Women's Access to Justice in Kazakhstan: Identifying the Obstacles & Need for Change

icj International Commission of Jurists

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1. INTRODUCTION

Ensuring access to justice is at once both a fundamental component of the rule of law and an indispensable element of human rights protection.

Yet, in a wide range of contexts across the world, women's access to justice remains elusive. Considerable legal, structural and practical obstacles continue to impede women's ability to claim their rights as legal entitlements, seek and ensure the accountability of those who transgress them and turn to the law for viable protection and meaningful redress.

Law and justice systems provide the building blocks of our societies. Where law and justice systems work for women, they create the foundations for an end to inequality. Where they fail to respond to the realities of women's lives, they perpetuate discrimination and disempowerment.

Even in those jurisdictions regarded as reflective of best practice, ensuring women's access to justice is an ongoing endeavor. Continuous and rigorous engagement and scrutiny is required to close the circle between the enactment of appropriate laws and procedures, the assurance of an effective justice sector response, and the empowerment of women, especially the most marginalized, to claim their rights and seek remedies in practice.

In 2011 the International Commission of Jurists (ICJ) initiated work with local partners in a range of countries with the purpose of contributing to their ongoing efforts to advance women's access to justice. Through these projects it works to explore the obstacles to justice women continue to face in the relevant contexts, identify recommendations for change and take steps to advance their implementation.

Kazakhstan

Together with local partners, the Feminist League Kazakhstan and the Kazakhstan International Bureau for Human Rights and Rule of Law, the ICJ began this process of exploration in Kazakhstan in July 2011. Local researchers conducted legal review and analysis of relevant law and procedures and held a series of interviews with over 45 experts, lawyers, civil society representatives and other stakeholders in Almaty, Astana and Shymkent. A roundtable discussion was conducted with representatives of relevant civil society organizations.

This report presents a number of key findings from that process.

It presents a range of common concerns concerning women's access to justice in Kazakhstan that were identified by participants and analyses the way in which Kazakhstan's international legal obligations require the Government to address them.

1.1 Report content & structure

The issues identified in this report are not new. They are common knowledge to those working to advance gender equality, human rights protection and access to justice across Kazakhstan. They are the obstacles these actors encounter and seek to transcend everyday.

Although all those we spoke to acknowledged that some important progress has been made towards improving women's access to justice in Kazakhstan, they also expressed concern at the extent to which barriers remain.

This report presents a summary of some of their key concerns. It synthesizes a cross section of identified issues and analyses them with reference to the requirements of Kazakhstan's international obligations. In this way it provides a unique reference point and source of guidance for a range of stakeholders, including civil society, government and international authorities.

In Section 2 the report provides a brief contextual overview, situating the subsequent analysis within broader considerations.

Section 3 of the report provides a short summary of the way in which international human rights law and standards require Kazakhstan to ensure access to justice and to address the specific justice seeking challenges and barriers women face. Each of these requirements are then scrutinised in more detail in Sections 4 and 5.

Section 4 considers the extent to which Kazakhstan's existing legal framework guarantees gender equality and prohibits discrimination against women. It synthesises a number of concerns brought to the ICJ's attention regarding women's ability to seek justice when facing discrimination. It then outlines the way in which compliance with international human rights obligations necessitates that Kazakhstan address these obstacles and improve relevant laws, policies and practices.

Section 5 briefly describes some of the particular legal and procedural access to justice concerns which the ICJ was told arise for women in situations of gender based violence. It then analyses the manner in which international requirements necessitate that Kazakhstan improve relevant laws, practices and procedures.

Section 6 outlines in a practical way the manner in which a number of problems addressed in the report have been dealt with by international authorities in individual cases. It presents a short summary of five of the individual communications presented to CEDAW under the Optional Protocol to the Convention on the Elimination of Discrimination against Women and outlines the relevant findings of the Committee in each case. These cases do not concern events in Kazakhstan. However they provide a useful illustration of the way in which international legal obligations apply to real life situations.

Throughought the report the wide range of actors who participated in the project, through interviews or roundtable discussions, are referred to collectively as '*participants*.' They include a broad cross-section of individuals working to advance access to justice in Kazakhstan including: lawyers, civil society representatives and gender equality experts.[1]

The report does not address all the obstacles to justice faced by women in Kazakhstan and does not represent a comprehensive overview. Instead it prioritizes discussion of a few key concerns that were repeatedly identified by participants and considers these in light of international human rights law and standards. Resource and capacity constraints limited the remit and reach of relevant research. Moreover although the report seeks to highlight expressed concerns which deserve attention and action, it does not represent an empirical study or present statistical information or data.

1 A full list of those consulted is available on request from the International Commission of Jurists.

Defining 'access to justice' and 'obstacles to justice'

Access to justice

Access to justice is a term that has divergent meanings when used in various contexts and by different stakeholders.

For the purposes of this report access to justice is described with reference to international human rights law and standards. It means that rights and their correlative legal protections are recognized and incorporated in law and that the right to an effective, accessible and prompt legal remedy, including reparation, for the violation or abuse of rights be guaranteed. As a result it entails the ability and empowerment to claim rights as legal entitlements, to seek the accountability of those who transgress them, and to turn to the law for viable protection and meaningful redress.

Although the provisions of international human rights treaties do not explicitly use the term 'access to justice', the obligations they impose on States parties require that these central components of access to justice be ensured. Section 3 below outlines and explores these international human rights obligations in more detail.

Obstacles to justice faced by women

The thematic focus of this report is not discrimination against women vis-à-vis men, but the obstacles to justice faced by women.

Such obstacles may include legal, structural, economic, practical and social factors that impede or reduce women's ability and willingness to claim their rights, benefit from legal protection, and enjoy effective legal remedies in cases of violations. They may range from normative discrepancies, such as discriminatory laws or inadequate remedial and regulatory frameworks, to failures of the administration of justice in practice, to social stigma, to practical day-to-day realities such as a lack of resources or information.

The obstacles considered are not limited to those that involve discrimination or that solely or predominantly affect women. Indeed certain barriers addressed may also affect men in equally serious ways. In such cases the focus on women should not be seen as an overstatement of the gender dimensions of justice deficiencies. The report simply seeks to capture the ways in which women experience these shared obstacles.

2. CONTEXTUALIZING WOMEN'S ACCESS TO JUSTICE

In this report the ICJ analyses the extent to which Kazakhstan's laws and procedures enable women's access to justice and comply with international law and standards. In doing so it focuses on two areas of central importance. First laws and procedures dealing with gender equality and non-discrimination. Second laws and procedures prohibiting gender based violence and providing for protection, accountability and remedial measures.

In respect of both these issues, over the past ten years Kazakhstan has taken a range of steps to reform existing laws and enact new legislation. However it appears that the relevant legal frameworks continue to reflect problematic flaws and gaps that continue to undermine women's access to justice, in law and practice. Moreover newly enacted laws, such as the Law on Equality between Women and Men and the Law on Prevention of Domestic Violence, do not outline clear prohibitions and enforcement and remedial procedures. As a result in a number of respects they appear to perpetuate, rather than counteract, the obstacles women face.

As the following sections will outline and explain in further detail, effective laws and procedures constitute an imperative building block in efforts to advance the protection of women's human rights and enable access to justice. They represent an essential foundation, without which progress will stall.

Of course, laws and procedures constitute only one piece of the puzzle and policies and practical measures designed to bring about social change are also vital. In this regard participants underlined that a range of practical and social issues confronting women in Kazakhstan continue to present serious impediments to women's recourse to justice:

- **Social norms:** Participants explained that gender roles and social expectations play a significant part in preventing women's access to justice in Kazakhstan. These manifest differently in different contexts. For example considerable stigma and stereotypes concerning sexual violence persist, and the perception that women who are sexually assaulted are to blame is commonplace. Meanwhile the view that family matters should be resolved privately, by and within the family, are a pervasive factor in reducing recourse to justice in situations of domestic violence. Simultaneously many participants explained that sexual harassment is often an implicit part of the social fabric and individual women themselves may sometimes not recognize conduct as unlawful.

- **Resource constraints**: At the same time participants also underlined the impact which resource constraints can have on women's recourse to justice, highlighting that women are regularly economically dependent on male partners, and as a result are often unable to claim their rights without their partner's consent or without adverse consequences on their future subsistence. Needless to say this will have particular consequences in situations of domestic violence and divorce proceedings. Meanwhile women's access to legal aid will often be determined with reference to general family wealth, which in reality may not be accessible to women.

- **Lack of training and knowledge**: Participants also highlighted that there is sometimes a lack of knowledge on the part of law enforcement, members of the judiciary and other administration of justice personnel, as to the existence of relevant legal guarantees and prohibitions or their operation in practice. They highlighted the need for ongoing training and education.

- **Lack of legal literacy**: Simultaneously participants explained that women themselves are often unaware of their rights and lack legal literacy. They noted that while programmes aimed at disseminating information and improving women's knowledge do exist, they are implemented by civil society organizations whose financial means undermines the extent of their remit.

Moreover any consideration of women's access to justice in Kazakhstan must also be contextualized within reflection on a range of broader and interrelated issues concerning human rights compliance and the domestic legal system:[2]

- **Corruption**:[3] Accounts of corruption within the administration of justice in Kazakhstan are commonplace and need little introduction. Although efforts have been made by the Government to address the problem, it continues to give rise to a general lack of faith in the justice system and a tendency to avoid contact with law enforcement authorities and recourse to the Courts. It also stymies effective justice sector response to discrimination against women, gender based violence, and other human rights concerns.

2 See in general: Equal before the law, A study of how citizens experience access to justice in Kazakhstan, Kyrgystan and Tajikistan, Eurasia Foundation and the Caucasus Research Resource Centres, 2011.

3 See in general: Corruption Perceptions Index, Transparency International, 2012; Monitoring Report Kazakhstan, OECD Anti-Corruption Network for Eastern Europe and Central Asia, Second Round of Monitoring, 29 September 2011.

- **Lack of legal rights claims:** Although international human rights provisions may be directly invoked in Kazakh Courts, and although a series of rights provisions that mirror the language of international standards, are included in the Constitution, they remain largely abstract and amorphous. There is little, if any, recourse to judicial mechanisms to claim and enforce these rights. Although in the sphere of criminal proceedings defense lawyers have more recently begun to invoke due process guarantees and ill-treatment prohibitions in attempts to secure fair trial rights for their clients, this approach has not been replicated when dealing with other human rights issues or other legal contexts. Initiating constitutional or civil law proceedings as a means to seek the implementation of rights guarantees is generally unheard of and, with a few exceptions, the judiciary and legal profession remain generally unaware of the possibilities.

- **Risk**:[4] Measures to reduce the free operation of civil society, clamp down on human rights defenders and undermine lawyers invoking rights guarantees in legal proceedings are not uncommon in Kazakhstan. Legislation enacted in 2012 seriously undermines the freedom of expression. There have been a number of high profile trials of human rights defenders and opposition politicians. Moreover disbarment proceedings have been initiated against a range of lawyers who have criticized court decisions as contrary to international guarantees of fair trial and the prohibition of torture. In some instances lawyers and human rights defenders have been detained in psychiatric facilities. In this context legal and public action to demand justice and rights protection is not without considerable risk.

4 See for example: Independence of the Legal Profession in Central Asia, ICJ Report, 2013. And see: Kazakhstan, Psychiatric detention of lawyer must be ended, ICJ Statement, 3 September 2013; Disciplinary Proceedings against Lawyers in Kazakhstan, ICJ Expert Legal Opinion, 13 February 2012; ICJ Submission to the 1st Periodic report of Kazakhstan to the Human Rights Committee, 1 June 2000. All available at: www.icj.org. See also Human Rights Watch, World Report 2013, Kazakhstan.

3. KAZAKHSTAN'S INTERNATIONAL OBLIGATIONS AND WOMEN'S ACCESS TO JUSTICE

Kazakhstan is a party a number of international human rights treaties. These include: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[5] and its Optional Protocol,[6] the International Covenant on Economic, Social, and Cultural Rights (CESCR),[7] the International Covenant on Civil and Political Right (ICCPR)[8] and its First Optional Protocol,[9] the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[10] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[11] the Convention on the Rights of the Child (CRC)[12] and the Convention on the Protection of All Persons from Enforced Disappearance.[13]

International legal materials and authorities

Throughout this report analysis of Kazakhstan's international obligations is based on the provisions of these treaties and the interpretations thereof that are to be found in the general comments and recommendations, views and concluding observations of the relevant treaty monitoring bodies. Particular reference is made to CEDAW, the ICCPR, the ICESCR and CAT and respectively to the corresponding international materials adopted by the Committee on the Elimination of Discrimination against Women, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee against Torture.

5 Ratified in 1998 without reservations.
6 Ratified in 2001. The Optional Protocol recognizes the competence of the CEDAW Committee to receive communications from individuals within the jurisdiction of States parties alleging violations of the Convention.
7 Ratified in 2006.
8 Ratified in 2006.
9 Ratified in 2009. The first Optional Protocol to the Covenant recognizes the competence of the Human Rights Committee to receive communications from individuals within the jurisdiction of States parties alleging violations of the Covenant.
10 Ratified in 1998.
11 Ratified in 1998. In 2008 Kazakhstan made a declaration under Article 22 of the Convention recognizing the competence of the Committee Against Torture to receive communications from individuals within its jurisdiction alleging violations of the Convention. In 2008 Kazakhstan ratified the Optional Protocol to the Convention.
12 Ratified in 1994. Kazakhstan is also a party to the first two Optional Protocols to the Convention.
13 Kazakhstan has been a party to this Convention since 2010.

These Committees are autonomous quasi-judicial authorities established pursuant to the treaties listed above and composed of independent experts elected by State parties. Each of these bodies has a number of functions: [14]

- They consider State periodic reports under the treaty and issue concluding observations thereon.
- They adopt general comments and recommendations that are authoritative interpretive statements concerning specific provisions in the treaty or general issues relevant to treaty implementation.
- In addition, a number of the treaty bodies are also mandated to examine individual complaints (known as 'individual communications') regarding alleged violations of the treaty by State parties. The Committees consider these communications and issue 'views' as to whether or not a violation has occurred and what reparative steps should be taken by the State. A number of these decisions are summarised in Section 6.

The report also draws on declarations and resolutions of the United Nations General Assembly and Human Rights Council and at times points to best practice recommendations from Special Procedures of the Human Rights Council and relevant UN departments and specialised agencies.[15]

General obligation to respect, protect and fulfil rights

Each of the treaties listed above imposes a general obligation on Kazakhstan to respect, protect and fulfil the human rights of all those within its territory and jurisdiction. This obligation is sometimes denoted as the obligation to respect and ensure rights.[16]

It entails three central components. First, that all State officials, including government agents and those who act under its instructions, direction or control or through delegation of governmental authority, must refrain from interference with the enjoyment of human rights (*respect*). Second, that the Government is required to protect individuals from the impairment or nullification of rights

14 For more detailed information on the mandates and functions of the treaty monitoring bodies see: Working with the United Nations Human Rights Programme, A Handbook for Civil Society, Office of the High Commissioner for Human Rights, 2008, http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_ru.pdf (Russian), http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf (English).

15 Ibid.

16 Article 2(1) ICCPR.

by third parties, including non-State actors such as business enterprises and private individuals (*protect*). Third, that the Government must take a range of positive pro-active steps to facilitate the enjoyment of rights (*fulfil*).[17]

To give effect to each of these three elements Kazakhstan must ensure an appropriate legal framework is in place. It must also enable the realization of rights in practice, including by taking effective legislative, judicial, administrative, educative and other appropriate implementation measures to ensure the ability of individuals to enjoy their rights.[18]

Access to justice

Although the provisions of the treaties do not explicitly use the term 'access to justice', it is clear from their provisions, and the relevant pronouncements by the treaty monitoring bodies, that the interrelated obligations they impose on Kazakhstan necessitate that the components of access to justice be ensured.

The paragraphs below summarize the way in which they do this, beginning with the requirement to enable access to justice in general and then focusing on the obligations to address the specific barriers to justice encountered by women. The purpose here is to provide a brief overview of the requirements. Each of the identified elements is discussed in more detail in Sections 4 and 5.

3.1 Access to justice: basic requirements

Four specific requirements imposed by Kazakhstan's human rights obligations are of particular relevance when it comes to ensuring access to justice:

(i) **Recognize and incorporate rights in law.** Kazakhstan must ensure that its human rights obligations, including those contained in the treaties to which it is party, are incorporated in its domestic legal framework.[19] Although these treaties do not prescribe a precise and uniform means and modality of incorporation, this obligation will be most effectively discharged where

17 See in general: Article 2, ICCPR; Article 2, ICESCR; Article 2 and 3 CEDAW; Human Rights Committee, *General Comment 3, Implementation at the National Level,* HRI/GEN/1/Rev.1, 1981 (hereinafter HRC General Comment 3); Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, Para. 7 (hereinafter HRC General Comment No.31); Committee Against Torture, *General Comment No.2, Implementation of Article 2 by States Parties*, CAT/C/GC/2, 24 January 2008 (hereinafter CAT *General Comment No. 2*.); CEDAW, General Recommendation 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28, 2010 (hereinafter CEDAW General Recommendation 28); Committee on Economic, Social and Cultural Rights, *General Comment No.9, The Domestic Application of the Covenant*, E/C.12/1998/24, 3 December 1998 (hereinafter CESCR General Comment No.9).

18 Ibid.

19 See for example: HRC, *General Comment No. 31,* Para. 13; CESCR General Comment No. 9; See also Article 2 (a)-(g) CEDAW and CEDAW General Recommendation 28.

a State has adopted implementing legislation, and the rights themselves should be codified in law.[20] The legal recognition of rights in this way is a vital component of access to justice as it provides the foundation for individuals to claim their rights as entitlements under the law. Simply put, if a right is not recognized in law an individual may not be able to invoke it or claim it has been infringed.

(ii) **Provide effective legal protection for rights.** It is not enough for Kazakhstan to simply recognize rights in law. Its legal system must also serve in actuality to regulate the conduct of public and private actors so as to prevent abuses and ensure accountability when they do occur.[21] This means that certain conduct must be prohibited in law, and systems and mechanisms put in place to ensure consistent enforcement, accountability and sanctions. For example, Kazakhstan is required to *protect* the rights to life, personal integrity and freedom from torture and other forms of ill-treatment through the enactment of criminal laws prohibiting certain forms of violence and the establishment of effective procedures and mechanisms for law enforcement, investigation and prosecution.[22] Other examples of required legal protection include regulation of health care[23] and of workplace conditions and entitlements.[24]

(iii) **Make effective, accessible and prompt legal remedies available**. In addition to recognizing rights in law and regulating the conduct of public and private actors, Kazakhstan must ensure that individuals can seek and receive effective legal remedies and redress when they face human rights abuses.[25] Without this access to justice is impossible. It means that the

20 Ibid.

21 See for example, Article 2(b)-(f) CEDAW and CEDAW General Recommendation 28, Paras. 17,31,36; HRC, General Comment No.31, Para. 8; CESCR, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4, 11 August 2005, Para. 20 (hereinafter CESCR General Comment No.16)

22 See for example Articles 2,4,12 & 16 CAT and in general CAT *General Comment No. 2*. See also ICCPR Articles 2, 6 & & 7 and HRC, *General Comment No.31*, Para. 8. And see CEDAW, *General Recommendation 19*, Violence Against Women, U.N. Doc. CEDAW/C/1992/L.1/Add.15, Paras. 19, 24(b) and 24(t) (hereinafter CEDAW General Recommendation 19); CEDAW, *General Recommendation 28,* Para. 34;

23 CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, 11 August 2000, Paras. 48 & 51 (hereinafter CESCR General Comment No. 14)

24 CESCR, *General Comment No. 18*, *The Right to Work*, E/C.12/GC/18, 24 November 2005, Paras. 32 & 35.

25 For a general account of what constitutes effective remedy and reparation see for example Article 2(3) ICCPR and HRC *General Comment No. 31*, Paras. 15-20; Article 2 CEDAW and CEDAW *General Recommendation 28*, Paras. 32,34,36; CESCR *General Comment No. 9*, Para. 9 et seq. This obligation is not only set out in the major human rights treaties, but is also a principle of general international law. It has been expressed in UN Principles and Guidelines, adopted by consensus of all UN member States at the General Assembly. It requires that Kazakhstan make available "adequate, effective, prompt and appropriate remedies, including reparation." Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

law must provide individuals with recourse to independent and impartial authorities with the power and capacity to investigate and decide whether an abuse has taken place and order cessation and redress. In order to be effective, a remedy must not be theoretical or illusory but meaningful in practice. Access to claim remedies and redress must be affordable and timely. In a wide range of circumstances access to a judicial remedy must be provided and even in situations where access to a judicial forum is not required at first instance, an ultimate right of appeal or review to a judicial body will be necessary. Meanwhile ensuring the right to redress requires a range of available reparative measures for a victim, including restitution, rehabilitation, satisfaction, guarantees of non-repetition and compensation. The stated needs and wishes of the victims are paramount and must be taken into account in determining the appropriate forms of redress.[26]

(iv) **Address practical barriers to justice and accountability.** Finally, although legal frameworks that recognize rights and provide legal protection and effective remedies are vital, they are insufficient by themselves. Kazakhstan must also take proactive measures to ensure that in practice individuals can avail themselves of these mechanisms.[27] For example legal processes must be affordable and accessible for ordinary people;[28] interpreters and translators must be provided when necessary;[29] and individuals must be given legal information so that they know about their rights and the content of relevant laws and procedures.[30]

3.2 Women's access to justice

Where Kazakhstan fails to deliver on these four requirements, the resulting access to justice hurdles will regularly affect both men and women. However, as noted previously, women will often face additional and specific obstacles to justice that arise because of their status as women. Moreover, certain shared barriers may affect women and men differently or be predominantly experienced by women.

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26 See for example, HRC General Comment No. 31, Paras. 15-20; CEDAW General Recommendation 28, Paras. 32,34,36; CESCR General Comment No. 9, Para. 9 et seq. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

27 See for example, HRC General Comment 3; CEDAW, *General Recommendation 28*; CESCR, *General Comment 16,* Para. 21; CESCR, *General Comment 9,* Paras. 2-3.

28 CEDAW, General Recommendation No. 28, Para. 34; HRC General Comment No. 32, Right to Equality before Courts and Tribunals and to a Fair Trial, Para. 10 (hereinafter HRC General Comment No. 32); Also see CESCR General Comment No. 19, Right to Social Security, E/C.12/GC/19, 4 February 2008, Paras. 77-78.

29 See for example, HRC *General Comment No. 32*, Paras. 13, 32 & 40.

30 See for example, HRC *General Comment No. 3*; CEDAW *General Recommendation 28*, Para.2; CEDAW, *General Recommendation 26, Women Migrant Workers*, U.N. Doc. CEDAW/C/2009/WP.1/R (2008), Para. 26 (hereinafter CEDAW General Recommendation 26).

As a result, compliance with each of the international obligations outlined above requires Kazakhstan to take specific steps to address the particular justice-seeking experiences and circumstances of women. This follows from Kazakhstan's obligation to respect, protect and fulfil the human rights of women on a basis of equality and non-discrimination.[31] In general terms, this obligation means that in taking proactive legal and practical measures to meet the four access to justice components detailed above, Kazakhstan must take account of and address the particular needs and problems facing women in the country.

More specifically, international authorities have outlined that necessary measures include:

- Recognizing women as equal rights bearers and according women equal legal capacity and protection of the law in all spheres and circumstances.[32]
- Revising and removing all discriminatory laws.[33]
- Establishing adequate and accessible remedies and legal protection from discrimination and unequal treatment in law and practice.[34]
- Ensuring that the definition and content given to legal rights takes account of the particular needs of women as women, arising for example from biological differences as well as social and culturally constructed differences.[35]
- Ensuring laws and law-enforcement procedures effectively prohibit and safeguard against human rights abuses that women face as women in public and private spheres or that effect women in distinct or disproportionate ways.[36]

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31 A detailed account of this obligation is provided in Section 4 below. See Article 2, CEDAW; Articles 2,3 & 26 ICCPR; Article 3 ICESCR; CEDAW, *General Recommendation 28;* CESCR, *General Comment No. 16; CESCR General Comment No. 20;* HRC, *General Comment No. 28*.

32 See in general HRC *General Comment No. 32;* CEDAW *General Recommendation 28;* CEDAW, General Recommendation 29, *Economic consequences of marriage, family relations and their dissolution*, General Recommendation on Article 16, CEDAW/C/GC/29, 26 February 2013, (hereinafter CEDAW, General Recommendation 29);

33 CEDAW *General Recommendation 28*. Para. 35

34 CEDAW *General Recommendation 28*. Para.31

35 CEDAW, *General Recommendation 25, On article 4, paragraph 1, on temporary special measures*, U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004) (hereinafter CEDAW General Recommendation 25).

36 See in general Article 2 CEDAW; Article 3 & 26 ICCPR; CEDAW *General Recommendation 28*; V.K. v. Bulgaria, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008, Paras. 9.9 and 9.11-9.16; Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, Paras. 8.5-8.9; V.V.P v. Bulgaria, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011l; CAT *General Comment No. 2*.

- Establishing gender-sensitive legal procedures and processes and ensuring that available forms of redress are designed to respond to the particular needs of women.[37]

- Taking steps to address the wide range of social and practical factors that can often impede women's ability to claim their rights, including the status of women, their lack of independent access to resources, and pejorative gender-based stereotypes, prejudices and norms in operation in a society.[38]

These obligations have been elaborated in particular detail in relation to a range of rights and issues addressed in this report.

Gender equality and non-discrimination:

- Kazakhstan's law must incorporate the principles of equality between women and men and of non-discrimination in the enjoyment of human rights and they must be given overriding and enforceable status.[39]

- Legislation guaranteeing equality and prohibiting discrimination in all fields of women's lives should define discrimination in conformity with CEDAW and other international treaties, should prohibit discrimination by both public and private actors (including public authorities, the judiciary, private organizations, business enterprises or individuals) and should clearly outline appropriate sanctions and remedies, including access to courts or tribunals established by law.[40] International law, including CEDAW, does not allow for exceptions to the prohibition of discrimination.[41]

- Meanwhile it is not enough to ensure laws, policies, and practices do not *explicitly* or *prima facie* discriminate against women. It is also necessary to ensure they do not have a discriminatory *effect* and effective measures must be taken to prevent and address discrimination in practice and to guarantee substantive equality in the enjoyment of rights.[42]

37 Ibid.
38 Article 5 CEDAW, CEDAW *General Recommendation 28*.
39 Article 2, CEDAW; Articles 2,3 & 26 ICCPR; Article 3 ICESCR; CEDAW, *General Recommendation 28,* Para. 31.
40 Article 2, CEDAW; CEDAW, *General Recommendation 28,* Paras. 17, 31-34; HRC, *General Recommendation 28,* Para. 31. See also CESCR, *General Comment No. 20,* Para. 40; CESCR, *General Comment No. 16,* Paras. 19 & 21.
41 Article 1, CEDAW; CEDAW, *General Recommendation 28,* Paras. 31 & 33.
42 CEDAW, General Recommendation No. 25; CEDAW, *General Recommendation No. 28;*

Multiple and intersectional discrimination:

- Women will often face discrimination not only on the basis sex, but also on other grounds, for example race, ethnicity, nationality, religion, language, marital status, social and economic status, age, place of residence, birth, descent, disability, and sexual orientation and gender identity. Such *intersecting* forms of discrimination will often have compounded negative impacts on these women and will often affect them differently than it will male members of these groups.[43]

- Kazakhstan's law should protect women from such forms of multiple or intersectional discrimination. The adoption of legal provisions that prohibit discrimination on a range of grounds other than sex, including each of those listed above, is indispensable not least to protect women who come from marginalized groups. [44]

Gender-based violence:

- Effective due diligence must be exercised to prevent, investigate, sanction and ensure access to remedies in instances of gender-based violence perpetrated by public and private actors.[45]

- This has a number of implications. For example, Kazakhstan must adopt and implement legislative frameworks dealing with various forms of gender-based violence, and providing adequate protection to all women respecting their integrity and dignity. Such frameworks must provide for penal sanctions, civil remedies, and remedial and protective provisions. Where officials fail to conduct a prompt, independent and effective investigation into incidents of gender-based violence that are brought to their attention, with a view to pursuing the accountability of the perpetrator, such omission to act will give rise to a breach of obligations.[46]

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43 CEDAW, *General Recommendation 28,* Paras. 18, 26 & 31; Para.17; CERD, *General Recommendation 25.*

44 Articles 2(1) & 26 ICCPR; CEDAW, *General Recommendation 28,* Paras.18 & 31; CERD, *General Recommendation 25.*

45 CEDAW, *General Recommendation 19*, Para. 9; CEDAW, *General Recommendation 28*, Para.19; CAT, General Comment 2, Para. 18; Article 4(c), *UN Declaration on the Elimination of Violence Against Women*, 20 December 1993, General Assembly, Resolution A/RES/48/104; CEDAW, *Vertido v. The Philippines*, Communication No. 18/2008, 16 July 2010, Para. 8.4; *Şahide Goekce v. Austria,* Communication No. 5/2005, 6 August 2007, Para. 12.1.4; *Fatma Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, *Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women,* U.N. Doc. E/CN.4/2006/61, 20 January 2006, Para. 29. HRC, *General Comment 31*, Para.8 (regarding private actors generally).

46 Articles 2(3) & 7 ICCPR; Article 2 CEDAW; Articles 12,13 & 16 CAT. See also: CEDAW, *General Recommendation 19*, Para. 9; CEDAW, *General Recommendation 28*, Para.19; CAT, General Comment 2, Para. 18; HRC, *General Comment 31*, Para.8.

- An effective investigation entails a number of components, but always requires that officials investigate allegations of such violence "promptly, thoroughly, impartially and seriously".[47] Such investigations should be initiated by officials of their own volition, i.e. without requiring victims to request that investigations take place. In addition, a gender-sensitive judicial process must be ensured in cases of such violence.[48]

- Other required steps include training and awarenss-raising exercises for officials at all levels, the establishment of effective oversight and monitoring mechanisms, the elaboration of clear codes of conduct and guidelines for officials and the accountability of those who do not adhere to them.

Labour protection:

- Women in Kazakhstan must be afforded equal workplace protection and rights, which includes the right to social security and protection of health and safety in working conditions.[49]

- This has a number of repercussions. For example, not only must the law guarantee equal treatment and non-discrimination on the basis of gender at work, but also as this applies to the forms of work that are predominantly carried out by women, such as domestic work, to ensure that such work is regulated and subject to labour rights protection and effective remedies so that all women workers can seek justice and claim their rights.

Resources and capacity:

- Adequate human and financial resources must be ensured to advance gender equality and combat discrimination against women. Administrative and financial support must be provided so that legal and other measures make a real difference in women's lives. Women should be provided with legal aid where necessary, particularly in respect of discrimination claims and family law matters.[50]

47 A.T. v. Hungary, CEDAW Communication No. 2/2003, Views of 26 January 2005, UN Doc. A/60/38 (Annex III); *Fatma Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005.

48 V.K. v. Bulgaria, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008, Paras. 20/2008,25July2011,Para.9.9 and 9.11-9.16; Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008.18/2008, 16 July 2010, Paras. 8.5-8.9.

49 Article 11, CEDAW; Articles 2(2) and 7, ICESCR.

50 CEDAW, *General Recommendation 28, Para. 34;* CEDAW, General Recommendation 29, Para.42

- Where justice system delays are caused by a lack of resources and under-funding, the allocation of possible supplementary budgetary resources for the administration of justice is required.[51]

- Education and training on human rights and equality should be directed to public officials, the legal profession and the judiciary.[52]

51 HRC, General Comment 32, Para. 27
52 CEDAW General Recommendation 28; HRC General Comment 31. CEDAW, *General Recommendation 28, Paras. 17, 38(d)*

4 GENDER EQUALITY AND DISCRIMINATION AGAINST WOMEN: ADDRESSING LEGAL PROTECTION GAPS

Although Kazakhstan's laws include a range of constitutional, civil and criminal provisions intended to ensure gender equality and prohibit discrimination against women, it does not appear that such provisions have been invoked by women before courts or other justice mechanisms in the country. Participants were unaware of cases in which women have sought legal redress against State or private actors for discrimination. Either no such complaints have been filed or their numbers are negligible. Similarly, national court jurisprudence on discrimination against women was not identifiable.

Yet participants highlighted that discrimination against women and gender inequality is prevalent in Kazakhstan. As a result they underlined that the lack of legal claims of discrimination by women is not symbolic of an absence of inequality. Rather they considered it to be indicative of an access to justice deficit.

In this regard they pointed to a number of intersecting contributory factors. These include a range of important practical obstacles such as resource constraints and the cost of legal action, women's lack of legal knowledge and information concerning their rights, as well as social norms and prevailing gender roles. Participants also underscored that these common practical realities are compounded by a series of normative and procedural barriers that result from inadequate legislative prohibitions against discrimination as well as the absence of effective and accessible remedial mechanisms. They highlighted that, although it is vital to address the practical barriers women face, ensuring the appropriate legal and remedial frameworks and mechanisms are in place is an imperative first step. Their approach accords with the views of international authorities as to action required by Kazakhstan's international obligations.

The following sections briefly summarise Kazakhstan's existing legal framework for gender equality and non-discrimination and outline the central problems with this framework that were identified by participants. They subsequently identify the relevant provisions of international human rights law and explain the manner in which they require this normative framework be improved.

4.1 Kazakhstan's legislative framework for gender equality

Constitutional provisions: Kazakhstan's Constitution proclaims that "everone shall be equal before the law and court"[53] and specifies that "no one shall be subjected to discrimination on grounds of origin, social and property status, sex, race and nationality, language, religion, creed, place of residence or any

53 Article 14(1), Constitution of the Republic of Kazakhstan

other circumstances".[54] Although participants noted the importance of these Constitutional guarantees, they also underscored the lack of a Constitutional definition of discrimination and a prevailing lack of clarity as to what legal procedures a victim of discrimination might use to invoke these guarantees. Although the Constitution specifies that everone shall have the right to "judicial defence" of her or his rights and freedoms,[55] it does not outline what legal procedures should be followed or specify a constitutional cause of action.[56] Indeed these guarantees do not appear to have been invoked as a cause of action by a woman facing sex discrimination.

Criminal law: In addition to the constitutional guarantee of equality before the law and prohibition of discrimination, Kazakhstan's Criminal Code provides that "violating the equality of citizens" is a criminal offence which can be punished by a fine, detention upon arrest or imprisoment for up to one year.[57] It defines this offence as the "direct or indirect restriction" of the rights or freedoms of a person on a range of grounds, including sex. In an additional provision the Criminal Code also states that refusal to hire a woman, or dismissing her, on grounds of pregnancy or because she has children under three years of age, is subject to a fine or correctional labour.[58] The Criminal Procedure Code classifies both of these offences as crimes of 'public accusation' and thereby vests responsibility for their investigation and prosecution with the State, providing that such investigations and prosecutions can and should be carried out irrespective of whether or not the victim makes a complaint.[59] However participants observed that no such legal action appears to have been initiated by the authorities in respect of discrimination against women on grounds of sex.

Gender equality legislation: In 2009, dedicated gender equality legislation was enacted for the first time. The Law on the State Guarantees of Equal Rights and Equal Opportunities of Women and Men sets out the State's policy goals concerning equal rights and opportunities[60] and outlines the responsibilities of various actors in securing equal rights and opportunities.[61]

54 Article 14(2), Constitution of the Republic of Kazakhstan
55 Article 13 (2), Constitution of the Republic of Kazakhstan
56 In addition to language on the right of persons to judicial defence of rights the Constitution specifies that in the course of relevant proceedings Courts may find that laws or regulations infringe on the rights enshrined and that in such cases they shall propose to the Constitutional Coucil that it declare the relevant provision unconstitutional. Article 78, Constitution of the Republic of Kazakhstan.
57 Article 141, Criminal Code of Kazakhstan
58 Article 148, Criminal Code of Kazakhstan
59 See Articles 32 – 24, Criminal Procedural Code of the Republic of Kazakhstan, 1997
60 Article 3, Law on the State Guarantees of Equal Rights and Equal Opportunities for Men and Women (unofficial translation from Russian) (hereinafter Law on Equal Opportunities)
61 See the Law in general. Specifically see: (Government) Article 6, (Central Executive Authorities) Article 7, Local Executive Authorities (Article 8), Law on Equal Opportunities.

Once again, although participants welcomed enactment of the legislation, they expressed considerable disappointment that, in the course of its enactment, authorities had not availed themselves of the opportunity to address and overcome prevailing gaps and ambiguities in the legal framework. They outlined a number of particular concerns regarding deficits in content and scope.

(a) *Prohibition of discrimination*: The Law on Equal Opportunities includes a provision specifying that laws constituting sex discrimination may be challenged before a court in accordance with civil procedural law.[62] However, beyond this prohibition of one form of legal (*de jure*) descrimination, it does not include a generally applicable provision prohibiting discrimination. As a result it does not appear to prohibit discrimination in practice (*de facto*) by public or private actors. Meanwhile it includes a number of provisions addressing equality in specific spheres such as public service employment,[63] employment more generally,[64] marriage and family relations and upbringing of children,[65] and health, education and culture.[66] Yet, apart from the provisions dealing with employment, these provisions do not include generally applicable obligations to ensure equality or prohibitions of discrimination in the relevant spheres. Instead they focus on broad policy goals that will be pursued by the State.[67] Although these may be important commitments, they cannot act as a substitute for prohibitions of *de jure* and *de facto* discrimination and inequality that can be generally invoked by women.

(b) *Definition of discrimination*: The Law on Equal Opportunities defines discrimination on grounds of sex as "any restriction or infringement of human rights and freedoms, as well as denigration of human dignity,

62 Article 4 (1), Law Equal Opportunities.
63 Article 9, Law on Equal Opportunities.
64 Article 10, Law on Equal Opportunities.
65 Article 11, Law on Equal Opportunities.
66 Article 12, Law on Equal Opportunities.
67 For example Article 11 on Marriage and Family Relations and Upbringing of Children specifies that, "Gender equality of rights and obligations of men and women in marriage and family relations and upbringing of children shall be secured by: 1) improving the image of the family, reinforcing family relations, and propagating the values of marriage and family; 2) equal sharing of responsibilities for upbringing of children between men and women; 3) implementation of a social policy aimed at maintaining and improving the quality of family life. In turn Article 12 on Health Protection, Education and Culture provides that, " The State shall guarantee: 1) further development of legislation of the Republic of Kazakhstan and adoption of measures aimed at the maintenance of reproductive health of men and women, reducing mortality and narrowing the gap between male and female life expectancies; 2) securing equal conditions of access of men and women to all kinds of professional retraining and advanced training; 3) preventing preferential treatment when granting admission to studies, except as specified by the laws of the Republic of Kazakhstan; 4) preventing advertisement containing textual, visual and auditory information which is contrary to the well-established standards of humanity and moral standards due to its use of offensive sex-related language, comparisons and images; 5) gender education in accordance with the current State policy aimed at ensuring equal rights and equal opportunities between men and women."

on grounds of sex".[68] This mirrors the language used in the Criminal Code. It qualifies this by stating that measures shall not be regarded as discriminatory if they are aimed at "protection of motherhood, childhood and fatherhood; protection of women on account of pregnancy and childbirth; increasing male life expectancy; proteciton of women in the context of criminal procedure and penal law".[69] It provides that "any distinction, exclusion, preference or restriction shall not be considered discrimination if it is predetermined by the requirements which are typical of any given type of labour, or if it results from the States special care about persons in need of a higher degree of social and legal protection".[70] Participants underscored that this is the only legal definition of discrimination currently to be found in Kazak law. They expressed concern that it is incomplete and ambiguous and does not align with the definition of discrimination contained in international law, and specifically in CEDAW.[71] They also pointed to the terms of a number of the exclusions as problematic, highlighting the absence of clarity as to their scope.

(c) *Penalties, remedies and enforcement*: Just as the Law on Equal Opportunities does not include a general prohibition of discrimination based on sex, nor does it include provisions detailing penalties or sanctions to be imposed against those who engage in discriminatory conduct. Neither does it outline what remedial mechanisms individuals might use to enforce its provisions. Instead, in addition to holding that discriminatory legislation may be challenged in court according to civil procedure,[72] it specifies briefly that any violation of its provisions "shall be punishable under the laws of the Republic of Kazakhstan", without specifying what laws would be applicable.[73] In addition, the provision dealing with employment outlines that "those who consider themselves victims of discrimiantion in employment relations shall have the right to complain to bodies and organizations responsible for securing equal rights".[74] Participants expressed the view that the legislation lacks effective enforcement and redress procedures. The ambiguous nature of the relevant provisions leaves women, their lawyers, civil society representatives and even public authorities themselves without clarity as to if, and how, the legislation may be enforced or used as a basis for legal action in situations of inequality and discrimination. The law does not appear

68 Article 1(3), Law on Equal Opportunities.
69 Article 4(2), Law on Equal Opportunities.
70 Article 4, Law on Equal Opportunities.
71 Article 1 of CEDAW, "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."
72 Article 4 (1), Law on Equal Opportunities.
73 Article 15, Law on Equal Opportunities
74 Article 10(4), Law on Equal Opportunities

to provide women with a cause of action and route to remedy. Participants stressed that, as a result, it does little to address the fact that existing laws do not provide women facing sex discrimination with an effective or accessible basis of claim.

(d) *Supervision and designation of responsibility*: Conerns were also expressed regarding the extent to which the Law on Equal Opportunities fails to clarify which State agencies are responsible for the Law's various policy commitments or for monitoring and supervising its implementation and compliance with its provisions. The Law's substantive policy pledges do not designate the responsible State agency. Meanwhile, although Article 13 specifies that monitoring and supervision of compliance shall be conducted through inquiries by State agencies in charge of securing equal rights and opportunities, it does not specify what State agencies it is referring to.[75] Participants explained that as a result there is a prevailing lack of clarity as to who bears what responsibility under the Law.

4.2 Kazakhstan's international obligations and best practice

Action by Kazakhstan to address the issues identified above represents a crucial step towards compliance with its international human rights obligations. International authorities have repeatedly identified a series of core requirements that legal frameworks on gender equality and non-discrimiantion must encompass. These mirror many of the normative and procedural gaps identified by participants and provide a reference point for future legislative change.

Indeed, advancing gender equality and preventing discrimination against women requires sustained engagement and long-term commitment. The process is not static. Measures taken must instead be continuously reviewed and improved. Participants identified the adoption in 2009 of the Law on the State Guarantees of Equal Rights and Equal Opportunities of Women and Men as an important milestone in a trajectory of change in Kazakhstan. They at the same time underlined that Government action to address each of the legislation's deficiencies is an imperative next step towards progress and the realisation of the Law's policy objectives. Deficiencies will otherwise continue to undercut the legislation's ability to play a meaningful and effective role in advancing the protection of women's human rights and access to justice.

75 The text of the Article provides: "State monitoring and supervision over compliance with the laws of the Republic of Kazakhstan on the State guarantees of equal rights and equal opportunities for men and women shall take the form of inquiries conducted by the State agencies in charge of securing equal rights and equal opportunities for men and women in accordance with the procedure established by the laws of the Republic of Kazakhstan."

General international obligation to address discrimination against women

In as much as international authorities have highlighted that the forms of gender inequality and discrimination against women and the factors behind it vary, so too have they stressed that a wide range of responsive measures are required by States. These derive from the international obligation to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality.[76]

On the one hand this obligation requires Kazakhstan to ensure its officials refrain from conduct that directly or indirectly results in the denial of the equal enjoyment by women of their human rights (respect). On the other it necessitates that Kazakhstan protect women from discrimination by private actors and take steps directly aimed at eliminating discriminatory social practices and stereotyped roles for men and women (protect). In addition it requires Kazakhstan to take a wide variety of positive and proactive steps to ensure that women and men enjoy equal rights *de jure* and *de facto* including, where appropriate, the adoption of temporary special measures (fulfil).[77]

These interrelated obligations require Kazakhstan to:

- Eliminate direct and indirect[78] forms of *de jure* discrimination and inequality, which manifests in laws, policies, regulations; and *de facto* inequality and discrimination, which manifests in practice.[79]

- Protect women from these forms of inequality and discrimination wherever they occur, throughout public and private spheres and whether they are perpetrated by public authorities, the judiciary, organizations, enterprises or private individuals.[80]

- Take measures to address: biological as well as socially and culturally constructed differences between women and men;[81] gender-based

76 See Article 2, CEDAW; Articles 2,3 & 26 ICCPR; Article 3 ICESCR; CEDAW, General Recommendation 28, Paras.9 and 37 and in general; CESCR, General Comment No. 16, Para. 17; HRC, General Comment No. 28; See also in general CESCR General Comment No. 20.

77 CEDAW General Recommendation 28, Paras.9 & 37, and in general. CESCR General Comment 16, Paras. 17-21; See also HRC, General Comment No. 28, Paras. 3 & 4 and in general.

78 CEDAW General Recommendation 28, Para. 16. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Meanwhile indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women.

79 Articles 2(a)-(g) & 3, CEDAW; CEDAW General Recommendation 28, Paras. 9, 16, 35 & 36 and in general; CEDAW General Recommendation 25, Paras. 7 & 8; CESCR General Comment 16, Paras. 6-8, 10-14, 17-21. See also in general CESCR General Comment No. 20.

80 Article 2(a)-(g) CEDAW; CEDAW General Recommendation 28, Paras. 10,13 & 17 and in general. CEDAW General Recommendation 25, Para. 7. CESCR General Comment 16, Paras. 6-8, 10-14, 17-21.

81 CEDAW General Recommendation 25, Para. 8. See also in general CESCR General Comment No. 20.

stereotypes, roles and norms;[82] underrepresentation of women in key sectors and professions;[83] and the unequal distribution of resources and power amongst men and women.[84]

Specific obligation to establish an effective legal framework

In this context, ensuring an appropriate and effective legal framework is in place that guarantees gender equality, prohibits discrimination, and provides for accountability and redress is just one piece of the puzzle.

Yet it is vital. First because it provides women with the normative basis and procedural mechanisms they need to seek justice when they face discrimination and inequality. Second, because it plays a broader social role and constitutes a crucial element in preventative and regulatory efforts. It not only sends an important signal that gender inequality and discrimination against women is unlawful but also provides for standards against which various actors can measure and improve their conduct.

As a result, international authorities have repeatedly stressed that States must ensure that:

- Through constitutional or other legislative means, the principles of gender equality and non-discrimination against women are enshrined in domestic law and given overriding and enforceable status.[85]

- Legislation is enacted that prohibits discrimination in all fields of women's lives and throughout their lifespan.[86]

At the same time, international authorities have repeatedly stressed that the existence of such guarantees are not by themselves sufficient. Compliance with international obligations not only requires that such legal provisions dealing with gender equality and discrimination against women be put in place: it also requires that they are 'effective' or 'fit for purpose'. To this end laws must fulfil certain criteria and encompass a number of specific elements.[87]

82 Article 5 CEDAW; CEDAW General Recommendation 28, Para. 9; CEDAW General Recommendation 25, Para. 7; HRC General Comment 28, Para. 5; CESCR General Comment 16, Para.19.
83 CEDAW General Recommendation 25, Para. 8; HRC General Comment 28, 29. CESCR, General Comment 16, Para. 21.
84 CEDAW General Recommendation 28, Para. 9; CEDAW General Recommendation 25, Para. 8.
85 Article 2(a) CEDAW; CEDAW, General Recommendation 28, Para. 31; CESCR General Comment 16, Para. 19.
86 Article 2(a),(b) CEDAW; CEDAW, General Recommendation 28, Para. 31; CESCR General Comment 16, Paras. 19, 41; CESCR General Comment 20, Para.37.
87 See for a general discussion and overview of a number of these elements: Gender Equality Laws, Global Good Practice, UNIFEM, 2009.

Effective guarantees of equality and prohibitions of discrimination: The first category of required criteria can be broadly described as those elements that are necessary to ensure appropriate guarantees of equality and prohibitions of discrimination are in place.

As a minimum they include the following:

- *A guarantee of equality*.[88] Laws should include a positive guarantee of substantive equality. This means that equality guarantees must extend beyond formal or *de jure* equality in and before the law and should encompass guarantees of gender equality in practice.

- *A clear and comprehensive definition of discrimination*.[89] The inclusion of a definition of discrimination which clearly identifies the conduct that constitutes discrimination is a necessity for effective legal provisions. The definition should mirror the elements included in Article 1 of CEDAW. No exceptions, qualifications or limits should be included,[90] apart from specifications necessary to explain that temporary special measures to advance gender equality, or measures to protect the rights of women in the context of pregnancy and childbirth, do not constitute discrimination.

- *A full prohibition of discrimination in public and private spheres.*[91] Laws must include a comprehensive prohibition of discrimination against women in all fields of women's lives and throughout their lifespan. This means that they must prohibit both direct and indirect, *de jure* and *de facto* discrimination in all sectors of society by both public and private actors. For example prohibitions must be applicable in respect of the conduct of public authorities, the judiciary, organizations, enterprises or private individuals.

In addition to these minimum requirements, best practices also indicate that gender equality and non-discrimination legislation should also address the following issues:

88 Article 2(a) CEDAW; CEDAW General Recommendation 28, Para. 31; CESCR General Comment 16, Paras. 19 & 41.

89 See in general Article 2(a) CEDAW and CEDAW General Recommendation 28, Paras. 31-33. Article 1 of CEDAW defines discrimination against women as: "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."

90 Article 1, CEDAW; CEDAW, General Recommendation 28, Paras. 31 & 33.

91 CEDAW General Recommendation 28, Paras. 13, 17, 31, 32. CESCR General Comment 16, Paras.19 & 41. See also HRC, General Comment 28 Paras.4 & 31

- *Sexual harassment*.[92] International law specifies that gender-based violence constitutes discrimination against women. Sexual harassment is one form of such violence which includes "unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions". As outlined in more detail in Section 4 of this report, compliance with international obligations requires States to prevent, investigate, sanction and ensure access to remedies in all instances of gender-based violence by public and private actors. [93] This includes an obligation to enact laws prohibiting sexual harassment, providing for accountability of the perpetrators and access to remedies by the victims.[94] Best practice indicates that including a specific prohibition and definition of sexual harassment in laws dealing with sex discrimination is an appropriate measure.

- *Recognition of intersectional discrimination*.[95] Women often face discrimination not only on the basis sex, but also on other grounds, for example race, ethnicity, nationality, religion, language, marital status, social and economic status, age, place of residence, birth, descent, disability, sexual orientation and gender identity. These *intersecting* forms of discrimination often have compounded negative impacts and will often affect women differently than male members of these groups. States are obliged to legally recognize and prohibit these intersectional forms of discrimination. Although there are different legislative mechanisms by which they can do this, best practices indicate that including provisions on intersectional or multiple forms of discrimination within gender equality laws may be the most effective way of doing so.

Effective remedies and enforcement: The second category of required criteria relate to ensuring that legal guarantees of gender equality and prohibitions of discrimination against women are enforceable and enable meaningful

92 See for a discussion of including sexual harassment prohibitions in gender equality legislation: Gender Equality Laws, Global Good Practice, UNIFEM, 2009.

93 CEDAW, General Recommendation 19, Para. 9; CEDAW, General Recommendation 28, Para.19; CAT, General Comment 2, Para. 18; Article 4(c), UN Declaration on the Elimination of Violence Against Women, 20 December 1993, General Assembly, Resolution A/RES/48/104; CEDAW, Vertido v. The Philippines, Communication No. 18/2008, 16 July 2010, Para. 8.4; Şahide Goekce v. Austria, Communication No. 5/2005, 6 August 2007, Para. 12.1.4; *Fatma Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, U.N. Doc. E/CN.4/2006/61, 20 January 2006, Para. 29. HRC, General Comment 31, Para.8 (regarding private actors generally).

94 CEDAW, General Recommendation 19, Paras. 18 & 24.

95 CEDAW, General Recommendation 28, Paras. 18, 26 & 31; CERD, General Recommendation 25; CESCR General Comment 16, Para.5; CESCR General Comment 20, Para. 17. See also Gender Equality Laws, Global Good Practice, UNIFEM, 2009.

accountability and redress in practice. They require both the establishment of effective implementation and monitoring procedures, and the elaboration of accessible and effective legal remedies and dissuasive sanctions.

Here the necessary elements include:

- *Clear assignment of responsibilities and monitoring mechanisms.*[96] Laws that outline gender equality guarantees and define relevant policy commitments for implementation by State actors will have little impact where they fail to delineate which State actors are responsible for these commitments. Legal provisions outlining policy commitments and pledging action need to clearly designate in each case which public body is responsible. Similarly, laws must establish a process by which their implementation can be monitored and evaluated on an ongoing basis and again must explicitly assign responsibility for oversight to a specific public body.

- *Penalties and sanctions.*[97] Prohibitions of discrimination against women must be accompanied by explicitly delineated penalties. The efficacy of gender equality laws will be undermined where they do not outline the applicable sanctions that will apply in case of breach. The lack of explicit sanctions provisions limit the deterrent effect of such laws and fail to provide an incentive for change. States must also ensure that the applicable penalties are disuassive and appropriate. A range of flexible pecuniary and non-pecuniary measures must be provided for.

- *Complaint procedures and redress.*[98] Laws prohibiting discrimination and promoting gender equality must provide women who are subjected to discrimination with appropriate remedies. This means that laws must clearly outline an effective remedial procedure and must clearly define the forms of redress available. To be 'effective' a remedial procedure or complaints process must not be theoretical or illusory and must meet a number of criteria:

96 CESCR General Comment 16, Paras. 21&41. CEDAW General Recommendation 28, Paras. 24 & 39. CESCR General Comment 20, Para.41. See Gender Equality Laws, Global Good Practice, UNIFEM, 2009.

97 Article 2(b) CEDAW; CEDAW General Recommendation 28, Paras. 17 & 37(b); CEDAW General Recommendation 25, Para.7.

98 Article 2(c) CEDAW; Article 2(3) ICCPR; CEDAW General Recommendation 28, Paras. 17, 32, 34, 36. CESCR General Comment 16, Paras. 21 & 48; CESCR General Comment 21, Para.40; HRC General Comment 31, Paras.15-20. See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

(i) It must enable recourse to a funded independent body, with the authority to make an enforceable decision, impose sanctions and award remedies.

(ii) It must involve a right of appeal to a judicial court or tribunal from any decision of that body.

(iii) It must involve a clear and well-defined procedure, in terms provided for by the law, for establishing liability.

(iv) It must apply in cases of discrimination by public authorities, private institutions and individuals.

(v) It must be affordable, such that legal aid should be provided for women without adequate means and exemptions from procedural costs and court fees should apply.

(vi) It must be timely.

Meanwhile ensuring the right to redress requires that a range of measures may be ordered, including restitution, rehabilitation, satisfaction,guarantees of non-repetition and compensation. The stated needs and wishes of the victim must be taken into account in determining the appropriate form of redress in a given case.

In addition to these fundamental requirements of international law, best practice indicates that remedial procedures in discrimination cases should encompass the following elements:

- *Burden of proof*.[99] Increasingly in civil claims of discrimination jurisdictions are placing the burden of proof on the alleged perpetrator to show that the discrimination did not occur.[100] This shift occurs only once the complainant has established facts from which it may be presumed that discrimination has occurred i.e. has made a prima facie case.[101]

99 See for a discussion: Gender Equality Laws, Global Good Practice, UNIFEM, 2009; Comparative Study on Access to Justice in Gender Equality and Anti-Discrimination Law (European Union), Synthesis Report, Milieu, February 2011.

100 See for example European Union Directive 2006/54/EC which has required all member States of the Union to adopt this approach in their national laws.

101 This shift should only occur in civil proceedings where otherwise the complainant would bear the onus. It is not appropriate in criminal procedures or in situations where the Court or another State institution bears the responsibility to investigate the facts.

- *Standing*.[102] Best practice indicates that not only should individual women have standing before the established remedial procedure, but that non-governmental organisations and associations should also have the standing to file claims. This is a particularly important measure in steps to address systemic discrimination, or where resource or saftey concerns impede victims from seeking justice themselves.

102 See for a discussion: Gender Equality Laws, Global Good Practice, UNIFEM, 2009; Comparative Study on Access to Justice in Gender Equality and Anti-Discrimination Law (European Union), Synthesis Report, Milieu, February 2011.

5. GENDER BASED VIOLENCE: IMPROVING LAWS, PROCEDURES AND PRACTICE

As in many jurisdictions of the world, significant discrepancies between the extent to which women face gender based violence and the extent to which it is reported, investigated and the perpetrators brought to justice, prevail in Kazakhstan.

Participants explained that women rarely seek justice and legal accountability when they face gender based violence, and where they do proceedings are often hampered by a range of obstacles. They expressed the view that this is the combined result of a number of factors and pointed in particular to a range of flaws and gaps in current laws and procedures, to problematic responses by justice sector officials when women report violence, and to a prevailing fear, on the part of women, of social stigma and pejorative stereotypes.

The preceeding sections briefly present the accounts received regarding certain aspects of these three issues.

- First, they provide a summary of participants' concerns regarding the way in which the legal framework deals with rape and sexual assault.
- Second, they address the notable lack of any legal provisions concerning sexual harassment
- Third, they identify a series of legal and practical obstacles to justice which participants explained arise in situations of domestic violence.

They then provide an overview of the ways in which Kazakhstan's international obligations require that each of these problems be addressed.

An opportunity for reform? Kazakhstan's legislature is currently reforming the Criminal Code and the Criminal Procedure Code. New codes have been proposed for adoption in 2014. However although many aspects of the new proposals differ from the legislation currently in place, unfortunately in the latest version of the draft Codes seen by the ICJ, the substantive and procedural frameworks dealing with gender-based violence remain the same. As a result the new proposals replicate each of the problems identified below. This reform process provides the Government with a unique opportunity to address these issues and improve the manner in which Kazakhstan's criminal law deals with gender-based violence.

5.1 Rape and sexual assault: flawed definitions and problematic procedures

A number of provisions in the Criminal Code and Criminal Procedure Code, read together with a binding 2007 Supreme Court Decree,[103] combine to establish Kazakhstan's criminal justice framework for dealing with sexual assault, including rape.[104]

Although recognising that over the years these areas of law have seen important additions and reform initiatives, participants expressed the view that a number of problematic legal provisions and protection gaps remain. In particular they highlighted inappropriate definitions of rape and sexual violence and the ongoing application of 'reconciliation' procedures to some instances of rape and sexual violence.

Definitions of rape and sexual assault*:* Participants outlined a number of concerns regarding the concepts and terminology used to define rape and other forms of sexual assault.

- *Rape is limited to penetrative vaginal intercourse perpetrated by a man against a woman.* Article 120 of the Criminal Code criminalises rape. It defines the crime as: "sexual intercourse accompanied by violence, or a threat of violence to a victim, or to other persons, or with the use of the helpless state of a victim".[105] The Supreme Court Decree provides further detail, explaining that rape is an act of sexual intercourse 'in its natural form' perpetrated against a woman against her will or without her consent, using violence or the threat of violence or taking advantage of her helpless condition.[106] It follows that the definition of rape does not encompass penetration through anal or oral sex or through the use of objects. Nor does it acknowledge that men may be victims of rape or that women may perpetrate rape.

103 "On some issues of definition of crimes of rape and other violent acts of a sexual nature," Supreme Court Decree, 2007 . (Hereinafter Supreme Court Decree)

104 These are supplemented, in relation to domestic violence of a sexual nature, by the 2009 Law on Prevention of Domestic Violence and related provisions in the Administrative Code which provide for specific procedures which may be applied in situations of domestic violence. See preceeding discussion below.

105 Article 120(1), Criminal Code of the Republic of Kazakhstan. This provides for a basic sentence of three to five years. Respectively Articles 120(2) and 120(3) specify a series of instances in which this will be increased. For example they outline that the penalty will increase to five to ten years in situations of gang rape, or rape involving particular brutality or transmission of a veneral disease (Article 120(2)). It increases again to between eight and fifteen years where rape is perpetrated against a child under fourteen or results in death or severe damage to health or contraction of HIV/AIDS (Article 120(3)).

106 Paragraph 1, Supreme Court Decree

- *Inappropriate categorisations and terminology.* In addition to the crime of rape, the Criminal Code includes a separate offence of "violent actions of a sexual character". Article 121 details this as: "sodomy, lesbianism, or other acts of a sexual character accompanied by violence or a threat of violence with regard to a given victim (male or female)"[107] and the Supreme Court Decree explains that this offence involves sexual violence in an 'unnatural form' against either men or women.[108] Essentially this provision appears to be intended to capture various forms of non-consensual sexual activity that fall outside the current definition of rape and that may be perpetrated by both men and women, and against both men and women. A similar range of penalties apply as for rape[109] and, as a result, although the offence of rape is limited to penetrative vaginal intercourse between men and women, other forms of sexual conduct, including where perpetrated against men, are criminalised to same extent. However participants expressed concern regarding the inappropriate use of terminology to define the conduct encompassed in Article 121. For example they identified the use of the term 'lesbianism', which describes a particular sexual orientation as opposed to types of sexual conduct, as confusing, unnecessary and pejorative. Moreover they observed that the distinction drawn in the Supreme Court Decree between 'natural' and 'unnatural' forms of sexual activity also has pejorative connotations and reinforces inaccurate stereotypes.

- *Violence or threat of violence are necessary elements of the crime*. Both the crime of rape and the crime of 'violent actions of a sexual character' are defined with reference to a requirement that they be accompanied by violence or a threat thereof. The Supreme Court Decree explains that 'violence' is an act meant to overcome the resistance of the victim, and gives examples such as striking, suffocating, holding down the victims arms, or ripping off clothes.[110] Thus physical force or a threat thereof are elements of each crime that must be present in order for each crime to have occurred. As a result it appears that Articles 120 and 121 do not apply to situations in which sexual contact is non-consensual but is not accompanied by violence or a threat thereto. Although Article 123 outlines a lesser offence of 'coercion into sexual intercourse, sodomy, lesbianism, or other actions', which does not include the element of physical violence, this crime entails a sentence of not more than two

107 Article 121(1), Criminal Code of the Republic of Kazakhstan
108 Paragraph 2, Supreme Court Decree
109 Article 121(2)&(3), Criminal Code of the Republic of Kazakhstan
110 Paragraph 3 of the Supreme Court Decree. Meanwhile Paragraph 4 defines 'a threat of violence' as intimidating the victim with the objective of preventing resistance or verbal threats expressing the intention to carry out physical violence.

years and is classified by the Criminal Procedure Code as a crime of private accusation.[111] This has certain negative procedural implications that will be discussed below.

Participants highlighted that each of these definitions and requirements perpetuates problematic gendered stereotypes that in turn undermine the effectivness of the relevant criminal provisions.

For example they underlined that because rape can only be perpetrated by a man against a woman through penetrative vaginal intercourse, this reinforces a range of problematic assumptions as to the nature and form of sexual violence. It conveys the impression that this form of assault by a man against a woman is somehow different in consequence or nature to other forms of sexual violence. It is also symbolic of an approach to sexual assault that is focused on the specific form the assault takes as opposed to the underlying violation of sexual autonomy that all incidents of sexual assault involve.

They explained that the use of terminology such as 'natural' and 'unnatural' to describe different forms of sex further demonstrates the extent to which assumptions as to the nature of different sexual acts underlie the approach of the legislative provisions.

Meanwhile they expressed considerable concern regarding the inaccurate stereotypes that underlie the inclusion of violence or threat thereof as an element of the crimes of rape and other violent acts of a sexual nature. Such requirements are based on problematic and inaccurate assumptions concerning the proper and natural reaction of victims to unwanted sexual contact. These include assumptions that if sex is truly non-consensual victims will physically defend themselves and perpetrators will need to use or threaten violence. They obscure the reality that fear and shock influence victims' behaviour in many different ways and that coercion may involve many forms of non-violent threats, intimidation and duress. Victims in many instances may therefore not physically resist sexual assault and perpetrators may not always need to rely on violence or threats thereof.

Framework for prosecution and investigation: Participants explained that the way in which certain aspects of these crimes are categorised and classified by the Criminal Code and Criminal Procedure Code can also undermine accountability and access to justice.

111 Article 123, Criminal Code of the Republic of Kazakhstan; Articles 32-33, Criminal Procedure Code of the Republic of Kazakhstan; Article 67, Criminal Code of the Republic of Kazakhstan.

- *No prosecution without victim's complaint*. Articles 32 to 34 of the Criminal Procedure Code outline that prosecution procedures will vary depending on whether a crime is classified as a 'private', 'private-public' or 'public' matter. In the case of private and private-public crimes, State prosecutions may only commence following an official complaint by the victim. Currently the Criminal Procedure Code designates that the crimes of rape and violent actions of a sexual nature are to be treated as private-public matters, unless the aggravating circumstances specified in Articles 120(2)-(3) and Articles 121(2)-(3) are present. This means that where incidents of rape and sexual violence do not involve elements such as gang rape, threats of death, severe impacts to the victim's health or infection with a disease,[112] the onus is on the victim to make an official complaint and pursue accountability. Only then can the State initiate prosecution. This differs from the procedure applicable to public crimes, which include aggravated forms of rape and sexual violence. In the case of public crimes, "prosecution shall be carried out irrespective of the submission of a complaint by the victim".[113]

- *No obligatory State investigation*. Moreover, where a crime is classified as a matter of private accusation, the State is not obliged to initiate an official preliminary investigation, even if a complaint is filed.[114] As outlined above, this classification includes the crime of sexual coercion defined in Article 123. This approach contrasts with other crimes where the onus is on State officials to immediately conduct a preliminary investigation into all incidents brought to its attention.

- *Reconciliation*. In addition the classification of certain forms of rape and sexual violence as private or private-public matters also means that in such situations a State prosecution must cease where, having made an official complaint, the victim later 'reconciles' with the perpetrator.[115] This possibility is provided for in Article 67 of the Criminal Code, which outlines that in certain contexts a perpetrator may be released from criminal liability if they have 'reconciled' with the victim and 'made good for the harm caused to the victim'.[116]

Participants stressed that these procedures undermine the ability of women who are victims of rape and other forms of sexual assault to seek justice and

112 See Articles 120(2)-(3) and 121(2)-(3) Criminal Procedure Code of the Republic of Kazakhstan for a full list.
113 Article 32(4), Criminal Procedure Code of the Republic of Kazakhstan
114 Articles 33 & 191(1), Criminal Procedure Code of the Republic of Kazakhstan
115 Articles 32-34, Criminal Procedure Code of the Republic of Kazakhstan; See also Articles 67 & 10(3) of the Criminal Code of the Republic of Kazakhstan.
116 Ibid.

accountability. Because in many instances prosecution cannot commence unless proactively initiated by the victim, family and social pressure on the victim, as well as threats, fear and stigma have a significant influence on whether accountability is pursued.

Participants explained that, as noted above, more often than not women do not file complaints in instances of sexual assault. They are particularly reticent to do so in situations where the perpetrator is someone known to them and where the incident does not result in serious physical injuries. Moreover, participants underlined that even in situations where women do file complaints, similar factors may subsequently intervene, leading them to 'reconcile' with the perpetrator and accept compensation, thereby precluding continuation of the prosecution.

Indeed these procedures place victims of sexual assault at considerable risk of revictimization as perpetrators may often seek to convince the victim to accept compensation or not to make a complaint in the first place. To this end they may use various methods of intimidation.

Meanwhile, participants highlighted that the situation is particularly problematic in relation to incidents of sexual assault that do not involve physical force or threats thereof. In such circumstances officials bear no obligation to conduct an investigation into the matter and if women wish to pursue justice they must pursue prosecution of their own volition and at their own cost.

5.2 Sexual harassment

There is currently no legal prohibition of sexual harassment in place in Kazakhstan. Where sexual harassment encompasses acts of sexual assault, these may be dealt with by invoking relevant Penal Code provisions discussed above.

Beyond this, however, sexual harassment is not prohibited and participants expressed considerable concern regarding this protection gap. They explained that women and girls often do not have a clear legal foundation on which to seek remedies and pursue the accountability of the perpetrator when they face unwanted sexual behaviour that may not involve sexual assault. For example this may include behaviour such as touching, requests for sexual favours, verbal or non-verbal conduct of a sexual nature, or display of sexual materials.

Participants explained that the absence of enforceable legal consequences causes situations of sexual harassment to escalate and repeat themselves. It enables the existence of a generally permissive approach to many forms of sexual harassment in Kazakhstan's workplaces, universities and schools. Participants expressed the view that, as a result, for many women sexual harassment is simply a fact of life that must be endured.

5.3 Domestic violence

Time and again participants stressed the gravity and extent of domestic violence facing women in Kazakhstan. They underlined that effective efforts by the State to combat the problem and offer greater protection to women must include a holistic package of interrelated normative, policy and practical measures.

In 2009 Kazakhstan enacted its first dedicated domestic violence legislation. This Law on the Prevention of Domestic Violence enshrines a legal definition of domestic violence and outlines a range of policy commitments and practical measures that various State bodies shall take towards the prevention of such violence. In addition it establishes a series of measures, including prevention orders, that can be imposed in individual cases.

Although welcoming the adoption of this Law, participants stressed that a range of ongoing weaknesses continue to undermine justice-sector response to domestic violence in Kazakhstan. These concerns are outlined in considerable detail in a recent report.[117]

They include:

No specific criminal offence. Kazakhstan's legal framework currently treats domestic violence as an administrative matter. The Law on Prevention of Domestic Violence does not establish domestic violence as a *criminal* offence. Although at times the constituent elements of domestic violence could be prosecuted under existing criminal provisions dealing with physical or sexual assault, participants explained that creating a specific criminal offence of domestic violence is an important step. They expressed the view that it would have an increased preventative effect, and would also enable prosecution in situations not clearly covered by existing criminal provisions on physical or sexual assault.

Insufficient penalties. Participants expressed the view that the current practice of imposing administrative fines as sanctions for domestic violence is insufficient. In their experience they are an ineffective deterrent. Moreover in practice such fines often negatively affect women and children as they are paid from, and thereby deplete, family resources. They identified this as one factor behind women's ongoing reluctance to seek legal protection in situations of domestic violence.

Unclear procedures. The Law on Prevention of Domestic Violence outlines a series of measures designed to reduce the risk of domestic violence in specific individual situations. These include measures such as 'preventive interviews',

117 The Report on Monitoring the Implementation of the Law of RK "On Prevention of Domestic Violence" a Human Rights Report, Crisis Cenre Podrugi, 2011

'prevention orders', 'temporary deprivation of liberty' and 'special requirements of behaviour'.[118] However participants explained that no corresponding procedures are outlined. The legislation provides that "grounds for using measures of individual domestic violence prevention shall include: applications or notifications by physical persons and legal bodies".[119] However it does not subsequently detail the steps women should follow if they wish to make such an application. Nor does it indicate to which specific authorities they should turn. Participants expressed the view that in practice these ambiguities prevent the Law from providing women with a viable basis on which to seek legal protection.

Inadequate protection measures: Additionally participants explained that the forms of protection the Law provides for are inadequate. For example 'prevention orders' are only made for a duration of five days and renewable for a maximum of thirty days.[120] Meanwhile there are no criminal sanctions for breach of a prevention order. Instead the Law specifies that violation of an order shall be treated as an administrative offence.[121] Participants also expressed the view that the Law's emphasis on preventative interviews and talks can often be ineffective.[122]

Lack of provision for key services. Although the Law on Prevention of Domestic Violence outlines that social assistance shall be provided to individuals facing domestic violence, it does not address the urgent need for crisis centres and sheltered housing. Nor does it guarantee legal assistance to victims of domestic violence. Participants explained that the crisis centres and shelters currently operating in Kazakhstan are too few to cope with demand. They are run by civil society and depend largely on voluntary donations for funding. A scarcity of State financial assistance is provided. Indeed participants identified the legislation's failure to address budgetary provision for the costs of implementation as a serious problem.

Problematic justice-sector response. Participants explained that, as in other jurisdictions, when women seek to report domestic violence they are often met with inappropriate responses from officials. In their experience, officials regularly encourage them to deal with issues of domestic violence privately or with the help of family members and seek to dissuade them from seeking justice and legal protection, in the name of marital or family unity. Meanwhile even where criminal proceedings for physical assault are initiated the possibility of 'reconciliation' between the parties, as provided for in Article 67 of the Criminal

118 Articles 16 – 22, Law on Prevention of Domestic Violence of the Republic of Kazakhstan, 2009
119 Article 18, Law on Prevention of Domestic Violence of the Republic of Kazakhstan, 2009
120 Article 20(5)-(6), Law on Prevention of Domestic Violence of the Republic of Kazakhstan, 2009
121 Article 20(7), Law on Prevention of Domestic Violence of the Republic of Kazakhstan, 2009
122 See for example Articles 19 and 22(4), Law on Prevention of Domestic Violence of the Republic of Kazakhstan, 2009

Code, is often the preferred mechanism of resolution on the part of prosecutors and members of the judiciary.

5.4 Kazakhstan's international obligations & best practice

International law and standards define gender-based violence against women as violence perpetrated by public or private actors that is directed against a woman because she is a woman, or violence that affects women disproportionately.[123] It encompasses, but is not limited to, sexual violence, sexual harassment and domestic or intimate partner violence.[124]

International authorities have repeatedly underlined that such violence constitutes a serious violation or abuse of women's human rights. Indeed not only does it constitute discrimination against women,[125] and undermines women's right to equality and non-discrimination in the enjoyment of rights, but it also infringes their rights to freedom from torture and ill-treatment,[126] to personal integrity[127] and to the highest attainable standard of health.[128] In addition, depending on the circumstances, it may undermine enjoyment of the right to life.[129]

General obligation to prevent, investigate and punish gender based violence

The requirement on States to respect, protect and fulfil each of these rights gives rise to a correlative duty to take appropriate and effective measures to overcome gender based violence in all its forms.[130] Not only must States address

123 CEDAW General Recommendation 28, Para.19; CEDAW General Recommendation 19, Para. 6; Article 1, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104; See for a general discussion the Report of the Secretary General: In Depth Study on all Forms of Violence Against Women, 6 July 2006, U.N. Doc. A/61/122/add.1.

124 See for example: CAT General Comment 2, Para. 18; CAT General Comment 3, Para. 33; CEDAW General Recommendation 19, Paras. 17-18, 23, 24(b); Article 2(b), Declaration on the Elimination of Violence Against Women, 20 December 1993, on A/RES/48/104

125 CEDAW General Recommendation 19, Paras. 1, 6, 7 and in general; CEDAW General Recommendation 28. Paras. 19, 34; CESCR General Comment 16, Para. 27; Article 3, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104;

126 CEDAW General Recommendation 19, Para. 7(b); CAT General Comment 2, Paras. 18, 22; CAT General Comment 3, Paras. 32, 34; HRC General Comment 28, Para. 7; Article 3, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104;

127 CEDAW General Recommendation 19, Para 7(d); Article 3, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104;

128 CEDAW General Recommendation 19, Para. 7(g); CESCR General Comment 14, Paras. 21, 51;

129 *Fatma Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Paras.12.1.1 – 12.4; *Goekce v. Austria*, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc.CEDAW/C/39/D/5/2005, Paras.12.1.1 – 12.4. CEDAW General Recommendation No.19, Para. 7; Article 3, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104;

130 CEDAW General Recommendation 19, Para. 24(a); CEDAW General Recommendation 28, Para. 19; CAT General Comment 3, Para. 18; HRC General Comment 28, Para.7; CESCR General Comment 16, Para. 27.

violence perpetrated by State actors and officials but they must also exercise effective due diligence to prevent, investigate and punish gender based violence by private actors.[131]

In general terms compliance with this obligation requires two kinds of State action.

(i) Establish an effective legal and policy framework: It requires States to take a broad series of social and legislative measures so as to establish an effective and comprehensive framework for the prevention, investigation and punishment of gender based violence. This includes the obligation to ensure an appropriate criminal legal framework is in place (as opposed to an administrative law framework) and that corresponding appropriate law-enforcement and judicial mechanisms exist. Among other things this means ensuring that laws and procedures: (i) appropriately and adequately define and prohibit all forms of gender based violence; (ii) impose dissuasive sanctions and punishment; (iii) establish effective protection procedures and social services; and (iv) provide effective complaints procedures and remedies for victims.[132]

(ii) Implement the framework in practice: It also requires States to ensure that this framework is applied in practice. Among other things this means officials must: (i) take immediate operational and legal steps to protect the physical and mental integrity of individual women who are at risk of violence where State authorities know or should know of this risk; (ii) conduct a prompt and effective official investigation into all allegations of gender based violence; (iii) ensure the vigilant and speedy prosecution of perpetrators; (iv) enable victims to seek remedies and reparation in practice, including through providing free legal aid where necessary.[133]

131 CAT General Comment 2, Para. 18; CEDAW General Recommendation 19, Paras. 8-9, 24(a); CEDAW General Recommendation 28, Para. 19; CESCR General Comment 16, Para. 27; See also HRC General Comment 31, Para.8; HRC General Comment 28, Para. 7; Article 1, Declaration on the Elimination of Violence Against Women, 20 December 1993, General Assembly Resolution A/RES/48/104; *Goekce v. Austria*, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc.CEDAW/C/39/D/5/2005.

132 CEDAW General Recommendation 19, Para.24; CEDAW General Comment 14, Para. 15(a); HRC, General Comment 28, Para.11; And see in general: *Goekce v. Austria*, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc.CEDAW/C/39/D/5/2005; *Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005; A.T. v. Hungary, CEDAW Communication No. 2/2003, View of 26 January 2005, UN Doc. A/60/38 (Annex III); Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; Jallow v. Bulgaria, CEDAW Communication No. 32/2011, Views of 23 July 2012, UN Doc. CEDAW/C/52/D/32/2011; V.K. v. Bulgaria, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008; V.V.P v. Bulgaria, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011.

133 Ibid. CAT, General Comment 2, Para.18; See also more generally HRC, Case of Delgado Paez v. Colombia, Communication No. 195/1985, 12 July 1990, Para.5.5; Case of Dias v. Angola, Communication No. 711/1996, 20 March 2000, Para.8.3; Case of Marcellana & Gumanoy v. Philippines, Communication No. 1560/2007, 17 November 2008, Para.7.6.a

Each one of these requirements exists independently of one another. Where a State fulfils some of the requirements but not others, it will be considered to have failed to comply with its obligation to exercise sufficient due diligence.

Adherence to these obligations necessitates that Kazakhstan take a number of measures to address each of the specific problems and issues outlined in Sections 4.1 to 4.3 above:

Sexual violence. International authorities have outlined a range of criteria and standards that laws, procedures and the practice of officials must meet in order to comply with international due diligence requirements regarding sexual violence.

Necessary steps include: [134]

- ***Removing force requirements***: Laws that include use of violence or threat thereof as constituent elements of sexual assault, including rape, must be revised so as to remove the requirement of force or violence or threat thereof. There should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence. Instead such crimes should be defined with reference to a lack of consent and laws should specify that consent is demonstrated by the existence of "unequivocal and voluntary agreement" or vitiated by the existence of "coercive circumstances", broadly defined.

- ***Broadening definition of rape***: Laws prohibiting sexual assault, including rape, should adopt an approach that does not centre on the 'form' of the sexual act involved, such penetration versus other forms of sexual contact, but instead recognises that a wide range of sexual violations can have devastating effects on a victim's autonomy and physical and mental integrity. To this end, best practices indicate that, where possible, distinctions between 'rape' and other forms of sexual assault should be removed from criminal laws and one broad offence of sexual assault should be created with gradations based on the level of harm experienced by the victim. Where this is not possible definitions of rape should be amended so as to encompass a wide range of conduct,

134 Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, Paras. 8.5, 8.7, 8.9(b) and in general; V.V.P v. Bulgaria, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011; CAT General Comment 3, Paras.33-35; CEDAW General Recommendation 19, in general; HRC General Comment 28, Para.20; See also: United Nations, Handbook for Legislation on Violence against Women, New York: Division for the Advancement of Women, 2010.

including anal and oral penetration. Definitions of rape should include such acts when perpetrated against men, and should not be dependent on the gender of the perpetrator.

- ***Instigating mandatory investigation and prosecution***: Laws must require officials to immediately, thoroughly, impartially and of their own volition investigate all alleged instances of sexual assault and in a speedy manner prosecute those responsible. Laws do not meet required standards if they: (i) predicate State prosecution of certain forms of sexual assault upon an official complaint by the victim; (ii) do not oblige officials to conduct an official investigation into all crimes of sexual violence, or (iii) provide that 'reconciliation' between victims and perpetrators of sexual assault shall cease prosecution proceedings.

- ***Ensuring gender sensitive response and proceedings***. In order to avoid re-victimisation and stigmatization judges, prosecutors, law-enforcement personnel and other officials must ensure a gender sensitive response to victims of sexual assault. For example, they must refrain from derogatory treatment of women who seek to report such violence. In addition to they must take a range of positive practical and procedural measures that take account of gendered aspects at play and specifically seek to ensure victims of sexual assault are able to come forward and obtain redress. Rules of evidence should exclude evidence based on gender stereotypes or discrimination.

- ***Prohibiting and defining sexual harassment***: Specific laws must be enacted to prohibit and criminalise sexual harassment in a wide range of circumstances. Sexual harassment should be recognised as a form of discrimination by explicit provision in gender-equality and non-discrimination legislation. A comprehensive definition of sexual harassment should be enacted and should encompass unwelcome sexually determined behaviour, both by those in authority and between peers, when it occurs in a broad range of circumstances including education, employment and the provision of goods and services. A series of applicable penalties should be outlined in the law.

Domestic Violence. International authorities have explained that in order to comply with international obligations of due diligence in respect of domestic violence, a specific range of legal, structural and practical measures are vital.

These include:[135]

- ***Protection measures***: Laws must establish an effective and accessible framework of protection measures that can be accessed urgently and do not place undue administrative and legal burdens on applicants. This means that a series of protection measures must be outlined that are fit for purpose, i.e. capable of offering meaningful protection. For example both short-term and longer-term protection orders must be available, and breach of such orders must entail serious criminal penalties.

- ***Clear and accessible procedures***: The relevant procedures and processes through which such measures are imposed must be clearly provided for in law, must enable urgent recourse and must be accessible in practice by individuals who may be facing risks of serious violence. The responsible authorities must be clearly designated. An effective system for monitoring compliance with relevant measures must be established. Provision should be made for waiver of procedural fees for individuals without access to independent resources.

- ***Shelters and support***: Establishing a system of protection measures for individuals at risk of domestic violence will have little effect if it is not accompanied by relevant support structures. Through direct provision and funding of relevant civil society organisations, States must ensure that adequate sheltered housing is available for women at risk of domestic violence, and their children. Laws that detail support services that the State will provide in situations of domestic violence must include provisions regarding legal advice and financial subsistence.

- ***A legal framework for investigation, prosecution and penalties***: In addition to providing for protection measures, a legal framework must be established that requires officials to immediately, thoroughly, impartially and of their own volition investigate all alleged instances of domestic violence and in a speedy manner prosecute those responsible. It must provide for penalties that prioritise the safety and wellbeing of the victim and the rehabilitation of perpetrators**.**

135 *Goekce v. Austria*, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc.CEDAW/C/39/D/5/2005; *Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005; A.T. v. Hungary, CEDAW Communication No. 2/2003, View of 26 January 2005, UN Doc. A/60/38 (Annex III); Jallow v. Bulgaria, CEDAW Communication No. 32/2011, Views of 23 July 2012, UN Doc. CEDAW/C/52/D/32/2011; V.K. v. Bulgaria, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008; CAT General Comment 2, Para.18; CEDAW General Recommendation 19, in general. United Nations, Handbook for Legislation on Violence against Women, New York: Division for the Advancement of Women, 2010

- ***Operational response***: Officials must respond urgently and appropriately to situations of domestic violence. Where they know or are on notice that an individual is at risk of domestic violence they should intervene as a matter of emergency and take serious measures to avert the risk. They should proactively seek the imposition of legal protection measures, should conduct an effective official investigation into all incidents of violence and should speedily instigate criminal proceedings. Where they fail to do so, international responsibility is engaged.

Cross-cutting issues: Best practices also indicate a range of cross-cutting measures that should be applied to all forms of gender-based violence:[136]

- ***Funding***: Without adequate funding and budgetary allocation, legislative provisions concerning gender-based violence cannot be implemented effectively. In many instances, for example in the case of dedicated domestic violence laws, the legislation itself should explicitly address budgetary measures.

- ***Protocols, guidelines and sanctions***: Detailed guidance and instructions must be provided to administration of justice officials and service providers concerning their obligations and responsibilities under legal provisions dealing with gender-based violence. This can be provided through regulations, protocols, guidelines, instructions, directives and standards. Penalties for serious, repeated non-compliance by officials should be established and enforced.

- ***Training***: Ongoing mandatory training and educational programmes for judges, prosecution officials and law enforcement personnel on gender based violence, relevant legal provisions and crucial elements of a gender-sensitive response must be established. These should involve collaboration with experts and take account of best practices.

- ***Monitoring, evaluation and sanctions***: A process must be established by which the implementation and effectiveness of legal provisions concerning gender-based violence can be monitored and evaluated on an ongoing basis. Responsibility for oversight should be clearly attributed to a specific public body. Where laws define relevant policy commitments they should delineate which actors are responsible for these commitments. Legal provisions outlining policy commitments and pledging action are ineffective unless they specify which actors bear responsibility for their implementation.

136 United Nations, Handbook for Legislation on Violence against Women, New York: Division for the Advancement of Women, 2010.

6. APPLYING INTERNATIONAL LEGAL PRINCIPLES TO REAL LIFE SITUATIONS: INTERNATIONAL CASE SUMMARIES

Many of the access to justice deficits identified in proceeding sections mirror problems facing women in other jurisdictions.

In some instances individual women or their families have filed individual complaints (known as 'communications') with treaty monitoring bodies concerning these barriers. In an attempt to obtain justice and accountability and ensure non-repetition, and when their efforts in domestic courts have failed, they have alleged failure by the concerned State to respect, protect and fulfil their rights under the relevant international treaty.

In each case the relevant treaty body has upheld their claims and has made a variety of findings concerning the violation that has occurred and the relevant remedial and reparative steps required of the State.

A small number of these cases are summarized briefly below in order to provide an illustration of the way in which international authorities will apply international legal principles to real life situations.

Each of these summaries concern a communication submitted to CEDAW. They concern situations of both domestic violence and sexual violence.

Kazakhstan accepted the jurisdiction of CEDAW to deal with individual communications from women in Kazakhstan in 2001.[137] However no such complaint has yet been filed.

Depending on the rights issues at stake complaints could also be submitted to the Human Rights Committee or Committee against Torture. Kazakhstan accepted the jurisdiction of the Human Rights Committee to deal with communications when it ratified the First Optional Protocol to the ICCPR in 2009. It also accepted the jurisdiction of the Committee against Torture to deal with communications when it declared its recognition of the Committee to do so under article 22 of the CAT upon accession to the Convention in 2008.

137 Through ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

6.1 Goekce v. Austria[138]

Facts: In December 2002, Sahide Goekce was murdered in Austria by her husband following years of domestic violence. Between 1999-2002 she had regularly reported incidents of violence to the authorities. Police officers imposed a series of short-term (10 day) expulsion and prohibition orders upon her husband. In 1999 Mr. Goekce was prosecuted for bodily harm but was acquitted because the physical injuries were deemed to be too minor. On that occasion the authorities were unable to prosecute him for the crime of making dangerous criminal threats as Mrs. Goekce would not provide the authorization required to prosecute that crime. In 2000, following another attack and a death threat, police officials requested the prosecutor to arrest and detain Mr. Goekce. However this request was refused. In 2002, following another violent incident, Mrs. Goekce pressed charges against her husband for bodily harm and dangerous criminal threats. The public prosecutor again denied a request from the police that he be detained. In October 2002, in the context of the ongoing legal proceedings, a district court imposed an interim three-month injunction forbidding him from contacting the victim or returning to the family home. The police were entrusted with the enforcement of the order. In November 2002 they received reports from social workers that Mr. Goekce had breached the order and was living in the family apartment. They also received reports from family members that Mr. Goekce had made further threats to his wife's life. In December 2002 the prosecutor ended the prosecution of Mr. Goekce for bodily harm and dangerous criminal threats on grounds that there was insufficient reason to prosecute him. Two days later Mrs. Goekce called the emergency services. However no official was sent to her apartment in response. A few hours later Mr. Goekce shot his wife with a handgun in their apartment in front of their two daughters.

State arguments: Sahide Goekce's family filed an individual complaint with CEDAW alleging that the State had failed to exercise effective due diligence to protect her. The State submitted that its efforts towards effective protection were doomed to fail without Mrs. Goekce's cooperation. It explained that following initial reports of violence to the police, in interviews and interrogations Mrs. Goekce would consistently seek to play down the incidents and deny that her husband had attacked her or threatened to kill her. The State observed that on the first attempt in 1999 to prosecute Mr. Goekce, Mrs. Goekce refused to authorize his prosecution for dangerous criminal threats and refused to testify against him. In 2002 when called to give evidence in Court she explained that her injuries were the results of an epileptic fit. The State explained that Mrs. Goekce voluntarily gave her husband the keys to the family apartment, despite the existence of the Court injunction.

138 *Goekce v. Austria*, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc.CEDAW/C/39/D/5/2005.

CEDAW findings: The Committee recognized that the State had established what it called a "comprehensive model to address domestic violence". However, it underlined that in order for individual women victims of domestic violence to enjoy their rights in practice, this comprehensive system must be implemented by State actors in each case. The Committee considered that in light of the sequence of events between 1999 and 2002 the police should have known Mrs. Goekce was in danger. They should have treated her last telephone call as an emergency and should have responded immediately. In addition, the Committee considered that the behaviour of Mr. Goekce between 1999 and 2002 had crossed a high threshold of violence and as such the prosecutor should not have denied police requests to arrest and detain him. Although subsequent to the murder Mr. Goekce had been arrested, prosecuted and sentenced to life imprisonment, the Committee deemed that the prior failures of the police and prosecutor amounted to a violation of the obligation to exercise due diligence. It held that this failure had violated the rights of Mrs. Goekce to life and to physical and mental integrity under articles 2(a) and (c)-(f) of the Convention on the Elimination of All Forms of Discrimination against Women, read in conjunction with article 1.

CEDAW recommendations: The Committee recommended that the State: (i) ensure that officials exercise due diligence to prevent and respond to domestic violence, including through sanctioning officials who fail to do so; (ii) vigilantly and in a speedy manner prosecute perpetrators of domestic violence; (iii) enhance coordination among law enforcement and judicial officers and ensure cooperation by officials with civil society organizations; and (iv) strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials.

6.2 A.T. v. Hungary[139]

Facts: For four years A.T. was subjected to regular and severe domestic violence and threats from her partner. She could not go to a shelter as none was equipped to accept her and her children, one of whom was disabled. No protection orders or restraining orders were available under Hungarian law. She changed the locks on the doors of the family apartment after which her partner initiated trespass proceedings against her and secured a legal order. She applied to a court to overturn this order. However, the Court dismissed A.T.'s claims, holding that there was no substantiation of her claims of violence and that her partner's right to property could not be restricted. On a number of occasions criminal proceedings were initiated against her partner for assault and battery. However, he was never detained or arrested at any time in relation to these proceedings, although in one case he was convicted and fined. In another he was acquitted

139 A.T. v. Hungary, CEDAW Communication No. 2/2003, View of 26 January 2005, UN Doc. A/60/38 (Annex III)

for lack of sufficient evidence. A.T. repeatedly sought assistance in writing, in person and by telephone from local child protection authorities who explained that domestic violence between adults was outside of their jurisdiction.

State arguments: A.T. filed an individual communication with CEDAW alleging that the State party had failed to provide her with effective protection from her partner's violence and passively neglected its obligations under CEDAW. The State observed that criminal proceedings were pending against A.T.'s partner when the application to CEDAW was filed and that criminal charges had been brought against him on many occasions by the authorities. It explained that it had adopted a national strategy on preventing domestic violence and would soon take relevant legislative action to ensure an appropriate and effective legal framework was in place.

CEDAW findings: The Committee noted that the legal framework in Hungary was not capable of providing immediate protection to A.T. against ill-treatment by her partner. It appreciated the State's recent efforts to institute a comprehensive action programme against domestic violence. However, it underlined that these measures had not yet benefited A.T. It observed that domestic violence cases did not enjoy high priority in Hungarian courts and that no remedies existed which could have provided A.T. with sufficient protection or security from the danger of continued violence. As a result it held that the State had failed to meet its due diligence obligations in violation of article 2(a), (b) and (e) of the Convention on the Elimination of All Forms of Discrimination against Women.

CEDAW recommendations: The Committee recommended that the State should: (i) take immediate and effective measures to guarantee the physical and mental integrity of A.T. and her family; (ii) ensure A.T. was given a safe home in which to live with her children, and provided with appropriate child support and legal assistance; (iii) ensure officials act with due diligence to prevent and respond to domestic violence; (iv) investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice; (v) provide victims of domestic violence with safe and prompt access to justice, including free legal aid; and (vi) provide offenders with rehabilitation programmes.

6.3 V.K. v. Bulgaria[140]

Facts: For many years V.K. was subjected to emotional, economic, psychological and physical violence by her husband. Following an incident where her husband had taken her son from her and denied her access to him for more than two months, V.K. filed an application with the District Court for an immediate

140 V.K. v. Bulgaria, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008

protection order under the Law on Protection against Domestic Violence. The Court granted an interim protection order. However, a number of months later, it rejected the application for a permanent protection order, finding that V.K. had failed to substantiate her case regarding danger to her life and that of her children. This decision was upheld on appeal.

State arguments: V.K. filed a communication with CEDAW alleging that the State had failed to provide her with effective protection against domestic violence. The State submitted that it had taken appropriate measures to provide adequate protection against domestic violence, including by adopting specific legislation. It noted that it had established a system of immediate protection orders that could be issued within 24 hours and that such an order was issued in V.K.'s case. It argued that V.K. had failed to substantiate her claim that she was left without protection following the denial of her application for a permanent protection order.

CEDAW findings: The Committee noted that the State had taken measures to provide protection against domestic violence. However, it specified that in order for V.K. to enjoy the protection in practice, all State actors, including the courts, must support the implementation of the relevant legislation. The Committee considered whether the Court's decision not to issue a permanent protection order against V.K.'s husband was arbitrary or discriminatory. It observed that the Court had denied the application because V.K. had failed to substantiate her claims of violence and because it did not find an imminent threat to life or health. The Committee explained that domestic violence does not necessarily involve a direct and immediate threat to the life or health of the victim. It is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or deprivation of liberty. The Committee found that Court applied an overly strict definition of domestic violence that was not warranted under domestic law and was inconsistent with the Convention. In addition, it found that, in the context of civil proceedings concerning protection orders, the Court applied too high a burden of proof in requiring that an act of domestic violence must be proven beyond reasonable doubt, thereby placing the burden of proof entirely on V.K. It concluded that this gave rise to violations of articles 2 (c) and (d) of the Convention. The Committee also considered that the unavailability of shelters where V.K. could stay with her children constituted a violation of articles 2(c) and (e).

CEDAW recommendations: The Committee recommended that the State should: (i) amend the Law on Protection Against Domestic Violence and remove time-limits on applications for protection orders, eradicate undue administrative and legal burdens on the plaintiffs and ease the burden of proof in favour of the victim; and (ii) ensure that a sufficient number of State-funded shelters were available to victims of domestic violence and their children and provide support to relevant NGOs.

6.4. Vertido v. Philippines[141]

Facts: Karen Vertido was previously the Executive Director of a City Chamber of Commerce in the Philippines. While she held that position she was raped in March 1996 by a former President of the Chamber. Within 24 hours of the assault, Ms Vertido underwent a medical examination and within 48 hours she reported the incident to the police and filed a complaint alleging rape. Initially a panel of public prosecutors conducted a preliminary investigation and then dismissed the case for lack of probable cause. Ms Vertido appealed this decision, which was reversed and the accused was charged with rape. In 2005, the Regional Court acquitted the alleged perpetrator. In its judgment the Court was guided by a number of considerations, including its conclusion that it is easy to make an accusation of rape and that the nature of rape is such that testimony of the complainant must be treated with extreme caution. The Court questioned the credibility of Ms. Vertido's testimony, specifying that it did not understand why she had not tried to escape when she had the opportunity to do so. It also expressed the view that had she fought off the accused he would have been unable to proceed to the point of ejaculation, not least because he was over 60.

State arguments: Ms Vertido filed a communication with CEDAW alleging that she suffered re-victimization as a result of the State's actions subsequent to the rape. She claimed that the State failed to ensure that she was protected against discrimination, including by the judiciary. She claimed that the decision to acquit the accused was grounded in gender-based myths and misconceptions about rape and rape victims and replete with inaccurate gender stereotypes.

The State submitted that its Courts carefully considered the situations before them on a case-by-case basis, and assessed available evidence and individual behaviour. It underlined that this approach was necessary to comply with the presumption of innocence. It specified that another approach could result in the conviction of innocent persons.

CEDAW findings: The Committee emphasized that it does not replace domestic authorities in the assessment of the facts or existence of criminal responsibility. Instead, it focused on the legal principles and concepts relied on by the national Court in reaching its decision. The Committee stressed that "stereotyping affects women rights to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim". It held that the State's compliance with its due diligence obligation to eradicate gender stereotypes

141 Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008

should be assessed in the light of the extent of gender sensitivity of the Court. It specified that the principles relied on by the Court and its approach were replete with gender bias. In particular, it pointed to misconceptions such as: allegations of rape are easy to make; women will physically resist sexual assault; women will try to escape; whether or not the complainant and accused know each other is determinative. The Committee found that the State had failed to fulfil its obligations under articles 2(c) and (f) and article 5(a), read in conjunction with article 1, of the Convention.

CEDAW recommendations: The Committee recommended that the State should: (i) take effective measures to ensure that court proceedings involving rape are pursued without undue delay; (ii) ensure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair and not affected by prejudices or stereotypical gender notions; (iii) remove requirements in the law that sexual assault be committed by force or violence and any requirement of proof of penetration; (iv) enact a definition of sexual assault that necessitates the existence of "unequivocal and voluntary agreement" or specifies that rape can take place in "coercive circumstances" broadly defined; and (v) provide appropriate training for judges, lawyers and administration of justice officials in understanding crimes of sexual violence in a gender-sensitive manner so as to avoid re-victimization of women.

6.5 V.V.P. v. Bulgaria[142]

Facts: V.V.P. was sexually abused as a child by a neighbour. Her mother filed a complaint with the authorities and a prosecutor's indictment charging the accused with sexual molestation of a child was issued almost two years after the incident. At the time of the incident this offence was punishable by up to five years and was not classified as a 'serious crime' under the domestic criminal law. Subsequently a plea bargaining agreement was reached between the prosecutor and the accused in which the accused admitted guilt and was sentenced to three years imprisonment. The sentence was suspended. Such a plea agreement was possible because the offence was not classified as a serious crime under domestic law. Following the plea agreement the victim's mother requested permission to participate as a civil claimant in the case and file a claim for moral damages. This was denied as a result of the plea bargain. The family subsequently filed a separate legal claim under the civil law of obligations seeking compensation for the intentional infliction of damage. The Court ruled in favour of the victim and ordered the perpetrator to pay compensation. However, no enforcement procedure was in place and although the family hired a private bailiff, it did not succeed in obtaining the money owed.

142 V.V.P v. Bulgaria, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011

State arguments: The victim's mother filed a communication with CEDAW alleging that the State failed to act with due diligence. The State submitted that its laws criminalized the sexual abuse of children and that the accused was prosecuted thereunder, in the context of which a plea-bargain was reached. Meanwhile civil proceedings for compensation were decided in the applicant's favour. The State observed that it had more recently amended its criminal law so as to increase the penalties for sexual abuse of children, thereby ensuring its classification as a serious crime and removing the possibility of recourse to plea bargains.

CEDAW findings: The Committee queried why the sexual abuse had been prosecuted as an act of molestation instead of rape or attempted rape. It considered that the facts indicated that an act of rape and attempted rape had occurred. The Committee expressed concern regarding the short suspended sentence given to the accused pursuant to the plea bargain. It considered that this situation amounted to a failure by the State to adopt adequate criminal law provisions to effectively punish rape and sexual violence and apply them in practice through effective investigation and prosecution of the perpetrator. The Committee also observed that legislation did not appear to contain any mechanisms for protection of victims of sexual violence from re-victimization, since after the end of criminal proceedings or sentences perpetrators are released and there was no legal mechanism, such as protection orders, in place to protect victims. The Committee also noted that the State had not established legal mechanisms that would adequately ensure that the victim would receive the compensation ordered by the Court. The Committee held that the State had violated its obligations under article 2, paragraphs (a), (b) (e), (f) and (g), of the Convention.

CEDAW recommendations: The Committee recommended that the State: (i) ensure that all acts of sexual violence against women and girls are defined in line with international standards and effectively investigated and that perpetrators are prosecuted and sentenced commensurately with the gravity of the crime; (ii) provide legal aid for the execution of judgments awarding compensation to victims of sexual violence; (iii) provide an adequate mechanism for provision of compensation for moral damages to victims of gender-based violence; and (iv) amend criminal legislation to ensure effective protection from re-victimization of the victims of sexual violence after perpetrators are released from custody.

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