reporting and management of cases of abuse. Especially the reporting of such cases is noteworthy, as this aspect could arguably infringe on the privacy of the women concerned as well. Moreover, if this reporting includes reporting a case to the law-enforcement authorities it may have even further complications, for it would mean that the CESCR in effect argues that third parties could and possibly should instigate criminal procedures against perpetrators of domestic violence without the consent of the woman involved; provided of course that the judicial system of a state would allow it.

The third category of obligations to fulfil with respect to domestic violence concerns the provisions that should be available for the victims. The range of facilities that are recommended by the Committee is broad: victims of domestic violence should be provided with: access to safe housing; remedies; redress for physical, mental and

emotional damage; counselling services with regard to medical, psychological and legal assistance; and possibly also rehabilitation services. Apart from the recommendations regarding these facilities, it is interesting to note that, also with regard to domestic violence, at all times appropriate and affordable housing should be available. For as the Committee notes in its COs on Canada, when this is not available it may induce women to stay in violent domestic situations. Lack of appropriate housing may therefore perpetuate the abusive situation.

Finally, a few words should be dedicated to the protection of victims by separating them from their violent partners. This can be done through the use of banning orders and, as was shown in the COs on Luxembourg where the Committee recommended the state party, by enacting a draft law stipulating that a violent spouse could be forced to leave the family home as soon as possible.

3.4.5 Trafficking and the obligation to fulfil

The measures that the Committee recommends with regard to trafficking to a large extent reflect the often-transnational character of the problem: taking place in countries of origin, of transit and of destination. It is interesting to see that the CESCR also pays attention to the situation of victims or potential victims in countries of origin, both with regard to the prevention of trafficking as well as the shelter for trafficking victims when they return from countries to which they have been trafficked (either by deportation or voluntarily). With regard to the former situation, to prevent the practice in the first place, the CESCR holds that the general public should be made aware of the phenomenon and observes in its COs on Moldova that the state party should combat trafficking by improving job possibilities and providing assistance to women living in poverty. In doing so the Committee addresses one of the root causes of trafficking in women for sexual exploitation in that state: poverty. It should be noted that the Committee addresses this specific cause due to the fact that a delegate of Moldova addressed the matter in relation to a policy of the state party to address trafficking. Besides this matter, the Committee focuses on the facilities that should be available to victims of trafficking upon return. States parties are requested to allow for their return, for their rehabilitation, to which end they should initiate programmes, and for their reintegration.

Several recommendations address the situation of victims in countries of transit and countries of destination. Both the general public as well as professionals that encounter victims of trafficking in their work (law-enforcement officials, the judiciary, medical and psychological personnel) need to be made aware of the phenomenon and need to be sensitised to the needs of victims. Moreover a number of facilities need to be available to women that have been trafficked: services that provide medical, psychological and legal support; crisis centres; and redress. Noteworthy is also the attention of the CESCR for deportation of trafficked women as illegal migrants. The Committee notes in this respect that states parties should ensure that the procedural safeguards for deportation are observed. Although this is an obligation to respect, one could also read

an obligation to fulfil into this recommendation. For in effect, what the CESCR makes clear is that trafficking may in certain circumstances necessitate granting a (temporary) residence permit.

Besides these specific facilities, the Committee makes a recommendation that is of a very different nature and does not focus directly on the situation of victims but is more of a procedural nature. It holds that state should ratify the international and regional instruments developed to combat trafficking and should cooperate with other states to fight the phenomenon.

3.4.6 Sexual harassment and the obligation to fulfil

The Committee hardly ever makes recommendations that reflect an obligation to fulfil the rights enshrined in the Covenant when it concerns the phenomenon of sexual harassment. This is in part due to the fact that the CESCR does not address this matter very often in general, and because when it does formulate recommendations of that nature, it mostly focuses on the criminalisation and prosecution of sexual harassment.

The range of duties with regard to sexual harassment are rather limited for that reason. Moreover, as noted previously, they mainly relate to sexual harassment in the workplace. In light of the obligation to fulfil the rights as enumerated in the Covenant, states are, following the COs, held to raise awareness of the phenomenon of sexual harassment amongst both the general public and among law enforcers and the judiciary. Noteworthy is the fact that in its COs on China, the CESCR also requests the state party to start awareness-raising programmes designed to eliminate gender-based prejudices and traditional practices that are harmful to women and girls in this respect. The Committee thus acknowledges a causal link between these harmful attitudes and sexual harassment and consequently requests the state party to tackle this root cause.

With regard to facilities, the Committee only recommends effective remedies for victims and does so in only one of its COs. This can hardly be called a general obligation for states parties under the ICESCR.

3.4.7 FGM and the obligation to fulfil

FGM is considered to be a harmful practice and should for that reason be fought under all circumstances. It is therefore not surprising that most recommendations regarding this practice refer to criminalisation and prosecution of this practice. Yet in a few COs, the Committee recommends the facilitation of certain services in order to prevent the practice and to protect its victims.

In a few instances, the Committee argues that FGM should be combated through educational programmes. The notion that states should raise awareness of the practice is reinforced by the fact that the CESCR welcomes awareness-raising programmes in one of its COs and criticises a state party for not taking this measure in another of its COs.

It is also noteworthy that the CESCR pays attention to the position of the practitioner in its COs on Benin. Since the general approach to FGM is that of criminalisation, the practitioner is usually identified as the *perpetrator*, who needs to be prosecuted. But in these COs the Committee acknowledges the difficult situation of circumcisers, who often have no other means to support themselves than through performing these procedures and for that reason are not very likely to give up their means of living very easily. The Committee invites Benin to redouble its efforts to fight FGM through, amongst other things, education and financial support for practitioners who cease their activities. Similarly, the recommendation of the HRC for promoting alternative rite of passage ceremonies in its COs on Kenya of 2008 deserves mentioning. These COs show that the CESCR is aware that FGM cannot be tackled through criminalisation alone.

At the same time, the attention for facilities for victims or for women who flee situations in which they fear circumcision is very limited. Only in one of its COs does the CESCR remark that the state party should consider establishing a mechanism for the protection of women in respect of this convention. What this protection should involve or what such a mechanism should entail it leaves unaddressed. The Committee thus pays no attention to the variety of facilities that should arguably be available for victims of FGM, such as medical and psychological care or redress. Nor does it lay down any duties for states parties to provide for facilities for women that try to escape FGM, such as shelters, hotlines, or, when women seek refuge in another country, (temporary) residence permits.

3.4.8 Other harmful practices and the obligation to fulfil

Besides the general recommendation of the CESCR to Sweden to implement its national strategy with regard to eating disorders, it is only in its COs on Jordan, when addressing honour crimes, that the Committee formulates some recommendations that would fall within the scope of the obligation to fulfil. In these COs, the CESCR recommends the state party to train law enforcers, care workers, judges and healthcare professionals in the identification, reporting and management of cases of this type of abuse. The remark mostly concerns the criminalisation and prosecution of these crimes. This also follows from the concern with regard to which the recommendation is made, namely that crimes against women perpetrated in the name of honour go unpunished. The Committee, however, also makes a statement with regard to the facilitation of certain services for victims, as it requests the state to continue to cooperate with social organisations as regards hotlines, shelters and counselling services for victims of these abuses.

The Committee pays no attention for facilities for victims with regard to any of the other harmful practices that it addresses, such as widow cleansing and the pledging of girls. In addition to this, it does not formulate any duties for states to raise awareness on any of these conventions, be it to inform the general public, and law enforcers and the judiciary in particular, of the criminal nature of these acts, or to address the root

causes of the phenomena such as gender inequality. The latter notion is especially remarkable since the Committee itself observes that these harmful practices are deeply ingrained in societies. Hence they are not likely to be tackled or eliminated by criminalisation alone, but would arguably require a transformation of attitudes present in society towards these practices.

4 PHYSICAL VIOLENCE AGAINST WOMEN AND DISCRIMINATION OF WOMEN

4.1 Introduction

The CESCR addresses physical violence against women in GC 16, which deals with the equal enjoyment of the rights laid down in the ICESCR. This indicates that the Committee considers these forms of violence to affect the principles of equality and non-discrimination. But besides this GC in which it addresses violence in general, it is remarkable that the CESCR hardly ever explicitly refers to gender inequality or discrimination in its work with regard to the specific forms of violence addressed. Only with respect to sexual harassment and honour crimes the Committee explicitly refers to the unequal status of women in society. Now and then some of the other expressions of violence against women are linked to discrimination, like rape in the COs on Congo, but in general, situations like de facto impunity of rape or sexual exploitation of women and girls are not related to discrimination of women or their unequal status. Yet, the Committee in a number of COs does address the factors that instigate an unequal situation for women or that reflects their unequal status. These statements are analysed in the following paragraphs in more detail.

4.2 Physical violence against women and direct discrimination

The Committee pays attention to a few issues that without a doubt constitute direct discrimination: the legal provisions which permit chastisement of a *woman* by her *husband*; the punishment of *women* for not adhering to certain dress codes or for entering the streets after dusk; and honour crimes, and in particular their prosecution. It is clear that all these matters also reflect the discriminatory attitudes of women present in societies, and for that reason are also manifestations of more deeply rooted discrimination of women. But they also constitute direct discrimination, since the legal provisions in respect of these matters make a direct and unjustifiable distinction between men and women. Remarkably, the Committee does not address the matters as such, it does not argue that legislation that provides reduction or exemption of sentence in cases where the honour of a woman was at stake is discriminatory. Nor does the CESCR explicitly consider legalisation of chastisement of wives or arbitrary punishment in regard to dress codes to constitute discrimination. But at the same time, without making reference to direct discrimination, it does hold that honour crimes reflect the persistent discrimination of women in societies.

The lack of analysis of national laws and policies that address different forms of violence against women on their possible discriminatory content, is exemplified by the fact that the Committee pays no attention in its work to the discriminatory nature of legal provisions in states parties. For example, the Committee does not refer to discriminatory provisions with regard to rape victims, for example those which demand victims to be 'honest' women, or those that lay down that a perpetrator goes free if he marries his victim. Depending on the formulation in the national provisions this could also amount to indirect discrimination, but as will be shown in the next paragraph, also in that regard the Committee does not refer to discrimination.

4.3 Physical violence against women and indirect discrimination

In addition to the laws and policies that make a direct distinction between men and women, prima facie gender-neutral regulations or policies might also have discriminatory effects. Naturally, this also applies to laws and programmes that deal with physical violence against women. In a number of COs, the Committee pays attention to such laws and policies. In its COs on Canada, for example, the CESCR observes that significant reductions in provincial social-assistance programmes, coupled with the unavailability of affordable and appropriate housing, and widespread discrimination in Canada, create obstacles for women to escape from domestic violence and give them no other choice than to stay in or return to the violent situation, or to become homeless. The decision to cut provincial funds puts women at a disproportionate disadvantage in this case and could reflect indirect discrimination. Another example is provided by the COs on Denmark of 2004, in which the Committee notes that strict migration legislation, which in principle does not distinguish between men and women, has serious negative consequences for migrant *women*. The CESCR observes that these women often do not report domestic violence for fear of deportation or expulsion. On that account they see no other option than to remain in the violent environment. But in all instances where the Committee addresses prima facie gender-neutral situations, laws or policies, and emphasises the negative consequences they have on the enjoyment of human rights by women, it does not link these matters explicitly to discrimination. The only exception to this is in GC 14, in which the Committee holds that with regard to Article 3 of the Covenant dealing with equality of men and women, the right to health should be understood as to provide victims of domestic violence with access to safe housing, remedies and redress for physical, mental and emotional damage. Here the Committee relates health-related services, or in fact lack of these services, to discrimination. For example, if a state party fails to provide for sufficient shelters, this would prima facie be a policy matter that does not directly discriminate against women, but could result in discrimination, for it is likely to be mostly women that are affected by the lack of such safe houses. The Committee recognises this in GC 16, where it argues that:

> 'Implementing article 3, in relation to article 10, requires States parties, inter alia, to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage.'[210]

In a number of COs the Committee refers to the causes that indirectly affect the enjoyment of human rights, like the migration law of Denmark, which could also reflect systemic discrimination of women. For example in its COs on Moldova, the CESCR links trafficking to the many women in the state party that live in poverty. And in its COs on Nigeria, the Committee relates rape and other forms of violence against women to the rising number of homeless women and young girls who are forced onto the streets. It does, however, not question these root causes and the fact whether they are caused by structural gender inequality in the state party.

4.4 Physical violence against women and systemic discrimination

Two forms of physical violence against women are expressly placed in the context of systemic discrimination: sexual harassment and honour crimes. With regard to both, the Committee notes that they reflect the unequal status of women in society. In regard to the other forms of violence the CESCR does not generally make this explicit link, an exception to this being the COs on Croatia, where the Committee in reference to its concern about the incidence of rape in the state party requests it to develop appropriate laws and polices to address the inequality of women.

Remarkably also, an issue like FGM, a matter which the Committee recognises to be deeply ingrained in society and on that account to reflect cultural attitudes, is generally not addressed as such. This is remarkable, for taking into account that only women undergo this harmful procedure, it is very likely to reflect discrimination of women. It should be noted here that there is one exception as far as FGM is concerned: in GC 16, which deals with the equal enjoyment of the rights laid down in the Covenant, the Committee calls for a prohibition of FGM in states parties. Although it does not explicitly argue that FGM reflects discrimination of women, it is clear that by addressing the matter in the context of this GC it links FGM to inequality, at least as far as the enjoyment of rights is concerned. But with regard to other issues such as trafficking and domestic violence, matters which have also frequently been argued to result from structural disadvantages of women, generally no attention is paid to this likely root cause.[211] An exception to this is found in the COs on Guatemala, where the Committee observes that the state party should organise awareness-raising campaigns so as to combat negative traditional practices and their effects and consequences, and on that account addresses what it considers to be the causes of this violence. It should

210 GC 16, para. 27.

211 With regard to root causes of trafficking, Askola refers for example to gender inequality, poverty and under-development. Askola, H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Hart Publishing, Oxford, 2007, p. 142.

be noted, however, that it does not mention whether these prejudices and attitudes in effect constitute a form of gender discrimination.

With regard to the underreporting of marital rape and domestic violence, thus not with respect to the actual abuse, the CESCR also makes some remarks on its possible causes. It notes that cases are rarely reported for cultural reasons as well as economic dependency of wives on their husbands. However, also here no reference is made to the fact that this may possibly reflect persistent discrimination of women (it does not look for the reasons of this economic dependency), or that it may actually amount to discrimination when women are hindered to file a complaint. It should, moreover, also be noted here that the Committee makes no recommendations to address these causes: it does not request Greece to tackle the problem of economic dependency of wives.

5 THE POSITION OF PHYSICAL VIOLENCE AGAINST WOMEN IN THE WORK OF THE CESCR

The call made in the Vienna Declaration and Programme of Action on the human rights monitoring bodies to include the status and human rights of women in their work entailed a request to address these matters in the same manner as other *traditional* human rights concerns are dealt with, i.e. consistently under each of the provisions that they affect, and not in an isolated manner, for example under the heading of 'women and children'.

The forms of physical violence against women, as addressed by the CESCR and described in this chapter, in general affect the right to protection and assistance to the family as laid down in Article 10 and the right to health formulated in Article 12 of the ICESCR. This follows from GC 14 and GC 16 and a number of COs. Less certainty is given as to which provisions are affected by the specific forms of physical forms of violence that the Committee pays attention to. The Committee makes it clear that domestic violence and FGM affect the right to health and, in the former case, also the right of protection of the family. But with regard to the other forms it generally, besides sometimes making reference to discrimination and equality, and thereby linking the issue to Article 3, does not mention which provisions of the Covenant are affected. This is interesting, for it could indicate that the matters that the Committee addresses are in principle not directly related to any of the rights laid down in the Covenant, but that the CESCR considers them to affect economic, social and cultural rights in general and for that reason considers it necessary to address them, or it could mean that in effect a multitude of the rights are, or could potentially be, affected by these issues. It would be worthwhile to know the exact reasons that the Committee has for not referring explicitly to any of the provisions in order to expose the context in which certain matters are addressed, which in turn might provide insight as to why certain matters are not addressed.

With regard to all issues, except eating disorders, the Committee notes that they affect women, and with regard to certain phenomena also, or mainly, children. Trafficking is furthermore also addressed as trafficking in persons.

6 CONCLUSIONS

6.1 The work of the CESCR and the request of the 1993 World Conference

The work of the CESCR shows that the Committee pays a lot of attention to various manifestations of physical violence against women and on that account clearly reflects compliance with Element I of the request of the 1993 World Conference on Human Rights. It is clear that issues like domestic violence, trafficking and FGM are high on the agenda of the CESCR. Noteworthy is also the attention of the Committee for eating disorders. Although addressed only once, it shows that the Committee is aware that eating disorders may affect the enjoyment of the rights as laid down in the ICESCR. Therefore, the work of the CESCR reflects, unlike that of the HRC, attention for what the former UN Special Rapporteurs on Violence against Women refer to as *Western beauty practices*.[212]

In order to address these issues effectively, the Committee formulates different types of obligations for states parties. Its work also reflects compliance with Element II of the request of the 1993 World Conference on Human Rights: overall, the CESCR formulates obligations for states parties that take into account the gender-specific form and circumstances of the human rights abuses that women encounter. States are requested to criminalise the various manifestations of physical violence against women, they should prosecute perpetrators, and punish them in accordance with the severity of the crime. And although most recommendations of the CESCR for states parties represent an obligation to protect human rights as regards physical violence against women, the Committee also pays considerable attention to raising awareness of these crimes and to services that should be in place for victims of these types of violence. The Committee refers to safe houses for battered women; counselling services to provide medical, psychological and legal assistance to victims of domestic violence; and telephone hotlines for women who have been raped. The CESCR also shows significant attention to the deportation by states parties of victims of trafficking, which it notes, makes these women double victims: they are confronted with a lack of sensitisation of police, judges and public prosecutors, a lack of appropriate care, and face certain risks and dangers when deported to their home countries. But although the

212 CHR, Violence against Women, *Integration of the Human Rights of Women and the Gender Perspective*, UN doc. E/CN.4/2002/83, p. 27; Report of the Special Rapporteur on Violence against Women, Yakin Ertürk, *Intersections Between Culture and Violence against Women*, UN doc. A/HRC/4/34, paras. 47-48. See on the relation between *Western beauty practices* and human rights also Winter, B., D. Thompson, S. Jeffreys, 'The UN Approach to Harmful Traditional Practices', *International Feminist Journal of Politics*, vol. 4, 2002, no. 1, p. 87; Jeffreys, S., *Beauty and Misogyny: Harmful Cultural Practices in the West*, Routledge, London, 2005, pp. 29-30; and Howard, R., 'Health Costs of Social Degradation and female Self-Mutilation in North America', *Human Rights in the Twenty-First Century: A Global Challenge*, Mahoney, K., and P. Mahoney (eds), Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 503-516. Chapter 4, Section 6.2.1., discusses this notion of *Western beauty practices* as human rights concerns.

Committee urges states parties to ensure respect for the necessary procedural safeguards when deporting victims of trafficking in persons, particularly when such victims are minors, it never, unlike the HRC, makes any recommendations requesting states parties to grant residence permits to these victims.

Furthermore, the work of the CESCR reflects compliance with Element IV of the request of the Vienna Declaration and Programme of Action: the Committee addresses the manifestations of physical violence against women in an integrated manner. Therefore, the work of the CESCR mainly reflects the request of the 1993 World Conference on Human Rights. Yet, there still is work to be done in order for the work of the CESCR to fully reflect this request. For clearly lacking in the work of the CESCR is Element III. It is only sexual harassment and honour crimes that are explicitly linked to deeply-rooted discrimination of women in society. No other manifestations that the Committee addresses are placed within the broader context of discrimination of women, although clearly many of them are likely to result from the subordinate status of women in society. In general therefore, the recommendations of the CESCR do not request states parties to tackle certain manifestations of violence against women by addressing its root cause: discrimination of women. As mentioned, its main recommendations for states parties, as far as physical violence against women is concerned, focus on the criminalisation and prosecution of these acts. This indicates that the CESCR requests states parties to address the evil's symptom, but not its cause. For the work of the Committee to reflect compliance with the request of the 1993 World Conference, it is therefore crucial that the CESCR examines whether these specific experiences of women result from underlying gender hierarchies in which women have a subordinate status. Moreover, where applicable, it should explicitly recognise this link and respond to it accordingly in its recommendations for states parties.

In addition to this, attention should be drawn to the fact that although the CESCR formulates a variety of different obligations for states parties that generally take into account the gender-specific nature of this abuse, this is not necessarily true for all types of women-specific human rights abuse that the Committee addresses. In this regard, attention should be drawn to the obligations that the Committee formulates with regard to trafficking and in respect of FGM. With regard to trafficking, for example, the work of the Committee generally does not reflect the fact that trafficked woman are often illegal residents. This illegal status of victims of trafficking make it less likely for these women to step forward and for example file a complaint against their trafficker, or to make use of the specific services that the CESCR holds should be available in states parties.[213] It is therefore doubtful whether the recommendations

213 See for example Gallagher, A.T., *Human Trafficking: International Law and International Responsibility*, PhD Dissertation 2006, p. 285; Gallagher, A.M., 'Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination', *Georgetown Immigration Law Journal*, vol. 19, 2002, no. 1, pp. 99-123. See also Askola, H., *Legal Responses*

of the Committee that represent obligations to protect and to fulfil human rights are fully women-inclusive, reflecting the gender-specific circumstances of trafficking, and whether they will really be effective.

Another doubtful point is that the CESCR pays practically no attention to sexual violence committed by state agents. Only in two COs does the Committee pay attention to sexual violence taking place in armed conflict. Although this could point to attention of the Committee to the role of state militia in matters of sexual violence, the CESCR does not refer in these COs to state agents as perpetrators of these abuses. Moreover, when the CESCR addresses the phenomenon of rape, it mostly refers to marital rape and has never explicitly addressed, for example, rape by militia members in armed conflict or in detention centres. One may wonder why the Committee does not address the role of state agents in acts of rape and their settlement by law enforcers and the judiciary. The Committee pays attention to sexual violence in armed conflict and may be expected to be aware of the fact that militia could be involved in rape and sexual abuse of women in these circumstances. However, also in these instances, the CESCR does not recommend any duties with regard to the actions by these state officials, but only discusses a duty for states to provide for certain facilities for the victims of these crimes

Also with regard to FGM, it can be questioned whether the obligations as denoted by the CESCR in its work are fully *women-inclusive*. This matter was also discussed in regard to the work of the HRC on FGM in Chapter 4. There it was noted that FGM is known to be usually performed for socio-cultural reasons by predominantly female private actors with apparent consent of the circumcised or her proxy.[214] This not only raises questions with regard to the practical implementation of the recommendation to prosecute, but it can also be questioned whether criminalisation is the only or best means to combat this practice. As mentioned in Chapter 4, organisations that operate on the ground argue that criminalisation of FGM should be accompanied by other measures, including the promotion of alternatives.[215] As the focus of the CESCR with regard to the elimination of FGM has so far mainly been on criminalisation, it could be worthwhile to also pay more attention to the societal context and alternative practices so as to prevent the occurrence of the practice. In this regard, the statements of the CESCR in its COs on Kenya of 2008 certainly prove to be a step in the right direction.

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to Trafficking in Women for Sexual Exploitation in the European Union, Hart Publishing, Oxford, 2007, pp. 150-152.

214 Obiora, L., 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision', *Case Western Reserve law Review*, vol. 47, 1997, no. 2, p. 284.

215 See for example the report of UNFPA entitled 'A Holistic Approach to the Abandonment of Female Genital Mutilation/Cutting', published in 2007, http://www.unfpa.org/gender/practices1.htm, accessed on 4 July 2009; and WHO, 'Eliminating Female Genital Mutilation – An interagency statement', http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf, accessed on 15 May 2009, pp. 16-17; Morris, K., 'Feature Issues on female genital mutilation/cutting – progress and parallels', *Lancet*, vol. 368, 2006, p. s65.

6.2 Opportunities in the work of the CESCR

6.2.1 Attention for sexual exploitation clarified

The Committee indicates that sexual exploitation is contrary to the rights as laid down in the ICESCR. In a number of COs it refers to sexual exploitation without specifying a specific form, in some other COs it refers to certain practices that it links to sexual exploitation: sex tourism and prostitution, forced or otherwise. But although in a few COs the CESCR refers to these manifestations of sexual exploitation, the question remains what exactly it considers to be sexual exploitation. The Committee does not define its interpretation of sexual exploitation. For example, it is not clear from the work of the CESCR whether prostitution necessarily constitutes sexual exploitation. The fact that the Committee refers to the term *forced* prostitution in its COs on Cyprus would indicate that voluntary prostitution would also exist, which therefore arguably does not constitute sexual exploitation. Yet the comments of the CESCR in its COs on Sweden lead to a different interpretation, for here it commends the state party on its newly adopted laws that criminalise the buying and soliciting of sexual services. It welcomes this development without even wondering whether this has been to the advancement or the detriment of the enjoyment of human rights by prostitutes.

The interpretation of prostitution as exploitation or not has been a hotly debated issue for centuries. Jolin notes that throughout its long history, prostitution has neither enjoyed uncontested acceptance nor endured total condemnation.[216] Gould makes describes four different views amongst feminists regarding the subject: some have taken a liberal position defending the right of women to sell sexual services and criticising those who would portray them as victims; the pragmatists, whatever their view on the morality of prostitution, state that punitive laws are impractical and argue for this reason alone that they should be replaced by something that is effective; the feminists, like Green and Schrage, find prostitution morally repugnant, degrading and exploitative, but prefer that moral means be used to fight it; and lastly, those who see prostitution as a form of violence against women which criminal law should seek to prohibit.[217] Some of these views can be juxtaposed. In light of the controversies about the subject it is remarkable that the CESCR does not inquire after the position of prostitutes. It does not do so when applauding the strict criminal policy of Sweden on prostitution, nor does it question the effects of the liberal prostitution policy of the Netherlands with regard to the enjoyment of human rights by prostitutes. To do so would give a more transparent picture regarding the effects of laws and policies regarding prostitution on the enjoyment of human rights, which would be better than welcoming a new law without questioning it or ignoring a liberal policy.

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216 Jolin, A., 'On the Backs of Working Prostitutes: Feminist Theory and Prostitution Policy', *Crime and Delinquency*, vol. 40, 1994, no. 1, p. 69.

217 Gould, A., 'The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden', *Journal of Social Politics*, vol. 30, 2001, no. 3, p. 438.

6.2.2 Attention for Western beauty practices

On one occasion, the CESCR indicates that what some authors refer to as 'Western beauty practices', in this case eating disorders, is a human rights concern. This is, however, the only instance in which the Committee makes reference to a practice that would fall under this heading. As observed in Chapter 4, with regard to the work of the HRC, a number of authors have referred to *Western beauty practices* as being harmful practices, which result from ingrained gender inequality or harmful gender ideologies.[218] Taking into account that the CESCR also addresses other harmful practices, which are argued to be of a similar nature, it can be argued that the CESCR can, and in light of the request of the Vienna Declaration and Programme of Action possibly should, pay attention to these issues in its work.[219] Hence, the CESCR should consider addressing these so-called *Western beauty practices* and to that end should examine the relation between these practices and the human rights norms laid down in the respective Covenants.

218 As noted in Chapter 4, Jeffreys observes that beauty practices are the main instrument by which the 'difference' between the sexes is created and maintained. She holds that they create the stereotyped role for women of being sex and beauty objects having to spend inordinate amounts of time and money on makeup, hairstyles, depilation, creams and potions, fashion, botox, and cosmetic surgery. Jeffreys, S., *Beauty and Misogyny: Harmful Cultural Practices in the West*, Routledge, London, 2005, pp. 29-30. See also OHCHR, UN Fact Sheet No. 23, *Harmful Traditional Practices Affecting the Health of Women and Children*. See on this matter the reports of the two former UN Special Rapporteurs on Violence against Women: Coomaraswamy and Ertürk: CHR, *Integration of the Human Rights of Women and the Gender Perspective*, UN doc. E/CN.4/2002/83, p. 27; Report of the Special Rapporteur on Violence against Women, Yakin Ertürk, *Intersections Between Culture and Violence against Women*, UN doc. A/HRC/4/34, paras. 47-48. See also Winter, B., D. Thompson, S. Jeffreys, 'The UN Approach to Harmful Traditional Practices', *International Feminist Journal of Politics*, vol. 4, 2002, no. 1, pp. 72-94; Jeffreys, S., *Beauty and Misogyny: Harmful Cultural Practices in the West*, Routledge, London, 2005; Howard, R., 'Health Costs of Social Degradation and female Self-Mutilation in North America', *Human Rights in the Twenty-First Century: A Global Challenge*, Mahoney, K., and P. Mahoney (eds), Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 503-516.

219 Howard for example compares the beauty practices of the West with FGM. Howard, R.E., 'Health Costs of Social Degradation and Female Self-Mutilation in North America', *Human Rights in the Twenty-First Century: A Global Challenge*, Mahoney, K.E., and P. Mahoney (eds), Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 503-516.

CHAPTER 7
CONCLUSIONS

1 INTRODUCTION

Are women's rights human rights? That is basically what the study as described in this book was about. The UN human rights system has been criticised for being androcentric, promoting and protecting human rights of men, but ignoring experiences specific to the lives of women. For that reason, it was argued that women's human rights were only protected to the extent that women experience situations commonly identified with the lives of men. The 1993 World Conference on Human Rights subscribed to this claim and requested a transformation of the international human rights system. Human rights of women must be integrated into the mainstream of UN human rights discourse and practice. To that end, the human rights monitoring bodies were asked to include the status and human rights of women in their deliberations and findings. This study has examined whether the work of the HRC and the CESCR reflects compliance with this request of the 1993 World Conference on Human Rights when dealing with issues that affect women's physical integrity.

On the basis of relevant UN documents, reports and literature, the request of the Vienna Declaration was interpreted as comprising four main elements, which served as a framework in examining the work of the Committees. The premise was that it may be concluded that the work of the HRC and that of the CESCR reflect compliance with the request of 1993 if this study reveals that in the relevant period of time the two Committees paid attention to human rights issues that specifically affect women, if it displays *women-inclusive* human rights obligations for states parties, if it links issues that affect women's physical integrity to discrimination of women where applicable, and if the relevant documents, first and foremost the concluding observations, address these issues in an integrated manner.

To find an answer to the main research question, the entire work volume of the HRC and the CESCR was studied from 1993 until 2008: their COs, GCs, lists of issues, reporting guidelines and views. Where the statements of the Committees in their COs needed clarifying, the summary records of the *constructive dialogues* with states parties were consulted. The study shows that the Committees gave attention to a variety of issues that affect women's physical integrity, relating to pregnancy and to physical violence against women. Chapters 3 to 6 of this book are devoted to these two clusters of human rights issues: each chapter presented conclusions with regard to the main research question in light of these categories of human rights issues. The present chapter is to give an overall answer to the research question and includes some final remarks.

2. RESULTS OF THE STUDY

2.1 Introduction

The work of the HRC and the CESCR regarding matters that affect women's physical integrity shows a striking resemblance, which is highly noteworthy considering their different mandates. Both Committees address practically the same issues, formulate similar obligations for states parties and in doing so, follow the same line of reasoning. For that reason, the results of the study on the work of both bodies as regards the four elements of the request of the 1993 World Conference are discussed together.

2.2 Element I: specific experiences of women

The results of the study, as discussed in Chapters 3 to 6 of this book, show that the HRC and the CESCR pay attention to a variety of issues that affect women's physical integrity. It is noteworthy that the Committees not only address issues that had already gained general international attention as human rights abuse at the 1993 World Conference on Human Rights, but also discuss issues which are not mentioned in the Vienna Declaration and Programme of Action and are not usually linked to provisions of their respective mandates.[1] Attention should be drawn to the extensive work of the Committees on manifestations of physical violence against women. In many of its COs, the HRC and the CESCR pay attention to rape, domestic violence, trafficking in women, sexual harassment and FGM. Violence against women, including domestic and sexual violence, has been in the spotlight of human rights forums for the last few decades. In 1992, the CEDAW Committee, whose mandate makes no explicit reference to violence against women, adopted General Recommendation 19 on this topic.[2] The UN General Assembly adopted the Declaration on the Elimination of Violence against Women in 1993. And in 1994, the then UN Commission on Human Rights adopted resolution 1994/45, in which it established the mandate of a Special Rapporteur on Violence against Women, including its causes and consequences. Moreover,

1 As mentioned in Chapters 4 and 6, much attention was paid to violence against women at the 1993 World Conference on Human Rights. Parisi notes that 90 NGOs that were determined to make the slogan 'Women's right are human rights' a success at the World Conference started a campaign to work on making violence against women a special theme at the Conference. Parisi, L., 'Feminist Praxis and Women's Human Rights', *Journal of Human Rights*, vol. 1, 2002, no. 4, p. 581. See also for example Ertürk, Y., 'The Due Diligence Standard: What Does It Entail for Women's Rights', *Due Diligence and Its Application to Protect Women from Violence*, Benninger-Budel, C. (ed), Martinus Nijhoff Publishers, Leiden, 2008, p. 30; Boyle, K., 'Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993', *Political Studies*, vol. 43, 1995, no. 4, pp. 91-92.

2 See also Ertürk, Y., 'The Due Diligence Standard: What Does It Entail for Women's Rights', *Due Diligence and Its Application to Protect Women from Violence*, Benninger-Budel, C. (ed), Martinus Nijhoff Publishers, Leiden, 2008, pp. 29-30; Brink, M. van den, 'Het Recht op Lichamelijke Integriteit en het Vrouwenverdrag', *NJCM-Bulletin*, vol. 18, 1993, no. 6, pp. 660-673.

the last decade has seen growing attention for the phenomenon of violence against women from international human rights NGOs and UN bodies.[3] This international recognition of violence against women as a human rights issue, is also reflected in the outcome of this study, which shows that both Committees pay considerable attention to various forms of physical violence against women.

The HRC and the CESCR also address other issues which in the past were not usually considered to be part of the realm of human rights, or at least not within the respective mandates of the two Committees. The HRC pays attention to a variety of reproductive health-related services and programmes. This is remarkable, since the mandate of the HRC, the ICCPR, does not make any reference to these healthcare services, unlike that of the CESCR, which operates with a mandate that covers the right to health, which is understood to encompass reproductive and maternal health.[4] Both the HRC and the CESCR use their concern about maternal mortality as a basis to address a number of facilities, services and policies that relate to the prevention of pregnancy as well as to situations when women are pregnant. The HRC links maternal mortality to the right to life, thereby bringing the topic of pregnancy within its mandate. The CESCR relates maternal mortality to the right to health. In light of maternal death rates in states parties, the two bodies address issues such as reproductive information and education, access to contraceptives and unsafe abortions. Their rationale is that states parties have an obligation to prevent unwanted pregnancies through family-planning programmes and services and through sex education, so that women do not have to resort to clandestine abortions, which would reduce the high maternal death rates.

Consequently, the two Committees also address the controversial topic of abortion. The Committees make it clear that states parties should prevent unsafe abortions as they lead to maternal mortality. For that reason, states parties are requested to allow abortion when pregnancy is the result of rape or when it endangers the life of the pregnant woman. Abortion is not considered to be contrary to human rights per se, as claimed by opponents of the practice. Both the HRC and the CESCR recommend states parties to review their *restrictive* abortion laws, e.g. when states parties have high maternal death rates, but they never request states parties to review existing

3 See for example the work of Amnesty International, Human Rights Watch and OMCT: the World Organisation against Torture, on Violence against Women. See http://www.amnesty.org/en/campaigns/stop-violence-against-women; http://www.hrw.org/en/category/topic/women%E2%80%99s-rights/domestic-violence; and http://www.omct.org/index.php?id=EQL&lang=eng&PHPSESSID= 6660603421375ed9f98dc697c42829d0, accessed on 16 May 2009. For example, the UN Population Fund organised in 2006, together with other UN organs 16 days of activism against violence against women. See http://www.unfpa.org/16days/documents/feminicidio.pdf, accessed on 16 May 2009.

4 The former Special Rapporteur on the Right to Health, Hunt, holds that in light of the right to health states have an obligation to ensure reproductive health and maternal healthcare services, including appropriate services for women in connection with pregnancy. *Report of UN Special Rapporteur Paul Hunt on the Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 16 February 2004, UN doc. E/CN.4/2004/49, para. 29.

liberal abortion laws. Even in states parties where abortion is used as a contraceptive method or where many female foetuses are aborted, situations that the Committees identify as human rights concerns, neither the HRC nor the CESCR challenge the laws on abortion of the states parties concerned, but recommend them to provide for family-planning services and information.

The work of the HRC and the CESCR shows that the Committees are aware of specific human rights abuse and constraints especially faced by women, and that they act on it. In that sense, their work can be considered to reflect compliance with the request of the 1993 World Conference on Human Rights. Yet, a few comments should still be made. Maternal mortality is clearly high on the agenda of both Committees. Since lack of maternal healthcare and unsafe abortions are the most important causes of maternal deaths, it is highly remarkable that the HRC hardly pays any attention to the availability of maternal healthcare and abortion services in states parties, although it recognises that these issues fall within the ambit of its mandate.[5] In light of its reasoning that maternal mortality affects the right to life, the Committee should also address the lack of available or accessible maternal healthcare and abortion services in light of maternal mortality.

The lack of attention from both Committees for so-called *Western beauty practices*, referred to by for example Special Rapporteurs on Violence against Women, Coomaraswamy and Ertürk, is also noteworthy.[6] Both Rapporteurs refer to the *beauty myth* of a slim feminine figure that prompts women to undergo cosmetic surgery and adopt eating disorders. The CESCR addresses eating disorders in one of its COs, thus indicating that it considers such beauty practices to affect human rights, but the HRC

5 See WHO, *The World Health Report 2005 – Make Every Mother and Child Count*, WHO, Geneva, 2005, http://www.who.int/whr/2005/whr2005_en.pdf, accessed on 16 May 2009. See also Hunt, P., and Bueno de Mesquita, J., *Reducing Maternal Mortality – The Contribution of the Right to the Highest Attainable Standard of Health*, 2007, http://www.unfpa.org/upload/lib_pub_file/ 750_filename_ reducing_mm.pdf, accessed on 17 May 2009, p. 4; Ransom, E., and N. Yinger, *Making Motherhood Safer – Overcoming Obstacles on the Pathway to Care*, Population Reference Bureau, February 2002, http://www.prb.org/pdf/MakMotherhdSafer_Eng.pdf, accessed on 17 May 2009, pp. 2-3; and UNFPA, *Investing in Midwives and Others with Midwifery Skills – Saving the Lives of Mothers and Newborns and Improving their Health*, 2008, http://www.unfpa.org/webdav/site/global/shared/documents/ publications/ 2008/midwives_eng.pdf, pp. 1-3, accessed on 17 May 2009. The problem of maternal mortality is recognised as a major international problem in the Millennium Development Goals (MDGs) of the UN. The MDGs are eight goals to be achieved by 2015 that, in the words of the UNDP, *respond to the world's main development challenges*. The MDGs are drawn from the actions and targets contained in the Millennium Declaration that was adopted by 189 nations-and signed by 147 heads of state and governments during the UN Millennium Summit in September 2000. See UN doc. A/RES/55/2. MDG 5 is to improve maternal health. Two indicators are set to achieve this goal: the maternal mortality ratio must be reduced by three-quarters and by 2015 universal access to reproductive health must be achieved. See UNDP, 'About the MDGs: Basics', http://www.undp.org/mdg/basics. shtml, accessed on 10 June 2009.

6 CHR, *Integration of the Human Rights of Women and the Gender Perspective*, UN doc. E/CN.4/ 2002/83, p. 27; Report of the Special Rapporteur on Violence against Women, Yakin Ertürk, *Intersections Between Culture and Violence against Women*, UN doc. A/HRC/4/34, paras. 47-48.

has never referred to any practices relating to the *Western beauty myth*. Yet, as shown in Chapters 4 and 6, it is argued by a number of authors that the practices do fall within the ambit of international human rights law and deserve attention.[7] The statements of the CESCR on eating disorders in one of its COs support that interpretation. Consequently, it could be argued that in order for the work of the HRC and the CESCR to fully reflect compliance with the request of the Vienna Declaration and Programme of Action, it should take into account these *Western practices*.

On the basis of the aforementioned, the final conclusion to be drawn as regards the main research question and addressing specific experiences of women (Element I) is that the work of the HRC and the CESCR reflects compliance with the request of the 1993 World Conference on Human Rights, but that there is still room for improvement. This is certainly the case as far as the attention of the HRC for maternal healthcare and abortion services is concerned, but arguably also with regard to other issues such as *Western beauty practices*. It is important that specific experiences of women are continuously brought to the attention of the HRC and the CESCR and that more research is conducted on the relation between these specific experiences and international human rights law. Since the social constructions of man and woman, and of masculinity and femininity, vary not only according to location and culture, but also over time, new situations may emerge that affect the enjoyment of human rights. This means that human rights necessarily have to be interpreted in a dynamic context, and therefore addressing specific experiences of women is an ongoing assignment that requires the human rights monitoring bodies to stay alert to situations that may affect women's human rights.

2.3 Element II: women-inclusive human rights obligations

Element II of the request of the Vienna Declaration and Programme of Action indicates that the work of the HRC and the CESCR should display *women-inclusive* human rights obligations for states parties. To examine whether the work of the Committees reflects compliance with this element, the obligations as discussed in the deliberations and findings of the HRC and the CESCR were categorised in accordance with the three-way division of obligations often employed in the human rights discourse: obligations to respect; to protect; and to fulfil.[8] As shown in Chapters 3 to 6

7 See for example Winter, B., D. Thompson, S. Jeffreys, 'The UN Approach to harmful Traditional Practices', *International Feminist Journal of Politics*, vol. 4, 2002, no. 1, p. 87; Jeffreys, S., *Beauty and Misogyny: harmful cultural practices in the west*, Routledge, London, 2005, pp. 29-30; and Howard, R., 'Health Costs of Social Degradation and female Self-Mutilation in North America', *Human Rights in the Twenty-First Century: A Global Challenge*, Mahoney, K., and P. Mahoney (eds), Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 503-516.

8 This division between various types of human rights obligations is employed for example by Nowak and by Eide. See Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, p. 49; Eide, A., 'Economic, Social, and Cultural Rights as Human Rights', *Economic, Social, and Cultural Rights: A Textbook*, Eide, A. (ed), Martinus Nijhoff Publishers,

of this book, the HRC and the CESCR formulate recommendations and requirements that include obligations for states parties in all three categories. In doing so, they address the gender-specific circumstances of the issues that affect the enjoyment of human rights by women. States are requested, for example, with respect to matters that affect women's physical integrity, to provide for family-planning programmes and services, sex education, shelters for battered women, and telephone hotlines and counselling services for victims of violence. States parties are also requested to: criminalise manifestations of physical violence, like rape, including marital rape, domestic violence, trafficking, and FGM; prosecute the perpetrators of these abuses; and punish them in accordance with the severity of the crime. What is meaningful is the considerable attention of the HRC and the CESCR for the needs of women that are confronted with various forms of physical violence. Also noteworthy are the recommendations of both Committees in which they address the granting of residence permits to victims of trafficking and FGM. Although the few recommendations made to states parties so far on this matter are in general still rather mild, they do indicate that the Committees take into account the specific circumstances and consequences of trafficking for women.[9]

The content of most obligations on physical violence against women as formulated by the Committees deals, however, with the criminalisation, prosecution and punishment of such acts, which therefore can be regarded as obligations to protect. This cannot be said for the obligations of states parties on pregnancy-related matters. Those primarily reflect an obligation to fulfil: states are requested to provide for various reproductive healthcare services, and under the ICESCR also maternal health-related services and programmes. Considering the fact that the availability of these services are a prerequisite for successfully addressing maternal mortality, it seems logical that

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Dordrecht, 2001, pp. 23-24. Former Special Rapporteur on the Right to Health, Hunt, notes in his annual report of 2004 that the analytical framework of obligations to respect, protect and fulfil is very useful as a way of sharpening legal analysis of, in this case, the right to health. *Report of UN Special Rapporteur Paul Hunt on the Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 16 February 2004, UN doc. E/CN.4/2004/49, paras. 43-44. Moreover, reference to these different types of obligations is also made, for example, in the Montreal Principles on Women's Economic, Social and Cultural Rights. See Montreal Principles on Women's Economic, Social, and Cultural Rights, *Human Rights Quarterly*, vol. 26, 2004, no. 3, p. 770.

9 The CESCR refers in this respect to the double victimisation of victims of trafficking due to the risks and dangers awaiting upon deportation to their home countries. See Chapter 6, Section 2.5.4. See for example Gallagher, A.M., 'Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination', *Georgetown Immigration Law Journal*, vol. 19, 2004, no. 1, pp. 99-123; and Askola, H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Hart Publishing, Oxford, 2007, p. 94. Askola observes that the potential right to asylum of some trafficking victims based on the principle of non-refoulement, owing to, amongst others, a real risk of retribution, violence, and/or re-trafficking if returned to country of transit or origin, is an issue that is almost completely unexplored. Askola holds that extending the right to asylum or subsidiary protection on trafficking grounds, for instance based on the threat of torture or inhuman or degrading treatment, could be justified, and even required, in some cases where the country of origin cannot guarantee protection from further violence, for example re-trafficking.

the Committees address these issues.[10] But attention should also be drawn to the fact that the HRC and the CESCR scarcely formulate any recommendations on pregnancy-related matters that would reflect obligations to protect. In general, the work of the Committees hardly shows any recommendations that request states parties to criminalise, prosecute, and punish actions of individuals that cause or influence pregnancy-related human rights abuses and constraints. Examples of such abuses and constraints can be forced abortion and forced sterilisation.[11] It can only be argued that the work of the HRC and the CESCR fully reflects compliance with the second element of the request of the 1993 World Conference if the gender specifics of human rights abuses and constraints experienced by women are reflected in the obligations for states parties. Following the aforementioned, more attention should therefore, as far as pregnancy-related issues are concerned, be paid to infringement by other individuals of women's enjoyment of human rights. Recent statements of the HRC in one of its COs on the obligation of the state party concerned on prosecution of forced sterilisation indicates the awareness of the Committee of the gender specifics of this situation.[12] This may prove to be an indication of future attention for the matter in its COs, which should also be taken up by the CESCR.

It should further be noted that the obligations of states parties as formulated by both Committees hardly, or even not at all, address a number of other women-specific concerns regarding matters relating to women's physical integrity. This is true, for example, for the lack of available and accessible abortion and post-abortion services. Although both Committees indicate that states parties should allow for abortion when a pregnancy is the result of rape or endangers the life of the pregnant woman, the HRC and the CESCR generally do not wonder whether these services are actually available, accessible and of good quality.[13] Hence, in general the work of the two Committees

10 See WHO, *The World Health Report 2005 – Make every mother and child count*, WHO, Geneva, 2005, http://www.who.int/whr/2005/whr2005_en.pdf, accessed on 16 May 2009. See also Hunt, P. and Bueno de Mesquita, J., *Reducing Maternal Mortality – The contribution of the right to the highest attainable standard of health*, 2007, http://www.unfpa.org/upload/lib_pub_file/750_filename_reducing_mm.pdf, accessed on 17 May 2009, p. 4; Ransom, E., and N. Yinger, *Making Motherhood Safer – Overcoming Obstacles on the Pathway to care*, Population Reference Bureau, February 2002, http://www.prb.org/pdf/MakMotherhdSafer_Eng.pdf, accessed on 17 May 2009, pp. 2-3; and UNFPA, *Investing in midwives and others with midwifery skills – Saving the lives of mothers and newborns and improving their health*, 2008, http://www.unfpa.org/webdav/site/global/shared/documents/publications/2008/midwives_eng.pdf, pp. 1-3, accessed on 17 May 2009.

11 As noted in Chapters 4 and 6, the HRC requests states parties in GC 28 to prevent forced sterilization and forced abortion, but scarcely refers to forced sterilisation in its COs and does not address forced abortion at all in these documents. The CESCR mentions forced sterilisation only in one of its COs and has never addressed the practice of forced abortion.

12 COs Czech Republic 2007, para. 10.

13 On the framework of available, accessible and good quality services, see for example the *Report of UN Special Rapporteur Paul Hunt on the Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 16 February 2004, UN doc. E/CN.4/2004/49, paras. 41-42. Hunt notes that one framework that is especially useful in the context of policy making is that healthcare services,

does not reflect an obligation for states parties to ensure that abortion and post-abortion services are actually available and accessible in situations where the abortion is legal.[14] This situation may have changed slightly in 2008, when the CESCR recommended a few states parties to ensure access to safe abortion, but the fact remains that this recommendation was only made in a few COs and focused in particular on abortion services and not post-abortion care.[15] The Committees, however, are aware of the consequences of the lack of these services, for they regularly express their concern about unsafe abortions and the maternal mortality they result in. In light of the request by the 1993 World Conference on Human Rights, which comprises an assignment to formulate obligations for states parties that take into account the gender-specific forms of the human rights abuses and especially concerns experiences by women, the HRC and the CESCR should also respond to the above-mentioned issues in their work by formulating appropriate obligations for states parties on abortion-related services. The steps taken by the CESCR in 2008 may indicate that the matter will be taken up on a more systematic basis in future reporting procedures.

As noted, the work of the HRC and the CESCR on physical violence against women mostly reflects an obligation to protect human rights. Although the Committees also pay attention to the needs of victims of several of these types of violence, they do not always take into account the full scope of the gender-specific circumstances of this abuse. This is illustrated by the approach of the Committees in addressing the issue of FGM. The main obligation for states parties as formulated by the Committees with regard to this practice is to prohibit it in their criminal legislation. Yet, what the Committees apparently fail to take into account is that FGM is usually performed for socio-cultural reasons by predominantly female private actors with apparent consent of the circumcised or her proxy.[16] This notion raises questions with regard to the prosecution of these acts as well as to the effectiveness of these recommendations in the actual elimination of the custom.[17] Various international organisa-

goods and facilities, including the underlying determinants of health, shall be available, accessible, acceptable and of good quality.

14 Exceptions could arguably be found in the COs of the HRC on Argentina, where it notes that restrictive abortion laws could deter medical professionals from performing the procedure in those cases where it was in fact legal. But although these COs could seem to suggest an obligation that states parties have to ensure in these conditions that abortion facilities are available and accessible, it has never explicitly stated this. Similarly, it is only in its COs on Mexico of 2006 that the CESCR expresses its concern about the obstruction of access to a legal abortion when the pregnancy was the result of rape. But, as noted in Chapter 5, also here the Committee did not hold that abortion facilities should be available and accessible when legal, but it held that the state party should ensure that *rape victims* had access to legal abortion. Both Committees never made any reference to post-abortion care in their work.

15 As noted in Chapter 5, Section 3.4., the context in which this recommendation was made indicates that the CESCR did not refer to an obligation of states parties to ensure access to safe abortion in general.

16 Obiora, L., 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision', *Case Western Reserve law Review*, vol 47, 1997, no. 2, p. 284.

17 See Chapter 4, Section 6.2.3, and Chapter 6, Section 6.1, where reference is made to the problems that may be encountered in effectively tackling FGM through criminalisation alone.

tions that aim to fight FGM on the ground argue that criminalisation of FGM alone is not enough, other measures also need to be taken to combat this phenomenon in an effective manner.[18] The HRC and the CESCR generally do not pay attention to other means of eliminating FGM, and in fact hardly formulate any recommendations on this practice that would denote an obligation to fulfil. The only positive exception to this is found in one of the COs of the CESCR of 2008.[19]

The final conclusion to be drawn here as regards the main research question, is that the work of the HRC and the CESCR reflects compliance with the request of the 1993 World Conference on Human Rights, but that on a number of points the obligations as formulated by the two Committees could better reflect the gender-specific circumstances of the situations that affect women's physical integrity. Similar to what has been said in the previous section on specific experiences of women, these characteristics of human rights abuses need further clarification, the Committees need to be aware of them, and they should subsequently respond to it by formulating gender-specific human rights obligations, for example with regard to FGM.

2.4 Element III: discrimination of women

Element III of the request of the 1993 World Conference on Human Rights includes an assignment for the human rights monitoring bodies to place the specific human rights issues of women in the context of discrimination of women in societies. As the conclusions in Chapters 3 to 6 indicate, the work of the HRC and the CESCR mostly fails to reflect this element of the request of the Vienna Declaration and Programme of Action. Although the Committees address many women-specific human rights concerns in their respective GCs on equality of men and women, they generally do not label these concerns as reflections of structural discrimination of women in societies. Reference to these concerns in the GCs, as well as reference to the common Article 3 in the work of the Committees, rather seems to reflect an awareness of the Committees that as far as the interpretation of human rights is concerned women may face different hurdles in their enjoyment of human rights than men. This understanding is an impor-

18 WHO, *Eliminating Female Genital Mutilation – An Interagency Statement*, http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf, pp. 13- 21, accessed on 17 May 2009; UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, 2005, http://www.unicef.at/fileadmin/medien/pdf/FGM-C_English-nov05.pdf, pp. 23 -33, accessed on 17 May 2009; UNFPA, *A Holistic Approach to the Abandonment of Female Genital Mutilation/Cutting*, published in 2007, http://www.unfpa.org/gender/practices1.htm, pp. 10-12, accessed on 17 May 2009; and Richardson, G., 'Ending Female Genital Mutilation? Rights, Medicalisation, and the State of Ongoing Struggles to Eliminate the FGM in Kenya, *The Dominion – News from the Grassroots*, 2005, no. 26, p. 12.

19 As discussed in Chapter 6, Section 2.7.2., the CESCR in its COs on Kenya of 2008 recommends the state party to combat FGM amongst other means by continuing to promote alternative rite of passage ceremonies, to educate parents, especially mothers, children and community leaders on the harmful effects of FGM, and to combat traditional beliefs about the usefulness of FGM for the promotion of marriage prospects of girls. CESCR, COs Kenya 2008, para. 23.

tant first step away from the idea of *sameness* as described in the introductory chapter to this book: men and women are equal, the same, and are therefore entitled to the same rights. The concept of *sameness* does not take into account the different lives that men and women often lead due to the construction of gender in societies. The work of the HRC and the CESCR shows an awareness of these different lives and of an appropriate response. This does not mean, however, that the HRC and the CESCR examine whether the women-specific human rights issues that they address are caused by structural discrimination of women. Occasionally, situations are linked to structural discrimination, but overall situations like de facto impunity of rape or sexual exploitation of women and girls are not related to structural discrimination against women or to their unequal status in societies. The only clear exceptions to this are the statements of both Committees on the abortion of female foetuses, and the statements of the CESCR with regard to sexual harassment and honour crimes.

As shown in Chapters 4 and 6, the general approach of the HRC and the CESCR in dealing with various forms of physical violence against women is not to focus on its root causes, which could be the unequal status of women in society, strengthened by certain gender ideologies and traditions. Both Committees rather call on states parties to tackle violence against women through criminalisation and prosecution. This means that the Committees request states parties to address only the manifestations of human rights abuse and not the gender ideologies that they may be based on.[20] Hence, the work of the HRC and the CESCR is first and foremost focused on fighting the symptoms, i.e. manifestations of physical violence against women, rather than on the actual disease, which is the structural inequality of women in societies.[21]

In light of the aforementioned, as regards Element III, the work of the HRC and the CESCR generally fails to reflect compliance with the request of the 1993 World Conference on Human Rights. The HRC and the CESCR need to pay more attention, both by expressing their concerns as well as by formulating their recommendations, to structural discrimination of women as a possible cause of human rights abuses and constraints.

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20 It is interesting to refer to the comments of Ertürk, the UN Special Rapporteur on Violence against Women. In her report of 2006 on due diligence standards with regard to violence against women, Ertürk observes: 'As a general rule, States have sought to discharge their due diligence obligations of prevention of violence against women through the adoption of specific legislation, the development of awareness-raising campaigns and the provision of training for specified professional groups. The forms of violence covered by these interventions include; domestic violence, sexual assault, trafficking, "honour crimes" and sexual harassment. These programmes tend to view violence against women as a stand-alone issue and there are relatively few examples of linkages being made between violence and other systems of oppression'. Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN doc. E/CN.4/2006/61, para. 38.

21 It is interesting to see that the HRC and the CESCR do refer to structural discrimination of women in their COs when it concerns the low representation of women in high-ranking positions.

2.5 Element IV: an integrated address

For the work of the HRC and the CESCR to reflect compliance with Element IV, it is required that the Committees approach the issues affecting women's physical integrity in an integrated manner. This means that these issues are not referred to in a separate section dealing only with issues that affect women, or issues affecting other marginalised groups, but that the Committees pay attention to this in all relevant sections of their work.

The work of the HRC and the CESCR reflects Element IV. The issues are often brought forward in light of the affected substantive provisions or with regard to the common Article 3 of the Covenants. On other occasions, where no explicit reference is made to any of the articles of the ICCPR and the ICESCR, the issues are addressed in different sections, for example in combination with other related human rights issues. For example, the HRC addresses rape during armed conflict together with other human rights abuse that occurs in those circumstances, like extrajudicial killings and disappearances.

Consequently, as the work of the Committees shows an integrated address of issues that affect women's physical integrity, it complies with the request of the 1993 World Conference on Human Rights.

2.6 Overall conclusion

Overall, the work of the HRC and the CESCR regarding matters that affect women's physical integrity reflects compliance with three out of the four elements of the request of the 1993 World Conference on Human Rights made to the human rights monitoring bodies to include the status and human rights of women in their deliberations and findings. The Committees seem to make good use of the possibilities within their mandates to address issues that affect women's physical integrity: they formulate obligations for states parties that in general take into account the gender-specific form, circumstances and consequences of these human rights abuses, and, moreover, these matters are addressed in an integrated manner. But still, the work of the HRC and the CESCR is generally lacking where it concerns Element III: the request to link specific experiences of women to discrimination of women in societies. Only in a few instances do the bodies expressly link the issues that affect women's physical integrity to discrimination of women in societies and formulate obligations for states parties to address it. Hence, the recommendations of the HRC and the CESCR generally do not request the states parties to tackle the root cause of human rights abuses and constraints that affect women's physical integrity. Consequently, the HRC and the CESCR show an awareness of specific experiences of women and respond to it, but as in general they do not address the evil that often causes the gender-specific abuse, they often only address the symptoms but not the cause of gendered human rights abuse and constraints that affect women's physical integrity. Further action is required to overcome this deficit. The Committees should clearly address the link between

women-specific human rights concerns and discrimination of women in societies in their work, where applicable, and formulate recommendations that aim to eliminate this structural discrimination. In this, NGOs and academics also have an important role to play, as they should make the Committees aware of the discriminatory background and nature of specific situations and issues and could present the Committees with ideas on how best to tackle these underlying causes.

3 FINAL REMARKS

This study shows that when it comes to including the status and human rights of women, the HRC and the CESCR are on the right track. But it is also clear that more efforts can and should still be made in order for their work to reflect compliance with the request of the 1993 World Conference on Human Rights. Although this study did not look into the actual reasons of the Committees to address human rights concerns and constraints that are characteristic of the lives of women, it is very clear that they are very willing to include the status and human rights of women in their work. It appears that when certain topics are addressed only sporadically or not at all, this is mainly due to a lack of information on the matter. For on those occasions where the Committees paid only infrequent attention to gender-specific human rights circumstances, it had usually received information on it, either from the state party itself or from NGOs.[22] Similarly, when certain issues or gender-specific circumstances are systematically dealt with in the work of the HRC and the CESCR, this often concerns topics that have already received a lot of international attention.[23]

This notion strengthens the idea that the work of NGOs is very important in the process of making women and their human rights visible within the UN human rights system.[24] For example, by providing *shadow reports* to the human rights monitoring

22 For example: the CESCR in its COs on the Republic of Moldova holds that the state party should combat trafficking by improving job possibilities and assistance to women living in poverty (CESCR, COs Republic of Moldova 2003, para. 41 and SR Republic of Moldova 2003, UN doc. E/C.12/2003/SR.32, para. 65); and the CESCR makes recommendations to Kenya as regards addressing FGM in the state party by means of continuing to promote alternative rite of passage ceremonies (COs Kenya 2008, para. 23).

23 Section 2.2 of this chapter refers to the international attention for violence against women and a number of specific forms of it.

24 See for example Chinkin, C., 'The Role of Non-governmental Organisations in Standard Setting, Monitoring, and Implementation of Human Rights', *The changing world of international law in the twenty-first century: a tribute to the late Kenneth R. Simmonds*, Norton, J. et al. (eds), Kluwer Law International, The Hague, 1998, pp. 51-65; Theytaz-Bergman, L., 'State Reporting and the Role of Non-Governmental Organizations', *The UN Human Rights Treaty System in the 21st Century*, Bayefsky, A. (ed), Kluwer Law International, The Hague, 2000, pp. 45-56; Brett, R., 'State Reporting: an NGO Perspective', *The UN Human Rights Treaty System in the 21st Century*, Bayefsky, A. (ed.), Kluwer Law International, The Hague, 2000, pp. 57-62; Miller, A., 'Women's Human Rights NGOs and the Treaty Bodies: Some Case Studies in Using the Treaty Bodies to protect the Human Rights of Women', *The UN Human Rights Treaty System in the 21st Century*, Bayefsky, A. (ed.), Kluwer Law International,

bodies on the implementation of human rights of women in states parties, NGOs make the Committees aware of the abuses and constraints that are characteristic of the lives of many women. Moreover, these reports present a chance to emphasise good practices as regards overcoming these human rights concerns, which in turn can be taken up by the Committees in their recommendations for states parties.[25] In addition to this, NGOs can, on behalf of victims of human rights violations, file individual complaints with the HRC or support such complaints, when the state party concerned is a party to the optional protocol that recognises the individual complaint procedure. In the future, they can also do this with the CESCR, when the Optional Protocol to the ICESCR enters into force.[26] Filing an individual complaint not only provides an opportunity to create awareness with the Committees about certain practices that affect women's human rights, but it also compels the human rights monitoring bodies to give their opinion on the compatibility of a particular situation with international human rights norms. A good example of this is provided by the case of K.L. versus Peru, as discussed in Chapter 3, where the HRC had to express itself on the controversial topic of access to abortion, a topic which it appears rather to avoid in its COs.[27] Unfortunately, at the time of writing, the case of K.L. is the only case in which the HRC gave its opinion on a matter that affects women's physical integrity.[28] Here an opportunity is presented and waiting to be seized, especially by NGOs, to gain attention for human rights violations that specifically affect women.[29]

But not only NGOs and the human rights monitoring bodies have an important role to play in further realising an international human rights system that fully pro-

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The Hague, 2000, pp. 195-207; Boerefijn, I., A. Gans, and R. Oostland, 'De Rol van Niet-Gouvernementele Organisaties in de Toezichtprocedures op basis van VN-Mensenrechtenverdragen', *Niet-Statelijke Actoren en de Rechten van de Mens; Gevestigde Waarden, Nieuwe Wegen*, Flinterman, C., en W. van Genugten (eds.), Boom Juridische Uitgevers, Den Haag, 2003, pp. 121-133.

25 Well-known NGOs that focus on women's human rights and which not only often provide the Committees with shadow reports, but which also give guidance to other NGOs on writing these reports include for example International Women's Rights Action Watch – Asia Pacific (IWRAW-AP), www.iwraw-ap.org, accessed on 10 June 2009; and The Center for Reproductive Rights, www.reproductiverights.org, accessed on 10 June 2009.

26 On 10 December 2008, the General Assembly unanimously adopted an Optional Protocol to the ICESCR which provides the CESCR competence to receive and consider communications. See UN doc. A/RES/63/117. At the time of writing, the Optional Protocol had not yet entered into force.

27 See Chapter 3, Section 2.1.2.7.4.

28 As the Optional Protocol to the ICESCR has not yet entered into force, the CESCR has not given any views in individual complaint procedures.

29 The work of the Center for Reproductive Rights, which has supported victims in filing individual complaints on for example forced sterilisation and denial of an abortion with the CEDAW Committee and the HRC, provides a good example for future NGO action. In addition to supporting individual complaints within the UN human rights treaty body system, the Center also assists local NGOs and victims of human rights violations in filing complaints before regional and national (human rights) courts. Recent cases involve Z. versus Moldova and U.L. versus Poland before the ECtHR. See Center for Reproductive Rights, *In the Courts*, http://reproductiverights.org/en/archive/cases, accessed on 11 June 2009.

motes and protects the human rights of both men *and* women. More research needs to be conducted into the content of human rights provisions from a gender perspective. Although literature exists in which provisions of mainstream human rights treaties are linked to issues that are of specific importance to women, the number of publications is still limited and is generally not based on an elaborate study of the content of the provision itself.[30] Studies generally start with looking at the abuses and constraints that are typical of women's lives and subsequently examine how the human rights system deals with, or could address these matters. Yet, if women's rights proponents want to work with the system as it stands now, it is essential that the subsequent step in transforming this system is addressing the system itself and the provisions in which it guarantees human rights for all. This is the only way that the system can be changed into an instrument that also promotes and protects the human rights of women in a systematic manner, rather than on an ad-hoc basis. Besides the work that has been conducted so far, as represented in publications as well as in the work of the human rights monitoring bodies, this will require further extensive research. This task cannot be performed by the human rights monitoring bodies alone. It is important that human rights scholars, for example in collaboration with NGOs working in the field, take up this study as well.[31]

The aforementioned should culminate in a reformulation of all GCs and reporting guidelines, so as to fully reflect the gender-inclusive content of the human rights provisions and related obligations for states parties. This should lead to a more structured approach to fully address the promotion and the protection of human rights of women. The reconstructed content of human rights provisions, reflected in these new GCs and reporting guidelines, should allow a more systematic consideration of human rights abuses and constraints that are characteristic of the lives of women, and

30 Examples of writings in which women's human rights concerns are linked to provisions of the two Covenants include: Cook, R., 'International Human Rights and Women's Reproductive Health', *Women's Rights, Human Rights: International Feminist Perspectives*, Peters, J. and A. Wolper (eds), Routledge, New York, 1995, pp. 256-275; Packer, C., 'Defining and Delineating the Right to Reproductive Choice', *Nordic Journal of International Law*, vol. 67, 1998, no. 1, pp. 77-95; Cook, R., 'Women's Reproductive Rights', *International Journal of Gynaecology and Obstetrics*, vol. 46, 1994, no. 2, pp. 215-220; Cook, R., 'International Human Rights and Women's Reproductive Health', *Studies in Family Planning*, vol. 24, 1993, no. 2, pp. 73-86; Cook, R., ''Women's International Human Rights Law: The Way Forward', *Human Rights of Women – National and International Perspectives* , Cook, R. (ed), University of Pennsylvania Press, Philadelphia, 1994, pp. 12-15; Charlesworth, H., 'What are "Women's International Human Rights"?', *Human Rights of Women – National and International Perspectives*, Cook, R. (ed), University of Pennsylvania Press, Philadelphia, 1994, pp. 58-84; Copelon, R., 'Intimate Terror: Understanding Domestic Violence as Torture', *Human Rights of Women – National and International Perspectives*, Cook, J. (ed), University of Pennsylvania Press, Philadelphia, 1994, pp. 116-152.

31 Attention should in this respect also be paid to the work of the UN Special Rapporteur on Violence against Women, amongst others on indicators of violence against women and related state responsibility, which will also prove to be helpful in performing this task. See for example Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk, *Indicators on Violence against Women and State Response*, UN doc. A/HRC/7/6.

clarify the way to address them by states parties, taking into account the gender-specific circumstances of the experiences.

In addition to these recommendations for future action, attention should also be paid to the CEDAW Committee and its role in the UN framework of human rights treaty bodies. Although the present study did not include an examination of the deliberations and findings of the CEDAW Committee, it is clear that the CEDAW Committee has and will have an important role to fulfil in the UN human rights system, besides the *mainstream* human rights instruments. It is clear that it was never the intention of the states that adopted the Vienna Declaration and Programme of Action to institute a process that would make the work of the CEDAW Committee redundant. On the contrary, in the Declaration and Programme of Action, the World Conference on Human Rights lays down that:

> 'The United Nations should encourage the goal of universal ratification by all States of the Convention on the Elimination of All Forms of Discrimination against Women by the year 2000. Ways and means of addressing the particularly large number of reservations to the Convention should be encouraged.'[32]

The intention of the World Conference clearly was to follow a two-track approach to addressing human rights of women: both as part of the mainstream and by a specialised monitoring body.[33] This position is supported by a widespread agreement amongst women's rights scholars and activists that human rights of women can best be promoted and protected, at the international legal level, through a combination of mainstream and specialist institutions and procedures.[34] The request to the human rights treaty monitoring bodies to include the status and human rights of women in their deliberations and findings can therefore not be interpreted as a call to work towards the abolition of the CEDAW Committee.

Moreover, it is important to note that the results of this study indicate that the work of the CEDAW Committee is still very much needed in order to fully address the gender-specific circumstances of human rights abuses and constraints that are characteristic of the lives of women. The mandate of the CEDAW Committee explicitly covers an obligation for states parties to take all appropriate measures to modify the social and cultural patterns of the behaviour of men and women, with a view to

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32 Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part II, para. 39.

33 See also the report of the expert group meeting on the development of guidelines for the integration of a gender perspective into human rights activities and programmes, UN doc. E/CN.4/1996/105, para. 24.

34 See for example Gallagher, A.T., 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System', *Human Rights Quarterly*, vol. 19, 1997, no. 2, p. 331; and Mertus, J. and P. Goldberg, 'A Perspective on Women and International Human Rights after the Vienna Declaration: The Inside/Outside Construct', *New York University Journal of International Law and Politics*, vol. 26, 1994, no. 2, p. 207.

achieving the elimination of prejudices, customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of men and women.[35] This obligation is clearly directed at addressing gender inequality and thus aims to tackle the root causes of many human rights abuses and constraints that are characteristic of the lives of women. As noted previously, the HRC and the CESCR only sporadically refer to an obligation of this nature. The Committees do not often recommend states parties to address gender inequality as the basis of human rights concerns and hardly ever do they formulate specific obligations that request states parties to change gender ideologies in their society. There is therefore still very much a need for a body like the CEDAW Committee to alert states parties to this obligation.

But even if the HRC and the CESCR systematically focused on the root causes of human rights concerns that are characteristic of the lives of women and formulated obligations that aim to tackle them, which hopefully they will, the work of the CEDAW Committee remains essential. The CEDAW Committee, as a body composed of experts on women's rights, has an important function in providing an example to the other human rights monitoring bodies on how to address human rights of women, including specific attention for any underlying discrimination of women in society, and in making recommendations that effectively ensure the enjoyment of their rights. Consequently, this also entails that if ever a Unified Standing Treaty Body is created, as proposed by the former High Commissioner for Human Rights Louise Arbour in 2006, or a similar body, these considerations on the important role of the CEDAW Committee in guaranteeing attention for the status and human rights of women within the UN human rights framework, need to be taken into careful consideration.[36]

Finally, this study has not only provided answers, it has also raised new questions. An important question relates to the motivation of the Committees for addressing certain matters. Although there are strong signs that the work of NGOs is significant, one of the questions is, for example, whether the gender or nationality of individual Committee members plays a role in the attention that is paid by the human rights monitoring

35 CEDAW, Article 5(a).

36 See *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, UN doc. HRI/MC/2006/2. For more information on the Proposal of the former High Commissioner, as well as criticism on it, see for example Schöpp-Schilling, H., 'Treaty Body Reform: the Case of the Committee on the Elimination of Discrimination against Women', *Human Rights Law Review*, vol. 7, 2007, no. 1, pp. 201-224; O'Flaherty, M. and C. O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: a Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body: Universal Periodic Review and the UN Treaty Body System', *Human Rights Law Review*, vol. 7, 2007, no. 1, pp. 141-172; Bowman, M., 'Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions?: Legal Mechanisms for Treaty Reform', *Human Rights Law Review*, vol. 7, 2007, no. 1, pp. 225-249; Johnstone, R., 'Cynical Savings or Reasonable Reform?: Reflection on a Single Unified UN Human Rights Treaty Body', *Human Rights Law Review*, vol. 7, 2007, no. 1, pp. 173-200.

bodies to issues that affect women's physical integrity, and if so to what extent? Further research on this matter is required so as to discover the hitches in the process of including the status and human rights of women in the work of the HRC and the CESCR and to address them effectively. The end of the process of integrating women into the human rights mainstream is not in sight. What is clear, is that the request of the 1993 World Conference on Human Rights is not a short-term assignment for the human rights monitoring bodies: it is *not* a matter of add and stir women's experiences into the big bowl of international human rights. Rather, it is a process that will be ongoing for as long as gender inequality exists. It is a process that requires the commitment of everyone involved in order to transform the international system so as to ensure that it fully accommodates and responds to human rights abuses and constraints that are typical of women's lives, now and in the future.

SAMENVATTING

'VROUWENRECHTEN ZIJN MENSENRECHTEN'

'Vrouwenrechten zijn mensenrechten!' Deze uitspraak lijkt vanzelfsprekend. Het internationale systeem dat onder auspiciën van de Verenigde Naties (VN) is ingesteld om de mensenrechten te bevorderen en te beschermen is immers gebaseerd op het idee van gelijkheid in waardigheid en rechten van mannen en vrouwen. Maar critici van dit internationale systeem hebben overtuigend aangetoond dat dit niet zo vanzelfsprekend is.

Met de beginselen van non-discriminatie en gelijkheid van mannen en vrouwen in de *mainstream* mensenrechtenverdragen en via mechanismen die zich speciaal richten op de bevordering van de rechten van vrouwen, tracht het VN mensenrechtensysteem het genot van mensenrechten door vrouwen te bevorderen en te beschermen.[1] Een van deze specifieke mechanismen voor vrouwen is het VN-Verdrag Inzake de Uitbanning van Alle Vormen van Discriminatie van Vrouwen (CEDAW-Verdrag). Critici van het VN systeem hebben echter met succes betoogd dat het instellen van institutionele mechanismen die zich uitsluitend richten op de rechten van vrouwen heeft geleid tot *ghettoisation* van deze rechten: ze raken geïsoleerd en gemarginaliseerd. Zij wijzen erop dat vrouwenrechten met het vaststellen van het CEDAW-Verdrag weliswaar voor het eerst expliciet binnen de sfeer van internationale mensenrechten zijn gebracht, maar dat ze nog steeds genegeerd worden in de mainstream mensenrechten-mechanismen. Critici stellen dat de VN-verdragscomités die de implementatie van de mainstream mensenrechtenverdragen in staten die partij zijn bij de verdragen (verdragsstaten) controleren niet of nauwelijks aandacht besteden aan schendingen en beperkingen van mensenrechten waar veel vrouwen wereldwijd mee worden geconfronteerd. De critici claimen dat deze zaken door de mainstream VN-verdragscomités worden overgelaten aan het gespecialiseerde CEDAW-Comité: het Comité dat toezicht houdt op de implementatie van het CEDAW-Verdrag. De vaststelling van het CEDAW-Verdrag heeft daarmee bijgedragen aan marginalisering van vrouwenrechten.

In 1993 kwam een lobby van vrouwenrechtenorganisaties en activisten uit de hele wereld bijeen in Wenen voor de Wereldconferentie Mensenrechten om daar aan de 171 aanwezige staten duidelijk te maken dat het internationale mensenrechtensysteem geen

1 *Mainstream* verwijst in deze context naar de mensenrechtenverdragen die zich niet specifiek richten op het genot van mensenrechten *door vrouwen*.

aandacht besteedt aan mensenrechtenschendingen die kenmerkend zijn voor de levens van vrouwen. Deze vrouwenrechtenlobby slaagde erin de deelnemende landen te laten zien dat veel van wat vrouwen als dagelijkse misstanden ervaren, geen aandacht kreeg van de internationale mensenrechtengemeenschap. Dit ondanks het feit dat het algemeen bekend was dat vrouwen regelmatig slachtoffer zijn van mishandeling en marteling, vernedering, seksuele intimidatie en exploitatie: zaken die overduidelijk een schending zijn van de internationaal erkende mensenrechten.

De bij de Wereldconferentie vertegenwoordigde staten erkenden deze tekortkoming van het internationale mensenrechtensysteem en stelden in de *Vienna Declaration and Programme of Action* (de Weense Verklaring en Actieprogramma), het slotdocument van de Conferentie, dat mensenrechten van vrouwen en meisjes een onvervreemdbaar, integraal en onverbrekelijk onderdeel vormen van de universele mensenrechten. Zij stelden dat mensenrechten van vrouwen geïntegreerd dienden te worden in de mainstream activiteiten binnen het gehele VN-systeem en dat deze zaken regelmatig en systematisch dienden te worden aangepakt binnen de betreffende organen en mechanismen van de VN. De Wereldconferentie deed bovendien in de Weense Verklaring en Actieprogramma een belangrijke oproep aan de VN-verdragscomités. Zij worden opgeroepen om de mensenrechten en status van vrouwen onderdeel te maken van hun overwegingen en bevindingen.

Sinds de Wereldconferentie van 1993 hebben verschillende VN-organen actie ondernomen om de integratie van vrouwenrechten in het mainstream internationale mensenrechtendiscours te bevorderen. Zo namen de Algemene Vergadering van de VN, de VN-Commissie inzake de Positie van de Vrouw, de voormalige VN-Commissie voor de Rechten van de Mens, en de VN-Subcommissie inzake de Bevordering en Bescherming van de Rechten van de Mens resoluties aan om de integratie van vrouwenrechten binnen de algemene mensenrechtenactiviteiten van de VN te ondersteunen en te stimuleren. En ook de VN-verdragscomités zelf toonden hun bereidheid om de schendingen en beperkingen van mensenrechten waar vooral of uitsluitend vrouwen mee geconfronteerd worden in hun werk op te nemen. Als antwoord op de oproep van de Wereldconferentie om de mensenrechten en status van vrouwen op te nemen in hun overwegingen en bevindingen besteedden deze verdragscomités in hun voorzittersvergaderingen aandacht aan de implementatie van vrouwenrechten. Zo toonden de voorzitters van de verdragsorganen onder meer hun betrokkenheid om de integratie van mensenrechten van vrouwen te verwezenlijken door tijdens hun achtste vergadering de VN Afdeling voor de Emancipatie van Vrouwen (*DAW*) te verzoeken een document op te stellen waarin uiteen wordt gezet welke maatregelen al genomen waren en welke genomen dienden te worden door de VN-verdragscomités om genderperspectieven in hun werk te integreren.

Wat nog niet was onderzocht, was of de VN-verdragscomités in de praktijk ook daadwerkelijk gevolg hadden geven aan de oproep om de mensenrechten en status van vrouwen onderdeel te maken van hun overwegingen en bevindingen. De centrale vraag in dit onderzoek was daarom of het werk van de Comités in overeenstemming is met de oproep van de Wereldconferentie Mensenrechten. De onderzoeksvraag was:

Voldoet het werk van het VN Mensenrechtencomité (*UN Human Rights Committee: HRC*) en het Comité inzake Economische, Sociale en Culturele Rechten (*Committee on Economic, Social and Cultural Rights: CESCR*) op het gebied van zaken die van invloed zijn op de lichamelijke integriteit van vrouwen aan de oproep van de Wereldconferentie Mensenrechten van 1993, waarin deze de Comités oproept om de mensenrechten en status van vrouwen onderdeel te maken van hun overwegingen en bevindingen?

Om een antwoord te vinden op deze vraag is een verkennend onderzoek gedaan naar wat er in de Weense Verklaring en Actieprogramma precies werd gevraagd van de VN-Verdragscomités. Om een goed inzicht te krijgen in deze oproep en wat het concreet betekent voor deze Comités zijn verschillende documenten onderzocht. Belangrijk hierbij waren uiteraard de Weense Verklaring en Actieprogramma van 1993 zelf, als ook de Beijing Verklaring en het Platform voor Actie van 1995, het slotdocument van de Vierde Wereldvrouwenconferentie. Daarnaast zijn VN-rapporten bestudeerd die ingaan op de oproep van Wenen en de implicaties daarvan voor de VN-verdragscomités. Deze documenten en rapporten bevatten input van vrouwenrechtenexperts en geven dientengevolge ook tot op zekere hoogte de kritiek weer die tijdens de Wereldconferentie van 1993 evenals vóór de Conferentie was geuit op het VN-mensenrechtensysteem. Voor het beantwoorden van de voorafgaande onderzoeksvraag waren drie documenten van specifiek belang: het rapport uit 1995 van de bijeenkomst van de groep van deskundigen over de ontwikkeling van richtlijnen voor de integratie van genderperspectieven in de mensenrechtenactiviteiten en -programma's van de VN, georganiseerd door het VN Centrum voor de Mensenrechten en het VN Ontwikkelingsfonds voor Vrouwen (*UNIFEM*); het rapport uit 1998 van de *DAW* over het integreren van het genderperspectief in het werk van de VN-verdragsorganen; en het rapport uit 1999 van de workshop over integratie van gender in het mensenrechtensysteem, georganiseerd door het Kantoor van de Hoge Commissaris voor de Rechten van de Mens, *DAW* en *UNIFEM*. Daarnaast is ter ondersteuning literatuur bestudeerd over vrouwenrechten, in het bijzonder in de context van het VN-mensenrechtensysteem, om een nog duidelijker inzicht te krijgen in het verzoek van de Wereldconferentie van 1993.

Op basis van bovengenoemde documenten zijn vier elementen van het verzoek van de Wereldconferentie van 1993 aan het licht gekomen, die ieder een opdracht vertegenwoordigen voor de verdragscomités. Om te kunnen concluderen dat het werk van het HRC en het CESCR voldoet aan het verzoek van Wenen, dient uit dit onderzoek te blijken dat de twee Comités aandacht geven aan schendingen en beperkingen van mensenrechten die met name of uitsluitend vrouwen raken (Element I); dat in de verplichtingen die de VN-verdragscomités voor de verdragsstaten formuleren aandacht is voor de vrouwspecifieke aspecten van deze schendingen en beperkingen (Element II); dat de Comités, waar van toepassing, een verband leggen tussen deze schendingen en beperkingen en discriminatie van vrouwen (Element III); en dat deze onderwerpen onder de relevante inhoudelijke verdragsbepalingen in hun werk worden behandeld (Element IV). Deze elementen vormden het kader waarbinnen naar een antwoord op

de centrale onderzoekvraag is gezocht. Al het werk van de HRC en de CESCR van 1993 tot 2008 is bestudeerd: hun *concluding observations* (COs), *general comments* (GCs), *lists of issues*, en hun *reporting guidelines* en *views*. Waar de opmerkingen van de Comités in hun COs toelichting behoefden, zijn de samenvattingen (*summary records*) van de dialogen met verdragsstaten geraadpleegd.

Uit het onderzoek is naar voren gekomen dat de aandacht van de Comités voor zaken die de lichamelijke integriteit van vrouwen aangaat grofweg in twee categorieën kan worden ingedeeld: aandacht voor zwangerschapsgerelateerde zaken en aandacht voor vormen van fysiek geweld tegen vrouwen. Er is bovendien gebleken dat het werk van de HRC en de CESCR met betrekking tot zaken die invloed hebben op de lichamelijke integriteit van vrouwen opvallend overeenkomt, wat zeer bijzonder is gezien de verschillende mandaten van de twee organen. Beide Comités houden zich met praktisch dezelfde onderwerpen bezig, formuleren vergelijkbare verplichtingen voor verdragsstaten en volgen daarin dezelfde argumentatie.

Het onderzoek laat zien dat de HRC en de CESCR aandacht besteden aan verschillende zaken die invloed hebben op de lichamelijke integriteit van vrouwen. Gewezen dient te worden op de uitgebreide aandacht die de Comités besteden aan vormen van fysiek geweld tegen vrouwen. In veel van hun COs gaan de HRC en de CESCR in op verkrachting, huiselijk geweld, vrouwenhandel, seksuele intimidatie en vrouwelijke genitale verminking (*Female Genital Mutilation: FGM*). Maar de HRC en de CESCR besteden ook aandacht aan zwangerschapsgerelateerde zaken, zoals voorzieningen voor gezinsplanning en seksuele voorlichting. Voor zowel de HRC als de CESCR is zwangerschapsgerelateerde sterfte een aanleiding om in te gaan op een aantal faciliteiten en diensten die te maken hebben met het voorkomen van zwangerschap alsmede met de zwangerschap zelf. De HRC legt een verband tussen zwangerschapsgerelateerde sterfte en het recht op leven, en trekt het onderwerp zwangerschap zo binnen zijn mandaat. De CESCR legt een verband tussen zwangerschapsgerelateerde sterfte en het recht op gezondheid. In verband met zwangerschapsgerelateerde sterftecijfers in een aantal verdragsstaten gaan de twee Comités in op zaken zoals informatie en voorlichting over voortplanting, toegang tot voorbehoedsmiddelen, en onveilige abortussen. Hun redenering is dat verdragsstaten verplicht zijn om ongewenste zwangerschap te voorkomen door programma's en faciliteiten voor gezinsplanning en door middel van seksuele voorlichting, wat ervoor moet zorgen dat vrouwen geen illegale abortus hoeven te laten plegen, en om zo de hoge zwangerschapsgerelateerde sterftecijfers terug te dringen.

Dit betekent dat de twee Comités zich ook bezighouden met het controversiële onderwerp abortus. De Comités geven duidelijk aan dat staten onveilige abortuspraktijken dienen te voorkomen omdat deze leiden tot zwangerschapsgerelateerde sterfte. Daarom wordt verdragsstaten verzocht abortus toe te staan als de zwangerschap het gevolg is van verkrachting of deze het leven van de zwangere vrouw in gevaar brengt. Abortus wordt op zichzelf niet beschouwd als schending van mensenrechten, zoals tegenstanders van abortus veelal stellen. Zowel de HRC als de CESCR adviseren verdragsstaten hun *restrictieve* abortuswetgeving te herzien, bijvoorbeeld wanneer zij

hoge zwangerschapsgerelateerde sterftecijfers hebben, maar zij verzoeken verdragsstaten nooit om bestaande *liberale* abortuswetgeving te herzien. Zelfs in verdragsstaten waar abortus wordt gebruikt als voorbehoedsmiddel of waar vrouwelijke foetussen worden geaborteerd (situaties die beide Comités beschouwen als reden tot zorg) stelt noch de HRC noch de CESCR de abortuswetgeving van de betreffende verdragsstaten aan de kaak, maar adviseren ze te zorgen voor gezinsplanningsfaciliteiten en informatieverschaffing.

Uit het werk van de HRC en de CESCR blijkt dat de Comités zich bewust zijn van de specifieke schendingen en beperkingen van mensenrechten die voornamelijk de lichamelijke integriteit van vrouwen raken, en dat zij hierop actie ondernemen. In die zin kan worden geconcludeerd dat hun werk voldoet aan het verzoek van de Wereldconferentie Mensenrechten van 1993. Toch zijn er nog enkele kanttekeningen te maken. Zwangerschapsgerelateerde sterfte staat bij beide Comités duidelijk hoog op de agenda. Omdat deze sterfte vooral veroorzaakt wordt door een gebrek aan kraamzorg en onveilige abortussen, is het bijzonder opvallend dat de HRC nauwelijks aandacht besteed aan de beschikbaarheid van kraamzorg en abortusfaciliteiten in verdragsstaten, ondanks het feit dat de HRC erkent dat deze zaken binnen zijn mandaat vallen. Gezien de redenering dat zwangerschapsgerelateerde sterfte invloed heeft op het recht op leven zou het Comité ook aandacht moeten besteden aan de gebrekkige beschikbaarheid of toegankelijkheid van kraamzorg en abortusfaciliteiten in het licht van zwangerschapsgerelateerde sterfte.

Ook opvallend is het gebrek aan aandacht van beide Comités voor zogenoemde ‘Westerse schoonheidspraktijken’, waarnaar bijvoorbeeld Coomaraswamy en Ertürk, Speciale Rapporteurs inzake Geweld tegen Vrouwen van de VN, verwijzen. Beide Rapporteurs verwijzen naar de ‘schoonheidsmythe’ van een slank en vrouwelijk figuur die vrouwen ertoe drijft cosmetische chirurgie te ondergaan en eetstoornissen te ontwikkelen. De CESCR vermeldt eetstoornissen in een van zijn COs, waarmee wordt aangegeven dat dergelijke praktijken van invloed zijn op mensenrechten, maar de HRC verwijst nergens naar praktijken die verband houden met de ‘Westerse schoonheidsmythe’. Toch betoogt een aantal auteurs dat dergelijke zaken binnen de sfeer van internationale mensenrechten vallen en dat het onderwerp meer aandacht zou moeten krijgen. Deze interpretatie wordt bevestigd door de uitspraken die de CESCR in een van zijn COs doet over eetstoornissen. Het kan daarom worden gesteld dat het werk van de HRC en CESCR pas volledig voldoet aan het verzoek van de Weense Verklaring en Actieprogramma wanneer het ingaat op deze schoonheidspraktijken.

Met betrekking tot de centrale onderzoeksvraag en de aandacht voor zaken die specifiek invloed hebben op vrouwen en hun mensenrechten (Element I) is de uiteindelijke conclusie derhalve dat het werk van de HRC en de CESCR voldoet aan het verzoek van de Wereldconferentie Mensenrechten van 1993, maar dat er nog steeds ruimte is voor verbetering. Het is in dit opzicht belangrijk dat specifieke schendingen en beperkingen van mensenrechten waar vooral of uitsluitend vrouwen mee worden geconfronteerd voortdurend onder de aandacht van de HRC en de CESCR worden gebracht en dat er meer onderzoek wordt verricht naar het verband tussen deze

ervaringen en internationale mensenrechten. Omdat de maatschappelijk geaccepteerde rolpatronen voor mannen en voor vrouwen, evenals de hiermee gepaard gaande invulling van mannelijkheid en vrouwelijkheid, niet alleen variërt naar plaats en cultuur maar ook in tijd, kunnen zich steeds nieuwe situaties voor doen die van invloed zijn op het genot van de mensenrechten. Dit betekent dat mensenrechten steeds in een dynamische context moeten worden geïnterpreteerd en daarom is de aandacht voor specifieke ervaringen van vrouwen een doorlopende opdracht: de VN-verdragscomités moeten altijd alert blijven op situaties die de mensenrechten van vrouwen kunnen beïnvloeden.

Ten aanzien van Element II van de oproep van de Weense Verklaring en Actieprogramma, dat stelt dat in de mensenrechtenverplichtingen die de VN-verdragscomités formuleren voor de verdragsstaten aandacht moet zijn voor de vrouwspecifieke aspecten van mensenrechtenschendingen en -beperkingen, komt in het werk van de HRC en de CESCR naar voren dat de Comités verschillende adviezen en vereisten formuleren die verplichtingen voor staten behelzen: de plicht tot respect voor, de plicht tot bescherming van, en de plicht tot verwezenlijking van mensenrechten. Daarbij besteden ze aandacht aan de gender-specifieke omstandigheden die invloed hebben op het genot van mensenrechten door vrouwen. Met betrekking tot zaken die invloed hebben op de lichamelijke integriteit van vrouwen worden staten bijvoorbeeld verzocht om te zorgen voor programma's en faciliteiten voor gezinsplanning, seksuele voorlichting, opvangcentra voor mishandelde vrouwen en speciale telefoonlijnen en counseling voor slachtoffers van geweld. Staten krijgen ook het verzoek om de volgende zaken te regelen: het strafbaar stellen van vormen van fysiek geweld, zoals verkrachting, waaronder verkrachting binnen het huwelijk, huiselijk geweld, vrouwenhandel en FGM; het vervolgen van de daders van dit misbruik; en het straffen van daders in overeenstemming met de ernst van hun misdaad. Een belangrijk feit is dat de HRC en de CESCR aanzienlijke aandacht besteden aan de behoeften van vrouwen die geconfronteerd worden met verschillende vormen van fysiek geweld. Daarnaast is het vermeldenswaardig dat beide Comités aanbevelingen doen over het verlenen van verblijfsvergunningen aan slachtoffers van vrouwenhandel en FGM. Hoewel het slechts een paar aanbevelingen betreft en deze tot nu toe vrij mild van inhoud zijn, geeft dit aan dat de Comités rekening houden met de specifieke omstandigheden en gevolgen van vrouwenhandel voor de betreffende vrouwen.

Aandacht moet echter ook worden gevestigd op het feit dat de HRC en de CESCR nauwelijks aanbevelingen doen over zwangerschapsgerelateerde zaken die een verplichting tot bescherming van mensenrechten zouden inhouden. Over het algemeen doen de Comités nauwelijks aanbevelingen waarin verdragsstaten verzocht worden tot het strafbaar stellen, vervolgen en bestraffen van handelingen door individuen waarbij vrouwen worden beperkt in hun reproductieve vrijheid, zoals gedwongen abortus en gedwongen sterilisatie. Er kan uitsluitend worden gesteld dat het werk van de HRC en de CESCR volledig voldoet aan het tweede element van het verzoek van de Wereldconferentie van 1993 indien de gender-specifieke aspecten van de schendingen en beperkingen van mensenrechten die in het bijzonder of uitsluitend vrouwen ervaren

zijn opgenomen in de verplichtingen voor de verdragsstaten. Uit recente verklaringen van de HRC in een van zijn COs blijkt dat dit Comité zich bewust is van de gender-specifieke aspecten van gedwongen sterilisatie en dit zou erop kunnen duiden dat er in de toekomst meer aandacht zal komen voor dit onderwerp. Hier zou ook de CESCR zich mee bezig moeten houden.

Verder moet er nog iets gezegd worden over het feit dat de HRC en de CESCR in het algemeen geen vragen stellen over het wel of niet beschikbaar zijn van abortus- of post-abortusfaciliteiten of over de toegankelijkheid en kwaliteit daarvan. De twee Comités formuleren daarom in het algemeen geen verplichtingen voor verdragsstaten die moeten garanderen dat er in situaties waarin abortus wettelijk is toegestaan ook daadwerkelijk abortus- en post-abortusfaciliteiten beschikbaar en toegankelijk zijn. Toch zijn de Comités zich bewust van de gevolgen van het gebrek aan deze faciliteiten, want ze uiten regelmatig hun bezorgdheid over de onveilige abortuspraktijken en de zwangerschapsgerelateerde sterfte die het gevolg zijn van dit gebrek. In het licht van de oproep van de Wereldconferentie Mensenrechten van 1993, dat een opdracht inhoudt om voor verdragsstaten verplichtingen te stellen die rekening houden met de gender-specifieke vormen van mensenrechtenschendingen en -beperkingen, zouden de HRC en de CESCR ook op deze zaken in moet gaan door effectieve verplichtingen te formuleren voor verdragsstaten op het gebied van abortusgerelateerde faciliteiten.

Zoals eerder aangegeven omvat het werk van de HRC en de CESCR waar het gaat om fysiek geweld tegen vrouwen vooral een verplichting tot bescherming van de mensenrechten. Hoewel de Comités ook aandacht besteden aan de behoeften van slachtoffers van enkele van deze vormen van geweld, houden ze niet altijd voldoende rekening met het gehele gamma aan gender-specifieke omstandigheden. Dit blijkt onder meer uit de benadering van de Comités van FGM. Met betrekking tot dit onderwerp formuleren de Comités met name de verplichting voor verdragsstaten om FGM te verbieden in hun strafrechtwetgeving. Hierbij lijkt het erop dat de Comités geen rekening houden met het feit dat FGM meestal wordt uitgevoerd om sociaal-culturele redenen, veelal door vrouwen, en met de schijnbare toestemming van de vrouw die besneden wordt of dat van haar gevolmachtigde. Dit werpt vragen op over de vervolging van deze activiteiten en over de effectiviteit van deze aanbevelingen als het gaat om het eigenlijke uitbannen van deze gewoonte. Verscheidene internationale organisaties die zich lokaal bezighouden met de strijd tegen FGM betogen dat het strafbaar maken van FGM niet voldoende is en dat er ook andere maatregelen moeten worden genomen om dit fenomeen effectief te bestrijden. De HRC en de CESCR besteden over het algemeen geen aandacht aan andere middelen om FGM uit te bannen en formuleren nauwelijks aanbevelingen over deze praktijk die een verplichting tot verwezenlijking van mensenrechten zou inhouden.

De eindconclusie ten aanzien van de centrale onderzoeksvraag in verband met Element II is dat het werk van de HRC en de CESCR voldoet aan het verzoek van de Wereldconferentie Mensenrechten van 1993, maar dat de door de twee Comités geformuleerde verplichtingen op sommige terreinen nog meer rekening zouden kunnen houden met de gender-specifieke omstandigheden van mensenrechtenschendingen en

-beperkingen. Net als wat hierboven werd gezegd over specifieke ervaringen van vrouwen, is er ten aanzien van deze gender-specifieke aspecten van mensenrechtenschendingen en -beperkingen nadere informatieverschaffing nodig, dienen de Comités zich van deze aspecten bewust te zijn, en dienen ze er vervolgens ook iets mee te doen door gender-specifieke mensenrechtenverplichtingen te formuleren, bijvoorbeeld met betrekking tot FGM.

Element III van het verzoek van de Wereldconferentie Mensenrechten van 1993 omvat een opdracht voor de VN-verdragscomités om de specifieke schendingen en beperkingen van mensenrechten van vrouwen te plaatsen binnen de context van discriminatie van vrouwen. In het werk van de HRC en de CESCR ontbreekt het veelal aan dit element van de Weense Verklaring en Actieprogramma. Hoewel de Comités zich in hun GCs over de gelijkheid van mannen en vrouwen bezighouden met een groot aantal vrouwspecifieke onderwerpen binnen de mensenrechten, beschouwen ze deze onderwerpen meestal niet als structurele of systeemdiscriminatie van vrouwen in de maatschappij. Het lijkt er meer op dat verwijzingen naar deze onderwerpen in de GCs, en ook verwijzingen naar het gezamenlijke Artikel 3 zoals opgenomen in beide verdragen, in het werk van de Comités, erop duiden dat de Comités zich ervan bewust zijn dat waar het gaat om interpretatie van mensenrechten, vrouwen in hun genot van mensenrechten met andere obstakels geconfronteerd worden dan mannen. Het werk van de HRC en de CESCR vertoont daarom een zeker bewustzijn met betrekking tot de verschillende levens en daaraan gerelateerde schendingen en beperkingen van mensenrechten waar vrouwen en mannen mee te maken krijgen. Dit betekent echter niet dat de HRC en de CESCR onderzoeken of de mensenrechtenonderwerpen die in het bijzonder van belang zijn voor vrouwen veroorzaakt worden door (structurele) discriminatie van vrouwen. Af en toe wordt er een verband gelegd tussen bepaalde situaties en structurele discriminatie, maar in het algemeen worden situaties zoals het feitelijk ongestraft blijven van verkrachting of seksuele exploitatie van vrouwen en meisjes niet in verband gebracht met structurele discriminatie tegen vrouwen of met hun ongelijke status in de maatschappij. De enige echte uitzonderingen op dit gebied zijn de uitspraken van beide Comités over het aborteren van vrouwelijke foetussen en de opmerkingen van de CESCR met betrekking tot seksuele intimidatie en eerwraak.

In het algemeen houden de HRC en de CESCR zich bij de aanpak van verschillende vormen van fysiek geweld tegen vrouwen niet bezig met de eigenlijke oorzaken, bijvoorbeeld de ongelijke status van vrouwen in de maatschappij, versterkt door bepaalde gender-ideologieën en tradities, maar roepen de Comités de verdragsstaten eerder op om geweld tegen vrouwen aan te pakken via strafbaarstelling en vervolging. Dit betekent dat de Comités verdragsstaten verzoeken om alleen de uitingen van mensenrechtenschendingen aan te pakken en niet de gender-ideologieën die er mogelijk de oorzaak van zijn. De HRC en de CESCR richten zich dus vooral op symptoombestrijding: het aanpakken van vormen van fysiek geweld tegen vrouwen, en niet op de eigenlijke ziekte: de structurele ongelijkheid van vrouwen in de maatschappij.

Het voorgaande geeft aan dat ten aanzien van Element III het werk van de HRC en de CESCR in het algemeen niet voldoet aan de oproep van de Wereldconferentie

Mensenrechten van 1993. De HRC en de CESCR dienen meer aandacht te besteden aan (structurele) discriminatie tegen vrouwen als mogelijke oorzaak van schendingen en beperkingen van mensenrechten daar waar het de lichamelijke integriteit van vrouwen betreft. Zij dienen dit te doen door hun bezorgdheid te uiten over de onderliggende oorzaak van deze schendingen en door aanbevelingen te doen die tot doel hebben dit onderliggende probleem effectief te bestrijden.

Zoals eerder aangegeven moeten de HRC en de CESCR om te voldoen aan Element IV ervoor zorgen dat de zaken die van invloed zijn op de lichamelijke integriteit van vrouwen integraal worden behandeld in hun werk. Dit betekent dat deze zaken niet afzonderlijk worden benoemd als zaken die vrouwen aangaan, of als zaken die andere gemarginaliseerde groepen aangaan, maar dat de Comités hier aandacht aan besteden in alle relevante onderdelen van hun werk. Het werk van de HRC en de CESCR voldoet over het algemeen aan dit element: de zaken die invloed hebben op de lichamelijke integriteit van vrouwen worden vaak besproken in het licht van de materiële bepalingen die zijn geschonden of met betrekking tot het gezamenlijke Artikel 3 van de Verdragen. Bij andere gelegenheden, waar niet expliciet verwezen wordt naar een artikel in het Verdragen, worden de zaken in verschillende onderdelen behandeld, bijvoorbeeld in combinatie met andere, eraan gerelateerde mensenrechtenonderwerpen. De HRC behandelt verkrachting tijdens gewapende conflicten samen met andere schendingen van de mensenrechten die onder die omstandigheden plaatsvinden, zoals buitengerechtelijke executies en verdwijningen.

Omdat uit het werk van de Comités blijkt dat de zaken die van invloed zijn op de lichamelijke integriteit van vrouwen op een integrale wijze worden behandeld, voldoet het aan het verzoek van de Wereldconferentie Mensenrechten van 1993.

In het algemeen voldoet het werk van de HRC en de CESCR op het gebied van zaken die van invloed zijn op de lichamelijke integriteit van vrouwen aan drie van de vier elementen van de oproep van de Wereldconferentie Mensenrechten van 1993 aan de VN-verdragscomités. De Comités lijken effectief gebruik te maken van de mogelijkheden die hun mandaten hen bieden om in te gaan op zaken die van invloed zijn op de lichamelijke integriteit van vrouwen; ze formuleren verplichtingen voor verdragsstaten die in het algemeen rekening houden met de gender-specifieke vorm, omstandigheden en gevolgen van de betreffende schendingen en beperkingen van mensenrechten; en ze behandelen deze zaken bovendien op een integrale manier. Toch vertoont het werk van de HRC en de CESCR enkele gebreken, in het bijzonder als het gaat om Element III: het verzoek om een verband te leggen tussen specifieke schendingen en beperkingen van mensenrechten die met name of uitsluitend vrouwen raken en discriminatie van vrouwen. Er is slechts een klein aantal voorbeelden waarin de Comités expliciet een verband leggen tussen zaken die van invloed zijn op de lichamelijke integriteit van vrouwen en discriminatie van vrouwen en waarin ze bovendien verplichtingen voor verdragsstaten formuleren om dit aan te pakken. Dit betekent dat de aanbevelingen van de HRC en de CESCR in het algemeen geen aanbeveling behelzen aan de betreffende staten om de eigenlijke oorzaak van mensenrechtenschendingen en -beperkingen die van invloed zijn op de lichamelijke integriteit van vrouwen

aan te pakken. De HRC en de CESCR tonen dus aan zich bewust te zijn van specifieke ervaringen van vrouwen en daarop actie te ondernemen, maar omdat ze in het algemeen niet de situatie aanpakken die veelal de oorzaak is van het gender-specifieke misbruik, houden ze zich slechts bezig met symptoombestrijding. Er is meer actie nodig om dit te ondervangen. De Comités dienen in hun werk, waar van toepassing, duidelijk in te gaan op het verband tussen vrouwspecifieke mensenrechtenonderwerpen en discriminatie van vrouwen in de maatschappij, en verplichtingen te formuleren die erop gericht zijn structurele discriminatie als onderliggende oorzaak uit te bannen. Hierin hebben NGO's en academici ook een belangrijke rol; zij kunnen de Comités attenderen op de discriminatoire achtergrond en aard van bepaalde situaties en onderwerpen en hen ideeën aan de hand doen over de beste manier om deze onderliggende oorzaken aan te pakken.

Dit onderzoek heeft aangetoond dat waar het gaat om het integreren van de status en de mensenrechten van vrouwen in de mainstream mensenrechtenactiviteiten, de HRC en de CESCR op de goede weg zijn. Het heeft echter ook duidelijk gemaakt dat er meer inspanningen mogelijk en noodzakelijk zijn om te zorgen dat het werk van beide Comités voldoet aan de oproep van de Wereldconferentie Mensenrechten van 1993. Hoewel er in dit onderzoek niet is gekeken naar de eigenlijke redenen die de Comités hebben om schendingen en beperkingen van mensenrechten die kenmerkend zijn voor vrouwen te behandelen, is het duidelijk dat ze bereid zijn om de status en mensenrechten van vrouwen onderdeel te maken van hun werk. Het lijkt erop dat wanneer bepaalde onderwerpen slechts sporadisch of helemaal niet worden behandeld, dit met name komt doordat er een gebrek aan informatie bestaat. Dit omdat bij onderwerpen waarbij de Comités slechts incidentele aandacht besteedden aan de gender-specifieke mensenrechtenomstandigheden, het Comité meestal informatie had ontvangen van de verdragsstaat zelf of van NGO's. En wanneer bepaalde onderwerpen of gender-specifieke omstandigheden juist systematisch worden behandeld door de HRC en de CESCR, gaat het vaak om zaken die al veel internationale aandacht hebben gekregen.

Ter afsluiting: dit onderzoek heeft niet alleen antwoorden opgeleverd, maar ook tot nieuwe vragen geleid. Een belangrijke vraag betreft de motivatie van de Comités voor het aanpakken van bepaalde zaken. Hoewel er duidelijke signalen zijn dat het werk van NGO's hierbij van belang is, is een van de vragen bijvoorbeeld of het geslacht of de nationaliteit van individuele leden van de Comités een rol spelen bij de aandacht die door de VN-verdragscomités wordt besteed aan zaken die van invloed zijn op de lichamelijke integriteit, en, zo ja, tot op welke hoogte. Verder onderzoek is noodzakelijk om te ontdekken waarom de integratie van de status en mensenrechten van vrouwen soms nog hapert en welke maatregelen genomen dienen te worden om deze obstakels uit de weg te ruimen. Het einde van het integratieproces is nog niet in zicht. Het is duidelijk dat de oproep van de Wereldconferentie Mensenrechten van 1993 geen korte-termijn opdracht behelst voor de Comités: het is geen kwestie van simpelweg toevoegen en doorroeren van ervaringen van vrouwen in de grote kom van internationale mensenrechten. Het is een proces dat zal blijven voortduren zolang gender-

ongelijkheid bestaat. Betrokkenheid is nodig van alle partijen om het internationale systeem zodanig te transformeren dat het de schendingen en beperkingen van mensenrechten die kenmerkend zijn voor de levens van vele vrouwen volledig in aanmerking neemt en hierop actie onderneemt, nu en in de toekomst.

TÜRKÇE ÖZET

'KADIN HAKLARI İNSAN HAKLARIDIR'

'Kadın hakları insan haklarıdır!' Bu sanı, Birleşmiş Milletler (BM) himayesi altında olan insan haklarını korumayı ve geliştirmeyi amaçlayan uluslararası sistem, kadınların ve erkeklerin eşit itibara ve haklara sahip olduğu fikri üzerine inşa edildiği için kendinden menkul görünebilir. Ancak bu sistemi eleştirenler tarafından ikna edici bir şekilde gösterildiği gibi, durum böyle değildir.

BM sistemi insan haklarından kadınların da yararlanmasını korumayı ve ilerletmeyi iki vasıta aracılığıyla gerçekleştirmeyi amaçlamaktadır: BM'ye ait *temel* insan hakları sözleşmelerinde yer alan ayrımcılığın yasaklanması ve eşitlik ilkeleri aracılığıyla ve kadınlara özel mekanizmalarda ortaya konulan bu ilkelerin pekiştirilmesi yoluyla: BM Kadınlara Yönelik Her Türlü Ayrımcılığın Ortadan Kaldırılması Sözleşmesi (CEDAW Sözleşmesi) ve BM Kadınların Statüsüyle İlgili Komisyon (CSW).[1] BM sistemini eleştirenler başarılı bir şekilde gösterdiler ki kadınlara özel ayrı kurumsal mekanizmalar yaratmanın bedeli kadın haklarının azınlık ve geri kalmışlık bölgesine itilmesi sonucunu doğurdu. Bu eleştirmenler, CEDAW Sözleşmesinin kabul edilmesinin, kadın haklarının ilk kez olarak açıkça uluslararası insan hakları şemsiyesi altına girmesi anlamına gelmesine rağmen, kadınların haklarının hala temel insan hakları mekanizmaları tarafından görmezlikten gelindiğini not etmektedirler. Onlara göre, temel insan hakları sözleşmelerinin uygulanmasını denetleyen insan hakları kurumları, kadınların itibarına yönelik aşikâr ihlalleri görmezlikten gelmekte ve bu meselelere değinmeyi bu konularda özelleşmiş CEDAW Komitesine bırakmaktadırlar. Bu yüzden, CEDAW Sözleşmesi'nin kabul edilmesi kadınların insan haklarının marjinalleşmesi sonucunu doğurmaktadır.

1993 yılında, Viyana'daki İnsan Hakları Dünya Konferansı'nda, orada temsil edilen 171 ülkeye dünyanın her bölgesinde kadınların her gün karşılaştıkları aşikâr insan hakları ihlallerinin uluslararası insan hakları sistemi tarafından görmezlikten gelindiğini göstermek için dünyanın çeşitli ülkelerinden gelen kadın organizasyonlarından ve eylemcilerden oluşan bir lobi grubu oluşturuldu. Bu kadın hakları meclisi, Dünya Konferansına katılan ülke temsilcilerine açıkça gösterdiler ki kadınların gündelik hayatlarında karşılaştıkları taciz ve kötü muameleler, uluslararası insan hakları toplumunun gözetim alanı dışında yer almaktadır. Kadınların düzenli

1 *Temel* kelimesi bu bağlamda özel olarak *kadınların* insan haklarından yararlanmasına odaklanmayan insan hakları sözleşmelerine gönderme yapmaktadır.

olarak kötü muameleye ve işkenceye, aşağılamaya, açlığa, cinsel tacize ve cinsel sömürüye, zoraki evliliğe ve zoraki gebeliğe maruz kaldığının herkes tarafından bilinmesine karşın ve bütün bunlar uluslararası camiada kabul edilen insan hakları normlarını ihlal ediyor olmasına karşın, durum bu şekildedir.

Dünya Konferansı'nda temsil edilen devletler, uluslararası insan hakları sisteminin bu eksikliğini kabul ettiler ve Konferansın nihai metni olan Viyana Deklarasyonu ve Eylem Programı'na şunu eklediler: Kadınların ve kız çocuklarının insan hakları, evrensel insan haklarının devredilemez, içsel ve ayrılamaz parçasıdır. Ayrıca ekledirler ki, kadınların insan hakları BM'nin genel olarak işleyiş sistemine entegre edilmeli ve bu meseleler ilgili BM kurumları ve mekanizmaları aracılığıyla düzenli ve sistematik olarak ele alınmalıdır. Bu bakımdan Dünya Konferansı, uluslararası insan hakları sözleşmelerinin *temel* izleyici kurumlarına önemli bir çağrıda bulundu: Viyana deklarasyonu ve Eylem Programı'nda, bu izleyici kurumlar, kadınların insan haklarını ve statülerini kendi çalışmalarına ve raporlarına eklemekle görevlendirildiler.

1993 yılındaki Viyana Dünya Konferansı'ndan sonra çeşitli BM organları tarafından, kadın haklarını genel uluslararası insan hakları şemsiyesine entegre olmasını desteklemek için önemli çalışmalar yapıldı. Siyasi düzlemde, BM Genel Kurulu, CSW, eski İnsan Hakları BM Komisyonu ve İnsan Haklarının Korunması ve Güçlendirilmesi Alt-Komisyonu, kadın haklarının BM'nin genel insan hakları faaliyetlerine entegre olmasını destekleyen ve buna destek veren bildiriler yayınladılar. Ayrıca izleyici BM organlarının kendileri de kadınların yaşadığı tecrübeleri kendi çalışmalarına entegre etmek için bir isteklilik gösterdiler. Viyana'daki Dünya Konferansı'nda, BM'nin izleyici kurumların toplantılarına ve bulgularına kadınların insan haklarının statüsünü eklemek için yapılan çağrıya yanıt olarak bu insan hakları izleme kurumları, komisyon başkanlarının katıldığı toplantılarda kadınlarla ilgili meselelere değinmeye başladılar. Buna ek olarak, insan hakları organlarının başkanları sekizinci toplantıları için Kadınların İlerlemesi için BM Bölümü'nü (DAW) cinsiyet ile ilgili perspektiflerin insan hakları izleme organlarının çalışmalarına entegre olması amacıyla bu organlar tarafından alınan ve alınması gereken önlemleri analiz eden bir arka plan raporu hazırlamaya davet ederek ve cinsiyet perspektifinin entegrasyonu için yapılan atölye çalışmalarına katılarak kadınların deneyimlerinin kendi çalışmalarına eklemlenmesi için kararlı olduklarını gösterdiler.

Burada incelenmesi gereken konu, insan hakları izleme Komitelerinin kendi toplantılarına ve bulgularına kadınların insan haklarının durumunu eklemek için yapılan çağrıyı pratikte yerine getirip getirmedikleridir. Bu bağlamda, bu eser tarafından ortaya atılan soru izleme organlarının çalışmalarının 1993 İnsan Hakları Dünya Konferansı'nda yapılan çağrıya uygun olup olmadığıdır. Bu amaçla cevaplanacak araştırma sorusu: BM İnsan Hakları Komitesi'nin (HRC) ve Ekonomik, Sosyal ve Kültürel Haklar Komitesi'nin (CESCR), kadınların fiziksel bütünlüklerini ilgilendiren meselelerdeki çalışmaları, 1993 İnsan Hakları Dünya Konferansı'nda yapılan ve bu komitelerin kendi toplantı ve bulgularında kadınların insan haklarını da kapsamaları şeklindeki çağrıya uyuyor mu?

Bu soruyu cevaplandırabilmek için öncelikle Viyana Deklarasyonu ve Eylem Planı'nda insan hakları izleme kurumlarından tam olarak ne istendiğinin anlaşılması amacıyla bir ön çalışma yapıldı. Bu çağrıyı tam olarak anlayabilmek ve bunun insan hakları izleme kurumları açısından ne anlama geldiğini değerlendirebilmek için farklı dokümanlar incelendi. Başlangıç noktalarının doğal olarak 1993 Viyana Deklarasyonu ve Eylem Planı, 1995 Pekin Deklarasyonu ve Eylem Platformu ve Dördüncü Dünya Kadın Konferansı'nın sonuç bildirgesi olması gerekiyordu. Buna ek olarak, Viyana'da yapılan çağrıyı takip eden ve bunun Komiteler açısından sonuçları ile ilgili BM raporları da incelendi. Bu rapor ve çalışmalar kadın hakları uzmanları tarafından yapılan katkıları da içeriyordu ve bu nedenle hem 1993 Dünya Konferansı'nda hem de daha önce BM insan hakları sistemi ile ilgili yapılan eleştirileri de bir ölçüye kadar yansıtıyordu. Ön araştırma sorusunu yanıtlarken özellikle üç doküman önem kazandı: Eski BM İnsan Hakları Merkezi ve BM Kadınlar için Gelişme Fonları (UNIFEM) tarafından 1995 yılında düzenlenen cinsiyet perspektiflerinin BM insan hakları faaliyetlerine ve programlarına entegre olması amacıyla gereken rehber ilkelerin geliştirilmesi ile ilgili uzmanlar toplantısının raporu; DAW tarafından hazırlanan ve cinsiyet perspektifinin BM insan hakları sözleşme organlarının çalışmalarına entegre edilmesi ile ilgili rapor ve İnsan Hakları Yüksek Komiserlik bürosu, DAW ve UNIFEM tarafından 1999 yılında organize edilen, insan hakları sistemine cinsiyet konusunun eklenmesi konulu atölye çalışmasının raporu. Bunlara ilaveten, 1993 Dünya Konferansı'nda yapılan çağrıyı daha iyi anlamak amacıyla özellikle BM insan hakları sistemi bağlamında kadın hakları ile ilgili dokümanlar da incelendi.

Yukarıda değinilen metinlerin çerçevesinde 1993 Dünya Konferansı'nda yapılan çağrı ile ilgili olarak dört unsur belirlendi ki bu unsurların her biri insan hakları izleme komiteleri açısından bir ödevi temsil eder. HRC'nin ve CESCR'nin çalışmalarının, Viyana'da yapılan çağrıya uyum göstermesi için bu iki komitenin özel olarak kadınları ilgilendiren ve onların insan haklarından tam olarak faydalanabilmelerini etkileyen meselelere özel olarak ilgi göstermeleri (Unsur I); üye devletlere kadınları kapsayan meseleler ile ilgili yükümlülüklerinin hatırlatmaları (Element II); eğer uygulanabiliyorsa kadınları ve onların insan haklarından faydalanabilmelerini özel olarak etkileyen meseleleri kadınlara yönelik ayrımcılık kapsamında değerlendirmeleri (Element III) ve bu meselelere kendi çalışmalarında entegre bir şekilde gönderme yapmaları (Element IV) gerekmektedir. Bu unsurlar, ana araştırma sorusunu yanıtlarken bir çerçeve görevini gördüler. HRC'nin ve CESCR'nin 1993'den 2008'e kadar olan tüm çalışmaları incelendi. Bunlar, nihai gözlemler (CO), genel yorumlar (GC), konuların listesi, raporlama ilkeleri ve fikirlerdir. CO'larda yer alan Komitelerin yaptığı sonuçlar daha çok açıklık gerektirdiğinde de üye devletler ile yapılan *yapıcı diyalog* dosyalarının özetlerine başvuruldu.

Bu çalışma gösterdi ki Komitelerin, kadınların fiziksel bütünlüğünü etkileyen meselelerdeki ilgisi genel olarak iki kategoriye ayrılabilir: gebelik ile ilgili meselelere ilgi ve kadınlara yönelik fiziksel şiddet durumlarına ilgi. Buna ek olarak bu çalışma gösterdi ki, HRC'nin ve CESCR'nin kadınların fiziksel bütünlüğü ile ilgili meselelere kendi çalışmalarındaki yaklaşımları çok büyük bir benzerlik göstermektedir ki bu iki

komitenin farklı görevlere ve yetkilere sahip olduğu düşünüldüğünde bu benzerlik özel olarak not etmeye değerdir. İki Komite de pratikte aynı meseleleri ele almakta, üye devletler için benzer yükümlülükler formüle etmekte ve böyle yaparak da benzer bir akıl yürütme ve nedensellendirmeyi kullanmaktadır.

Bu çalışmanın ana ilgisi, Komitelerin kadınlara yönelik fiziksel şiddetin çeşitli biçimleri üzerine yaptıkları çok geniş çalışmalara eğilmektir. Birçok CO'da, HRC ve CESCR tecavüz, aile içi şiddet, kadın pazarlaması, cinsel taciz ve kadın sünneti (FGM) konularına ilgi göstermektedir. Ayrıca HRC ve CESCR, aile planlaması hizmetleri ve cinsel eğitim gibi gebelik ile ilgili konulara da eğilmektedir. Hem HRC, hem de CESCR anne ölümleri ile ilgili kaygılarını, gebeliğin önlenmesi veya kadınların gebe kaldığı durumlar ile ilgili hizmetler, kaynaklar ve politikalar kapsamında bir çıkış noktası olarak kullanmaktadır. HRC, anne ölümlerini yaşama hakkı ile bağlantılandırmakta ve böylece konuyu kendi yetki ve ilgi alanına çekmektedir. CESCR ise anne ölümlerini sağlık hakkı çerçevesinde değerlendirmektedir. Üye devletlerde görülen anne ölümleri oranları ışığında, iki komite de üremek ile ilgili bilgiler ve eğitimler, doğum kontrol araçlarına erişim ve güvenli olmayan kürtaj gibi konuları ele almaktadır. Bunları yaparken şöyle bir gerekçe öne sürmektedirler: Üye devletler istenmeyen gebelikleri aile planlaması programları ve hizmetleri ve cinsel eğitim yoluyla önlemekle yükümlüdürler, böylece kadınların yasal olmayan kürtaj gibi yollara başvurması önlenerek, yüksek olan anne ölüm oranları indirilebilir.

Sonuç olarak bu iki Komite, tartışmalı bir konu olan kürtaj meselesine de değinmektedir. Komiteler şunu açıklıkla belirtmektedir ki üye devletler, anne ölümlerine yol açtığı için güvenli olmayan kürtajı önlemelidir. Bu nedenle, üye devletler gebelik tecavüz sonucu gerçekleştiyse veya hamile annenin hayatı tehlikedeyse kürtaja izin vermeye çağrılmaktadır. Kürtaj uygulamasına karşı olanların iddia ettiği gibi kürtaj Komiteler tarafından insan haklarına aykırı görülmemektedir: Hem HRC, hem de CESCR eğer yüksek anne ölümleri görülen ülkelerdeki *kısıtlayıcı* kürtaj kanunlarının gözden geçirilmesini tavsiye etmektedirler ama liberal kürtaj kanunları olan ülkelerden kendi kanunlarını yeniden gözden geçirmeleri istenmemektedir. Kürtajın doğum kontrol metodu olarak kullanıldığı veya birçok fetüsün kürtaja tabi olduğu ülkelerde bile bu durumlar insan hakları bakımından kaygı verici bulanmakla birlikte, ne HRC ne de CESCR bu devletlerin kürtaj kanunlarını sorgulamamaktadır. Sadece bu ülkelere aile planlaması hizmetleri ve bu konuda bilgiler verilmesi tavsiye edilmektedir.

HRC'nin ve CESCR'nin çalışmaları göstermektedir ki bu Komiteler özellikle kadınların tabi olduğu kötü muamelenin ve sınırlamaların farkındadırlar ve bu konuda bir takım çalışmalarda da bulunmaktadırlar. Bu açıdan bu Komitelerin çalışmalarının 1993 İnsan Hakları Dünya Konferansı'nda yapılan çağrıya uyum göstermektedir denilebilir. Ancak bu noktada bazı yorumlar da yapılmalıdır. Anne ölümü açıkça görülmektedir ki bu iki Komitenin gündeminin üst sıralarında yer almaktadır. Anne sağlığı ile ilgili hizmetlerin yeterince verilmemesi ve güvenli olmayan kürtajlar anne ölümlerinin en önemli nedenleri olduğu için, HRC'nin bu konuların kendi yetki alanına girdiğini belirtmesine karşın, üye devletlerde, anne sağlığı ve kürtaj ile ilgili

hizmetlerin mevcut olup olmadığına neredeyse hiç ilgi göstermemesi belirtilmesi gereken çok ilginç bir noktadır. Kendi akıl yürütmesine göre, anne ölümü yaşama hakkını etkilemektedir. Bu yüzden Komite anne ölümleri açısından, anne sağlığı ve kürtaj hizmetlerinin de yeterli olup olmadığına değinmelidir.

İki Komitenin de *Batılı güzellik uygulamaları* olarak da bilinen ve örneğin Kadına Yönelik Şiddet üzerine Özel Raportörler olan Coomaraswamy ve Ertürk tarafından da değinilen uygulamalara ilgi göstermemesi ayrıca not edilmesi gereken bir noktadır. İki raportör de, zayıf ve kadınsı görünümün bir *güzellik efsanesi* yaratarak, kadınları estetik ameliyatına ve yemek yeme bozukluklarına itmekte olduğuna gönderme yapmaktadır. CO'larının birinde, CESCR yeme bozukluklarına değinmekte ve böylece bu tip güzel kalma uygulamalarının insan haklarını etkilediğini düşündüğünü göstermektedir; ancak HRC Batılı güzellik uygulamalarına hiç gönderme yapmamaktadır. Bazı yazarlar tarafından da ileri sürüldüğü gibi, bu uygulamalar uluslararası insan hakları hukukunun kapsama alanına girmektedir ve bu yüzden ilgiyi hak etmektedir. CESCR'nin de bir CO'sunda yeme bozuklukları ile ilgili olarak vardığı sonuçlar da bu görüşü desteklemektedir. Sonuç olarak söylenebilir ki HRC ve CESCR, Viyana Deklarasyonu ve Eylem Planı'nda yapılan çağrıyla tam uyum içinde olmak için bu tür Batı uygulamalarını da göz önüne almalıdırlar.

Yukarıdaki açıklamalar ışığında, temel araştırma sorusu ve kadınların özel tecrübelerinin yansıtılıp yansıtılmadığı (Unsur I) ile ilgili olarak varılan nihai sonuç, HRC'nin ve CESCR'nin 1993 İnsan Hakları Dünya Konferansı'nda yapılan çağrıya uyum göstermekte oldukları ama hala bazı konularda durumun daha da geliştirilebileceği şeklindedir. Bu noktada şunları belirtmek önemlidir: Kadınların yaşadığı özel tecrübeler sürekli olarak HRC'nin ve CESCR'nin önüne getirilmekte ve uluslararası insan hakları hukuku ve bu özel tecrübeler arasındaki ilişki ile ilgili gittikçe daha fazla araştırma yapılmaktadır. Kadın ile erkek ve Kadınlık ile erkeklik hakkındaki sosyal kurgulamalar sadece lokasyondan lokasyona veya kültürden kültüre farklılık göstermekle kalmamakta, ayrıca zamanla da değişmektedir, böylece insan haklarından faydalanmayı etkileyen yeni durumlar da ortaya çıkabilmektedir. Bu da demektir ki insan hakları zaruri olarak dinamik bir bağlamda yorumlanmalıdır. Bu yüzden kadınların özel tecrübelerine değinmek, insan haklarını izleme kurumlarının kadınların insan haklarını etkileyen durumları görebilmeleri açısından sürekli alarmda olmalarını gerektiren sürekli devam eden bir ödevdir.

Viyana Deklarasyonu ve Eylem Planı'nda yapılan çağrının, HRC'nin ve CESCR'nin çalışmalarının üye devletlere *kadınları-kapsayıcı* insan hakları yükümlülüklerini işaret etmeleri ile ilgili olan ikinci unsuruna gelince (Unsur II), bu iki komitenin çalışmaları gösterir ki Komiteler, üye devletlere insan haklarına saygı göstermek, onları korumak ve uygulamakla ilgili yükümlülükler yükleyen tavsiye ve talepler formüle etmektedir. Böyle yaparak, kadınların insan haklarından tam olarak faydalanmalarını etkileyen cinsiyet ile ilgili koşullara gönderme yapmaktadırlar. Devletlerden örneğin kadınların fiziksel bütünlüğünü etkileyen meselelerde aile planlaması programları ve hizmetleri, cinsel eğitim, şiddete maruz kadınlar için sığınma evleri ve bu şekildeki kadınların kullanabileceği telefon hatları ve danışmanlık

servisleri sağlamaları talep edilmektedir. Üye devletlerden ayrıca talep edilmektedir ki: aile içi veya dışı tecavüz, aile içi şiddet, kadın pazarlaması ve kadın sünneti gibi uygulamalar suç kapsamında değerlendirilmeli; bu suçları işleyenler veya teşvik edenlere suç isnadı yapılmalı ve suçun şiddetine göre de cezalandırılmalıdır. HRC'nin ve CESCR'nin çeşitli şekillerde fiziksel şiddete maruz kalan kadınların ihtiyaçlarına gösterdikleri önemli ilgi çok anlamlıdır. Ayrıca eklemekte fayda var ki iki Komite de kadın pazarlaması ve kadın sünneti kurbanı olan kadınlara oturum izni verilmesi yönünde tavsiye de bulunmaktadır. Şu ana kadar bu konuda üye devletlere yapılan öneriler henüz çok ılımlı olsa da, Komitelerin kadın pazarlaması ile ilgili özel koşulları ve sonuçları göz önüne aldığını göstermektedir.

Ancak dikkat çekilmesi gereken bir gerçek vardır ki o da HRC'nin ve CESCR'nn korumak ile ilgili yükümlülükleri etkileyebilecek bir konu olan gebelik ile ilgili meselelerde çok az sayıda tavsiye formüle ettiğidir. Genel olarak, Komitelerin çalışmaları, üye devletlere yönelik, gebelik ile ilgili insan hakları tacizlerine ve sınırlamalara neden olan bireylerin eylemlerini suç kapsamına almak, yargılamak ve cezalandırmak gibi talepleri içeren tavsiyeleri kapsamamaktadır. Bu tür kötü muamelelerin ve sınırlandırmalara örnek olarak zoraki kürtaj ve zoraki kısırlaştırma verilebilir. Eğer cinsiyet ile ilgili ve kadınlar tarafından maruz kalınan insan hakları tacizleri ve sınırlandırılmaları üye devletlerin yükümlülüklerinde yansıtılıyorsa, HRC'nin ve CESCR'nin çalışmalarının, 1993 Dünya Konferansında yapılan çağrının ikinci unsuru ile tam olarak uyum gösterdiği söylenebilir. Yakın zamanlarda HRC'nin CO'larından birinde yapılan bazı açıklamalar, bu Komitenin zoraki kısırlaştırmanın cinsiyete özel bir konu olduğunun farkında olduğunu ve CESCR tarafından ele alınması gereken bu meseleye belki gelecekte ilgi gösterileceğinin bir göstergesi olabilir.

Bir diğer gerçek üzerine de bazı yorumlar eklenmelidir ki o da HRC'nin ve CESCR'nin kürtaj ve kürtaj sonrası hizmetlerin üye devletlerde bulunup bulunmadığına, bunlara erişimin kolay olup olmadığına ve bunların iyi durumda olup olmadığına genellikle çok dikkat etmediklerdir. Bu yüzden de Komitelerin çalışmaları, kürtajın yasal olduğu durumlarda üye devletlere, kürtaj ve sonrası hizmetleri kurmak ve erişimi sağlamak gibi konularda genel olarak bir yükümlülük yüklememektedir. Komiteler, güvenli olmayan kürtaj ve bunun sonucu ortaya çıkabilecek anne ölümleri ile ilgili kaygılarını düzenli olarak belirttikleri için bu tür hizmetlerin olmamasının sonuçlarının da farkındadırlar. 1993 İnsan Hakları Dünya Konferansı'nda yapılan ve özellikle kadınların hayatlarını etkileyen, insan hakları ihlallerinin cinsiyet ile ilgili olan biçimlerini göz önüne almaları için üye devletlerin yükümlülüklerini formüle etmeleri yönündeki çağrının ışığında söylenebilir ki HRC ve CESCR, yukarıda da belirtildiği gibi kürtajla ilgili hizmetler ile alakalı olarak da devlet yükümlülüklerini formüle etmelidir.

Belirtildiği gibi, HRC'nin ve CESCR'nin kadınlara yönelik fiziksel şiddet ile ilgili çalışmaları çoğunlukla insan haklarını korumak için bir yükümlülüğü yansıtır. Komiteler, bu tarz bazı şiddet biçimlerinden etkilenmiş mağdurların ihtiyaçlarına ilgi gösterse de, bu tarz kötü muamelelerin cinsiyete-özel koşullarının tüm boyutlarını her

zaman göz önüne almamaktadırlar. Bu konu, kadın sünnetine (FGM) değinirken Komitelerin takındığı tavırda kendini göstermektedir. Bu uygulama ile ilgili olarak Komiteler tarafından formüle edildiği şekilde üye devletlerin temel yükümlülüğü, FGM'yi kendi ceza kanunları yoluyla yasaklamalarıdır. Ancak Komitelerin bir konuyu göz önüne almadıkları açıkça görünüyor ki o da FGM'nin sosyal ve kültürel nedenlerle genellikle kadın bireyler tarafından ve sünnet olan kadının veya onun yakınlarının izniyle yapıldığıdır. Olayın bu boyutu, bu eylemlerin cezalandırmasıyla ilgili olduğu kadar, bu tarz tavsiyelerin bu geleneği ne kadar ortadan kaldırabileceği ile de ilgili olarak soru işaretlerine yol açmaktadır. FGM ile mücadele etmeyi amaçlayan ve bizzat sahada çalışan çeşitli uluslararası örgütlere göre bu uygulamayı suç kapsamına almak kendi başına yeterli değildir ve bunla etkili şekilde mücadele edebilmek için başka önlemler de alınmalıdır. HRC ve CESCR genellikle FGM'yi ortadan kaldırabilecek diğer önlemlere ilgi göstermemekte ve hatta yerine getirilmesi gereken bir yükümlülük şeklinde formüle edilmiş bir tavsiyede neredeyse hiç bulunmamaktadır.

Dolayısıyla ana araştırma sorusunun Unsur II ile ilgili olan kısmıyla alakalı nihai bir sonuca varılabilir ki o da HRC'nin ve CESCR'nin çalışmalarının 1993 İnsan Hakları Dünya Konferansı'nda yapılan çağrıyla uyum içinde olduğudur. Ancak bazı konularda, iki Komite'nin formüle ettiği yükümlülüklerin, kadınların fiziksel bütünlüğünü etkileyen, cinsiyete-dair durumları daha iyi yansıtması gerekirdi. Kadınlara özel tecrübelerle ile ilgili olarak bir önceki bölümde de belirtildiği gibi, bu tür insan hakları ihlallerinin karakteristikleri daha netlik gerektirir, Komiteler bunların farkında olmalıdır ve bunlara örneğin FGM ile ilgili olarak cinsiyete-özel insan hakları yükümlülükleri formüle ederek yanıt vermelidir.

1993 İnsan Hakları Dünya Konferansı'nda yapılan çağrının üçüncü Unsuru, insan haklarını izleme kurumlarına kadınların özel insan haklarını, toplumlarda kadınlara yönelik ayrımcılık kapsamında değerlendirmeleri yönünde bir görev verir. HRC'nin ve CESCR'nin çalışmaları, Viyana Deklarasyonu ve Eylem Planı'nda bu konuda yapılan çağrıyla genellikle uyum göstermemektedir. Komiteler, kadın ve erkek eşitliği ile ilgili olarak genel yorumlarında (GC), kadınlara-özel birçok meseleye gönderme yapıyor olsalar da, genellikle bu meseleleri kadınların toplumlarda karşılaştıkları sistematik ayrımcılığın yansıması olarak kategorilendirmemektedirler. GC'lerde ve iki Komite için de aynı olan 3. Maddeye bu konulara yapılan göndermeler, daha çok Komitelerin insan haklarının yorumlaması söz konusu olduğunda, kadınların insan haklarından yararlanırken, erkeklerden daha farklı sorunlarla karşılaştıklarının farkında olunduğunu göstermektedir. HRC'nin ve CESCR'nin çalışmaları bu nedenle, kadınlarla erkeklerin farklı tecrübeler ve bunlarla alakalı olarak da farklı kötü muameleler ve sınırlandırmalar ile karşılaştıklarının farkında olunduğunu yansıtmaktadır. Ama bu, HRC'nin ve CESCR'nin değindikleri, kadınlara-özel insan hakları meselelerinin, kadınların sistematik bir şekilde ayrımcılık görmeleri nedeniyle mi olup olmadığının incelendiği anlamına gelmemektedir. Bazen meseleler sistemik ayrımcılık ile bağlantılandırılmakta ama tecavüz ve kadınların veya kızların maruz kaldıkları cinsel istismar gibi konular, kadınlara yönelik yapısal ayrımcılıkla ya da onların toplumlardaki eşit olmayan statüleri ile ilintilendirilmemektedir. İki Komitede de

görülen bu durumdaki tek net istisna, kız fetüslerin kürtaj edilmesi meselesi ve ayrıca CESCR'nin cinsel taciz ve töre cinayetleri ile ilgili yaptığı yorumlardır.

HRC'nin ve CESCR'nin kadınlara yönelik şiddetin değişik biçimleri ile ilgilenirken takındığı genel tavır, bu sorunun ana nedenlerine odaklanmak değildir, ki bunlar bazı cinsel ideolojiler ve gelenekler nedeniyle kadınların toplumda eşit statüye sahip olmaması olabilir. Bunun yerine Komiteler üye devletleri, suç kapsamına alma ve cezalandırma gibi yollarla kadınlara yönelik şiddetle başa çıkmaya çağırmaktadır. Bu, Komitelerin üye devletlerden, insan hakları ihlallerinin dayanıyor olabileceği cinsiyetçi ideolojileri değil de, sadece insan hakları ihlallerinin gösterilmiş biçimlerini ele almalarını talep ettiği anlamına geliyor. Bu yüzden, HRC'nin ve CESCR'nin çalışmaları öncelikle ve en yoğun olarak kadınlara yönelik toplumlardaki sistematik eşitsizlik gibi asıl hastalıkla değil de, kadınlara yönelik şiddetin gösterilmiş biçimleri gibi belirtilerle mücadele etmeye odaklanmaktadır.

Yukarıdaki açıklamaların ışığında, Unsur III ile ilgili olarak söylenebilir ki HRC'nin ve CESCR'nin çalışmaları, 1993 İnsan Hakları Dünya Konferansı'nda yapılan çağrıyla genellikle tam uyum göstermemektedir. HRC'nin ve CESCR'nin hem kendi kaygılarını ifade ederek, hem de insan hakları ihlallerinin ve sınırlamalarının olası bir nedeni olan kadınların sistematik olarak ayrımcılığa tabi tutulması ile ilgili olarak kendi tavsiyelerini formüle ederek bu konuya daha çok alaka göstermesi gerekir.

Belirtildiği gibi, HRC'nin ve CESCR'nin Unsur IV ile uyum göstermeleri için, Komitelerin kadınların fiziksel bütünlüğü ile ilgili meselelere entegre bir biçimde yaklaşması gerekmektedir. Bu şu anlama gelir: Bu meseleler, ayrı bir bölümde sadece kadınlarla veya diğer marjinalize olmuş gruplarla ilgili konulara değinilmesi şeklinde değil, Komitelerin çalışmalarında her ilgili bölümünde, bu meselelere eğilmesi şeklinde olmalıdır. HRC'nin ve CESCR'nin çalışmaları bu konuda uyum göstermektedir: Kadınların fiziksel bütünlüğünü etkileyen meseleler çok sık olarak konuyla ilgili önemli yükümlülükler veya iki Sözleşmenin de ortak maddesi olan 3. Madde kapsamında ileri sürülmektedir. Diğer bazı durumlarda, eğer Kişisel ve Siyasi Haklar Sözleşmesi'nin ya da Ekonomik, Sosyal ve Kültürel Haklar Sözleşmesi'nin maddelerine açıkça gönderme yapılmıyorsa, bu konular mesela başka ilgili insan hakları meseleleri ile kombine olarak, ayrı bölümlerde ele alınmaktadır. Örneğin, HRC silahlı çatışma zamanlarında yaşanan tecavüzü, böyle şartlar altında ortaya çıkan yargısal olmayan ölümler veya kayıplar gibi diğer insan hakları ihlalleri ile birlikte incelemektedir.

Sonuç olarak, Komitelerin çalışmaları, kadınların fiziksel bütünlüğünü etkileyen meselelerde bütünlükçü bir yaklaşım gösterir ve 1993 İnsan Hakları Dünya Konferası'nda yapılan çağrıyla uyumludur.

Genel olarak, HRC'nin ve CESCR'nin kadınların fiziksel bütünlüğünü etkileyen konulardaki çalışmaları, 1993 yılında İnsan Hakları Dünya Konferansı'nda insan hakları izleme kurumlarının kendi bulguları ve toplantılarına kadınların statüsünü ve insan haklarını eklemeleri yönünde yapılan çağrının, dört unsurunun üçü ile uyum göstermektedir. Komitelerin, kadınların fiziksel bütünlüğünü etkileyen konulara

gönderme yaparken kendi yetkilerini gayet iyi kullandıkları görülmektedir: Üye devletler için, insan hakları ihlallerini ele alırken, bu ihlallerin cinsiyete-özel biçimlerini, koşullarını ve sonuçlarını da kapsayan yükümlülükler formüle etmektedirler. Buna ilaveten, bu meseleler entegre bir biçimde ele alınmaktadır. Ama yine de HRC'nin ve CESCR'nin çalışmaları şu şekilde özetlenebilecek Unsur III ile ilgili olarak biraz eksik kalmaktadır: Kadınların özel tecrübelerini, toplumlarda kadınlara yönelik ayrımcılık ile bağlantılandırmak. Sadece bazı az sayıdaki meselede Komiteler, kadınların fiziksel bütünlüğünü etkileyen durumları, kadınlara yönelik toplumlardaki ayrımcılıkla ilişkilendirmekte ve bu konuya eğilmeleri için üye devletlere yükümlülükler yüklenmektedir. Dolayısıyla, HRC'nin ve CESCR'nin tavsiyeleri genellikle üye devletlerden, kadınların fiziksel bütünlüğünü etkileyen sınırlandırmaların ve insan hakları ihlallerinin derinde yatan nedenine eğilmelerini talep edici şekilde değildir. Sonuç olarak HRC ve CESCR kadınların özel tecrübelerinin farkında olduklarını göstermekte, ama cinsiyet ile ilgili ihlallere neden olan iblis genellikle işaret edilmemektedir. Genellikle, cinsiyetçi insan hakları ihlallerinin ve kadınların fiziksel bütünlüğünü etkileyen sınırlandırmaların nedenini değil de, sadece belirtileri ele almaktadırlar. Bu açığı kapatmak için daha fazla eyleme ihtiyaç duyulmaktadır. Komiteler netlikle, kadınlara-özel insan hakları sorunları ile toplumlarda kadınlara yönelik ayrımcılık arasındaki bağlantıyı göstermeliler ve eğer mümkün olabiliyorsa da bu tarz yapısal ayrımcılığı ortadan kaldırmak için tavsiyeler formüle etmelidirler. Burada, sivil toplum örgütleri ve akademisyenler, Komitelerin, onların önüne getirilen meselelerin ayrımcılığa dayanan arka planını ve özel bazı konu ve durumların doğasını ve en temelde yatan sebeplerle en iyi nasıl başa çıkılabileceğini göstererek önemli bir rol oynayabilirler.

Bu çalışma gösterir ki kadınların insan haklarını ve statüsünü entegre etmeye gelince, HRC ve CESCR doğru yoldadır. Ayrıca açıktır ki 1993 İnsan Hakları Dünya Konferansı'nda yapılan çağrıyla Komitelerin çalışmalarının uyumlu olması için daha fazla çaba da gösterilebilir ve gösterilmelidir. Bu çalışma, kadınların hayatlarının karakteristiği olan insan hakları meseleleri ve sınırlamalarının hangi nedenlerle Komiteler tarafından göz önüne alındığını incelememekle beraber, onların kadınların statüsünü ve insan haklarını kendi çalışmalarını entegre etmek için çok istekli oldukları açıktır. Bazı konuların düzensiz olarak veya hiç bir şekilde ele alınmadığı tespit edilebilir, bunun nedeni de genellikle konuyla ilgili bilgi eksikliğine dayanmaktadır. Komitelerin, cinsiyetle ilgili insan hakları meselelerine sürekli olmayan bir ilgi gösterdiği durumlarda da, genellikle o konuda ya bizzat üye devletten ya da sivil toplum örgütlerinden genellikle bilgi aldıkları görünmektedir. Benzer şekilde, bazı konular veya cinsiyetle ilgili koşullar HRC'nin ve CESCR'nin çalışmalarında sistematik bir şekilde ele alındığında, genellikle bu konular uluslararası arenada zaten çok ilgi toplayan konular olmaktadır.

Son olarak, bu çalışma sadece bazı cevaplar vermekle kalmaz, aynı zamanda bazı sorular da ortaya atar. Önemli bir soru, bazı meselelere değinirken Komitelerin motivasyonu ile ilgidir. Sivil toplum örgütlerinin çalışmalarının önemli olduğuna dair güçlü kanıtlar olmasına karşın, sorulabilecek sorulardan birisi, örneğin, Komite

üyelerinin cinsiyetlerinin ve uyruklarının, Komitelerin kadınların fiziksel bütünlüğü ile ilgili konularda gösterdikleri alakayı etkileyip etkilemediğidir ve etkiliyorsa da bunun ne kadar etkileyici olduğudur. Bu konuda ileride bir araştırma yapılması, HRC'nin ve CESCR'nin kadınların statüsünü ve insan haklarını kendi çalışmalarına nasıl eklemlediklerini ve bu meselelere ne kadar etkili bir şekilde eğildiklerini göstermesi açısından gereklidir. Kadınları, insan hakları ana dalgasına entegre olmaları sürecinin bir gün sona ermesi şu anda mümkün gözükmüyor. Açık olan bir şey var ki o da, 1993 İnsan Hakları Dünya Konferans'ında, insan haklarını izleme kurumlarına yapılan çağrı kısa vadeli bir ödev değildir: Bu mesele, kadınların tecrübelerinin büyük uluslararası insan hakları kazanına eklemek meselesi değildir. Bu daha çok ve cinsiyetler arası eşitsizlik sürdükçe devam edecek bir süreçtir. Bu ayrıca sistemin, kadınların hayatlarının bir karakteristiği olan, insan hakları ihlallerine ve sınırlamalarına tam anlamıyla yanıt veren ve bunları tamamıyla içine alacak şekilde kendini transforme etmesi için müdahil olan herkesin çabasını gerektiren bir süreçtir. Hem şimdi, hem de gelecekte.

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No. 28: Equality of Rights Between Men and Women (Article 3); CCPR/C/21/Rev.1/Add.10
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Fleur van Leeuwen studied law at Utrecht University in the Netherlands. In 2003 she obtained her Masters in Law (LL.M.) degree in public international law. Before starting her PhD on women's human rights at the Netherlands Institute of Human Rights of Utrecht University in 2004, Fleur worked as a legal officer at the Clara Wichmann Institute, the former Expert Centre on Women and Law.

Besides writing her PhD, Fleur has coordinated and taught courses on human rights, women's human rights, and pubic international law. She published articles on women's human rights in various languages, has a regular column on international human rights developments in the Katern of the Dutch journal Ars Aequi, and has written a guidebook for NGOs on the Optional Protocol to the CEDAW Convention. Fleur has given seminars and presentations on human rights and women's human rights at various national and international events, including the Global Safe Abortion Conference in London, United Kingdom, in 2007 and the Jornadas de Introducción a La Teoría Feminista Y su Aplicacíon al Derecho (Conference on the Introduction of Feminist Theory and its Application to Law) in Valencia, Spain in 2006. During her PhD research, Fleur was a member of the Graduate Programme Committee of the Netherlands School of Human Rights Research, secretary and active member of the working group on feminism and international law of the Dutch section of the International Law Association, and representative of the Netherlands Institute of Human Rights in the Dutch Network on the CEDAW Convention. Since 2009, Fleur is a member of the editorial board of the Tijdschrift voor Genderstudies (Journal on Genderstudies).

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